



Supreme Court of New Zealand

20 June 2014

**MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

**EWAN ROBERT CARR and BROOKSIDE FARM TRUST LTD v  
GALLAWAY COOK ALLAN  
(SC 27/2013) [2014] NZSC 75**

**PRESS SUMMARY**

**This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)**

The appellants claimed that the respondent firm of solicitors was liable for damages for professional negligence in relation to a failed commercial transaction. The parties agreed to arbitrate the dispute. The agreement stated that the arbitrator’s award would be final and binding on the parties, subject to the qualification that the parties had a right to appeal to the High Court on “questions of law and fact”. The phrase “questions of law and fact” was italicised in the agreement, and followed by the words “emphasis added”.

The arbitrator delivered a partial award dismissing the appellants’ claim. The appellants sought to challenge the award in the High Court. However, the provision in the arbitration agreement for an appeal to the High Court on questions of fact and law was ineffective. There is no statutory basis in the Arbitration Act or other legislation for a right of appeal on questions of fact and the parties could not, by agreement, create such a right.

The appellants sought to have the award set aside by the High Court under art 34(2)(a)(i) of the first schedule to the Arbitration Act 1996, on the basis that the arbitration agreement was invalid. The High Court found in favour of the

appellants and set aside the arbitral award. The Court of Appeal allowed the respondent's appeal and reinstated the award.

There were three issues before the Supreme Court.

The first issue was whether the parties' "arbitration agreement" for the purposes of the Arbitration Act was limited to the contractual term submitting their dispute to arbitration or also included the provision for a right of appeal. The Court has decided unanimously that the meaning of "arbitration agreement" in the Act is not limited to a submission clause but also encompasses procedural matters on which the parties agree.

The second question was whether the ineffective words providing for a right of appeal on factual matters could be severed from the remainder of the parties' agreement so as to preserve the agreement's validity. The Court has decided unanimously that whether or not a contractual term can be severed is an issue of construction of the contract. It is likely to be permissible to sever an invalid promise which is subsidiary to the main purpose of the contract but severance may not destroy the main purpose of what has been agreed or alter the nature of the contract.

Applying this approach, the Court has decided that the italicisation of the words "questions of law and fact" and the notation of "emphasis added" made clear, objectively, that the scope of the right of appeal went to the heart of the parties' agreement to arbitrate. The provision for this right of appeal was so material and important a promise that it could not be severed from the agreement. Therefore, the arbitration agreement was invalid.

It followed that the appellants had established the existence of a ground on which the arbitral award could be set aside under art 34(2)(a)(i) of schedule 1 of the Arbitration Act.

The final issue before the Supreme Court was whether the Court should exercise the discretion to set aside the award. A majority of the Court, comprising Elias CJ, McGrath, William Young and Glazebrook JJ, has decided that the award should be set aside. There were no special circumstances that would make it appropriate for the Court to refuse to set aside an award that had been made in the absence of a valid agreement to arbitrate.

Arnold J has dissented on this final issue. He would have refused to set aside the award.

In accordance with the views of the majority, the appeal is allowed and the arbitral award is set aside.

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