# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Australian Premium Coals Pty Ltd v Roche Mining Pty Ltd* [2004] QSC 334 |
| PARTIES: | **AUSTRALIAN PREMIUM COALS PTY LTD**<br>**(ACN 077 890 932)**<br>(first applicant)<br>**COPPABELLA COAL PTY LTD**<br>**(ACN 095 976 042)**<br>(second applicant)<br>**CITIC AUSTRALIA COPPABELLA PTY LTD**<br>**(ACN 067 547 442)**<br>(third applicant)<br>**MAPELLA PTY LTD**<br>**(ACN 082 873 961)**<br>(forth applicant)<br>**WINVIEW PTY LTD**<br>**(ACN 082 339 357)**<br>(fifth applicant)<br>**KC RESOURCES PTY LTD**<br>**(ACN 081 887 130)**<br>(sixth applicant)<br>**NS COAL PTY LTD**<br>**(ACN 082 900 972)**<br>(seventh applicant)<br>**v**<br>**ROCHE MINING PTY LTD**<br>**(ACN 004 142 223)**<br>(first respondent)<br>**KEN HINDS**<br>(second respondent) |
| FILE NO/S: | BS6639/04 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 23 September 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 8 August 2004 |
| JUDGE: | Moynihan J |
| ORDER: | **That the proceedings commenced by originating application BS6639/04 be stayed pursuant to s 53 of the** |

***Commercial Arbitration Act* 1990 (Qld).**

CATCHWORDS: ARBITRATION – CONDUCT OF ARBITRATION PROCEEDINGS – TERMINATION OR STAY OF PROCEEDINGS – where applicant seeks declaratory and injunctive relief challenging the validity of a reference to arbitration.

*Commercial Arbitration Act* 1990 (Qld)

*Arunsen v Casson Beckamn Rutley & Co* [1977] AC 405
*Bremer Vulcan Schiffbau Und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 990
*CMC Cairns Pty Ltd v Isicob Pty Ltd* [2003] 1 Qd R 228
*Manningham City Council v Dura (Australia) Constructions* [1999] 3 VR 13
*Mazelow Pty Ltd v Herberton Shire Council* [2003] 1 Qd R 174
*Mulgrove Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2002] 2 Qd R 514
*New South Wales v Austeel Pty Ltd* [2003] NSWCA 392
*PMT Partners Pty Limited (in liquidation) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301
*Re Contrapak Pty Ltd (formally Brismar Pty Ltd) v Australian Wool Realisation Commission (formerly Australian Wool Corporation)* (unreported), Supreme Court Qld 17 July 1992
*Re White Industries (Qld) Pty Ltd* (1990) 7 BCL 200
*Robertson v Asva Holdings Pty Ltd & Barass* (unreported), Supreme Court VIC 25 September 1989
*Santos Pty Ltd & Ors v Pipeline's Authority of South Australia* (1996) 66 SASR 38
*South Bank Corporation v Mostia Constructions Pty Ltd* (unreported 3639 of 1999 BC9903210)
*Yendex Pty Ltd v Prince Constructions Pty Ltd* (1989) 5 BCL 74

COUNSEL: R N Wensley QC and D G Ryan for the applicants

J K Bond SC for the first respondent

SOLICITORS: Minter Ellison Lawyers for the applicants

Clayton Utz Lawyers for the first respondent

[1] The first respondent in originating application BS6639 of 2004 ("Roche") seeks a stay of these proceedings which were instituted by a number of parties conveniently identified as "Australian Coals" under s 53 of the *Commercial Arbitration Act* 1990 (the *Act*).

[2] In those proceedings, Australian Coals seeks declaratory and injunctive relief challenging the validity of a reference to arbitration. It contends that a notice of dispute did not comply with contractual requirements that it "adequately identify

and provide details" of the dispute between Roche and Australian Coals. Australian Coals claims that as a consequence the dispute has not validly been referred to arbitration.

[3] The second respondent, in the principal proceeding (Hinds), has been proposed, if not agreed, as the arbitrator. He did not participate in the proceedings before me and his position requires no further consideration.

