Sea Containers Limited v ICT Limited*

New South Wales Court of Appeal

Removal of arbitrators - misconduct - reasonable apprehension of bias - section 44 Uniform Commercial Arbitration Acts - cancellation fees - variation of fees agreed between the arbitrator(s) and the parties

*Robert Hunt & David Thyer***

Volume 20 Number 1 of '*the arbitrator & mediator*' contained a Case Note of the decision of the English Court of Appeal, in Andrews v Bradshaw [2000] BLR 6, in relation to the need for caution by arbitrators when only one party agrees to fees proposed by the arbitrator.

The recent unanimous decision of the New South Wales Court of Appeal in *Sea Containers Limited v ICT Limited* [2002] NSWCA 84 (18 April 2002), affirming the decision of Gzell J in *ICT Limited v Sea Containers Limited* [2002] NSWSC 77 (22 February 2002), is a robust statement by an Australian appellate Court which further reinforces the need for caution by arbitrators when a variation is sought of the fees which have been agreed by the parties.

ICT applied to the NSW Supreme Court for an order pursuant to s.44 of the Commercial Arbitration Act 1984 NSW) on the grounds of apprehended bias on the part of the arbitrators and their misconduct in pressing the parties to agree to the payment of cancellation fees. On appointment of the arbitrators in February 2000, agreement to the payment of cancellation fees was not sought. The issue was raised for the first time by the arbitrators by letter on 9 May 2000, and pursued by the arbitrators with some vigour in correspondence and at directions hearings held during the ensuing twelve months. As Sheller JA observed in his judgment in the Court of Appeal in relation to a directions hearing on 1 May 2001:

'57 ... The members of the arbitral Tribunal were bringing pressure to bear on counsel for ICT to agree to pay the members of the Tribunal a cancellation fee. The parties wished to have the hearing dates vacated and the proceedings stayed so that they could negotiate a settlement. Ominously, in this context Mr de Fina, speaking for his colleagues, went on record as saying that the Tribunal was not minded to do other than protect its interests in the matter. They indicated that they proposed to frustrate the parties' wish by refusing to make the order unless the parties, and particularly ICT, agreed to pay a cancellation fee. To put it in the mildest language, the arbitrators were not justified in doing this. One arbitrator said he was comfortable with Sea Containers' position. Obviously, the problem was ICT's withdrawal of its offer. ICT's counsel was accused of stonewalling by saying that he was bound

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* A case note of the decision at first instance written by David Thyer has been published in the Victorian Chapter Newsletter (Spring Issue)

**Robert Hunt is a barrister in NSW and is Immediate Past President of IAMA. David Thyer is a diretor of Thyer & Associates Pty Ltd. Construction Contract Consultants.

*by his instructions. The Chairman said bluntly that the attitude of ICT and its solicitors was not legal, was unethical and in breach of the solicitor's professional responsibility. They were told to indicate to ICT the Tribunal's displeasure. The arbitrators had taken up an adversarial position on the matter of their personal pecuniary interests by insisting upon a payment not contemplated by the arbitration agreement that they had made. Their insistence upon the payment of a can*cellation fee when one party did not agree to it had led to this.'

At first instance, Gzell J found that demands by two of the three arbitrators for payment of cancellation fees, under threat of litigation, constituted both misconduct and the appearance of bias. In ordering that the three arbitrators be removed, his Honour said:

'28 Since an arbitrator's fee is primarily a matter for tripartite contract between the arbitrator and the parties, there can be no impropriety in an arbitrator requesting a commitment fee or a cancellation fee. The issue in this case is as to the manner in which the arbitrators persisted in their request after rejection by one of the parties.

37 Counsel for the defendant submitted that the arbitrators were doing no more than negotiating for a cancellation or commitment fee. In my view, however, the arbitrators went further than mere negotiation and sought to apply pressure to parties already committed to assigned hearing dates who, in consequence, were at a disadvantage. This case demonstrates the wisdom of an arbitrator reaching agreement with the parties as to his or her remuneration upon appointment. Here the arbitrators had not done so and their concern to have agreement upon a cancellation or commitment fee ultimately assumed such importance in their minds that they allowed themselves to be swayed by this concern to the detriment of their duty to maintain the appearance of acting in the interests of bringing down a just award.

