Mungo v. Saverino

Ontario Judgments

Ontario Court of Justice (General Division)

Campbell J.

Heard: July 4, 1995.

Judgment: October 15, 1995.

No. Re 178/95

[1995] O.J. No. 3021 | *58 A.C.W.S. (3d) 175*

Between Mungo, and Saverino

(18 pp.)

Case Summary

Company law — Sale of shares — Valuation — Arbitration — Judicial review — Jurisdiction of arbitrator, general — Excess of jurisdiction.

This was an application to vary or resubmit four parts of an arbitral award in a share valuation in a shareholders' action. The applicants argued the arbitrator exceeded his jurisdiction in respect of three issues and denied natural justice in respect of two others. The parties agreed the standard of review was whether there had been a clear excess of jurisdiction. The applicant argued "amounts ... the arbitrator determines to be owing" was restricted to existing liabilities and had a narrow meaning. He also argued the arbitrator erred in using tax averaging without notice to the parties.
HELD: The application was dismissed.

The words had a wide scope. They were not ambiguous. The use of an average tax rate occurred in the context of misunderstanding among the parties. However, it had not resulted in a denial of natural justice. The procedure agreed by the parties was followed. Disappointed expectations per se did not amount to a denial of natural justice. The applicants had had an opportunity to state their case on the issue.

Statutes, Regulations and Rules Cited:

Arbitration Act, *S.O. 1991, c. 17, ss. 44*, 46(1).

Counsel

Brian Casey, counsel for the applicant. Warren Rapoport, counsel for the respondent.

CAMPBELL J. (endorsement)

The Application

1 Mungo, Paglia, and the Saverinos owned and operated a number of construction companies. They settled their bitter shareholders' litigation by appointing an arbitrator to value their shares in the companies and determine any amounts they owed to the companies, after which Mungo and Paglia would buy out the Saverinos on the basis of the amounts determined by the arbitrator, Farley Cohen.

2 Mungo and Paglia apply to vary or resubmit to the arbitrator four parts of the arbitral award.

3 They argue, and the Saverinos deny, that the arbitrator exceeded his jurisdiction under the arbitration agreement in respect of three disputed issues and denied natural justice to Mungo and Paglia in respect of two disputed issues.

4 The applicants, wisely, abandoned any attempt to obtain leave to appeal on questions of law.

Disputed Issues Chart

	Dispute	Amount	Issue	Relief Sought
1.	Saverino's "fair" remuneration	$29,487	Jurisdiction -and- Natural Justice	Quash -or- Remit
2.	Turks & Caicos	$ 6,394	Jurisdiction	Quash

3.	Car-Go	$11,113	Jurisdiction	Quash
4.	Tax Averaging	$68,456	Natural justice	Remit

The Court's Jurisdiction

5 Section 46 of the Arbitrations Act 1991 S.O. c. 17 provides:

> 46. (1) On a party's application, the court may set aside an award on any of the following grounds:
>
> 3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.
>
> 6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.

Standard of Review: Jurisdictional Issues

6 The whole purpose of arbitrations, especially arbitrations designed to settle court cases, is to avoid the expense and delay of further court proceedings like these. Loose standards of jurisdictional review defeat the value of arbitrations. Strict standards of review are necessary.

7 Counsel, after a brief skirmish based loosely on C.E.D. Title 8 Arbitration 3d pp. 8-194 to 8-196, agreed for the purposes of this application that the standard of review on jurisdictional issues is whether the applicant shows "clearly" that the arbitrator exceeded his jurisdiction under the agreement.

8 Having been referred to no judicial authority on the standard of review, I accept for the purposes of this case the standard agreed upon by counsel.

The Arbitration Agreement

9 The arbitration agreement is recorded in a number of letters.

10 First, Mr. Hoffman's letter of July 8 to Mr. Rapoport:

> 4. The arbitrator may act in the first instance as a valuator in order to conduct an independent valuation of the shares of the Companies in order to determine the value

of the Saverinos' shares on the basis of 25% of the total of all of the Companies "fair market value" with no minority discount.

