SUPREME COURT OF QUEENSLAND

CITATION:	*Barclay Mowlem v Ishikawajima-Harima Heavy Industries Co Ltd* [2003] QSC 011
PARTIES:	**BARCLAY MOWLEM CONSTRUCTION LIMITED** (applicant) **v** **ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES CO LIMTED** (respondent)
FILE NO:	10433 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 January 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 December 2002
JUDGE:	Muir J
CATCHWORDS:	ARBITRATION – whether there is an arbitration agreement within the meaning of s 53 of the Commercial Arbitration Act – construction of agreement – stay of proceedings *Commercial Arbitration Act* (Qld), s 53 *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* [1998] VSC 103 *Bavcor Pty Ltd v State of New South Wales* [2001] 52 NSWLR 587 *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1986) 14 FCR 193 *Crusader Resources NL v Santos Ltd* (1990) 155 LSJS 449 *Delhi Petroleum Pty Ltd v Santos Ltd* [1999] SASC 37 *GWJ Blackman & Co SA v Oliver Davey Glass Co Pty Ltd* [1966] VR 570 *Huddard Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502 *QH Tours v Ship Design & Management Pty Ltd* (1991) 33 FCR 227. *Thomas v Star Mail International Pty Ltd* [1999] FCA 911
COUNSEL:	EJ Lennon QC with D Kelly for the applicant H B Fraser QC with D Logan for the respondent

SOLICITORS: Clayton Utz for the applicant
Minter Ellison for the respondent

Introduction

[1] The applicant subcontractor seeks, by originating application, declarations which include a declaration that a "taking over certificate" dated 30 August 2002 issued to the applicant by the respondent was issued in breach of a written agreement ("the subcontract") between the applicant and the respondent and that the issuing of the certificate was repudiatory conduct by the respondent which entitled the applicant to validly terminate the subcontract by letter dated 19 September 2002.

[2] The respondent, by an application in the proceedings, seeks an order that the proceedings be stayed pursuant to section 53 of the *Commercial Arbitration Act* (Qld) ("the Act"). Also before me is the applicant's application that the proceedings be placed on the Commercial List.

[3] The respondent has a contract for the design, manufacture, erection, commissioning and testing of a boiler in a power generation plant in the course of construction at Tarong, Queensland. The subcontract which is the subject of these proceedings is in respect of the erection, commissioning and testing of the boiler.

Whether there is an arbitration agreement within the meaning of s 53 of the *Commercial Arbitration Act*

[4] The basis for the application is that the subject dispute falls within the scope of a clause in the subcontract which is said to be an "arbitration agreement" within the meaning of s 53 of the Act. The respondent resists the application on a number of bases, paramount amongst which is the contention that the arbitration clause has been superseded by clause 5 of an agreement entered into by the parties after the subcontract and referred to as "the Heads of Agreement".

[5] Clause 34 of the subcontract provides as follows –

"SETTLEMENT OF DISPUTES – ARBITRATION

> 34.0 If any unresolved dispute or difference remains between the Contractor, and the Subcontractor in connection with or arising out of the Subcontract or the carrying out of the Subcontract Works (whether during the progress of the Subcontract Works or after their completion, and whether before or after the termination, abandonment or breach of the Subcontract), it shall be referred to arbitration. Such arbitration will be by arbitrator(s) appointed by the Institute of Arbitrators, Australia. The award of the arbitration shall be final and binding upon the Contractor, the Contractor's Representative and the Subcontractor hereto."

[6] Clause 5 of the Heads of Agreement provides:

> "The parties agree to a process for the resolution of BMCL's claims (submitted and to be submitted) as follows:
>
> All claims received at site by IHI by end-June 2002 will have been reviewed and responded to by IHI in readiness for resolution on site mid-July 2002 (15 July 2002).
>
> Claims received by IHI in subsequent months will have been reviewed and responded to in readiness for resolution on site by middle of the following month.
>
> If resolution cannot be reached on site within such period, claims may be referred for off site resolution between Chris Horner of BMCL and a senior executive of IHI to be nominated.
>
> If a resolution is not reached between off site representatives within 28 days, the claim is to be referred to a facilitation process; and
>
> If a resolution is not reached within 28 days, the matter may be referred to arbitration."

