Enforcing Costs Orders made in the Course of an Arbitration

by Kylie Downes[1] and Dale Brackin[2]

Introduction

In the recent decision of the Supreme Court of Queensland in Schockman and Schockman v Hogg[3], the applicants approached the Court for assistance in enforcing an order made by arbitrators that the respondent pay their costs associated with an adjournment of the arbitration.

The applicants contended that the order was an award within the meaning of the Commercial Arbitration Act 1990 (Qld) ("the Act").

Alternatively, the applicants relied upon s47 of the Act and sought orders that the interlocutory orders issued by the arbitrators be "*made an order of the Court pursuant to s47 of the Act*", or in the alternative that "*the Court order the costs thrown away by the adjournment of the arbitrators be assessed and paid in accordance with the arbitrators' decision and/or directions*".

Whether costs order an award

When deciding if the costs order was an award, certain considerations were relevant.

1. Statutory interpretation

The decision as to whether the costs order was an award within the meaning of the Act requires an examination of the Act itself. In particular:

a. s.4 of the Act defines "award" as meaning final or interim award;
b. s.14 of the Act provides that, subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit;
c. s.23 of the Act provides that, unless a contrary intention is expressed in the arbitration agreement, the arbitrator or umpire may make an interim award;
d. s.28 of the Act provides that, unless a contrary intention is expressed in the arbitration agreement, the award made by the arbitrator or umpire shall, subject to this Act, be final and binding on the parties to the agreement;

1 Kylie Downes is a Brisbane barrister.

2 Dale Brackin is a partner in the construction section of Clayton Utz, Brisbane.

3 Unreported, Supreme Court of Queensland, Philippides J., 11 October 2002.

e. s.29(1) of the Act provides that, unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator or umpire shall make the award in writing, sign the award and include in the award a statement of the reasons for making the award;
f. s.34(2) of the Act provides that any costs of the arbitration (other than the fees or expenses of the arbitrator or umpire) that are directed to be paid by an award shall, except so far as taxed or settled by the arbitrator or umpire, be taxable in the Court;
g. s.47 of the Act provides that the Court shall have the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the Court.

Looking at the context of the Act and in particular the context in which the word "award" is used in the Act, it is apparent that:

(a) the Act refers to both awards and interlocutory orders (s.47). If all interlocutory orders were awards within the meaning of the Act, there would be no such distinction;
(b) under s.14 of the Act, the arbitrator has power to conduct the proceedings in the manner in which the arbitrator thinks fit which is distinguished from the power bestowed upon the arbitrator to make an interim award (s.23);
(c) the wording of s.34(2) of the Act envisages a situation where costs of the arbitration are not directed to be paid by an award. If all costs orders made by an arbitrator were an award, there would be no need for the words "that are directed to be paid by an award" in s.34(2).

2. Whether the arbitrators described the order as an award

If the arbitrators themselves do not consider that they have made an award and, in fact, do not use the word "award" when making the order (or otherwise comply with the requirements of form under the Act), this is a factor against a finding that an award was in fact made[4].

3. Whether an issue between the parties has been determined

It has been consistently held that an issue between the parties must be determined before a decision or order can be characterised as an award.

In *Fidelitas Shipping Company Limited v V/O Exportchleb*[5], Lord Denning MR held at page 638:

> *"But it seems to me that an interim award may be of two kinds. It may be an interim order made pending the final determination of the case; such as an award that an instalment under a building contract be paid pending final determination of the amount due. Or it may be an interim decision, given on a particular issue or issues between the parties, pending final determination of the whole case; such as a decision that a contract was concluded, but leaving over the question of damages. Such an award is not a final award because the arbitrator has not*

4 See Fidelitas Shipping Company Limited v V/O Exportchleb [1966] 1 QB 630 at 639 (line E).
5 See footnote 4.

exhausted his duties. ***It is, however, an award because it is an order or decision on an issue calling for determination****. It is, therefore, an interim award."* (emphasis added)

This is consistent with the definition of "award" in the Butterworths Australian Legal Dictionary[6]: "the determination and order of an arbitrator resolving a dispute referred to arbitration".