[4] The proceeding arises out of a contract between Roche, referred to in the contract as the Contractor and Australian Coals referred to as the Principal. The contract is for the development of a coal mine in Central Queensland.

[5] As is usual in such cases the contract comprises a number of documents including Australian Standard General Conditions of Contract, AS2124-1992 (as amended) (the General Conditions).

[6] As is becoming more common in such contracts, the contract provides for a layered dispute resolution process with the exchange of information, obligations to meet in endeavours to resolve disputes, access to means of alternate dispute resolution and ultimately to arbitration or litigation if the dispute is not resolved earlier.

[7] Relevantly for present purposes cl 56.1 of annexure B to the General Conditions provides for the establishment of a Project Review Group (the group) with representatives from Roche and Australian Coals and as to the functioning of that group. Clause 56.2 requires it to provide assistance to resolve disputed issues.

[8] Clause 56.4 provides that when a dispute exists it is to be referred to the group. The group is to endeavour to facilitate the resolution of the dispute in accordance with stated principles which are of no immediate concern. The clause concludes by providing that if the group fails to resolve the dispute within the agreed time the dispute resolution procedure provided for by cl 47 of the General Conditions is to be invoked.

[9] That clause relevantly provides:

> "47 DISPUTE RESOLUTION
>
> 47.1 Notice of Dispute
>
> If a dispute between the Contractor and the Principal arises out of or in connection with the Contract, including a dispute concerning a direction given by the Superintendent, then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.
>
> …
>
> A claim in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration, may be included in an arbitration.
>
> 47.2 Further Steps Required Before Proceedings

Alternative 1

Within 14 days after service of a notice of dispute, the parties shall confer at least once, and at the option of either party and provided the Superintendent so agrees, in the presence of the Superintendent, 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. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.

In the event that the dispute cannot be so resolved 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 notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration or litigation."

[10] By letter of 9 June 2004 Roche wrote to Australian Coals enclosing a "Notice of Dispute pursuant to cl 47.1 of the Contract" and requiring a conference pursuant to cl 47.2 within 14 days of the notice to attempt to resolve the dispute.

[11] The Notice of Dispute provided as follows:

"WHEREAS

A. The Principal, through the Principal's disclosed agent, entered into a written contract dated 19 April 2002 with the Contractor for the performance by the contractor of, amongst other things, the drilling, blasting, excavation, load, haulage and placement of waste and PCI quality coal, water management, pit and haul road maintenance, support services and associated works at the Coppabella Mine Nebo Shire Queensland ("the Contract").

B. Clause 56.4 of the General Conditions of Contract provides that whereas dispute exists between the parties it shall be referred to the Project Review Group (PRG) to be dealt with on the terms set out therein, and that if the PRG fails to resolve the dispute, the dispute resolution procedure, clause 47 of AS2124, shall be invoked.

C. Clause 47.1 of the General Conditions of Contract provides, amongst other things, that in the event of a dispute between the parties arising out of or in connection with the Contract, then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a Notice of Dispute in writing adequately identifying and providing details of the dispute.

D. Dispute or difference have arisen between the Contract and the Principal arising out of or connected with the Contract as

identified in the attached schedule ("the Disputes") which have been referred to the PRG but the PRG has failed to resolve them.

NOW TAKE NOTICE THAT the Dispute have arisen within the meaning of Clause 47.1 of the General conditions of Contract and this notice is delivered pursuant to that Clause 47.1
THE SCHEDULE

DETAILS OF THE DISPUTES

The Disputes concern the following matters:

1. The Contractor's entitlement to payment for the additional costs incurred as a result of the Principal's delay in providing full access to the South Pit:

    a. The Principal had an obligation to provide Roche with full access to South Pit from 1 July 2003

    b. Full access to South Pit was not available until 19 December

2. The Contractor's entitlement to payment for additional costs incurred as a result of the change by the Principal in the alignment of the road/rail corridor from the alignment staged by the Principal during the tender period.

