Arbitrations: failure to call evidence

Tom Goudkamp, Stacks the Law Firm with Goudkamp Mahony, Sydney

Two recent decisions of the NSW Court of Appeal make it evident that defendants who fail to call evidence in an Arbitration Hearing so as not to show their hand before a Court hearing run the risk of receiving indemnity costs orders against them.

In *Quach & Anor v Mustafa* (unreported) 15th June 1995 the plaintiff received an award after the defendant elected not to show the Arbitrator adverse film of the plaintiff. The defendant produced the film at the trial. As a result the plaintiff received a judgment significantly lower than the Arbitration award.

The Trial Judge, who was informed that the film had not been shown to the Arbitrator, ordered the defendant to pay the plaintiff's costs of the Arbitration hearing and the trial, on an indemnity basis. The defendant's appeal was dismissed. The Court of Appeal's reasons were given by Kirby P, with whom the other learned Judges agreed.

At page 11 he stated:

"The appellants stated that the course which they had followed was one which is ordinarily pursued by a defendant with investigative films. For forensic reasons, a defendant will rarely disclose a film before the Arbitrator. It will keep the film in reserve for the trial in the District Court. If shown before the Arbitrator, the element of surprise will be lost. The forensic utility of the film will be squandered.

Of course, I can understand the forensic reasons behind the decision of the appellants not to exhibit their film before the Arbitrator. But if a party elects that course, it cannot later expect to benefit from it. It is now impossible to know what reaction the Arbitrator might have had, had the films been shown before him. It seems likely, from his description of the respondent's complaints during the Arbitration, and Karpin DCJ's description of the film, that the Award entered by the Arbitrator would have been for a sum substantially less.

As a matter of principle, to secure the operation of Arbitration proceedings as the Act appears to contemplate (as a true alternative to a hearing in the District Court and to relieve that Court of the burden of hearings) the failure of the appellants to show the film has a consequence: considerable waste of public and private time and cost. The process of settlement which it is the object of Pt 19A r9 DCR to promote is frustrated. At least in the circumstances of this case, where the films were obviously most significant, the failure to show them before the Arbitrator should have costs consequences. Those consequences are sufficient to sustain an order of this Court providing otherwise than Pt 19A r9(6) would ordinarily require."

In *MacDougall & Anor v Curlevski* (unreported) 14th November 1996, the Court of Appeal dismissed an appeal by the defendant against the Trial Judge's order that the defendant pay the plaintiff's costs of the Arbitration and the trial, on an indemnity basis, despite the fact that the Trial Judge had entered a verdict for the defendant.

In that case the plaintiff had sued for damages for injuries allegedly suffered when the defendants ejected the plaintiff from their hotel.

At the Arbitration the defendant called no evidence. The Arbitrator entered an award for the plaintiff. The defendants applied for a re-hearing and at the trial the bar manager was called to give evidence in the defendant's case. The bar manager's evidence was accepted and as a consequence the plaintiff's action failed and was dismissed.

On the question of costs the defendants argued that they had taken a forensic decision not to call any evidence so as "not to show their hand if the matter was to go before a Judge".

It was conceded by the defendants that the Trial Judge had a wide discretion to make an order other than the usual one that costs should follow the event.

Priestley J A agreed with Kirby P in *Quach* that whilst a defendant can decide to withhold evidence at an Arbitration Hearing, it must take the risk of an adverse costs order against it.

At page 6 he stated:

"... the Court considering the costs questions is entitled to take into account..., the desirability of actions referred to Arbitrators for determination being determined once and for all by the Arbitrator. ... The scheme is not one designed to provide successive hearings by Arbitrator and Judge as a regular matter in which the first trial is to be regarded as a practice run, but rather one where the first trial is intended to be the final trial, subject to the re-hearing safeguard in the occasional, out of the ordinary, case."

Whilst conceding that the Trial Judge's costs orders were severe in the circumstances Priestley JA regarded them as ... *"within the discretionary range open to the Trial Judge... the Courts should take what steps they properly can to ensure that the Arbitration system works without the waste of time and money in all probability caused by the course taken by the defendants in the present case."*

Cole J A stated, at page 6:

"If the Trial Judge forms the view that, had the withheld evidence been called at the Arbitration, the result of the Arbitration was likely to have been different, and the subsequent Court proceedings thus were likely to be unnecessary, that is a factor which is permissible to consider in the exercise of the discretion as to costs."

Conclusion

Whilst a defendant should not be unfairly deprived of the legitimate forensic advantage of calling the best evidence for the first time at a hearing before a Judge, a Trial Judge can exercise his/her discretion in relation to costs to punish the defendant if withholding the evidence at the arbitration hearing significantly changes the ultimate outcome of the case.

Tom Goudkamp is a partner in Stacks the Law Firm with Goudkamp Mahony, an accredited specialist in Personal Injury Law and co-author of LBC's Personal Injury Law Manual NSW.