Case Note: State Constructions Pty Ltd v. Baulderstone Hornibrook Engineering Pty Ltd and Anor

Supreme Court of South Australia –
Matheson J.
27 March 1997 (unreported)

Bias, misconduct, delay and pleadings.

The February 1997 issue of *the Arbitrator* contained a note concerning the decision of the Supreme Court of Western Australia in *Giustiniano Nominees Pty Ltd v. The Minister for Works and Anor* (Unreported, Full Court, Supreme Court of Western Australia, 10 November 1995). That case dealt with an application for removal of an arbitrator for bias.

The principles concerning alleged bias on the part of an arbitrator, including *Giustiniano's case* have recently been considered by the Supreme Court of South Australia in *State Constructions Pty Ltd v. Baulderstone Hornibrook Engineering Pty Ltd and Anor* (Unreported, Supreme Court of South Australia per Matheson J., 27 March 1997).

The decision also deals with two other important issues:

- the extent to which formal pleadings are required in arbitration proceedings; and
- the question of whether an arbitrator can be guilty of misconduct by delay in delivering a ruling.

Facts

The arbitration arose out of two subcontracts between plaintiff and defendant relating to the construction for Kimberly-Clark Australia Pty Ltd of the Tantanoola Pulp Mill. The substance of the dispute does not appear from the judgment. However, the dispute led to the issuing of Notices of Dispute under each subcontract which, in turn, resulted in protracted arbitration proceedings before a single arbitrator. The occurrences leading to the present decision were as follows –

- There had been ongoing difficulty in relation to the adequacy of the plaintiff's Points of Claim and especially the adequacy of particulars.

- The arbitrator had repeatedly ordered the delivery of amended Statements of Claim.
- The plaintiff delivered its fourth Amended Statement of Claim, pursuant to orders of the arbitrator, on 4 July 1995.
- The arbitrator held a further conference to consider the fourth Amended Statement of Claim, which did not take place until 4 October 1995. At the conference, the arbitrator stated that he would advise the parties of his decision "in about a week's time". The decision was not delivered until 20 May 1996.
- The arbitrator then rejected and struck-out parts of the fourth Amended Statement of Claim for want of particulars.
- The plaintiff brought an application to the Court, pursuant to Section 44 of the *Commercial Arbitration Act* 1986 for an order removing the arbitrator for misconduct. It was said that the misconduct was comprised as follows:
  (a) the conduct of the arbitrator gave rise to a reasonable apprehension of bias against the plaintiff;
  (b) the conduct of the second defendant in delaying his decision on the fourth Amended Statement of Claim for a period in excess of six months constituted misconduct; and
  (c) the conduct of the arbitrator in rejecting the plaintiff's fourth Amended Statement of Claim and earlier Statements of Claim were based on the view that the plaintiff's Statement of Claim in an arbitration proceeding "should follow as nearly as reasonably practical the procedures and practices of the Court" and constituted misconduct by the arbitrator.
- In the course of an earlier conference, it was alleged that the arbitrator had conferred with the representatives of one party in the absence of the other party.

Bias

The Court, having considered the evidence of what transpired at the conference, rejected the assertion that the arbitrator had acted improperly.

However, in doing so, the Court reviewed the principles relating to bias. In doing so, Matheson J. referred to *Giustiniano* and accepted the statement of principle relating to bias therein.

The Court found that the 'real likelihood of bias' test has been rejected in Australia by the High Court in *Webb v. The Queen* (1994) 181 CLR 41. Matheson J. found that the proper test of bias is whether fair-minded people might reasonably apprehend or suspect that the Judge has pre-judged or might pre-judge the case. The same principle applies to arbitrators.

In the light of his findings of fact, the Court rejected the allegations of bias.

Misconduct by Delay

The Court found that the fact that the arbitrator had said that he would deliver his determination "in about a week's time" did not advance the plaintiff's argument.

The Court then considered the decision of Byrne J. in the Supreme Court of Victoria in *Boncorp Pty Ltd v. Thames Water Asia/Pacific Pty Ltd and Anor* (1996) 12 BCL 139. In that case, the Court considered an 8½ month delay in the delivery of an interim award. The Court found that the delay did not constitute misconduct.

Despite the fact that, in the present case, the decision was a ruling on a pleading rather than an interim award, the Court nevertheless found that the delay did not amount to misconduct. Relevant factors in this decision were:

- the pleading in question extended over 100 pages and included elaborate and complex schedules;
- the Christmas holiday period intervened; and
- the plaintiff had itself been guilty of significant delays in complying with earlier directions and orders of the arbitrator concerning the delivery of Points of Claim.

The decision does not rule out the possibility that delay could constitute misconduct in appropriate circumstances. However, it is not clear what those circumstances are. Presumably, the delay would have to be extreme in extent and without extenuating circumstances.

Pleadings

In striking out parts of the Statement of Claim, the arbitrator had followed the decision of the Full Court of the Supreme Court of Australia in *Re Commercial Arbitration Act* 1986; *South Australian Superannuation Fund Investment Trust v. Leighton Contractors Pty Ltd* (1990) 55 SASR 327. In that case, White J., with whom Mohr J. agreed (Bollen J. dissenting) held that, in long complex arbitrations, procedural justice requires that arbitrators should "follow as nearly as reasonably practical the pre trial pleading, discovery and other procedures of the Court".

Matheson J. found that, although he was not sure whether he agreed with everything said by White J., he was bound by the finding that Supreme Court practice ought be followed as closely as reasonably practicable, although he went on to say that the decision does not mean that the Court Rules are to be followed slavishly by an arbitrator. Accordingly, Matheson J. found that the arbitrator was not guilty of misconduct. He went on to uphold the arbitrator's finding that the particulars provided were not adequate and should be remedied.

Matheson J. noted that the decision in *South Australian Superannuation Fund* was criticised by Rogers C.J. in *Imperial Leatherwear Ltd v. Macri & Marcellino Ltd* (1991) 22 NSWLR 653. In that case, His Honour suggested that the *South*

Australian Superannuation approach could defeat the purpose of arbitration in expediting complex proceedings.

The decision is also criticised by the learned author of Jacobs *Commercial Arbitration Law and Practice* (at pages 17,103-17,132) on similar grounds. Conversely, the 11th edition of *Hudson's Building & Engineering Contracts* discusses the decision and comments that;

> "The importance of the case in other jurisdictions, it is suggested, lies in its valuable substantive discussion of the proper degree of particularisation required in the arbitration of a typical complex construction dispute and of the requirements of natural justice in such a case..." (Hudson Volume 2, page 1675.)

Comment

Neither the *South Australian Superannuation Fund* decision nor the present decision in *State Constructions* is binding on Courts elsewhere in Australia. In the light of the *Imperial Leatherwear* decision, it seems likely that these decisions will not be followed in their full extent in some other jurisdictions. However, *State Constructions* is a useful indication of the principles to be applied in relation to particulars of pleadings in complex arbitration matters. The principle which can be extracted appears to be that, where complex factual matters are involved in an arbitration of significant size, natural justice will require that sufficient particulars be provided by way of pleadings to enable the other party to understand the case which it is required to meet. In some instances, this will require that formalities akin to those adopted in a Court be adopted.

Craig Doherty, *Toomey Maning & Co.;*
Barristers & Solicitors, Hobart