Recent Cases

Arbitration - Judicial Review of Arbitration Awards - The New Approach

Promenade Investments Pty Limited v State of New South Wales, Supreme Court of NSW, Commercial Division, Rogers CJ

The recent decision of his Honour Mr Justice Rogers, Chief Judge of the Commercial Division of the Supreme Court of New South Wales, in *Promenade Investments Pty Limited v State of New South Wales* considers, for the first time in New South Wales, the approach to be taken under the recently amended provisions of the Commercial Arbitration Act, 1984 in dealing with applications for leave to appeal against an arbitral award.

In the absence of the consent of all parties to the arbitration agreement, an appeal under Section 38(2) of the Commercial Arbitration Act is subject to the provisions of the now amended section 38(5) of the Act which provides that:

> "(5) the Supreme Court shall not grant leave under sub-section (4)(b) unless it considers that:
> (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and
> (b) there is:
> (i) a manifest error of law on the face of the award; or
> (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law."

Promenade Investments Pty Limited v The State of New South Wales concerned a dispute over the lease of Luna Park between the plaintiff/sub-lessee and the defendant/sub-lessor. The Luna Park Site Act 1990 brought other proceedings between the parties over the lease to an end, and provided that the plaintiff would be entitled to compensation from the Crown in relation to the determination of the lease. It also provided for the appointment of an arbitrator. The role of the arbitrator was to determine the maximum amount of compensation that the plaintiff/sub-lessee was entitled to receive.

The arbitrator was appointed and delivered interim and final awards within a five month period.

After the arbitrator's appointment, but before his awards were delivered, the Commercial Arbitration (Amendment) Act 1990 was passed, assented to and proclaimed. The Act amended the Commercial Arbitration Act, 1984 and section 38(5) in the manner set out above.

The plaintiff, being dissatisfied with the arbitrator's awards, commenced proceedings in the Commercial Division of the Supreme Court of New South Wales for leave to appeal against the awards. A central issue in the proceedings was whether the application for leave to appeal should be determined by the provisions of section 38(5) of the Commercial Arbitration Act 1984 as they were before the amendments were introduced, or whether the amended section 38(5) should govern the application for leave to appeal.

His Honour Mr Justice Rogers found that the arbitrator's awards were subject to judicial review in accordance with the amending provisions of the Commercial Arbitration (Amendment) Act 1990. His Honour then went on to consider "What Does The 1990 Amendment Act Require?"

His Honour considered the background to the introduction of the Amendment Act, referring to the divergence of judicial opinion which existed in Australia concerning the interpretation of section 38(5). On the one hand, some courts interpreted section 38(5) in a restrictive way, on the other, courts interpreted the section in a way which gave them latitude to consider all the circumstances of the case under review. His Honour stated:

> "Some courts in Australia construed subsection 5 as constraining the Court, in considering applications for leave to appeal, to exercise their discretion in accordance with the principles laid down by the House of Lords in *Pioneer Shipping Limited v BTP Tioxide Limited (The Nema)* 1982 AC 724 and *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)* 1985 AC 191. However, in *Qantas Airways Limited v Joseland and Gilling* (1986) 6 NSWLR 327 the New South Wales Court of Appeal held that the discretion conferred by subsection 5 was to be exercised after considering all the circumstances of the case. Distinguishing *The Nema* the court said (p333) "We are not convinced that the statements of Lord Diplock, based as they are on a different background are applicable to section 38 of our Act. The matters to which Lord Diplock refers are important factors in determining whether leave should be given. But the exercise of discretion conferred by S.38 does not depend on whether the claimant has made out a strong prima facie case or fulfilled the other requirements to which his Lordship refers. It is a discretion to be exercised after considering all the circumstances of the case."