6. The Saverinos', their solicitors and accountants retained solely by them, may on one occasion, attend at the Companies' premises with Cohen prior to Cohen's draft report. Similarly, Mungo, Paglia, their solicitors and accountants retained solely by them may also meet once with Cohen privately prior to Cohen's draft report. The initial meeting with Cohen will be held in the absence of the other parties, their solicitors and accountants. Cohen will then provide the draft report, which will contain no determination of value or other conclusions, but will rather simply set out the factors which Cohen has taken into account with respect to the arbitration and such other matters as he deems appropriate. Each of the parties, shall then have an opportunity to provide written comments upon the draft report, so long as a copy of the written comments is given to the other side at the same time as it is provided to the arbitrator. The Saverinos' will provide their comments to the arbitrator first and Mungo and Paglia will provide their comments to the arbitrator within a time for delivery to be fixed by the arbitrator but no less than seven days thereafter. Once these written comments have been exchanged, Cohen will meet with the parties or their counsel, separately, or in the presence of each other as may be agreed or as Cohen may direct, in order to provide an opportunity for each party to tender further evidence and make submissions respecting the draft report and the comments of the opposite parties;

7. After that time, Cohen will release the final report. It is expected that the final report will be provided within 30 days after the draft report. The final report shall be final and binding without right of appeal. It is expected, subject to Cohen's availability, that the draft report will be prepared by August 31, 1994 and that the final report will be prepared by September 30, 1994;

11 Second, Mr. Hoffman's letter of August 4 to Mr. Rapoport:

Thank you for your letter dated July 28, 1994 which discusses proposed amendments to our letter dated July 28, 1994.

We understand that there are no loans outstanding to your clients and thus no need to refer to "loans" in the Agreement. Further, other than the bonus of $150,000.00, referred to in the Agreement, there are no debts owing as between the Saverinos' and the Companies.

The concern you raised in our recent telephone conversations was that the Agreement ought to empower the arbitrator to consider your clients' allegations that there may be amounts due from our clients, Mungo and Paglia, to the Companies and that the arbitrator should be empowered to award to your clients 25% of any such amounts, if any.

If such amounts are not part of the "valuation" of the shares of the Companies then paragraphs 3, 4, 5 and 9 should be amended by adding "including any amounts which the arbitrator determines to be owing to the Saverinos' by the Companies", as follows:

...

2. In paragraph 4 after "with no minority discount";

12 Third, Mr. Rapoport's letter of August 9 1994:

> Thank you for your letter of August 4, 1994. So long as it is understood that the amounts owing to the "Saverinos" includes by definition their personal corporations, the amendments proposed are acceptable.
>
> However, we note that although your clients' position is that there are neither any loans outstanding, nor are any debts owing as between the Saverinos and the Companies, both of these issues remain within the realm of the arbitrator to consider. We do not presume to know the ultimate answer in this regard. So long as the second paragraph of your letter is simply "observation", the substantive portions of your letter starting in the fourth paragraph are acceptable.
>
> With that proviso, my clients will sign the amendment letter and this letter will be annexed as an addendum to your letter. Please confirm that this is acceptable.

13 Fourth, Mr. Hoffman's letter of August 9 1994:

> Thank you for your letter dated August 9 1994. This is acceptable.

14 Putting all this together, the agreement as amended by these letters empowered the arbitrator to

> ... conduct an independent valuation of the shares of the Companies in order to determine the value of the Saverino's shares on the basis of 25% of the total of all the Companies "fair market value" with no minority discount including any amounts which the arbitrator determines to be owing to the Saverinos' by the Companies.

15 Expressly excluded from the agreement were certain matters which form the basis of Mr. Casey's jurisdictional arguments on the Turks and Caicos and Car-Go matters, items 2 and 3 in the above chart.

Fair Remuneration: Jurisdiction: Issues

16 Mr. Casey argues:

(1) That the words "any amounts which the arbitrator determines to be owing to the Saverinos' by the Companies" are restricted by the context in which the words appear in the various letters that make up the agreement and

(2) That the conduct of the parties and the arbitrator subsequent to the agreement demonstrate an original intention to restrict those words

(3) That the word "owing" is restricted to existing liabilities and is not wide enough to create a new liability

17 "Owing" is defined in the Shorter Oxford as:

> That is yet to be paid or rendered, owed, due.

