SUPREME COURT OF QUEENSLAND

CITATION:	*Rainbow Builders Pty Ltd v State of Queensland* [2020] QSC 25
PARTIES:	**RAINBOW BUILDERS PTY LTD (ACN 111 506 720)** (Applicant in 14202/19/Respondent in 14161/19) **v** **STATE OF QUEENSLAND THROUGH THE DIRECTOR GENERAL, DEPARTMENT OF HOUSING AND PUBLIC WORKS** (Respondent in 14202/19/Applicant in 14161/19)
FILE NO/S:	BS 14202 of 2019 and BS 14161 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application filed 20 December 2019 and Application filed 19 December 2019
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Delivered Ex Tempore on 21 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	20 February 2020
JUDGE:	Jackson J
ORDER:	**The order of the Court on application of BS 14202 of 2019 is that:** **1. The application is dismissed.** **The order of the Court on application of BS 14161 of 2019 is that:** **2. The Further Interim Award No 2 made by the arbitral tribunal on 30 September 2019 in the domestic commercial arbitration between the parties conducted under the *Commercial Arbitration Act* 2013 be enforced.**
CATCHWORDS:	ARBITRATION– RECOURSE AGAINST AWARD– GROUNDS FOR REMITTING OR SETTING ASIDE– MISCONDUCT– DENIAL OF NATURAL JUSTICE– where Rainbow Builders applied to set aside the September Award under section 34(2) of the *Commercial Arbitration Act* 2013 (Qld) – where the State applied to enforce the September Award under section 35 of the Act– where in the alternative the State applied to enforce an earlier award from August 2019– where if the September Award is set aside

Rainbow Builders applied for declaratory relief that the August Award is not a final determination– where Rainbow Builders resisted the enforcement of both Awards pursuant to section 36 of the Act– where Rainbow Builders submit that the September Award should be set aside as they did not have a reasonable opportunity to present their case– where Rainbow Builders also submit that the September Award should be set aside as the parties where not treated with equality– where the court ordered that the application be dismissed and the September Award be enforced.

Commercial Arbitration Act 2013 (Qld), s 18, s 19, s 34, s 35, s 36(1)
Resolution Institute Arbitration Rules 2016, Article 17 sub (1), Article 27 sub (3), Article 27 sub (4)

Balfour Beatty Power Construction Australia Pty Ltd v Kidston Gold Mines Limited [1989] 2 Qd R 105, cited
Mango Boulevard Proprietary Limited v *Mio Art Proprietary Limited* [2018] 1 QR 245, discussed
The Movie Network Channels Pty Ltd v Optus Vision Pty Ltd [2009] NSWSC 132, discussed
Westminster Chemicals & Produce Limited v Eichholz & Loeser [1954] 1 Lloyd's Reports 99, cited

COUNSEL: D Keane for Rainbow Builders Pty Ltd
Reading for The State of Queensland

SOLICITORS: Robinson Locke for Rainbow Builders Pty Ltd
Clayton Utz for The State of Queensland

Jackson J: On 30 September 2019 Ian Miller, as sole arbitrator constituting the arbitral tribunal in an arbitration under the *Commercial Arbitration Act* 2013, between Rainbow Builders Proprietary Limited and The State of Queensland through the Director-General of the Department of Housing and Public Works, made an award in writing entitled "Further Interim Award Number 2-30/09/2019" in 76 pages and incorporating or cross-referring to another document signed and dated by the arbitrator on that date entitled "Addendum Number 2" which I'll call the "September Award".

By these cross-applications Rainbow applies to set aside the September Award under section 34(2) of the Act, and the State applies to enforce the September Award under section 35 of the Act. Alternatively, the State applies to enforce an earlier award made in the same arbitral proceeding by the same arbitrator signed and dated 28 August 2019.

In the event that the September Award is set aside or not enforced Rainbow applies for declaratory relief that the August Award is not a final determination of the issues in dispute which it purported to decide.

In relation to both awards, Rainbow resists enforcement, and seeks that enforcement be refused under section 36 of the Act on the same or similar grounds that it deploys to have the September Award set aside.

Each of the September Award and the August Award is in the nature of a partial award, as I used that term in *Mango Boulevard Proprietary Limited* v *Mio Art Proprietary Limited* [2018] 1 QR 245. Such an award is liable to be set aside under section 34 of the Act.

