Arbitration Clause - NPWC3 - Application for Stay Of Proceedings, Claim For Quantum Meruit - Whether Arising Out Of The Contract.

Transaustralian Constructions Pty Limited v Northern Territory of Australia & Anor, Supreme Court of the Northern Territory, Angel J, 31 July 1991, unreported.

The contractor was engaged by the first defendant principal to design and construct a water storage tank at Alice Springs. Completion of the contract was scheduled for 8 May 1987. The Certificate of Practical Completion was not issued until 8 October 1987.

The contractor alleged that the delay in completion of the project was due to the principal's insistence upon work which was not included in the original scope of works. The contractor wrote to the principal advising it of the substance of its claims. Those claims were then submitted to the principal's Superintendent pursuant to clause 45(a) of General Conditions of Contract NPWC3. The Superintendent rejected the claim.

The contractor then instituted proceedings in the Supreme Court of the Northern Territory whereupon the principal applied to the Court to stay the contractor's claims against it in the proceedings, pursuant to s.53 of Commercial Arbitration Act (N.T.). In the meantime, the defendant had itself filed a summons and an affidavit with respect to those proceedings.

Issues

The parties raised the following issues during their arguments before the Court:-

1. Had the principal, by the filing of a summons and affidavit, taken a step in the proceedings for the purposes of s.53(2)?
2. Does clause 45 of Standard Form NPWC3 constitute an arbitration agreement as defined by s.4 of the Commercial Arbitration Act?
3. If the defendant is eligible for a stay of proceedings, should a stay be granted?
4. Was the contractor's claim in quantum meruit a claim "arising out of the contract" for the purposes of cl.44?

Section 53

Section 53, sub-sections (1) and (2) of the Commercial Arbitration Act (NT) provide that:-

> "(1) If a party to an arbitration agreement commences proceedings in a Court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to sub-section (2), apply to the Court to stay the proceedings and that Court, if satisfied:-
>
> (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
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> (b) that the application was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration,
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> may give an order staying the proceedings and may further give such directions in relation to the future conduct of the arbitration as it thinks fit.
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> (2) An application under sub-section (1) shall not, except with the leave of the Court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance."

1. Had the principal, by the filing of a summons and affidavit, taken a step in the proceedings for the purposes of s.53(2)?

Angel J held that despite the principal's notification to the contractor that the filing of the documents was without prejudice to its insistence upon arbitration, the better view was that such measures did constitute a step in the proceedings for the purposes of s.53(2). Angel J further held that the fact that the principal made it clear to the contractor that it insisted on arbitration and actively prevented the contractor being lulled into thinking the principal agreed to the litigious process was relevant only to the discretion as to whether to grant leave pursuant to s.53(2) of the Act, and applied *Metropolitan Tunnel and Public Works v London Electric Railway Company* [1926] 1 Ch371 at 384 per Lord Hanworth MR and at 393 per Scrutton LJ.

2. Does clause 45 of standard form contract NPWC 45 constitute an arbitration agreement as defined by s.4 of the Commercial Arbitration Act?

Section 4 of the Commercial Arbitration Act (NT) defines "arbitration agreement" as follows:-

> "Arbitration agreement" means an agreement in writing to refer present or future disputes to arbitration".

Angel J regretted that, in his view, clause 45 of NPWC 3 was drafted in a "sloppy" manner and noted that the bulk of confusion arising from that clause stemmed from the use of the word "shall" in paragraph (a) which confers on the

contractor the right to refer the matter at issue to the superintendent and the use of "may" in paragraph (b) which confers on the contractor the right to have the matter at issue submitted to the principal. In addition, Angel J noted that the word "may" was also employed in the following paragraph which confers on the contractor the right to give notice requiring the matter at issue to be referred to arbitration. To determine whether clause 45 was an agreement to arbitrate, Angel J proceeded to consider whether clause 45 was a mandatory provision, or merely a permissive one. In so doing, Angel J quoted the judgment of Windeyer J in *Finance Facilities Pty Limited v FCT* (1971) 127 CLR 106 as to the effect of the word "may" in the interpretation of statutes. In his judgment, Windeyer J indicated that the prima facie meaning to be attributed to the word "may" is permissive, but upon a construction of a clause in its broader context, it may mean "must". Angel J considered that this rule applied equally to contracts.

Upon consideration of the judgments in *Commonwealth of Australia v Jennings* [1985] VR 586, *Reed Constructions Pty Limited v State Rail Authority of New South Wales* [1987] B.C.L. 384 and *Rheem Australia Limited v Federal Airports Corporation* [1990] B.C.L. 130, Angel J came to the conclusion that clause 45 does constitute an arbitration agreement within s.4. As to the use of the words "shall" and "may", Angel J said that:

> "Reading "may" as "shall" seems to me with respect, to be the only logical interpretation of the clause; otherwise it would seem to be devoid of any real meaning or practical operation.
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> The cases on statutory interpretation to which I referred earlier I believe support this interpretation. As in *Finance Facilities*, the "may" here is circumscribed by the fulfilment of the condition precedent, i.e. the submission of the dispute to Superintendent. In the context, bearing in mind that the procedures set down is the only way to achieve arbitration, meaning can only be attributed if "may" means "shall"."

The following words, appearing in the second last paragraph of clause 45 appear to have strengthened Angel J in this view.

> "A reference to arbitration under this clause shall be deemed to be a reference to arbitration within the meaning of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto ..."

A further issue which arose in the course of argument was whether the fact that only the contractor can initiate the arbitration process provided for by clause 45 in any way detracts from a finding that the clause is an arbitration agreement for the purposes of the Act. In considering this point, Angel J referred to the judgment of Underwood J in *Minister for Main Roads for Tasmania v Leighton Contractors Pty Limited & Anor* [1985] B.C.L. 381 concerning earlier arbitration legislation which required a "submission to Arbitration". At 385:

> "An agreement which gives one of the parties an option to submit a dispute to Arbitration does not amount to a submission."

