

JURISDICTION OF ARBITRATOR ON REMISSION OF AN AWARD

Supreme Court of New South Wales,

Unreported, Giles J, 14 November 1994.

- Mark Blake Builders Pty Limited v John Frederick Davis and anor

Even though the amendments to section 38 of the Commercial Arbitration Act 1984 (Act) have reduced the scope for appeal from arbitral awards, remitters are, it seems, one of the occupational hazards of being an arbitrator.

The recent decision of Giles J in *Mark Blake Builders Pty Limited v Davis & Anor* (unreported, Supreme Court of New South Wales, 14 November 1994) demonstrates the legal technicalities that attend the remittal of arbitral awards under section 43 of the Act.

The facts of this case arose from disputes over a residential building contract. The disputes were of the usual kind, variations, extension of time claims, delay cost claims, claims for defective work and liquidated damages.

In March 1994 the arbitrator published an interim award giving the builder a net award in its favour. Later, a final award dated 2 May 1994 was published which awarded interest and costs in the builder s favour.

The proprietor sought to set aside the interim award on the basis of misconduct.

The misconduct alleged against the arbitrator was of a technical type, namely that in making findings in connection with the extended date for practical completion and the associated issues of extensions of time, delay costs and liquidated damages, he went beyond the case as pleaded and particularised by the builder in two respects, only one of which is relevant.

In particular it was alleged against the arbitrator that in relation to a claimed cause of delay, being the supply and installation of motorised blinds, the builder's pleaded case was that a request for instructions was satisfied on 2 December 1992, but the arbitrator found that the request was satisfied on a later date, not pleaded, 23 December 1992. This had consequences for delay costs, the date for practical completion, as extended, and liquidated damages.

The proprietor s complaint was upheld by Giles J on 24 June 1994. (Refer, *The Arbitrator*, Vol 13 No 3 November 1994, P. 170). The interim and final awards were set aside and remitted to the arbitrator for reconsideration in the light of his Honour s judgment. The orders of Giles J were:

1. *I set aside an interim award dated 30 March 1994 to the extent stated in these reasons and remit the award to the arbitrator for reconsideration in the light thereof.*
2. *I set aside the award of 2 May 1994 and remit it to the arbitrator so that any adjustments thereto which flow from his reconsideration of the interim award can be made.*

The remitter proceeded with the parties providing further written and oral submissions to the arbitrator. No additional evidence was tendered and importantly there was no application by the builder to amend its pleadings.

The proprietor, in its submissions, took the view that the result of Giles J's judgment was that there was no existing award dealing with the date for practical completion, delay or liquidated damages and that the remitter reopened those matters for consideration. In short, the proprietor saw the effect of the remitter as being wider than merely an adjustment of the date for practical completion, having regard to the terms of Giles J's judgment.

The builder's position was that the remitter did not include all matters the subject of delay claims. In passing his Honour did not consider this to be correct because if there were claims which were previously thought to be irrelevant in context of the arbitrator's original reasoning (because they were not critical or were concurrent), then having regard to the court's findings, they may have warranted further attention to see whether they were in fact critical. Relying on Giles J's orders and his conclusions, the builder contended that the arbitrator was confined in his task. In effect, the builder submitted that there ought to be no new consideration of the motorised blinds delay claim, but the extension of time granted should be trimmed back from 23 December to 2 December.

On the parties' submissions, the battle lines were clearly drawn. The proprietor was contending that the effect of the remitter enabled the arbitrator to reconsider afresh the issues of delays and extensions of times. The builder contended that the arbitrator's tasks on the remitter were confined and narrow.

The arbitrator provided a second interim award on 22 September 1994 which differed substantially from the first interim award. The cause of delay in issue, the supply and installation of motorised blinds, in contrast to the original interim award, was found not to be critical at all. No extension of time was found to be justified. The consequence was that the:

- (a) builder's delay costs were reduced; and
- (b) proprietor's liquidated damages increased.

The proprietor's overall liability was consequently reduced. The builder now attacked the arbitrator's second interim award on the basis that the arbitrator had exceeded his jurisdiction on the remitter.

In its attack on the award, the builder maintained the position adopted before the arbitrator, namely that the form of the court's orders only allowed an adjustment of the period of delay relating to motorised blinds. It followed, in the builder's submission, that the arbitrator had no power to consider the matter afresh and to make the relevant finding expressed in the second interim award.

The proprietor submitted, to the contrary, that due to the court's orders and its remitter, issues of delay and extensions of time in connection with the motorised blinds were at large and the arbitrator was entitled to make findings in the way that he did.

Whether or not making an award for which there is no jurisdiction amounts to technical misconduct was not expressly decided by Giles J

because he found that in any event it was clear that an award made without jurisdiction is void.

The court examined the position of an arbitrator after the publication of the award. It appears that the principles are as follows:

1. After the publication of an award, an arbitrator is *functus officio*. There is no power to alter the award except for the power to correct it in conformity with section 30 of the *Commercial Arbitration Act 1984* - slip rule.
2. If the award is wholly set aside (and the arbitrator is not removed) the arbitration reverts to the position before the publication of the award. The arbitrator regains his jurisdiction. He is not bound by his previous findings.
3. Where an award is set aside in part, the arbitrator does not regain jurisdiction in respect of that part of the award which was not set aside.
4. The arbitrator is entitled to reconsider matters in respect of which the award was set aside.
5. Where an award is set aside in part the jurisdiction of the arbitrator will depend upon the terms of the court's order. To work out the extent to which the arbitrator's power has been revived, it may be necessary to look to the terms of the judgment. It is permissible for the arbitrator to look at the judgment as a whole to see whether there is an implied or express limitation of jurisdiction on remission.
6. An arbitrator has no jurisdiction to go beyond what is necessary to give effect to the order of the court.

The Builder's arguments prevailed. The court found that on the terms of its original orders and judgment, the arbitrator's jurisdiction was limited. There was no jurisdiction to consider the motorised blinds extension of time claim afresh or to treat issues as being at large.

On the facts of this case the arbitrator had only limited jurisdiction. He could have:

- (a) dealt with an application to amend. No application was made;
- (b) revised the award to trim the extension of time relating to the motorised blinds claim back to 2 December 1992, the date pleaded; and
- (c) reconsidered whether any delay claim that he thought was concurrent with the motorised blinds claim, should be reconsidered further having regard to the fact that the blinds delay claim was to be revised back to 2 December 1992.

Accordingly, the arbitrator's second interim award was treated as a nullity. The arbitrator was obliged, for the second time, to take up the original awards as remitted to him and with the benefit and guidance obtained from the judgment, reconsider the matters remitted to him and make awards in conformity with them.

The facts of this case provide a clear example of the desirability of arbitrators being clear about what is required of them when awards are remitted.

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