The underlying dispute arose out of a construction contract for Rainbow to build home units at Labrador, entered into in or about 20 March 2012 which I will call "the contract".

On 10 September 2013 the superintendent issued a certificate of practical completion under the contract. As at the date of practical completion the sum of $57,750, excluding GST, was held by the State as retention monies.

Clause 47.1 of the General Conditions of Contract provided that in the event of a dispute either party may give a notice of dispute in writing. Clause 47.2 provided for the referral of the dispute to arbitration if it could not be resolved.

On 13 December 2016 Rainbow issued a payment claim for payment of the retention monies.

On 4 January 2017 the State issued a payment schedule rejecting the payment claim.

On 14 February 2017 Rainbow gave notice of dispute under clause 47.1.

On 12 April 2017 Rainbow gave notice referring the dispute to arbitration under clause 47.2. Ian Miller was appointed as the arbitrator.

On 14 September 2017 the arbitrator's agreement was sent to the parties.

On 19 October 2017 the arbitrator convened a preliminary conference. By that date the solicitors for the parties had completed the document entitled "Arbitrator's Agenda" and signed it on behalf of their respective clients. Under the heading "Nature of Proceedings" in that document the parties recorded that there was a counter-claim by the State for the approximate amount of $410,000 in relation to defective workmanship.

Further preliminary conferences were held on 19 December 2017 and 25 September 2018.

From 17 December 2018 to 19 December 2018 the issues in dispute in the arbitration were heard at an oral hearing which I will call the "December Hearing". The parties were represented. Evidence was adduced from lay and expert witnesses.

One witness was Neil Burchall. Mr Burchall was a quantity surveyor who prepared a report as an expert witness as to the estimated costs of repair relevant to the State's counter-claim.

Mr Burchall was not cross-examined on the report at the December Hearing. That hearing adjourned for the arbitrator to decide the dispute by making an award on all issues except interest and costs which were to be deferred.

On 12 February 2019 the arbitrator made an award headed "Interim Award" in 75 pages signed by him, and dated 12 February 2019 which I will call the "February Award". Pages 42 to 53 inclusive concern part of the State's counter-claim designated as "12 Wet Areas and Directions to Rectify." From pages 42 to 49 inclusive the arbitrator considered whether the waterproofing in the wet areas was carried out in accordance with the contract and the original tendered design as detailed for the wet areas. The arbitrator found that it was not.

From pages 50 to 53 the arbitrator considered the question of quantum of the rectification costs for that breach, concluding that he sought the submissions on a number of matters raised from both parties before making an award for that item of the counter-claim.

In the summary of the February Award on page 75, in a section headed "Award to the Respondent" the arbitrator described his award for the item of the State's counter-claim described as "12 Waterproofing to Wet Areas" as "Determination Pending."

On 19 February 2019 the State provided hearsay evidence from Mr Burchall as to the meaning of the relevant part of his report.

On 22 February 2019 Rainbow responded, relying on a further affidavit that it had obtained from Ahmad Mousali and objecting to the hearsay evidence that had been provided to the arbitrator as to the meaning of Mr Burchall's report.

On 22 March 2019 Mr Burchall produced a supplementary report that the State provided to the arbitrator. The supplementary report dealt with matters not covered in the first report, and estimated the costs of the rectification of the wet areas in the sum of $455,375.19.

On 26 April 2019 Rainbow provided a written response to Mr Burchall's supplementary report to the arbitrator.

On 17 May 2019 the arbitrator wrote to the parties stating that he would proceed to determination so as to amend the Interim Award as appropriate.

On 5 June 2019, following further correspondence in the meantime, Rainbow requested that the arbitrator disqualify himself for reasonable apprehension of bias. He did not do so. I note that apprehension of bias is a ground of the application to set aside the September Award but it was not pressed in written or oral submissions as a separate ground.

On 18 June 2019 a further supplementary report by way of letter from Mr Burchall was provided to the arbitrator by the State.

On 1 July 2019 Rainbow sought time to consider, and respond to the further evidence of Mr Burchall.

On 12 July 2019 Rainbow advised the arbitrator that it had not had the opportunity to cross-examine Mr Burchall on the matters in his supplementary reports, and reserved the right to do so.

On 20 July 2019 Rainbow provided a report to the arbitrator by Matthew Lee, a quantity surveyor, in response to Mr Burchall's further supplementary report, and in reliance on Mr Lee's report made written submissions as to the amount that should be allowed by the arbitrator as the reasonable costs of rectification of the wet areas.

