

In the recent decision of *CBI Constructor's Pty Ltd v. Chevron Australia Pty Ltd* [2023] WASCA 1, Western Australia's Court of Appeal confirmed the primary judge's decision to set aside an arbitral award on the basis that, when the award was made, the arbitral tribunal was *functus officio* (that is, the authority of the tribunal had been completed or exhausted) and on other related legal grounds.

The Court of Appeal's decision highlights the dangers that can arise in failing to properly advance a case on liability in bifurcated disputes.

Procedural History

The underlying arbitration proceedings concerned a claim by CKJV (the eventual appellant) in respect of its alleged entitlement to reimbursement of costs of "Staff" and other services on the Gorgon oil and gas project, and Chevron's contention (by counterclaim) that CKJV had overcharged it.

The dispute was split so that liability and quantum would be dealt with separately, with the tribunal to determine the parties' liability first.

Central to the present dispute were two awards issued by the tribunal:

1. The first, dated 14 October 2018, related to issues of liability in accordance with earlier interlocutory arbitral orders (First Interim Award)
2. The second, dated 2 September 2020, the subject of the primary decision (Second Interim Award)

In the First Interim Award, CKJV failed in its primary case that it was entitled to recover remuneration for Staff by reference to contractual rates. However, the tribunal determined that in CKJV's alternative case, in response to Chevron's counterclaim, CKJV was entitled to raise matters going to show the actual overall costs of Staff.

The Second Interim Award addressed whether CKJV was precluded (by issue estoppel, *res judicata* or Anshun estoppel) from pursuing a case (and, by extension, whether the tribunal were precluded from hearing the case by reason of the *functus officio* principle) that it was entitled to recover not just the actual costs incurred, but a cost determined by reference to certain contractual criteria referred to in an attachment to the contract (Contract Criteria Case).

In the Second Interim Award, the tribunal (by majority) found that the tribunal was not *functus officio* and that CKJV was not precluded from arbitrating its Contract Criteria Case. The arbitrator in the minority found that CKJV was precluded from running such a case on the basis that the tribunal had ordered bifurcation, with all issues of liability to be determined by the First Interim Award. Accordingly, after publishing the First Interim Award, the tribunal was *functus officio* in relation to liability issues, the Contract Criteria Case was a liability issue, and so the tribunal had no jurisdiction to hear the Contract Criteria Case.

In the primary decision, Kenneth Martin J effectively accepted the minority arbitrator's findings and set aside the Second Interim Award on the basis that the Contract Criteria Case was not a confined quantum or quantification calculation exercise, and the tribunal was *functus officio* in respect of the Contract Criteria Case.

His Honour said, in effect, that the Contract Criteria Case was a case concerning liability in respect of ascertaining Chevron's contractual liability to CKJV under the Contract.

Under s 34(2)(a)(iii) of the Commercial Arbitration Act 2012 (WA) (Act), an award can be set aside by the court where the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

Once his Honour had established the tribunal was *functus officio* within the scope of s 34(2)(a)(iii) of the Act, his discretion to set aside the award was "virtually automatic."

Issues on Appeal

CKJV's Submissions

CKJV's four grounds of appeal were that the primary judge erred in:

1. Finding that the *functus officio* principle is a "self-supporting" doctrine that applied to the tribunal in the absence of a *res judicata*, issue estoppel or Anshun estoppel
2. Failing to find that, for the *functus officio* principle to apply, it was necessary to displace the tribunal's findings that there was no *res judicata*, issue estoppel or Anshun estoppel, which findings, if erroneous, were mere errors of law not bearing against the tribunal's jurisdiction
3. Law in failing to find that, for the *functus officio* principle to apply, it was necessary to find that the tribunal erred in its construction of the phrase "all issues of liability" in the early procedural orders, or in its characterisation of the Contract Criteria Case as not being a liability issue when, if any such error were made, it was merely an error of law not bearing against the tribunal's jurisdiction
4. Law and/or in fact in finding that the Contract Criteria Case fell within the expression "all issues of liability" within the meaning of earlier procedural orders, and in setting aside the Second Interim Award on the basis that the tribunal was *functus officio*

In respect of grounds 1 and 2, CKJV submitted that it is not possible to reach a conclusion that the tribunal was *functus officio* without first finding a *res judicata*, issue estoppel or Anshun estoppel, and that the majority in the Second Interim Award had made express findings on those subjects.

