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BAULDERSTONE HORNIBROOK ENGINEERING PTY LTD v KAYAH HOLDINGS PTY LTD - BC9706464

SUPREME COURT OF WESTERN AUSTRALIA
HEENAN J

CIV 1742 of 1996

19 November 1997, 2 December 1997

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Arbitration -- Engineering contract -- Clause enabling parties to refer disputes to independent third person -- Referee to act as expert and not as arbitrator -- Difference between expert and arbitrator -- Whether arbitration agreement -- Whether clause void as against public policy -- Reference undertaken pursuant to clause -- Institution of court proceedings raising same issues -- Whether reference should continue

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Case(s) referred to in judgment(s):

Arenson v Casson Beckman Rutley & Co [1977] AC 405
Christmas Island Resort Pty Ltd v Geraldton Building Co Pty Ltd, unreported; SCt of WA; 9 September 1997
Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643)
In re Carus-Wilson and Greene (1886) 18 QBD 7
Jones v Sherwood Computer Services [1992] 2 All ER 170
Novamaze Pty Ltd v Cut Price Deli Pty Ltd (1995) 128 ALR 540
Scott v Avery (1856) 5 HL 810
Star International (UK) Ltd v Bergbau-Handel [1966] 2 Lloyd's Rep 16
Tehno-Impex v Gebr Van Weelde [1981] QB 648
The Oranie and The Tunisie [1966] 1 Lloyd's Rep 477

Case(s) also cited:

Anderson v G H Michell & Sons Ltd (1941) 65 CLR 543
Attwood v Lamont [1920] 3 KB 571
Briscoe & Co Ltd v Victorian Railways Commissioners [1907] VLR 523
Carney v Herbert and Others [1985] 1 All ER 438
Community Developments Pty Ltd v Engwerda Construction Co (1966) 120 CLR 455
Goodinson v Goodinson [1954] 2 QB 118

Hawker De Havilland Ltd v Femandes & Anor (1996) ATPR 41-479
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers [1997] ATPR 54, 319
Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955 (1944) 179 CLR 597
Hurst v Film Co Ltd (1985) 3 ACLC 636

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Hurst v Vestcorp Ltd (1988) 6 ACLC 286
In re Davstone Estates Ltd's Lease [1969] 2 Ch 378
Marquett v Walsh (1929) 29 SR (NSW) 298
Mason v Provident Clothing & Supply Co Ltd [1913] AC 724
McFarlane v Daniell (1938) 38 SR (NSW) 337
News Ltd v Australian Rugby Football League Ltd (1996) 139 ALR 193
Niemann v Smedley [1973] VR 769
Norths Ltd v McCaughan Dyson Capel Cure Ltd (1988) 6 ACLC 320
O'Loughlin v O'Loughlin [1958] VR 649
Pont Data Australia Pty Ltd v ASX Operations Pty Ltd (1990) 93 ALR 523
Re Permanent Trustee Nominees (Canberra) [1989] 1 Qd R 314
South Australian Railways Commission v Egan (1973) 130 CLR 506
Swanson v Board of Land & Works [1928] VLR 283
Thomas Brown & Sons Ltd v Fazal Deen (1962) 108 CLR 391

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This action concerns a clause in an engineering contract which provides for reference to an independent third party, other than the Court, in order to resolve disputes arising out of the contract. The Court is required to decide whether or not the clause is void as being against public policy and in either event whether, in light of the institution of court proceedings which raise the same issues between the parties, the reference already under way should continue.

The plaintiff company was the project manager for the upgrading of the CSR Readymix Plant at Gosnells. The defendant company, as trustee of The Dryka Family Trust, trades under the name of Dryka Consulting Engineers. On 3 March 1995 the parties executed a contract, prepared by the plaintiff, whereby the defendant agreed for a fee of $245,400 to provide shop drawings (that is, drawings for use in the workshop) for the structural steel fabrication required in the project. A dispute arose between the parties as to whether the defendant completed the drawings within time and otherwise as required by the contract and as to whether it is entitled to payment for additional work, delay costs and variations.

On 7 October 1995 the defendant served a notice on the plaintiff requiring that the dispute be resolved in accordance with cl20 of the contract. Pursuant to the provisions of that clause Mr Allan Swann was nominated by the Chairman of the Institute of Arbitrators to determine the dispute. In compliance with procedural orders made by Mr Swann the defendant served points of claim on the plaintiff in April 1996 and the plaintiff served points of defence and counterclaim on the defendant during the following month. Those documents show that the defendant claim $390,213 from the plaintiff and that the latter claims $3,600,881 from the defendant.

