ARBITRATOR / ADJUDICATOR IMMUNITY : THE DOWN UNDER EXPERIENCE

In the United Kingdom the arbitrator enjoys a wide degree of protection against undue pressure, including any attempt by a party to the arbitration to blackmail / cajole / coerce / influence or otherwise threaten the arbitrator, which might adversely impact upon the arbitrator's ability to reach an impartial decision. This protection is embodied in the Arbitration Act 1996 at section 29, which states as follows :-

Immunity of arbitrator.

29(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator ***unless the act or omission is shown to have been in bad faith****.*

29(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.

29(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).

Likewise, the construction adjudicator is also protected by virtue of 108(4) Housing Grants, Construction and Regeneration Act 1996, which requires a relevant construction contract to incorporate adjudicator immunity. S108(4) provides as follows :-

108(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator ***unless the act or omission is in bad faith****, and that any employee or agent of the adjudicator is similarly protected from liability*

If this were not the case, an arbitrator might consciously, or unconsciously, tip-toe around a belligerent litigant during the course of proceedings, be it during case management, during the hearing or in the body of an award, to ward off potential litigation. This would be contrary to the duty to act impartially at all times. It would impede the arbitrator's ability to act in a robust manner as and when required.

Bad faith is the only limitation to this immunity. What then amounts to bad faith? In what circumstances might the immunity be overridden and where that occurs, what is the consequence, first in terms of the enforceability of an award and secondly what are the consequences for the arbitrator? Does the arbitrator forfeit his entitlement to his fees and expenses? Could an arbitrator acting in bad faith be held accountable for any of the consequences of so acting, and if so how extensive would that liability be? Would it extend to the costs of the parties thrown away in the action or perhaps go even further to cover economic loss due to the failure to bring about closure? Apart from removal, what other consequences might flow from an arbitrator being removed on the grounds of bad faith? Recent judgements concerning construction adjudication, both in the UK and in Australia, throw some more light upon these questions.

Setting aside an award and removal of an arbitrator for serious irregularity

This is not the time or place for an extended discussion on the grounds for setting aside an award for serious irregularity or the grounds for the removal of an arbitrator, or to conduct a review of case law in that regard, but a brief reminder of the statutory regime sets the scene for consideration as to what additional recourse might be had against the arbitrator.

Power of court to remove arbitrator.

24.(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds-

- *(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;*
- *(b) that he does not possess the qualifications required by the arbitration agreement;*
- *(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;*
- *(d) that he has refused or failed-*
  - *(i) properly to conduct the proceedings, or*
  - *(ii) to use all reasonable despatch in conducting the proceedings or making an award,*

and that substantial injustice has been or will be caused to the applicant.

24(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

24(3) The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

24(4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

24(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section.

24(6) The leave of the court is required for any appeal from a decision of the court under this section.

Recoverable fees and expenses of arbitrators.

64(1) Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.

64(2) If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties)-

(a) determine the matter, or

(b) order that it be determined by such means and upon such terms as the court may specify.

64(3) Subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

64(4) Nothing in this section affects any right of the arbitrator to payment of his fees and expenses.

Challenging the award: serious irregularity.

68(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

68(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

68(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may-

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

68(4) The leave of the court is required for any appeal from a decision of the court under this section.

The case law to date.

Wicketts v Brine Builders & Siederer [2001] App.L.R. 06/08

This case concerned an application for an order under ***'Section 24(1) of the Arbitration Act 1996'***, for the removal of Mr. Siederer as arbitrator and the grounds set out in subsection (d) namely *'(d) That he has refused or failed (i) properly to conduct the proceedings, or (ii) to use all reasonable dispatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.'*

The court took notice of the overriding principles set out under s1 Arbitration Act 1996, namely that *'The provisions of this Part [which is Part 1 of the 1996 Act] are founded on the following principles and shall be construed accordingly...'* with specific reference to subsection (a) namely *'The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal, without unnecessary delay be expense .. '* and of the arbitrator's duties set out in s33(1) Arbitration Act 1996, to the effect that *'The tribunal shall (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'*

The complaint related to an application to the tribunal for security of costs and peremptory orders. The applicants complained that they had suffered delay and incurred additional costs arising in connection with the failure of the arbitrator to adopt suitable procedures and asserted that the arbitrator failed to understand and apply properly his powers in relations to sections 38(3) and 40 of the Arbitration Act.

Wicketts had accused the arbitrator of spinning out the proceedings and allowing the respondent to conduct his case in such a way, such that costs were through the roof and rising and made it clear that he considered the arbitrator was negligent and incompetent, and that he might well take action against him or make complaint against him.

The arbitrator observed that Wicketts was not so clever having gone through three sets of solicitors.

Wicketts responded that that was because they had all advised him that the arbitrator was mis-conducting the proceedings.

The arbitrator took all this as a threat and advised the other party that this amounted to grounds to overturn any award he might produce on the grounds that it was procured by undue pressure / influence. The parties then unsuccessfully attempted a compromise settlement.

The following day Brine asked for an adjournment on health grounds. Wicketts objected.

The arbitrator initially ignored the application for adjournment and tried to get the parties to deal with the terms of an amended agreement. They refused and insisted on moving to the central issue once submission of evidence was complete.

The arbitrator wrote the next day and directed the parties that should they broker a settlement a draft should be sent to him for approval, instructions on any payment provisions that might go in the settlement including apportionment of the costs of the arbitration and detail arrangements for payment of the arbitrator and directed that no payment could be made until his (the arbitrator's) fees had first been paid. The arbitrator subsequently itemized his bill to date, plus VAT totaling in excess of £20K.

Following a renewed application for security of costs, the arbitrator wrote stating that because of the failure of the parties to fully comply with requests for interim payments of his fees on account, which could indicate that the parties were experiencing financial difficulties and stated that he was minded to direct that both parties provide reciprocal security for the costs of the other party, on the basis of joint and several liability. He subsequently wrote suggesting each party could deposit £13K as an indication of good faith. Brine indicated that they would send a cheque, post dated for 7 days and conditional on the Wicketts doing the same. Wicketts declined.

The arbitrator then informed the parties that he would issue peremptory orders for both parties to provide £30K security of legal costs and an additional £26K security to cover the arbitration fees.

Pending the hearing of an application for removal, pursuant to Section 24(3) the arbitrator decided to plough on, and attempted to set up a hearing. This led to an application for a restraining injunction. At the hearing the arbitrator agreed to an adjournment. After the application for removal, the arbitrator had ordered that a supplemental witness statement be received as evidence despite the absence of any opportunity for Wicketts to challenge the evidence. The arbitrator also permitted Brine to quantify a previously un-quantified counterclaim.

Having noted that the first order was not requested by either of the parties and thus none of the arbitrator's business, His honour Judge Seymour concluded that the second order had no legal foundation. The arbitrator had no perception of his proper functions and duties and was duly removed. This was all without considering events subsequent to issue of the orders. The court capped his fees at £10K.

One might think that in the circumstances the arbitrator was lucky to get what he did. The value of the claim was only £60K. The parties must have run up massive legal expenses. The entire affair had been extremely protracted and at the end of it all they still had no resolution. Nonetheless, the arbitrator received some remuneration (*albeit that the costs of the removal hearing would make a big dent in that sum*) but the parties were left with no recovery for the costs and consequences of the arbitrator's incompetence and inability to manage the arbitration. This is hardly surprising since compensation had not been asked for, no doubt because in the light of the "*section 29 Arbitration Act immunity*" provision, it was felt that such an application would not be appropriate. Furthermore, it is no doubt for this very reason that there is virtually no case law on the broader implications of breach of the "***good faith***" exception to immunity to date.

Rankilor (1) & Perco Engineering Service Ltd (2) v Igoe (M) Ltd [2006] Adj.L.R. 01/27

This case concerned two enforcement actions (1) for monies due pursuant to an adjudicator's decision and (2) payment by the losing applicant for an equal share of the adjudicator's fee. Perco had been retained to carry out boring works. The boring machine failed to bore out one area and took additional time to bore out another. The contract was terminated and traditional excavation methods adopted using an alternative contractor. Due to insufficient data on ground conditions, the contractor had undertaken to carry out the work within 10 days on the basis of normal ground conditions, excluding liability for delay or inability to bore if he encountered unexpected ground conditions.

The client's view was that he had tendered out for boring through clay. The ground was clay and thus there was nothing unexpected about the ground conditions. The problem was due either to worn out boring machinery or inexperienced operators. The contractor's case was that the ground conditions were not normal and prevented the machine functioning or functioning properly. Paperwork established that the boring machine was only 18 months old.

The adjudicator found that the ground conditions were unexpected. This decision was reinforced by his conclusion about why the boring equipment did not perform effectively, which he reached by relying on his own geological expertise. This view differed from that of the claimant and the defendant. The defendant asserted that he has been deprived of an opportunity to address this latter issue which was not canvassed in the adjudication.

The court found that the claimant in the adjudication (here the defendant) had failed to prove his case viz. normal conditions. Whilst the contractor's theory as to the cause of the loss differed from that of both the client's expert and also the adjudicator's alternative explanation (adduced from technical reports of both parties), the adjudicator was entitled to conclude that the conditions were unexpected.

The adjudicator did not have to share all provisional views with the parties. The parties between them had raised all the technical data relied upon by the adjudicator. The defendant had chosen to rely on a bold assertion that the ground conditions were normal, without adducing any proof. He had failed to prove that the machine was defective or adduce evidence of incompetence. He did not adduce any evidence as to why the machine was ineffective. That was his choice. He was not obliged to do so, but a failure to do so meant that the adjudicator was left to reach his own preliminary conclusions. These conclusions were not at odds with the evidence. Accordingly there was no breach of the rules of natural justice. Both of the adjudicator's decisions were accordingly enforced.

What is of interest to us here is the penultimate paragraph of His Honour Judge Gilliland's judgment :-.

33 *Perco is in my judgment entitled to enforce Dr. Rankilor's decision and it must also follow that Dr. Rankilor is entitled to recover the half share of his fee from Igoe. In the circumstances, I do not need to consider Dr. Rankilor's claim that even if his decision had been vitiated by a breach of the rules of natural justice, he would still have been entitled to recover his fee under the terms of the adjudication contract which had been entered into. It is,* ***I must say, a surprising submission that if an adjudicator's decision has been reached in serious breach of the rules of natural justice and thus would not be enforced by the court, that the adjudicator should nevertheless be entitled to claim payment for producing what was in fact a worthless decision*** *without even any temporary binding legal effect. I prefer however to leave that question for determination in a case where it is necessary to do so. The present is not such a case.*

Whilst the problem under discussion is thus alluded to, no further enlightenment on what the answer might be is provided by the judgment. It is nonetheless a clear invitation for a future frustrated party to an ineffective arbitration or adjudication to seek to recover costs thrown away and to withhold fees.

Paul Boardwell v k3D Property Partnership Ltd [2006] Adj.C.S. 04/21[1]

The court found that the adjudicator had failed to consider a substantial part of the defence submission on the grounds that it concerned a counterclaim beyond his jurisdiction. The adjudicator should in fact have dealt with the information to the extent that it also amounted to a defence, whilst excluding the counterclaim element, which in any case was un-quantified at that time and incapable to resulting in an award. The adjudication decision included a statement to the effect that whilst only a limited number of matters were addressed by the decision all other matters had been considered. The court held that the catch all phrase *"all other matters had been considered"* was insufficient to establish that this was in fact the case.

His Honour Judge Raynor noted that the adjudicator intended to pursue an action for outstanding fees and remarked in an aside that the "***Rankilor"*** effect might come into play, with clear reference to paragraph 33 set out above, in that the adjudicator would be pursuing payment for a service that had in the event no value to the defaulting parties. It is not known where events went thereafter.

Timwin Construction P/L v Facade Innovations P/ L [2005] NSWSC 548. 1st June 2005.[2]

A contractor (Timwin) / subcontractor (Façade) construction variations payment dispute was submitted to adjudication. Timwin's response to a payment application was to assert that the variation payments were for works under the contract, that there had already been an overpayment due to duress and asserted a damages claim for delay. Façade's submission to the adjudication sought to demonstrate that clause 7 of the contract (which required written, valued instructions for all variations, in the absence of which the variation would be at the subcontractor's risk) had been waived in that there had been written instructions about many of the variations and promises to pay. Timwin sought to rebut these assertions.

The adjudicator went about the issue a different way. McDougall J found that he had ignored the submissions of both parties and instead found for Façade on the basis that any work done which the contractor had not demonstrated to be within the scope of the works was a variation for which payment was due. This was not an argument explored by the parties in their submissions or responses.

The issue before the court was "*whether the adjudicator, in the way that he dealt with the defence to the payment claim based on the assertion that the variations "****are amounts that should have been carried out pursuant to the contract****", attempted in good faith to exercise the powers given to him by the Act."*

1 Paul Newman's commentary on this case, where an application for summary enforcement was refused, is set out above.

2 Whilst an appeal appeared to be pending against McDougall J's judgement, there is no report of progress to date. However in the interim period, the ***Timwin*** test has been applied on a number of occasions. See ***Fifty Property Investments P/L v Barry J O'Mara*** *[2006] NSWSC 428;* ***Springs Golf Club P/L v Profile Golf P/L*** *[2006] NSWSC 344;* ***Pacific General Securities Ltd v Soliman & Sons P/L*** *[2006] NSWSC 13;* ***De Martin & Gasparini P/L v State Concrete P/L*** *[2006] NSWSC 31;* ***Tolfab v Tie*** *[2005] NSWSC 326;* ***Glen Eight v Home Building*** *[2005] NSWSC 907;* ***Reiby Street Apartments v Winterton Constructions*** *[2006] NSWSC 375;* ***Lanskey v Noxequin*** *[2005] NSWSC 963;* ***Shellbridge P/L v Rider Hunt Sydney P/L*** *[2005] NSWSC 1152;* ***Holmwood Holdings P/L v Halkat Electrical Contractors P/L*** *[2005] NSWSC 1129****; Energy Australia v Downer Construction (Australia) P.L*** *[2006] NSWSC 52.*
At an interlocutory appeal ***Facade Innovations P/L v Timwin Constructions P/L*** *[2005] NSWCA 197* the court of appeal ordered that Order 3 made by McDougall J on 1 June 2005 in proceedings 55035/05 for payment out to Timwin of money paid into court be stayed until the judgment entered in favour of Facade in 11729/05 had been set aside. Nothing in the interim judgment however detracts from the validity of the ***Timwin*** test.

In ***Brodyn v Davenport*** *[2004] Adj.L.R. 11/03* Hodgson JA having canvassed the concept of good faith within the context of ***Anisminic Ltd v Foreign Compensation Commission*** [1969] 2 AC 147, concluded that the payment legislation mandated "*a bona fide attempt by the adjudicator to exercise the relevant power …* " accorded to him by that legislation. He concluded that where an adjudicator does not fulfill the statutory requirements the decision will be deemed invalid. Whilst ***Brodyn*** established that judicial review is not the appropriate mechanism for challenging payment adjudication procedures in New South Wales it nonetheless made it clear that there are mechanisms to set aside an invalid decision and render it unenforceable. The following extract from McDougall's judgment in ***Timwin*** develops the concept of good faith further :-

38 *There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in* ***Brodyn.*** *Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in* ***Roberts v Hopwood*** *[1925] AC 578, 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer."*

39 *That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see* ***Zhang v Canterbury City Council*** *(2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).*

40 *As his Honour emphasised, the requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made. His Honour relied on the tests expounded in* ***The Queen v Hunt; ex parte Sean Investments Proprietary Limited*** *(1979) 180 CLR 322 (Mason J) and in* ***Evans v Marmont*** *(1997) 42 NSWLR 70, 79-80 (Gleeson CJ and McLelland CJ in Eq).*

41 *In the present case, I think that an available, and better, inference is that the adjudicator did not consider, in the sense that I have just explained, the submissions for the parties in which the ambit of the dispute that was intended to be raised in relation to variations was explained. Had he turned his mind to those submissions, he would have known what it was the parties understood the dispute to be; what it was that they were arguing. Because he did not, as it appears, turn his mind to those submissions, he did not deal with the real dispute.*

42 *It is of course apparent that the adjudicator turned his mind to the submissions for Timwin. However, did he so in the context of dismissing them (on this issue) because of s 20(2B). Had he read, and given consideration to, the submissions for Façade, he could not reasonably have done this. That, to my mind, supports rather than denies the drawing of the inference that the adjudicator did not have regard to, or consider, the relevant submissions.*

43 *I therefore conclude that the adjudicator did not attempt in good faith to exercise the power given to him by the Act because he did not attempt in good faith to consider the submissions put by the parties to understand what, in relation to variations, the real dispute was.*

His Honour continued

49 *I am conscious that the question of (in effect) attempting in good faith to exercise the power given by the Act has not been the subject of prior judicial exposition. However, the relevant question is one that was argued for the direct benefit of Façade and not merely as a service to the industry. In those circumstances, I see no reason why the usual order for costs should not be made.*