3. The Contractor's entitlement to payment for additional costs incurred and an extension of time for delay suffered due to it encountering conditions comprising the thinning of the coal deposit in Johnson Pit.

4. The Contractor's entitlement to be paid for the actual tonnage of PCI coal delivered and its rate of production to be similarly determined by the actual tonnage delivered (the ROM Coal Density dispute):

    (a) The Superintendent has determined the payment due to the Contractor for coal delivered by the Contractor is to be calculated by multiplying the surveyed insitu coal volume (BCM) by a coal density of 1.411 tonnes/BCM, which is not the actual density of the coal delivered.

    (b) The Contract requires that the Contractor to produce and be paid based on actual tonnes of coal.

5. The Contractor's entitlement to payment for additional costs incurred and an extension of time for delay suffered due to it encountering conditions comprising more extensive wet Tertiary material in the Johnson Pit.

6. The Contractor's entitlement to payment for additional costs incurred and an extension of time for delay suffered due to it encountering conditions comprising hard Tertiary material in the Johnson Pit.

7. The Contractor's entitlement to payment for additional costs incurred and an extension of time for delay suffered due to it encountering conditions comprising significant ground water and dynamic water in the southern end of the Johnson Pit.

8. The Contractor's entitlement to payment for additional costs incurred as a result of the change in orientation of the highwall in the southern end of the Johnson Pit" By letter of 9 June 2004 the first respondent wrote to the applicants enclosing a Notice of Dispute "pursuant to cl 47.1 of the Contract." and requiring a conference pursuant to cl 47.2 within 14 days of the notice to attempt to resolve the dispute unless it had been earlier resolved.

[12] By letter of the 18th June Australian Coals acknowledged service of the Dispute Notice and reserved its position in respect of it. After an exchange of correspondence and discussions, which it is not necessary to consider, on 24th June Australian Coal wrote to Roche in the following terms:

"Re: 'Notice of Dispute' Served on 11 June 2004

We refer to our letter of 18 June 2004 regarding the above, and to your response of the same date.

**1. Non-compliance with clause 47.1 of the General Conditions of Contract**

Clause 47.1 of the General Conditions deals with disputes.

Paragraph D of your Notice states that 'disputes or differences' have arisen. With respect, clause 47 has no application to 'differences' unless they are 'disputes'.

Clause 47.1 requires a notice of dispute to adequately identify and to provide details of the dispute. Contrary to your assertion, we do not believe that you have done so.

You have not indicated which items are 'disputes' and which are 'differences'. In most cases you have not provided any details supporting a suggestion that there is a 'dispute'. Paragraph D states that the disputes or differences have been referred to the PRG but the PRG has failed to resolve them. You have not detailed when the matters were referred to the PRG and when they were rejected.

Further, you have not stated the provisions under the contract relied upon, you have generally not provided details of the dates of the relevant circumstances, you have not stated details of any claims made under the provisions of the contract (or their status), and you have not provided any quantification of the alleged costs or delay.

For the above reasons we do not believe that you have adequately identified and provided details of any disputes. Accordingly the Notice served on 11 June 2004 is not a valid notice under the contract.

We reserve our rights in relation to the above matters should you seek in error to refer these matters to arbitration or litigation.

**2. Disputes not properly the subject of the Notice**

For completeness sake and subject to our reservation of position in relation to the invalidity of your Notice, we have reviewed that document. Our inquiries indicate that:

(a) No claims have been made under the provisions of the contract in respect of the matters as detailed in paragraphs 1, 2, 3, 4, 5, 8 and 9 of the schedule to your Notice. Further, these matters have not been referred to the PRG under clause 56.4. On the proper view these formal steps must be complied with before clause 47 can be invoked.

(b) In respect of paragraph 4, a formal claim was made by letter to the superintendent dated 26 November 2003, however, it was a materially different claim to that stated in your Notice. The 'dispute' as stated in paragraph 4 has also not been referred to the PRG under clause 56.4 and the same comments as above apply.

