

Case note: State of Victoria v Seal Rocks Victoria (Australia) Pty Ltd

Arbitrator's procedural rulings / interim award — exercise of Court's power under s 47 Uniform Commercial Arbitration Acts

Robert Hunt*

The decision of Byrne J in *State of Victoria v Seal Rocks Victoria (Australia) Pty Ltd* [2001] VSC 76 (23 March 2001, Supreme Court of Victoria) is the first case of which the writer is aware arising under the Institute's 1999 Rules for the Conduct of Commercial Arbitrations.

The proceedings in the Court concerned claims made by the State of Victoria to the arbitrator that certain documents be not produced or disclosed on the ground of public interest immunity. The arbitrator received evidence, heard submissions on the claims to immunity and, having inspected the documents with the consent of the parties, determined that many of them should be produced and made available for inspection by Seal Rocks and its representatives. The State sought declaratory and other relief to the effect of reversing the arbitrator's ruling, pursuant to ss 43 or 47 of the *Commercial Arbitration Act 1984* (Vic) (the Act) or, alternatively, pursuant to the inherent jurisdiction of the Court.

His Honour held he had no power to set aside the arbitrator's determination on any of the bases argued and dismissed the application.

It was submitted that the determinations of the arbitrator were interim awards and therefore 'awards' within the meaning of s 4 of the Act. His Honour referred to what was said by Kirby P (as he then was), speaking for the majority of the Court of Appeal, in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662, where such an argument was described as 'hopeless' by Kirby P, when he observed that an award of the kind contemplated by the Act is one which is a final step in the arbitration (at 672). Byrne J then said, at para 13:

The availability of the power in the arbitrator to make an interim award does not detract from this. It is, historically, a power conferred on an arbitrator by agreement or statute to deal successively with matters referred to arbitration, a power which was denied at common law. Interim in this expression is not to be understood as merely temporary. It is clear that a decision of the arbitrator is not

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an award of any kind unless it disposes of a matter referred to arbitration. It is not appropriate to describe a merely procedural decision as an award.'

An argument was then put to the Court that s 47 of the Act endowed the Court with a general supervisory role in procedural matters to ensure that the arbitration was conducted fairly, on the authority of the decision of the South Australian Full Court in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (1990) 55 SASR 327, at 354-356. In rejecting that submission, his Honour said, at para 19-20:

It was, however, put on the authority of the decision of the South Australian Full Court in the South Australian Superannuation case that this Court is endowed by s 47 with a general supervisory role in procedural matters to ensure that the arbitration is conducted fairly. I was referred, too, to a number of single judge decisions including three of this Court, where the existence of this jurisdiction appeared to have been accepted or, at least, not rejected. I think it is fair to say that, on this point, the reasoning underlying the majority decision of the South Australian Superannuation case, but not its authority, has suffered a mortal blow at the hands of Rogers CJ Comm D. Its authority, in the context of an Australia wide legislative scheme, has been impugned by *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*, where the Court of Appeal held that s 47 does not provide a ready entitlement to secure a review of interlocutory orders made in an arbitration; the section "is intended to empower the Court, in cases properly before it, to make interlocutory orders to the extent that it is not elsewhere specifically provided for in other sections of the Act".

For my part, I prefer to follow the *Cockatoo Dockyard* case and the reasoning of Bollen J, in dissent, in the South Australian Superannuation case. Section 47 is not available as a source of power to enable the court to review an interlocutory decision of an arbitrator made within power. Accordingly, s 47 may not be called upon to support the present application.

Finally, an argument was put to the Court that the orders sought may be made pursuant to the inherent jurisdiction of the Court. On the authority of what was said by Kirby P in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (at pp 675-676), it was accepted that this jurisdiction exists only in respect of determinations and orders of an arbitrator which are beyond the scope of the arbitration.

His Honour noted the powers available to an arbitrator to make directions or rulings in respect of evidentiary and procedural matters pursuant to rule 13 of the 1999 *Rules for the Conduct of Commercial Arbitrations*.

It was submitted that where the arbitrator's conclusion on public interest immunity was not properly founded, then the arbitrator was acting beyond power and the Court might intervene. In rejecting that submission, his Honour said, at para 25:

Faced with the strong line of authority which would deny to the court any inherent jurisdiction generally to review a procedural determination or evidentiary ruling of an arbitrator, I would be very reluctant to act upon the distinction which these submissions would require the court to draw. The submission provides no line to indicate when an error by an arbitrator on such a point is an excess of power and therefore reviewable, or when it is merely an error of fact or law within the scope of the arbitration, which is not. Nor was any suggested, whether by reference to the egregious nature of the error or otherwise. The acceptance of such a distinction would place an intolerable burden on the arbitrator and perhaps on the parties an unacceptable prospect of interruption to the arbitral process by application to the Court. Nor was I able to derive comfort from the suggestion put by counsel for the State that I should limit my acceptance of their submission to cases involving public interest immunity. ☼

Case Note: Walter Construction Group Ltd v Walker Corporation Ltd

Is GST payable on a Court judgement or Arbitral Award?

Robert Hunt

There have been various decisions of State Supreme Courts which indicate that a judgment in contested proceedings is not a 'supply' on which GST is payable under *A New Tax System (Goods & Services) Act 1999* (Cth) (the GST Act), such as to be recoverable as damages in those proceedings.

Section 9-5 of the Act defines a 'taxable supply' as follows: