



## Limin James Chen & Anor v Kevin McNamara & Sons Pty Ltd & Anor [2013] VSC 539

### FACTS

The Plaintiffs entered into an agreement with Kevin McNamara & Sons (KMS) for the design and construction of a tennis court, a water tank and associated landscaping works. The Agreement stipulated that in the event of a dispute, the parties must refer the matter to arbitration pursuant to the *Commercial Arbitration Act 1984 (Vic)* (“the 1984 Act”).

Following a dispute between the parties, an Arbitration Award was made in favour of KMS. The Plaintiffs subsequently sought leave to appeal the Award, contending that the Arbitrator made errors in relation to the identity of the parties to the contract, breaches by KMS of implied terms and its duty of care, and the determination of costs. Under s.38 of the 1984 Act, leave for judicial review could only be granted where there was ‘*a manifest error of law on the face of the award*’ or ‘*strong evidence that the arbitrator...made an error of law.*’

### ISSUES

When will the Court grant leave to appeal the decision of an Arbitrator?

### FINDINGS

Croft J reiterated the reasoning in earlier cases that the criterion for granting leave should be restrictive in order that parties accept the decision of the arbitrator whom they initially elected (in their contract) to decide the matter. His Honour found that the grounds contended by the Plaintiffs in the present case largely involved questions of fact rather than law, and that there was no basis for determining that the Arbitrator had erroneously applied the law.

### QUOTE

Croft J:[97] “The alleged errors need to be evident or obvious, rather than arguable.”

[98] “Strong evidence means that it must be shown that there was a strong prima facie case that the arbitrator was wrong on a question of law and in this context the task of the Court is to assess the strength of the case for error, not to decide the case for error.”

### IMPACT

The judgement demonstrates the difficulty in appealing the decisions of arbitrators.

Further, the 1984 Act is the predecessor of the current *Commercial Arbitration Act 2011 (Vic)* (“the 2011 Act”) which forms part of the Uniform Arbitration Legislation and applies in most Australian jurisdictions. The new 2011 Act imposes increased difficulty in obtaining an appeal under s.38; a party can now only appeal an arbitration award where the parties agree *and* the court grants leave.

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