SUPREME COURT OF QUEENSLAND

CITATION:	*PT Pelayaran Sumatra Wahana Perkhasa v Oxford Yachts Pty Ltd* [2003] QSC 096
PARTIES:	**PT PELAYARAN SUMATRA WAHANA PERKASA** (applicant) **v** **OXFORD YACHTS PTY LTD ACN 80 083 146 614 trading as SOUTHERN HEMISPHERE SHIPYARDS** (respondent)
FILE NO/S:	SC No 2808 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	2-4 April 2003
JUDGE:	Mackenzie J
ORDER:	**Reasons published for making order as per draft initialled by Mackenzie J and placed with the papers**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SETTLEMENT OF DISPUTES – where contract between applicant and respondent to build 3 vessels – where contract included provision for penalty for delay in delivery – where contract included provision excluding liability in certain circumstances for delay – where lien over vessels for money due – where vessels not completed and delivered in time stipulated – where parties entered deed stating their respective positions and settling the dispute – where deed contained a provision that if the conditions of the deed were not met by the respondent the applicant could terminate the agreement and take possession – where respondent claimed failure to comply with deed due to factors beyond control – where applicant sought possession of the vessels and to remove them from the jurisdiction – where respondent claimed monies owing – where there were holders of fixed and floating charge over the assets of the respondent *Beneficial Finance Corporation Ltd v Conway* (No 2) [1971] *VR 594, cited*

Doulton Potteries Ltd v Bronotte(1971) 1 NSWLR 591, cited
Re: D A Story Pty Ltd (1993) 2 Qd R 355, cited
T*he Linda* (1988) 1 Lloyd's Rep 175, cited
The Nordglimt [1988] QB 183, cited

COUNSEL: D Andrews SC for the applicant
R G Bain QC, with him D A Quayle, for the respondent
D R W Tucker, solicitor, for Messrs Worrall and Khatri, Chartered Accountants

SOLICITORS: Freehills for the applicant
MacGillivrays Solicitors for the respondent
Tucker & Cowen for Messrs Worrall and Khatri, Chartered Accountants

[1] **MACKENZIE J:** Argument in the application to which these reasons relate was heard on 2 and 3 April 2003. There was said to be a degree of urgency about the matter since if the applicant was successful it was hoped that the boats which are the subject of the claim would be loaded on a ship for the purpose of transporting them to Indonesia on the weekend of 5 and 6 April 2003.

[2] On the morning of 4 April 2003, having formed a view overnight as to the most appropriate outcome of the matter, one which would preserve a balance of bargaining power between the parties, I communicated information about the possible elements of an order I had in mind to the parties and invited them to consider whether progress could be made to resolving the issue within the suggested framework while I attended to the Applications List which appeared to be lengthy.

[3] The parties came back before me with a draft order. The respondent's counsel indicated that he had no instructions to consent to the order but did not wish to be heard further on it in view of his perception of the probable outcome of the matter, which was accurate. His approach was that while he was not consenting to the order he did not wish to make submissions as to its content. The applicant and the solicitor for Messrs Worrell and Khatri, Chartered Accountants, who were the holders of a fixed and floating charge over certain assets of the respondent, were in agreement as to the form of the order.

[4] The scheme of the order was that upon payment into court or provision of an unconditional irrevocable bank guarantee drawn on an Australian trading bank (which would secure to the respondent the fruits of any award in its favour in relation to outstanding moneys) and upon Messrs Worrell and Khatri undertaking thereupon to provide a release of the charge to the applicant, the vessels and certain documentation relating to them would be delivered to the applicant. Payment out of court or calling upon the bank guarantee was not to occur until seven days written notice of the intention to do so had been given to Messrs Worrell and Khatri.

[5] I turn now to the facts of the matter. The respondent had entered into three identical agreements to build three vessels for the applicant. The contract price was fixed but there was provision for the contract price to be automatically adjusted by a penalty at a set rate should there be delay in delivering the vessel beyond 16 weeks (112 days). There was a provision relieving the respondent from liability for any default or delay caused by or due to any contingency beyond the builder's control, such as

war, fire, flood, riots, insurrection, earthquakes, blockades, embargoes and acts of God, provided that as soon as any such cause was removed and no longer existed the builder was to continue to carry out and perform the covenants and conditions of the agreement.

