IMPLIED WARRANTY • FRUSTRATION • INTEREST • RISE & FALL CLAUSE •

Codelfa Construction Pty. Ltd. v. State Rail Authority of New South Wales (1982) Vol. 56 A.L.J.R. 459.

The company Codelfa entered into a contract with Commissioner for Railways, the predecessor of the State Rail Authority of New South Wales, which subsequently became bound by the contract, to excavate tunnels and do concrete work in them. Certain stages of the work were to be completed by given dates and the whole within 130 weeks of the date of notice to proceed. Time was made of the essence of the contract. The work generated considerable noise and vibration and a resident obtained an injunction against Codelfa including an interim injunction against performing construction work between 10 p.m. and 6 a.m. Codelfa claimed from the Commissioner an amount additional to the contract price in respect of additional costs and lost profits by reason of the change in working conditions it was forced to adopt. The Commissioner refused the claim and the dispute was submitted to arbitration under a provision of the contract containing a *Scott v. Avery* clause that no action should be brought for breach of the contract until an award was obtained. The Arbitrator found that there had been common understandings between the parties that the work could and would be carried out on a three shift basis, six days per week and no injunction would be granted in relation to nuisance. He found also that the work could not be carried out as agreed except on that basis and that neither party foresaw the possibility of restrictions being imposed on the hours of work. The Arbitrator stated his Award in the form of a special case and the parties sought determination of the questions stated on summonses in the Supreme Court of New South Wales. The proceedings went on appeal to the High Court of Australia from the Supreme Court of New South Wales.

These facts gave rise to a legal situation which may best be described as a litigants' nightmare and a lawyers paradise.

A number of matters which were decided by the High Court will be of interest to Arbitrators.

Implied Warranty

The Court held that there was not to be implied in the contract a term

that on the issuing of an injunction restraining a nuisance caused by Codelfa working on the basis of three shifts per day six days of the week, the Commissioner would grant Codelfa a reasonable extension of time for completion or a term that the works could be carried out working on that basis and that no injunction could or would be granted in relation to nuisance from working on that basis. Mason J. (with whom Stephen and Wilson JJ. agreed) considered the rules governing the admissibility of evidence of surrounding circumstances to assist in the interpretation of a written contract.

The rule as to the conclusiveness of a document as evidence of the terms of the transaction it embodies is stated in Cross on Evidence, Australian Edition at p. 652 as follows:

> "Extrinsic evidence is generally inadmissable when it would if accepted have the effect of adding to, varying or contradicting the terms of a judicial record, a transaction required by law to be writing, or a document constituting a valid and effective contract or other transaction."

The learned author cites two judicial pronouncements of the rule. The first is that of Lord Morris in *Bank of Australasia v. Palmer* (1897) A.C. 540 at 545 as follows:

> "Parole testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract."

The second judicial pronouncement referred to by the author is a statement of Lord Denman in *Goss v. Lord Nugent*(1833) 5 B. & Ad. 58 as follows:

> "If there be a contract which has been reduced into writing verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during the time it was in a state of preparation so as to add to or subtract from or in any manner vary or qualify the written contract."

However, there are circumstances under which extrinsic evidence may be admitted in aid of the interpretation of a document. It is not within the scope of these notes to deal in detail with the circumstances under which extrinsic evidence may be so admitted, but, in very general terms, it may be put such evidence may be admitted to resolve an ambiguity. The question is discussed in the Australian edition of Cross on Evidence at p. 662. et seq.

Frustration

In Codelfa four Justices of the Court Stephen, Mason, Aickin and Wilson JJ. (Brennan J. dissenting) held that the situation produced by the grant of the injunction was such that it was impossible lawfully to perform the contract in a manner which would have complied with its requirements and that in these circumstances the performance of the contract had become a thing radically different from that undertaken by the contract producing frustration of the contract in the true sense of the term.

Those four Justices held also that in general an Arbitrator has jurisdiction under an arbitration clause, including the case where the clause contains a *Scott v. Avery* provision, to entertain a claim based on frustration of the contract and the arbitration clause in the Codelfa contract was wide enough to embrace a claim by Codelfa for remuneration on a quantum meruit based on frustration of the contract.

Interest

This subject was discussed in a note by Mr F. J. Shelton in the Commercial Arbitrator June, 1982 p. 11. It is there stated that in *Government Insurance Office of New South Wales v. Adamson-Leighton Joint Venture* (1980) 31 A.L.R. 193, the High Court held by a 3/2 majority that quite apart from any agreement between the parties, arbitrators have an inherent power to award interest.

In Codelfa, Stephen, Mason Aickin and Wilson JJ. (Brennan J. dissenting) held that notwithstanding that under a contract containing a *Scott v. Avery* clause a cause of action does not arise until the Arbitrator makes his award, the Arbitrator had the power to award interest in respect of any monetary sum awarded by him from the date when the dispute or difference arose to the date when the award became effective but that as his power to do so was referable to S. 94 of the Supreme Court Act 1970 (N.S.W.) which by S.94(2) (a) excludes the giving of interest upon interest he could not award compound interest. *Government Insurance Office of N.S.W. v. Atkinson-Leighton Joint Venture* was applied.

It is to be borne in mind that the interest referred to relates only to the period between the date when the cause of action arose and the date when the judgment takes effect. Under S.95 of the Supreme Court Act (N.S.W.), interest shall unless the Court otherwise orders be payable at the prescribed rate from the date when the judgment or order takes effect on so much of the money as is from time to time unpaid. It would appear therefore that if a claimant who succeeds in arbitration proceedings seeks interest on the amount awarded he may obtain that interest only by judgment on the Award.

The provisions of the Supreme Court Act 1958 (Vic.) relating to interest are set out in Ss. 78, 79 and 79A. An Arbitrator on a dispute which is justiciable under the laws of the State of Victoria, who is requested to make an award of interest, should satisfy himself that the claim is one in respect of which interest may be awarded by the Supreme Court of Victoria not only in respect of the period between the time when the cause of action arose, and the time when the arbitration proceedings were commenced, but also between the time when the proceedings were commenced and the time of making the Award. Care should be taken also that the exclusions of the power to award interest which are set out in S.79A(2) and (3) do not operate in the particular case to exclude the granting of interest in respect of the period from the commencement of the proceedings until the making of the Award.

Rise and Fall Clause

In Codelfa the contract provided that the price should be calculated at the unit prices set out in the Schedule of Rates for the quantities of the respective items of work actually performed. A rise and fall clause provided that if the costs to the contractor were varied by reason of legislation or awards causing a change in minimum award rates the contract price should be varied for each 1% increase or decrease in the "average weekly wage" by a specified percentage of the "value of the uncompleted portion of the contract as at the date of any such variation". The average of the weekly wage was required to be calculated from the rates prescribed by specified Awards applicable to the several trades mentioned taking the trades into account in given pro-