

CUFONE & ORS V CRUSE & ORS NO SCGRG-99-269 [269] SASC 304 (8 SEPTEMBER 2000)

Supreme Court of South Australia

FACTS

Cufone and Cruse owned equal numbers of units in a unit trust that operated a tavern for which Fun Trading was the trustee. Cufone and Cruse had equal shareholding in Fun Trading but the Cufone representatives held majority interest on the Board of Directors of Fun Trading.

Cruse sought equality in the representation of each group as directors of Fun Trading and as signatories to the Company's bank account. The parties referred the dispute to an arbitrator subsequent to clause 9 of an agreement between the parties.

The Arbitrator consented to Cufone submitting any question of law arising from the ruling to the Supreme Court pursuant to s39 (1)(a) of the Commercial Arbitration Act ("the Act") and did not make an award. Cufone therefore applied to the court contending that the Arbitrator had no jurisdiction under s42 of the Act and sought declaratory relief.

ISSUE

1. Does the arbitrator have power to grant declaratory relief?
2. Is rectification of the agreement within the ambit of the arbitration clause?

FINDING

Section 42 of the Act is inapplicable in the absence of misconduct on the part of the arbitrator or where an award has not been improperly procured.

The arbitrator had implied powers to grant declaratory relief where dispute was one that could have been submitted to the Supreme Court and where the court could have given such relief. However, a court of law can only grant declaratory relief on disputes that involve contractual rights or other legal rights and not disputes based on principles of equity or fairness. Since the arbitrator had not identified and determined the nature of the dispute whether it was contractual or based on some other legal principles the arbitrator had erred in holding that he could grant declaratory relief. Given that the arbitrator has power to grant declaratory relief it should be reserved for further consideration the extent of the arbitrator's powers to consider claim for rectification.

QUOTE

Bleby J said:

"An Arbitrator has an implied power to grant declaratory relief where the dispute is one which could have been submitted to the Court and where the Court could have given such relief. However, an Arbitrator does not have power to grant relief in respect of disputes that are based on principles of equity and fairness"

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because a court of law could not grant declaratory relief in respect thereof. Indeed, a court could not grant any relief unless the dispute were based on alleged contractual right or some other legal right.”

IMPACT

An arbitrator has the authority to give relief as would be available in a court of law having jurisdiction with respect to the subject matter. A power to award a declaration may be implied into the arbitration agreement and that power will be co- extensive with the power of the Supreme Court. The power to consider a claim for rectification is not isolated from the claims made to consider the arbitrator’s power to give relief.

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