(c) In relation to paragraphs 6 and 7, a formal claim was made by letter to the superintendent dated 23 February 2004. The superintendent requested further details, however those details have not as yet been provided to him. The contractual provisions regarding these claims must be followed before a notice of dispute can be issued.

Therefore these claims cannot properly be the subject of a notice of dispute under the contract at this point in time.

We additionally reserve our rights in relation to these specific matters, including our rights to oppose any claims to the basis that they are time barred because you have not complied with the requirements of the contract.

**3. Meeting on 25 June 2004**

It may be that you will provide details to us, on or before 25 June 2004 which will clarify some or all of the above matters. Presently, however, given the above matters, we are unable to agree that the meeting is formally a meeting under clause 47.2 (Alternative 1).

We look forward to meeting with your representatives tomorrow."

[13] The issues between the parties, to use a neutral phrase, remained unresolved. On 28 June 2004 Roche wrote to Australian Coal nominating three arbitrators, seeking agreement as to one, and enclosed a Notice of Referral of Disputes to Arbitration pursuant to cl 47.2 of the General Conditions.

[14] The material provisions of the Reference Notice were:

"WHEREAS:

A. The Principal, through the Principal's disclosed agent Australian Premium Coals Pty Ltd, entered into a contract on 19 April 2002 with the Contractor for the performance by the contractor of, amongst other things, the drilling, blasting, excavation, load, haulage and placement of waste and PCI quality coal, water management, pit and haul road maintenance, support services and associated works at the Coppabella Mine Nebo Shire Queensland ("the Contract").

B. By Clause 47.1 of the General Conditions of the Contract in the event of a dispute between the parties arising out of or in connection with the contract, then either party may give to the other, and to the Superintendent, a Notice of Dispute by hand or certified mail adequately identifying and providing details of the dispute.

C. By clause 47.2 (alternative 1) of the General Conditions of the contract, within 14 days after service of the Notice of Dispute , the parties are required to confer at least once to attempt to resole the dispute or failing which, to explore, and if possible agree, upon methods of resolving the dispute by other means.

D. Clause 47.2 (alternative 1) of the General Conditions of the contract provides that in the event that the dispute cannot be so resolved, 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 notice in writing to the other party (delivered by hand or certified mail) refer such dispute to arbitration or litigation.

E. Under cover of a letter dated 9 June 2004 the contractor affected service of a Notice of dispute in accordance with Clause 47.1 ("the Notice of Dispute").

F. The disputes referred to items 1 – 9 of the Notice of Dispute have not been resolved and remain in dispute between the Contractor and the Principal.

[15] Australian Coals responded with a letter of 5 July 2004 maintaining the position that the Dispute Notice was not a valid notice under the contract with the consequences that:

> "The claims made cannot properly be the subject of a notice of dispute under the contract. Accordingly, we do not accept that the notice of referral of disputes to arbitration is a valid notice under the contract."

[16] The letter concluded by reserving Australian Coals' rights in relation to the "above matters" including its right to apply for a stay if Roche sought to have an arbitrator appointed. The letter concluded by saying that if the views expressed in the letter were incorrect Australian Coals had no objection to a nominated arbitrator in the event he was not available but Hinds' name came forward as acceptable to both parties.

[17] There was further correspondence about the identity of an arbitrator which is now unnecessary to consider and on 30 July Australian Coals brought these originating applications for declaratory and injunctive relief which Roche now seeks to stay.

[18] Issues relating to validity aside there is little occasion to doubt that the parties are in dispute about the items referred to in the Dispute Notice forwarded under cover of Roche's letter of 9 June 2004.

[19] The Dispute Notice and the subsequent events demonstrated a "disagreement or difference of opinion." Roche advanced claims under the contract which Australian Coals does not accept. This constitutes a dispute as that is commonly understood; see further the discussion *Re Santos Pty Ltd & Ors v Pipeline's Authority of South Australia* (1996) 66 SASR 38 (Full Court) per Debelle J, Cox and Prior JJ's agreeing at 44.

