

ELSPAN INTERNATIONAL LTD V. EUROCOPTER INTERNATIONAL PACIFIC LIMITED
[1999] NSWCA 418

NSW Court of Appeal – 1 December 1999

FACTS

Markham was the arbitrator of a building dispute between Elspan and Eurocopter.

Elspan claimed that the arbitrator's award should be set aside on the ground that the arbitrator was guilty of misconduct. The alleged misconduct by Markham included a delay in making the award and giving unsatisfactory reasons for the delay in making the award.

The other ground for an allegation that Markham was guilty of misconduct was that he had made findings on points on which the director of Elspan had not been cross-examined about or informed were at dispute between the parties.

ISSUES

Did the conduct of Markham amount to misconduct and if there was misconduct should the Court set aside his award?

FINDING

While the conduct of Markham could arguably amount to misconduct the alleged misconduct did not justify the removal of the arbitrator or the setting aside of his award.

QUOTE

Sheller JA said:

"It is common enough for judges and arbitrators to prefer the evidence of one witness to the evidence of another and to conclude that evidence given is not true. It is usually unnecessary to go further. A witness may give untrue evidence for a variety of reasons, most of which have to do with the frailty of human memory. It is quite another matter to conclude that a witness, knowing the truth, has deliberately set out to mislead a tribunal of fact. If it is necessary to reach such a conclusion it should be based on the surest of ground." – para 13 of [1999] NSWCA 418.

"Even though the claimant has an arguable case of misconduct to ground an order under s42 [of the Commercial Arbitration Act] or an appeal under s38, I do not think the appeal to this Court which the claimant seeks leave to bring has any prospect of success. In my opinion, the alleged misconduct, even if established, would not, in the circumstances, justify the removal of the arbitrator, the disturbing of his findings or the remitting of the question of costs to any other arbitrator. In addition to the evidence supporting [Markham's] findings [Markham's] findings on credit were made in circumstance where Mr Ellen's [the director of Elspan] credit was very much an issue to which the claimant and its advisers were aware." – para 24 of [1999] NSWCA 418.

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Jim Doyle
1800 888 783

jdoyle@doylesconstructionlawyers.com
www.doylesconstructionlawyers.com

IMPACT

An allegation that an Arbitrator is guilty of misconduct is not by itself a sufficient reason to justify the setting aside of the Arbitrator's award.

There must be evidence to suggest that the decision of the Arbitrator was affected by the alleged misconduct before a Court will determine whether the Arbitrator is in fact guilty of misconduct.

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