Case Note: Varnsdorf Pty Ltd v Fletcher Construction Australia Pty Ltd

Consolidation of arbitration proceedings.

On 18 December 1998 Mandie J. of the Supreme Court of Victoria delivered an important judgment in relation to consolidation under section 26 of the *Commercial Arbitration Act* 1984 (Vic.). The judgment was given in *Varnsdorf Pty Ltd v. Fletcher Construction Australia Pty Ltd* (unreported, No. 8125/1998, Mandie J., [1998] VSC 206).

Section 26

Section 26 enables an arbitrator to consolidate arbitration proceedings and provides for an appeal to the Court against the refusal or failure of an arbitrator to make an order for consolidation. Importantly, subsection 3 provides that an order for consolidation may not be made unless it appears:

"(a) that some common question of law or fact arises in all of the arbitration proceedings;

(b) that the rights to relief claimed in all of the proceedings are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make the order...".

The provisions of subsection 3 closely follow those found in rule 9.12 of the Rules of the Supreme Court of Victoria, which have their counterparts in all other jurisdictions and which reflect the desire to avoid multiplicity of proceedings and inconsistency of result and the promotion of finality in litigation: see, for example, section 29(2) *Supreme Court Act* 1986 (Vic.) and *Port of Melbourne Authority v. Anshun Pty Ltd* [No. 2] (1981) 147 CLR 589. The Rules of Court permit consolidation where the claims made in two or more sets of proceedings could properly have been joined in the one proceeding: *Bolwell Fibreglass Pty Ltd v. Foley* [1984] VR 97.

The facts

The plaintiff, Varnsdorf, applied to the Court for an order that arbitration proceedings brought against it by the first defendant, Fletcher, be consolidated with arbitration proceedings brought by Varnsdorf against the second defendant, Command Energy Pty Ltd ('Command'). The arbitrator had refused an order for consolidation.

The dispute between the parties arose out of the construction of a co-generation plant for six hospitals by Fletcher for Varnsdorf. Notice of dispute had been given by Fletcher to Varnsdorf in December 1994 and an arbitrator appointed in August 1995. Lengthy and substantial interlocutory steps were engaged in by those parties. A date for arbitration was eventually fixed for 24 November 1998. This date was abandoned, however, in the light of the consolidation application.

Varnsdorf had served a notice of dispute upon Command in late August 1998. The notice referred specifically to allegations made in witness statements filed by Fletcher in August and which had resulted in the arbitrator in the Fletcher proceeding making orders in September for the provision by Fletcher of amended points of reply and defence to counterclaim. Prior to September, Fletcher's points of claim had contained only limited allegations that Varnsdorf had failed to ensure the proper performance by Command of its obligations in relation to the works.

Against this background Varnsdorf sought consolidation.

The arbitrator's refusal to consolidate

The arbitrator had refused consolidation on a number of grounds, including that consolidation should not be forced upon a party unless exceptional circumstances had arisen. Whilst it was not necessary for Mandie J. to consider the arbitrator's reasons, having regard to the acceptance by the parties of the fact that the hearing before the Court constituted a rehearing, His Honour expressed the view that consolidation could not be refused on the ground stated.

Mandie J.'s decision

Whilst the pleadings in the Varnsdorf/Command arbitration had not been fully developed (if at all), His Honour was satisfied that there were substantial common questions of fact common in the arbitration proceedings. It was not necessary for Mandie J. to consider whether sub-paragraphs (b) and (c) of subsection 3 were satisfied, having regard to His Honour's view that sub-paragraph (a) was satisfied.

The question then became one of discretion. It was submitted by Fletcher that, if the effect of the consolidation order were substantial delay in hearing of the consolidated arbitration, then it would suffer severe financial loss. Further, substantial costs would be thrown away. (A sum in excess of $2 million had already been incurred by Fletcher.) In other words, it would suffer prejudice which could not be remedied.

In His Honour's view, there would be a "scandalous waste of committed resources" if the arbitration were to be put off (it had been suggested that Command would not be in a position to proceed for some eight months). Nevertheless, the policy underlying section 26 was to avoid the risk that Command might be affected by adverse findings in the Fletcher arbitration.

In order to limit prejudice to Fletcher and to give effect to the policy underlying section 26, Mandie J. ordered consolidation on terms that the second arbitration proceeding should not be heard until after the first, that pleadings should not be consolidated, but that Command should be entitled to appear in the Fletcher arbitration, to make submissions and to cross-examine witnesses as well as have access to discovered documents. This would adequately protect Command against the risk of adverse findings.

It is suggested that Mandie J. was correct in giving proper effect to the fact that findings in one arbitration would not be binding in other, that is that there could be no question of issue estoppel absent some order for consolidation in the terms put forward by His Honour: see *Birtles v. Commonwealth* [1960] VR 247, 249, Adam J., referring to *Green v. Berliner* [1936] KB 477.

Subsequent history

Both arbitrations were fixed for hearing on 16 March 1999. On 9 December 1998 Command gave notice of dispute to Fletcher. It was alleged by Fletcher that the notice of dispute was given out of time. Command sought an extension of time under section 48 of the *Commercial Arbitration Act* 1986 (Vic.).

The circumstances outlined in section 48 enabling the Court to grant an extension of time are analogous to those in which a court asked to grant an indulgence in ordinary civil litigation may grant such an indulgence.

On 1 February 1999 Beach J. ordered that there be an extension of time within which Command might give notice of dispute to Fletcher (unreported, 1 February, 1999, No. 8125/1998, Beach J., [1999] VSC 9. In His Honour's view, the issues raised by Command were inextricably bound up with the issues in the other two arbitrations. The amount at stake was large and great prejudice could be caused to Command if it was precluded from pursuing its claim against Fletcher. Fletcher, on the other hand, would not be prejudiced by the making of the order. Command was approximately nine weeks late in giving notice of dispute and the delay could not be attributed to Command or to its present solicitors.

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