"ARBITRATING AFTER *NAURU TRUST v MATTHEW HALL*"

[1994] 2 VR 386 ADRLJ 223

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1. THE IMPORTANCE OF *NAURU v MATTHEW HALL* FOR ARBITRATORS

The case dealt with four significant issues for arbitrators:

1. It considered the discretion of the Court under s.47 of the *Commercial Arbitration Act* 1984 to intervene in procedural directions of arbitrators. In the *Nauru Case*, the issue involved the Court's power to order that Further and Better Particulars of Claim should be delivered in an Arbitration where the arbitrator had refused to order that Further and Better Particulars be provided.
2. It considered the ability of the Court under s.44 of the *Commercial Arbitration Act* 1984 to remove an arbitrator for misconduct, on the basis of an alleged denial of natural justice, in consequence of the arbitrator refusing to order Further and Better Particulars in circumstances where the Respondent alleged that it had not been informed with adequate particularity of the case it would have to meet.
3. It considered what particulars were required to be provided by a claimant who was making a "global claim". A "global claim" is now a common feature of construction cases. It can be described as a claim in which a "global" sum is submitted as a measure of damages where a number of events or a combination of events are said to have caused delay or disruption, and where it is said that it is impossible or impracticable to provide a breakdown as to how any particular event caused delay or disruption in any particular way or contributed to the loss claimed.
4. It considered the issue as to whether "global" or "total loss" claims, as they are referred to in America, where the claimant asserts an inability to show a nexus between any events complained about and the alleged time/money consequences, should be struck out as an abuse of process, and, if so, whether the Court has the ability to do so in an arbitration context.

2. FACTS OF THE NAURU CASE

2.1 Matthew Hall was a specialist contractor who contracted to provide mechanical services for the redevelopment of the Savoy Plaza Hotel in Melbourne, which is owned by the Nauru Phosphate Royalties Trust. In August 1991 Matthew Hall delivered Points of Claim claiming $1.5m against Nauru, for delay and disruption. The claim alleged

disruption and delay by other contractors on site, failure to properly co-ordinate the works, failure to give proper instructions to permit the orderly progress of the works, and failure to give possession of the site to permit orderly progress of the works. A number of Schedules were provided, listing events that allegedly caused difficulty, but no particulars were provided which identified how any particular event caused actual disruption or delay, or was responsible for any part of the global sum claimed.

The claim was essentially a lump sum claim based on the difference between the total hours worked on the project and the total of the reasonable hours required for the project (less an allowance for variations), based on the tenders of other tenderers.

All additional hours above the claimed tender allowance were attributed to disruption and delay caused by the Proprietor.

2.2 After delivery of Points of Defence, Matthew Hall, on 17 October 1991, delivered an Amended Schedule for loss and damage, reducing its net claim for prolongation and disruption costs to $1.2m, there was no change to the basis of the claim.

2.3 On the morning of the Hearing, on 17 February 1992, the contractor served Amended Schedules which bore no relationship to the original Schedules, and which completely recast the allegations relied upon. In one Schedule there were 54 new allegations. The new approach taken was to make broad allegations about the failures of Nauru, include some specific instances by way of example, but not provide an exhaustive list of these instances. For example:

> "1. Failing to direct and coordinate the work properly or at all so that trade contractors frequently located themselves to workfaces of their choice, with consequence frequently that -
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> (a) the work of trades was not executed in the proper order;
>
> (b) trades were working on top of one another at the one workface or in the one area;
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> so that by way of example, Matthew Hall in the Basement and Levels 1, 2, 3, 9, 10 and 11 in or about April/September 1990 encountered workfaces or areas where sprinkler piping and sanitary plumbing pipe works had already been installed while Matthew Hall found that in attending the workfaces on the east side of Levels 9, 10 and 11 during the period April to September 1990 to install fan coil units, another trade had already installed their work out of sequence. "

2.4 The damages claim remained the same. Consequently, it was a situation in which a whole series of different and alternative events were alleged to have caused exactly the same prolongation and disruption as a combination of earlier alleged defaults, which were no longer being complained about.

