DISTRICT COURT OF QUEENSLAND

CITATION:	*One Sector Pty Ltd v Panel Concepts Pty Ltd* [2021] QDC 54
PARTIES:	**ONE SECTOR PTY LTD** (Plaintiff/Respondent) **v** **PANEL CONCEPTS PTY LTD** (Defendant/Applicant)
FILE NO/S:	BD 2957/2020
DIVISION:	Civil
DELIVERED ON:	8 April 2021
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2021
JUDGE:	Barlow QC DCJ
ORDERS:	**The defendant's application filed on 12 March 2021 be dismissed.**
CATCHWORDS:	ARBITRATION – ARBITRATION AGREEMENT – ARBITRATION AGREEMENT AS GROUND FOR STAY OF COURT PROCEEDINGS – POWER OF COURT TO STAY – VALID ARBITRATION AGREEMENT – Plaintiff sub-contracted defendant to complete construction work – Plaintiff suing defendant for breach of contract – Sub-contract includes dispute resolution clause – Dispute resolution clause includes potential referral to arbitration – Whether clause amounts to arbitration agreement under *Commercial Arbitration Act*. ARBITRATION – ARBITRATION AGREEMENT – ARBITRATION AGREEMENT AS GROUND FOR STAY OF COURT PROCEEDINGS – POWER OF COURT TO STAY – TIME FOR APPLICATION – Plaintiff suing defendant for breach of contract – Plaintiff successfully sought default judgment – Defendant applied to have default judgment set aside – Defendant filed affidavit in support of application to set aside judgment – Whether statements in affidavit describing proposed defences amounted to first statement on the substance of the dispute. *Commercial Arbitration Act* 2013 (Qld), s 8 *CPB Contractors Pty Ltd v Celsus Pty Ltd* (2017) 353

ALR 84, considered

Gilgandra Marketing Co-operative Ltd v Australian Commodity & Marketing Pty Ltd [2010] NSWSC 1209, considered

Pathak v Tourism Transport Ltd [2002] 3 NZLR 681, cited

COUNSEL:	S Colditz, for the plaintiff
	J Marr, for the defendant
SOLICITORS:	Active Law for the plaintiff
	Robinson Locke Litigation Lawyers for the defendant

Introduction

[1] The defendant was a sub-contractor of the plaintiff – the head contractor - under a contract for the construction of an industrial complex. The plaintiff sues the defendant for damages for breach of that contract.

[2] The defendant applies for a stay of the proceeding, pursuant to s 8(1) of the *Commercial Arbitration Act* 2013, so that the parties may refer their dispute to arbitration pursuant to the contract.

[3] Subsection 8(1) of the Act provides:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[4] "Arbitration agreement" is defined in s 7, in essence, as a written agreement to submit to arbitration disputes that have arisen or may arise between the parties.

[5] The contract in this case is apparently a standard form of subcontract drawn by the plaintiff. Its operative part (the general conditions) is not long. Clause 25, upon which the defendant relies, is headed "Dispute Resolution." It is set out in the annexure to these reasons.

[6] The defendant's principal contention is that none of the steps referred to in clause 25 has been taken and therefore the parties remain obliged, by clause 25.1, to comply with the steps set out in the balance of the clause before the plaintiff may continue with this proceeding. Therefore it seeks a stay of this proceeding. The parties agree that an order staying the proceeding is an effective way of the court referring the parties to arbitration under s 8.

[7] The plaintiff submits that the parties have taken the steps provided in clauses 25.2 to 25.4 (a notice of dispute, followed by a without prejudice conference), but it says that, after the conference, the defendant did not issue a further notice of dispute, under clause 25.5, setting out the details of the dispute and referring it to arbitration.

Nor have the parties otherwise agreed on arbitration which, the plaintiff contends, is an alternative route for arbitration (that is, by a separate agreement).

[8] The plaintiff opposes a stay on a number of grounds:

(a) first, there is no arbitration agreement, as the preconditions to the operation of the contractual requirement that the parties arbitrate their differences have not been met;

(b) secondly, the defendant made this application too late – in particular, after it had, in this proceeding, submitted its first statement on the substance of the dispute;

(c) thirdly, any arbitration agreement in the contract is inoperative as the defendant has chosen to participate in this proceeding rather than to arbitrate and it should be held to that choice.

Is there an arbitration agreement?

[9] The defendant contends that clause 25 constitutes an arbitration agreement. The parties must therefore comply with the steps provided in that clause before they may litigate. But the plaintiff contends that none of the steps taken by the parties to date was a step under clause 25 or, if any action purported to be such a step, it was taken too late. Therefore there is no current or operative agreement that the disputes the subject of this proceeding be referred to arbitration.

[10] The plaintiff submits that only clause 25.5 permits one party, in the circumstances described in that clause, unilaterally to refer disputes to arbitration. A party may do so only after the following steps have occurred:

(a) one party has given to the other a notice of dispute under clause 25.2;

(b) the parties have held a without prejudice conference, either within 7 days of the giving of the notice of dispute under clause 25.3 or later under clause 25.4 if either party is a member of the Queensland Master Builders Association;[1]

(c) if the parties do not settle at a conference, one party has given the other a second notice of dispute and referred the dispute to arbitration.

