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50 Paragraphs

JEMENA GAS NETWORKS (NSW) LTD -- DEFENDANT v AGL ENERGY LTD -- PLAINTIFF - BC201704518

Supreme Court of New South Wales -- Equity -- Commercial List
Hammerschlag J

2017/143388

5, 14 June 2017

Agl Energy Ltd v Jemena Gas Networks (Nsw) Ltd [**2017] NSWSC 765**

COMMERCIAL ARBITRATION -- Commercial Arbitration Act 2010 (NSW) ss 7(1), 8(1) -- Request by defendant for an order that the parties be referred to arbitration -- Arbitration agreement -- Whether there is an agreement by the parties to submit to arbitration all or certain disputes -- Where only express reference to arbitration in the parties' written agreement is in a clause which provides that each party agrees to endeavour to settle the Dispute by mediation before having recourse to arbitration or litigation -- Held -- No arbitration agreement.

(NSW) Commercial Arbitration Act 2010

(NSW) Commercial Arbitration Act 1984

(NSW) National Gas (New South Wales) Act 2008

InfraShore Pty Ltd v Health Administration Corporation [2015] NSWSC 736; *Manningham City Council v Dura (Australia) Constructions Pty Ltd*[1999] 3 VR 13; *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd*[2002] 2 Qd R 514; *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service*(1995) 184 CLR 301, cited

Hammerschlag J.

INTRODUCTION

[1] HIS HONOUR: The defendant moves for an order under s 8(1) of the Commercial Arbitration Act 2010 (NSW) (the Act) that there be referred to arbitration an action commenced against it in this List by the plaintiff. In the action, the plaintiff claims damages for breach by the defendant of two written Reference Service Agreements under which the defendant agreed to provide gas haulage reference services to the plaintiff, including meter reading and associated data activities.

[2] The sole question for determination in this application is whether each of the Reference Service Agreements is an arbitration agreement by the parties as defined in s 7(1) of the Act, which provides:

> 7 Definition and form of arbitration agreement
> (1) An "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

[3] The parties agree that if the answer is yes, the Court must refer the parties to arbitration under s 8(1) of the Act, which provides:

> 8 Arbitration agreement and substantive claim before court
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

BACKGROUND

[4] The defendant operates a gas distribution network. The plaintiff is a gas retailer.

[5] The National Gas (New South Wales) Act 2008 (NSW) is part of a national scheme to establish a framework to enable third parties to gain access to natural gas pipeline services, such as those operated by the defendant. The enactment makes provision for application in this State of the National Gas Law as part of that scheme.

[6] The plaintiff has access to the defendant's gas network under an instrument known as an Access Arrangement (AA), imposed by the Australian Energy Regulator under the *National Gas Law*. The Access Arrangement incorporates, by way of a schedulised Reference Service Agreement, the terms and conditions on which the defendant will supply services.

[7] The terms and conditions for the period 1 July 2010 to 30 June 2015 are governed by one Reference Service Agreement. That agreement was varied and replaced by another which governs the period 1 July 2015 to 30 June 2020. But for one small difference which is referred to below, they are relevantly for present purposes in the same terms. I will refer to them as the Agreement.

[8] The defendant is responsible for reading and maintaining natural gas meters. Under the Agreement, the defendant provides details of gas meter readings to the plaintiff so that the information can be used by it to bill its retail customers.

[9] In the action, the plaintiff alleges that the defendant breached its meter reading obligations under the Agreement as a result of which the plaintiff suffered loss or damage.

[10] Clause 30 of the Agreement is entitled Dispute Resolution. It provides:

30.1 Application

(a) The Parties acknowledge and agree that this clause 30 does not, and is not intended to, limit or exclude in any way the provisions in the National Gas Law in relation to dispute resolution.

(b) The Parties agree that where a Party refers any matter in connection with this Agreement or its performance to be dealt with in accordance with the dispute resolution provisions set out in the National Gas Law:

(i) if an access determination is made by the dispute resolution body in respect of the access dispute, the Parties must comply with that access determination;

(ii) neither Party can subsequently utilise this clause 30 in respect of the same dispute.

