

CASE NOTES

EXTENSION OF AMBIT OF ARBITRATION PROCEEDINGS

SUPREME COURT OF NEW SOUTH WALES: UNREPORTED

SMART J.

25 MAY 1988

K.B. Hutcherson Pty. Ltd. v. Janango Pty. Ltd.

Section 25 of the New South Wales Commercial Arbitration Act 1984 is headed "Extension of Ambit of Arbitration Proceedings". It reads:

"(1) Where —

- (a) pursuant to an arbitration agreement a dispute between the parties to the agreement is referred to arbitration;
- and
- (b) there is some other dispute between those same parties (whenever the dispute arose), being a dispute to which the same agreement applies,

then, unless the arbitration agreement otherwise provides, the arbitrator or umpire may, upon application being made to the arbitrator or umpire by the parties to the arbitration agreement at any time before a final award is made in relation to the first-mentioned dispute, make an order directing that the arbitration be extended so as to include that other dispute.

- (2) An arbitrator or umpire may make an order under sub-section (1) on such terms and conditions (if any) as the arbitrator or umpire thinks fit".

In this case, Mr Justice Smart considered the meaning of this provision. He particularly considered whether the requirement that the application must be made "by the parties" allowed the arbitrator to entertain an application to extend the ambit of the proceedings if one of the parties to the arbitration did not join in the application.

The use of the words "by the parties" as distinct from "by a party" or "by any of the parties" certainly suggests that the application must be made by all the parties and that if one party did not join in the application then the application could not be made.

His Honour pointed out, however, that to give such an interpretation to Section 25(1) would render Section 25 (1) virtually ineffective since, because of the consensual nature of arbitration, the parties have always been able, by consent, to extend the ambit of the proceedings.

His Honour further noted that Section 26 of the Act, which refers to the consolidation of arbitration proceedings, refers to an application to the Court "of all the parties". The different language used in the next succeeding section gave support to His Honour's views that a literal interpretation should not be given to the words "by the parties" in Section 25.

His Honour therefore held that for the purposes of Section 25(1), an application to extend the ambit of arbitration proceedings may be made by one party.

His Honour commented upon the manner in which an arbitrator should then entertain such an application. Firstly, the arbitrator should satisfy himself that the other dispute comes within the ambit of the arbitration agreement. Then the arbitrator must exercise his discretion as to whether or not the ambit of the arbitration proceedings should be extended to include the other dispute. Since this was a matter for the discretion of the arbitrator, in the case before him, His Honour was not prepared to express an opinion as to how that discretion should be exercised.

In his judgement, His Honour made the following comment upon the New South Wales Commercial Arbitration Act 1984 which is in similar terms to Commercial Arbitration Acts in other States and Territories apart from Queensland:

“The *Commercial Arbitration Act*, 1984 was a major step forward. It eliminated many past areas of difficulty, for example, the stated case, and introduced valuable new procedures, for example settlement conferences under s 27. S 37 states the duties of the parties to an arbitration agreement. The underlying policy of the Act was to facilitate and streamline arbitrations to enable them to bring about the just, prompt and economic resolution of disputes covered by an arbitration agreement”.

EXCLUSION AGREEMENT

SUPREME COURT OF NEW SOUTH WALES: UNREPORTED

YELDHAM J.
28 APRIL 1989

Corner v.C. & C. News Pty. Limited & Ors

An agreement for the sale of shares in a company contained a provision restraining the vendor of the shares generally from engaging in competition with the company. It was further provided as follows:

“In the event of there being any dispute between the parties hereto as to whether or not there has been a breach of paragraph (2) of this clause, then either party may refer the dispute to Mr Phillip Argy, solicitor and attorney of Messrs Mallesons, Stephen Jaques to act as arbitrator of the dispute. The arbitration shall be conducted in accordance with the provisions of the Commercial Arbitration Act 1984 (as amended). The parties agree that the Award of the Arbitrator shall be final, conclusive and binding upon them. Mr Argy shall be entitled to nominate an alternate person to act as arbitrator in the event that he is unable personally to act as such”.

The dispute was referred to arbitration under this clause. The arbitrator found that the vendor had breached the covenant and determined that the appropriate measure of damages was the sale price of the shares.

The vendor sought leave to appeal to the Supreme Court pursuant to section 38(4)(b) of the New South Wales Commercial Arbitration Act 1984.