18 "Owe" is defined as:

> To have to pay. 1. To be under obligation to pay or repay (money, etc.); to be indebted in, or to the amount of...

19 The word "owing" is a word of the widest meaning. The parties in order to settle an expensive lawsuit gave the arbitrator (subject to certain exclusions) the widest jurisdiction to examine into the financial state of affairs between the companies and the parties and to achieve a final global resolution of all the financial disagreements including the actual state of indebtedness between the companies and the parties.

20 It begs the question to say that the arbitrator, in determining what is owing, is limited to existing liabilities. The agreement provides that the amounts owing are the amounts determined by the arbitrator to be owing. The arbitrator's jurisdiction to determine what is to be paid gives the arbitrator, not the court, the jurisdiction to determine liability to pay.

21 There is no ambiguity in the words "including any amounts which the arbitrator determines to be owing to the Saverinos' by the Companies".

22 Because of

(1) the wide scope of the words "including any amounts which the arbitrator determines to be owing to the Saverinos' by the Companies"

(2) the lack of ambiguity in the words "including any amounts which the arbitrator determines to be owing to the Saverinos' by the Companies" and the consequent lack of any justification to go to recitals or conduct outside the express words of the agreement in order to interpret it,

it is not clear that the arbitrator exceeded his jurisdiction.

23 The applicants fail on this issue.

Turks & Caicos

24 The Turks and Caicos issue formed part of the arbitrator's global adjustment of amounts owing to the parties, covered by the wide words of the agreement.

25 The arbitrator found that Mungo and Paglia should bear the costs of this unsuccessful joint venture with Gianotti because it was outside the ordinary course of the companies' business, because Saverino had no knowledge of it, and because equity participation arrangements were never agreed upon.

26 Having regard to the wide scope of the words noted above, this matter was within the jurisdiction of the arbitrator. Contrary to Mr. Gareri's argument in paragraph 21 of his affidavit, the arbitrator's findings in schedule 9 do not depend on any excluded ground such as oppression or breach of duty.

27 The applicants fail, on this issue.

Car-Go

28 The Car-Go issue, like the Turks and Caicos issue, formed part of the arbitrator's global adjustment of amounts owing to the parties, covered by the wide words of the agreement.

29 Despite Mr. Casey's attractive argument that the Car-Go matters were expressly excluded from the agreement, his own witness Gareri (q. 263) agreed that it was a proper matter for the arbitrator to consider. As Mr. Casey points out, Gareri's admission does not bind the applicants because he is not a party. But Gareri's answer to question 263 is so persuasive that I adopt it as my conclusion on this issue.

30 The applicants fail on this issue.

Standard of Review: Natural Justice Issues

31 Counsel referred to one authority only on the natural justice standard of review, Kane v. Board of Governors of UBC *[1980] 1 S.C.R. 1105* per Dickson J. at p. 1116:

> We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

32 In the absence of any submission that this test is inapplicable to consensual arbitrations, and having been referred to no other judicial authority on the standard of review, I accept that standard for the purposes of this case.

Tax Averaging: Issues

33 The arbitrator, in considering the effect on retained earnings of remuneration overpaid or underpaid from 1985 to 1994, used an average or midpoint tax rate for those fiscal years instead of applying the tax rates applicable in each year starting from a 1985 base.

34 The applicants say the arbitrator denied natural justice by making his award on this basis without hearing direct evidence on this point or giving the applicants the opportunity to lead evidence.

35 It was Mr. Casey's point that his client expected the arbitrator to apply the real tax exigible each year and that the arbitrator, if he intended for his own reasons to apply something completely different like an "effective tax rate" or an "average tax rate" instead of the applicable

tax rate, should have given the applicants a specific opportunity to lead evidence and argue the point.

36 Mr. Casey submits that the applicants, as a result of their submissions to the arbitrator after the draft award, believed that the arbitrator would simply continue the annual calculations as was done with wages, and would do the taxes on a year by year calculation of the tax rate that would apply to the remuneration in question.