2.5 Nauru sought time to consider the new documents, and when the hearing resumed, as is reported in the judgment, "*there was a big song and dance made about if all*". Objection was made to the arbitrator about

the way in which the claim was being put and the lack of particularity. Counsel for the contractor submitted to the arbitrator that the case "*was put on the basis of overall impression*" and that "*that was the way that loss of productivity claims were often put.*"

The arbitrator then directed that the owners be given two days within which to deliver any Request for Particulars, that the further particulars be provided within six days thereafter, and that the Hearing should resume on 2 March, 1992. Nauru subsequently delivered a Request for Further and Better Particulars, described in the judgment "*as a lengthy document of some 50 pages*", which sought, amongst other things, particulars about each of the alleged omissions of Nauru, and the nature and extent of the alleged disruption and loss alleged to have been suffered as a result of each disrupting event.

2.6 On 24 February, 1992 there was a Further Preliminary Conference requested by Matthew Hall to obtain a ruling that it should **not** be required to supply further and better particulars pursuant to any of the requests. The arbitrator rejected Nauru's criticism of the "global loss" nature of the claim, and out of 81 events referred to in the new revised Schedules, ordered particulars to be provided in only 7 cases, requiring further particularity about the events and the examples relied upon, but none requiring any nexus to be shown, and fixed an adjourned Hearing Date to 6 April, 1992.

2.7 On 10 March, 1992 Matthew Hall purported to deliver further and better particulars of its amended Schedules, purporting to give some more examples of alleged disrupting events, (the spitting incident) abandoning some particulars, and in some cases asserting "that save that there were numerous instances the Claimant is unable to supply further particulars." On 12 March, 1992 Nauru served Matthew Hall with a letter advising that the lack of particulars left Matthew Hall's "*claim for damages for disruption – loss of productivity so lacking in precision that the respondent is unable to understand or appreciate the case it will have to meet.*"

A further Preliminary Conference took place on 13 March, 1992 in which the arbitrator rejected Nauru's complaints, but stated that if some unexpected matter came up during the course of the hearing, it would always be open to the respondent to make submissions on the subject. He directed the arbitration commence on 6 April, 1992.

2.8 Nauru then applied to the Court to:

(a) remove the arbitrator on the ground of misconduct;

(b) alternatively, strike out the claim for disruption as an abuse of process;

(c) alternatively, remit the matter to the arbitrator and direct him to order further and better particulars of the loss of productivity claim.

It was this application that was heard and determined by Smith J.

3. THE CONCLUSIONS OF THE COURT

3.1 **The application to remove the arbitrator**

Nauru argued that the arbitrator, by declining to require Matthew Hall to give particulars showing a causal connection between events relied upon in its Schedules and the damages claimed for disruption and prolongation, had denied Nauru natural justice, in failing to give Nauru adequate notice of the case that had been put against it. It was argued that the particulars and nexus were important because if it was alleged that an event caused disruption resulting in loss of productivity (effectively increased labour hours), there were a number of different possibilities:

- The event may have taken place at a time when there was no resulting disruption to the works;
- The event may have caused some delay with no impact upon the productivity of the contractor;
- The works may have been done in a different way resulting in the same number of men working for additional time;
- The works may have required more men to be engaged for the work in question;
- The event may have caused the work to be broken up and done in sections resulting in inefficiency and loss of productivity.

Unless the claimant was required to show how a particular event actually disrupted the works and caused loss of productivity, it was contended on behalf of Nauru that there could be "no agenda" for the Arbitration Hearing, to use the words of the Privy Council in *Wharf Properties v Eric Cumine* (1991) 52 BLR 1, and that Nauru faced an unreasonable and unfair burden, i.e. Nauru had the reverse onus of endeavouring to show that there were other causes for the alleged loss of productivity. The Hearing would presumably consist of the contractor giving evidence of a large number of defaults, in a lengthy and expensive trial, and asserting that the job took considerably longer than allowed for in the tenders by reason of such defaults. Nauru would then be required to establish that some or all of the defaults did not really result in loss of productivity or delay, without knowing in what way the productivity loss claim was being put. Further, Nauru would presumably have the onus of establishing that other events or causes, i.e. the contractor's own poor supervision and site organisation, contributed to the loss of productivity.

If Nauru were able to establish that some of the events either did not cause loss of productivity or delay, or that there were contributing reasons attributable to the defaults of the contractor, it was for the arbitrator to determine the calculation of the loss of productivity and delay claims. Presumably, the arbitrator would then be asked to decide the matter on the basis of "overall impression" and "pick a figure".

His Honour concluded that there was no denial of natural justice

because Matthew Hall had the right to choose the way in which it would present its case, and had elected to put its case by arguing that each of the events in question were capable of causing disruption, and that there was no other explanation for the loss of productivity and prolongation. Nauru was not taken by surprise because it had been given sufficient particulars to enable it to identify the alleged disruptive events, and to prepare its case.

