DISPUTES | JULY 2022

CASE NOTE: HANCOCK V HANCOCK PROSPECTING

[2022] NSWSC 724

The Supreme Court of New South Wales has recently confirmed the test for challenge to an arbitrator under the *Commercial Arbitration Act 2012* (WA) (CCA).

In *Hancock v Hancock Prospecting,*[1] the applicants sought a declaration that there were justifiable doubts as to the impartiality or independence of Mr Wayne Martin, a member of a three-person tribunal.

Section 12 of the CCA sets out the grounds upon which a challenge can be made. It provides, relevantly (sub-sections (3) and (4)) that:

> *An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed to by the parties. [...]*
>
> *For the purposes of sub-section (3), there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.*

In this case, the challenge was essentially founded on the involvement of the arbitrator's wife (Ms Margaret O'Halloran) in the period from 1994 to 1996 in matters related to those in the arbitration proceeding.

First, Ms O'Halloran had, in her capacity as solicitor, attended certain meetings involving the parties in circa 1994; secondly, the firm with whom Ms O'Halloran was employed as a solicitor had given advice in 1995; and, thirdly, Mr Martin had been briefed by Ms O'Halloran (again, in her capacity as solicitor) in a separate related matter in 1995. The evidence was that Mr Martin and Ms O'Halloran had married in 1996 but had been in a relationship at the relevant times.

The Tribunal had dismissed the challenge and the plaintiffs applied to the court under s 13 of the CCA.

The nature of the test

As Ball J observed:

> *The 'real danger of bias' test [...] reflects the test adopted by the House of Lords in R v Gough [1993] AC 646 (Gough). It appears to set a higher threshold for removal than the Australian common law test for apprehend bias set out in Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63 (Ebner). In that case, a majority of the High Court stated the test in terms of whether the "fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide": at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ.*

His Honour then considered the report of the Standing Committee on Uniform Legislation and Statutes Review on the Commercial Arbitration Bill 2011 (WA): Legislative Council, Parliament of Western Australia, Standing Committee on Uniform Legislation and Statutes Review, *Report 67* (November 2011) noting the reasons for the adoption in the CCA of a higher threshold than the common law included the fact that bias challenges are increasingly used as

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tactical steps in international arbitration; the higher threshold would contribute to the promotion of Australia as an attractive seat.

His Honour continued (at [19] and [20]):

> *... the test stated by s 12 requires a real danger of actual bias. Moreover, the test is stated as a purely objective one [...]*
>
> *The test, at least in the present context, must also be understood as a test concerning a person in the position of the arbitrator being challenged. The test is concerned with the objective likelihood of there being a real risk that someone in the position of the arbitrator would not be able to bring an impartial mind to (all of) the questions to be determined. The test should not be understood as requiring an investigation into the particular attitudes or propensities of the arbitrator under challenge.*

The Court's analysis

The Court dealt first with the second and third issues.

Justice Bell observed that *the real issue in relation to the [advice] is whether there is a real danger that Mr Martin will not be able to consider impartially the plaintiff's submission that the advice was fundamentally flawed. The danger is said to arise from the fact that it is possible that Ms O'Halloran had some involvement in its preparation and Mr Martin may consciously or subconsciously be reluctant to reach a conclusion that his wife was involved in the preparation of defective advice* (at [28]).

His Honour concluded that there was no evidence that Ms O'Halloran had any involvement in the preparation of the relevant advice. His Honour considered this to be a complete answer to the second and third bases of the challenge, observing that *there is no real danger that Mr Martin would have a difficulty in reaching the conclusion for which the plaintiffs contend because that conclusion might reflect poorly on his wife* (at [30]).

As to the brief, there was no evidence of what the brief contained or what Mr Martin was told, and Mr Martin told the parties that he had no recollection of being briefed on the matter by Ms O'Halloran. As his Honour noted, *the question [...] is whether, as a consequence of being briefed, Mr Martin became privy to some information not otherwise available to him in the arbitration that was sufficiently relevant to some issue in the arbitration that there is a real danger that Mr Martin's consideration of that issue would be affected by that information* (at [32]). However, in the absence of evidence of the brief and in the absence of any recollection by Mr Martin of the brief, his Honour concluded that *there is no basis from which a conclusion of real danger of bias could be reached* (at [33]). The court rejected the submission that Mr Martin's recollection could be prompted by the arbitration proceedings which may have *serious consequences*, because, amongst other things, *what might occur in the future is not relevant to the question whether there are grounds for challenge now* (at [36]).

As to the first issue, which the Court described as *more complicated*, there was consensus that if Ms O'Halloran were to be called as a witness in the arbitral proceeding because of her attendance at the relevant meeting, then Mr Martin could not sit as arbitrator, however, the evidence from the defendants was that Ms O'Halloran would not be called. The plaintiffs did not concede that they would not call Ms O'Halloran as a witness. Putting this issue aside, the defendants' submission on the third issue was that Mr Martin would not be able to consider impartially submissions they intended to make about earlier related litigation or submissions as to inferences which the Tribunal might be asked to draw as to Ms O'Halloran's involvement in the matter or her attendance or otherwise as a witness.

His Honour rejected the submissions based on the 'negligible' risk that Ms O'Halloran would give evidence, emphasising again that the challenge must be decided on the present facts, *not speculative possibilities concerning the future* (at [38]).

As to Mr Martin's ability approach to the submissions, his Honour identified the question as to *what submissions might reasonably be put consistently with the pleadings and evidence concerning [the earlier litigation] that might reflect, or might be thought to reflect, poorly on Ms O'Halloran so as to give rise to a real danger that Mr Martin will not be able to consider those submissions (and the evidence on which they were based) impartially* (at [40]). His Honour observed further that *[t]he risk, if there is one, is that it might be inferred that Ms O'Halloran failed in her professional duties because of some other finding that the Tribunal is asked to make* (at [41]).

In considering the merit of the challenge, the Court considered the submissions likely to be made by the defendants in the arbitration. His Honour examined each, to the extent relevant, by reference to the allegations in the pleadings,

the issues likely to arise in the arbitration proceeding based on the pleadings and the questions for determination by the Tribunal. Importantly, his Honour found that *Ms O'Halloran's conduct is not an issue in the arbitration* (at [55]). In relation to the submissions of inference, his Honour found that *the risk identified by the plaintiffs does not exist* (at [57]). The plaintiffs' application was dismissed.

Conclusion

The decision reinforces the high threshold for a successful challenge to an arbitrator under the CAA, the requirement for an objective assessment and the need, in each case, for consideration of the context in which the challenge is made. It is also an important reminder that the matters to which the court will have regard are the matters then before the court; the analysis does not involve an evaluation of future matters or possibilities.

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