38 The arbitrators comprised a retired judge and a member of the bar. They must be presumed to have known that if they resigned or if the arbitration was settled, they were entitled to seek an order from the court in relation to the costs of the arbitration. S36 of the Act provides such power where, for any reason, an arbitration fails. Instead of taking this course when the plaintiff refused to agree to the payment regime twice proposed by the defendant, the arbitrators increased their pressure upon the parties and, in particular, the plaintiff, to agree. The arbitrators had been referred to the three cases on cancellation or commitment fees referred to above. Amec suggested that the court might be unlikely to include such fees in its determination of what constituted the costs of the arbitration. ***K/S Norjarl A/S*** *raised the prospect that to persist in seeking agreement from the parties might constitute misconduct. The lawyer members of the tribunal must have understood that caution was called for: and yet they persisted in applying pressure.*

39 The demand for payment of the per diem rates for time set aside made on 9 May 2000 came at a time well after the setting of the hearing dates for 4 weeks from 9 October 2000 at the preliminary conference on 21 February 2000. By that stage I may infer that the parties were committed to preparation for hearing with consequent cost implications if the matter did not proceed. The cancellation of the 29 May 2000 directions hearing because the 'take it or leave it' arbitrators' fee arrangement had not been accepted, put more pressure on the parties. The order made on 15 November 2000 that the parties forthwith confer in an attempt to reach agreement with respect to the cancellation

fees was made well into the preparation period leading up to the then hearing dates of 4 weeks commencing on 21 May 2001. The rejection on 13 March 2001 of the element in the plaintiff's suggested regime that credit be given for other remuneration evidenced a determination to maintain the arbitrators' demands at all costs. The 24 April 2001 directions hearing saw unrelenting pressure put on the parties. The refusal at the directions hearing of 1 May 2001 to make orders consented to by the parties unless an agreement to pay cancellation fees was acknowledged and the assertion that a legal obligation existed with respect to them constituted, in my opinion, the pitting of the power of the arbitrators against the parties. As Mr de Fina so aptly put it on that occasion: the tribunal was not minded to do other than protect its interests in the matter. The sending of the fee notes in July 2001 and the assertion that they would be enforced on 17 August 2001 constituted the furtherance of an adversarial contest between the arbitrators or, at least two of them, and the parties. The setting down of a complex matter acknowledged to require 4 weeks of hearing for 2 weeks without regard to the convenience of parties, witnesses and counsel, placed yet more pressure on the parties.

40 It was submitted that the lack of response by the plaintiff's solicitors to correspondence from the arbitrators in December 2001 meant that it was perfectly reasonable for the arbitrators to bring matters to a head by nominating the 2 week period. The plaintiffs could, it was said, apply to have the dates vacated. What was contemplated by the arbitrators in December 2001 was a directions hearing. The plaintiff's solicitors' failures could easily have been cured by setting the February date as a directions hearing. From the history of the matter I regard the setting of the two week hearing in February 2002 as a deliberate step on the arbitrators' part to put more pressure on the parties.

41 Mr Thompson did not send a fee note. He was, however, party to the discussions at directions hearings and he participated in those discussions and he did not demur to the statements made by Mr Carruthers QC or Mr de Fina.

42 On the evidence before me, I am satisfied that each of the arbitrators misused his position in applying pressure to the parties to agree to a cancellation or commitment fee and that constituted misconduct in terms of s44(a) of the Act.'

Sea Containers then sought leave to appeal to the Court of Appeal. Leave to appeal was granted and the appeal was dismissed. Sheller JA (with whom Mason P and Meagher JA agreed) said, at paragraph 104:

'101 The arbitrators had the benefit of Deacons' submissions of 9 June 2000 and fuller submissions of 17 July 2000 from Sea Containers' then senior counsel that they had no right to require the payment of a cancellation fee. They rejected a reasonable proposal to which both parties agreed and quite clearly insisted on something more generous. However, although ICT's further offer was accepted by the arbitrators, it was withdrawn before the other party to the tripartite agreement had accepted it. The arbitrators saw fit to suggest that no orders would be made unless agreement on cancellation fees was reached. Their next step was for two of them to claim payment of the cancellation fees under threat of litigation.

102 It is enough if I say that in my opinion the conclusions Gzell J reached on this conduct were justified by the facts. The situation had reached a point and the misconduct of the arbitrators was such that there was no choice but to remove them.

