CASE NOTES

ARBITRATION – CONTRACT – INCORPORATION BY REFERENCE – WHETHER ARBITRATION CLAUSE OF MAIN CONTRACT INCORPORATED INTO SUBCONTRACT – WHETHER ARBITRATOR VALIDITY APPOINTED WHETHER ANY CAUSE SUFFICIENT TO REMOVE ARBITRATOR – S44 COMMERCIAL ARBITRATION ACT 1985

Supreme Court of Western Australia
Scott J.
17 April 1996
Unreported
Carob Industries Pty. Ltd. (In Liquidation) v. Simto Pty. Ltd.

In this case the Court was concerned with the question whether an arbitration clause of the main contract had been incorporated into the subcontract. A decision on that issue would determine whether the arbitrator had been validly appointed to a dispute under the subcontract. A second issue arose concerning whether the failure to properly serve the notice of dispute affected the appointment of the arbitrator.

THE FACTS

During the course of the preliminary hearing between the parties to a subcontract agreement one party objected to the jurisdiction of the person nominated as arbitrator on the ground that there was no arbitration clause in the subcontract agreement. The nominee arbitrator accepted the nomination and entered upon the reference. He consented to an application to the Court pursuant to Section 39 of the Commercial Arbitration Act being determined by the Court.

The issues raised for determination in the eventual application to the Court were:

(i) whether the subcontract agreement contained a valid arbitration clause; and
(ii) whether the arbitrator was validly appointed in accordance with the arbitration clause.

As to the question of the validity of the arbitration agreement the subcontract provided that:

> 'The following documents shall be in deed form and be read and construed as part of this agreement, namely:
>
> (b) The general conditions of contract as issued by (the head contractor)'.

Part of those general conditions contained an arbitration clause. The subcontract also provided that:

> 'Any disputes arising between the subcontractor and the company must be referred in writing to the company within 7 days of the occurrence, so that the matter can be dealt with in a proper manner.'

INCORPORATION

His Honour Scott J observed that the issue as to whether an arbitration clause can be incorporated into a subcontract between parties by reference was one which has involved legal complexity and upon which differing judicial opinions have been expressed.

His Honour first referred to the English cases of *Aughton Limited v M F Kent Services Limited* (1991) 57 BLR 6 and *Co-Operative Wholesale Society Limited v Saunders & Taylor Limited* (1994) 39 Con LR 77.

His Honour followed the reasoning of Sir John Megaw in *Aughton*, that an arbitration clause cannot be incorporated by mere reference but can be incorporated only where it is expressly referred to in the subcontract. The contrary view of another judge in Aughton was not preferred.

By the claimant, who was the respondent to the appeal, it was argued that the Court should be loathe to interfere with the rights of the parties to resolve disputes by arbitration and should not read down provisions which deprive the parties of access to arbitration. Reliance was placed on *IBM Australia Limited v National Distributor Services Limited* (1991) 100 ALR 361 especially at 366 and *Qantas Airlines v Dillingham Corporation* (1985) 4 NSW LR 113 at 122.

His Honour accepted the general proposition that Courts have become more liberal in the interpretation of arbitration clauses and are willing to permit parties to resolve issues by arbitration but it was still a matter of construing each individual contract to determine whether or not the parties had agreed for disputes to be resolved by way of arbitration.

In the present case His Honour decided that the parties did not intend to incorporate the arbitration clause given the terms of the contract, especially that the subcontract did not refer to the provisions of the arbitration clause of the head contract in any way. In the absence of some express consideration the arbitration clause was held not be read as included in the subcontract.

VALIDITY OF APPOINTMENT

In view of His Honour's decision that there was no binding arbitration agreement between the parties the question of the validity of the appointment of the arbitrator did not fall for consideration. Nevertheless, His Honour went on to consider the merits of the argument on that issue. The issue was whether the failure to serve the notice of dispute by certified mail as required by the dispute resolution clause of the head contract was

fatal to the appointment of the arbitrator. His Honour distinguished *Eriksson v Whalley* (1971) NSW LR 397 which found that it was fatal not to send a notice of default as part of a process to terminate a contract, because in the present case the notice was not critical to determining the rights of the parties which respect to the consequences which followed from the notice. His Honour decided that the sending of the notice in the present case by certified mail was merely a formality, in no way determinative of the rights of the parties, and that service by ordinary mail was sufficient. Further, His Honour noted that the respondent clearly had notice of the existence of the dispute as evidenced by the fact that it was later represented at a preliminary conference before the arbitrator. His Honour was therefore not persuaded that there was any invalidity in the appointment of the arbitrator.

GREG STEINEPREIS.

APPEAL AGAINST DECISION OF TRUSTEE IN BANKRUPTCY NOT TO PURSUE LITIGATION ARISING OUT OF ARBITRATOR'S AWARD AND SUPREME COURT PROCEEDINGS REFUSED

Federal Court of Australia
Sunberg J.
10 April 1996
David Haskins and Connie Cassar v. The Official Receiver in Bankruptcy (as Trustee of the bankrupt estate of D. Haskins and C. Cassar).

In this case the applicants applied to the Court under Sec. 178 of the Bankruptcy Act to review a decision of their Official Trustee in Bankruptcy not to pursue litigation arising out of a home building contract (MBAV form VHC 1) dispute which had previously been arbitrated and had also been the subject of not less than seven proceedings in the Supreme Court of Victoria. See Case Note *The Arbitrator* Vol. 15 No. 1 May 1996 at page 35 – Haskins and Cassar v. Brae Villa Homes Pty. Ltd.

The Official Trustee in making his decision relied on detailed advice from the Australian Government Solicitor (AGS) including a statement that the merits of the proceedings were "highly dubious".

The Applicants contended-

1. That when hearing an appeal against the Arbitrator's Award Byrne J. Supreme Court of Victoria, did not call Counsel for the builder, Brae Villa Homes Pty. Ltd., before deciding the case against the applicants,
2. That they did not have a copy of Byrne J's reasons for his decision and were thus denied "reasons for appeal", and
3. That they had been denied natural justice because the Arbitrator had