

CASE NOTES

CONCILIATION/MEDIATION PRIOR TO COMMENCEMENT OF OTHER PROCEEDINGS

(Unreported, Supreme Court of Queensland, Master Horton QC
12 March 1990)

*ALLCO STEEL (QUEENSLAND) PTY LTD v
TORRES STRAIT GOLD PTY LTD & ORS*

Allco Steel (Queensland) Pty Ltd ("Allco") entered into an agreement with Torres Strait Gold Pty Ltd ("Torres Strait") to carry out design and construction works with respect to a goldmine. The agreement contained the following clause headed "Disputes":

"a. In any case, any dispute or difference shall arise between the Torres Strait Gold and the contractor either during the progress of the work under the contract or after determination, abandonment or breach of this contract as to the construction of the same or as to any matter or thing whatsoever arising thereunder or in connection therewith then the aggrieved party shall give to the other notice in writing setting out in full the detailed particulars of the dispute or difference. Upon receipt or issue of the notice, Torres Strait Gold shall give written notice to the contractor, appointing a date, time and venue for a conciliation meeting to be held to discuss in detail the dispute or difference and may appoint such further time as may be necessary for the continuation thereof. The parties shall not be legally represented at said meeting but shall present, in their own manner, with the assistance of witnesses and documentary evidence, the details of their respective cases.

b. If at the conclusion of the conciliation meeting the parties fail to resolve the dispute or difference either party may give to the other, within fourteen days a notice stating that at the expiration of thirty days it will proceed to have the dispute or difference referred to a Court of competent jurisdiction in the province, state or territory and country stated in the project data section 1.7 and at the expiration therefore may so proceed."

The court formed the view that the plaintiff had made no bona fide effort to conciliate. The court however did not regard this as relevant since it was not prepared to enforce an agreement to conciliate. The Master stated that even though there was clearly a breach of the obligation to conciliate on the part of the plaintiff, the doctrine that the jurisdiction of the court could not be ousted dominated any other principle that would require the plaintiff to honour its contractual obligations. The Master severed the conciliation clause from the rest of the agreement.

The Master commented that the position would be different had the clause been an arbitration clause where the legislation gives the court power to stay proceedings.

COMMENT

There has been a move in recent times to include dispute resolution clauses in contracts which require the parties to engage in conciliation or mediation procedures for a certain period e.g. 21 days prior to commencing arbitration or court proceedings. This decision obviously casts doubt on the efficacy of such clauses.

The problem which arose in the above case would not occur where the Institute's recommended conciliation clause is used:-

"If any dispute or difference arises between the parties to this contract they will consider resolving it in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Conciliations'.

This clause does not impose an obligation upon the parties to conciliate and recognises that there is little point in placing an obligation upon parties to engage in a voluntary process unless they genuinely wish to.

DRAFTING OF AGREEMENTS AND CONTRACTS TO REFLECT PARTIES INTENTIONS

*CAPRICORN INKS PTY LTD v LAWTER INTERNATIONAL
(AUSTRALASIA) PTY LTD [1989] 1 Qd.R*

Lawter International (Australasia) Pty. Ltd. ("Lawter") supplied to Capricorn Inks Pty. Ltd. ("Capricorn") printing vanishes which were admitted to be defective. The parties appointed a firm of accountants to determine the measure of damages payable to Capricorn by Lawter. Terms of settlement between the parties contained the following clause:-

"The Quantum of Damages as per our letter of 7th July is to be assessed by an independent firm of Accountants to be jointly instructed by the parties. The Accountant's role is not to determine whether or not the heads of damage noted in our letter of 7/7/87 have been suffered by our client (that being admitted); rather, their function is to simply qualify the losses under these heads. In this regard, they will have to refer to our client's own Accountants and possibly another firm of ink manufacturers. The independent Accountants do not have to assess the losses in respect of Accountant's fees to date and loss-assessor's fees. We are to simply produce to you invoices evidencing those losses".