

## Vodafone Pty Ltd v Supercall Pty Ltd

[2003] NSWSC 302 (21 May 2003), Supreme Court of New South Wales

*Section 38 Uniform Commercial Arbitration Acts - leave to appeal from an arbitrator's award - when a determination 'could substantially affect the rights' of a party - exercise of discretion when 'unassailable findings of fact'*

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This recent decision of Nicholas J is of particular interest because of some illuminating remarks made by his Honour in considering the application of s.38(5)(a) of the Act, in relation to what is meant by 'could substantially affect the rights' of a party.

A brief overview of the facts will be helpful. Supercall's contractual entitlement to act as a service provider of Vodafone was suspended by a later agreement between the parties, which provided that, if and when Supercall met certain criteria, the suspension would cease. The dispute referred to arbitration centred around whether Supercall had met that criteria by a particular date.

In relation to the s.38(5)(a) issue, his Honour said:

- '55 *Vodafone contends that a determination of the questions of law raised in this application substantially affects the rights of Supercall and/or Advanced and itself. The grounds for the contention are:*
- (a) *Supercall and Advanced have foreshadowed proceedings claiming a substantial amount of damages in the event that they obtain determinations to the effect that the criteria for which cl 10.3(a) of the Asset Sale Agreement provides were satisfied;*
  - (b) *the Award under challenge constitutes a finding of a necessary element of that foreshadowed cause of action; and*
  - (c) *if (as Vodafone contends) the Award is affected by appellable errors it cannot stand, and an essential element of the foreshadowed cause of action must be held not to have been established against Vodafone.*
- 56 *On behalf of Supercall it is submitted that Vodafone's contention is without substance. It contends that damages is not an issue in the Award under consideration or, indeed, in the entirety of the arbitration. It is acknowledged that proceedings for damages may be commenced when the arbitration is complete, and that the determination of the present application will result in the determination of no rights but at most the existence of an issue of estoppel. It was submitted that there was no evidence as to whether any damages would be claimed in any future court proceedings.*

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- 57 Little, if any, guidance is available to the Court when it comes to consider the issue under s 38(5)(a) whether having regard to all the circumstances, the determination of the question of law raised on appeal could substantially affect the rights of one or more parties to the arbitration agreement. However, I understand by the use of the word "could" the Court's consideration is directed to the issue whether the determination, on appeal, of the question of law is capable of substantially affecting, or has the capacity to substantially affect, the rights of the parties. The issue, then, is "could", not "would". Thus the Court is not required to consider whether the determination would, as a matter of fact, substantially affect these rights. The ordinary words of the provision do not suggest that the Court's consideration should be narrowly confined.
- 58 The exercise may be fairly straight forward in cases in which the outcome affects an award which determines the liability of one party to pay a sum of money to another (eg *Horizons Corporation Pty Ltd v Lahey Constructions Pty Ltd* (Unreported, NSWSC, 27 November 1998 para 78); *Natoli v Walker* (Unreported, NSWCA, 26 May 1994, Mahoney JA, p 9). The present is not such a case, being one in which the Award affects the rights of the parties under the Agreement. The Court's consideration is not confined to cases in which the nature of the affectation is monetary. If the determination of the question of law concerned involves the construction of a provision of a contract between the parties to the arbitration agreement, the application of which provision was the subject of the arbitration, it may readily be seen to be capable of substantially affecting their rights or obligations.
- 59 In this case the Arbitrator has determined that as at the relevant date Supercall met the criteria under cl 10.3(a)(ii) relevant to the cessation of the suspension of the rights and obligations of Supercall and Vodafone under cl 10.1. The effect of satisfaction by Supercall of the several criteria under cl 10.3 is to attract the application of cl 10.5 so that the Advanced Service Provider Agreement will be reactivated on and from the relevant date. Thus, when regard is had to all the circumstances, the relevance of the Award to questions whether Vodafone had breached the Agreement and, if so, the nature and extent of any consequential liability, is clear.
- 60 In my view it is not necessary that Vodafone should show that litigation about the Agreement is imminent or on foot in order for the Court to consider whether relevant rights could be substantially affected by the determination of the question of law.
- 61 I am satisfied that, having regard to all the circumstances, the determination of the question of law concerned (being the proper construction of cl 10.3(a)(ii) of the Agreement) could substantially affect the rights of one or more parties to the arbitration agreement and that, therefore, Vodafone has met the requirement of s 38(5)(a) of the Act.' (emphasis added)

The Court found that no error of law, manifest or otherwise, on the face of the Award had

been demonstrated, and accordingly that the requirement of s.38(5)(b)(i) was not satisfied. No attempt was made by Vodafone to satisfy the requirements of s.38(5)(b)(ii).

The Court went on to find that, even if Vodafone had satisfied the two limbs of s.38(5), the proper exercise of the Court's discretion would be to refuse leave to appeal. In coming to that conclusion, Nicholas J said:

- '62 Even if the requirements of s.38(5) of the Act are satisfied, the question still remains as to whether as a matter of discretion leave to appeal should be granted (*Promenade Investments Pty Ltd v State of New South Wales* p 225-226; *Natoli v Walker Mahoney JA*, p 3-4; *Horizons Corporation Pty Ltd v Lahey Constructions Pty Ltd* para 21).
- 63 In my view, having regard to all the circumstances of the case, the proper exercise of discretion results in an order that leave to appeal be refused.
- 64 In coming to this conclusion I am guided by the well-settled view that the underlying legislative intention of Pt V of the Act is that **leave to appeal against an award should not readily be given, and that the intervention of the Courts must be strictly limited** (eg *Natoli v Walker* per Kirby p 28).
- 65 It is plain that the proceedings before the Arbitrator were not limited to the consideration of the question of law, namely the proper construction of cl 10.3(a)(ii), but involved an extensive and thorough investigation as to whether, as a matter of fact, Supercall met the criteria at the relevant date. **The Arbitrator made findings of fact that the necessary working capital was immediately available for use by Supercall in the business. The findings, which are recorded in the Award paras 117-121, 131, 145, 147, 148-150, are unassailable and could not be disturbed...**
- ...
- 67 I am not persuaded that it would be at all likely that there would be a different award if, following a successful appeal by the Plaintiff, the matter was remitted to the Arbitrator to proceed with an enquiry as to the liquid nett asset position of Supercall as at the relevant date.' (emphasis added)