In *Resort Condominiums International Inc*[7], Lee J. was concerned with whether interlocutory or procedural orders of an arbitrator in the United States constituted a "foreign award" within the meaning of the *International Arbitration Act 1974*, or an "arbitral award" within the meaning of the 1958 United Nations Convention on Recognition & Enforcement of Foreign Arbitral Awards, such as to be capable of enforcement in Queensland. After setting forth the orders which were clearly of a procedural nature pending the hearing of the arbitration, His Honour stated that:

"In Queensland and the United Kingdom, an arbitrator engaged on a duly constituted arbitration is, as a matter of principle, a master of his or her own procedure: Carlisle Place Investments v Wimpey Constructions UK Ltd *(1980) 15 BLR 1109;* Third Valleys Water Committee v Binnie & Partners (a firm) *(1990) 52 BLR 42 .... It has been held in England that a Court has no inherent jurisdiction to interfere in an entirely private system of adjudication. .... (Page 421). (Quoting commentary on the report of* Three Valleys Water Committee v Binnie & Partners, *supra,) ... an arbitrator's interlocutory decision on a procedural point is not susceptible of challenge (unless of course it is a decision on a substantive issue and becomes an award). It follows that the Court has no power to compel the arbitrator to give reasons for any such decision (Pages 422-423).* ***... All authorities which I have been able to locate indicate that an interim award determines at least some of the matters in issue between the parties (page 424) ...*** *The jurisdiction of an arbitrator was to decide disputes and that an award, interim or final, can only be an award in respect of matters referred for decision. Thus the power to make an interim award was the power to decide matters in dispute between the parties and that an arbitrator when making an interim award had to specify the issues or claim or part of the claim which was a subject matter of that award. This view is consistent with the meaning of "interim award" under Australian legislation:* Halsbury's Law of Australia, *Vol. 1, [25.565]. For example, the Queensland Act, s.4, defines "award" as meaning a final or an interim award. By s.23, an arbitrator in Queensland has the power to make an interim award unless the contrary intention is expressed in the arbitration agreement.* ***By s.28, awards must be final and this means either an interim award or a final award. ... This refers only to awards which finally determine all or some of the disputes referred to the arbitrator for determination.*** *So even if an interim award is capable of enforcement under the Act, it is clear that the order made on 16 July, 1993 cannot be classified as an interim award as that term is usually understood with respect to arbitration proceedings (page 425)."*
(emphasis added)

6 Butterworths, 1997.
7 [1995] 1 Qd R 406

4. Tendency against judicial intervention

Courts are loathe to interfere with what are truly procedural orders which are not determinative of any of the issues in the arbitration. Because of this, the Courts tend against characterising orders or directions which have been made in the course of an arbitration as awards.

In *Doran Constructions Pty Ltd v Administration Corporation of New South Wales*[8], Rolfe J. stated that:

> *"... the basic philosophy underlying the arbitral process as enshrined in the Act, viz that when parties agree to refer to disputes to arbitration it is only in most exceptional cases, and then only after an exercise of discretion ..., the Court will interfere. The conditions for interference are either manifest error on the face of an award, or misconduct. Unless an applicant for relief can fit within the stringent tests the Court must ignore error. ... The parties have determined by whom and how the matter will be determined. In my opinion the document of 7 February, 1994 is not an award. It was a decision as to procedural matters. The second defendant may, in the exercise in his discretion, reconsider it or he may, in the exercise of his discretion, give further or other directions. In doing so he must ensure there is procedural fairness."*

5. Legal characterisation

In *Commonwealth of Australia v Cockatoo Dock Yard Pty Ltd (No. 2)*[9], Rolfe J. stated that:

> *"An award, generally speaking, will be a final and conclusive determination of all matters referred to an arbitrator or, in the case of an interim award, of restricted matters so referred. An award, generally speaking, is not a decision on how the arbitration should be conducted. If that were so every ruling of an arbitrator in the course of the hearing would have that quality, and I cannot agree that is correct. One must, in my opinion, look at the substance of the document, however it is described, to determine its correct legal characterisation."*

