Arbitration - Grounds For Leave to Appeal In Western Australia

Commonwealth of Australia v Thiess Contractors Pty Ltd (1991) 4 WAR 425.

In *Commonwealth of Australia v. Thiess Contractors Pty Ltd* (1991) 4 WAR 425 the Applicant ("Thiess") sought to appeal to the WA Supreme Court on the ground that the arbitrator (appointed to determine a dispute between the parties pursuant to the terms of their contract) had made an error in law. In order to do so, the Thiess required leave since the respondent had not consented to the appeal (section 38(4)(b) *Commercial Arbitration Act 1985* (WA) ("the Act").

Promenade Investments and Leighton Contractors

Master White clearly assumed that *The Nema* [1982]AC 724 principles would apply to the application before him since the dispute concerned the construction of a document. In Master White's opinion, the Court exercising a discretion to grant leave to appeal is required to consider the principles raised in The Nema.

The Full Court of the Supreme Court of Victoria in Leighton *Contractors Pty Ltd v Kilpatrick Green Pty Ltd*, (see (1992) ACLN #22 p48, held that having regard to all the circumstances of the case, the Court has an unfettered discretion to grant leave to appeal where the "determination of the question of law could substantially affect the rights of the parties to the arbitration agreement". The unfettered discretion to allow leave to appeal was exactly that - unfettered.

The Victorian Supreme Court, Full Court did not require that the discretion only be exercised after having had regard to *The Nema* principles. The Victorian Full Court considered *The Nema* principles only some of the factors to be taken into account when exercising such discretion; all of the circumstances of the case must be considered and a court should not be limited by *The Nema* principles.

The Victorian Supreme Court, Full Court's opinion was not limited to the type of decision or award appealed. The Full Court agreed with the approach taken by the New South Wales Court of Appeal in *Qantas Airways Limited v Joseland* (1986)6 NSWLR 327 ("Qantas"). This earlier decision did not concern an application for leave involving the construction of documents. It was on this ground that the New South Wales Court was able to distinguish *The Nema* principles.

Master White in *Thiess* distinguished the decision in *Qantas* on the basis that it did not concern the construction of a document - whereas the dispute before Master White did.

In Master White's opinion a pre-requisite to an exercise of the Court's discretion is that the rights of the parties be substantially affected by the error in law on the ground that the Act was "... designed to limit the intervention of the Courts in arbitrations".

Master White held that when the Court is considering an application for leave to appeal pursuant to Section 38 of the Act, the Court should have regard to the following:

1. Whether the proposed appeal is concerned with a question of law which arises out of the award;
2. If so, whether the rights of any party or parties are substantially affected by the determination of that question of law;
3. Whether the question of law involves the construction of a clause in the contract, and whether that clause is a "one off" clause or is a clause in a standard contract? If it is a "one off" clause leave to appeal will not ordinarily be granted unless the arbitrator's decision is obviously wrong. If, however, it is a clause of the latter type a strong prima facie case will need to be made out that the arbitrator was wrong in his construction; and
4. Whether if a question of law does not involve the construction of a clause in a contract the arbitrator's decision is obviously wrong.

Master White was not satisfied that the grounds submitted by the Applicant raised serious questions of law which could substantially affect the rights of the parties.

The New South Wales Court of Appeal in *Promenade Investments Pty Limited v State of New South Wales* (see(1992) ACLN #23, p69) would only grant leave to appeal if it concerned a question of law arising out of the decision or award being appealed. In other words, the Court required that the first of *The Nema* principles be applied. The Court was prepared, however, to go as far as to say that even once an error of law was involved the Court still has a discretion to grant leave to appeal. The error of law must be more than just an arguable question, there must be an error of law manifest in the decision or award. It is important to note that the New South Wales Court was still prepared to hold that the Court did have a discretion.

It is interesting to note that Master White's decision in *Thiess* was influenced by the fact that the parties chose to proceed by way of arbitration and that, therefore, they should be obliged to accept the arbitrator's decision in light of the fact that the New South Wales Court of Appeal upheld the arbitrator's decision and in that case the arbitrator had pointed out that, in choosing the arbitral process, the parties should have accepted the procedure "warts and all".

Grounds of Applicant's Appeal

The Applicant submitted that the arbitrator erred in law, as follows:

1.(a) The arbitrator misdirected himself in finding that a lack of communication and a proper exchange of information constituted an attempt to subrogate or even abrogate all

of the respondent's and the Superintendent's responsibilities.

(b) The arbitrator erred by not finding that the Superintendent's Representative was under no obligation under the Contract to provide any instructions or directions to the respondent, aside from stipulating the final result required by the Applicant.

Master White found that the first ground neither constituted a question of law and nor could a determination of this matter substantially affect the rights of either party.

2.(a) The arbitrator erred in law in finding that the specified requirements, as set out in the Contract, specified a method of construction different from the method of construction proposed by the respondent and accepted by the Applicant's Superintendent.

(b) The arbitrator erred in that he did not find that the respondent's method had complied with the specified requirements, nor did they constitute an alternative method of construction and nor did those requirements specify a method by which they should be achieved.

Master White found this ground unlikely to constitute a question of law and if it did, it would involve the construction of a "one-off" clause which would require the arbitrator's decision to have been obviously wrong or for there to have been a strong prima facie case that he was wrong. Master White also noted that since it was not a specification in general use there would be no general utility for the purpose of assisting other arbitrators to arrive at consistent decisions.

3.(a) The arbitrator erred in finding that the respondent's method was necessary to comply with the specified requirements.

(b) The arbitrator erred since he did not find that the specified requirements could have been complied with without using the respondent's method.

Master White found that even if the arbitrator had erred in law by finding that the respondent's method was necessary to comply with the specified requirements, the error was displaced by the fact that the Applicant and the respondent had agreed to this method and that this method was necessary in order to comply with the specified requirements.

4.(a) The arbitrator erred in finding that the respondent's method constituted a variation from the specified requirements for the works and thus erred in finding the respondent was entitled to reimbursement for additional costs incurred by performing the Contract in that manner.

(b) The arbitrator should have held that the agreement by the Applicant's Superintendent and Superintendent's Representative to the respondent's method:

(i) did not constitute a variation to or an order to vary work performed under the Contract; or

(ii) alternatively, if the agreement was a variation of the Contract the arbitrator should have held that the respondent was not liable to a reimbursement of any additional cost incurred as a result of performing the Contract in this manner because the agreement was entered for the benefit of the respondent.

Master White found that at most this ground raised an "arguable point" for the Applicant. It was not the case that the arbitrator's decision was obviously wrong or that a strong prima facie case had been made out that it was wrong.

5. If there was a variation the arbitrator erred in law in finding the sum of costs as a result of the variation by taking into account irrelevant considerations and failing to take into account relevant considerations.

6. The arbitrator erred in law by rejecting and/or refusing to allow or make findings in respect of certain parts of the Applicant's Counterclaim.

Master White found that the fifth and sixth grounds of appeal did not involve a question of law arising from the arbitrator's award.

- **Kimberley Poynton, Kott Gunning, Solicitors, Perth.**