Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd [2014] FCA 414

Federal Court of Australia, Pagone J, 30 April 2014

When will an arbitral award be set aside for breaching the rules of natural justice?

Facts

The Applicant (**"Emerald Grain"**) sought to set aside an arbitral award dated 20 August 2013 (**"the Award"**) made in favour of the Respondent (**"Agrocorp"**). The Award was made following an arbitration concerning a dispute between the parties about the performance of a contract for the sale by Emerald Grain to Agrocorp of Australian canola in bulk for delivery in Bangladesh.

Agrocorp claimed that Emerald Grain was liable to pay certain amounts under the contract. Emerald Grain cross claimed for breach of contract and alternatively for negligence.

The Tribunal found in favour of Agrocorp and awarded it an amount of US$469,625.

Emerald Grain applied to the Federal Court to set aside the Award under article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (**"the Model Law"**). Emerald Grain claimed that in making the Award, the arbitral tribunal breached the rules of natural justice on two grounds:

1. there was no evidence of probative value before the arbitral tribunal to permit it to make its findings ("the no evidence claim"); and

2. the arbitral tribunal made its findings based on its own opinions and ideas without having given Emerald Grain adequate notice ("the no hearing claim").

Article 34(2)(b)(ii) of the Model Law provides that an arbitral award may be set aside by a court if the court finds that the award "is in conflict with the public policy" of, relevantly, Australia. It is through s16 of the *International Arbitration Act 1974* (Cth) that the Model Law has force in Australia. Section 19 of the *International Arbitration Act 1974* (Cth) states that an award is in conflict with, or is contrary to, the public policy of Australia within the meaning of Article 34(2)(b)(ii) if, relevantly, a breach of a rule of natural justice occurred in connection with the making of the award.

Decision

Ultimately, Pagone J dismissed the application on the basis that Emerald Grain did not succeed on either its "no evidence claim" or its "no hearing claim". Before addressing the particular issues of the case, Pagone J made some general observations about setting aside arbitral awards.

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First, an Arbitral Award governed by the Model Law and the *International Arbitration Act* (1974) Cth is required to be regarded by the courts as binding and is not to be set aside other than as provided for by the Act. There is no appeal against findings of fact.

Second, an application to the court to set aside an arbitral award is by originating application and must be accompanied by a statement of claim or an affidavit. Where an affidavit accompanies the original application in lieu of a statement of claim, it must state the material facts on which the Applicant relies that are necessary to give the Respondent fair notice of the case to be made against him. His Honour emphasised that it was not sufficient to assert that the Award was in conflict with the public policy of Australia by reason of a breach of the rules of natural justice. These matters are not a statement of the material facts which are relied upon and would not give a Respondent fair notice of the case to be made against him at trial. Further, an application that attempts to leave open the possibility of adding to the grounds by describing in the affidavit the matters relied upon as being "among other things" is ineffective to incorporate grounds which are not raised by a fair reading of the grounds set out in the statement of claim or affidavit.

Third, whether there has been a breach of the "no evidence" or "no hearing" rules depends on the content of the rule in any given case. In the case of an international arbitration governed by the *International Arbitration Act 1974* (Cth) and the Model Law, the content of the rule will be influenced by how the relevant provisions have been understood and applied in the courts of the convention countries.

No evidence claim

The first group of grounds upon which the Award was challenged was the "no evidence claim". The issue to be decided was whether there was probative evidence before the Tribunal to support its findings.

Drawing on the remarks made by Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Pagone J suggested that the task for the Court is to determine whether the facts found had no foundation on the evidence before the Tribunal or from permissible inferences from that evidence. The Court's role in cases of this kind, consistently with the objectives of the Act, is to be satisfied that the facts challenged lack evidence upon which they could be made rather than that they have been wrongly decided.

What will amount to probative evidence will vary with the circumstances. Relevant in the present circumstances was that the Tribunal had before it the documentary material upon which the parties had elected to base their claims and that the Tribunal was required by the parties to determine the dispute "on the papers" without oral testimony or oral hearing.

The Applicant had identified 15 matters said to have been found by the Tribunal, not just incorrectly, but contrary to the rules of natural justice in the sense of there being no probative evidence upon which the Tribunal could have made the findings. In relation to each of the 15 matters, Pagone J considered the evidence before the Tribunal and concluded that in each instance, the Tribunal's findings were based upon probative evidence.

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No hearing claim

The second group of grounds upon which the Award was challenged was the "no hearing" claim. The issue to be decided was whether the Tribunal made its findings based on its own opinions and ideas without affording the parties an opportunity to be heard.

In his consideration of the no hearing rule, his Honour expressed agreement with the comments made by Fisher J in *Trustees of Rotoaira Forest Trust v Attorney-General* [2999] 2 NZLR 452 and agreed with by Murphy J in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214. Drawing on those judgments, Pagone J suggested that the task of establishing a breach of the no hearing rule imposes an obligation upon an Applicant to demonstrate that it, as a reasonable litigant, would not have foreseen the possibility of the Tribunal's reasoning. It must also show that "it might have been possible to persuade" the Tribunal otherwise if the Tribunal had given adequate notice.

His Honour held that the evidence tendered for Emerald Grain did not establish that Emerald Grain, as a reasonable litigant, would not have foreseen any of the matters complained about. His Honour suggested that whilst Emerald Grain might have been surprised that their submissions were not accepted, this did not amount to the conclusion that the findings would not have been reasonably foreseen. Further Emerald Grain failed to demonstrate how it would have persuaded the Tribunal otherwise if it had been given adequate notice of the matters complained about.

Implications

The decision in this case reaffirms the threshold a party must meet in order to have an arbitral award set aside for breaching the rules of natural justice, and in particular, the "no evidence" rule and "no hearing" rule.

In respect of a "no evidence" claim, the Applicant is required to show that the Tribunal's findings were made in the absence of evidence or on evidence incapable of supporting those findings. It is not sufficient to argue that the findings were wrong.

In respect of a "no hearing" claim, the Applicant must establish that no reasonable litigant would have foreseen the Tribunal's findings and that it could have persuaded the Tribunal otherwise if given adequate notice.

The case also demonstrates the practical importance of precisely and carefully articulating any grounds to be relied upon in an affidavit accompanying an application, as grounds beyond the scope of that affidavit may be ignored.

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