

Villani and Anor v Delstrat Pty Ltd and Anor [2002] WASC 112

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Arbitrators are required to address all the issues before them during an arbitration hearing, as failure to determine all issues may result in misconduct or a breach of the rules of natural justice. Where misconduct is found, what happens to the award, and what is the arbitrator's position?

The applicants, Mr and Mrs Villani, had entered into a contract with Delstrat Pty Ltd to build a house in Ascot Waters, Perth. During the contract a dispute arose which was referred to arbitration. By their application, Mr and Mrs Villani sought to set aside the arbitrator's award by reason of misconduct, as "... *the arbitrator [had] misconducted the proceedings by failing to decide substantial pleaded issues between the parties.*"

The contract was alleged to have been partially written and partially oral. Alleged oral terms included that the works would be substantially completed by 1 July 2000; that only 10% of the works would attract GST liability. In the alternative, the Villanis claimed that the builder had made an oral representation about the date of completion which was misleading and in contravention of TPA (Cth) s52 and FTA (WA) s10. Submissions made during the hearing before the arbitrator dealt with both the alleged misleading and deceptive conduct and the alleged oral representation about the date of practical completion.

The arbitrator's award set out what he considered the contract documents to be. These were the normal written contract documents. The award then stated, under the heading "Commercial Arbitration Act Section 22", that it had been agreed at the preliminary meeting that the application of s22(1) of the Act (according to law) would be applicable. The award also stated that the arbitrator's determination was therefore stated on the contract documents; it then stated "*after hearing the evidence of the witnesses, examining the contract documents and other exhibits together with the points of claim and defence and the parties find submissions, I award and determine as follows ...*"

The award indicated the arbitrator's findings on various matters and included when practical completion could have been achieved. The reasoning of, and conclusion on, this issue did not deal with the claim from Mr and Mrs Villani that a term of the contract relating to practical completion had been breached (their claim of practical completion was six months earlier than the date found by the arbitrator). Breaching of this term and the damages which flowed from the alleged breach were also not considered by the arbitrator in the award.

This raised four issues in McKechnie J's judgment.

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1. Had the arbitrator failed to decide or consider an issue raised in its arbitration, as there was no mention of the issue in the arbitrator's award?

This was to be decided as a question of fact to be inferred from all the circumstances.

The issue which the arbitrator had failed to consider was the Villani's alleged oral date of practical completion, and also what they alleged comprised the contract. These were central to the Villani's counterclaim.

In the award of the arbitrator after setting out the contract documents:

- (a) there was no mention of the alleged oral contract terms nor of any alleged implied terms;
- (b) no determination was reached in regard to whether other documents or oral terms were part of the contract;
- (c) the issue of alleged practical completion was not considered;
- (d) no reason was given for omitting (a) to (c) above.

McKechnie J stated that in an award:

- "(i) it is not necessary to deal with every submission or issue put forward by each party; but*
- (ii) the issues which will materially affect the result, such as the substance of a claim or counterclaim, must be dealt with."*

On this basis, identifying the date of practical completion and what constituted the contract were of fundamental importance to the Villani's counterclaim, the Judge found that by not including these issues, the award failed to determine all necessary issues required to be decided under the arbitration.

2. Having found such a factor, would this amount to misconduct under the Commercial Arbitration Act s42?

This was to be decided as a question of law, following the finding of fact in 1. (above).

Under Section 4 "misconduct" is defined inclusively as "corruption, fraud, partiality, bias and a breach of the rules of natural justice". The Court has the power to set aside an arbitrator's award where an arbitrator has either misconducted the proceedings or there has been misconduct on the part of the arbitrator, under s42(1)(a) of the Act.

There is undoubtedly a requirement for an arbitrator to give written reasons under s29(1) of the Act. In this case the issue is whether the award breaches the rules of natural justice due to the failure to give sufficient reasons.

The main rationale of the rule was explained as giving the parties the opportunity to exercise their appeal rights; also there is an overall obligation to be seen to provide procedural fairness on all parties.

Is procedural fairness equivalent to the rules of natural justice? This question was left open; McKechnie J found that there was procedural misconduct due to the award of the arbitrator failing to resolve an issue in connection with the arbitration. Therefore, whether misconduct arose from the failure to give adequate reasons is a breach of the rules of natural justice, was a question not required to be answered.

The arbitrator has a duty to resolve all issues in disputes as defined by points of claim and

points of defence, except where such issues have been abandoned by the relevant party. When a dispute is submitted to arbitration, there is an implied condition that the arbitrator will make a finding on issues in dispute.

Thiess Contractors Pty Ltd v. Water Corporation of Western Australia (unreported; S Ct of WA; Library No. 970561; 28 October 1997 per Parker J at 38) was followed and confirmed that misconduct in an arbitration can occur when all issues in dispute have not been decided as the process "has, or may have, unjustly prejudiced a party in some respect material to the outcome".

It would appear that the distinction between an arbitrator breaching the rules of natural justice, and an arbitrator operating contrary to a general rule of law is a fine one. For the majority of potential cases of misconduct, it is a distinction which the courts need not decide on.

- (a) All issues in dispute were not considered by the arbitrator's award.
- (b) As a result of (a) above, not all issues in dispute were determined by the arbitrator's award.
- (c) The award is not an award with respect to the whole dispute.
- (d) The award fails (by omission) to show the reasoning process of the arbitrator; this failure gives rise to material procedural unfairness.
- (e) Procedural unfairness may/may not also amount to a breach of the rules of natural justice.

3. Having found the existence of procedural unfairness, the question was then whether the award should be set aside by using discretion of the Court?

It was found that Mr and Mrs Villani could have potentially received the full amount of their claim and therefore the failure to deal with any issues of their claim meant that they may have been materially unjustly prejudiced.

4. If the award is set aside should the matter be remitted by the Court back to the arbitrator, or should that arbitrator be removed?

After noting that an arbitrator may be removed under s44(a), it appears that no reason was advanced to require such a removal. McKechnie J considered that the failure of the arbitrator in dealing with every issue did not involve any moral wrongdoing or display any bias, prejudice, interest or corruption, sufficient to remove him.

In the absence of any contrary compelling reason, it makes practical sense to remit the matter back to the arbitrator for resolution of the remaining outstanding issues, as the arbitrator has already heard the evidence and is familiar with the matter.

A further advantage of using the existing arbitrator to resolve the remaining outstanding issues is that he can revisit his award to the extent affected by the new award. The matters already determined by the award, and not affected by the outstanding issues, are not to be revised.

Having decided these issues in this manner the award was set aside, with the arbitrator to resolve the questions previously not considered by his award.

This case illustrates the dangers to arbitrators that can occur if all claims are not given sufficient attention. The points of claim and defence and counterclaim need to be considered sufficiently by arbitrators to fully grasp each material claim, and understand each issue in dispute. If this understanding is not achieved by the arbitrator, then the danger will always be apparent that the award will be set aside for misconduct, as all issues in dispute have not been resolved.

According to an unwritten arbitration convention, awards are written more for the unsuccessful party rather than the successful one. In this case the failure found in the award was sufficient to sustain a finding of misconduct, as claimed by the unsuccessful party, despite their being no "moral turpitude" shown by the arbitrator.