Therefore, according to Smith J, a claimant can elect as of right to put forward a delay and disturbance claim on a "global basis", without particulars being provided as to how specific events that have allegedly resulted in disruption actually caused loss of productivity, and without having to itemise the relevant loss in each case.

It is significant that in the latest edition of Hudson's *Building and Engineering Contracts* (11th Ed) by I.N. Duncan Wallace, the author questions the Judge's decision and describes that part of the judgment that related to whether Nauru was being unfairly prejudiced, so as to be a breach of natural justice, as "*ambivalent and unpersuasive*".

Duncan Wallace is also critical of the extraordinarily short periods imposed by many arbitrators on defendants in their timetables and when fixing Hearing dates (11th Ed Vol 2 para 18-159E):

> "Thus in this case, as the judge found, while the plaintiffs were given complete latitude to recast (for the second time) their entire claim on the morning of the first hearing date on February 17, and still further substantial amendments were apparently made in their later particulars on March 10, the claim itself was based on an obviously highly theoretical form of total cost; there had been no written complaint ever made by the contractors during the course of the contract; and on the basis of particulars so far delivered the only alleged instructions relied upon were oral. Nevertheless the defendants were ordered to deliver requests for particulars within only 48 hours of receiving the wholly recast claim on the morning of the hearing on February 17, and, when inadequate particulars were supplied and objected to on March 10 (which the judge later found to be inadequate) the arbitrator nevertheless on March 13, ordered the hearing to commence on April 6."

Duncan Wallace finally makes a very telling and significant comment (11th Ed Vol 2 para 18-159E):

> "The case is illustrated as being on its apparent facts typical of a trend in construction arbitrations in which inadequately particularised and inherently improbable claims are accepted at face value by arbitrators, and of early hearing dates insisted upon which can only be oppressive and unfair to defendants, and a standing encouragement to the speculative presentation of unjustified or exaggerated claims. "

Duncan Wallace finally points out (Vol 2 para 18-160) that there is a real danger that arbitrators can all too readily be persuaded that lengthy and bulky Schedules provide an adequate basis upon which a defendant to a claim or a counterclaim can readily respond prepare its case for the Hearing. In fact, what is often pleaded is what Duncan Wallace refers to as "*a whole mass of facts or assertions but not showing any necessary logical linkage or chain of events or identifying and separating*

specific facts which lead to the conclusions of liability or quantum which he is asserting", in other words, there is a breach of the principles of natural justice. This leaves the party in default free to shift his ground at the hearing within the generalised mass of claims or assertions, which makes it difficult or impossible for his opponent to assemble evidence and marshall counter-arguments in advance.

In view of the specific and detailed discussion of the *Nauru* Case by an author of the international stature of Duncan Wallace, I believe that there is a real possibility that another Supreme Court Judge or the Court of Appeal may treat an arbitrator's failure to require adequate particulars in "global claims" as a breach of the principles of natural justice, in that the opposite party has not been informed with adequate precision of the case which it will have to meet, justifying the possible removal of the arbitrator for misconduct.

3.2 **The application to strike out pursuant to s.47**

At the outset, Smith J. accepted the argument that an arbitrator cannot strike out a claim in an abuse of process, but that s.47 permits a Judge to strike out a claim in arbitration proceedings where it was demonstrated that it was an abuse of process. Section 47 gives the Court the same power to make interlocutory orders in Arbitrations as it has in Court Proceedings.

It was concluded by the Court that there was no abuse of process because a party was permitted:

> "to proceed with a global claim where it is not possible to spell out the interaction of events and their relationship to the quantum claimed in other words the nexus . "

The assertion was accepted, from counsel for the contractors, that it was not possible to provide a further detailed breakdown. Smith J. concluded that although a "global claim" approach placed unfair burdens upon Nauru, Matthew Hall was not obliged to give particulars of nexus because it was not part of its case to establish a nexus between each alleged disrupting event and the loss sustained. The Judge did not consider that the burdens cast upon Nauru, such as shifting of the evidentiary onus of proof and lengthy preparation, constituted an abuse of process. His Honour then went on to concede that if particulars are produced:

> "they may clarify issues or reduce the area of argument even if the plaintiff can provide only alternative hypotheses."

However, no abuse of process had been established.

