

The Giving of Reasons in Arbital Awards

SUPREME COURT OF NEW SOUTH WALES

Smart J.

1st December, 1986

Menna v. H. D. Building Pty. Ltd.

Application for Leave to Appeal.

Section 29(1) of the *Commercial Arbitration Act* 1984 (NSW) ("the Act") provides that an arbitrator shall: —

"(c) include in the award a statement of the reasons for the making of the award".

THE FACTS

ELEONARA MENNA ("the proprietor") entered into a written lump sum building contract with H. D. Building Pty. Ltd. ("the builder") on 19th January, 1986, to erect a first floor addition to the proprietor's premises. The contract price was \$40,000, subject to duly authorised variations.

Before the work was completed, disputes arose as to whether the builder or the proprietor engaged in repudiatory conduct, thus raising a question as to which party had lawfully terminated the contract. The builder claimed to be entitled to sue on a quantum merit basis for the value of work and materials supplied including variations. The proprietor in turn cross-claimed that she was entitled to damages for the cost of completion and rectification. The proprietor also claimed that under Section 45 of the *Builders' Licensing Act* 1971 (NSW) the builder was restricted to suing pursuant to the contract and therefore could not claim on a quantum merit basis.

THE AWARD

The dispute was referred to arbitration and an award was handed down by the arbitrator on 20th August, 1986. The findings of the arbitrator were as follows: —

1. That on balance the proprietor's purported termination amounted to a repudiation of the contract.
2. That the builder was entitled to claim on a quantum merit basis.
3. That the value of work done and materials supplied by the builder amounted to \$51,545.01.
4. That \$4,960 representing the costs of rectification be deducted from the above sum.
5. That \$35,584.65 had been paid by the proprietor and, accordingly, the builder was entitled to an award of \$11,000.36.

The proprietor pursuant to Section 38(4)(b) applied to the Supreme Court for leave to appeal against the award on the grounds that: —

1. Insufficient reasons were provided by the arbitrator, and that;
2. The arbitrator had erred in law in allowing the builder to claim on a quantum merit basis.

SMART J'S DECISION

Upon the hearing of the application, Smart J. granted leave to appeal on the ground that the award contained insufficient reasons. Pursuant to Section 38(3)(b) of the Act, His Honour remitted the award to the arbitrator to enable the provision of sufficient reasons. Smart J. felt it unnecessary to consider the second ground of appeal until adequate reasons for the award were provided.

His Honour stated that the duty to give reasons called for "the arbitrator [to] deal with the issues raised before him and [to] make all necessary findings of fact". Citing the dicta of Hutley J. A. in *Housing Commission of New South Wales v. Tatmar Pastoral Company Pty. Ltd. & Anor* (1983) 3 NSWLR 378 with approval, (a case concerning the duty of a judge to give reasons), Smart J. formulated the test for a breach of the duty to give reasons as follows:—

"... that it must be shown that the finding of fact not made would, if made, have given rise to a question of law upon which an appellate court would have ordered a new trial".

In applying the test to the facts before the Court, His Honour found the arbitrator's reasons for the award to be insufficient in several respects. That is, in making the award, the arbitrator failed to:—

1. Set out the facts that led to his conclusion that the proprietor and not the builder had been guilty of repudiatory conduct;
2. Indicate the basis for calculating the sums representing the value of work and materials provided and the cost of rectification;
3. Address the issue as to what work represented duly authorised variations and what work remained incomplete.

In adopting such a test His Honour imposes an obligation upon arbitrators equivalent to that imposed upon judges in judicial decision making at common law. At common law the extent of the duty to give reasons has been formulated as such in order "to allow a party to exercise appeal rights". (*The Housing Commission* case Supra at 386 per Mahoney J. A.). In framing awards arbitrators should take care that the reasons provided address all the issues raised between the parties and that the findings of fact underlying the arbitrator's decisions be explicitly stated.

Failing this, an arbitrator may find his award the subject of an appeal to the Supreme Court under the Act. The message of the judgment is clear—at the end of the day the parties are entitled to know why any given award has been made.

Editor's Note:

For further reading on the important matter of "reasons" please refer to page 23 of this issue of "The Arbitrator".