30.2 Notification of Dispute

If a Party claims that there exists:

(a) any dispute or difference of opinion between the Parties; or

(b) the absence of agreement by the Parties,

about a matter which arises out of or relates to this Agreement, or the breach, termination, validity or subject matter thereof, or as to any related claim in restitution or at law, in equity or pursuant to any statute (Dispute), then that Party must notify the other Party of the Dispute.

30.3 Nomination of Representative

As soon as practicable after a notice is given under clause 30.2, each Party must nominate in writing a representative authorised to settle the Dispute on its behalf.

30.4 Good Faith Discussions

Each Party must enter into discussions in good faith, to resolve the Dispute or to agree on a process to resolve all or part of the Dispute. Unless the Parties otherwise agree, discussions between the Parties' representatives under this clause 30.4 must continue for 7 Business Days after notice of the Dispute was given under clause 30.2.

30.5 Mediation

(a) In the event that discussions under clause 30.4 fail to resolve the Dispute, each Party expressly agrees to endeavour to settle the Dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC) before having recourse to arbitration or litigation.
(b) The mediation shall be conducted in accordance with the ACDC Guidelines for Commercial Mediation (Guidelines) which are operating at the time the matter is referred to ACDC.
(c) The Guidelines set out the procedures to be adopted, the process of selection of the mediator and the costs involved.
(d) The terms of the Guidelines are hereby deemed incorporated into this Agreement.
(e) Clause 30 shall survive termination of this Agreement.

30.6 Urgent relief

Nothing in this clause 30 will prevent a Party from seeking urgent declaratory or injunctive relief.

30.7 Information confidential

Any information or documents disclosed by a representative during the course of the discussions or any mediation in relation to the Dispute under this clause 30:

(a) must be kept confidential; and
(b) may not be used except to attempt to settle the Dispute.

30.8 Without Prejudice Discussions

Any discussions which take place as contemplated by this clause 30 will be without prejudice to the respective rights and obligations of the Parties in relation to the subject matter of the Dispute.

30.9 Continue to perform Agreement

> Notwithstanding the existence of a Dispute, or the undertaking of any Dispute resolution in accordance with this clause 30, each Party must continue to perform its obligations under this Agreement.

[11] The earlier Reference Service Agreement contained the following provision instead of what is cl 30.7 of the later one:

> 32.7 Information confidential
>
> Any information or documents disclosed by a representative during the course of the discussions under this clause 32:
>
> (a) must be kept confidential; and
> (b) may not be used except to attempt to settle the Dispute.

[12] The later one thus includes an obligation to keep information or documents disclosed during the course of discussions or any mediation confidential, whereas the earlier one makes no reference to mediation. The significance of the difference is said by the plaintiff to be that the later instrument expressly provides for confidentiality relating to mediation, but not for arbitration.

[13] The Guidelines for Commercial Mediation issued by the Australian Commercial Disputes Centre (referred to in cl 30.5(b)) contain comprehensive provisions, among others, for the notification of disputes, selection of mediators, fees, date, time and place of mediation, authority of the mediator, confidentiality and indemnity for the mediator.

[14] On 29 July 2016, the plaintiff gave the defendant written Notification of a Dispute under cl 30.2. It articulated the Dispute as a claim based on losses arising from the defendant's failure to complete meter reads on time and a claim based on losses arising from its failure to advise the plaintiff of the quantity of gas taken at each delivery point, within the time periods provided for in the Agreement.

[15] Under cl 30.4, the plaintiff requested a meeting of the parties' representatives to be convened in an effort to resolve all or part of the Dispute or to agree on a process to resolve all or part of the Dispute. The Dispute was not resolved. Nor, apparently, was there agreement on a process to resolve all or part of it.