On 9 August 2019 the arbitrator dated and signed a document entitled "Further Interim Award" in 78 pages, together with attached editing notes, a spreadsheet of the valuation of Mr Burchall's supplementary report of 22 March 2019 and clarifications, and a further section headed "Wet Areas Rectification Further Interim Award Number 2" in nine pages, which I will call the "August Award".

Pages 44 to 56 substantially replicated the February Award with minor amendments. The further section headed "Wet Areas Rectification Further Interim Award Number 2" dealt with the quantum of the State's counter-claim for that item, or items. The conclusion reached was that the total sum was to be awarded in favour of the State for the relevant items of rectification was $218,995.11, exclusive of GST. However, sub-paragraph (vii) on page 5 concluded that there was no definitive evidence that an item previously referred to in Mr Burchall's report or reports as "Corian Benchtops" was for shower linings as in Mr Burchall's letter of 18 June 2019, and sought further clarification evidence.

On 22 August 2019 the State forwarded an email, attaching the statutory declaration of David Trotter, with attachments to provide clarification as to the areas in which the Corian sheeting was installed, and associated costs.

On 28 August 2019 the arbitrator wrote to the parties stating that it appeared clear, from the prior document, that the "Corian Benchtops" in Mr Burchall's report were

in fact Corian wall sheeting and seeking clarification and advice as to whether those were extra wall costs, and additive to the amount of the quantum of the award.

On 3 September 2019 the State responded, confirming that the costs for the Corian wall sheeting had not been included in the other wall costs tabulated in Mr Burchall's supplementary report, and that those costs were separate and additional.

On 17 September 2019 the arbitrator wrote to the parties referring to his letter of 28 August 2019, and observing that Rainbow had made no response. He advised that accordingly he intended to accept the Corian sheeting used in the wet areas as costs in the rectification, and to incorporate them in the award in due course.

On 20 September 2019 Rainbow responded asserting, in my view incorrectly, that at no time was a response sought from Rainbow by the arbitrator in respect of that issue. The letter concluded by seeking clarification as to whether the arbitrator sought further submissions or evidence from the claimant in respect of the cost of replacement of solid surface sheeting in wet areas, or rectification works to the wet areas generally. In fact the arbitrator had not sought further submissions or evidence in relation to the rectification works of the wet areas generally.

On 30 September 2019 the arbitrator made the award headed "Further Interim Award Number 2" dated 30 September 2019 which I have referred to as the September Award. The document headed "Addendum Number 2" held that the Corian costs were for wall panels in wet areas, and awarded the State $50,152.78 for those costs; that amount was included in the table in the Further Interim Award Number 2.

Counter-claim outside the scope of the arbitral reference

Rainbow contends that the only dispute, the subject of the reference to arbitration, was Rainbow's claim for payment of the retention monies as reflected in the notice of dispute, and notice of dissatisfaction delivered by Rainbow.

In my view that point must be rejected.

First, by 19 October 2017 Rainbow, by its solicitors, had agreed to submit the State's counter-claim for the approximate amount of $410,000 in relation to defective workmanship as part of the arbitral proceeding.

Second, thereafter, the preliminary conferences, pleadings and hearing of evidence over three days in the December Hearing, and the steps leading to the February, August and September Awards were all carried out without any objection by Rainbow to the jurisdiction of the arbitrator to deal with the State's counter-claim on the basis that it was not part of the dispute submitted for determination by the arbitrator.

It is trite law that parties may, by agreement, expand the scope of their dispute from an original subject matter of reference, and that a party who agrees to do so will be bound by their conduct, either as a matter of implied agreement, or waiver, or estoppel. See, for example, under earlier arbitration statute laws, *Westminster Chemicals & Produce Limited v Eichholz & Loeser* [1954] 1 Lloyd's Reports 99,

105 and *Balfour Beatty Power Construction Australia Pty Ltd v Kidston Gold Mines Limited* [1989] 2 Qd R 105, 116.

Neither of the parties submitted that the provisions of the Act altered the operation of those principles of law.

Reasonable opportunity of presenting party's case

By section 18 of the Act:

> "The parties must be given a reasonable opportunity of presenting the parties' cases."