His Honour described briefly the second report of the working group established by the Standing Committee of Attorneys General and the fact that the working group pointed out that one of the major objectives of the uniform

legislation was to minimise judicial supervision and review of arbitration. In particular, His Honour stated that the working group:

> "considered that if "arbitration were to be encouraged as a settlement procedure and not as a "dry run" for litigation, a more restrictive criterion for the granting of leave was desirable than that applied by the Australian courts". As a matter of policy, the working group agreed with Lord Diplock's statement in *The Nema* (at p743) that "the parties should be left to accept, for better for for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance"."

These views led the working group to recommend that section 38(5) be amended to incorporate the guidelines enunciated in *the Nema* to the effect that leave should only be given if an error of law is apparent on the face of an award, without the court hearing argument on the issue.

Describing the legislative and judicial backdrop to the amended section 38(5), His Honour referred to three factors:

1. "the amendment represents an obvious desire to tighten up and further restrict the scope for judicial supervision of arbitral awards."
2. The amendment "adopts the philosophy of the English courts that an application for leave should not involve a major and lengthy examination of the award but rather that the argument for grant of leave should be so strong and so apparently compelling that a fairly rapid examination should disclose that the requirements of the Act have been satisfied."
3. "it is necessary to look at how the former provision was construed and it will be clear why the phraseology was adopted in order to put to rest any doubt that there may have been as to the correct approach to be made to an application for leave."

His Honour confirmed that the amended section 38(5) now made it clear that the broad discretionary approach referred to in *Qantas* was rejected. The position now is, in line with *The Nema* that "it is necessary that the error be so obvious or so perceptible to the judge as to be manifest. That is the primary test required to be satisfied in the present case" (for leave to appeal).

However, his Honour Mr Justice Rogers did not go so far to say as did Lord Diplock in *The Nema* that leave should not be given unless it was apparent to the Judge upon a mere perusal of the award **without the benefit of adversarial argument**, that there was an error of law. His Honour stated that the benefit of adversarial argument could not be discarded under the first limb.

Although, as his Honour states, "I recognise that there may be some difficulties in the working out of this approach", it does not seem that the role for adversarial argument would be great having regard to the high threshold that the party contending for an error of law must satisfy - "so obvious or perceptible to the judge as to be manifest".

In Mustill and Boyd, Commercial Arbitration Second Edition, 611, the learned authors in describing the English practice on applications for leave to appeal state that:

> "The hearing of the application takes place inter partes, and usually takes no more than 10 or 15 minutes, the judge having previously read the papers lodged with the court. The hearing is not intended as an opportunity to rehearse the arguments in support of the substantive appeal, but to debate whether or not the application falls within *The Nema* guidelines."

In recognising the fact that adversarial argument cannot be banned altogether, and the precise scope for it is to be worked out, the judgement points to a practical approach. However, having regard to what was said in *The Nema* and in the recommendations of the working party, there is obviously no scope for prolonged adversarial argument.

The wording of section 38(5)(b)(i), as amended, states that the error of law referred to, must appear on the face of the award. His Honour stated that as well as intending to reject the broad discretionary approach enunciated in *Qantas*, the legislation was also intending to overcome:

> "a latent problem in applications for leave which had it genesis in the decision of the English Court of Appeal in *Universal Petroleum Co Ltd v Hendels und Transport GmbH* 1987 WLR 1178."

In that case, the party seeking to challenge the arbitral award was not permitted to bring evidence showing material before the arbitrator but not referred to in his award. There, the court stated that the question of law must arise out of the award, not out of the arbitration. This led to the situation whereby applicants for leave to appeal were not permitted to bring evidence relating to matters which did not arise out of the arbitral award, but respondents were permitted to put on extrinsic evidence on the basis that leave to appeal could not, in any event, lead to a different outcome from the arbitrator's conclusion.

The approach expressed by the Court of Appeal in *Universal Petroleum* was followed by his Honour Mr Justice Smart in *Warley Pty Limited v Adco Constructions Pty Limited* (1989) 5 BCL 141 and in *Graham Evans & Co Pty Ltd v SPF Formwork Pty Limited* (Brownie J, unreported, 9 April 1991).

