SUPREME COURT OF QUEENSLAND

CITATION:	*Caneebie Engineering Services Pty Ltd & Anor v Drummond* [2002] QSC 115
PARTIES:	**CANEEBIE ENGINEERING SERVICES PTY LTD (ACN 090 108 375)** and **CANEEBIE ENGINEERING SOLUTIONS PTY LTD (ACN 065 054 435)** (Applicants/Appellants) **v** **DONALD NEVILLE DRUMMOND** (Respondent)
FILE NO/S:	1637 of 2002
PARTIES:	**DONALD NEVILLE DRUMMOND** (Applicant/Appellant) **v** **CANEEBIE ENGINEERING SERVICES PTY LTD (ACN 090 108 375)** (First Respondent) AND **CANEEBIE ENGINEERING SOLUTIONS PTY LTD (ACN 065 054 435)** (Second Respondent)
FILE NO/S:	1769 of 2002
DIVISION:	Trial
DELIVERED ON:	2 May 2002
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2002
JUDGE:	Helman J.
CATCHWORDS:	ARBITRATION – AWARD – SETTING ASIDE – PROCEDURE – application for leave to appeal against arbitrator's award – whether there was a manifest error of law on the face of the award *Commercial Arbitration Act* 1990, s.38, s.38(2), s.38(4)(b), s.38(5) *Federal Commissioner of Taxation v. Orica Ltd* (1998) 194 C.L.R. 500 *Metropolitan Rail Co v. Jackson* (1877) 3 App. Cas. 193 *Re Tiki Village International Limited* [1994] 2 Qd. R. 674
COUNSEL:	Mr D.J. Campbell for Caneebie Engineering Services Pty Ltd & Anor. Mr M.W. Sayers for Drummond.

SOLICITORS: Jans Lawyers for Caneebie Engineering Services Pty Ltd & Anor.

Wellner & Associates for Drummond.

[1] **HELMAN J:** There are two applications before me, nos. 1637 and 1769 of 2002. Each application was made under s. 38 of the *Commercial Arbitration Act* 1990 and the two were heard together.

[2] On 26 June 2001 Mr Antonio de Fina handed down an award in an arbitration he had conducted of disputes between, on the one side, Caneebie Engineering Services Pty Ltd and Caneebie Engineering Solutions Pty Ltd, and on the other side Mr Donald Drummond. I shall refer to the companies as Caneebie Services and Caneebie Solutions in what follows. The disputes arose concerning the construction of a fishing boat called *Purple Haze* in relation to which there was an agreement in writing dated 2 May 2000 to which Caneebie Services and Mr Drummond were the parties. Mr de Fina was called upon to arbitrate a related dispute between Caneebie Solutions and Mr Drummond.

[3] By an application filed on 24 July 2001 (no. 6626 of 2001) Caneebie Services sought leave pursuant to s. 38 of the *Commercial Arbitration Act* to appeal against Mr de Fina's award. On 30 August 2001 Caneebie Services was granted leave to appeal against so much of the award as awarded $8,050.17 'for costs associated with the repair of the vessel' and $9,991 'for lost income from down time'. The appeal was allowed to the extent that the award included those two sums. The award, so far as it included the two sums, was remitted to the arbitrator 'to be determined in accordance with the rules of natural justice'.

[4] On 14 January 2002 Mr de Fina conducted another hearing of the matters remitted to him, and on 22 January 2002 handed down his further award. In paragraphs 8 to 16 Mr de Fina recorded his reconsideration of the award of the $8,050.17:

> 8. By paragraphs 54 to 58 inclusive of my earlier award I allowed Drummond the sum of $8,050.17 covering the costs incurred by Drummond in eliminating vibration.
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> 9. Although not previously argued by Caneebie, its position at this present stage of these proceedings and which amounted to a reopening of its case is that Clause 11 of the contract between the parties and expressed as follows
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> > "If any defective workmanship or material shall be discovered in the hull, engines, machinery, fittings, plant and equipment of the vessel within six months after the sea trials, fair wear and tear excepted, notice in writing of the same be at once given to the builder, the builder shall either repair and make good the same, or pay a sum equal to the cost which the builder would have

> incurred in repairing or making good the same at their yard in Gladstone."

denies Drummond an award other than an amount determined as

> "a sum equal to the cost which the builder would have incurred in repairing or making good the same at their yard in Gladstone".

