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Case note

Indemnity cost orders for overzealous applicants

John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd [2016] QSC 282; [2018] QSC 48

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Abstract

*In John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd*⁴ (**John Holland Judgment**), the Queensland Supreme Court considered an application for leave to appeal an arbitration award under the now repealed Commercial Arbitration Act 1990 (Qld) (the Act). The application was dismissed on the basis that no errors of law were made out. Given the oppressive nature in which John Holland Pty Ltd (**John Holland**) filed its submissions, Justice Jackson in *John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd (No 2)*⁵ (**John Holland Cost Judgment**) ordered John Holland pay the costs of Adani Abbot Point Terminal Pty Ltd (**Adani**) on an indemnity basis.

The authors note that John Holland would not have been able to seek leave to appeal the arbitration award under the current Commercial Arbitration Act 2013 (Qld) (**2013 Act**), without agreement to appeal from Adani. Section 34A(1) of the 2013 Act states that an appeal on a question of law arising from an award is only available where the parties agree that an appeal may be made and the Court grants leave.

Background

In 2009, John Holland contracted with Ports Corporation of Queensland (**PCQ**) to upgrade the Abbot Point Coal Terminal. In May 2011, Adani acquired an interest in the Abbot Point Coal Terminal pursuant to which PCQ's rights and obligations in the Abbot Point Coal Terminal passed to Adani.

In May 2014, John Holland alleged that PCQ breached an essential term of the contract, being a clause that PCQ would ensure that the superintendent would act honestly and fairly in the exercise of his functions under the contracts and would not interfere with the superintendent (**Clause 23**). John Holland alleged PCQ had repudiated the contract and purported to terminate. The repudiation claim was heard in

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⁴ [2016] QSC 292.

⁵ [2018] QSC 48.

arbitration, and the arbitrator found PCQ did not breach or repudiate the contract and therefore the contract was not terminated.

John Holland sought leave to appeal the arbitral award in the Supreme Court under section 38(4)(b) of the Act. Under section 38(5) of the Act, the Court may only grant leave to appeal where there is a question of law and its determination could substantially affect the rights of one or more parties to the arbitration agreement *and*:

- (a) there is a manifest error of law on the face of the award; or
- (b) strong evidence that the arbitrator made an error of law *and* that the determination may add or likely add substantially to the certainty of commercial law.

John Holland judgment

John Holland sought to rely on 11 grounds of appeal, although Justice Jackson found that ground 11 was related to other groups of grounds and so proceeded to consider 10 main grounds. In the judgment, the Court stated the number and width of the grounds were unusual and the combinations of questions of law were unmanageable. Justice Jackson also remarked on John Holland's '*snow storm of material*', which included over 2,000 pages of affidavit material filed on behalf of John Holland, an unpaginated folder of central communications and hundreds of pages of written submissions for John Holland. His Honour held the application so framed was '*tantamount to an abuse of process*' and explained that he had to comment on the manner in which John Holland had presented its application because failing to comment '*would be to acquiesce in an unacceptable method of proceeding, inconsistent with the obligation of a party under r 5 of the Uniform Civil Procedure Rules 1999 (Qld) to proceed in an expeditious way*'.

After making these comments about the manner in which John Holland presented its application, Justice Jackson set out his determinations in relation to the grounds of appeal.

In brief, the first two grounds of appeal centred on whether the arbitrator misconstrued Clause 23 and failed to correctly apply legal principles in considering whether undisclosed communications between PCQ, PCQ's lawyers and the superintendent were material representations calculated to influence the superintendent's administration of the contract. These grounds also considered whether PCQ interfered in the superintendent's administration of the contracts.

In his consideration of grounds one and two, Justice Jackson commented on the detailed submissions by John Holland in relation to what it called '*Impugned Representations*', noting an annexure listing 140 communications and meetings it submitted in the arbitration and a further 299 paragraphs of written submissions in the application. His Honour admitted to spending hours considering these materials but then rejected that the Court is '*required to scour through them to ascertain for itself what might be the content of the applicant's contention that there is a question of law*'.

The grounds were rejected as they did not amount to manifest errors of law on the face of the award and there was no evidence the arbitrator made such an error.

Ground three was '*expressed in a confusing manner*', although Justice Jackson managed to derive that it was in relation to whether the arbitrator incorrectly failed to consider whether the undisclosed communications between PCQ, PCQ's lawyers and the superintendent could create an apprehension of impartiality in a fair-minded person. In rejecting the submission, Justice Jackson stated that John Holland had not read the paragraph relied on in the arbitrator's reasons in context and that the arbitrator's finding in this respect was unexceptional.

The fourth ground was a submission that the arbitrator erred in law by making findings without any probative evidence. Justice Jackson rejected John Holland's argument that the onus was on Adani to

identify the probative evidence and instead stated the onus lay with John Holland to prove the absence of evidence. After noting that John Holland had ignored the requirement for leave to appeal that the determination of the question of law must also add or be likely to add substantially to the certainty of commercial law, the Court stated that a determination of the alleged error in this case was not a sufficient ground of appeal as it did no more than redress the rights of parties in a particular case.