[16] On 13 October 2016, the defendant wrote to the Australian Disputes Centre informing it that a dispute between the parties had not been resolved and was to be referred to mediation in accordance with the Australian Disputes Centre Guidelines for Commercial Mediation.

[17] On 28 March 2017, the defendant wrote to the plaintiff stating that they had entered into good faith discussions and subsequent mediation in attempt to resolve the Dispute as required under cl 30.4 and cl 30.5. The letter went on to state that clause 30.5(a) provided that "the parties must endeavour to settle the Dispute by mediation 'before having recourse to arbitration or litigation', and that despite undertaking good faith discussions and mediation in accordance with clauses

30.4 and 30.5, the Dispute remained unresolved."

[18] The letter gave notice to the plaintiff that the defendant referred the Dispute to arbitration and stated that such notice had been served on the plaintiff's registered office to comply with formal service requirements under the Commercial Arbitration Act 2010 (NSW). The defendant stated that it would contact the plaintiff shortly to make arrangements for the identification of a suitable arbitrator.

[19] On 12 May 2017, the plaintiff commenced action in this Court.

[20] On 22 May 2017, the defendant filed its motion for referral to arbitration.

[21] Mr J. Giles SC together with Mr J. Mitchell of counsel appeared for the defendant, the applicant on the motion. Mr R Lancaster SC appeared for the plaintiff respondent. The Court had the benefit of written submissions which were refined in oral argument. I have had regard to all the arguments as finally put but have not restated them.

DISCUSSION

[22] To be an arbitration agreement under s 7(1), the Agreement must make binding provision for compulsory arbitration, whether as a consequence of an election by a party or otherwise: *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service*(1995) 184 CLR 301 ("*PMT Partners"*) at 325-326.

[23] Do the words which the parties chose, objectively assessed with regard to the commercial purpose or objects to be secured by the Agreement, make such provision?

[24] Apart from cl 30.5(a) itself, the Agreement makes no other express reference to arbitration. The defendant relies, and relies only, on cl 30.5(a) as embodying the arbitration agreement.

[25] It argues that by expressly restricting the parties' recourse to arbitration until after mediation, cl 30.5(a) necessarily implies that after mediation they will have that recourse.

[26] It argues that given that there is no other express reference to arbitration in the Agreement, cl 30.5(a) has no effective content with respect to arbitration unless it is regarded as a binding arbitration agreement.

[27] It argues that because the provision refers to recourse to arbitration **or** litigation, each party is given an effective option to choose which one it wants. It argues that its election to arbitrate prevails over any election of the plaintiff to litigate, because it elected first, and its election will only be effective if the plaintiff is held to arbitration.

[28] It is, on examination, apparent that the reasoning urged by the defendant has significant shortcomings with regard to both the existence of an arbitration agreement and to its operation.

[29] The words of cl 30.5(a) do not disclose any agreement for compulsory arbitration. They are words of limitation, not of expansion. They restrict recourse to arbitration or litigation unless a condition is fulfilled. There is no justification in language or logic to read them as creating a contractual right to force that which the clause limits. Just as they do not confer any right to litigate, (a right which a party has in any event) they do not confer any contractual right to force compulsory arbitration.

[30] Cl 30.4 imposes an obligation to resolve the Dispute or to agree a process to resolve all or part of it. In the particular circumstances of a case, that obligation may include one to discuss in good faith an agreement to resolve the Dispute or part of it by arbitration. An arbitration agreement may result. If this occurred, cl 30.5(a) would dictate that mediation would have to happen first. Cl 30.5(a) accordingly has content and utility, even if it does not itself amount to an arbitration agreement.

[31] It is also to be observed that cl 30.9 requires each party to continue to perform its obligations under the Agreement

notwithstanding the undertaking of any Dispute resolution in accordance with cl 30. This could include Dispute resolution in the form of an arbitration agreed pursuant to cl 30.4.