10. Evidence was given by Mr Lane of Caneebie as to what those costs might have been had Caneebie followed the means of rectification adopted by Mr Price as set out in the affidavit of Mr Price dated 26 October 2001 (which effectively repeated Mr Price's oral testimony given in the previous hearing on the means of rectification adopted by him).

11. The evidence of Mr Lane at both hearings was to the effect that the vibration was evident when the vessel was first launched and was still evident when the vessel was handed over to Drummond some six weeks later following sea trials conducted by Caneebie during that six week period.

12. Mr Lane in evidence acknowledged that the vessel was in the control of Caneebie until it was handed over to Drummond on 11 August 2000.

13. The further evidence of Mr Lane was that Caneebie had not identified the cause of or a means of rectification of the vibration.

14. Clause 11 of the contract is express in its terms and applies only "after" sea trials.

15. Accordingly I find on Caneebie's own evidence that the rectification of vibration is not caught under the provisions of Clause 11 of the contract and Caneebie's argument that the amount for rectification originally allowed should be reduced pursuant to Clause 11 fails.

16. The cost of rectification as originally calculated and awarded in the sum of $8,050.17 is herewith confirmed and awarded.

As to the $9,991, the issue which arose for determination on the further hearing was the extent to which that sum should not have been awarded to Mr Drummond because the losses in question were not those of Mr Drummond but rather those of a company called Sandblaster Fisheries Pty Ltd, the company that was to operate the *Purple Haze*. Mr de Fina recorded in paragraph 22 that he had 'no jurisdiction to deal with any claims that might be properly made by Sandblaster or aspects of

the involvement of Sandblaster as they may relate to liability or quantum of damages unless affecting Drummond and arising out of commercial arrangements between Drummond and Sandblaster'. In paragraph 32 Mr de Fina recorded his opinion that it was not open to him to consider 'any claim for loss of income by adopting the activities of Sandblaster as if Drummond and Sandblaster were one and the same'. He found however that Mr Drummond 'invested' in the vessel at least $300,561 (the contract price for the building of the boat of $316,380 less the retention sum of $15,819), and to enable him to do so had arranged to borrow $220,060 from the St. George Bank: paragraphs 42 to 46. Having determined that Mr Drummond had not had possession of the boat for 121 days as a result of Caneebie's 'unlawful acts of taking possession of and expressly refusing to return the propeller, propeller shaft, and rudder collar when requested by Drummond' (paragraphs 37 and 40), Mr de Fina concluded Mr Drummond was entitled to $11,285.70: $8,450.75 as interest paid on the part of the loan drawn down in that period, and $2,834.95 as the portion of the annual insurance premium of $8,551.71 attributable to that period: paragraphs 48-50, and 55.

[5] In application no. 1637 of 2002 Caneebie Services and Caneebie Solutions are shown in the heading as '**Applicants/Appellants**' but only the former is shown as seeking relief. It seeks leave to appeal pursuant to s. 38 of the *Commercial Arbitration Act* against the whole of the award of 22 January 2002. Under that section there is provision for appeals to this court, but, so far as it is relevant to these applications, only with the leave of the court on a question of law: subsections (2) and (4)(b). Subsection (5) provides:

> **(5)** The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that –
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> (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of 1 or more parties to the arbitration agreement; and
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> (b) there is –
>
> (i) a manifest error of law on the face of the award; or
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> (ii) strong evidence that the arbitrator or umpire made an 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.

