[2013] QCA 366

COURT OF APPEAL

MUIR JA

Appeal No 11785 of 2013
SC No 11536 of 2013

AUSTRALIA PACIFIC LNG PTY LTD	**Applicant**
v	
RICHARD GEORGE GOLDEN **VANESSA LOUISE FOWLES** **JANE MARY ZAHNLEITER**	**First Respondents**
THE HONOURABLE IAN CALLINAN AC	**Second Respondent**

BRISBANE

MONDAY, 9 DECEMBER 2013

JUDGMENT

MUIR JA: The applicant applies for an order that the Honourable Ian Callinan AC be restrained from taking any further steps to proceed with an arbitration scheduled to commence at 1.00 pm on 9 December 2013. The matters relevant to the proposed arbitration proceeding came before the primary judge who declared, on 3 December 2013, that the lawful effect of the election notices signed by one of the first respondents and given to the applicant is to require the parties to use reasonable endeavours to finish the arbitration referred to in the election notices by a certain time unless the parties agree to a longer period; and that such arbitration conducted pursuant to the *Petroleum and Gas (Production and Safety) Act* 2004 (Qld) ("the Act") may be held even though:

(a) the applicant does not agree to such arbitration and/or;

(b) someone given notice of it (the applicant) does not attend in relation to (a).

The election notices to which the primary judge referred were given under s 537A of the Act. They identified arbitration as the ADR process required and, as may be inferred from the foregoing, nominated Mr Callinan AC as the arbitrator. The applicant asserts that, on the proper construction of s 537A, as it had not agreed to the appointment of an arbitrator under s 537A(2)(b), the first respondents' entitlement to call on it to agree to an ADR process was spent. Counsel for the first respondents conceded that the applicant's case was arguable but submitted, in effect, that it was weak. In my view, the applicant's case is fairly arguable.

I do not consider it desirable that I should attempt any further grading. That is a matter for determination of the Court of Appeal in due course. I observe merely that the applicant's case gains some substance from the words in s 537A(2):

"Either party may by a notice (an ***election notice***) –

(b) to the other party – call upon them to agree to an alternative dispute resolution process (an ***ADR***) to **negotiate** a conduct and compensation agreement." (emphasis added)

If the first respondents' construction is to be preferred, it is at odds with the thrust of Chapter 5, Part 5 of the Act, which appears to be directed to negotiated settlements, failing which, compensation is to be determined by the Land Court.

There was a debate between the parties as to the correct principles to be applied in the determination of this application. I am content to proceed on the basis that the appropriate principle is that identified by Keane JA in *Cook's Construction Pty Ltd v Stork Food Systems Australia Pty Ltd* [2008] QCA 322 at paragraph [12]. It was contended by Mr Thompson QC, who appeared for the first respondents, that this was a case of mere inconvenience and not a case in which, if the applicant is successful, the orders made on appeal will be rendered nugatory. I am unable to accept that proposition. As was argued by Mr Dunning QC, who

appeared with Mr Sheehan for the applicant, if an appropriate order is not made today, the applicant will be forced to participate in an arbitration costing some hundreds of thousands of dollars. As well, its personnel will need to be deployed in preparing and participating in the arbitration proceedings. There is considerable doubt about how, if at all, the costs of the arbitration proceedings will be recovered, or will be recoverable, by the applicant if it is ultimately successful. The mere fact that the arbitration, if it is not sanctioned by the Act, will have taken place, will result in the parties having been sent down on a route which the provisions of the Act seek to avoid. That may have adverse long-term consequences on the parties' relationship.

It is appropriate also to consider matters going to the balance of convenience. Mr Thompson referred in part to the loss of a right to expeditious determination of this matter. I accept that that is a relevant consideration, but it is not a case, I think, where there will be any financial loss to the first respondents apart from the cost thrown away by the adjournment of the arbitration. Much of the preparation for the arbitration will not have been wasted. I have considered the other matters raised by both sides for and against the balance of convenience. Having regard to the time and the fact that the arbitration is due to commence within the hour, I do not propose to give my reasons in any greater detail.

…

MUIR JA: Mr Thompson, do you have any submissions to make in respect of paragraph 2 of the application?

MR THOMPSON: We have a submission to make about the terms upon which an order such as that should be made. Can I develop those now?

MUIR JA: Yes.

MR THOMPSON: The concern we have is that the Court of Appeal will deal with this matter and, in the event that the appeal is dismissed, we don't know when the Court of Appeal's decision will be given, and consequently, we don't know the availability of Mr Callinan then

to resume the hearing of the arbitration or his availability then to deliver an award within the statutory 20 day period, and so any injunction that your Honour grants ought to be on the condition that if it turns out that Mr Callinan is unavailable at some particular point in time to deal with the matter expeditiously at the end of that process, that the point is not taken against us then that the arbitration hasn't been disposed of within the statutory 20 day period. So we shouldn't be put to any prejudice in relation to that.