103 The conduct of the arbitrators in December 2001 leading up to the fixing of dates for hearing in February 2002 I also regard as misconduct. So far as the material goes there is no suggestion nor is there any in what Mr Carruthers wrote that either party was calling for an urgent hearing. Arbitration is largely a consensual process. There is nothing to suggest that ICT *had at any stage been dilatory. Failure to respond to two letters could not be said to give rise to a clear inference that ICT had abandoned the arbitration process. In any event it was known to the arbitrators before the end of December that that was not the case. For the arbitrators having issued a document that there would be some preliminary hearing on seven days notice to go ahead without warning to the parties and arrange for the hearing to take place on three weeks notice, I regard as misconduct. The arbitrators said that this action was justified by an anxiety to meet their responsibilities to the parties and to the administration of law. In the result, had ICT not taken steps to bring the matter before the Supreme Court they would have been effectively forced on at short notice without the benefit of their senior counsel. How this can be said to assist in the proper resolution of the matters before the arbitrators which was their principal responsibility to the parties, I fail to understand. For my own part, I am not prepared to conclude that the arbitrators' conduct was motivated by the failure of ICT to agree to pay a cancellation fee. However, whatever the motivation or intention, having fixed the matter on dates without notice to ICT and then, despite ICT's objection, to have sought to proceed with the matter is no proper way to conduct an arbitration. Furthermore, as this case demonstrated, it was a wasteful and expensive way of doing it. Arbitrators need the assistance of parties and their representatives, particularly in long and complicated cases like the present. Unilateral action which has the result of disturbing or denying that assistance is for the benefit of no one.*

104 It was for the reasons so given that in my opinion it was appropriate to dismiss the appeal with costs. I was of the view that leave to appeal should be granted not because I regard the appeal as having merit but because it seemed to me that it might be useful to re-state the principles about how arbitrators should conduct themselves if they wish to vary a fee arrangement with the parties or if they wish to set matters down for hearing at short notice. I should say finally that the conduct of the arbitrators in this case, particularly at the directions hearing of 1 May 2001, would give rise to a reasonable apprehension of bias in the mind of a fair minded lay observer who could reasonably apprehend that the arbitrators might not bring an impartial and unprejudiced mind to the resolution of the question they were required to decide. Mr Clifford's evidence was not determinative of this but was relevant to the issue. Had he not had such concerns there would have been grounds for refusing relief on this basis.'

In his judgement, Meagher JA said:

'2 In this matter I have studied with care the judgment of Gzell J in the Court below, and also, in draft, the judgment of Sheller JA in this Court. I agree, if I may respectfully say so, with every word in each judgment.

3 The facts are set out in detail in both those judgments. In short, there are only two facts which matter. The first is that the parties to an arbitration never agreed to pay a cancellation fee to the arbitrators. The second is that the arbitrators kept badgering the parties to make such an agreement.

4 Anyone who has been at the Bar (as two of the arbitrators had been) would realise that unless a barrister expressly stipulates for a cancellation fee when he accepts a brief he is forever disentitled from seeking one. The same, mutatis mutandis, is true of arbitrators. As Legatt LJ said in ***K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd*** *[1992] QB 863 at 878:*

> *"Any fee upon which (the arbitrators) wish to insist should be made known at the outset before acceptance of appointment"*

Here it was not. That is what makes the arbitrators' subsequent conduct so unseemly.

5 It also makes ironical the remarks of Mr Carruthers at the directions hearing of 1 May 2001, when he talks of "the legal obligation which we perceive the parties to have [i.e. to agree to the cancellation fee]; there is a moral obligation here which the parties just seem to be absolutely refusing to acknowledge." There was, of course, no legal obligation, no agreement to pay even having been reached; just how there could be a moral obligation to pay for work which might never be done, I quite fail to see. It is, in my opinion, that at this point the conduct of the arbitrators passed beyond the realms of unseemliness into misconduct - and misconduct of a very high order.

6 But, there is worse. During the May 1 2001 hearing, Mr Carruthers said, in response to a joint application from the parties for an order vacating an existing hearing date and an order staying the arbitration:

> *"The arbitrators are not minded to make any orders unless there is an acknowledgement by the parties that their obligation to provide a cancellation fee [is made]."*

7 If one thinks about it, what Mr Carruthers was saying was that the arbitrators would refuse to do their job unless the parties agreed to acknowledge a liability, which did not exist.

8 And worse still. In July 2001 two of the arbitrators, Messrs Carruthers and de Fina, actually sent accounts to the parties (for $60,000 in one case, and $38,000 in the other) for the cancellation fee. They told the Institute of Arbitrators and Mediators that they intended to "take such steps as are necessary to enforce that entitlement". Such steps, presumably, did not exclude litigation. They, apparently, brushed to one side any consideration that a litigant might feel more than a little uncomfortable if he went to Court knowing that the judge was plaintiff in an action against him arising out of the very matter the judge was supposed to adjudicate.