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Meanwhile, by writ issued on 16 February 1996 Total Fabrication Engineers Pty Ltd, a sub-contractor engaged on the project, commenced an action against the plaintiff claiming, among other things, damages resulting from the late supply of and defects in the drawings supplied by the defendant. By third party notice dated 7 March 1996 filed in that action

the plaintiff has claimed from the defendant indemnity and/or contribution and/or damages. The claim made in the third party notice is the same as that which the plaintiff has made in its points of defence and counterclaim.

Cl20 of the contract reads as follows:

"This Agreement shall be governed by and construed in accordance with the laws of Western Australia.

If any dispute arises out of this Agreement, the Parties shall in the first instance attempt to resolve such dispute by mutual consultation between the Chief Executive Officers of the Parties, and any Party may at any time serve a notice on the other Party requesting such consultation and stating the nature of the dispute.

If after fourteen [14] days of service of such notice the dispute has not been settled, then either party may serve a notice on the other requiring that the dispute be resolved by the determination of an independent third party [the "Referee"] acceptable to both parties. If the parties cannot agree on the Referee within seven [7] days of the date of service of the notice then either party may request the Chairman of the Institute of Arbitrators Australia to nominate the Referee.

The Referee who has been agreed upon or appointed shall act as an expert and not as an arbitrator.

The Referee shall investigate the dispute and make his decision on it in any manner that he shall see fit, subject to the following:

[a] He shall observe the principle of procedural fairness and natural justice.

[b] He shall make his decision in writing and include in it a statement of the reasons for making his decision.

[c] The investigation and decision shall be kept confidential between the parties and the Referee.

The decision of the Referee shall be final and binding upon the parties, except that the Referee may correct his decision where in his opinion it contains a clerical mistake, an error arising from an accidental slip or omission, a defect of form, a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the decision.

The Parties shall at all times do all things which the Referee requires to enable a just award to be made, including making available any documents he requests to inspect or any employees he requests to interview. The Parties shall not act so as to delay or prevent an award being made.

Each party shall bear its own costs of the determination and the parties shall share equally the costs of the Referee and the determination."

It is noteworthy that, although the clause expressly requires mutual consultation as a first step towards resolving the dispute, the giving of the second notice is optional. The use of the word "may" in the third paragraph purports to give each party merely a right to refer the dispute for determination in the manner prescribed. However, the clause goes on to impose an obligation to join in the reference once the specified notice has been given. As is pointed out in Dorter & Sharkey Building and Construction Contracts in Australia para14.276/2, at law the option itself is a contract or an agreement. Thus the parties clearly have agreed in writing, either by the option alone or by the option together with the notice, to refer the dispute for determination by an independent third party.

As a general rule, the Court will recognise as proper any procedure which the parties have agreed upon to settle a dispute. As the provisions of the Commercial Arbitration Act 1983 show, if they have agreed in writing to refer present or future disputes to arbitration their agreement will be recognised and

enforced. Even if the procedure agreed upon is not arbitration, the agreement might well be enforceable as a matter of contract. Thus the Court usually will not intervene when the parties have referred a matter for the determination of an expert if such determination is within the referee's particular field of expertise (for example, see the judgment of the Court of Appeal in Jones v Sherwood Computer Services [1992] 2 All ER 170). However, on behalf of the plaintiff it is contended that the procedure agreed upon in this case is so contrary to fundamental principles that it must be treated as against public policy and void.

The main limitation imposed upon the power of the parties to prescribe their own rules of procedure is that they cannot by contractual provision oust the jurisdiction of the Court (Scott v Avery (1856) 5 HL 810 and Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643). For a recent discussion of the topic see the judgment of Drummond J in Novamaze Pty Ltd v Cut Price Deli Pty Ltd (1995) 128 ALR 540 at 548-9. In this case, cl20 provides for the resolution by the referee of any dispute arising out of the contract, whether or not the determination of the dispute is within his particular field of expertise. Further, the clause purports to make the referee's decision final, rather than making the determination nothing more than a condition precedent to a legal right capable of enforcement by action through the Court. To that extent it operates to oust the jurisdiction of the Court and will not be recognised.