As to ground 3, CKJV argued that the merits analysis undertaken by the primary judge was a matter pertaining to admissibility and not jurisdiction.

Finally, CKJV submitted that, when the tribunal ordered that "all issues of liability" were to be determined at the first hearing, it did not, as the majority had explained, objectively intend that the question of the meaning of "cost" (or "actual cost") was to be determined at the first hearing.

Chevron's Submissions

Chevron submitted, in respect of grounds 1 and 2, that, once a tribunal has decided that which the parties have submitted it to decide, it has performed its office and cannot re-perform it or purport to perform it again in a different way. Further, there was no case that supported the proposition that, in order to conclude that a tribunal is *functus officio*, there must first be a finding of some preclusionary estoppel.

Reference was made to various authorities to the effect that the court is the final arbiter of the tribunal's jurisdiction and is to make its own objective determination on the facts, whatever the tribunal's view of them may have been.

With regards to ground 3, Chevron contended that it was necessary for the court to identify what was the subject of the First Interim Award. While this would likely involve an assessment of factual matters, the court must assess objectively and for itself the jurisdiction of the tribunal.

As to ground 4, Chevron submitted that, in light of the procedural history, the Contract Criteria Case raised a paradigm issue of liability as opposed to quantum. That is, the Contract Criteria Case was not pleaded by CKJV prior to the First Interim Award; even if it had been pleaded, it was not pressed at the hearing in relation to the First Interim Award, and, in any case, the First Interim Award finally determined any issue of liability.

The Appeal Court's Decision

In deciding the case, the court provided extensive reference to various authorities on the scope of arbitration, *res judicata*, issue estoppel and the *functus officio* principle.

Relevantly, the court (citing *Fidelitas*¹) considered that the creation of an issue estoppel and the exhaustion of an arbitrator's authority (as *functus officio*) are separate and distinct. That is, "[o]ne affects the rights of the parties; the other affects the jurisdiction of the arbitrator."

While a tribunal has authority to rule on its own jurisdiction,² that authority is not conclusive. In considering the nature of an application under s 34(2)(a)(iii) of the Act, the court is required to review for itself the issue of jurisdiction. In doing so, the court is not bound by a tribunal's view on jurisdiction, although it may be assisted by their view to the extent it is cogent.

In dismissing grounds 1-3, the court held that the majority of the tribunal was not correct in finding:

1. The Contract Criteria Case was not a case on liability, but a case on quantum
2. The relevant procedural orders had not required all issues of contractual liability to be heard and determined at the hearing the subject of the First Interim Award
3. The first hearing had not proceeded on that basis
4. That it was "commercially unrealistic" for the parties not to raise every point on liability at the first hearing on the basis that the commercial significance might not be appreciated.

Finally, the court dismissed ground 4 on the basis that neither party had pleaded a Contract Criteria Case prior to the issuance of the First Interim Award and that there was nothing in the First Interim Award to indicate that the tribunal reserved, for further consideration, CKJV's entitlement or Chevron's liability for Staff costs beyond what had already been pleaded.

In essence, the Court found that the tribunal was *functus officio* in relation to liability issues, including the Contract Criteria Case after the First Interim Award.

¹ *Fidelitas Shipping Co Ltd v. V/O Exportchleb* [1966] 1 QB 630.

² Section 16(1) of the Act.

Key Takeaways

This decision considers a number of key legal issues, including the:

1. Distinction between matters of admissibility and jurisdiction
2. Relationship between preclusionary estoppels and the *functus officio* principle
3. Nature of an application under s 34(2)(a)(iii) of the Act
4. Scope of the court's authority under the Act to conclusively determine a tribunal's jurisdiction

The decision serves as a stark reminder to litigants that they should ensure they properly and comprehensively plead and pursue all key aspects of their case in circumstances where the proceedings have been bifurcated.

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