Subpoenas in Arbitration in Australia: Recent Guidance by the Supreme Court of Victoria

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In the recent decision of *Carlisle Homes Pty Ltd v Schiavello Construction (Vic) Pty Ltd [2024] VSC 283*, Justice Croft of the Supreme Court of Victoria has provided a critical judgment that underscores the principles governing the issuance of subpoenas in the context of commercial arbitration. This ruling, delivered on May 31, 2024, is a significant addition to the jurisprudence on arbitration and reinforces the court's supportive role in arbitral proceedings.

Background of the Case

The dispute arose between Schiavello Construction (Vic) Pty Ltd ('Schiavello') and Carlisle Homes Pty Ltd ('Carlisle') over the management of fit-out works at a property in Mulgrave. Schiavello, the applicant in the arbitral proceedings, sought subpoenas to compel the production of documents from three third parties involved in the installation and testing of services at the property.

Carlisle's application for the issuance of these subpoenas was made under Section 27A of the Commercial Arbitration Act 2011 (Vic) ('CAA'), which allows for court assistance in the arbitration process by issuing subpoenas for documents and examinations.

Key Issues and Submissions

Carlisle argued that the documents sought were crucial to resolving the core issues in the arbitration, specifically

regarding the installation and commissioning of mechanical services and the achievement of practical completion under the relevant contract. **The application was unopposed, and the Arbitrator, David Levin KC, had provided consent for Carlisle to seek the subpoenas, reflecting a harmonious approach to procedural cooperation.**

Legislative Framework

Section 27A of the CAA and Rule 9.14 of the Supreme Court (Miscellaneous Civil Proceedings) Rules 2018 govern the issuance of subpoenas in arbitration. **The legislation requires that the court be satisfied of the necessity and reasonableness of the subpoenas and mandates that the application must be accompanied by an affidavit and a draft subpoena.** These provisions ensure that the court exercises its coercive powers judiciously, particularly when non-parties to the arbitration are involved.

Court’s Reasoning and Principles Applied

Justice Croft meticulously examined the application against the legislative requirements and existing case law. In his reasoning, he highlighted several pivotal principles:

1. **Deference to the Arbitral Tribunal:** Justice Croft emphasized that the court should show deference to the arbitral tribunal’s judgment. This principle stems from the parties’ consent to arbitration and the tribunal’s proximity to the dispute’s factual matrix. **The court should avoid ‘second-guessing’ the tribunal’s decisions unless there is a compelling reason to do so.**
2. **Reasonableness of the Subpoena:** The court must independently verify that the subpoena’s issuance is reasonable. This includes ensuring that the documents sought are relevant to the dispute and that the subpoena is for a legitimate forensic purpose. **The court’s role is not to act as a ‘rubber stamp’ but to provide**

thoughtful judicial oversight to support the arbitral process.

3. **Minimizing Cost and Delay:** Justice Croft underscored the importance of minimizing costs and delays in arbitration, which is a primary advantage of this form of dispute resolution. The court's intervention should be swift and efficient, avoiding unnecessary procedural complexities that could burden the arbitration.

Implications of the Decision

The judgment in Carlisle Homes Pty Ltd v Schiavello Construction (Vic) Pty Ltd sets a precedent for the court's approach to supporting arbitration through the issuance of subpoenas. It affirms that while the court must ensure compliance with statutory requirements, it should also facilitate the arbitration process by respecting the arbitral tribunal's role and decisions.

This decision is particularly noteworthy for its reinforcement of the principle that the court should not act as a mere formality in arbitration-related applications. Instead, it should provide substantive judicial support that enhances the arbitration's efficacy and integrity.

Conclusion

The ruling in *Carlisle Homes Pty Ltd v Schiavello Construction (Vic) Pty Ltd [2024] VSC 283* is a significant contribution to commercial arbitration law. **It highlights the delicate balance the court must maintain between exercising its coercive powers judiciously and supporting the arbitral process efficiently.** This decision will undoubtedly guide future applications for subpoenas in arbitration, ensuring that they are handled with the necessary judicial scrutiny while fostering an arbitration-friendly legal environment.

For practitioners and parties involved in arbitration, this

judgment provides a clear framework for understanding the court’s role in the arbitration process and underscores the importance of procedural cooperation and judicial deference to arbitral tribunals. As commercial arbitration continues to evolve, such landmark decisions will play a crucial role in shaping a robust and supportive legal infrastructure for dispute resolution.

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