Case note

Ottoway Engineering Pty Ltd v ASC AWD Shipbuilder Pty Ltd [2017] SASC 69

Erika Williams[292]

In *Ottoway Engineering Pty Ltd v ASC AWD Shipbuilder Pty Ltd*,[293] the Supreme Court of South Australia (**the Court**) heard an application by Ottoway Engineering Pty Ltd (**Ottoway**) for leave to appeal against an arbitration award on the ground that the arbitrator erred in law by not providing reasons or sufficient reasons for key findings. The Court identified inconsistencies in current case law considering the standard required of an arbitrator's reasons, and concluded this was a matter of general public importance which necessitated the granting of leave to appeal.

Facts

In September 2009, Ottoway entered into a contract for pipe fabrication and assembly (**Contract**), whereby Ottoway was required to provide piping to ASC AWD Shipbuilder Pty Ltd (**ASC**) for the Australian government's $9 billion Air Warfare Destroyer project. Clause 25 of the Contract provided for disputes between the parties to be referred to, and resolved by, arbitration in accordance with the Institute of Arbitrators and Mediators Australia (**IAMA**) Rules for the Conduct of Commercial Arbitrations.

In March 2016, ASC gave the Resolution Institute (the IAMA's successor) a notice of arbitration claiming $387,266 reimbursement of its capital contribution for the purchase of certain equipment used by Ottoway. Ottoway cross-claimed $1,045,469 for the additional overhead allegedly expended in carrying out the works. In April 2016, the parties attended a preliminary conference before the nominated arbitrator, Colin Fullerton. In November 2016, the arbitrator made an award in favour of ASC's claim including interest and dismissed Ottoway's cross claim (**Award**).

Ottoway sought leave to appeal against the award on the ground that the arbitrator erred in law by not providing reasons or sufficient reasons for key findings. In particular, Ottoway contended that the decision was obviously wrong, or at least open to serious doubt, and the question of the standard required of an arbitrator's reasons was one of general public importance.

Opt in or opt out?

When the parties entered into the Contract in 2009, the *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA) (**the 1986 Act**) was in place and created an 'opt out' regime whereby parties could agree to opt out from the right of appeal against awards.

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[293] [2017] SASC 69.

When the *Commercial Arbitration Act 2011* (SA) (**the Act**) came into force, section 34A conferred a similar right of appeal, however, on an 'opt in' basis whereby parties can agree to include the right of appeal against awards in their agreement.

While section 34A of the Act is consistent across all states and territories since the introduction of uniform domestic commercial arbitration acts in each jurisdiction between 2010 and 2017,[294] the requirements of section 34A have not yet been the subject of much judicial interpretation. In the present case, ASC relied upon another judgment that refused leave to appeal in similar circumstances. In *Ashjal Pty Ltd v Elders Toepfer Grain Pty Ltd*[295] (***Ashjal***), Hammerschlag J rejected there was an implied contractual term allowing parties to appeal on a question of law with leave of the Court.[296] However in the present case, Blue J disagreed with the reasoning of Hammerschlag J, instead finding that the implied term was in fact necessary to give the contract business efficacy, despite the 1986 Act giving a right of appeal. He explained:

> '…*the fact that it was not necessary for the parties under the existing statutory regime to opt in to a right of appeal explains why they did not include an express provision that there should be a right of appeal, but does not negate the necessity to imply a term to ensure that their contractual intention that there be a right of appeal was achieved in the event of future change to a statutory opt in regime.*'[297]

In refusing to follow the decision in *Ashjal*, Blue J commented that the question of whether a decision of a single judge in a different jurisdiction has the same level of persuasive authority as a decision of an intermediate appellate court in a different jurisdiction did not apply in the present case. His Honour stated that this question of precedential value only applies to decisions about the *content* of the law and not to the application of settled principles of law to the facts. Justice Blue found that in this case, there was no dispute about the settled legal principles; rather the only question was the application of those principles to the facts of the contract in this particular case.[298]

Section 34A allowing for the right to appeal on an opt in basis is unique to the uniform domestic commercial arbitration regime. There is no equivalent provision in the *International Arbitration Act 1974* (Cth) (**IAA**) to which the courts could turn for assistance with judicial interpretation of section 34A of the domestic acts, nor is there an equivalent provision in the UNCITRAL Model Law which would allow Australian courts to look to foreign jurisdictions for guidance.