The second thing I can inform your Honour is that we are content with some undertakings which our learned friend has indicated will be given to the court concerning the giving of a further election notice and proceeding to the Land Court under the existing election notice.

MUIR JA: There should be an undertaking as to damages as well, I would have thought.

MR THOMPSON: Yes, your Honour. Because my client may suffer quite considerable damages as a result of the injunction. There's no evidence before your Honour about that, but that is the case. So there ought to be an undertaking as to damages given by our learned friend for the price of the injunction. But it's also that first point that concerns us, that we might finish up being successful in the Court of Appeal but find that because of Mr Callinan's other commitments having embarked upon the arbitration and made directions, we would see it desirable that he should resume the process.

MUIR JA: Mr Dunning?

MR DUNNING: Thank you, your Honour. Can I deal with the uncontroversial issues – I wouldn't say uncontroversial but the easier issues – naturally on behalf of the applicant I give the usual undertaking as to damages. Can I pass up to your Honour please – or do you want me just to read out a form of undertaking that is acceptable to Mr Thompson?

> "The applicant by its counsel undertakes, pending the determination in the appeal in CA 11785 of 2013, earlier order or written agreement of the parties, that:
>
> (1) the applicant will not apply to the Land Court in respect of the respondents,
>
> (2) the applicant will not issue any further election notice to the respondents pursuant to s 537A(2) of the *Petroleum and Gas (Production and Safety) Act*."

MUIR JA: Thank you.

…

MR DUNNING: Your Honour, can I then move to the final topic that Mr Thompson raises. The difficulty, and we don't naturally say this critically, we haven't been offered a form of words that gives us any particular certainty about it, so if Mr Callinan came back and said, "I need two years", well, plainly enough, we wouldn't agree to it. We think there's a simpler solution, and that is that a combination of the statutory provisions themselves and such order as the Court of Appeal might make upon the giving of the order.

Can I first of all deal with the statutory capacity to deal with this issue? If one goes to s 537AB(3), if an arbitration is called for the parties must use reasonable endeavours to finish it within 20 business days after giving of the notice. Then (4) and (5) provide a regime for the parties to extend the period of time.

So the first thing is that the parties might agree to do it. The second is, though I accept that reasonable minds might differ on it, but it seems that if it be right, that you can by the delivery of the election notice unilaterally compel an arbitration, the arbitrator will then be seized of the proceedings and the arbitrator can make directions. Now, he's got a statutory responsibility to use reasonable endeavours to finish with 20 days, but one of the things that would inform those reasonable endeavours is an injunction granted by the Court of Appeal, people's commitments once the decision's handed down. That really seems to us to address the concern, but if there's any residual concern and any residual potential for prejudice, it's too hard, in our respectful submission, to try and resolve that issue today.

An easier regime would be to look at that and when we get notice that the Court of Appeal decision is imminent, contact can be made with Mr Callinan. Now, he might turn around and say, "I don't have any difficulties, I'm ready to go", in which case the issue won't arise. If it does arise, and he says, "I'm going to need 40 working days", well, the parties can talk and open up the window in which they've got to do it, and if that failed, well, then, the matter can be mentioned by the court to make what orders it needs to make, because at the moment, any

undertaking or order would seem to be in a vacuum and would have to contemplate too many contingencies that are much better attended to.

(1) It might not arise at all because the appeal succeeds, or

(2) It might not arise but Mr Callinan has no availability issues.

There's another matter I wanted to raise about expedition, but is it convenient to deal with that issue first before - - -

MUIR JA: Yes.

MR DUNNING: Thank you.

MUIR JA: Mr Thompson, is there really a problem?

MR THOMPSON: Well, our concern is that there may be, but there's a simple solution. If your Honour takes up s 537AB and goes to subsection (5), "If the parties agree to a longer period, that period applies instead of the usual period". It would be very easy to cast a further undertaking that APLNG agrees to a longer period not exceeding two months in the event that Mr Callinan has any difficulty with availability to hear the arbitration and give an award following decision of the Court of Appeal. We wouldn't want to be in a position where Mr Callinan said he can't do it for four months or five months or six months either, but we're just concerned that if he's got to embark within 20 days of the Court of Appeal and he happened to be doing something else, we're going to lose the benefit of the decision, essentially, and be thrown back into this regime.

MUIR JA: That would seem reasonable enough, wouldn't it, Mr Dunning?