37 Mr. Casey submits that if the arbitrator had advised that he was considering an average tax rate the applicants would have submitted that he was wrong in law and would have led evidence to show how an imputed tax rate would distort the true result based properly on the actual tax rate.

Tax Averaging: Reasonableness

38 This is a convenient place to dispose Mr. Rapoport's lengthy factual tax rate argument. He declined to court's invitation to say why the argument was relevant to the natural justice issue, the only ground advanced by Mr. Casey and the only ground in issue. In the absence of any answer to the repeated question, why that lengthy argument is relevant, I have not considered it.

The Section 44 Issue

39 This is a convenient place to dispose of Mr. Rapoport's argument, that the arbitrator's April 5 1995 confirmation, that there were no errors in the calculations prepared for the award, invokes the principle that

> The court has no jurisdiction to change the terms of the Award decided by the arbitrator. The court's power to rectify an award exists only for correcting an error in the award when it does not correctly state the conclusions arrived at by the arbitrator.

40 As Mr. Casey points out, the arbitrator's letter of April 5 (in accordance with s. 44 of the Act) demonstrates that the jurisdictional and natural justice issues raised by the applicants were not the result of any slip or oversight, thus triggering the applicants' right under s. 46 to demonstrate, if they can, that the award resulted not from a slip or oversight that requires rectification, but from jurisdictional error and denial of natural justice that requires parts of the award to be quashed or remitted.

Tax Averaging: Categorizing the Evidence

41 The evidence fits into two categories, on the one hand the formal evidence and written submissions and on the other hand the diffuse and impressionistic recollections of Gareri, the applicants' accountant, about his telephone conversations with the arbitrator and his assistant, none of which were confirmed in writing or reflected in the applicants' written submissions to the arbitrator.

42 The formal evidence consists of

1. paragraph 6 of the agreement;
2. the arbitrator's letter, December 22, confirming parties' agreement December 20, on the expanded timetable for further submissions and procedures with respect to the provision of further information to the arbitrator and the procedure for making submissions to the arbitrator after the draft award;
3. the draft award dated December 23 1994;
4. the respondents' comments on the draft award, January 23 1995;
5. the applicants' comments on the draft award, February 6 1995;
6. the arbitrator's award of February 28 1995, released March 6;
7. the applicants' letter of March 28 to the arbitrator about the tax issue;
8. the arbitrator's reply of April 5.

43 The evidence of Gareri's recollections and impressions of conversations with the arbitrator and his assistant consist of

1. Gareri's affidavit of April 5 1995;
2. Gareri's supplementary affidavit of May 3 1995;
3. Gareri amended affidavit of May 5 1995;
4. Gareri's 111 page cross examination of June 13 1995.

44 The respondent on May 29 1995 attempted to examine the arbitrator who properly took the position, based on Agnew v. Association of Architects, that the arbitrator was not compellable, and no evidence was obtained from the arbitrator.

Tax Averaging: the Formal Evidence

45 Paragraphs 6 and 7 of the arbitration agreement set out the procedure to be followed to ensure that each side had a fair opportunity to put its case:

> The Saverinos', their solicitors and accountants retained solely by them, may on one occasion, attend at the Companies' premises with Cohen prior to Cohen's draft report. Similarly, Mungo, Paglia, their solicitors and accountants retained solely by them may also meet once with Cohen privately prior to Cohen's draft report. The initial meeting with

> Cohen will be held in the absence of the other parties, their solicitors and accountants. Cohen will then provide the draft report, which will contain no determination of value or other conclusions, but will rather simply set out the factors which Cohen has taken into account with respect to the arbitration and such other matters as he deems appropriate. Each of the parties, shall then have an opportunity to provide written comments upon the draft report, so long as a copy of the written comments is given to the other side at the same time as it is provided to the arbitrator. The Saverinos' will provide their comments to the arbitrator first and Mungo and Paglia will provide their comments to the arbitrator within a time for delivery to be fixed by the arbitrator but no less than seven days thereafter. Once these written comments have been exchanged, Cohen will meet with the parties or their counsel, separately, or in the presence of each other as may be agreed or as Cohen may direct, in order to provide an opportunity for each party to tender further evidence and make submissions respecting the draft report and the comments of the opposite parties;
>
> After that time, Cohen will release the final report. It is expected that the final report will be provided within 30 days after the draft report. The final report shall be final and binding without right of appeal. It is expected, subject to Cohen's availability, that the draft report will be prepared by August 31, 1994 and that the final report will be prepared by September 30, 1994;