[6] Provision was made for delivery to be accompanied by the provision of a range of documentation concerning the vessels. There was also a provision to the effect that the builder was not liable for consequential loss of use or earnings or the cost of hiring a substitute vessel. This appeared in the clause generally dealing with defects. However, counsel for the applicant relied on it as evidence that the applicant was unable to recover costs incurred as a result of delay in completing the vessels and needing to hire others, as had occurred in this case because the applicant had entered into a charterparty in anticipation of the vessel's being ready at an earlier date.

[7] There was a provision for a lien over the vessel for moneys due. Title to all accessories and proprietary items supplied by the builder was to remain in the builder until paid for and all items purchased by the builder to be installed on the vessel were the property of the purchaser.

[8] The period of 16 weeks or 112 calendar days expired on 7 October 2002. The boats were not completed. In November 2002 an unsuccessful attempt at mediation occurred. However discussions between the parties continued. Then on 9 January 2003 the plaintiff's solicitors called on the respondent to complete the contract by 4 pm on 7 March 2003, under threats that time was of the essence and that the applicant would terminate the contract and seek recovery of the vessels. Reference was made to the losses that the plaintiff would suffer under the charterparty agreement it had entered into in anticipation that the vessels would be available.

[9] Correspondence and discussions continued until a deed was executed on 28 January 2003. Amongst other things, the recitals noted the respondent's responsibility to build the boats under the three agreements, the applicant's contractual right to adjust the cost price, that a dispute had arisen because the vessels had not been completed by 7 October 2002, and that proceedings (which I was told were no longer on foot) had been commenced in the Supreme Court. The deed then continued "The Purchaser and the Builder have agreed to settle the Dispute and Proceeding on the terms set out in this deed."

[10] In consideration of certain agreements and undertakings the respondent agreed to have the vessels ready for delivery by 7 March 2003. The term "ready for delivery" comprehended that the vessels were certified by an ABS surveyor as having been completed in accordance with certain provisions in the agreement and in a condition and capable of being taken to a location, such that all that had to be done was for them to be loaded on a carrier vessel.

[11] It was acknowledged by the respondent that it was liable to pay to the applicant the Delay Payment Sum, defined in the deed as the sum of $280,500, calculated in accordance with the three agreements. However the applicant agreed to waive the whole sum if delivery was made by 28 February 2003, and half of it ($140,250) if delivery was made after that date but by 7 March 2003.

[12] In the deed the respondent confirmed that the purchaser should retain title, free of all liens and other encumbrances in the vessels, to all items procured by the

respondent in connection with the three agreements and all items procured by the respondent, the applicant or a third party on behalf of the respondent or applicant in connection with the three agreements.

[13] The respondent was to procure from the two holders of fixed and floating charges (the National Australia Bank and Messrs Worrell and Khatri) an acknowledgment that the charge did not extend to the three vessels and that they would not deal with the vessels in any way. More will be said about this shortly. There was a provision for payment to Freehills Trust Account of particular sums for payment of scheduled items and for provision to the respondent of a letter of credit for "the final payment sum" (defined as $277,114.30) and a letter of credit valid until 4 March 2003 for half the Delay Payment Sum which could be drawn down against if the vessels were completed by 28 February 2003.

[14] The respondent agreed to adhere to the construction schedule in the deed. If it failed, because of its acts or omissions, to complete any of the milestones set out in the schedule the applicant was entitled to terminate the three agreements and take possession of the three vessels irrespective of whether the ABS Survey Report had been completed. The letter of credit for $140,250 could also be cancelled. The procedure for payment of accounts relevant to items in the schedule previously mentioned from moneys placed with Freehills was prescribed.

[15] Save as amended by the deed the terms and conditions and specifications in the three agreements were to continue in effect and be binding. The applicant's rights, accrued or not, under the agreement were reserved. Time was stated to be of the essence. Amendments, variations or extensions of the deed, including extensions of time to complete the work, were declared to be ineffective unless in writing and signed by the parties.