3.3 **The Application for Particulars**

The interesting aspect in this part of the judgment was that His Honour concluded that a case could be put that further particulars should have been ordered, and "*that there may have been some value for the handling of the preparation of the case, the assessment of the case by the parties, and the hearing of the case, if further particulars had been ordered.*"

His Honour also concluded that such particulars should have been ordered in the arbitration, even if they resulted only in particulars in the form of alternative allegations to be inferred from the facts already pleaded. However, His Honour accepted the analysis of s.47 expressed by Rogers J. in *Imperial Leatherware Co Pty Ltd v Macri & Marcellino Ltd* (1991) 22 NSWLR 653 at p.666, that s.47 could be applied by a Court to interfere in the procedural directions of arbitrators in **very limited circumstances**, in preference to the analysis of the Full Court of the Supreme Court of *South Australia in South Australian Fund Investment Trust v Leighton Contractors Pty Ltd.* (1990) 55 SASR 327 which held that s.47 authorised supervision by the Court in the procedural stages of Arbitration. His Honour considered that the discretion is broad and should not be fettered. In deciding whether to exercise his discretion in the *Nauru* case, His Honour considered the following circumstances to be relevant:

(i) The burden of proof lies on the applicant.
(ii) The policy of the Act is to encourage arbitration as a flexible procedure.
(iii) The parties had agreed to refer their disputes to an arbitrator of their choice.
(iv) Such arbitrator was given a wide discretion to control the procedural aspects of the arbitration (s.14 of the Act) subject only to the requirement of ensuring that natural justice is given.
(v) The arbitrator had been asked to rule on the question of the sufficiency of the particulars, and had done so.
(vi) That the arbitrator had the power to deal with the question.
(vii) The manner in which he exercised that power.
(viii) The arbitrator had the advantage of applying his expertise in the construction industry to the question of what particulars are needed.
(ix) There may be some advantage to be gained as described above in requiring further particulars.
(x) It had not been demonstrated, however, that there had been a denial of natural justice to Nauru as a result of the arbitrator's decision.

On the balance, the Judge was not persuaded that the need for such particulars which he would have directed, outweighed the other considerations concerning jurisdictional intervention under s.47, and declined to order that further particulars be given by Matthew Hall, or to direct the arbitrator to so direct.

The significance of Smith J's decision is that he preferred the view of the New South Wales Supreme Court, that s.47 was **not** intended to set up a special supervisory jurisdiction for dealing with procedural rulings of arbitrators, but was essentially available to make interlocutory orders such as security for costs, orders staying

arbitrations and Mareva injunctions, which arbitrators have no jurisdiction to make, and declined to follow the decision of the majority of the Full Court of South Australia in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (1990) 55 SASR 327, which concluded that s.47 authorised the intervention of the Court in the procedural aspects of the arbitration and required arbitrators to comply strictly with Court rules in complex arbitrations, whilst allowing a more liberal informal approach in simple arbitrations.

4. THE APPROACH IN RALPH M. LEE PTY LTD V GARDNER & NAYLOR INDUSTRIES (UNREPORTED, SUPREME COURT OF QUEENSLAND, 11 FEBRUARY, 1993, MOYNIHAN J.)

In this case an electrical contractor, who sub-contracted to carry out electrical works relating to the supply and installation of ventilation systems to a telephone exchange, claimed in its Statement of Claim damages for delay in consequence of breaches of implied terms of the sub-contract that the contractor would take all steps as were reasonably necessary to enable the plaintiff to complete the works in accordance with a construction program applied by the contractor, without incurring extra costs. The sub-contractor claimed breaches of implied terms, alleging generally failure to provide access to the site, sufficient time to enable completion of works in accordance with the program, failure to supply drawing approvals in sufficient time, and delayed instructions.

The sub-contractor claimed 289 days delay, which represented the difference between the programmed date of completion and the actual date of Practical Completion. The particulars relied upon consisted of a bar chart which purported to reflect the actual, as compared with the contracted, progress in the works.

The contractor brought an application seeking further and better particulars of the delay claim and, in particular, the causal connection between the breaches relied upon, the delay, and consequent damage. Moynihan J. stated that the sub-contractor was required to "*specify a discernible nexus between the alleged wrong and consequent delay and damage*", and adopted the observation of Lord Oliver in *Wharf Properties v Eric Cumine Associates* supra at p.21 of the importance of establishing "an agenda for the trial". This is done by pleading or particularising "material facts", not by asserting a relationship.

