an impartial and unprejudiced mind to the resolution of the questions involved in the arbitration".

The arbitrator was not represented at the hearing of the application, indicating that he was prepared to abide by any order made by the court.

Relying on the High Court decision of re Polites: ex parte Hoyts Corporation Pty Ltd (1991) 65 ALJR 445, His Honour was not prepared to restrain the arbitrator from proceeding. His Honour particularly noted that immediately after his appointment as arbitrator, the arbitrator had indicated to the parties that he had many contacts in the building industry and had worked with and was well known to many barristers and solicitors.

The owner also sought a stay of the arbitration proceedings because it had possible claims against the architect employed by it on the project. It submitted that it would be preferable for court proceedings to be issued by it against the builder and architect. This would have the effect of avoiding a multiplicity of proceedings and the possibility of inconsistent decisions. Following the approach taken by Rogers J. in *Qantas Airways Limited v Dillingham Corporation* (1985) 4 NSWLR 113 at 118 that the courts must adopt a new approach to arbitration under the uniform legislation and bearing in mind that arbitration proceedings had been on foot since February, 1991, His Honour exercised his discretion to refuse the application to stay the arbitration proceedings.

His Honour also refused leave to appeal stating:

> "The law, I think, has moved a great deal from what I might refer to as the old days of arbitration when an arbitrator lived a start and stop existence, being brought to a standstill from time to time by various orders of this Court".

The owner was ordered to pay the builder's costs.

LEAVE TO APPEAL ARBITRATOR'S AWARD ON COSTS REFUSED

Supreme Court of Victoria
Mr Justice Nathan
19 September, 1991
Angelatos v. Alternative Constructions Pty Ltd

Mr and Mrs Angelatos ("the owners") retained Alternative Constructions Pty Ltd ("the builder") to enlarge and renovate their home.

A dispute arose between the owners and the builder. From the decision it appears that the owners prevented the builder from completing the works and the builder alleged that this constituted a repudiation of the agreement. The builder sought recovery from the owners for payment on a quantum meruit,

or alternatively on the basis set out in the contract. The builder's claim on a quantum meruit came to approximately $60,000.00. This compared to the claim under the contract which came to approximately $35,000.00. The owners alleged that the works were defective and claimed an amount of $66,000.00 from the builder.

The dispute was referred to arbitration in accordance with the terms of the contract. In handing down his award the arbitrator made the following decisions:

1. The builder was not entitled to recovery on a quantum meruit basis.
2. The builder was entitled to payment of the sum of $9,000.00 from the owners.
3. The owners were to pay 85% of the builder's costs and the builder was to pay 15% of the owners' costs.
4. The Taxing Master of the Supreme Court may not be obliged to tax costs on the County Court scale even if so directed by the arbitrator.

The owners sought leave to appeal against the arbitrator's decision. The application focused on the Arbitrator's decision on costs. The matter came before His Honour Mr Justice Nathan.

His Honour considered that as at the date of his decision the principles recited in the *Nema* case were binding upon him. (The position will no doubt be different given the decision of the Full Court in *Leighton Contractors Pty Ltd and Kilpatrick Green Pty Ltd*—unreported 22 October 1991—see separate case note on p. 193). His Honour also noted that one of the requirements which must be satisfied under section 38 of the Commercial Arbitration Act in relation to the granting of leave to appeal is that the points in respect of which leave is sought ". . . are points of general concern rather than being a one off issue . . .". When an arbitrator is considering liability for costs the arbitrator is exercising a discretion. His Honour was of the view that ". . . The grounds as to the exercise of discretion are almost inevitably singular . . ." and therefore did not consider that the grounds of appeal in this case satisfied the requirements of section 38.

Notwithstanding that His Honour formed the view that there was not a point of general concern at issue, His Honour then went on to consider whether or not there had been a prima facie error on the face of the record.

In support of the proposition that there had been an error, the owners raised two arguments. These were:

(a) The arbitrator had not paid due regard to the dismissal of the builder's quantum meruit claim.
(b) The arbitrator had not paid due regard to the smallness of the sum awarded in favour of the builder.

His Honour was of the view that both contentions were incorrect. In relation to the builder's claim for a quantum meruit the arbitrator had found that it was reasonable for the builder to pursue this claim even though it had ultimately been unsuccessful. The arbitrator considered that it was only appropriate to take into account the failure to succeed in one claim, when other claims had succeeded, when the failed claim was totally without merit. The judge agreed that where a claim is based upon a contentious set of facts it may well be reasonable for a party to argue in the alternative.

In relation to the sum recovered by the builder the judge did not consider that the sum was small having regard to the claims and counterclaims. The judge noted that the builder succeeded in something like 10% to 12% of its claim after overcoming a claim on the part of the owners which exceeded the builder's claim. In these circumstances the judge considered that the builder had been successful.

The judge then considered the departure by the arbitrator from the usual rule in relation to costs. The arbitrator, in his award, had noted the general principle in relation to awarding costs. In relation to this His Honour said as follows:

> "He (the arbitrator) did not follow the general principle he referred to of awarding costs on a single party basis, and that is an indication—and in my mind a very strong one—of the way in which the arbitrator directed his mind specifically to the issues before him and awarded costs on a meritorious basis."

Finally, His Honour dealt with the question of the scale of costs. His Honour was of the view that:

> "an arbitrator, under the terms of the Act, does have a discretion to award costs on other than a Supreme Court scale, and so much follows from a plain reading of section 38."

However, the judge concluded that he could not find any error in the exercise of the arbitrator's discretion in directing that the costs of the arbitration before him be paid on the Supreme Court scale rather than the County Court scale. The judge noted that the parties had available to them, at the time of singing the contract, the opportunity to fix the awarding of costs on some scale other than the Supreme Court scale. His Honour also made the following comments:

> "The issue is what is the appropriate scale of costs? The matter was vigorously argued by skilled and experienced counsel before the arbitrator. Counsel appearing before me are Supreme Court practitioners, and they may retain that status whether they appear before the arbitrator or before me. This was not a dispute which bore the stamp of Magistrates' Court proceedings. It was vigorously contested by the parties, as I have already indicated, determined to impale either themselves or the other party upon an upturned spike. They chose this jurisdiction; they therefore chose, in my view, implicitly its cost structure, and the arbitrator was entitled to award costs on the Supreme Court scale."

His Honour found that there were no grounds upon which to exercise his discretion to grant leave to appeal against the arbitrator's award.

Phillip Greenham
Minter Ellison