[20] As Debelle J went on to point out (at page 45):

> "The existence of a precisely formulated claim is not necessary to create a dispute"

Having cited *Arunsen v Casson Beckamn Rutley & Co* [1977] AC 405 Debelle J continued that the emphasis in the context of a referral was that there should be a "formulated dispute which is submitted to the arbitrator…about an identifiable subject matter." He concluded it is not necessary for the parties to have precisely formulated their respective positions.

[21] Debelle J's approach has been referred to with approval in *Mazelow Pty Ltd v Herberton Shire Council* [2003] 1 Qd R 174 at 185 per Williams JA and *CMC Cairns Pty Ltd v Isicob Pty Ltd* [2003] 1 Qd R 228 at 233 and *New South Wales v Austeel Pty Ltd* [2003] NSWCA 392 at para 30.

[22] Roche's letter with the enclosed Reference Notice of 28 June is an unequivocal election, as contemplated by general condition 47.2. The parties became contractually bound to arbitrate, the contractual option to litigate was foreclosed by Roche's election; see *PMT Partners Pty Limited (in liquidation) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, *Manningham City Council v Dura (Australia) Constructions* [1999] 3 VR 13 and *Mulgrove Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2002] 2 Qd R 514.

[23] Those considerations are sufficient to enliven the Court's jurisdiction under s53 of the *Act* to grant a stay of Australian Coal's originating application. It is therefore necessary to turn to the question of the validity of the Dispute Notice.

[24] General condition 47.1 provides that a notice of dispute "adequately identifying and providing details of the dispute."

[25] There are many cases about the contents of a proper notice, many have been cited to me. These cases contain dicta about the level of specificity required in the particular circumstances but are of little direct assistance here since the context and verbiage differs from case to case. The cases do, however, provide a useful background against which to consider the effect of clause 47.1 in the present circumstances.

[26] In *Yendex Pty Ltd v Prince Constructions Pty Ltd* (1989) 5 BCL 74 the Full Court (Queensland) deal with the adequacy of a notice of default to found the exercise of specified contractual powers by a head contractor against a subcontractor.

[27] The contractual requirement in *Yendex* was that the notice "shall specify the default, refusal or neglect on the part of the subcontractor". The court spoke of a requirement that the notice conveyed to a "commercial builder what was said to be amiss so that he could turn his mind to it and show cause."

[28] *Re White Industries (Qld) Pty Ltd* (1990) 7 BCL 200 was a case where the impeached notice was designed to found termination of the contract. Byrne J held it was not in the circumstances. The contractual requirement was to "specify and detail the default relied on."

[29] In *South Bank Corporation v Mostia Constructions Pty Ltd* (unreported 3639 of 1999 BC9903210) Mackenzie J dealt with an application for an injunction under s53 of the *Act.* The issue was whether in respect of a Dispute Notice was one "adequately identifying and providing details of the dispute". His Honour stated:-

> "Whether a notice identifies and provides details of dispute must be determined by reading the notice and forming a judgment whether the information contained therein constitutes identification and provision of details of the dispute".

[30] Noting that the context in *Yendex* (supra) was different and referring to *White Industries,* Mackenzie J went on:

> "It's a question of degree as to whether the details of the dispute have been adequately identified and provided. It is the question of the point at which sufficiency is reached."

and held it had not been.

[31] In my view, the words of the clauses in these cases connote a greater degree of precision and detail than does a clause requiring a notice "adequately identifying and providing details of the dispute". Thus a requirement to "specify" (*Yendex)* connotes an obligation to "mention or name specifically or definitely; state in detail"; see the (Macquarie dictionary.) In *White Industries* the clause required the notice to "specify.and detail". "Detail" connotes "an individual or minute part; an item or particular…minutia"; (Macquarie Dictionary). In *South Bank Corporation* the requirement involved "adequately identifying and providing details." "Adequate" connotes "equal to the requirement or occasion, reasonably sufficient"; (Macquarie Dictionary).

