Supreme Court of New South Wales Decisions

Sun Alliance Australia Limited v Lawrence James Moulds [1997] NSWSC 115 (7 April 1997)

SUN ALLIANCE AUSTRALIA LIMITED v Lawrence James MOULDS

40084/96

Monday, 7 April 1997

THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

MEAGHER JA, BEAZLEY JA, DUNFORD AJA

CATCHWORDS: DISTRICT COURT - arbitrator's award - judgment thereon - application to set aside and file application for re-hearing out of time - relevant considerations - District Court Act 1973 s.63A(5) - District Court Rules Pt 31 r 12A(1), Pt 51A rr 10,11 - Arbitration (Civil Claims) Act 1983 s.18(2)

EX TEMPORE/RESERVED: Reserved

ALLOWED/DISMISSED: Upheld

The respondent sued the appellant in the District Court for indemnity under an insurance policy, the appellant's defence being one of material non-disclosure. The action was referred to arbitration, the arbitrator found for the appellant, and no application for rehearing having been filed within the prescribed time, the award was deemed to be a judgment of the Court. In correspondence and in his evidence before the arbitrator, the respondent referred to H as an insurance broker acting on his behalf.

Subsequently the respondent commenced a further action against H alleging breach of contract and negligence in the performance of his duties as the respondent's insurance broker and agent, but H defended the proceedings on the ground that he was not an insurance broker and had not had any contractual relationship with the respondent.

The respondent then, two and a half years after the arbitrator's award, applied for orders that the judgment in the earlier proceedings flowing from the arbitrator's award be set aside and that he have leave to file an application for rehearing out of time. The judge considered, inter alia, that the respondent should have the judgment set aside if it was based on a false premise as regards H's role, considered where the greater hardship lay and made an order staying the "judgment of the arbitrator" and providing that, dependent on the outcome of certain of certain issues in the later proceedings, the judgment in the earlier proceedings should be set aside and the respondent have leave to file an

application for re-hearing. The appellant appealed.

Held:

(1) The mere fact that the respondent had conducted his earlier case on one basis and lost and was now faced with the possibility of losing the later case based on the same assertion was not a ground for setting aside the judgment. There could be no issue estoppel arising between the two actions as the parties were different. Ramsay v Pigram [1968] HCA 34; (1968) 118 CLR 271 followed.

(2) There was no evidence to suggest that the arbitrator's award was obtained "irregularly, illegally, or against good faith", and accordingly there was no power, pursuant to DCR Pt 31 r 12A(1), to set aside the judgment based upon it.

(3) In considering whether to extend the time for filing an application for re-hearing the judge failed to have regard to the fact that the failure to file the application had not been due to any mistake, oversight or accident, but had been the result of a deliberate decision then made not to do so.

(4) The judge's discretion had accordingly miscarried and it fell to the Court of Appeal to exercise such discretion afresh. Having regard to the length of the delay which had not been satisfactorily explained, that at the time of the award the respondent had no intention of seeking a rehearing, and that the application only arose from a change of heart as a result of the defence filed in the later proceedings, this was not a proper case for an extension of time.

ORDERS

1. Appeal upheld.

2. Orders of the District Court of 19 and 20 February 1996 set aside;

3. In lieu thereof, motion dismissed;

4. The Respondent to pay the costs of the appeal and of the proceedings in the District Court.

JUDGMENT

MEAGHER JA: I agree with Dunford AJA.

BEAZLEY JA: I agree with Dunford AJA.

DUNFORD AJA: This is an appeal pursuant to leave granted on 11 March 1996 from orders made by her Honour Judge Sidis in the District Court at Parramatta on 19 and 20 February 1996. The respondent has filed a submitting appearance and the matter was accordingly heard ex parte.