The parties have agreed, in the fifth paragraph of cl20, that the referee "shall observe the principle of procedural fairness and natural justice" and shall state his decision and his reasons for it in writing. But it is clear from the express provisions of the fourth paragraph that, although he is required to use his own skill and knowledge as an expert, the referee shall not "act .... as an

arbitrator". As Mocatta J observed in Star International (UK) Ltd v Bergbau-Handel [1966] 2 Lloyd's Rep 16 at 18-19, "There are few subjects on which it is more difficult to make an accurate generalization than arbitration". Nevertheless, it is clear that an arbitration involves "a judicial enquiry worked out in a judicial manner" (In re Carus-Wilson and Greene (1886) 18 QBD 7 at 9 per Lord Esher MR). Thus an arbitrator must not only be impartial but, unlike an expert, must decide the dispute in accordance with the substantive law (see, for example, Tehno-Impex v Gebr Van Weelde [1981] QB 648 per Oliver LJ at 669-670 and per Watkins LJ at 680) and on the basis of such evidence and submissions as the parties seek to present to him, where the nature of the dispute does not render this inappropriate (see, for example, Arenson v Casson Beckman Rutley & Co [1977] AC 405 per Lord Wheatley at 428 and per Lord Salmon at 439).

As the points of claim and the points of defence and counterclaim show, the issues for determination in this case involve matters both of fact and of law. For example, there are issues as to whether the contract was partly oral and partly written, as to whether the defendant was required to carry out engineering and dimensional checks in addition to preparing the drawings, as to whether there was any agreement as to the price for additional work undertaken, as to whether on a correct interpretation of the contract certain work done by the defendant was included in the scope of work specified, as to the period during which the work was to be done by the defendant, as to whether there was an agreement that the defendant would carry out the work in Malaysia and as to whether the plaintiff later directed the defendant to carry out part of the work in Perth. Satisfactory determination of those matters by a referee who is required to act as an expert and not as an arbitrator is impossible: by its very nature the task is one for an arbitrator and not an expert.

On behalf of the defendant it is submitted that, even if cl20 is not valid and enforceable, it is appropriate now for the Court to make it so by, for example, severance of the passage requiring the referee to act as an expert and not as an arbitrator. Counsel for the defendant referred to cl22 of the contract, the relevant part of which reads as follows:

"Every provision of this Agreement shall be deemed to be severable and if any provision of this Agreement shall be void or illegal or unenforceable for any reason then the same shall be deemed to be severed and omitted herefrom and this Agreement with such provision thus severed and omitted and with such consequent amendment as may be necessary shall otherwise remain in full force and effect."

Despite the broad terms of cl22, in my opinion it does not enable a Court to sever a provision or provisions of the contract in order to bring about a result which is in conflict with the express intention of the parties. That would be so here.

Thus I find that cl20 is not an arbitration clause and that the Court cannot make it so. I find also that the clause is against public policy in that it (a) purports to oust the jurisdiction of the Court and (b) prescribes a procedure which is entirely unsuited to the resolution of disputes which may arise out of the contract. For those reasons I conclude that the clause is void.

It is well recognised now that the Court has jurisdiction to restrain either a party or the referee from proceeding with a reference (see, for example, Christmas Island Resort Pty Ltd v Geraldton Building Co Pty Ltd, unreported; SCt of WA; 9 September 1997). It seems that the guiding principles are that a stay must not cause injustice to the other party and that the applicant must satisfy the Court that the continuance of the reference would be oppressive or vexatious to him or an abuse of the process of the Court (see The Oranie and The Tunisie [1966] 1 Lloyd's Rep 477 at 487 per Sellers LJ).

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From my conclusion that cl20 is void it follows that there should be a stay of the reference in this case. There are other, practical, reasons for the stay. These include the expense and delay occasioned by the conduct of two sets of proceedings relating to the same dispute, the potentiality for inconsistent findings and the convenience of having the claim of the third party against the plaintiff determined at the same time as the dispute between the parties to this action - something which cannot be achieved in the reference - and, last but not least, the unsatisfactory nature of the process prescribed by cl20.

In my opinion such considerations outweigh the claim of the defendant to have its dispute with the plaintiff determined in the way agreed upon by the parties.

Order

I conclude that an order should be made restraining the defendant permanently from proceeding with the reference.

Counsel for the plaintiff: Mr John Gilmour QC & Mr S R Boyle

Solicitors for the plaintiff: Clayton Utz

Counsel for the defendant: Mr R W Bower

Solicitors for the defendant: Corser & Corser