[7] Clause 5 applies only to "claims" "submitted and to be submitted" by the applicant to the respondent. It is thus rather narrower in its operation than cl. 34 which applies to "any unresolved dispute or difference" remaining between the parties.

[8] What is meant by the expression "claims" in clause 5 is not perfectly clear. Having regard to the processes described in the clause, the expression appears to refer to claims for money payments or, at least, claims which directly bear on the applicant's right to payment pursuant to the provisions of the subcontract such as progress claims, variations, delay claims and the like. I do not consider that the expression encompasses claims of the nature of those made in the originating application which concern, in substance, the questions of whether the subcontract has been validly terminated and, if so, by whom and when.

[9] Clause 5 contemplates the receipt of claims on site by the respondent followed by their consideration by the respondent and an attempt at on site resolution. Failing agreement, designated representatives are to give the matters in dispute further consideration. The process thus envisages continued performance under the subcontract.

[10] It is common ground between the parties that the subcontract is at an end. The applicant's contention is that the issuing of the *Taking Over Certificate* dated 30 August 2002 constituted repudiatory conduct on the respondent's part which enabled the applicant to terminate the subcontract by letter dated 19 September 2002. The respondent contends that the applicant, by its letter of 19 September 2002 and subsequent conduct, manifested an intention not to be bound by the subcontract and related agreements enabling the respondent to accept

the applicant's unlawful repudiation and terminate the subcontract by letter dated 14 October 2002.

[11] The evidence does not suggest that the issue concerning the *Taking Over Certificate* was treated by the parties as one which fell within clause 5 or that any of the procedures contemplated by clause 5 were followed in that regard. Moreover, there is no suggestion by either party that the operation of clause 5 survived the termination of the subcontract. If I am incorrect about the meaning of "claims", the applicant waived any rights it may have had to rely on clause 5 in relation to the subject dispute.

[12] For the above reasons the applicant's reliance on clause 5 is mis-placed. In so far as there is a dispute between the parties concerning the taking over certificate it is unresolved and falls within clause 34. The question of how the termination of the subcontract has come about also falls within the ambit of the clause as being an unresolved dispute or difference "in connection with … the subcontract". The clause is expressed to operate in respect of disputes or differences "whether before or after termination of the subcontract". Such provisions are effective. [1]

[13] The applicant advances a number of arguments in the alternative as to why the matter should not be referred to arbitration

Issues raised by the originating application include matters which should be determined not only between the applicant and the respondent, but as between the respondent and the principal, Tarong Energy Corporation Limited.

[14] The matters which the applicant alleges require the joinder of Tarong concern the entitlement of the applicant to a charge over money payable by the principal to the head contractor. There is no substance in this point. The applicant's claim is against the respondent only and Tarong has no interest in the outcome of the proceedings. It has paid monies into court in proceedings commenced in relation to the charge and is prepared to abide by the order of the court. If there is any advantage to be gained by having it a party to any determination of the issues between the applicant and the respondent, it must be very slight.

The respondent, at the time the proceedings were commenced, was not ready and willing to do all things necessary for the proper conduct of the arbitration.

[15] The applicant relies on s 53 (1) of the Act which conditions the court's power to stay proceedings on its being satisfied that "the applicant 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".

[16] The applicant criticises the respondent over the way in which it went about seeking to have an arbitrator appointed. I regard the criticisms as unfounded. The

[1] Heyman v Darwins Ltd [1942] A.C. 356, Ferris v Plaister (1994) 34 NSWLR 474

respondent did nothing to prevent the applicant from participating fully in the procedures necessary to appoint an arbitrator or from progressing the arbitration. Criticisms were also made of an attempt to commence the arbitration whilst the issues are undefined or not properly defined. I do not see any particular problem in that. The respondent made it plain that it wished to negotiate a settlement of the matters in dispute. There has been no illegitimate delay on its part and nothing stands in the way of proper identification of the issues by the parties.