On 31 October 1991 the respondent commenced proceedings No. 2072/91 in the District Court for indemnity under an insurance policy issued by the appellant in respect of the theft of a bobcat with backhoe attachment. The appellant defended the action on the ground, inter alia, of material non disclosure in the proposal. The action was referred to arbitration pursuant to the Arbitration (Civil Claims) Act 1983 and heard by the arbitrator on 12 May 1993 who published his award on 17 May 1993 by which he found for the appellant. The Registrar of the Court thereupon gave notice of the award to the parties on 27 May 1992. By reason of District Court Act 1973 s 63A(5) and DCR, Pt 51A r 10, the arbitrator's award was deemed to be a judgment of the court on 24 June 1993 unless an application for rehearing was filed before that day: Arbitration (Civil Claims) Act s 18(2), DCR Pt 51A r 11. No such application was filed.

In correspondence prior to the arbitration, including a letter of further and better particulars dated 16 June 1992, and in his evidence before the arbitrator the respondent referred to one Ian Edward Harvey as an insurance broker acting on his behalf. At no stage did the appellant claim or assert the Mr Harvey was either the respondent's insurance broker or the agent of the appellant.

Following the arbitrator's award the respondent commenced further proceedings in the District Court at Parramatta (No. 488/94) against Mr Harvey alleging breach of contract and negligence in the performance of Mr Harvey's duties to the respondent as the latter's alleged insurance broker and/or agent, but by his Notice of Grounds of Defence filed March 1995 Mr Harvey denied that at any time he conducted the business of an insurance broker or had any contractual relationship with the respondent. Previously, in a letter to the respondent's solicitors dated 10 January 1995, Mr Harvey's solicitors had asserted that he was not an insurance broker and that at all times in dealings with the respondent he was acting as an agent of Sun Alliance Australia Insurance and that this had been disclosed to the respondent.

Some nine months after the filing of the Notice of Grounds of Defence in the later action and two and a half years after the making of the arbitrator's award, the respondent on 22 December 1995 caused to be filed the subject Notice of Motion seeking orders inter alia:

1. That the judgment entered 14 June 1993 (sic) be set aside;

2. That the plaintiff have leave to file an application for rehearing within 14 days.

The only evidence filed in support of the motion was an affidavit by the respondent annexing the arbitrator's award, various correspondence, the Statement of Claim and Notice of Grounds of Defence in the later action and a somewhat bald statement, "I have not been able to make this application sooner as I only have limited financial resources".

In her judgment delivered on 19 February 1996 her Honour said:

"There are obviously conflicting interests to be resolved in determining the application. On the one hand the plaintiff ostensibly should have the judgment set aside if it is in fact based upon a false premise as regards Mr Harvey's role in the contracting of insurance between the plaintiff and the defendant. Against this there is the plaintiff's delay in bringing the motion. In addition, the defendant has prima facie a right to have the judgment which on its face was regularly obtained after each party had the opportunity to argue it before the arbitrator.

In these circumstances it is apparent that I must consider where the greater hardship would lie in an effort to do justice between the parties....I take into account the fact that the defendant should have been in a position to put evidence to the Court as to the strength of Mr Harvey's claim to have been acting as its agent and it has not done so. The affidavit filed on behalf of the defendant does not even deny the assertion made by Mr Harvey."

Ultimately her Honour made orders staying "the judgment of the arbitrator" and further providing that, if the respondent's claim against Mr Harvey was unsuccessful on the basis that the latter was acting as the appellant's agent, the judgment should be set aside and the respondent have a further 28 days in which to file an application for rehearing in the present action; but if the respondent's claim against Mr Harvey was unsuccessful or failed for any other reason the judgment in the present action was to stand.

It was submitted on behalf of the appellant that there had been a denial of natural justice because neither party had sought a stay of proceedings and neither party had made submissions relating to a stay of proceedings nor been invited to do so, and that the conditional orders made by her Honour for setting aside the judgment did not cover all possible outcomes of the later proceedings and

accordingly could lead to possible ambiguity and uncertainty. In my view it is not necessary to consider these matters further as there are other reasons why I consider the orders appealed from should be set aside.

Her Honour appears to have regarded Mr Harvey's assertion in the action against him as having some relevance to the respondent's action against the appellant, and as suggesting that the arbitrator's award may have been based upon a false premise, whereas such assertion in the later action was irrelevant to the earlier action where the present respondent as plaintiff had asserted that Mr Harvey was his insurance broker and agent and the respondent had not disputed such assertion, as it was entitled to do. The mere fact that the respondent had conducted his earlier case on one basis (that was Mr Harvey was his agent) and lost, and was now faced with the possibility of losing the later case against Mr Harvey based on the same assertion was not a ground for setting aside the judgment following the award. There could be no issue estoppel arising between the two actions as the parties were different: Ramsay v Pigram [1968] HCA 34; (1968) 118 CLR 271.

