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Case note
Arb-med-arb: Follow the rules or face the costs

Ku-ring-gai Council v Ichor Constructions Pty Ltd[1]

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Abstract

*This case note by Erika Williams and Alex Nicolaidis examines the New South Wales Supreme Court decision of Ku-ring-gai Council v Ichor Constructions Pty Ltd [2018] NSWSC 610 (**Ku-ring-gai Decision**). The Ku-ring-gai Decision provides an important reminder that courts are prepared to take a strict approach when construing prescriptive legislative requirements, such as the 'arb-med-arb' provisions of the Commercial Arbitration Act 2010 (NSW) in this case. Arb-med-arb describes the process where an arbitrator ceases to act as an arbitrator in order to act as a mediator in arbitration proceedings and then later continues in their mandate as an arbitrator, following mediation.*

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Introduction

The decision in *Ku-ring-gai Council v Ichor Constructions Pty Ltd*[4] by the New South Wales Supreme Court is a reminder of the strict approach courts take when construing prescriptive legislative requirements. The term 'arb-med-arb' describes the process where an arbitrator ceases to act as an arbitrator in order to act as a mediator in arbitration proceedings and then later continues in their mandate as an arbitrator, following mediation. In the primary decision,McDougall J held that an arbitrator had no mandate to continue arbitration proceedings following his acting as a mediator in the same proceedings, where he had failed to obtain the written consent of all parties to do so.

However, in 2018, the Ku-ring-gai Council (**Council**) filed an application for leave to appeal this decision and Ichor Constructions Pty Ltd (**Ichor**) filed a notice of motion to dismiss the Council's application as incompetent on the basis that under the *Commercial Arbitration Act 2010* (NSW) (**Act**), the primary decision was final. The New South Wales Court of Appeal dismissed the application as incompetent and made a costs order against Council for both the costs of the Council's application and Ichor's objection to competency.

This case serves as an expensive lesson to the parties to follow the letter of the law when it comes to arb-med-arb.

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[4] [2018] NSWSC 610.

Facts

This case concerned a construction dispute between Council and Ichor, which found its way to arbitration. During the arbitration, both parties agreed in writing to engage in what would turn out to be unsuccessful mediation, with the arbitrator assuming the role as the mediator. Following the mediation's conclusion, the parties recommenced arbitration. Ichor, four business days after the conclusion of the hearing, sent a letter to Council 'in protest' claiming that they had not consented when the mediation transitioned back to arbitration.[5] The Council sought orders in the Supreme Court claiming that the arbitration should continue, which was opposed by Ichor.

Section 27D(1) of the Act provides that an arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement if:

(a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration), or
(b) each party has consented in writing to the arbitrator so acting.

Section 27D(4) of the Act then provides that an arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.

McDougall J, in reaching his decision, was asked to consider the following questions:[6]

(a) Did the arbitrator act as a mediator?
(b) If the arbitrator did act as a mediator, did the parties give their written consent before the arbitrator resumed the arbitration?
(c) If those consents were required and had not been given, had Ichor waived its right to object to the arbitrator resuming the arbitration?
(d) Alternatively, was Ichor estopped from asserting that the requirements of s 27D(4) were not met?

Was the arbitrator acting as a mediator?

On the last day of the arbitration, in an 'off the record' discussion, the arbitrator asked if the parties would consent to his putting forward a settlement proposal. The arbitrator said he would only put a proposal forward 'under the cloak of mediation'.[7] The parties signed written consent to engage the arbitrator as a mediator for the purposes of him putting forward a proposal. The arbitrator clearly intended he would be acting as a mediator in putting forward his proposal, and in doing so was acting in a non-arbitral character. The Council argued that because the arbitrator had not exercised all the functions of a mediator he was therefore not acting as a mediator.

McDougall J observed that there was no reason why all the 'features' of a mediation need to be present before there can be a mediation.[8] The arbitrator and the parties had clearly intended to mediate and held that the Act should be construed in such a way which promoted simplicity and certainty of operation.[9]

[5] Ibid [67].
[6] Ibid [3].
[7] Ibid [31].
[8] Ibid [40].
[9] Ibid [45].

The parties, having engaged in mediation, were therefore obliged to satisfy the precondition of written consent in section 27D(4) before recommencing the arbitration.

Was written consent obtained?