In *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*[10], directions were made by an arbitrator, on application by a party in the arbitration, relating to disclosure of documents. Kirby J., at page 672, described the Commonwealth's submission that such interlocutory orders were an award, as hopeless. His Honour stated at line F:

> *"In this case, indubitably, [an award] has not [been made]. I regard the Commonwealth's argument to the contrary as hopeless. The "award" of the kind contemplated by [the Commercial Arbitration Act] is the final step in the arbitration. It is certainly not a mere procedural order on the way to an award."*

In *State of Victoria v Seal Rocks Victoria (Australia) Pty Ltd & Anor*[11], an application was made to the Court in relation to interlocutory orders made by an arbitrator relating to the production and disclosure of documents (see [2]). Byrne J observed that:

---

8 Unreported, Supreme Court of New South Wales, BC 9405137, 2 September 1994

9 Unreported, Supreme Court of New South Wales, BC9405604, 15 November 1994

10 (1995) 36 NSWLR 662

11 [2001] VSC 76

"It is clear that a decision of the arbitrator is not 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]."

Costs order not an award

In *Schokman and Schokman v. Hogg*, supra, Philippides J. held as follows:

"... for the purposes of section 34(2), for the costs to be taxable in the Court, the costs must be costs that are directed to be paid by "an award". The costs orders of 21 June 2002 were not costs orders that were "directed to be paid by an award". They did not constitute an award, as that term is explained by the relevant case law, for the purposes of s34(2). Accordingly, until those costs are taken up and included in "an award" of the arbitrators, whether interim or final, they cannot be taxable in the Court for the purposes of section 34(2)."

This is significant because it is the only decision in which it has been expressly held that a costs order made in the course of an arbitration was not an award.

Whether section 47 extends to court assisted enforcement of costs order

Section 47 of the Act provides as follows:

"47 General Power of the Court to make interlocutory orders
The Court shall have the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the Court."

Scope and Intent of s47

A wide construction of section 47 is that the Court can make any and all interlocutory orders in relation to arbitration proceedings which it would normally make in the course of proceedings before it. The wide view is that the Court can do this irrespective of whether or not the order sought from the Court could have been, or has already been, made by the arbitrator.

The narrow construction is that the Court can only make interlocutory orders under section 47 which the arbitrator does not have power to make and further that the Court cannot entertain an application for an interlocutory order when an application for the same interlocutory order has already been entertained by the arbitrator and the arbitrator has made a decision.

The weight of authority is in favour of a narrow construction of section 47 of the Act[12].

12 See Imperial Leatherware Co Pty Ltd v Macri & Marcellino Pty Ltd (1991) 22 NSWLR 653; Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd (1994) 2 VR 386; Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (1994) 35 NSWLR 705 and on appeal (1995) 36 NSWLR 662; Victoria v Seal Rocks Victoria (Australia) Pty Ltd [2001] VSC 73 and on appeal [2001] VSCA 94; John Holland Pty Ltd v Federal Building Industries [2001] QSC 326; cf South Australian Superannuation Fund Investments Trusts v Leighton Contractors Pty Ltd (1990) 55 SASR 327.

In *John Holland Pty Ltd v Federal Building Industries*[13], Moynihan J said, at paras 10 and 11:

> *"[10] The decided caselaw shows a dichotomy in approaches to the nature of the jurisdiction conferred by s47. Broadly speaking, the view on one hand is that s47 gives the Court a general supervisory role in respect of the conduct of arbitrations. On the other hand, it is that its purpose is to allow Courts to make orders in aid of arbitration, which Arbitrators do not have the power to make: common examples are security for costs, third party disclosure, a mareva injunction, orders for the preservation or inspection of property.*
>
> *"[11] These issues and the relevant cases are comprehensively considered in an article in (1995) 69 ALJ 822[14]. I do not intend, nor is it necessary to repeat that exercise. In my view, the learned author is correct in his conclusion that the latter approach is correct..."*