By section 34(2)(a)(ii):

> "A ground on which an arbitral award may be set aside is if the party making the application was unable to present the party's case."

Two points raised by Rainbow may be considered under this heading. First, Rainbow complained that it did not have the opportunity to cross-examine Mr Burchall in respect of his supplementary reports. Second, Rainbow complained that the arbitrator proceeded to award the claimed Corian costs by the September Award without giving it the opportunity to present submissions or provide evidence. In my view both allegations must be rejected.

As to Mr Burchall's supplementary reports, although Rainbow reserved its right to cross-examine Mr Burchall in its letter of 12 July 2019, after furnishing Mr Lee's report under cover of its letter dated 20 July 2019, it did not seek an opportunity to cross-examine Mr Burchall. Instead, it made a written submission relying on Mr Lee's report that the reasonable costs of rectification of bathroom wet areas were no greater than a certain amount. In my view Rainbow thereby impliedly invited the arbitrator to proceed to determine that issue. On 23 July 2019 the State requested the arbitrator not to proceed further until it could provide an appropriate response. On 29 July 2019 the State provided that further response, including a submission that the arbitrator should proceed to award the full amount properly, and reasonably incurred by the State in rectifying the defective work on the basis of Mr Burchall's expert evidence. On 31 July 2019 Rainbow responded, submitting Mr Lee's report must be considered. At no time during this correspondence was any request made to cross-examine Mr Burchall.

As to the September Award, following the State providing Mr Trotter's statement and annexures to the arbitrator on 22 August 2019, the arbitrator clearly requested both parties to clarify, and advise as to the appearance that the Corian benchtops in Mr Burchall's reports were in fact Corian used as Corian wall sheeting, not in the benchtops as Mr Burchall had postulated, and as to whether the extra Corian wall costs were not included in the other wall costs tabulated in the supplementary report.

Following that, on 17 September 2019 the arbitrator noted that the claimant made no response, and advised his intention to accept those costs and incorporate them in the award. The award was not made until 30 September 2019. In the interim period

Rainbow sent an argumentative letter to the arbitrator, as I find misstating that no prior request for clarification had been made to Rainbow, and asking the arbitrator to clarify whether he sought further submissions or evidence from the claimant in respect of items by way of rectification works to the wet areas generally, as well as replacement of solid surface sheeting in wet areas.

In my view those facts do not reveal any inability on Rainbow's part to present its case in relation to the Corian costs.

Treating the parties with equality

Section 18 of the Act also provides that the parties must be treated with equality. And section 34(2)(b)(ii) provides that an arbitral award may be set aside by the court if the court finds that the award is in conflict with the public policy of the State. On these grounds Rainbow makes a number of complaints about the arbitral process.

First, Rainbow complains that at the conclusion of the oral hearing on 19 December 2018 the arbitrator was to decide the dispute in respect of all issues. He did not, in fact, do so in the February Award.

In effect, Rainbow seeks to draw an analogy between the arbitral proceeding in the present case, and a common law trial where judgment is reserved, after which time a party would only be granted leave to reopen its case in accordance with well-known principles. See *The Movie Network Channels Pty Ltd v Optus Vision Pty Ltd* [2009] NSWSC 132 at paragraphs 4 to 8 where the principles are articulated, and some of the leading cases are collected, as an example.

Rainbow submits that in this arbitral proceeding it was wrong for the arbitrator to defer a decision on quantum of the counter-claim for rectification costs of the wet areas in order to give the State the opportunity to put in further evidence and submissions. The State submits that the arbitrator's power to do so by a partial award is supported by the rules under which the arbitration was conducted for the purposes of section 19 of the Act being the Resolution Institute Arbitration Rules.

Article 17 sub(1) of those rules provides that:

> "Subject to the Rules an Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality."

Article 27 sub (3) provides that:

> "At any time during the arbitral proceedings the Arbitral Tribunal may require the parties to produce documents, exhibits or other evidence."

Article 27 sub (4) provides that:

> "The Rules of Evidence do not apply, and the Arbitral Tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered."

However, none of those rules deals explicitly with the power of an arbitrator to make a partial award when all issues have been submitted for determination, and the hearing of the arbitration on all issues concluded. Nevertheless, the power of an arbitrator to make a partial award is not in dispute, and it is recognised by the Act.