Angel J explained that in contrast to that earlier legislation, the present Commercial Arbitration Act requires an agreement to arbitrate and that it was of no consequence that only one party to NPWC3 could initiate arbitration proceedings under clause 45. In reaching this conclusion, Angel J relied upon the judgment in *Pittalis v Sherefettin* (1986) 2 ALL ER 227 and the views expressed by the authors of Russell on Arbitration, 19th Edition.

3. If the defendant is eligible for a stay of proceedings, should a stay be granted?

In considering this question, Angel J noted that the approach of modern courts, when faced with arbitration clauses in agreement has generally been in favour of holding the parties to their bargain and thus in favour of granting a stay unless there is "a sufficient reason" why the dispute should not be referred to arbitration. In coming to such a conclusion in the present instance, Angel J noted that:

> "None of the factors relied upon by the contractor is sufficient to warrant denying stay. While the issues of law are not simple, they are common in works contracts disputes such as this, and experienced arbitrators with engineering and building background are just as fit as the judiciary (if in some cases not more so) to expeditiously resolve."

Further, Angel J held that although the principal had taken a step in the proceedings as contemplated by s.53(2), the defendant should nevertheless be granted leave pursuant to that sub-section, since it had always maintained its insistence upon arbitration, and the contractor had not been prejudiced in any way by the principal's actions.

4. Was the contractor's claim in quantum meruit a claim "arising out of the contract for the purposes of cl.44?

This was perhaps the most significant point argued by the contractor. It submitted that despite the words "all disputes or differences arising out of the contract", a claim on quantum meruit was not encompassed by clause 45. In support of this contention the contractor referred to the decision of the High Court in *Pavey & Matthews Pty Limited v Paul* (1987) 162 CLR 221, where it was held that the right to recover on a quantum meruit did not depend upon the existence of an implied contract, but rather, on principles of unjust enrichment. This being so, it was submitted, the claim of quantum meruit could not be said to "arise" out of the contract as, in the view of the High Court it is a matter quite divorced from the contract and the law of contract. In support of this contention.

Angel J referred to the judgment of Viscount Simon

LC in *Heyman & Anor v Darwins Limited* [1942] A.C. 357 in which his Lordship said, at 367:

> "I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application because the contract has "come to an end" as, for example, by frustration. In such cases it is the performance of the contract that has come to an end".

Despite criticism of these views in subsequent cases (see e.g. *Bliss Corporation Limited v Kobe Steel Limited*, Smart J. unreported, 29 September 1987), Angel J nevertheless considered that the present claim on quantum meruit had sufficient nexus to the contract:

> "In cases such as this where there was a concluded contract between the parties, and work was done pursuant to that contract, then even if the contract has come to an end, whether by frustration or abandonment as the contractor here alleges, it is difficult to see how it can be said that the claim on quantum meruit for the work done and accepted by the defendant did not "arise out of" the original contract. In my view the contractor's claims on a quantum meruit only arises out of the contract and fall within the ambit of clause 45."

- **Craig Straughan, Solicitor,**
  Allen Allen & Hemsley, Solicitors.

Editorial Note:
It is instructive to compare this decision with the *Brunswick* case report, which appears on page 58 of this Issue. It is submitted that *Brunswick* might be given more weight.

Delay Costs - Wharf Properties Case

Wharf Properties Ltd v Eric Cumine Associates [1991] 52 Build. L.R. 8

In [1990] #11 Australian Construction Law Newsletter p.12 the decision of the Hong Kong Court of Appeal is noted. The plaintiff, Wharf Properties has unsuccessfully appealed to the Privy Council against the striking out of the claim.

In 1982, Wharf Properties completed a large residential and commercial development on the Hong Kong waterfront known as Harbour City. The work was plagued by delay and Wharf Properties was sued by the main contractor and various subcontractors. Those actions were compromised on the basis that Wharf Properties paid the claimants many millions of dollars. In the present action, Wharf Properties sought reimbursement from ECA who had been engaged by Wharf Properties as architects and surveyors. The claim was based on alleged negligence and breach of contract by ECA.

It was claimed that ECA delayed in completing designs and caused or permitted an excessive number of variations, with the consequence that Wharf Properties incurred extra costs due to late possession of the site and widespread disruptions to the programme.

ECA sought particulars of the claims. For example, with respect to the alleged excessive variations, ECA asked Wharf Properties to identify each variation instruction which was alleged to be excessive. ECA asked for the date of the instruction, the nature of the variation, the date on which the changes were made, the consequences to progress and the amount of loss or expense caused.

Wharf Properties refused to provide the detailed particulars and said, "it will be necessary at the trial to consider all variations instructed in order to establish which of them are unnecessary". Wharf Properties also made the statement, "It is the plaintiff's case that the cumulative delay to the Works and the totality of losses as pleaded were the responsibility of [ECA]. Due to the complexity of the project, the inter-relationship of the very large number of delaying and disruptive factors pleaded and their inevitable 'knock on' effects and the necessarily overlapping nature of the many allegations made ... it is not possible at this stage to identify and isolate individual delays in the manner requested."

This did not impress the Privy Council who said at p23:

> It is for the plaintiff in an action to formulate his claim in an intelligible form and it does not lie in his mouth to assert that it is impossible for him to formulate it and that it should, therefore, be allowed to continue unspecified in the hope that, when it comes to trial, he may be able to plead and substantiate.

The Privy Council agreed with the Hong Kong Court of Appeal that the action should be struck out as an abuse of the process of the court.

- Philip Davenport