> appropriate for me to substitute a different figure for that directed by the arbitrator. In this regard I should add that s 47 of the Act was not relied upon as a source of power. The power under s 18 (1) (c) is one which enables me to order a party to do something which the arbitrator is empowered to order it to do. It is a discretionary power and in the circumstances of the present case I was not prepared to exercise my discretion in favour of ordering the payment of the amount nominated by the arbitrator as security for costs." .

During a short adjournment, the arbitrator varied his direction so as to direct each party to lodge a total of $4,000 as security for costs. His Honour, on resumption, ordered the parties to comply with that direction of the arbitrator by certain dates. In the event that the first named defendant failed to comply with the order, his Honour ordered a stay of further proceedings in the arbitration.

J.A. MORRISEY

ARBITRATION – APPEAL AGAINST AWARD – WHETHER "MANIFEST ERROR" OF LAW ON FACE OF AWARD – RELEVANT PRINCIPLES EXPLAINED

New South Wales Court of Appeal, Unreported.

Kirby P: Mahoney JA: Meagher JA (dissenting) – 26 May, 1994.

In this Case. the majority of the Court of Appeal allowed an appeal by the builder and dismissed a cross appeal by the proprietor from a judgment of Rolfe J. who had granted, in part, leave to appeal and an appeal by a proprietor against the award of two Arbitrators, in a domestic building arbitration. whereby the award which the builder had obtained against the proprietor for $33,643 40 was changed to judgment for the proprietor for $25,696.98 (inclusive of interest).

In the course of their judgments. the majority (Kirby P and Mahoney JA) applied the decision of the Supreme Court of New South Wales in *Promenade Investments Pty. Ltd. v. State of New South Wales* (1991) 26 NSWLR 203 and reaffirmed that the policy of the legislature when it amended s 38 of the *Commercial Arbitration Act* 1984 was to restrict the granting of the right to appeal to cases where there is "a manifest error of law" on the face of the Award, and in the words of Kirby P

> "to confine most narrowly the cases in which appeals to the Supreme Court from an Award of an Arbitrator would be permitted."

The purpose of the policy is to promote finality of arbitral awards:

> "even at the price of denying a party its usual entitlement to the determination of the dispute by a court of law, ie, the precise assignment of the parties' legal rights after a detailed scrutiny of the relevant facts and application of the relevant law."

In the course of his detailed judgment Kirby P. stated the reasons why the stringent requirement had been adopted by parliament:

"(1) The approach previously adopted by the courts, including in this State, was unduly disturbing of the use and finality of arbitral awards;

(2) The leading authority of this Court in a judgment of McHugh JA in *Qantas Airways Ltd. v Joseland & Gilling* (1986) 6 NSWLR 327 (CA) 333 was too attentive to the achievement of justice and insufficiently attentive to the needs of finality in this class of litigation;

(3) Other decisions in the Court, and the inclination of the judges (including myself) to review arbitral awards and to re-examine facts had to be brought to a halt. My own inclination in this area can be found in my dissenting opinion in *Azzopardi v. Tasman UEB Industries Ltd.* (1985) 4 NSWLR 139 (CA) and in my minority opinion in *Wardley Proprietary Limited v Adco Constructions Pty. Limited* (1988) 8 BCL 301 (NSWCAS), 305f;

(4) The clear preference of Parliaments throughout Australia has been for the more robust and narrow approach favoured by the House of Lords in *Pioneer Shipping Ltd. and Ors. v. BTP Tioxide Ltd* [1982] AC 724 (HL) ["The Nema"];

(5) That this is so can be seen simply by tracing the amendments to the *Commercial Arbitration Act* s.38 and contrasting the provisions as they stood in the Act of 1984 with those which now obtain. The Act now requires, relevantly, that there is 'a manifest error of law on the face of the award' In case of doubt, it is permissible to read what the Attorney-General said to Parliament in introducing the *Commercial Arbitration (Amendment) Bill* 1990. The Government was concerned that, all too often arbitration had become simply a "dry run" for the litigation which followed. The Opposition Spokesman (Mr. Whelan) also emphasised the need for speed in the alternative dispute resolution which arbitration provides. Because of the delays in the court system, and the capacity of litigation in the courts to occasion frustration and expense, many commercial people have been unable to have their matters resolved in a timely way. *See New South Wales Parliamentary Debates (Legislative Assembly)* 29 November, 1990, 11569;

(6) Effect was given to the statutory amendment by the decision of this Court in *Promenade.* There Sheller JA explained the amendment its purposes and its requirements. His Honour's judgment enjoyed the general agreement of Mahoney JA and the concurrence of Meagher JA;

(7) *Promenade* has been followed by other courts in Australia. It has thereby contributed to the policy reflected in the legislation of other jurisdictions which have adopted the same statutory standard. See e.g. *Commonwealth v. Rian Financial Services and Developments Pty. Limited* (1992) 36 FCR 101;

