

The Principles Of Interpreting An Arbitral Award

- **Keith Redenbach, Minter Ellison Lawyers.**

Where a building contract provides for arbitration, the arbitrator's award will generally bind the parties. However, when considering the finality of the award, it is necessary to look not only at the legislation and contractual provisions relating to arbitration but also to the very nature of the award itself.

In a recent decision - *Gingis & Anor v Mount Scopus Memorial College Ltd* ("Gingis") - the Court of Appeal of the Supreme Court of Victoria examined the principles of interpreting an arbitral award.

Although the decision does not involve a building dispute, the principles expressed can be applied to arbitral awards in building disputes.

The facts

The plaintiff (the "school") sued the defendants/appellants (the "Gingis") in the County Court claiming payment for unpaid school fees. The Gingis' denied that they owed money to the school and argued that a dispute referred to arbitration by Rabbi Heilbrunn resulted in an "award" that was binding.

The County Court found in favour of the school and awarded it \$45,196 plus interest and costs. The Gingis' appealed to the Court of Appeal of the Supreme Court of Victoria and argued that the "award" by Rabbi Heilbrunn prevented the County Court from deciding the case.

The issues the court considered

The Court of Appeal had to consider two main issues. First, was there a relevant "award" made by the arbitrator? Secondly, were the terms of that award such as to preclude the school from suing the Gingis'?

The Court of Appeal considered s.28 of the *Commercial Arbitration Act* 1984 (Vic), which provides that an arbitrator's award is final and binding on the parties to the agreement.

The court's decision

The Court of Appeal concluded that the arbitrator had not made a valid award.

The court then commented that even if an "award" existed to the extent claimed, the terms of such an award did not prevent the school from suing the Gingis' for repayment of \$45,196 plus interest and costs.

Accordingly, the appeal was dismissed with costs and the order made by the County Court against the Gingis' stood.

Some observations

In his decision, Justice Charles, one of the judges of the Court of Appeal, cited the main authorities concerning the interpretation of an arbitral award and noted that arbitral awards may govern the rights of parties and prevent them having the matter decided in the courts.

Justice Charles identified certainty, completeness and finality of the award as the primary requirements for an award to exist. The court noted that arbitral awards that contain mere suggestions or recommendations may lack the primary elements of an arbitral award.

In interpreting the terms of an arbitral award, the courts will adopt the interpretation most favourable to preserving the award, subject to the requirements of certainty, completeness and finality.

According to the court, the primary requirements of an arbitral "award" include language that clearly shows that the arbitrator has come to a decision on the points submitted for arbitration and a final determination of the rights of the parties.

Arbitrations in building matters

Section 14 of the *Domestic Building Contracts Act* 1995 (Vic) states that:

"[a]ny term in a domestic building contract or other agreement that requires a dispute under the contract to be referred to arbitration is void."

This prevents arbitrations in domestic building disputes, which must instead go to the Victorian Civil and Administrative Tribunal. Similar provisions exist in other states (for example, in Queensland see s.67 *Queensland Building Services Authority Act 1991*).

“Arbitrations” are common in other building disputes. Parties often agree to resolve disputes by engaging an expert building consultant to make a decision (or “award”) about the matter that the parties agree will be final and binding.

As illustrated by the *Gingis*’ case, an arbitral “award” will need to be certain, complete and binding on the parties. For instance, clear documentation of any arbitration agreement and a binding decision will assist in ensuring compliance with these criteria.

It may then be possible to argue that the *Commercial Arbitration Act 1984* (Vic), and similar legislation in other states, prevents the dispute from becoming the subject of litigation.

Clearly, arbitral awards that meet the criteria identified by the Court of Appeal in the *Gingis*’ case will have more chance of preventing the courts from hearing and determining the dispute after the building arbitration.

- Minter Ellison’s On Site.