**WESTPORT INSURANCE CORPORATION & ORS v GORDIAN RUNOFF LIMITED (S110/2010 & S219/2010)**

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| Court appealed from: | New South Wales Court of Appeal [2010] NSWCA 57 |
| Date of judgment: | 1 April 2010 |
| Date of grant of special leave / referral into the Full Court: | 3 September 2010 |

On 13 October 2008 a panel of arbitrators ("the Arbitrators") delivered an award in which Gordian Runoff Limited ("Gordian") was the claimant and Westport Insurance Corporation and Ors ("Westport") were the respondents. The dispute concerned the scope and operation of contracts of reinsurance issued by Westport, as re-insurer. It also involved the entitlement of Gordian, as the reinsured, to recover from Westport claims made on it by its original insured, FAI Insurances Limited ("FAI").

The Arbitrators held that once s 18B of the *Insurance Act* 1902 (NSW) ("the Insurance Act") was considered, the reinsurance contracts applied to those claims made within three years of the inception of the FAI policy. The re-insurers were therefore obliged to pay those claims under that policy which were notified to Gordian within that time.

Westport sought leave to appeal from the Arbitrators' award to the Supreme Court on the following bases:

a) Manifest error on the face of the award pursuant to s 38(5)(b)(ii) of the *Commercial Arbitration Act* 1984 (NSW) ("the Arbitration Act");

b) Strong evidence of error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

Justice Einstein heard both the application for leave to appeal and the appeal concurrently.

Westport's main complaint, with which Justice Einstein agreed, concerned the Arbitrators' interpretation and application of s 18B of the Insurance Act. Justice Einstein held that the Arbitrators had misunderstood s 18B to a degree that satisfied both ss 38(5)(b)(i) and (ii) of that Act.

Upon appeal Gordian submitted:

a) That Justice Einstein had erred in hearing the application for leave to appeal and the appeal concurrently;

b) That Justice Einstein had erred in finding that the Arbitrators' award demonstrated manifest error under s 38(5)(b)(i) and strong evidence of an error of law;

c) That Justice Einstein had erred in determining that the question of law may or may be likely to add substantially to the certainty of commercial law under s 38(5)(b)(ii).

Westport filed a notice of contention, submitting that three grounds not dealt with by Justice Einstein were sufficient to justify his Honour's orders. These were:

a) That the Arbitrators had erred in concluding that the loss was not caused or contributed to by the events or circumstances;

b) That the Arbitrators had failed to provide reasons for the finding that the proviso to s 18B(1) was satisfied;

c) That the Arbitrators had failed to provide reasons for the conclusion relating to the Arbitration Act and that general justice and fairness would produce the same result.

At the hearing on 3 September 2010, this Court granted special leave to appeal on some grounds, referred other grounds for further consideration and dismissed the remaining grounds.

The re-insurers also cross-appealed concerning the refusal of Justice Einstein to permit an issue to be raised (about the applicability of s 18B to reinsurance when that point had not been taken before the Arbitrators).

The Court of Appeal (Spigelman CJ, Allsop P & Macfarlan JA) unanimously allowed the appeal and dismissed the cross-appeal. Their Honours held, inter alia, that:

1. The context and legislative history of the Arbitration Act, s 38 make it plain that ordinarily a leave application should precede an appeal. An application for leave to appeal and an appeal should only be heard concurrently in special cases;

2. A "manifest error" for the purposes of s 38(5)(b)(i) must be more than arguable. It must be evident or obvious;

3. The assertion that the Arbitrators had not provided reasons as required by s 29(1)(c) was rejected.

On 13 January 2011 a summons seeking leave to appear as *amici curiae* was filed on behalf of the Australian Centre for International Commercial Arbitration Limited, the Australian International Disputes Centre Limited, the Institute of Arbitrators and Mediators Australia Limited and the Chartered Institute of Arbitrators (Australia) Limited.

On 14 January 2011 a summons seeking leave to appear as *amicus curiae* was filed on behalf of the Attorney-General of the Commonwealth.

In matter number S110/2010 the questions of law said to justify the grant of special leave include:

- Did the New South Wales Court of Appeal misconstrue and misapply the criteria under sub-ss 38(5)(b)(i) and 38(5)(b)(ii) of the Arbitration Act for leave to appeal from the award of the Arbitrators?

In matter number S219/2010 the ground of appeal is:

- The New South Wales Court of Appeal erred in failing to conclude that the Arbitrators had not given any, or any adequate, reasons as required by s 29(1) of the Arbitration Act for the conclusion that:

    a) It was reasonable for Westport to be required to indemnify Gordian within the meaning, and on the proper construction, of the proviso to s 18B(1) of the Insurance Act;

    b) Considerations of general justice and fairness did not compel the conclusion that Westport should not be required to indemnify Gordian within the meaning, and on the proper construction, of s 22(2) of the Arbitration Act.