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AUSTRALIAN COURT SETS A HIGH BAR FOR CHALLENGES TO ARBITRATORS

Australia
Legal Briefings – By **Leon Chung, Guillermo Garcia-Perrote and Samara Cassar**

The Supreme Court of New South Wales has recently confirmed that, in Australia, the relevant test for challenges to the independence or impartiality of arbitrators is the 'real danger of bias' test, rather than the lower threshold of the 'reasonable apprehension of bias' test applicable at common law.

TAKEAWAY

Challenges to the independence or impartiality of arbitrators face a high bar in Australia. The relevant test requires a 'real danger of bias', which should be determined objectively based on existing circumstances (and not an evaluation of future matters or possibilities).

THE BIAS CHALLENGE

In *Hancock v Hancock Prospecting Pty Ltd* [2022] NSWSC 724, the applicants sought a declaration that there were justifiable doubts as to the impartiality and independence of one of the three arbitrators (the **bias challenge**). The arbitral tribunal had previously dismissed the challenge and the applicants applied to the Court under section 13 of the *Commercial Arbitration Act 2012 (WA)* (**CAA**).

The bias challenge was based on three circumstances stemming from the fact that nearly twenty years prior, the arbitrator's wife worked for a law firm which now represented the defendant. The three circumstances were as follows:

i. First, the arbitrator's wife, then a solicitor, attended and took file notes of certain

meetings involving the parties.

ii. Secondly, the firm where the arbitrator's wife worked as a solicitor had allegedly given defective advice.

iii. Thirdly, the arbitrator had been briefed by his wife (in her capacity as solicitor) in a related procedural aspect of the matter.

Essentially, the applicants argued that the arbitrator may consciously or subconsciously resist accepting the plaintiff's submissions because it would involve an implied criticism of his wife.

THE DECISION

The Court dismissed the bias challenge based on the following analysis of the 'real danger' test.

THE 'REAL DANGER' TEST IMPOSES A HIGH THRESHOLD FOR BIAS CHALLENGES

The CAA (and its identical iterations across Australia)[1] provides that:

- a potential arbitrator has an ongoing duty to disclose anything which is '*likely to give rise to justifiable doubts*' as to their impartiality or independence;[2]
- '*justifiable doubts*' is only reached if '*there is a real danger of bias*'.[3]

In this case, the Court confirmed[4] that the relevant test for bias challenges is the 'real danger of bias' test adopted by the House of Lords in *R v Gough*,[5] which sets a higher threshold than the common law test of 'apprehend bias'.[6] In this regard, the Court referred to the notion that the higher threshold contributes to the promotion of arbitration in Australia, in the sense that the reasons for the adoption in the CAA of a higher threshold than the test applicable at common law, include the fact that bias challenges are often used as a tactical tool in international arbitration.[7]

THE COURT'S ANALYSIS

In relation to the circumstances giving rise to the bias challenge, the Court found as follows:

- As a starting point, the standard for a successful challenge is a high one. In the case at hand, it was relevant that the conduct allegedly giving rise to a risk of bias occurred

twenty years ago.

- As to the wife’s role as a solicitor, there was no evidence that she had any material involvement in the preparation of the advice (indeed, the arbitrator’s wife was not stated to be an author of the advice, and no time recordings were produced to demonstrate her specific involvement).

- As to the briefing of the arbitrator, there was no evidence of what the brief contained or what the arbitrator was told. The Court considered that it was significant that the arbitrator disclosed that he had no recollection of being briefed. In the absence of evidence of the brief, the risk of bias was small particularly given that the brief dated back to 1995.

- In concluding that there was no risk of actual bias, the Court explained that the test is concerned with the ‘o*bjective 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.’*[8] In particular, the Court rejected the submissions based on the '*negligible*' risk that the arbitrator’s wife would give evidence in the case, explaining that challenges to the independence and impartiality of an arbitrator are adjudicated against existing circumstances, not hypothetical scenarios.

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1. See, for example, *Commercial Arbitration Act 2010* (NSW) s 12(3); *Commercial Arbitration Act 2013* (Qld) s 12(3); *Commercial Arbitration Act 2011* (Tas) s 12(3).
2. *Commercial Arbitration Act 2012* (WA) s 12(3).
3. *Commercial Arbitration Act 2012* (WA) s 12(6).
4. [2022] NSWSC 724 [20].
5. *R v Gough* [1993] AC 646.
6. The test is set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
7. [2022] NSWSC 724 [16-20].
8. [2022] NSWSC 724 [20].

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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