9 At this point the arbitrators' behaviour became disgraceful.'

As noted in paragraph 104 of the judgement of Sheller JA, leave to appeal was granted, because 'it seemed to me that it might be useful to re-state the principles about how arbitrators should conduct themselves if they wish to vary a fee arrangement with the parties or if they wish to set matters down for hearing at short notice.'

Those principles are set out in paragraphs 91 - 98 of the judgement of Sheller JA, as follows:

91 To distil the approach that should be taken in determining that issue, it is useful to refer again to two of the cases mentioned earlier. In ***K/S Norjarl A/S v Hyundai Heavy Industries Limited*** *[1992] QB 863, Leggatt LJ at 877 stated the following principle:*

"once an arbitrator has accepted an appointment, no term can be implied that entitles him to a commitment fee, and the arbitration agreement cannot be varied in that way without the consent of all parties. To insist on such a fee in those circumstances would therefore constitute misconduct, making the arbitrator liable to removal."

92 *At 878 Leggatt LJ said:*

"Any fee upon which [the arbitrators] wish to insist should be made known at the outset before acceptance of appointment. It is not unlawful to stipulate for a commitment fee, though some may prefer to heed the advice given by the authors of Mustill & Boyd, Commercial Arbitration, 2nd ed (1989), p244 that the risk of premature settlement should be regarded as 'an occupational risk in arbitrating.' If, because the case is a long one, protection is required, it should not extend to payment of the entire fees for the hearing before it has started. A modest proportion of the fees for the hearing should normally suffice to cover the period between settlement and the time by which an arbitrator can reasonably expect to find substitute employment. The risk that an arbitration may settle after it has started is a diminishing one that besets barrister and arbitrator alike."

The advice given in Mustill & Boyd is set out in the judgment of Cole J in ***AMEC Construction Pty Limited v Coal and Allied Operations Pty Limited*** *in a passage to which I will come shortly.*

93 *At the beginning of his judgment at 884 Browne Wilkinson V-C observed:*

"There is a problem latent in every arbitration. An arbitrator, par excellence, is in a quasi-judicial position. He must avoid both the reality and the appearance of bias. The receipt by a judge of money or other benefits is the classic example of conduct which is unacceptable since, at its lowest, it raises the possibility of bias. Yet an arbitrator is paid by the parties. How is this conflict resolved? To date moderation and common sense have provided the answer. Those virtues being singularly absent from the present case, we have to give a legal answer. Such answer should, if possible, continue to permit sensible arrangements to be made between arbitrators and the parties where cupidity and obstinacy are absent."

Unfortunately, in the present case moderation and common sense were overlooked.

94 *His Lordship observed, at 885, that:*

"The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract: see ***Compagnie Europeene de Cereals SA v Tradax Export SA****. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in considerations of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status. Amongst those disabilities is an inability to deal unilaterally with one only of*

the parties to the arbitration, let alone to bargain with one party alone for a personal benefit.

So far as the parties are concerned, their obligations under the trilateral contract include the liability to pay remuneration for the services of the arbitrator."

95 His Lordship went on to point out that in the United Kingdom the amount of such remuneration and the person liable to pay it can be fixed either by agreement, or by the arbitrator under s18(1) of the Arbitration Act 1950 or by taxation under s19 of the Act. His Lordship could see no impropriety in the arbitrator's requesting a commitment fee or raising the question of their fees with both parties with a view to obtaining their joint agreement. He observed, at 885-6:

"The letter of 1 March 1990 is unhappily expressed, suggesting as it does the dictation of fees to be paid rather than an invitation to agree reasonable fees."

I interpolate that the arbitrators' letter of 9 May 2000 carries the same overtones. At 886 His Lordship said:

"Although a commitment fee would not have been payable in default of agreement, I can see nothing improper in the arbitrators proposing the payment of a commitment fee so long as that proposal is made to both parties and all negotiations relating to it are conducted with both parties. Could it really be suggested that, if both Norjarl and Hyundai had agreed to the payment of a commitment fee, it was improper for the arbitrators to suggest that one should be paid?