Grounds five and six were submissions that the arbitrator made errors of law in failing to provide adequate reasons for the determinations made on substantial matters in dispute and that the arbitrator failed in his duty to give reasons of a quality that reflected the nature of the case including the large commercial subject matter, the status of the arbitrator, the retainment of senior counsel and large commercial firms, the formality of the pre-hearing procedures and the requirement of detailed written and oral submissions. After commenting that John Holland had not identified the findings for which it submitted there was a failure to give adequate reasons, Justice Jackson stated that in his view, John Holland's submissions '*should be recognised as an attempt to dress up a question of fact as a question of law*'. His Honour noted that even if there were errors of law, they were confined to the particular case.

Ground seven was related to grounds five and six and concerned an argument that the arbitrator engaged in technical misconduct by failing to deal with submissions, and failed to consider and examine evidence. The Court also rejected ground seven as it was deemed a question of fact, or a question of law confined to the case.

Ground eight was an argument that the arbitrator failed to either exercise jurisdiction or accord procedural fairness or that he dismissed a part of John Holland's case without adequate reasons. Under the contract, the superintendent had discretion to extend the date for practical completion, even where the provisions requiring notice were not complied with. In the arbitration, John Holland submitted that the superintendent's failure to exercise his discretion to extend the date was a breach of the requirement to act honestly and fairly. In the award, the arbitrator found the superintendent had the discretion, however John Holland contended that the arbitrator did not otherwise refer to this part of John Holland's case. The Court held that the arbitrator had made a finding that the superintendent had the discretion and chose not to exercise it. Further, the Court found that such a consideration is not an error of law and would therefore not be considered. Justice Jackson said that nothing of substance is added by construing a failure to address contentions at a hearing as both a failure to give adequate reasons and a failure to accord procedural fairness. The Court also rejected ground eight on the grounds that whether the arbitrator failed to exercise jurisdiction or dismissed part of John Holland's case without adequate reasons, were not questions of law.

Ground nine concerned the issue of information barriers with PCQ's lawyers acting as the lawyers for both PCQ and the superintendent. John Holland submitted that the arbitrator did not deal with an important part of John Holland's case or dismissed it without adequate reasons. The Court rejected the ground and Justice Jackson stated the Court is not available to hear an '*unlimited range of submissions not properly raised as questions of law, in circumstances where already an excessive burden has been created by the manner of conducting the application*'.

The tenth ground was whether the arbitrator made an error of law in failing to find Clause 23 as an essential term. Justice Jackson commented that it was not necessary for the arbitrator to determine whether or not Clause 23 was an essential term for the purpose of the award and therefore questioned how it could be required in law for the arbitrator to give reasons on an unnecessary matter for his decision. Nevertheless, the Court considered this ground as a question of law that could substantially affect the rights of the parties to the arbitration agreement but ultimately rejected leave to appeal, stating that the submission was not strongly arguable.

The Court also considered a discretionary consideration, being if leave to appeal was granted, was there a breach of contract that went to the root of the contract enabling John Holland to terminate. John Holland submitted that it was fanciful to suggest that it ought to have produced to the arbitrator the combination of

findings that would amount to a substantial breach justifying termination. The Court rejected this submission on the grounds that the submission amounted to saying that the arbitrator was required to sift through all possible permutations and combinations. The Court stated that if it was too difficult for John Holland to answer whether there was a breach of contract that enabled termination, then how could the arbitrator know what case he should consider and Adani know what to address. After commenting on the plethora of points taken by John Holland on the application for leave to appeal, the Court concluded that it was not possible to assess whether, if leave to appeal was granted, John Holland could make out a breach of contract justifying termination.

The Court dismissed John Holland's application for leave to appeal.

John Holland costs judgment

Adani applied for an order that John Holland pay Adani's costs on an indemnity basis as John Holland conducted the application in an unacceptable manner. Adani argued that this caused an undue prolongation of the case, loss of time and the greater investment of the court's and Adani's resources.

Justice Jackson considered John Holland's application to be tantamount to an abuse of process. His Honour commented on the *'many items of detail that were unnecessary for the points to be decided on an application for leave'* and noted that John Holland did not explain why over 2,000 pages of affidavit material or a second hearing day were justified for the application. Justice Jackson stated that the presentation of the application was not what was required for an application for leave to appeal.

John Holland submitted that the Court should not order costs on the indemnity basis as Adani had not put John Holland on notice that it would be seeking an indemnity costs order. Justice Jackson held that while a lack of warning was a relevant factor to take into account, a warning is not a precondition to making an indemnity costs order.

The Court concluded there was oppression in the material filed by John Holland and in the conduct of the application for leave to appeal and that, even though Adani had not warned John Holland of the special costs order it sought, it was appropriate that Adani be awarded its costs on the indemnity basis.

Conclusion

These judgments highlight that the circumstances where the Court will grant leave to appeal an arbitration award are strictly limited. The circumstances where leave to appeal will be granted is further narrowed by the 2013 Act which now requires parties to agree to the appeal, in addition to the Court granting leave. If parties are able to overcome such hurdles, the John Holland Judgment and John Holland Cost Judgment show the need for parties to consider the manner in which they present their applications to the court, bearing in mind that creating oppression by burdening another party and the court with voluminous material and a lengthy hearing could result in an indemnity costs order.