For the same reason it was irrelevant that the appellant had failed to lead any evidence on the motion as to whether Mr Harvey had been its agent or not, and it was also irrelevant to consider where the greater hardship lay; either the respondent was entitled to have the deemed judgment set aside or he was not.

The power to set aside a judgment (apart from default judgments and judgments entered in the absence of a party) is contained in DCR Pt 31 r 12A(1) which is as follows:

"A judgment or order of the Court in any proceedings may, on sufficient cause being shown, be set aside, on terms, by order of the Court, if the judgment was given or entered up, or the order was made, irregularly, illegally, or against good faith."

Not only did her Honour not direct her attention to the relevant rule but there was no evidence to suggest that the arbitrator's award was obtained "irregularly, illegally, or against good faith". So far as her Honour did consider it, her finding was to the contrary because she said:

"...the defendant has prima facie a right to have the judgment which on its face was regularly obtained after each party had the opportunity to argue it before the arbitrator."

Her Honour appears to have been concerned that if the respondent failed in his action against Mr Harvey there would be inconsistent judgments but this was not a ground for setting aside a judgment regularly obtained, either absolutely or conditionally on the result of other proceedings which were not between the same parties and which would not give rise to any issue estoppel between the parties.

It was submitted that even if Mr Harvey was found in the later action to have been the agent of the present appellant that would not prevent the respondent succeeding against him if the respondent established, as he claims, that he informed Mr Harvey of the material matters which were not disclosed in the proposal for insurance. It is unnecessary to reach any conclusion on this point because, for the reasons I have indicated, the issue is irrelevant to the present proceedings. It is also unnecessary to consider whether the conditional orders for setting aside the judgment covered all possible outcomes of the later action because, the evidence did not establish the matters required by Pt 31 r 12A(1) to give the court jurisdiction to set aside the judgment.

The other order sought in the Notice of Motion was for an extension of the time limited by DCR Pt 51A r 11 for the filing of an application for rehearing pursuant to Arbitration (Civil Claims) Act s 18 (2). It has not been established that such time can be extended after the period fixed by the Rules for the filing of the application has expired: El Ali v Government Insurance Office (NSW), (1988) 15 NSWLR 303. Such an order does not involve the setting aside of the judgment as such order takes

effect as though the arbitrator's award had never been deemed to have become a judgment: El Ali v Government Insurance Office (NSW), supra at 313-4 (per Mahoney JA) and 316 (per Clarke JA).

There was no evidence or suggestion that the failure to file the application for rehearing had been due to any mistake, oversight or accident, and what clearly emerged was that during the time limited for filing such application the respondent had no wish or intention to do so, and only decided to do so after the Notice of Grounds of Defence in the later proceedings was filed, for which for the reasons I already indicated, I regard as irrelevant.

Her Honour failed to take these considerations into account and incorrectly had regard to the defence filed in the other proceedings and what she referred to as a consideration of "where the greater hardship would lie". Even in relation to delay, although her Honour referred to it, she apparently paid insufficient weight to the massive delay in this case of approximately two and a half years.

I am accordingly satisfied that her Honour's discretion on this issue miscarried, and it is necessary for this Court to exercise the discretion itself. Having regard to the length of the delay which has not been satisfactorily explained, that at the time when the arbitrator's award was notified, the respondent had no intention to seek a rehearing and that the application only arises from a change of heart on his part as a result of the Defence filed in the other proceedings, I am of the view that this was not an appropriate case for any extension of the time fixed by DCR Pt 51A r 10.

I therefore propose the following orders:

1. Appeal upheld;

2. Orders of the District Court of 19 and 20 February 1996 be set aside;

3. In lieu thereof, motion dismissed;

4. Order the respondent to pay the costs of the appeal and of the proceedings in the

District Court.