(8) A review of the decisions of single judges in the Supreme Court since Promenade also appears to bear out the contention that its principles are being accurately observed. This Court, in its turn, is conforming to the requirement. See *C.R. and R. Lieschke v. B.R. Turner,* Court of Appeal, unreported, 9 March1992 (refusing leave to appeal from Giles J];

(9) In only one case. so far as I am aware. has this Court provided leave to appeal where it was refused by a judge at first instance. This is *Friend and Brooker Pty. Ltd. v. Council of the Shire of Eurobodalla,* Court of Appeal, unreported, 24 November, 1993 [1993] NSWJB 123. In that case an appeal, from a refusal by Cole J. was allowed because there appeared to the Court to be a clear and simple oversight by the arbitrator of the principle of law that if a breach of contract has two causes, both cooperating and of equal efficacy in causing the

> loss, a party responsible for the breach is liable to the plaintiff. The case involved the examination of the contractual documents, the disputed facts and the contested arguments that has been such a feature of this case, both at first instance and in this Court ".

The issues raised in the appeals involved contentions that there had been "a manifest error" of law by the Arbitrators in relation to their determinations concerning three matters

(a) whether certain "nominated sub-contractors" should be included or excluded from the lump sum contract price;
(b) whether painting formed part of the contract works; and
(c) the date and circumstances upon which the builder was deemed to have brought the works to practical completion, in relation to the imposition of liquidated damages

In each case, the majority determined that "a manifest error of law" had not been demonstrated, and that the construction of the agreement which the arbitrators took was open to them.

In the course of Kirby P's judgment, His Honour emphasised that in hearing a leave application what is in issue is "a preliminary impression" without requiring a great deal of argument. A party seeking the intervention of the Court should be able to easily demonstrate the suggested error without the necessity of requiring the Court to engage in an elaborate scrutiny of the facts and the law. Otherwise, the legislature had adopted the policy that "it is better for the community as a whole that the parties should be held to their arbitral award". His Honour cautioned Judges against the inclination to depart from the clear intentions of Parliament when their natural inclinations may suggest that they should embark upon a detailed and painstaking review of the facts and the law to determine whether arbitrators had erred.

In the judgment of Mahoney JA he set out a number of key considerations which should influence a Judge's decision whether to grant leave:

(1) If the suggested error of law requires for its determination the examination of a number of decisions of fact made by the arbitrators, then *prima facie* the case is not a proper one for leave to appeal.
(2) Where the isolation of a question of law involves reconciliation of various documents, and consideration of factual issues, the case will not ordinarily be one for leave to appeal.
(3) to appeal will not be appropriate if the dispute involves not the consideration of a bare question of law, but examination of how, against the contractual structure, the parties acted in a particular case. The Court should not become involved, in principle, in determining the rights of the parties arising from their actions. Rather the Court should restrict its activities to the determination of questions of law arising from the contractual documents referred to in the award.
(4) One of the relevant considerations to be taken into account in

determining whether leave to appeal should be granted is the relationship between the cost of the appeal and the significance of the questions of law to be determined. His Honour stated:

> "The Court may be satisfied that the determination could substantially affect such rights but yet conclude that, measuring the effect of the determination of such rights against the cost of determining them, leave should not be granted. It has long been accepted that it is in the interest, not merely of the parties. but also the State, that litigation should be brought to an end. As I have suggested, the cost of justice may be too great. To rectify error at too great a cost may produce not justice but injustice."

His Honour expressed concern that the amounts in issue when measured against the costs of the arbitration and the costs of court proceedings did not justify the award being the subject of an appeal by the Courts

The case re-emphasises the extremely limited circumstances in which leave to appeal will be granted by the Courts in consequence of the amendment to s.33 of the Act, and the clear intentions of Parliament that other than in the most restricted circumstances the parties should be held to their arbitral awards. Indeed, the case is an apt demonstration of the very "mischief" which Parliament has sought to overcome. A dispute over relatively small sums arising from a domestic building contract was the subject of an arbitration, an application for leave to appeal to the Supreme Court, the hearing of the appeal before the Judge at first instance, an application for leave to appeal to the Court of Appeal and finally the hearing and determination of the appeal by the Court of Appeal, resulting in delays, uncertainties and, not the least significant, onerous cost obligations to the parties.

GEORGE H. GOLVAN Q.C.

COSTS – FRIVOLOUS OR VEXATIOUS PROCEEDINGS

Supreme Court of Victoria – [1994] 1 VR 220
Gobbo J.

J. & C. Cabot v City of Keilor

Paragraphs (b) and (c) of sub-section 22(2) of the Victorian *Retail Tenancies Act* 1986 ("the Act") provide:

(b) The fees and expenses of the arbitrator are borne jointly by the parties to the dispute unless the arbitrator is of the opinion that a party has behaved in a frivolous or vexatious manner in which case the arbitrator may make such order as to those fees and expenses as the arbitrator things just;
(c) The parties to the dispute must bear their own costs unless the