Arbitrator's Award - Leave to Appeal - s38(5) of Commercial Arbitration Act 1984 (NSW), As Amended

Promenade Investments Pty Limited v State of New South Wales, New South Wales Court of Appeal, Mahoney, Meagher, Sheller JJA, 18 February 1992, unreported.

The decision of Rogers CJ Comm D in *Promenade Investments Pty Limited v State of New South Wales* (Supreme Court of New South Wales, 20 June 1991, unreported - but see the report in ACLN Issue #20, page 52) has recently been upheld by the New South Wales Court of Appeal.

Brief Facts

In 1987 Promenade Investments (in fact its predecessor in title) entered into three subleases for the Luna Park site. The lessors were State Government instrumentalities. It was within the power of the New South Wales Government to vary the use to which the site could be put.

In entering the subleases, Promenade had considered the possibility of commercial development on the site. The NSW Government was initially supportive of redevelopment but, in the face of criticism from the North Sydney Municipal Council and the public, decided to oppose any redevelopment of the Luna Park site.

The NSW Government determined the leases over the Luna Park site and in September 1990 passed the *Luna Park Site Act* to return the site to the people.

An arbitration was held before Sir Laurence Street KCMG to determine the quantum of the compensation to which Promenade was entitled. The arbitration was conducted between 18 October 1990 and 22 November 1990. An interim award was made on 11 February 1991 and the final award on 12 March 1991.

On 13 December 1990 the Governor of NSW assented to the *Commercial Arbitration (Amendment) Act* 1990 which commenced on 25 January 1991. Relevantly to the facts of this case, the *Commercial Arbitration (Amendment) Act 1990* amended section 38(5) of the Commercial Arbitration Act 1984.

The amended s38(5) provides as follows:

> "(5) The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that:
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> (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
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> (b) there is:
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> (i) a manifest error of law on the face of the award; or
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> (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."

Interpretation of the Previous Section 38(5)

Although in identical terms in both Acts, unfortunately the New South Wales and Victorian Supreme Courts had diverged in interpreting s38(5) of the *Commercial Arbitration Acts* of NSW and Victoria.

The Victorian courts had interpreted section 38(5) in the light of *Pioneer Shipping Limited v BTP Tioxide Limited (The Nema)* 1982 AC 724. In particular, the Victorian courts had applied Lord Diplock's guidelines (at pages 742 and 743) which discourage the courts from allowing appeals from arbitrators' awards:

> "Where, as in the instant case, a question of law involved is the construction of a "one-off" clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance."

And:

> "... rather less strict criteria are in my view appropriate where questions of construction of contracts in standard terms are concerned. That there should be as high a degree of legal certainty as it is practicable to obtain as to how such terms apply upon the occurrence of events of a kind that it is not unlikely may reproduce themselves in similar transactions between other parties engaged in the same trade, is a public interest that is recognised by the Act particularly in section 4. So, if the decision of the question of construction in the circumstances of the particular case would add significantly to the

clarity and certainty of English commercial law it would be proper to give leave in a case sufficiently substantial to escape the ban imposed by the first part of section 1(4) bearing in mind always that a superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote clarity in settled principles of commercial law. But leave should not be given even in such a case, unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction; and when the events to which the standard clause fell to be applied in the particular arbitration were themselves "one-off" events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to "one-off" clauses."

The NSW courts had adopted a far more discretionary approach to the review of arbitrators' awards in *Qantas Airways Limited v Joseland & Gilling* (1986) 6 NSWLR 327. In particular, see McHugh JA at 333:

"We are not convinced that the statements of Lord Diplock, based as they are on a different background, are applicable to s38 of our Act. The matters to which Lord Diplock refers are important factors in determining whether leave should be given. But the exercise of the discretion conferred by s38 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."

It should be noted (although s38(5) of the Victorian Act has not yet been amended) that the Full Court of the Victorian Supreme Court, perhaps surprisingly, has now adopted the approach of McHugh JA in its decision in *Leighton Contractors Pty Limited v Kilpatrick Green Pty Limited* (22 October 1991, unreported, but see ACLN Issue # 22 at p48).

Which Act to Apply

Relying on section 68(1) of the *Interpretation Act 1987*, Rogers CJ Comm D found that the amended *Commercial Arbitration Act* applied to the proceedings. On appeal, the Court of Appeal agreed.

Interpretation of Section 38(5)(b)

In arriving at his interpretation of s38(5)(b) Rogers CJ Comm D made reference to the report of the Attorneys General of the States' Working Group on the Operation of Uniform Commercial Arbitration Legislation in Australia, and also to the second reading speech of the Attorney General when he introduced the amending legislation. Section 34 of the *Interpretation Act 1987* sets out limited circumstances in which such extrinsic material may be considered in interpreting legislation. However, the Court of Appeal, in particular Sheller JA, adopted Rogers CJ Comm D's approach in interpreting s38(5)(b).

