ARBITRATION - QUANTUM MERUIT CLAIM

In *Bliss Corporation Ltd v Kobe Steel Ltd* Smart J in the NSW Supreme Court (29.9.87 unreported) declined to grant a stay of proceedings in respect of a quantum meruit claim. Bliss purported to enter a contract with Kobe for the manufacture of certain plant. Bliss claimed that in fact no contract was made because Kobe had failed to provide drawings, without which the extent and nature of the work under the contract could not be ascertained. Bliss manufactured the plant and sued in the Supreme Court for a reasonable remuneration for its work. In the alternative Bliss sued under the purported contract.

The purported contract included an arbitration clause providing for arbitration in Tokyo in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators. It was accepted by the parties that Kobe was entitled to a stay of proceedings under s. 57 of the Commercial Arbitration Act, 1984 of NSW with respect to the alternative claim under the purported contract. However, Bliss contended that the quantum meruit claim did not fall within the arbitration agreement because the claim did not arise out of any contract. Bliss relied on the High Court decision in *Pavey & Matthews v Paul* 61 ALJR 151.

In (1989) 5 Australian Construction Law Newsletter at p 5 there is an article on Unjust Enrichment and the implications of the decision in *Pavey & Matthews v Paul.* The article points out the distinction between a quantum meruit claim that is for a reasonable remuneration for work performed under a contract and a quantum meruit claim that is based on the absence of a contract. It was the second type of quantum meruit claim that Bliss sued upon. Bliss argued that there was no contract out of which or in connection with which the dispute over quantum meruit arose. This argument was successful. Hence the Commercial Arbitration Act did not apply to the quantum meruit claim.

Smart J followed *Heyman v Darwins* (1942) AC 356 and declined to follow *Government of Gibraltar v Kenny* (1956) 2 QB 410. He canvassed the possibility that since the purported contract provided that a validity and interpretation of the contract must be governed by Japanese law, the situation could arise that under Japanese law there is a concluded and enforceable contract but under NSW law there is no contract at all. Nevertheless, he could not order a stay under s. 57 of the Commercial Arbitration Act with respect to the quantum meruit claim. He decided that the appropriate course in respect of the quantum meruit claim was to refer it pursuant to Part 72 of the Supreme Court Rules for determination by a single arbitrator agreed between the parties or to the three arbitrators appointed to determine the alternative claim under the contract. Smart J said that he would be prepared to authorise those persons to take evidence in Japan under Part 27 of the Supreme Court Rules. Bliss indicated that it would not resist the reference by the Court being heard concurrently with the arbitration under the contract and the evidence in the reference being evidence in the arbitration and vice versa.

- Philip Davenport

EXTENSION OF ARBITRATION TO INCLUDE OTHER ISSUES IN DISPUTE

In *K.B. Hutcherson Pty Ltd v Janango Ltd* (unreported), Smart J., 25 May, 1988, Mr Justice Smart of the Supreme Court of New South Wales considered the meaning and application of Section 25(1) of the Commercial Arbitration Act 1984.

Section 25(1) provides:

1. Where -

(a) pursuant to an Arbitration agreement a dispute between the parties to the agreement is referred to Arbitration; and

(b) there is some other dispute between those same parties (whenever the dispute arose), being a dispute to which the same agreement applies,

then unless the Arbitration agreement otherwise provides, the Arbitrator or umpire may, upon application being made to the Arbitrator or umpire by the parties to the Arbitration agreement at any time before a final award is made in relation to the firstmentioned dispute, make an order directing that the Arbitration be extended so as to include that other dispute.

It was argued on behalf of the builder that by reason of the words upon application being made ... by the parties to the Arbitration agreement, all the parties to the Arbitration agreement had to make application to the Arbitrator before s.25 could apply. In the course of his judgment His Honour held that, if the construction put forward by the builder was correct, it was difficult to see what useful operation s.25 of the Act could have.

His Honour pointed out:

> "It has always been open and still is open to all the parties to an Arbitration agreement to include in an Arbitration, by agreement, additional disputes."

His Honour considered that s.25 was intended to remedy the need for a further Notice of Dispute to be given where additional disputes were included in the Points of Claim and objection was taken by the respondent to their inclusion.

His Honour noted that the Commercial Arbitration Act 1984 was intended to facilitate and streamline arbitrations to enable them to bring about the just, prompt and economic resolution of disputes covered by an Arbitration agreement. In His Honour's opinion, the words the parties in s.25 were words of general description and included one party. Consequently, it was sufficient if an application was made by one party to the Arbitration agreement. His Honour contrasted s.25 with the operation of s.26 which relates to consolidation of arbitration proceedings, and uses the terminology upon the application of all the parties to those proceedings ...

His Honour described the procedure to be adopted by an Arbitrator once an application was made by one of the parties to include other disputes:

Once an application is made by one of the parties to