46 The arbitrator's letter of December 22 confirmed the parties' agreement on an expanded timetable as follows:

> Draft report December 23 1994
>
> Respondents' comments by January 25 1995
>
> Applicants' comments by February 3
>
> Arbitrator will meet with each group individually or together as he deems appropriate during period February 8 to 17 1995
>
> Final report on or before March 3 1995

47 On December 23 1994 the arbitrator released the draft award, without appendices or numbers. It referred to the tax issue, but not to the specific tax rate which the arbitrator intended to apply to his final analysis:

> The excess and non-business expenses incurred by the Four Companies for the benefit of Mungo and Paglia were deducted for income tax purposes. Accordingly, we have reflected this in the amount to be awarded

48 The respondents in a letter to the arbitrator on January 23 1995, with a copy to the applicants, made their comments on the draft award without any reference to the tax issue.

49 The applicants in a letter to the arbitrator on February 6 1995, with a copy to the respondents, made their comments on the draft award and said this about the tax issue:

> 8.1 We want to confirm that the numbers used in determining the additional award will be adjusted at the appropriate tax rate which would vary depending upon the component of the additional arbitral award being considered. We would like an opportunity to discuss with you the method for determining the additional arbitral award, if any. The result will depend, in part, upon which party received the benefit.

50 This letter made no reference to the fact that Gareri had made submissions to the arbitrator on behalf of the applicants in respect of the tax issue during telephone conversations.

51 The final award, dated February 28 and released March 6, said only this on the tax issue, in a note to Schedule 6, the summary of the additional arbitral award:

> Tax savings have been computed at an effective rate of 33.34%

52 The applicants, by a copy of their March 28 1995 letter to the respondents, asked the arbitrator to "[c]onsider correcting the tax rate averaging effects in the Award" as discussed in the letter which enclosed a schedule prepared by Gareri setting out the position taken by the applicants on the tax calculation issue.

53 The arbitrator on March 31 replied to Gardiner Roberts in relation to equipment value (one of the points in the March 28 letter) and said "we are considering the other points raised in your letter and will respond shortly"

54 The arbitrator on April 5 replied further to the March 28 letter of Gardiner Roberts, declined to amend the tax calculation, and setting out the factors he considered in determining the tax rate to be applied.

Tax Averaging: The impressionistic Evidence

55 Gareri says that after the award and the letter he had a conversation (he thought on April 4, the day before Cohen replied) with Cohen discussing the reasons why Cohen was inclined to apply an average tax rate as opposed to the yearly calculation advocated by Gareri, going all the way back to 1985 and readjusting. The conversation was interrupted,

> and he couldn't get back to me. .. we weren't able to talk about it further.

56 Gareri said that the method he advocated was the method he had earlier discussed with Cohen, that Cohen

> didn't really have ready answers for me and that he assumed that Cohen had relinquished the work on the tax calculation to his assistant Patel.

57 Gareri said that following the receipt of the draft award, Gareri

> asked the arbitrator which tax rate he was going to apply

to the taxable income overpaid or underpaid in each year

58 Gareri took the position that the passage in the draft award about the tax rate was confusing to him and on speaking to Cohen it

> became obvious that he did not have tax rates included in this. He commented on it, but he did not disclose what the tax rates were or how he was going to determine them.

59 Gareri said that Cohen

> asked me specifically to deal with it and to provide him with the additional information that would allow him to make his calculations. So there ... was no need for me to put it in the written, or contribute to the written report ..." (emphasis added)

60 Gareri said that he later provided Cohen with the actual tax rates along with taxable income so that Cohen could do the year-by-year calculation. cross 22

61 Gareri said that Cohen after the draft award had told him that he "was going to" go back all the way to 1985 and readjust on the basis of a year by year analysis. Gareri later said that Cohen said that he "wanted to" go through that procedure to see what the after-tax impact was on Mr. Saverino. Mr. Gareri later said that Cohen asked for the taxable incomes and the loss carry forwards to that Cohen "would be able to" calculate what the adjustments would be on a year-by-year basis.