The Court of Appeal acknowledged that the intent of s38(5)(b) is to encourage finality of arbitrators' awards and to reject the discretionary approach to granting leave to appeal found in Qantas. Sheller JA suggested the legislature may have introduced s38(5)(b)(ii) to preserve some of the discretion allowed by the decision in *Qantas*, although agreeing that the discretion has been somewhat limited.

Section 38(5)(a)

In order to obtain leave to appeal from an arbitrator's award pursuant to s38(4)(b) a plaintiff must first satisfy the requirements of s38(5)(a). It would be rare that the requirements of s38(5)(a) would not be satisfied. Usually an amount of money is enough, although Giles J in *Balcombe v Young* (Supreme Court of New South Wales, 18 October 1991, unreported) suggested that consideration may be given to the amount involved as a percentage of the award.

The Arbitration Process

Rogers CJ Comm D pointed out that, in choosing the arbitral process, the parties accept the procedure "warts and all". Giles J in *Balcombe v Young* reiterates this observation and adds that in going to arbitration the parties accept that they may get errors of fact and law.

Section 38(5)(b)(i)

The requirement of this subsection is that there be a "manifest error of law on the face of the award".

Rogers CJ Comm D said that "it is necessary that the error be so obvious or so perceptible to the Judge as to be manifest". His Honour also said that an error should be capable of perception "on a mere reading of the award, even without the benefit of adversarial argument". Arguably, Rogers CJ Comm D was not suggesting that there was no necessity for adversarial argument. However, His Honour may have been squarely adopting the working party's recommendation that there should be no adversarial argument.

In any event, Sheller JA rejects the proposition that there should be no adversarial argument. Sheller JA said the test under s38(5)(b)(i) should be that there are "powerful reasons for considering on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law" (emphasis added).

From the judgments of both Rogers CJ Comm D and the Court of Appeal whilst an error of law may appear on the face of the award, in order for leave to appeal to be granted, the error of law must also be "manifest". Sheller JA adopted McHugh JA's interpretation in Larkin v Parole Board (1987) 10 NSWLR 57 (at 70 to 71) that "manifest" indicates something that is "evident or obvious". Therefore, Sheller JA said that a manifest error of law must be "more than arguable".

Sheller JA said even if there is a manifest error of law on the face of the award, it is a matter of discretion whether leave to appeal should be granted.

Section 38(5)(b)(ii)

The antecedants of the phrase "strong evidence" in this subsection are far from clear and the courts seem thus far to have avoided interpreting the subsection. Neither the working party nor the decision in The Nema provide any guidance as to the origin or interpretation of "strong evidence".

To reiterate, section 38(5)(b)(ii) states that leave to appeal may be granted if there is:

> "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."

Cole J in *Wilkinson v Creer* (Supreme Court of NSW, 3 July 1991, unreported) applied s38(5)(b)(ii) to grant leave to appeal, without providing an interpretation of the subsection, on the basis that the arbitrator had not been fully informed of an extensive line of legal authority.

In his decision in Promenade, Rogers CJ Comm D did not find it necessary to interpret the subsection.

Sheller JA identified the problem that lurks in the drafting of the subsection. The subsection appears to contemplate the presentation of evidence in support of (and opposition to) an application for leave to appeal under this subsection. Further, this evidence is not restricted to the face of the award as in the case of s38(5)(b)(i), but by the operation of s38(2) appears to encompass the wider concept "arising out of the award".

Sheller JA indicated that the subsection must involve a two-step test.

In *The Nema*, Lord Diplock suggested, that the guidelines should not be so stringently applied to standard form contracts.

In *Wilkinson v Creer* Cole J (at page 5) held that partnership agreements fulfilled the criteria of "commercial law".

Sheller JA said that "commercial law" is a term which should not be given a narrow construction.

Summary

The test to be applied when deciding whether leave to appeal from an arbitrator's award should be granted pursuant to s38(5)(b)(i) is that, without prolonged adversarial argument, there should be powerful reasons for considering that there is an error of law that is evident or obvious, rather than merely arguable.

Perhaps unfortunately, the test for s38(5)(b)(ii) may be more complex. Potentially, it might involve re-opening the evidence in the arbitration to determine whether there is "strong evidence". If that (at least, in some circumstances) is so, it is respectfully submitted that it might be preferable to determine first whether the second limb of s38(5)(b)(ii) (regarding adding "substantially to the certainty of commercial law") is satisfied.

It is understood that leave is being sought from the High Court to appeal this decision.

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