The cases in which a narrow interpretation of section 47 has been adopted in relation to the making of interlocutory orders have reached that conclusion by considering the context in which section 47 appears in the legislation, and in particular, by undertaking a comparison with the provisions which operate in respect of awards by arbitrators. In this regard, in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (supra) Kirby P said:

> *"...it would be extraordinary if the Act were so to control and limit appeals against final awards but to provide such a ready entitlement to secure a review of interlocutory orders made in an arbitration. To suggest this is to ignore the context in which s47 of the Act appears."*

Likewise, in Victoria v Seal Rocks (Australia) Pty Ltd (supra) (on appeal) Ormiston JA said:

> *"[10] ... the assumption behind the judgments just referred to is an implication from the terms of the Act that the Court has only limited powers to interfere in an arbitration. In particular, short of finding misconduct pursuant to s42 and s44, the Court's powers to review decisions at least in the form of awards, is circumscribed significantly by s38 and s40. The only other general power given to the Court by the Act to consider matters of substance in an arbitration is the very limited power to determine questions of law pursuant to s39 which requires at least the consent of the arbitrator or all other parties. These limitations, as well as the widely expressed powers given to arbitrators under sections such as s14, s19, s22 and s37* ***points strongly against the conclusion that provisions such as s47 give the Court some general right to supervise or otherwise intervene in the interlocutory stages or during the hearing of an arbitration****.*
>
> *"[11] It was suggested that s47 would permit the Court to make interlocutory orders where they had not been sought from the arbitrator. The matters to which I have just adverted make such a conclusion highly unlikely, except where there is doubt as to the*

13 [2001] QSC 326

14 The article to which Moynihan J. referred is by Marcus Jacobs QC entitled "The Spectre of s47 of the Model Uniform Legislation" (1995) 69 ALJ 822.

arbitrator's own power. It is, however, presently unnecessary to resolve that question, for here the arbitrator sought to resolve the objections to production with the apparent concurrence of both parties and delivered 3 considered rulings on them. ***Under s47 the Court should not countenance, under the guise of making interlocutory orders, an appeal against, or a review of, an arbitrator's decisions.*** *The relevant grounds of appeal dependent on s47 have not been made out."*
(emphasis added)

Clearly, section 47 does not empower "an appeal against, or a review of, an Arbitrator's decision". Indeed, in *Victoria v Seal Rocks Victoria (Australia) Pty Ltd* (supra) (at first instance), Byrne J observed at para 18:

"[18] It should be noted that this section does not, in terms, confer on this Court any jurisdiction of an appellate nature; it speaks of the same power to make interlocutory orders as the Court has in relation to its own proceedings. If the determinations presently in question had been made by a judge in the course of a trial which is continuing, there is no power in another judge to review them or set them aside. The power which the State would have the Court exercise is not conferred by the words of s47."

In *South Australian Superannuation Investment Trust v Leighton Contractors Pty Ltd* (supra), White J said at page 336:

"Under s47, ***the interlocutory order must be both 'in relation to' and 'for the purposes of' the arbitration proceedings*** *... To my mind, the power to make "interlocutory orders for the purposes of and in relation to arbitration proceedings (as if the latter were Court proceedings)* ***was probably intended to refer to the making of some order in furtherance or in the continuance of arbitration proceedings.***".

The narrow approach was preferred by Philippides J in *Schokman and Schokman v Hogg*, (supra), who determined that the applicants were seeking "a remaking of the order of the arbitrators" which was not permissible under section 47 of the Act.

Conclusion

The decision of Schokman and Schokman v Hogg has, for the first time, clarified that an order as to costs made in the course of an arbitration will not necessarily be an award within the meaning of the *Commercial Arbitration Act 1990 (Qld)*. The consequence of this is that the beneficiary of such an order cannot enforce the order as to costs unless and until the order is incorporated into an award.

This decision is also important because it has reinforced the narrow construction of section 47 of the Act, being that the Court's power under section 47 is enlivened if the order sought is not one which could be obtained from the arbitrator, and furthermore, that section 47 cannot be used as a de facto appeal section, utilised to overturn an unsatisfactory order made by the arbitrator of the same type sought from the Court.