Sections 38(2) and 38(5)(b)(i) of the Commercial Arbitration Act are not in identical terms. The terminology employed in section 38(2) has not been amended. It still refers to an appeal to the Supreme Court on any question of law **arising out of an award**. Theoretically, an appeal on a question of law arising out of an award may still be brought - however, consent of all parties under section 38(4)(a) is necessary. In situations where there is no consent, leave of the court is required. The amendments now provide that the error of law must be manifest on the face of the award. As his Honour stated, section 38(5)(b)(i)

focuses attention on what appears on the face of the award rather than on what arises out of the award.

Since the issues which the plaintiff relied upon were not considered by his Honour to manifest an error of law on the face of the award leading to a refusal to grant leave to appeal, there was no need to consider section 38(5)(a) whereby the court should not grant leave to appeal unless having regard to all these circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties. The part, if any, that section 38(5)(a) might play in future applications will be a matter of interest. It is possible that section 38(5)(a) will play no real part in application for leave to appeal. In this case, his Honour Mr Justice Rogers did not consider the plaintiff's leave points in context of section 38(5)(a), he went straight to consider the *The Nema* guidelines contained in section 38(5)(b)(i) and (ii).

To place matters in context, it must be remembered that the English legislation concerning judicial review of arbitral awards, the Arbitration Act 1979, considered in *The Nema* was in substantially similar terms as section 38(5)(a). Section 1(4) of the English legislation states:

> "The High Court shall not grant leave under subsection 3(b) above unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties in the arbitration agreement."

The application of the guidelines laid down by Lord Diplock in *The Nema*, determine whether the matters in section 1(4) will be satisfied, leading to leave to appeal being granted or refused under section 1(2). Under the guidelines there is no specific consideration of section 1(4) itself.

If the application of *The Nema* guidelines lead to the resolution of the issues raised by the English counterpart of section 38(5)(a), it is difficult to see any good reason for separate consideration of section 38(5)(a) and then section 38(5)(b), especially so when it is clear that what was said in *Qantas* is no longer applicable.

It is suggested that section 38(5)(a) may play no part in applications for leave to appeal, the Court's attention being focused primarily on section 38(5)(b). Alternatively, it would not be surprising if the Court's conclusion on the issue raised in section 38(5)(a) corresponded entirely with its prior conclusion about whether an applicant for leave had satisfied either of section 38(5)(b)(i) or (ii).

The procedure adopted by the plaintiff in these proceedings was to file two summonses, one seeking leave and the other relating to the appeal proper. This may have reflected earlier practice where, in some instances, the Court dealt with the leave to appeal point and the appeal at the one time. See *Qantas* and *State Rail Authority of New South Wales v Baulderstone Hornibrook Pty Ltd and Anor* 5 BCL p117 at 119. His Honour Mr Justice Rogers made it clear that this approach would not be encouraged, stating:

> "It was intimated that the parties desired to argue both the application for leave to appeal and the appeal at the same time. I declined to accede to this course because in my view it is entirely inimical to the purposes of the Commercial Arbitration Act 1984."

The case of *Geogas SA v Trammo Gas Limited* 1991 2 WLR 794 was cited in support of this approach. One of the reasons underlying the English practice of separating the leave application from the appeal was stated by Donaldson LJ in *Babanaft International Co SA v Avant Petroleum Inc* (1982) 1 WLR 871 at 881 to relate to the court's desire to restrict long adversarial argument on applications for leave since, in cases where the application for leave is followed immediately by the hearing of the appeal, there usually is prolonged adversarial argument.

Mr Justice Rogers has made it clear that the intention of the Legislature limiting the scope for appeal from arbitral awards will be implemented. The adoption of *The Nema* guidelines will, it is suggested, put an end to the flow of appeals from arbitrators. It may even cut down the flow of applications for leave to appeal, once it is realised just how narrow the grounds for appeal are.

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