Supreme Court of Victoria - Court of Appeal

Sauber Motorsport AG v Giedo van der Garde BV & Ors [2015] VSCA 37 (12 March 2015)

Last Updated: 13 March 2015

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2015 0020

SAUBER MOTORSPORT AG — Applicant

v

GIEDO VAN DER GARDE BV and
GIEDO GIJSBERTUS GERRIT VAN DER GARDE — Respondents

and

MARCUS ERICSSON AND LUIZ FELIPE DE OLIVEIRA NASR — Third Parties

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JUDGES:	WHELAN, BEACH and FERGUSON JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	11, 12 March 2015
DATE OF JUDGMENT:	12 March 2015
MEDIUM NEUTRAL CITATION:	[2015] VSCA 37
JUDGMENT APPEALED FROM:	[2015] VSC 80 (Croft J)

ARBITRATION – Enforcement of a foreign arbitral award – Whether court should have refused to enforce award – Whether terms of award uncertain – Whether terms of award so uncertain that court should refuse to enforce – Whether enforcement of award would be contrary to public policy – Natural justice – Whether there was a breach of the rules of natural justice in connection with the making of the award – Futility – Whether enforcement of award would be futile – *International Arbitration Act 1974* (Cth), ss 2D, 8 and 39.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr R M Garrett QC with Ms C van Proctor	Hall & Wilcox Solicitors
For the Respondents	Mr J W S Peters QC with Mr T Clarke	King & Wood Mallesons
For the Third Parties	Mr W T Houghton QC with Mr T I Purdey	Lander & Rogers

WHELAN JA

BEACH JA

FERGUSON JA:

Introduction

1 Yesterday, 11 March 2015, the judge in charge of the Arbitration List in the Commercial Court acceded to an application made by the respondents, Giedo van der Garde BV and Giedo Gijsbertus Gerrit van der Garde, under s 8(2) of the International Arbitration Act 1974 (Cth) (the 'Act') to enforce an arbitral award, handed down on 2 March 2015, as if it were a judgment of the Supreme Court of Victoria.[1] Specifically, the judge made orders in the following terms:

> 1. The First Partial Award handed down by Mr Todd Wetmore on 2 March 2015 in SCAI Case No 30031ER–2014 be enforced as if it were a judgment or order of this Court.
> 2. [Sauber Motorsport AG] refrain from taking any action the effect of which would be to deprive Mr van der Garde of his entitlement to participate in the 2015 Formula One season as one of Sauber's two nominated race drivers.

2 The applicant, Sauber Motorsport AG, now seeks leave to appeal. The applicant's proposed grounds of appeal may be summarised as follows:

1. The command of the Award being uncertain as to what the applicant was obliged to do or not to do, the judge erred in not holding that its enforcement as an order of the Court was contrary to public policy.
2. The judge erred in holding that meaning could be given to the Award because 'all concerned are well aware of the nature of the dispute referred to arbitration'.
3. The judge erred in not holding that the enforcement of the Award would be contrary to public policy, in circumstances where the command of the Award was futile, whatever its meaning.
4. The judge misconstrued, and erred in his treatment of, a transcript passage of a witness for the applicant at a hearing before an emergency arbitrator in November 2014.
5. The judge erred in not holding that the enforcement of the Award would be contrary to public policy, where permitting Mr van der Garde to race posed an unacceptable risk and danger, in circumstances set out in evidence that was unchallenged.
6. The judge erred in finding that the issue of futility was canvassed in the Award and, in any event, in not holding that, relevantly in relation to futility, it was futility as at and from the date of the order of the Court would speak, if the Award were enforced as a judgment of the Court.
7. The judge erred in regarding as relevant in relation to futility that the critical dispositive provision sought to be enforced applied to the whole of the 2015 Formula One season, and not just the Melbourne Grand Prix, when those other races take place outside Australia, and it was possible that the arbitrator might be approached for 'further relief appropriately expressed'.
8. The judge erred in law in not addressing, as a breach of natural justice, the disposition of the claim for injunctive relief on the footing of a breach of promise personally made to Mr van der Garde that he would drive in the 2015 Formula One season, when no party to the arbitration presented or ran its case on the existence of any such promise.
9. The judge erred in law in refusing to countenance as a breach of natural justice the non-notification by a moving party in an arbitration to a non-party directly affected thereby, of an application for injunctive relief.
10. The judge erred in proceeding on the basis that the Court had not been taken to authority on an aspect of the applicant's natural justice case, in circumstances where the applicant's written submissions below contained a relevant reference to authority (*William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403).

The relevant legislative provisions

3 Section 8 of the Act relevantly provides:

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.

...

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy.

(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

4 All of the applicant's proposed grounds rely upon ss 8(7) and (7A). Before the trial judge the applicant had also relied on s 8(5)(d). That provision was not relied upon on this application.

5 Section 39 of the Act requires a court considering the exercise of a power under s 8 to enforce a foreign award to have regard to 'the objects of the Act' and 'the fact that ... awards are intended to provide certainty and finality'.