50 *Façade also asked that I make an order referring the matter back to the adjudicator to be dealt with according to law. I do not propose to do so, in circumstances where the time for the making of a determination has long since expired and where Façade's rights are preserved under s 26 of the Act. In that context, and unless it is not crystal clear, I should say that the view to which I have come has nothing to do with the merits of the case, and does not prevent the present or any other adjudicator from determining a further adjudication application, based on the same payment claim, according to law.*

Whilst it is to be noted that ***Timwin*** does not and could not have dealt with the liability of the adjudicator for costs thrown away, what it does do is to throw some light upon what "***good faith***" involves. The implication is that it is not restricted to "***bad faith***" but embraces a failure to fulfill or comply with the statutory duties that one has voluntarily undertaken by accepting a public or private appointment. Australia has taken the lead on

the development of jurisprudence in relation to good faith generally. Thus ***Zhang v Canterbury City Council***, noted in ***Brodyn*** above, concerned the duties of a planning tribunal which pursued its own policy agenda against prostitution, un-related to the criteria for planning permission. Where as "***misconduct***" by an arbitrator provides grounds for setting an award aside and for the removal of an arbitrator, the court both at first instance and on appeal in ***Sea Containers v ICT*** *[2002] NSWSC 77; NSWCA 84* went one step further and adopted a robust view to the misconduct of arbitrators who were more concerned with securing their fees than the business at hand and deprived them of the very fees they had been so anxious to ring-fence. Even so the arbitrators escaped any further liability for the legal costs incurred by the parties.

Traditionally the status of good faith agreements has been considered to be extra-legal, equating such commitments as promises to do something ***in good faith,*** the absence of which has no legal repercussions, since there is no intention to be legally bound by the promise. There is however a leap of logic in such a conclusion. Whilst it would be contradiction in terms to force parties to agree and thus comply with an agreement to agree, as per ***May v Butcher*** [*1929] ADR.L.R. 02/22* and ***Walford v Miles*** *[1992] 2 AC 128,* it does not follow that the parties intended the undertaking to be optional. After all, it is possible to measure the extent to which the parties have or have not complied with the undertaking. This has been acknowledged already to the limited extent that the courts are prepared to stay court action pending participation in settlement negotiations, whether the parties have contractually committed themselves to do so, or indeed where the court considers that it would be beneficial for the parties to do so. It is not uncommon in US jurisdictions for the court to require a mediator to submit a report to the court, detailing the extent of participation in the mediation process of both parties, recording both attendance and the level of co-operation, noting any refusal to put forward a case or to otherwise actively engage in the process. Such conduct, it is submitted, amounts to a failure to do that which one has undertaken to do and would fit within the ***Timwin*** definition of an absence of "***good faith***".

Immunity is important to guard against behaviour that might prejudice the ability of an adjudicator to act impartially. Nonetheless, Parliament has made it clear by inclusion of the absence of "***good faith***" exceptions that there is no intention to extend the blanket immunity enjoyed by the judiciary to arbitration or construction adjudication. Despite stout resistance from the professions, long standing immunities based on public policy are gradually being stripped away. The mere objection that it is difficult to strike the right balance between competing public and private interests is no longer sufficient justification for not providing a remedy for the consequences of professional incompetence, as demonstrated by ***Arthur J.S Hall and Co. v Simons*** *[2000] UKHL 38,* so that today even lawyers can be held liable for incompetence in the presentation of a case.

The accountability (if any) of an arbitrator to a professional governing body for misconduct is small comfort to those who have costs thrown away by incompetence. To place the risk of professional incompetence on the parties to carefully choose who they appoint is not realistic, since they have little scope to assess the risk beyond relying on the reputation of the professional body, which also enjoys immunity. Clearly, it would be unsatisfactory to expose an arbitrator to legal suit at the whim of any and every unsuccessful party. If such litigation were to amount to a retrial, that would be tantamount to by-passing the appeal process and afford the litigant another bite of the cherry. That cannot be the way forward. The Supreme Court, Ontario, Canada held in ***Ryman v Ontario Association of Architects*** *[1998]* that professional indemnity cover extended to liability for losses arising from the incompetence of an arbitrator. It is only through an action for professional incompetence that the parties can avail themselves of the protection provided by professional indemnity cover. It is almost inevitable that the courts will in due course have to develop a jurisprudence of accountability for arbitrators, adjudicators and mediators. Perhaps ***Timwin*** points the way.

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