His Honour pointed out that it was a gross over-simplification to assert, as the plaintiff did in its pleadings, that each day of delay was caused by the defendant's breach of contract, and led to "a days damages". He pointed out that some events are more critical than others, and the existence of possible "float" in the construction program. His Honour did not accept the plaintiff's explanation that the causes of delay were cumulative, and it was not possible to itemise each incident of delay and

attribute such delay to a specific breach.

His Honour stressed the importance of the plaintiff's claim satisfying "*the rules of pleading and particularity designed to identify and confine the issues and set the agenda for an adversarial trial.*"

He concluded that the particulars as they stood were inadequate to identify the facts relied upon to establish a causal connection between breach, delay and damage, which was obviously going to be a major area of controversy at the trial, and directed further and better particulars to be provided.

5. THE LESSONS FOR ARBITRATORS

1. I believe that it is a real concern that some arbitrators, in their desire to appear cost effective and expeditious, sometimes impose unrealistic, and occasionally draconian, time limits on parties in highly complex cases, forgetting that a claimant has frequently had a great deal of time to formulate its claims.
2. I am also in agreement with Duncan Wallace, that whilst an arbitrator is obviously the master of the procedure which is to be used in the arbitration, and need not require formal pleadings, nevertheless, arbitrators in complex matters, particularly construction cases, should ensure that there are proper pleadings, or some other exchange of information, for example, written Witness Statements or Statements of Claim, which precisely and properly particularise claims and defences which are to be relied upon, so that each party knows with some measure of precision the case which it will have to meet, and will have ample opportunity to prepare in advance of the Hearing. I am not a great fan of the "if you come across a problem during the course of a Hearing, you may have liberty to apply" approach.
3. An arbitrator who fails to require provision of adequate particulars is subject to a considerable danger of removal for misconduct under s. 44 of the Act on the basis of a denial of natural justice, and any Award of the arbitrator may be subject to being set aside.
4. The attitude of the Supreme Court of Victoria in the *Nauru* Case, where it is clear that the Court will only intervene in the procedural rulings of arbitrators in the most exceptional case, and not even when the Court itself might have made some other direction, places greater responsibility on the shoulders of arbitrators to ensure that their procedural rulings do justice between the parties.
5. "Global claims" place an arbitrator in a very difficult position On the one hand, as correctly observed by Smith J, it is up to the claimant to decide how to put its case. It can choose to put a case that it does not propose to establish the individual effect of each alleged breach of progress of the works, but rely upon the fact that there has been a loss of productivity or delay because of the cumulative effect of a number of events, without ever being able to demonstrate how any one particular

event caused loss of productivity. It can be fairly said that there are a number of leading decisions in which Courts have accepted a "global cost" method of claim as sometimes the only way in which a contractor is able to present its claim. On the other hand, there is the danger that the "global cost methodology" technique is really intended to conceal claims lacking any real substance, and can place respondents to such claims at a great disadvantage in knowing the case that they have to meet, and being unable to properly prepare for the hearing. Accordingly, claims based upon such methodology should be examined very carefully by arbitrators, who need to be alert for the "genuine" case, and also identify the "speculative" case, or, as has been described by Victorian Supreme Court Judge, Justice David Byrne in a recent paper (*Total Costs and Global Claims*), the "snow job". The solution may be to insist upon the provision of proper and adequate particulars providing a nexus between the events relied upon and the disruption or money consequences claimed. If such particulars cannot be provided, reliance may be placed upon what was said by Mr John Tackaberry QC (sitting as a Deputy Official Referee) in *Mid-Glamorgan County Council v J. Devonald Williams & Partner* (unreported, Queen's Bench Division, decision of Deputy Official Referee, Mr John Tackaberry Q.C., 17 September, 1991). "*In such a case, it seems to me that the Court should expect some evidence to demonstrate that the level of particularisation that has been supplied or is being promised really is the best that could be done in the circumstances, and that all reasonable efforts have been made to break down and apportion the claim.*"

6. Finally, as argued by Duncan Wallace, arbitrators should be astute not to be overly impressed by lengthy pleadings and impressive sets of Schedules which are often put forward as a "dog's breakfast" of the facts and assertions without properly establishing a causal nexus between the facts relied upon and the damages claimed. Arbitrators frequently treat requests for particulars as being a delaying or obstructive tactic, without properly appreciating the deficiencies in the material provided.