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7 Pages

TRIARNO Pty Ltd v TRIDEN CONTRACTORS Ltd - BC9201735

SUPREME COURT OF NEW SOUTH WALES COMMON LAW DIVISION
COLE J

55062 of 1992

22 July 1992

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Triden

Contractors Ltd (Triden) entered into an agreement dated 17 August 1989 whereby Triden agreed with Triarno Pty Ltd (Triarno) to design, execute and complete a Ritz Carlton standard hotel and retail development at Double Bay.

Subsequently by deed dated 15 March 1991 between Triden and Triarno that contract was terminated upon the terms set out in the deed. CL24 of the deed required, in effect, the provision by Triden of a bank guarantee for \$500,000. That guarantee was to be released to Triden on 28 February 1992 unless Triarno had made a claim against Triden under the terms of the deed by that date. If Triden agreed to Triarno's claim, the amount so agreed was to be claimed from the bank guarantee. If the agreed sum exceeded \$500,000, Triden was to pay the excess to Triarno within seven days. CL25 continued: "If Triden and Triarno are unable to agree as to the value of any claim made by Triarno, Triarno shall be entitled to immediate payment from the bank guarantee for \$500,000 of the amount not in dispute (if any) but shall not be entitled to any amount of its claim in dispute until it receives a determination from an independent expert agreed upon by the parties or failing agreement, appointed by the Chairperson of the Institute of Arbitrators Australia, NSW Chapter, whose decision shall be final and binding. Upon receipt by Triarno's solicitor, of a copy of the independent expert's determination, Triarno shall be entitled to be paid from the bank guarantee for \$500,000 any additional amount to which it is entitled. If the amount determined by the independent expert exceeds the amount available under the bank guarantee for \$500,000, Triden shall pay Triarno immediately any such difference. If the determination by the independent expert does not give rise to an entitlement on Triarno's part to be paid the amount of such bank guarantee whether in whole or in part Triarno shall, but not before February 28 1992 forthwith direct the independent solicitor to release such bank guarantee to Triden, subject to any rights of Triarno pursuant to this deed."

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The deed made no express provision for payment of the independent expert, for the procedures to be followed by the independent expert in reaching his determination, or for any rights or obligations upon Triarno or Triden in relation to such expert's determination.

The only provisions of the agreement regarding costs are CL28 and CL29 which provide: "28. Each party shall pay its own legal costs in relation to this Deed save that Triden shall pay one quarter of Triarno's legal costs in relation to this Deed on account of Triarno's document preparation. 29. The parties shall pay the costs of the above mentioned independent solicitor equally."

Triarno has made claims pursuant to the deed in excess of \$500,000. The parties have been unable to agree upon those claims. The parties have agreed that the "independent expert" referred to in CL25 should in fact be two persons, Sir Laurence Street and Mr JA Morrissey. The former is legally experienced. The latter is experienced in building matters.

Neither of the parties have yet reached agreement with each other or with the independent experts concerning the procedures, the form or the cost of the independent expert's determination.

Subsequent to the deed of 15 March 1991, Triden ceased major involvement upon the building site whilst the remainder of the building works were completed. It seems that Triarno's claims arise, at least in part, in relation to events subsequent to the deed. Triden asserts that it does not have knowledge of the circumstances giving rise to many of Triarno's claims, that some of the claims for defective workmanship brought against Triden relate to work which was covered over before inspection by Triden, and that many of the claims by Triarno have not been properly particularised to Triden so that it is unaware of "evidence likely to be presented in support of the claims". Because of these circumstances Triden asserts that it is unable to present to the experts evidence regarding Triarno's claims, or to controvert evidence which might be placed before the experts by Triarno. Thus it wishes for there to be a procedure whereby Triarno first discloses to Triden and the experts, the evidence which it wishes to advance in support of its claims with Triden then being given the opportunity to cross examine any witness who may support that evidence, coupled with Triden then being given the opportunity to place additional evidence in rebuttal, if it is able, before the independent experts.

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Although the details are not entirely clear, I was informed from the Bar Table that a meeting had been held between the independent experts and representatives of Triarno and Triden.

The matters to which I have referred were placed before the independent experts. Triarno has signed a document headed "Agreement for Binding Determination of Disputes by Expert Appraisal", but neither Triden nor the independent experts have signed that agreement. The agreement is, in substance, in the form of that drafted by Sir Laurence Street and published in Australian Dispute Resolution Journal, Volume 1, Number 3, August 1990 at 134-5. It is unnecessary to set forth the whole of that agreement. In substance the agreement makes clear that the experts in certifying their determination will act as experts and not as arbitrators, will proceed "in such manner as they think fit", will take into consideration all documents, information and other written and oral material that the parties place before them including documents, information and materials relating to the facts in issue and to arguments and submissions upon the matters in issue, will not be required or expected to refer to other materials or documents, and will be entitled "without giving reasons (to) issue a certificate in such form as they consider appropriate stating their determination of the matters in issue". The agreement, had it been signed, provided that whilst the parties may be accompanied by legal representatives, they "agree to be bound by such procedural directions as may be given by the experts both in preparation for and during the course of the meeting". It continued: "The parties agree that any such meeting shall be deemed not to be a hearing such as to import any colour of the proceedings under this agreement being considered to be an arbitration."