[32] In *New South Wales v Austeel Pty Ltd* [2003] NSWCA 392 the New South Wales Court of Appeal dismissed an appeal against a decision to the effect that a notice of dispute complied with the applicable contractual conditions. Mason P with whom Meagher and Giles JA's agreed rejected the appeal. The contractual requirement was for a "written notice of the dispute", arguably a more liberal requirement than the requirements in this case.

[33] Having held one notice was sufficient to cover more than one "dispute or difference" the Court went on:

> "[19] A notice must, like a pleading, attempt to catch or describe the essence of the existing dispute or differences, at least from the perspective of the initiating party, but like any business document it is to be construed fairly in its context. It was not submitted that it has to be drawn with all the formality of a pleading.".

[34] In the course of his reasons Mason P (the other members of the Court agreed) stated considerations which are, to my mind, directly relevant to the present case are:

> "[17] ..here the notice sets the scene for dispute resolution, but it does so in a fairly preliminary manner. Discussion and mediation will follow if necessary. Inevitably some issues will drop away and others will be reformulated. Ultimately, if necessary, there will be an arbitration in which attention will have to be given to proper points of claim. If those points of claim go beyond the scope of the notice then certain rights may arise
>
> All of this may not come to pass of course if the dispute is resolved earlier but in determining what this contract requires in order to satisfy the obligations of the initiating party to give 'written notice of the dispute that has already arisen out of in the context of the agreement' we should focus on the context. As I have indicated, it is a context of laying the ground work for various tiers of informal and ultimately formal dispute resolution."

[35] Whether the Dispute Notice in this case is a notice "adequately identifying and providing details of the dispute" is a conclusion to be arrived at in the light of the surrounding facts and circumstances. The requirement is not one of formality but of substance; the issue is whether the notice sufficiently "catches or describes the essence of the dispute" or is "reasonably sufficient in the circumstances" for Australian Coals to know and meet Roche's complaints.

[36] In these circumstances, an arbitrator's jurisdiction to deal with substantive disputes carries with it the power for the arbitrator to decide all questions of fact on which alleged authority to proceed is dependent; *Re Contrapak Pty Ltd (formerly Brismar Pty Ltd) v Australian Wool Realisation Commission (formerly Australian Wool Corporation)* (unreported), Supreme Court Qld 17 July 1992 per Ryan J at page 4.

[37] See also *Bremer Vulcan Schiffbau Und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 990 per Lord Diplock at 981. As Fullagher J noted in *Robertson v Asva Holdings Pty Ltd v Barass* (unreported), Supreme Court VIC 25 September 1989 a court would ordinarily exercise its jurisdiction in favour of allowing or, if necessary, requiring the arbitrator to decide jurisdictional facts.

[38] At this stage, three points may be made; pursuant to s14 of the *Act* an arbitrator has ample power to give directions to clarify issues and require particulars to give the parties an opportunity to deal with them. Section 25 gives an arbitrator power to extend a reference should it emerge that claims clarified in this fashion go beyond the scope of the notice. Thirdly, the arbitrator has power to determine the issues raised by the originating application expeditiously by way of a preliminary determination.

[39] Australian Coals submits that it is inconsistent with s 53(1) to conclude that the issues raised in the originating application are a "dispute" within the meaning of cl 47 or is agreed to be referred to arbitration. It does not blush in submitting that if these issues are to be pursued they would necessarily have to pass through the stepped dispute resolution requirements of clauses 47.1 and 47.2.

[40] The proposition thus stated seems to me to expose the flaws in the submission. The issues raised by the originating application are not a discrete class of dispute arising under the contract. They are ancillary to the resolution of the dispute notified by the Notice of 9 June and the election to arbitrate of 28 June.

[41] The position therefore is that the contractual requirements for the referral of the dispute between the parties have been satisfied. The arbitrator has power to determine expeditiously the issues raised by the originating application if that is appropriate. No good reason has been shown for not holding Australian Coals to its agreement to arbitrate.

[42] I therefore order that the proceedings commenced by originating application BS6639/04 be stayed pursuant to s 53 of the *Act*.