[6] In application no. 1769 of 2002 Mr Drummond too seeks leave to appeal against the award of 22 January 2002 under s. 38.

[7] There are five grounds of appeal, (a) to (e), in application no. 1637 of 2002. Grounds (a), (b), and (c) concern the award of the $11,285.70. Mr Douglas Campbell, for the Caneebie companies, confined his argument on those grounds to one: that the basis upon which Mr de Fina reached his conclusion that Mr Drummond suffered personal loss constituted an error of law. There was, Mr Campbell submitted, no evidence of personal loss suffered by Mr Drummond.

It was uncontested that on the evidence Mr Drummond had been personally liable for the bank interest and the insurance premium but that the relevant payments had been made by Sandblaster Fisheries, so it followed, Mr Campbell argued, that there was a manifest error of law on the face of the award of 22 January 2002.

[8] It is a question of law whether there is evidence that, if accepted, would establish a fact in controversy: *Metropolitan Rail Co v. Jackson* (1877) 3 App. Cas. 193 at p. 207 per Lord Blackburn. It follows that if the evidence before Mr de Fina was incapable of supporting the conclusion he reached he made an error of law.

[9] On behalf of Mr Drummond Mr Sayers argued that if there had been an error it was one of fact and not of law. In paragraph 48 Mr de Fina referred to the $8,450.75 as having been paid by Mr Drummond, and in paragraph 50 to the $8,551.71 as having been paid by Mr Drummond, but in paragraph 47 Mr de Fina recorded that accepting 'that if Sandblaster did contribute some funds for the reasons earlier given at paras 19 to 22 inclusive and 32 to 36 inclusive I treat the balance of the monies [*sic*] paid for the vessel and being in excess of the bank loan as being monies paid by Drummond personally or monies for which Drummond is personally liable'. In paragraphs 19 to 22 Mr de Fina explained his lack of jurisdiction to deal with any claims that Sandblaster Fisheries might have. I have already quoted the conclusion recorded in paragraph 22. I have also already referred to the contents of paragraph 32. In paragraphs 33 to 36 Mr de Fina discussed *inter alia* possible accounting arrangements between Mr Drummond and Sandblaster Fisheries, and the absence of direct evidence concerning them 'save that Mr Drummond attested that certain non-business accounts were paid by the company and so recorded as Drummond personal payments against a loan account' (paragraph 34). In paragraph 34 Mr de Fina also noted that the 1999 taxation return of Sandblaster Fisheries supported 'by inference' that 'proposition'. It appears then that Mr de Fina treated the payments of the bank interest and the insurance premium in the way explained in paragraph 47, and so recoverable by Mr Drummond.

[10] I am not persuaded that there was an error of law leading to the award of the $11,285.70. It was, I think, open to Mr de Fina to conclude that Mr Drummond would be required to, or would even if not so required, account to Sandblaster Fisheries for its payments. If one accepts that the drawing of that inference was open to Mr de Fina on the evidence, it would follow that if he erred in drawing the inference his error was one of fact and not of law. The argument for Mr Drummond would be further strengthened if the payments by Sandblaster Fisheries did not discharge Mr Drummond's debts. When a third party pays a debtor's debt the debtor is discharged, but only if the debtor has assented to the payment or ratifies the payment by subsequent assent: see *Federal Commissioner of Taxation v. Orica Ltd* (1998) 194 C.L.R. 500 at p. 514 per Brennan C.J.

[11] Ground (d) in application no. 1637 of 2002 was:

> d) Failing to construe clause 11 of the Contract as applying to all of the defective workmanship and materials whether discovered before or after the sea trials, but in any event a matter of which notice was given within 6 months of the sea trails [*sic*], and consequently failing to hold that the damages payable to the Respondent was the amount calculated under clause 11 of the contract;

Mr de Fina's determination on this question resulted from a manifest error of law, Mr Campbell argued.