However, in my judgment the arbitrators in this case went far beyond simply suggesting a negotiation with both parties for the payment of agreed fees including a commitment fee. It immediately became clear that Norjarl and Hyundai were not of one mind in their response to the arbitrators' approach. I do not find it necessary to reach a final decision whether or not what happened thereafter amounted to misconduct. But at the lowest, it came very close to the line. The arbitrators (although at all times stopping short of concluding an agreement with Norjarl without the consent of Hyundai) entered into separate negotiations with one party, Norjarl, as a result of which Norjarl were willing to agree to far more beneficial terms than Hyundai. Not surprisingly, Mr Steel's letter of 10 August is much more flattering about the approach of Norjarl's solicitors than that of Hyundai's. This illustrates clearly the risk involved when arbitrators enter into negotiations as to their fees with one of the parties in the absence of the other. The risk is of the appearance of bias arising from the disparate responses of the parties and the not unnatural suspicion that the arbitrators will be more favourably inclined towards those more responsive to their approach than to those who have been less responsive."

In the present case, the arbitrators certainly by 1 May 2001, after Deacons' withdrawal of its client's offer, were more flattering in their comments of the approach taken by Sea Containers than of the approach taken by ICT, a matter not surprisingly observed by or conveyed to Mr Clifford.

96 With due respect, the Vice Chancellor pointed out the very problem that emerged in this case. After their remuneration had been agreed the arbitrators sought the parties' agreement to a cancellation fee. This was quite proper. By the end of December 2000 the parties had agreed to a

cancellation fee as proposed by ICT on 13 December 2000. This was a perfectly reasonably proposal. However the arbitrators were not prepared at that time to accept it. From that moment there was a real risk of conflict encouraged by Sea Containers indicating, when they agreed to ICT's proposal, that they also agreed to the proposal put by the arbitrators in May. This was followed by insistence from the arbitrators that a better offer be put forward. This was done on 8 May and "reluctantly" accepted by the arbitrators. However, Sea Containers, for reasons unknown, were not prepared to accept the renewed and better offer from ICT. It was abundantly clear that the matter was getting out of hand. This was demonstrated when, absent agreement by Sea Containers, ICT withdrew its offer. That was followed by what I can only describe as extravagant language from the arbitrators about the obligations of the parties and ultimately a threat made publicly that two of them would take all steps necessary to recover $60,000 each for cancellation fees. In my opinion, the arbitrators had stepped well beyond requesting that a cancellation fee should be paid and well into the area of demanding that it should be paid. This demand was never withdrawn.

97 *In* **AMEC Construction Pty Limited v Coal and Allied Operations Pty Limited** *(NSW Supreme Court - Cole J - 29 April 1993, unreported), at 6-7 Cole J said:*

> *"A difficulty arises where a reference is expected to take a lengthy period and the referee, at the request of the parties, sets aside the time which the parties indicate is likely to be an appropriate duration for the hearing, and the matter is settled either at the commencement of the hearing or during it. If the parties in their agreement regarding fees have contemplated this occurrence and agree a fee structure should it occur, that agreement should be adhered to. If, however, there has been no such agreement yet the referee has set aside a significant period of time which is not utilised, he may lose income which otherwise he anticipated and he may be unable to obtain other employment whether as a referee, arbitrator or otherwise during that period because of its close proximity. The conflicting considerations which then arise are discussed, in my view appropriately, in Mustill and Boyd at 243-244:*
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> > *These are all cases in which the arbitrator seeks to be paid for work done before the reference came to an end. It is, however, possible that the arbitrator will look for more than this. He may argue that but for the premature termination of the reference he would have been entitled to earn additional fees, and that the loss of fees is something for which he should be compensated. Such an argument may in isolated cases reflect a genuine hardship. The arbitrator may have been asked to set aside several weeks for the hearing. If the dispute is settled immediately beforehand, the arbitrator may not be able to fill the space with sufficiently remunerative work. The Court would no doubt feel sympathy in such a case, but it is unlikely to provide redress. A claim in damages would be hopeless, for even if the relationship could properly be explained in terms of contract, it would be absurd to contend that the parties committed a breach by failing to continue with the reference of a dispute which for practical purposes had ceased to exist: for example, because it was settled or because in the exercise of a statutory or common law jurisdiction the court had prevented it from being*

pursued. Nor is the proposition more attractive if the relationship is one of status, rather than contract. Public policy demands that the arbitrator should be paid for what he has done, but not that he should be paid for what he has not done. Indeed, considerations of policy point the other way, for the Court would not wish to confer on the arbitrator a right to compensation, the existence of which might inhibit the freedom of the parties to settle the dispute as they think best, or to invoke the supervisory jurisdiction of the Court when circumstances so required. Much the better view, we suggest, is to treat the risk of a settlement as an occupational risk of arbitrating. If a dispute is so large and the potential hardship to the arbitrator so great the risk appears unacceptable, there is nothing to prevent the arbitrator from stipulating as a condition for agreeing to accept the appointment that he shall be recompensed for keeping his time available."❄