MR DUNNING: Your Honour, I'm getting some instructions on that proposal. It does nonetheless have its own suite of difficulties, but I accept that they in effect have a two month cap on as a result, and it assumes Mr Callinan remains able and willing to do it. His position may have changed.

Your Honour, can I deal with the topic of expedition whilst some instruction is being sought? The other thing is, as we indicated in our submissions, we would ask that the appeal be heard

expeditiously. Typically the court's practice, at least as I understand it, is a letter to the Registrar who then takes it up with the President. Given we're before your Honour, is that matter that I can raise now, or is that a matter that should be raised in the way I've just mentioned?

MUIR JA: Mr Thompson, I take it you support that?

MR THOMPSON: Yes, your Honour, we would like an expedited appeal.

MUIR JA: I don't know that I can give a direction that it be dealt with expeditiously, but it's something I'll raise with the Registry and seek to have it given priority. The extent to which it can or will be given priority will depend, I suppose, on whether there are other matters which have a pressing need to be heard.

MR DUNNING: Yes, I understand that.

MUIR JA: But I will seek to have it expedited.

MR DUNNING: Thank you very much, your Honour. May I then please return to the topic of the undertaking? I assume this would attend to Mr Thompson's concern that we give an undertaken that, if it be necessary, we will agree to the 20 business day period being extended so that the ADR process is finished within two months of the delivery of judgment. I've endeavoured to try and get it to stick closely to the statutory formulation in that regard.

MUIR JA: So is the undertaking in these terms:

> "The applicant undertakes that if it becomes necessary the applicant will agree to the 20 business day period referred to in s 537AB(3) being extended so that the period within which the parties must make reasonable efforts to finish the ADR is two months rather than 20 business days."

…

MR DUNNING: Yes, thank you very much. That is the undertaking I give.

MR THOMPSON: That's satisfactory, thank you.

MR DUNNING: Thank you, Mr Thompson. I realise there are competing views on it, but given that our undertakings are styled until a date, earlier order, or agreement, may we have an express liberty to apply?

MUIR JA: Yes, I was going to mention that.

MR DUNNING: Thank you.

MUIR JA: So the orders will be these:

"Upon the applicant by its counsel:

(a) giving the usual undertaking as to damages;

(b) giving the undertaking contained in exhibit 3 hereof, that's the written undertaking; and

(c) undertaking that if it becomes necessary, the applicant will agree to the 20 business days period referred to in s 537AB(3) being extended so that the period within which the parties must make reasonable efforts to finish the ADR is two months rather than 20 business days,

it is ordered:

(1) in terms of paragraph 2 of the application, with the deletion from the first line thereof of the words "the Honourable Ian Callinan AC" and the substitution therefor of the words "the respondents".

(2) the parties have liberty to apply;

(3) the costs of and incidental to the application be reserved."

MR THOMPSON: Would your Honour hear me briefly on the question of costs?

MUIR JA: Yes.

MR THOMPSON: It is, of course, true that we oppose the application and ordinarily that has certain consequences, but here it was necessary for the applicant to seek an indulgence of the

court to obtain a stay. My client has the benefit or an order of the Supreme Court entitling it to declarations and in those circumstances can I ask your Honour to make an order that our costs be paid by the applicant.

MUIR JA: Thank you. Mr Dunning.

MR DUNNING: Your Honour, we don't oppose the order your Honour makes. We might've been inclined to suggest each party's costs should be the costs in the proceedings, but your Honour shouldn't, respectfully, accede to Mr Thompson's submission. If the appeal is successful, then the proceeding oughtn't be brought below, much less expedited. We had no choice but to come here for the reasons that are made clear by your Honour's reasons just delivered and it'd be wrong for us to be deprived of our costs and even more so for the respondent to be rewarded by an order of costs for today. So the costs of today, ultimately, should follow the fate of the appeal, in our respectful submission. The order your Honour suggested would achieve that.

MUIR JA: Thank you. Mr Thompson, anything in reply?

MR THOMPSON: Nothing in reply, your Honour. Doesn't mean I accept what he said.

MUIR JA: Well, it was certainly quite a bold submission, if you don't mind me saying so, but it doesn't appear to me to be appropriate that either party have their costs. That should be determined when the correct construction of the legislation is determined by the Court of Appeal, but that brings me to the question of whether it wouldn't be preferable that the costs be the parties' costs in the cause. Do you have any difficulty with that Mr Thompson?

MR THOMPSON: I'm just getting some instructions. … We don't have a problem with it, your Honour.

MUIR JA: Thank you. I revoke the former part of the order and order that the costs of and incidental to the application be in the parties' costs in the appeal.