International Malting Company Australia Pty Ltd v Pyle

[2003] VSC 496 (19 December 2003 - Smith J) Supreme Court of Victoria

Arbitration - misconduct - determination according to law - sections 22, 42, 44 Uniform Commercial Arbitration Acts

Robert Hunt[1]

This decision deals with two interesting points concerning the manner in which the arbitrator is to conduct an arbitration, and should give some comfort to arbitrators concerned that courts may judge them by the standards of a court or other legal tribunal.

The first point concerned whether the arbitrator had erroneously failed to consider and apply the correct legal test in determining whether the respondent (IMCA) had established that the claimant (Pyle) had failed to mitigate his loss. In rejecting that argument, his Honour said:

> *"30 There is a fundamental obstacle facing IMCA on this issue. It is true that* ***it raised mitigation in its points of defence and the award mentions it in the summary of the parties' issues. It is also true that in the first part of the final submissions of Pyle, the issue was mentioned. It was not, however, an issue on which Pyle was challenged in cross-examination to any extent. Later, in final submissions, counsel for IMCA did not list it as an issue for determination by the arbitrator. As a result, I am satisfied that the arbitrator was not called upon to decide the issue of mitigation.*** *IMCA's argument, therefore, proceeds on a false assumption. The arbitrator dealt with the evidentiary matters in a different context and that may explain the language used."* (emphasis added)

The second point concerned whether the arbitrator had misconducted himself by determining the matter according to commercial principles rather than according to law as agreed by the parties. His Honour set out various matters raised by counsel for IMCA in contending that the arbitrator had applied principles of general justice and fairness rather than determining the matter according to law:

> *"32 Clearly, by the terms of the arbitration agreement, the arbitrator was obliged to determine the questions in accordance with law and not by applying principles of general justice and fairness. Counsel submitted that a reading of the award demonstrated that he had done the latter and drew attention to the following matters:*

1. Immediate Past President IAMA, Barrister-at-Law, Arbitrator and Mediator.

(a) notwithstanding comprehensive and detailed written submissions setting out detailed legal contentions and principles relied upon by the parties, there was no statement of any of those legal principles save a brief reference to an authority on lost opportunity damages. Counsel conceded that the arbitration agreement required the arbitrator's reasons to be brief but submitted that this did not excuse the arbitrator from giving proper consideration to the fundamental legal principles by which he was to determine the issues. The award should at least have contained a statement of the basic legal principles upon which he decided the issues;

(b) IMCA relies also on a statement made by the arbitrator at the conclusion of the hearing in the following terms:

> *"I initially indicated I would try to produce an award within a week of today. I don't intend to make an enormously detailed legal analysis and hundreds of pages of detailed analysis. I don't think I'll be able to have done my award within a week but I will certainly do my very best to do it within two weeks. I'm required under terms of the agreement to provide brief reasons. I will almost certainly provide you with adequate reasons to understand my thinking.*

(c) Counsel also relied upon a letter written by the arbitrator to IMCA's solicitors dated 6 November 2003 in which counsel submitted the arbitrator made it clear that he regarded himself as a commercial and not a judicial arbitrator. Counsel also relied upon the fact that the arbitrator referred to clause 8.2 of the arbitration agreement but not clause 8.6, the clause that required him to make his award in accordance with law. Counsel also submitted that it was significant that he had submitted his award to an engineer for "quality assurance".

33 Counsel submitted that having regard to these matters it was clear that the arbitrator had not honoured the requirement of applying the law and had approached his task on a different basis – a commercial basis. It was put that such conduct would amount to misconduct within the meaning of the Act and this would empower the Court to set the award aside and remove the arbitrator."

In rejecting the submission, his Honour said:

"34 Taking the last of the three items first, I suggest that no significance attaches to the fact that the letter to the solicitors for IMCA did not refer to clause 8.6. The letter was directed towards a series of questions asked about areas of methodology which did not touch directly on the application by the arbitrator of the law. Similarly, the reference of the award to the engineer was directed to the form of the award. As to the arbitrator's reference to him regarding his role as that of a commercial and not a judicial arbitrator, I interpret that as an indication that he did not see it as his role to provide a presentation on the law in his award. This is also the interpretation I place on his remarks on page 1197 of the transcript –

quoted above. He was not saying that he was not going to apply the law. In fact, when his award is examined, he quite plainly, in a number of areas, had regard to the issues that needed to be decided having regard to the law and its application to the facts.

35 *It is true, however, that he has not set out any statement of the legal principles to be applied in deciding the issues. It seems to me that this arose because by and large the legal principles were reasonably clear and not in dispute. It was their application that was in dispute.*

36 *Counsel for IMCA relied upon statements of Byrne J in Peter Schwarz (Overseas) Pty Ltd v Morton [2003] VSC 144:*

> *"The requirement for reasons in s 29 means that the Arbitrators must set out the facts which they have found and the legal principles which they have relied upon as the foundation for the award and that this should be in terms sufficient for the parties to understand why they have won and lost and for them to decide whether to make and for the Court to determine an application for leave to appeal or enforcement.*

37 *Byrne J went on to say, however:*

> *". . . Judges, mindful of their own judgment-writing experience, have been careful not to impose upon Arbitrators a burden greater than their own. And so, there is no need to deal with contentions which are frivolous, irrelevant or even peripheral to the matters in issue.*
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> *This has led the Court to stipulate that Arbitrators must deal with every 'submission worthy of serious consideration'. In Fletcher Construction Australia Ltd v Lines McFarlane and Marshall Pty Ltd the Court of Appeal in this State said that a reasoned judgment of a court must 'deal with the central contentions advanced by the parties'.* ***However the test is expressed, the minimum requirement is not that the Arbitrators deal with every contention. Precisely where the line is to be drawn in a given case will depend upon the circumstances, including the relevance of the contention to the Arbitrators' conclusions. The decision to deal in the reasons with a particular rejected submission may also depend upon an assessment of its weight, particularly in a case where the arbitrating parties are not legally represented. Putting it bluntly, some points are so obviously bad that no good purpose is served by dealing with them in any detail. I need hardly add that the prudent Arbitrator will prefer to err on the side of comprehensiveness in order that the award should be of benefit to the parties.***
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> ***A further matter bearing upon the application of this principle is that the Arbitrators will commonly not have had the benefit of legal training.*** *Accordingly, Smart J in a much quoted passage has said this:*

> ***'Elaborate reasons finely expressed are not to be expected of an arbitrator. Further, the court should not construe his reasons in an overly critical way.' . . ."***

38 ***In the present case I do not consider that it was necessary for the arbitrator in satisfying his obligations and performing his duties to set out, as a judge might, a summary of the relevant legal principles. The parties, reading his detailed and well organised award which dealt with all the issues raised by the parties for final determination, would understand, without them being spelt out, the legal principles he applied and the legal choices he made.*** *In particular, it is quite clear that the arbitrator applied the Meehan and not the Placer analysis to the agreement.*

39 *I have also considered the three matters relied upon by IMCA in combination but am not persuaded that doing so leads to a different conclusion.*

40 *I am not persuaded, therefore, that there has been misconduct demonstrated on the part of the arbitrator."* (emphasis added)