62 Gareri also deposed that Jay Patel, Cohen's assistant, told Gareri that he expected that Cohen would take some average tax rate over a period of years, that Gareri said this would not be appropriate, and that Patel advised that the arbitrator would do a calculation on a year by year basis and also on an average basis and let us know the result. Gareri said that he did not hear back from either Patel or Cohen on this point prior to the release of the final award.

63 It was Gareri's position that there was no need to incorporate the argument and evidence about the tax rates into the Mungo and Paglia response to the draft award, not because the arbitrator had an obligation to calculate the tax on the basis suggested by Gareri, but because the arbitrator said he would do it that way:

> That is why there wasn't an objection placed beforehand, before the final arbitral award was issued, because he said he was going to deal with it in that manner. Why object to it if he said he's going to deal with it?

64 The applicants take the position

> The draft arbitral award does not comment upon the tax rate which the arbitrator intended to apply to his final analysis and thus the applicants could not have commented upon this aspect of the award except to inquire of the arbitrator as to his methodology

65 This is based on a passage in Mr. Gareri's affidavit:

> The applicants could not have commented on (a) and (b), above, because the draft arbitral award was silent on their treatment

Tax Averaging: Conclusions

66 The difficulty with that position is the fact that the applicants could have said everything in that letter that they said in this court about the unconfirmed phone conversations and Mr. Gareri's impressions of them.

67 It is not necessary to deal with Mr. Casey's submission that the problem flowed from the arbitrator's inexperience, or to speculate that the problem would have been resolved by an explicit reference to the tax issue and the phone conversations in the letter of February 6. There is no question that there was a communication problem around the tax issue. The question is not whether the arbitrator and the applicants could each have done more to avoid the misunderstanding, and the question is not who was more to blame for the communication problem. The only question is whether there was a denial of natural justice.

68 It is regrettable that this application requires the parties and the court to step outside the documents contemplated by the agreement and plunge into vague recollections of telephone conversations in order to determine the rights of the parties. It should be possible to determine the rights of the parties by reference to the documents contemplated by the agreement or by further communications reduced to writing. It was the applicants who initiated, or at least participated enthusiastically in, this kind of casual telephone communication not expressly contemplated by the agreement. No one complains about the informality of the communication and there was no evidence whether this kind of running telephone discussion between the arbitrator and one party is a practice common in the world of arbitration. The applicants however, having engaged unbeknownst to the respondents in undocumented private phone calls with the arbitrator must bear their own share of the risk inherent in that kind of conduct. The applicants' participation in that process places the burden of persuasion on the applicants in these circumstances to demonstrate that any miscommunication created a denial of natural justice.

69 It would have been better had there been no misunderstanding about the tax rate. It is difficult to assign blame for the misunderstanding as between the applicants' accountant on the one hand and the arbitrator's assistant on the other hand. The bottom line, however, is that the procedure agreed by the parties was followed. It was open to the applicants in the letter of February 6, particularly in light of the conversation between the accountant and the arbitrator's assistant, to say everything about the tax issue that was said by the accountant and to reflect clearly the understanding that the tax rate would be calculated in respect of each year and not averaged.

70 The simple question is whether the applicants had an opportunity to be heard on the tax issue. The arbitrator referred to the tax issue in his draft report, Gareri had some conversations with the arbitrator, and the issue was referred to very briefly in the applicants' reply.

71 Disappointed expectations as to the basis on which an award will be calculated, even if based on a party's mistake or misunderstanding, do not in themselves amount to a denial of natural justice.

72 The arbitrator decided the case on the material before him, contemplated by the agreement; the draft report, the submissions, the further submissions. Although the telephone calls with the applicants created confusion I am not satisfied that they created a reasonable apprehension that the applicants were denied the opportunity to make submissions.