[32] The defendant cited two intermediate appellate court decisions concerning contracts which made provision for a dispute to be referred to "arbitration or litigation". In both cases, it was held that the contract under consideration contained an arbitration agreement and an election for arbitration by one party would prevail over an election for litigation by the other, even if the election for arbitration occurred second. The defendant argued that cl 30.5(a) should be given this effect.

[33] The first of these decisions is *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] 3 VR 13 ("*Manningham*"), in which the Victorian Court of Appeal considered whether a written building contract contained an arbitration agreement under s 4(1) of the Commercial Arbitration Act 1984 (VIC). Although differently worded, that section was materially indistinguishable from s 7(1) of the Act.

[34] Cl 13.01 of the contract in *Manningham* provided that in the event of any dispute or difference arising under or in connection with the contract, either party may give the other notice in writing identifying the dispute. It provided that the giving of such notice shall be a condition precedent to the commencement by either party of proceedings (whether by way of litigation or arbitration) with regard to the matters identified in the notice. Cl 13.02 provided that within ten days after service of a notice of dispute the parties were to confer to attempt to resolve the dispute and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means. Cl 13.03 and cl 13.04 went on to provide as follows:

> 13.03 FURTHER NOTICE BEFORE ARBITRATION OR LITIGATION
>
> In the event that the dispute cannot be resolved in accordance with the provisions of cl13.02 or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may by further notice in writing which shall be delivered by hand or sent by certified mail to the other party refer such dispute to arbitration or litigation. The service of such further notice under this cl13.03 shall also be a condition precedent to the commencement of any arbitration or litigation proceedings in respect of such dispute.
>
> 13.04 REFERENCE OF DISPUTES
>
> At the time of giving the notice referred to in cl13.03 the party who wishes the dispute to be referred to arbitration shall provide to the other party evidence that he has deposited with the Chapter of The Royal Australian Institute of Architects or the Master Builders' Association, in each case of the State, Territory or place in which the Site is located, the sum of one thousand dollars ($1000.00) by way of security for costs of the arbitration proceedings. Subject to compliance with the provisions of cl13.03 and the foregoing provisions of this cl13.04 such dispute or difference (unless meanwhile settled) shall be and is hereby referred to arbitration pursuant to the succeeding provisions of this s13.

[35] Applying *PMT Partners*, the Court found an arbitration agreement, albeit that arbitration would only come about if a party elected it.

[36] Each of the members of the Court separately (Winneke P at [3], Phillips JA at [13] and Buchanan J at [30]-[32]) concluded that there was an arbitration agreement which made arbitration the preferred method of dispute and one which the parties intended would be adopted in the event that either party elected to go to arbitration.

[37] Winneke P, in particular, made reference to the operation of cls 13.03 and 13.04 together. Cl 13.03 made provision for a party to refer the dispute to arbitration or litigation, which notice was a condition precedent to the commencement of any arbitration or litigation. Cl 13.04 went on to provide that a party who wished the dispute to go to arbitration was to provide security for the costs of the arbitration and if that occurred, the dispute was referred to arbitration. These provisions it seems to me leave little room for doubt that the parties had agreed that they were to go to arbitration if the procedure was followed.

[38] The second decision is *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2002] 2 Qd R 514 ("*Mulgrave*") in which the Queensland Court of Appeal followed *Manningham* with respect to a contract which included provisions almost identical to cls 13.02 and 13.03 in *Manningham*, but had no equivalent to cl 13.04. At [10] McPherson JA described cl 13.02 in *Manningham*, and the corresponding clause in *Mulgrave*, as being identical in the "critical respect" of providing for a notice by either party referring the dispute to arbitration or litigation. At [12] his Honour considered that when compared with each other, the effect of the two provisions was the same in that both provided for the giving of an initial notice of dispute, followed by a negotiation phase, and then by a second notice by either party referring the dispute to arbitration or to litigation. He observed that in both cases it is a function of that second notice to signify to the other party that the negotiation phase is at an end and in both the consequence of including in it a notice of election to arbitrate is to refer the dispute to arbitration. Jones J generally agreed with McPherson JA.

