Auburn Council v Austin Australia Pty Ltd

(Administrators Appointed) [2004] NSWSC 141

Bill Morrissey[1] / Sarah Connell[2]

Justice Bergin of the Supreme Court of New South Wales considered the effect of administrators being appointed to a party to an arbitration during the course of arbitration proceedings.

Facts

Auburn Council ('the Plaintiff'), and Austin Australia Pty Ltd ('the Defendant'), entered into a Construction Management Contract ('the Contract') on 22 March 1999 by which the Defendant agreed to provide management services and to exercise certain functions on behalf of the Plaintiff in connection with particular works. The Contract contained an arbitration clause. Subsequently, a dispute arose between the parties and they agreed to proceed to an arbitration before the nominated arbitrator.

On 31 December 2003, Ernst & Young were appointed administrators of the Defendant. The Plaintiff's solicitor notified the arbitrator of the appointment of the administrators and requested advice as to whether he considered the proceedings to be stayed. The Defendant's solicitor notified the arbitrator that the administrators were of the view that the matter should proceed and without delay.

On 13 January 2004, the Plaintiff's solicitor requested the Defendant's solicitor to advise as to whether they had the written consent of the administrators to proceed with the action in accordance with section 440D of the *Corporations Act 2001*. On the same day the Plaintiff's solicitor wrote to the arbitrator requesting that no further work be undertaken until the stay of proceedings was appropriately lifted in accordance with section 440D of the Act. The Plaintiff's solicitor advised the Defendant's solicitor that their letter to the arbitrator informing him that the administrators were of the view that the matter should proceed and without delay did not constitute a valid written consent in accordance with the Act and invited the provision of an appropriate written consent.

On 22 January 2004, the Plaintiff's solicitor requested the Defendant's solicitor to advise as to whether they had instructions to provide security for costs. Although the Defendant's solicitor provided a cheque to the Institute of Arbitrators and Mediators in the amount of $30,000, said to represent security for the arbitrators fees, no response was provided in respect of the request to provide security for the Plaintiff's costs.

On 6 February 2004, a preliminary conference was held before the arbitrator at which the Defendant informed the arbitrator that, in the administrators' view, their consent was

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unnecessary for proceedings to continue. The arbitrator confirmed that proceedings would continue.

The Plaintiff commenced proceedings seeking leave to proceed with the summons and an order that 'to the extent necessary' it be granted leave to proceed with its cross claim in the arbitration. It also sought security for its costs in the arbitration from 1 December 2003 to the completion of proceedings.

Section 440D

Section 440D provides that during the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with except with the administrators written consent or with the leave of the court.

The question was whether the cross claim in the arbitration proceedings was, for the purposes of section 440D, 'a proceeding in a court against the company or in relation to any of its property'. Counsel for the Plaintiff submitted that 'arbitral proceedings may be seen to fall within the operation of section 440D of the Act' and relied upon Justice Austin's decision in *Brian Rochford (administrators appointed) Ltd v Textile Clothing and Footwear Union of New South Wales* (1998) 30 ACSR 38 in which his Honour concluded that the Industrial Relations Commission was a 'court' for the purposes of section 440D. His Honour stated that what was 'significant is that despite these procedures, the tribunal has the ultimate authority to determine the dispute by making binding orders'.

In *Auburn,* the parties privately agreed, by virtue of the arbitration clause contained in the contract, that disputes would be arbitrated before an arbitrator.

In *Rochford*, Justice Austin concluded that the words 'a proceeding in a court against the company' in section 440D have their 'general, undefined meaning'. His Honour reviewed the relevant case law in respect of the meaning of 'court' and concluded that:

(a) there are no conclusive, generally applicable criteria for classifying a body as a court;
(b) the answer in each case depends on the particular statutory question to be decided; and
(c) the answer is to be supplied in light of a close consideration of the statutory constitution and functions of the body in question.

Justice Bergin agreed with this approach.

Justice Bergin found that the policy contained in section 440D could be frustrated if proceedings could be brought and/or continued against the company in administration in a place other than a court. However, her Honour found that it was not absurd or fantastic to exclude an arbitrator from the general definition of 'court'. While her Honour concluded that there are many hallmarks of what some arbitrators do that are similar to what occurs in courts created by statute, those similarities do not convert an arbitrator, appointed by reason of an arbitration agreement, into a 'court' for the purposes of section 440D.

Security for costs

The Defendant argued that leave should not be granted to the Plaintiff, or security should not be ordered, because the Plaintiff had delayed in bringing its application for security. The Plaintiff submitted that prior to the appointment of the administrators there was no proper basis upon which to bring such an application. The Plaintiff moved promptly after the appointment of the administrators and sought their agreement for security for the Plaintiff's costs in the arbitration. Justice Bergin did not regard the Defendant's submission on delay as having any force. Her Honour considered it appropriate that an order for security be made. Her Honour ordered that the Defendant give security for the Plaintiff's costs in the arbitration in the amount of $325,000 by way of bank guarantee in a form approved by the Plaintiff.