[12] Clause 11, however, must be construed in the context of the whole agreement, particularly clause 8, which, as recorded in the award of 26 June 2001, was as follows:

> 8. The vessel shall be built in accordance with the plans and specifications referred to in clause 1 (which are part of this contract) or [*sic*] the best materials and workmanship and finished in a substantial and workmanlike manner complete in every detail. The vessel when thus completed shall be taken out for sea trials and for the adjustment of compass, and the expense of such trials shall be borne by the builder. *Completion of the vessel shall be deemed to have been achieved once acceptable trials have been carried out, all equipment on board operated and commissioned, to the satisfaction of the purchaser. The vessel shall be deemed to be ready for operation once all of the preceding have been achieved and all documentation of registration, survey, safety and stability have been completed.*

It was common ground before Mr de Fina that the builder had notice of the vibration defect prior to the conduct of sea trials, as recorded in paragraphs 11 and 12 of the award of 22 January 2002. It was submitted on behalf of Mr Drummond that Mr de Fina had not erred in law by excluding the operation of clause 11 which, Mr Sayers argued, concerned latent defects in the boat after its delivery to Mr Drummond, and that Mr de Fina correctly applied the general warranty provision in clause 8 to the defect causing the vibration.

[13] Reading the agreement as a whole, I am persuaded by the argument for Mr Drummond. Certainly the construction contended for on behalf of Mr Drummond is arguable, so there was no manifest error of law in Mr de Fina's determination on this point: see *Re Tiki Village International Limited* [1994] 2 Qd. R. 674 at p. 677.

[14] Application no. 1637 of 2002 must fail then, for the reasons I have given, on grounds (a) to (d) inclusive.

[15] The fifth ground of appeal, (e), in application no. 1637 of 2002 concerned costs. It was agreed at the hearing before me that consideration of that ground should be deferred until after my decision on the other issues before me was given.

[16] In application no. 1769 of 2002 there were two grounds of appeal. On behalf of the applicant, Mr Drummond, the first ground was abandoned. The second ground, that the arbitrator erred in law in making an award against Caneebie Solutions on 22 January 2002, was argued.

[17] In his award of 26 June 2001 Mr de Fina recorded in paragraph 7 that it was agreed 'between the parties' and submitted to him that he should deal 'as far as it was appropriate to do so in [that] arbitration, with Caneebie Engineering [i.e., Caneebie Services] and Caneebie Solutions as joint respondents and that agreements or conduct of one of the Caneebie entities in effect be taken as an agreement or conduct of both of the Caneebie entities'. As I have related, the application heard on 30 August 2001 was brought by Caneebie Services only and Caneebie Solutions

was not a party to it. No stay of the original award of 26 June 2001 was granted. On its face the award of 22 January 2002 purports to bind both Caneebie Services and Caneebie Solutions even though only Caneebie Services was a party to the appeal. It was argued on behalf of Mr Drummond that logically the only party to the further hearing before Mr de Fina was Caneebie Services. Consistently with that analysis Caneebie Services is, as I have already noted, the only applicant-appellant seeking relief in application no. 1637 of 2002. Mr Sayers argued that Caneebie Solutions should be struck out as a party to application no. 1637 of 2002 and that that company should remain liable under the terms of the original of the award of 26 June 2001 since it had not sought to appeal from that decision of the arbitrator. I cannot detect any flaw in that argument and accordingly Mr Drummond is entitled to the relief sought in application no. 1769 of 2002. It may be however that in the light of the fate of application no. 1637 of 2002 on grounds (a) to (d) Mr Drummond may not wish to proceed with application no. 1769 of 2002. If he does, there will be the somewhat anomalous result brought about by the conduct of the applications on behalf of the Caneebie companies: there will be a discrepancy between the amount awarded against Caneebie Services and that awarded against Caneebie Solutions in the sum of $1,294.70: the $11,285.70 less the $9,991.

[18] I shall invite further submissions on the subject I have just referred to and on costs.