73 Even on the agreed Kane natural justice test, a fully informed reasonable person would not find any real unfairness here. The Kane bystander might understand the applicants' dismay at the result of their self-initiated miscommunication with the arbitrator, in which they participated enthusiastically without burdening the other side. The Kane bystander might say that the arbitrator and the applicants could both have done much better in their communications and that the arbitration was far from perfect. But the bystander would look at factual test set out by Le Dain J. in Cardinal v. Kent *[1985] 2 S.C.R. 643* at 653-4,

> "it is a denial of natural justice for a tribunal to decide a case on the basis of an issue with respect to which the parties have not had an opportunity to make submissions"

and the Kane bystander could only conclude that the applicants here had an opportunity to make submissions on every issue upon which the arbitration turned.

74 When all is said and done, the Saverinos put everything they wanted to put to the arbitrator through Gareri's phone calls and the arbitrator in the end disagreed with his position.

75 So far as the formal record is concerned, the most that can be said is that the arbitrator did not respond to the Gardiner Roberts letter saying wanted an opportunity to discuss the issue. The letter, however, does not reflect the discussions between Gareri and the arbitrator.

76 Although the arbitrator did not respond to that request, discussions about the tax issue had already taken place between the arbitrator and Gareri and it appears that the applicants through Gareri in fact discussed in some detail the exact point that has been made in court about the basis for calculating the tax rate, and that the arbitrator understood the applicant's position advanced through Gareri's telephone conversations. The applicants through Gareri said everything that could have been said about the issue. The applicants' real problem is not that it lacked the opportunity to make its tax argument to the arbitrator, but that it had the opportunity through Gareri's phone calls and it took advantage of the opportunity but the arbitrator in the final event disagreed with Gareri's position.

77 Had there been a real denial of natural justice, or any suggestion that the applicants had no opportunity to put their case on the tax issue, one would expect to have seen it raised immediately after the award.

78 The great merit of arbitrations is that they should be, compared to courts, comparatively

quick, cheap, and final. There is a trade-off between perfection on the one hand and speed, economy, and finality on the other hand. If you go to arbitration, you can get quick and final justice and you can get on with your life. If you go to court, you can get exquisitely slow and expensive justice and you can spend the rest of your life enduring it and paying for it.

79 For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second guess other tribunals and thus defeat the greatest benefit of arbitration, its finality.

80 It is therefore important for the court to resist its natural tendency, faced with a clear and attractive argument on jurisdiction and natural justice, to plunge into the details of the arbitration and second-guess the arbitrator not only on the result but also on the punctilio of the process. If an arbitration is basically fair, courts should resist the temptation to plunge into detailed complaints about flaws in the arbitration process.

81 Nothing in this evidence in this defeats that principle. The arbitration process was not perfect, and it is arguable that it was far from perfect. But when all is said and done, and all the phone calls and mutual misunderstandings and disappointed expectations have been explored, this arbitration was jurisdictionally sound enough and fair enough to pass the generous tests of jurisdiction and natural justice that are necessary to preserve the integrity, if not the perfection, of the arbitral process.

82 The applicants fail on this issue.

Fair Remuneration: Natural Justice

83 Although it would have been better to have had explicit prior comments' in relation to this issue, I am not satisfied that any shortcoming in this regard resulted in a denial of natural justice which requires the remission of this issue to the arbitrator.

84 The applicants fail on this issue.

Conclusion on the Application

85 For the reasons above, despite Mr. Casey's able argument, I am not persuaded that there was any jurisdictional error in the scope of the award or any denial of natural justice.

86 The application is dismissed.

The Counter-Application

87 There was nothing in either party's factum or argument about the counter-application to enforce the award. It may be that the success of the counter-application necessarily follows the dismissal of the application, in the same way that the tail follows the dog. Assuming this is the

case, counsel may agree on whatever formal language is necessary to achieve this in the formal order of the court.

Costs

88 The parties may make written submissions under 5 pages on costs, their scale, whether and in what amounts they should be fixed; first by the respondent then by the applicants then a two page reply, all submissions to be received by November 3 unless counsel otherwise agree. It would be helpful if counsel could explain how the amount in issue can justify the legal expense suffered by the parties.

89 These proceedings, if the parties do not bring them to a quick conclusion, will rival Jarndyce v. Jarndyce. The parties are urged to settle all remaining issues before their legal expenses devour their equity.

CAMPBELL J.