6 Section 2D sets out the objects of the Act as follows:

(a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and

(b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and

(c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and

(d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twentyfourth meeting; and

(e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and

(f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

Legal issues

7 Insofar as reliance is placed upon s 8(7)(b) and (7A)(b), we adopt the analysis of the Full Federal Court in TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd.[2]

8 In order to establish that the enforcement of an award would be contrary to public policy by reason of a breach of natural justice what must be shown is real unfairness and real practical injustice.[3] Courts should not entertain a disguised attack on the factual findings or legal conclusions of an arbitrator 'dressed up as a complaint about natural justice'.[4] Errors of fact or law are not legitimate bases for curial intervention.[5] Unfairness in any particular case will depend upon context, and all the circumstances of that case.[6]

Resolution of this application

9 Initially, the applicant sought a stay of the judge's orders, with the application for leave to appeal and any appeal to be heard and determined following the Melbourne Grand Prix on Sunday 15 March 2015. We did not consider this course to be in the interests of justice, and accordingly we directed that the application for leave to appeal and any appeal, if leave be granted, be fully argued today.

10 Having heard the applicant's counsel's argument in support of the applicant's proposed grounds of appeal, and having heard counsel for Marcus Ericsson and Luiz Felipe De Oliveira Nasr (referred to by the judge in his reasons as 'the other drivers'), we have determined that leave to appeal should be granted but that the appeal should be dismissed. In our view, and for the reasons given by the judge, the judge did not err in making the orders from which the applicant seeks leave to appeal.

11 We will briefly address the matters raised under compendious headings.

Uncertainty

12 The trial judge dealt with these matters, re-agitated again before us, at Reasons [7] and [20]–[22]. When one reads the Award, particularly at [331]–[338], the trial judge's conclusion that all concerned are well aware of the nature of the dispute and its resolution is well founded.

Futility

13 The trial judge dealt with this matter at Reasons [7], [27] and [30]. The divergence of evidence to which the judge referred was, in our view, a valid matter to be noted, as the judge did. The judge was unpersuaded that there was such a demonstrated lack of utility in the Award as to render it against public policy to enforce it as an order of the Court. We see no error in his approach or his conclusion.

Legality and safety

14 Much reliance was placed on purported concerns as to legality and safety. The trial judge dealt with this at Reasons [7] and [28]. As the judge observed, these purported concerns raise no relevant issue of public policy. No person is required to undertake any illegal or unsafe activity. These events are highly regulated. We proceed on the assumption that the regulators will ensure all safety requirements are complied with.

Natural justice — the arbitrator's error

15 The arbitrator may have made an error as to the parties to the Driver's Agreement. The judge dealt with this issue at Reasons [7] and [11]–[12]. As the judge made clear, before him this was a matter put in reliance upon both s 8(5)(d) and 8(7)(b).

16 It seems to us that the case before the arbitrator was conducted on the assumption that Mr van der Garde had a contractual entitlement to drive if the misrepresentation defences were not upheld. But, in any event, in the context of this case, and the tri-partite agreement which did exist, no real unfairness or real practical injustice has been demonstrated.[7] All of the arguments which the applicant wished to put, and did put, to the arbitrator were dealt with in detail by him.

17 The trial judge emphasised that an enforcement application does not involve anything in the nature of a merits appeal. In our view his conclusions on this issue were correct for the reasons which he gave. The complaint now made in this regard is a complaint as to a legal or factual conclusion which is, to use the words of the Full Court of the Federal Court in TCL, 'dressed up as a complaint about natural justice'.

Position of the other drivers

18 Mr Houghton QC who appeared for the other drivers submitted that the existing order exposed them to liability for contempt. In our view this concern was far-fetched. There is no realistic prospect of contempt by them if they do no more than comply with their own contractual arrangements. Counsel for the respondents confirmed, after taking instructions, that that was the position adopted by the respondents. We proceed on that basis.

19 Otherwise, the trial judge dealt with the issue of the lack of involvement of the other drivers in the arbitration at Reasons [8]-[9] and [26]. In our view the judge's analysis was correct. Mr Houghton submitted that in circumstances where an injunction was sought in arbitral proceedings which could significantly affect non-parties, either notice to those non-parties would have to be given or the matter would simply be incapable of arbitration at all. He was unable to cite any authority for that proposition. As the trial judge observed, arbitral proceedings are necessarily inter partes in nature, in the sense that they are confined to the parties to the contract. The arbitrator has determined what the contractual obligations of the parties to the relevant contracts are. Neither the applicant nor the other drivers have established that it would be contrary to public policy to enforce that determination.

Conclusion

20 The application for leave to appeal is allowed. But the appeal must be dismissed.

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[1] *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80 ('Reasons').

[2] (2014) 311 ALR 387 (‘*TCL*’). See: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89, 151–2 [135].

[3] (2014) 311 ALR 387, 414–15 [108], [111].

[4] Ibid 398 [54]–[55].

[5] Ibid 414 [105].

[6] Ibid 409–10 [86].

[7] Ibid 414–15 [108] and [111].