Ottoway submitted that the parties had agreed to opt in to the right to apply for an appeal either at the preliminary conference in 2016 or as an implied term of the Contract in 2009. ASC denied that any such opt in had occurred, and therefore Ottoway had no right to appeal against the arbitrator's award.

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[294] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2017* (ACT).

[295] [2012] NSWSC 545.

[296] [2017] SASC 69 [23]-[24].

[297] Ibid [55].

[298] Ibid [57].

Preliminary conference

Ottoway's first contention was that the requisite agreement that an appeal may be made against an award was made at the preliminary conference in April 2016. At the preliminary conference, various matters were discussed and agreed, including that there was no written agreement prohibiting any question being determined according to law, or dispensing with the requirement for the arbitrator to include a statement of reasons for making the award. The arbitrator subsequently produced minutes recording this, which were signed by all parties as correct.

Implied term

Ottoway's second contention was that the requisite agreement that an appeal may be made against an award was an implied term of the Contract. ASC's argument was based on the principle that it is for contracting parties to formulate their agreement and the court can not rewrite a contract merely to address eventualities the parties did not foresee.[299] However, the Court found that this principle was not offended when a term is implied in accordance with the presumed intention of the parties in the manner accepted by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[300] (that is, it is appropriate to look to the circumstances surrounding the making of a contract when deciding on the implication of a term).[301]

Justice Blue held that it was in fact an implied term of the Contract that such an appeal may be made.[302] In doing so, his Honour found that the parties had made a deliberate decision under the 1986 Act that they would not opt out of a right of appeal,[303] and therefore it objectively followed that it was the contractual intention of the parties that there was to be a right of appeal against any award.[304]

Justice Blue considered that each of the conditions identified in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*[305] had been satisfied in respect of the implied term as follows:

(a) it is reasonable and equitable to imply the term;

(b) it is necessary to give business efficacy to the Contract because otherwise the Contract would operate capriciously, unreasonably and inequitably;

(c) it goes without saying because the parties hypothetically and objectively assessed would have said 'of course' that should be the position if the issue had been raised;

(d) it is capable of clear expression;

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[299] Citing *Placer Development Ltd v The Commonwealth* (1969) 121 CLR 353 at 372; *Trollope & Coles Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 407.

[300] (1982) 149 CLR 337.

[301] (1982) 149 CLR 337 at 348-353 per Mason J.

[302] [2017] SASC 69 [59].

[303] Ibid [41].

[304] Ibid [42].

[305] (1977) 180 CLR 266.

(e) it does not contradict the express terms of the Contract; and

(f) it is entirely consistent with the effect of the contract under the statutory 'opt-out' scheme prevailing at the time of the Contract.[306]

Failure to give reasons

Having been satisfied that the parties had agreed to include a right to appeal an award, Justice Blue then had to determine whether leave to appeal should be granted. Pursuant to section 34A(3), leave to appeal may be granted where:

(a) the determination of the question will substantially affect the rights of one or more of the parties; and

(b) the question is one which the arbitral tribunal was asked to determine; and

(c) on the basis of the findings of fact in the award:

(i) the decision of the tribunal on the question is obviously wrong; or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

(d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

Noting that it was difficult to comprehensively understand the case, evidence and arbitration in its entirety due to the limited material before him on appeal, Justice Blue found that the arbitrator's reasoning for the denial of Ottoway's cross claim was insufficient.

Decision obviously wrong

In respect of the arbitrator's rejection of the cross claim, Ottoway submitted that the arbitrator 'did not refer to much of the evidence given by the witnesses, did not refer to any oral evidence, did not accept or reject the evidence of any witness and did not give reasons for preferring the evidence of any witness over any other witness',[307] and therefore the arbitrator's decision was 'obviously wrong'.