It further provided: "The parties shall share equally in paying the costs and expenses of the determination as previously agreed with the experts or, in the absence of previous agreement, as certified by the experts.

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The determination shall include a determination by the experts as to whether a party shall pay to the other party any costs of that other party in the determination."

The putative agreement provided that: "Triarno and Triden agree to accept the determination in the said certificate as final and binding."

It seems that at the meeting between the parties with the independent experts agreement regarding procedures and costs could not be reached. As the agreement for expert determination is in a form drafted by Sir Laurence Street, I assume

that the independent experts advanced that agreement as the basis upon which they would undertake that role. Triarno signed the agreement but Triden did not. An hiatus apparently developed. I rather gather that Sir Laurence Street suggested that an approach be made to the Court for a determination regarding the manner in which the expert determination should be conducted. Ultimately there was commenced the present proceedings in which the following relief was sought: "1. A declaration as to the rules and procedures for the conduct of an expert determination pursuant to CL25 of a Deed dated March 15, 1991 between the Plaintiff and the Defendant ("the Deed"), including declaration that: (a) any independent experts appointed pursuant to CL25 of the Deed: (i) are not required to apply the rules of natural justice; (ii) are not required to provide their reasons for any expert determination; (b) any expert determination made by the independent experts pursuant to CL25 of the Deed shall be final and binding; (c) the parties to the expert determination pursuant to CL25 of the Deed are required to share equally the costs of the expert determination excluding their respective legal costs, subject to any determination as to costs (including legal costs) by the independent experts.

2. An order that the Defendant submit to and cooperate with any expert determination pursuant to CL25 of the Deed conducted in accordance with the terms set out in any declaration of the Court, any other term ordered by the Court and any lawful directions given by the independent experts.

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2A. An order that the conduct of the expert determination be in accordance with the terms and conditions set forth in paraB to G of the agreement annexed hereto and marked with the letter "A".

ParaB to G referred to in para2A of the summons are a reference to the provisions of the draft Agreement for Binding Determination of Disputes covering the aspects of procedure, costs and finality to which I have referred.

Whilst recognising that there may be utility in the court determining procedures to be followed in an expert determination, in my opinion the court has no jurisdiction to do so. The court has power in an arbitration subject to the Commercial Arbitration Act 1974 to make interlocutory orders in relation to arbitration proceedings (s47). However the contemplated proceedings are for a determination by an expert, and are not intended to be an arbitration. That seems clear from the provisions of CL25 and the draft agreement advanced either by the experts or Triarno. The difference in function between an independent expert and an arbitrator is well recognised (see for instance Hudsons Building Contracts 3rd ed, volume 1, at 707-717 and cases there collected; In Re: Carus Wilson and Greene 188718 QBD 7 at 9; Legal and General Life of Australia Ltd v A Hudson Pty Ltd 1985 1 NSWLR 314 at 336 per McHugh JA as he then was).

If the parties have not by their deed agreed the procedures to be followed upon an expert determination, that is not a void the court can fill. There is no reason to imply a term that the court will determine procedures. It is a matter for either agreement between the parties, or determination by the independent experts as to the procedures to be followed.

The question of the costs of the independent experts is not explicitly dealt with by the deed. However, the operation of CL25 is a critical mechanism in implementation of the deed's provisions. CL29 makes clear that the costs of the independent solicitor are to be equally shared. CL28 makes clear that subject to one particular aspect, the parties are to bear their own legal costs. These two clauses, in my view, exhibit an intention on the part of the parties that the costs of independent mechanisms necessary for operation of the deed are to be equally shared, but that the parties are each to bear their own legal costs of implementing the deed. An implied term that each party pay equally the costs of the independent experts satisfies the tests referred to in BP Refinery (Westernport) Pty Ltd v Hastings Shire Council 1977 52 ALJR 20 at 26. It was suggested that such a term was not so obvious that "it goes without saying" because any such independent determination was for the benefit of Triarno. In my view that is not so. Each party benefits by the implementation of a mechanism to resolve disagreement between them. I am thus of the view that there is an implied term that each party pay one half of the costs of the independent expert.

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As a matter of construction of the deed, and in particular CL25, it is clear in my view that the decision of the independent experts pursuant to CL25 is final and binding. The clause says so.

I do not think that the court has any power to direct that a party "submit to and cooperate with any expert determination pursuant to CL25 of the Deed". It is a matter for each party to determine what role, if any, it will take in relation to the expert determination, if the experts determine that there is a role for either party to take apart from notification of the disputes to be determined.

Order

For the reasons expressed above I decline to make the declarations sought in para1(a), or the orders sought in para2 and para2A of the summons.

I declare that any expert determination made by the independent experts pursuant to CL25 of the deed shall be final and binding. I further declare that the parties to the deed dated 15 March 1991 are required to share equally the costs of the independent experts making a determination pursuant to CL25 of the deed. I further declare that each party is required to bear its own legal costs associated with any such determination. In my view there is nothing in the agreement which suggests or necessarily implies that a determination by the independent experts which is favourable to one party or the other should result in a party paying the costs of the independent experts, nor is there any express or implied power in the independent experts conferred by the deed to make an order for costs.

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Each party has been partially successful before me. Accordingly I make no order as to costs.

---- End of Request ----

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