

Allmore Constructions Pty Ltd v Failli

Supreme Court of Victoria

Section 22 Uniform Commercial Arbitration Acts - determination according to law or as amiable compositeur

Robert Hunt¹

The decision of the Victorian Supreme Court in *Allmore Constructions Pty Ltd v Failli* [2002] VSC 483 (12 November 2002) provides a rare instance of consideration by an Australian superior court of what is involved in making a determination 'by reference to considerations of general justice and fairness', the wording used in section 22(2) of the *Uniform Commercial Arbitration Acts*.

In '*Commercial Arbitration Law and Practice*', Marcus Jacobs QC points out (paragraphs 21.90–21.195) that there are a number of different ways in which the wording of the legislation may be construed. The *Allmore Constructions* decision provides assistance to arbitrators in identifying conduct which falls within the boundaries, without defining where the boundaries in fact lie.

As noted in paragraph 4 of the decision, the arbitral procedure was laid down in clause 2(d) of the General Conditions of Contract between the parties (Master Builders Association of Victoria form GCC3), as follows:

'The arbitrator must hear and decide any matter by reference to considerations of general justice and fairness, and is not bound to apply the rules of evidence and procedure.'

What is contained in that clause is consistent with the wording of:

- section 22(2) of the Uniform Acts (ie. 'if the parties ... so agree in writing, the arbitrator.. may determine any question that arises for determination in the course of the proceedings ... by reference to consideration of general justice and fairness'); and
- section 19(3) of the Uniform Acts (ie. 'unless otherwise agreed in writing by the parties ..., the arbitrator is not bound by the rules of evidence but may inform himself or herself ... in such manner as the arbitrator ... thinks fit').

Section 22(1) of the Uniform Acts provides that 'unless otherwise agreed in writing by the parties ..., any question that arises in the course of proceedings ... shall be determined according to law'.

Mr Justice Harper pointed out that there was no necessary inconsistency between applying 'the law' and applying 'considerations of general justice and fairness'. He said:

1 Immediate Past President IAMA, barrister, arbitrator, mediator.

'68 I have analysed those of the arbitrator's findings which were the subject of the application for leave to appeal. It is unnecessary to say more about whether or not they were in accordance with the law, although it is pertinent to point out that they were so to the extent that they were the result of the application of considerations of general justice and fairness.

69 ***It is important in this context to discredit the assumption, which seems to be implicit in the plaintiff's submission on this point, that "the law" and considerations of general justice and fairness are frequently different and readily distinguishable, and that an arbitrator whose duty it is to apply considerations of general justice and fairness will fail in that duty if he or she applies "the law". This in my opinion is clearly not the effect of clause 2(d) of the form of contract adopted by the parties in this case. That clause requires an arbitrator to avoid legal technicalities if, when applied, they would be inconsistent with considerations of general justice and fairness. It does not require, or necessarily allow, an arbitrator to disregard legal principle. It does not allow an arbitrator to decide a matter by reference to considerations which appear to the arbitrator, but to no one else, to be just and fair. Nor does it require an arbitrator to categorise his or her approach as being in accordance with the law on the one hand or general justice and fairness on the other. The efficacy of arbitration as a mechanism for resolving disputes would be seriously compromised were arbitrators required to perform the mental gymnastics which adherence to that proposition would involve. An arbitrator acting under clause 2(d) will fulfil his or her duty under that clause if he or she adheres to considerations of general justice and fairness. If this is the approach, no misconduct will occur.***

70 *The plaintiff submits that the arbitrator was guilty of technical misconduct in the performance of his function. For the reasons set out above, I reject the premise upon which this submission is based. I am further of the opinion that no misconduct has been shown in this case. There is no evidence before me to suggest that the arbitrator did not proceed by reference to considerations of general justice and fairness. That is what he was bound to do. It might lead him to decide issues in accordance with (for example) the terms of the contract and to find facts on evidence which would satisfy a judge. Or it might not. So long as he was guided by the considerations specified in clause 2(d) he need not concern himself with the further categorisation of his approach.'* (emphasis added)