The Court refused to conclude that it was 'obvious' that the arbitrator's reasons did not comply with the form and content requirements in subsection 31(3) of the Act which provides that an award *'must state the reasons on which it is based, unless the parties have agreed that no reasons are to be given…'.* The Court said that, to do so, it would be necessary to hear arguments as to the standard of reasons required of an arbitrator, and no such arguments were presented on the application for leave to appeal.[308]

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[306] [2017] SASC 69 [44].

[307] Ibid [125].

[308] Ibid [134].

Decision open to serious doubt

In evaluating the arbitrator's decision (in particular, the 17 pages of reasons for the dismissal of the cross claim), Justice Blue noted that the arbitrator's references to written evidence were confined to evidence that supported ASC's case.[309]

Further, His Honour stated that it was difficult to identify from the reasons a clear picture of Ottoway's case on the cross claim or the evidence relied on by Ottoway.[310] Accordingly, His Honour concluded that the failure to give reasons for key findings made it at least open to serious doubt that the arbitrator's reasons did not comply with subsection 31(3) of the Act.[311]

General public importance

Finally, the Court found that judicial consideration of the standard required of an arbitrator's reasons under subsection 31(3) of the Act is a matter of general public importance.[312] The history of litigation in this area is conflicted. In *Oil Basins Ltd v BHP Billiton Ltd*,[313] the Victorian Court of Appeal provided detailed guidance as to the nature and extent of the reasons required to be given by an arbitrator. Later, in *Gordian Runoff Limited v Westport Insurance Corporation*,[314] the New South Wales Court of Appeal gave similarly detailed but contradictory guidance. Then, in *Westport Insurance Corporation v Gordian Runoff Limited*,[315] the High Court of Australia imputed that 'a gloss should not be put on the words of the statutory requirement for reasons to be given, the subject matter and extent of reasons will depend on the circumstances of the case, and more specific guidance will need to await subsequent cases'.[316] As such, Justice Blue concluded that there is a pressing need to 'determine afresh the nature and extent of the reasons required to be given by an arbitrator'.[317] Ottoway's case required such a determination, therefore leave to appeal to the Supreme Court of South Australia was granted.[318]

Broader implications?

This jurisprudence on the effect of amendments to legislation that change 'opt out' provisions to 'opt in' need not cause concern in relation to the relatively recent changes to the IAA whereby the confidentiality provisions conversely changed from 'opt in' to 'opt out'. These amendments brought the IAA into line with the expectation that arbitration proceedings are confidential unless parties agree otherwise. This case need not cause concern however, because the amended legislation specifically states that it applies

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[309] Ibid [113].

[310] Ibid.

[311] Ibid [134]-[135].

[312] Ibid [136].

[313] (2007) 18 VR 346.

[314] (2010) 267 ALR 74.

[315] (2011) 244 CLR 239.

[316] [2017] SASC 69 [78].

[317] Ibid [136].

[318] Ibid [142]. Note that as this is an appeal from an award, the appropriate court is the Supreme Court of South Australia, rather than the Court of Appeal of the Supreme Court of South Australia.

only to international arbitration agreements concluded on or after 14 October 2015, and any arbitration proceedings arising out of those agreements. The clear transition date in the IAA means that these amendments should not cause the same confusion as the adoption by the domestic commercial arbitration acts of the 'opt in' right of appeal against awards which seemingly apply to *all* arbitration agreements, whether made before or after the commencement of the new legislation.

Legislators in each state and territory may wish to consider addressing the ambiguity in this space. As seen in *Ashjal* and *Ottoway*, different approaches have been taken in relation to section 34A in different jurisdictions. As it stands, the absence of clear transitional provisions, and the lack of consistency in judicial interpretation across Australia may continue to cause problems for parties to contracts that predate any of the domestic commercial arbitration acts.

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