[39] Thomas JA took a different view. At [45] his Honour considered that the clause created equal rights for reference to litigation or arbitration and did not deal with the question of how a case was to be resolved where one party, at all material times, opted for arbitration, and the other, at all material times, opted for litigation. At [54]-[55], his Honour considered that it was clear that litigation was regarded as one of the available methods by which the dispute may be resolved. His Honour concluded that the clause did not meet the requirements identified in *PMT Partners*, namely that there must be a provision that in certain events the parties must arbitrate rather litigate.

[40] In contrast to the contracts under consideration in *Manningham* and *Mulgrave*, there is no "critical" provision in the Agreement for either party to refer the dispute to arbitration or litigation, let alone any indication that arbitration has primacy.

[41] Cl 30.5(a) contains no words of election and certainly none giving one party a right to compel the other in one direction. Cl 30.5(a) contemplates that there might be arbitration or litigation, but embargoes both until after mediation.

[42] Absent provision for referral, the basis upon which the Court both in *Manningham* and *Mulgrave* gave primacy to arbitration falls away. One is left only with an inhibition on recourse to arbitration or litigation with no provision, let alone a clear one, that in certain events the parties must arbitrate rather than litigate.

[43] Nothing in cl 30.5(a) indicates primacy of arbitration over litigation or that the party who moves first prevails over the party who moves last. In order to be read as giving a right to force arbitration, it would either have to operate on a first past the post basis with the person calling for the arbitration beating the party opting for litigation, or arbitration has to prevail even if the other party litigates first. I have difficulty in attributing an intention to the parties that this should be the case, because both are unsatisfactory. The first encourages a race and the second results in the unsatisfactory consequence that the party choosing litigation would have taken a step it was entitled to take at the time but then be penalised if the other later chose arbitration; see *InfraShore Pty Ltd v Health Administration Corporation* [2015]

NSWSC 736.

[44] In *Mulgrave,* even where there was a provision for referral but there was no machinery for the selection of one of two alternatives, Thomas JA concluded that there was no arbitration agreement. His Honour's reasoning -- behind which I respectfully suggest there is some force -- would lead *a fortiori* to a conclusion of no arbitration agreement where there is no provision for referral.

[45] It would be surprising if a reasonable person in the position of the parties, who had in cl 30 agreed to a Dispute Resolution process, including mediation, for which they comprehensively legislated, would have understood from the bare language of limitation in cl 30.5(a) that it was committing itself to compulsory arbitration at the instance of its counterparty.

[46] The plaintiff argued that the inclusion of the express reference in cl 30.7 to mediation supports its position because arbitration was not included. It puts that the inference is that the parties contemplated a binding agreement to mediate but not one to arbitrate. The words of cl 30.5(a) do not disclose an arbitration agreement. I do not consider that any meaningful role is played by the inclusion in cl 30.7 of the reference to mediation in determination of the issue before the Court. It is to be observed that under both versions, information disclosed during the discussions would have to be kept confidential. This obligation would not, it seems, terminate because there was a subsequent mediation or arbitration.

[47] In my view there is no arbitration agreement within the meaning of s 7(1).

[48] This conclusion renders it unnecessary to deal with a submission put by the plaintiff that any arbitration agreement the parties may have purported to conclude is void for uncertainty.

RESULT

[49] The defendant's motion is dismissed.

[50] I provisionally order the defendant to pay the plaintiff's costs of the motion. This order will solidify unless within 48 hours either party notifies my Associate that some other order is sought and the grounds for it, in which event I will make directions for such further argument as is required. I will stand the matter over for directions generally to the next convenient date.

Order

Defendant's motion is dismissed.

Counsel for the applicant: *J. Giles SC* with *J Mitchell -- Defendant*

Counsel for the respondent: *R.P.L. Lancaster SC -- Plaintiff*

Solicitor for the applicant: *Gilbert + Tobin -- Defendant*

Solicitor for the respondent: *Allens Linklaters -- Plaintiff*