In my view it was not a failure to treat Rainbow with equality, for the arbitrator not to finally determine the wet areas rectification costs quantum in the February Award. In the relevant part of Mr Burchall's first report there was some lack of clarity of expression. Further, when read fairly, the report did not fully deal with the costs that were claimed by the State.

By not determining the question of that quantum on the inadequate evidence that was before him, the arbitrator can be said to have disadvantaged Rainbow by exposing it to the risk that eventuated of the State repairing its case by producing further and better evidence, but in my view that is not sufficient to conclude that Rainbow was not treated with equality within the meaning of section 18, or that the arbitrator proceeded in a way that was in conflict with the public policy of the State within the meaning of section 34(2)(b)(ii).

In amplification of this ground of challenge, Rainbow made other submissions in writing and orally that I acknowledge. But in my view it is unnecessary to say more to dispose of the question whether the arbitrator's decision to make a partial award in the February Award was a step that constituted not treating Rainbow with equality.

Next, Rainbow submits that the disagreement between the supplementary reports of Mr Burchall, on the one hand, and the report of Mr Lee, on the other hand, required that the arbitrator engage in further processes before resolving those differences by decision, either by requiring a joint meeting of experts and a joint report, or by cross-examination.

In my view the arbitrator was not required to do either. As to a joint meeting of experts, and a joint report, neither of the parties requested it, and it is not a procedural pre-condition to deciding disputed question of expert opinion. As to cross-examination, I have already dealt with the fact that Rainbow did not ultimately request cross-examination itself. Itis hardly sensible to suggest that in those circumstances the arbitrator was required of his own motivation to do so. In any event, in my view, any failure to do so did not amount to not treating Rainbow with equality; nor did it amount to proceeding in conflict with the public policy of the State.

Rainbow makes cognate complaints in relation to the September Award. It complains that for a second time the arbitrator did not finally decide the issue of the wet areas rectification quantum to the extent that he sought further clarification about the Corian costs. Rainbow complains that, yet again, when the State had not presented sufficient or clear enough evidence to justify an award for those costs in making the August Award, the arbitrator made a partial award that excluded that item of dispute from decision.

It is understandable, in my view, that a party to a proceeding which has been brought and heard with a view to the final resolution of the dispute might feel aggrieved

when not once, but twice, the decision maker defers resolution of issues included in the dispute, so as to give the opposite party the opportunity to repair its case. In my view there may well be a case in which to do so time and again would amount to not treating the parties with equality within the meaning of section 18 of the Act, and constitute a conflict with the public policy of the State for the purposes of section 34 subsection (2) (b)(ii).

It is also understandable that Rainbow feels aggrieved by some of the contents of the August Award. In particular, the statement at paragraph (xxvi) on page 7, that Rainbow did not present evidence against the counter-claim originally, and chose not to examine Mr Burchall at the December Hearing is one that lacks any logical force, and amounted to a gratuitous criticism not relevant to the decision that was before the arbitrator on the basis of Mr Burchall's supplementary reports, and Mr Lee's report as at August 2019.In the arbitrator's defence I observe that it was a submission positively made to him by the State's lawyers but it would have been better not repeated in the award.

However, in the present case the reservation for further consideration of the Corian costs was a single, separate item in small evidentiary compass, although valued at over $60,000. Given the limited nature of the further clarification, and opportunity accorded to the State to further repair its case, whilst giving the opportunity to Rainbow to make any response, I do not conclude that the arbitrator did not treat Rainbow with equality for the purposes of section 18.

In my view it must be practically recognised that in construction disputes, at times, there are many items to be considered, and it may be that an arbitrator, in doing so, will require relatively limited additional evidence or assistance from the parties in the course of considering the arbitral award to be made.

For those reasons, in my view, Rainbow's application to set aside the September Award should be dismissed.

It becomes unnecessary therefore to consider any further questions as to the legal effect of the August Award.

It must also follow, in those circumstances, that an order should be made that the September Award should be enforced under section 35 of the Act as the grounds on which enforcement may be refused, contained in section 36(1) of the Act, that mirror the grounds of the application to set aside the September Award are not made out.

The orders I have concluded that should be made are that:

1. on application 14202 of 2019 the order of the court is that the application is dismissed;

2. on application 14161 of 2019 the order of the court is that the Further Interim Award Number 2, made by the arbitral tribunal on 30 September 2019, in the domestic commercial arbitration between the parties conducted under the *Commercial Arbitration Act* 2013 be enforced.