The Court, in the exercise of its discretion, should refuse the stay.

[17] Section 53(1) provides that the court may stay proceedings commenced in a court in respect of a matter agreed to be referred to arbitration by an arbitration agreement if satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.

[18] The applicant relies, inter alia, on the following expression of principle in *GWJ Blackman & Co SA v Oliver Davey Glass Co Pty Ltd*,[2] which has been referred to with approval in a number of subsequent cases.[3]

> "In form the section throws upon the party to a submission, who desires that the agreement for a submission should be enforced, the burden of satisfying the court that there is no sufficient reason why the matter should not be referred in accordance with the submission. But in applying the section the courts have consistently acted on the view that the parties should be kept to their bargain unless strong reasons are shown why an action commenced in defiance of the agreement for a submission should be allowed to continue."

[19] In other cases the expression "good cause"[4] and "good reason"[5] have been used. In *Huddard Parker Ltd v The Ship Mill Hill*,[6] Dixon J spoke of "a strong bias in favour of maintaining the special bargain".

[20] Whilst these authorities provide guidance in principle as to the exercise of the discretion conferred by s 53(1)(a), in the end result it is necessary to consider whether a "sufficient reason" exists by reference to the facts of the case being determined.

[21] Mr Lennon QC who, together with Mr Kelly appeared for the respondent, put the respondent's argument this way in his outline of submissions –

> "The dispute is analogous to a threshold question of law suitable for separate and early determination by the Court. See Dillingham Constructions v Downs (1969) 90 WN NSW (Part1) 258 at 272. The

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2 [1966] VR 570 at 570.

3 *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1986) 14 FCR 193 at 208 and *QH Tours v Ship Design & Management Pty Ltd* (1991) 33 FCR 227 at 232.

4 *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* [1998] VSC 103 and *Thomas v Star Mail International Pty Ltd* [1999] FCA 911.

5 *Bavcor Pty Ltd v State of New South Wales* [2001] 52 NSWLR 587.

6 (1950) 81 CLR 502 at 508-9.

> early finality of a determination by the Court allows both parties to proceed more efficiently. If resolved against the Applicant it would permit the Applicant to continue to rely on its Subcontractor's charge and the continuation of its action for recovery of payment under the Subcontract Agreement without needing to sue and prepare a case in the alternative. If resolved in favour of the Applicant it would permit the Applicant to elect to claim in restitution outside the Subcontract Agreement and if it did so it would no longer need to maintain the Subcontractor's charge nor to continue the proceedings in the alternative."

[22] One factor which, on occasions, has persuaded courts to decline to stay court proceedings is the perception that difficult and/or complex questions of law are best decided by courts, particularly where the arbitrator is a layperson.[7]

[23] Also relevant to the exercise of discretion is whether the matter may be determined more expeditiously in one forum than the other.[8] The applicant seeks to ensure an early hearing by having the proceedings placed on the Commercial List and points to evidence that arbitration may involve months of delay.

[24] I am not persuaded, however, that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement. Mr Lennon's present estimate of the length of such a hearing is 3 days. That estimate, made without the benefit of a clear statement of the issues the respondent would wish to advance, suggests that some factual issues will need resolution. Until the scope of the issues properly in dispute between the parties is more precisely identified, it is impossible to determine their difficulty or complexity. It is also not possible to determine, with confidence, whether some of those issues will lend themselves to a separate early determination or to properly assess the utility of such a determination.

[25] I propose to give directions as to the future conduct of the arbitration proceedings with a view to clarifying the issues between the parties and expediting the arbitration. Otherwise, it seems appropriate that I dismiss the applications for a stay and for listing on the Commercial List. I will hear submissions on the orders which ought be made to reflect these reasons.

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7 See the authorities cited by French J in *Bond Corporation Pty Ltd (supra)* at 209 and those cited by Perry J in *Delhi Petroleum Pty Ltd v Santos Ltd* [1999] SASC 37 at paras 110 and 111.

8 *Thomas v Star Maid International Pty Ltd (supra)* and *Crusader Resources NL v Santos Ltd* (1990) 155 LSJS 449