McDougall J observed that where written consent is a requirement for something to happen, what is needed is a written expression of consent signed by, or otherwise attributable to, the parties whose consent is required.[10] Even though both parties had continued with the arbitration, following the unsuccessful mediation, it was not sufficient to abrogate the requirement of written consent.

Had Ichor waived its right to object?

Council sought to rely on Article 4 of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) which provides that a party may waive its right to object by proceeding with the arbitration with knowledge that a requirement under the arbitration agreement had not been complied with. McDougall J noted that Article 4 of the Model Law intentionally requires actual knowledge as it does not contain the phrase 'knows *or ought to* know'. Council submitted that by proceeding with the arbitration, following the unsuccessful mediation, without written consent, Ichor had waiver its right to object. The court disagreed, observing that Article 4 could not operate as the unchallenged evidence of Ichor was that it (including its principal) did not have actual knowledge of the written consent requirements of section 27D(4) at the time the arbitration was continued. As such, there was no waiver.

Did estoppel arise?

The Council also advanced estoppel arguments. McDougall J dismissed these arguments hastily, questioning how a conventional assumption could overcome the need for written consent where neither party was aware of such a requirement. Put another way, absent knowledge of the requirement of section 27D(4), there could no be estoppel.

Appeal

The appeal in this matter was heard on 13 September 2018 and the decision of the New South Wales Court of Appeal, written by Bathurst CJ with whom Beazley P and Ward CJ in Eq concurred, was handed down on 5 February 2019.[11]

Before the Court of Appeal could determine whether the application for leave to appeal was incompetent, they were first asked to determine whether the power for the Supreme Court to hear and determine the proceedings at first instance arose under s 14(2) or s 17J of the Act.

Section 14 of the Act provides for situations where an arbitrator becomes in law or in fact unable to perform his or her functions or otherwise fails to act. Section 14(2) gives the courts the power to determine any controversy in relation to an arbitrator's failure or impossibility to act and section 14(3) provides that a decision by the court under section 14(2) that is within the authority of the court is final.

On the other hand, section 17J gives the court authority to order interim measures.

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[10] Ibid [56].
[11] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2019] NSWCA 2.

Chief Justice Bathurst concluded that a decision on whether the mandate of the arbitrator had been terminated was not an interim measure but fell within the ambit of whether an arbitrator was unable to perform under section 14(1) of the Act.[12] Accordingly, the court at first instance was operating under section 14(2) when it determined the arbitrator's mandate had been terminated. It followed, that the question for the court of appeal was whether the primary decision was final pursuant to section 14(3) of the Act.[13]

Chief Justice Bathurst first noted that the words '*within the authority of the court*' in section 14(3) contemplated a review of a decision under section 14(2) for jurisdictional error but commented that only a limited form of review should be available.[14]

Following an analysis of the text, context and purpose of section 14(3), Bathurst CJ adopted the construction that promotes the paramount object of the Act stated in section 1C, namely, to '*facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense*'. Bathurst CJ observed that appeals on the issue of whether an arbitrator was unable to act would only delay the process. The application for leave to appeal was held to be incompetent and dismissed on that basis.[15]

Bathurst CJ did comment that, in any event, he would not have granted leave to appeal as '*the application did not raise any matter of general importance or principle*'.[16]

Council was ordered to pay Ichor's costs of the application, including the objection to competency.

Conclusion

In all Australian States and Territories, an arbitrator can act as a mediator during arbitration proceedings and then later recommence their mandate as an arbitrator, conditional upon the written consent of all parties being obtained, that right is preserved in section 27D(4) of each arbitration act in Australia. Failing to observe strict prescriptive legislative requirements can lead to significant costs, cause lengthy delays in achieving resolutions, require the appointment of a new arbitrator and potentially render arbitration awards unenforceable. The consequences for arbitrators who fail to follow these requirements can be equally damaging.

Parties contemplating appealing an arbitral award or a decision of the court in relation to arbitration should also bear in mind that, when considering whether an award or decision of the court is final in the context of arbitration, the courts can and will take into account the paramount object of the Act, namely '*to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense*'. Appealing and award or decision which goes against this paramount object can prove costly, as Council learnt in this proceeding.

[12] Ibid [65].
[13] Ibid [66]-[67].
[14] Ibid [71].
[15] Ibid [74].
[16] Ibid [79].

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