[16] It was common ground that neither NAB nor Messrs Worrell and Khatri had provided a document in terms of the deed with regard to their rights. They had not been given notice to the present proceedings. When it became apparent that the evidence was deficient as to whether they had a claim to an interest in the vessels themselves the need to serve them with the material relied on was accepted. On the second day, submissions were heard from Mr Tucker, who had only recently been provided with the material and appeared and informed me that because of the limited time to consider their position his clients Messrs Worrell and Khatri were not prepared to indicate that they were not entitled to an interest in the vessel at that point. There was evidence in the form of a letter from NAB that no moneys were owing under its charge and that the only impediment to its being discharged was lack of a request to do so from the respondent. In view of the way events have unfolded, it is not necessary to analyze the precise nature of any rights that Messrs Worrell and Khatri may have had.

[17] Essentially what the respondent claimed was that either by operation of the clauses in the three agreements relating to delay or an understanding reached by the solicitors for the parties that the same principle would apply when they were negotiating the deed, strict compliance with the time limits for completion in the deed was not necessary because of various delays, which were said to be beyond the respondent's control, referred to in evidence in the affidavit of the Chief Executive Officer of the respondent. Some of these delays were attributed by him to payments not being made from the fund held by the applicant's solicitors in a way which

ensured that the flow of work was not disrupted. It was submitted that the critical dates in the deed should be adjusted to reflect the delay for which the respondent should not be held responsible. The former issue appears to depend on a question of construction. If that were not resolved in favour of the respondent the question would be whether there was a collateral contract made at the time of the execution of the deed concerning the consequences of delay not attributable to the respondent.

[18] It is impossible to say whether a case entitling the respondent to moneys, and if so how much, is likely to be made out. There are numerous factual issues, in addition to legal issues, which could only be resolved in proceedings for that purpose. However without making out a case for adjustment of the dates, the respondent appeared to be not arguing from a position of strength because of the terms of the deed including, particularly, the recital describing the purpose of the deed as being to settle the dispute and the proceedings between the parties.

[19] It was therefore essentially a money dispute and if sufficient money was assured to cover any entitlement accruing to the respondent it would not be prejudiced if there was a fund or security from which any moneys owing to it could be satisfied. It seemed appropriate, because the assets in the form of the vessels would be taken out of the jurisdiction and, moreover, overseas and because the applicant is a foreign corporation, to require a satisfactory fund or security to cover any entitlement of the respondent to be created.

[20] Counsel for the applicant submitted that whether an exercise of admiralty jurisdiction was involved or whether equitable principles applied, there is authority that offering security in lieu of a claim to possession is permissible (*The Linda* (1988) 1 Lloyd's Rep 175, 179; *The Nordglimt* [1988] QB 183; R*e: D A Story Pty Ltd* (1993) 2 Qd R 355, 360; *Doulton Potteries Ltd v Bronotte* (1971) 1 NSWLR 591, 599-600; *Beneficial Finance Corporation Ltd v Conway (No 2)* [1971] VR 594, 607). There are general statements to that effect in some of the authorities, although others were concerned with particular statutory or procedural provisions. The time available did not allow for definitive analysis beyond that point.

[21] The outcome achieved does not preclude arbitration if, as the respondent submits, there is a subsisting right to follow that course. Since it was not pressed in the final stages of the hearing that the course proposed would unfairly prejudice the respondent any concern that the proceedings should not have been commenced by originating application is of no practical consequence. Triable issues can be resolved in an appropriate forum and recovery of moneys due, if any, realised against the fund or security.

[22] Mr Tucker helpfully pointed out a number of practical difficulties occasioned by the form of a letter of credit that was initially offered. The outcome was that a deposit of sufficient money to cover any claim or a bank guarantee drawn on an Australian bank was to be offered as a precondition to delivering the vessels and documentation. With respect to Messrs Worrell and Khatri the situation appeared to be that their right was derivative through the respondent if they had any right. Any claim that they might have could be satisfied by recourse to the fund or security set up to satisfy any claim established by the respondents.

[23] For these reasons, the orders made on 4 April 2003, reflecting the draft provided to me, were pronounced.