[11] Unless those steps are taken within the time periods stated, then arbitration may only occur if the parties agree to proceed to arbitration. In the event of such an agreement, clauses 25.6 to 25.9 apply. Otherwise, either party may commence and proceed with litigation.

[12] In his submission, Mr Colditz, counsel for the plaintiff, sought to distinguish between a unilateral referral to arbitration under clause 25.5 and a bilateral, separate agreement under clause 25.6. The basis of this distinction was the reference, in clauses 25.6 and 25.9 to "the parties" referring or failing to agree to refer a dispute to arbitration. Mr Colditz submitted that clauses 25.6 to 25.9 did not apply to a unilateral referral under clause 25.5. Rather, those clauses refer to the possibility that, in the absence of a unilateral referral, the parties may agree jointly to refer their

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1 Neither party is a member of the QMBA.

dispute, to arbitration. In this case, there was no unilateral referral, nor have the parties separately agreed to refer their dispute to arbitration. Therefore, there is no arbitration agreement.

[13] I respectfully disagree with that construction. The contract is not well drawn, but clearly clauses 25.6 to 25.8 apply to an arbitration to be conducted after one party requires referral under clause 25.5. The references to "the parties" should be construed as referring to either party. Otherwise clauses 25.6 to 25.8 would be redundant (being entirely dependent on there being a fresh agreement to arbitrate). Furthermore, the reference, in clause 25.9(c) to a referral to arbitration under clause 25.6 is clearly an error, as the only method of referring a matter to arbitration is under clause 25.5.

[14] The effect of clauses 25.5 to 25.9 is that:

(a) if the parties have had a without prejudice conference after a notice of dispute under clause 25.2 was given, then either party may give the other another notice of dispute setting out details of the dispute then existing (which may not be all the original disputes) and, by that notice, elect to refer to arbitration the items of dispute set out in the notice;

(b) if either party makes such a referral and the parties cannot agree on an arbitrator, the method of selection of an arbitrator set out in clauses 25.6 and 25.7 will be used to have one appointed;

(c) if neither party gives the other a notice of dispute and referral to arbitration (under clause 25.5) within 7 days of a conference under clause 25.3,[2] or if a conference did not take place due to the refusal of the party given the original notice of dispute, either party may commence litigation about the disputes set out in the original notice of dispute.

[15] Clause 25 as a whole is clearly an arbitration agreement.

Was the defendant's application for a stay made too late?

[16] The plaintiff contends that the defendant sought to refer the dispute to arbitration too late, as the first occasion on which the defendant, by its solicitor, mentioned referral to arbitration was on 9 March 2021, after it had successfully applied to have a default judgment against it set aside. In support of that application, the defendant's solicitor swore an affidavit in which he said,[3]

> I am informed by John Hennessy and believe that the Defendant has a Defence and a Counterclaim, being:
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> (a) At all times, the Defendant was ready and willing to complete the work pursuant to the subcontract, including rectifying any alleged defects. However, the Plaintiff prevented the Defendant from performing work because the Defendant was denied access to site. As the Plaintiff prevented the Defendant

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2 That period of 7 days derives from clause 25.9, which I consider applies to a referral by either party under clause 25.5 (or indeed by both parties). If there is no referral within 7 days of a conference, either party may commence litigation.

3 Affidavit of Malcolm Robinson filed on 24 February 2021, paragraph 8 (errors in original).

from performance, by the doctrine of prevention, it cannot take advantage of its own default and allege breach of contract by the Defendant.

(b) The Plaintiff's claim for alleged liquidated damages includes claim for a period caused by the Plaintiff itself which prevented earlier performance. The Plaintiff only gave access to site after 4 December 2018. As such the liquidated damages claim seek to take advantage of delay caused by the Plaintiff. Further, the period of time includes time when the Defendant was prevented from performance due to exclusion from site.

[17] Counsel for the plaintiff submitted that those paragraphs comprise the defendant's "first statement on the substance of the dispute,"[4] in which case the defendant became disentitled to file its application seeking a stay after it filed that affidavit.

[18] Mr Colditz referred me to several authorities that have considered what amounts to a "first statement on the substance of the dispute." I have also reviewed the discussion of the section and its equivalents in other jurisdictions in *Commercial Arbitration Act 2010 (NSW) (Annotated)* published by Westlaw AU.

[19] I preface my consideration of this issue by noting that a court should attempt to construe the Act in a manner consistent with the UNCITRAL model law on international commercial arbitration, on which the Act is based.[5]

[20] In *CPB Contractors*, at [91]-[92] Lee J referred to two decisions of other Courts. Of particular assistance is that of Slattery J in *Gilgandra Marketing Co-operative Ltd v Australian Commodity & Marketing Pty Ltd* [2010] NSWSC 1209. His Honour commenced his decision by remarking, at [1], that the case illustrated that a party operating under the Act may need to decide early to pursue a stay application.

[21] In *Gilgandra*, the plaintiff commenced an action for a debt allegedly owed and obtained an interlocutory injunction restraining the defendant from dealing with the goods sold to it by the plaintiff. Directions were made for pleadings and a prompt trial. The defendant filed an unconditional notice of appearance and then took other steps, including applying to set aside the injunction. Some months later, it filed its defence and, on the same day, a motion seeking a stay of the proceeding to enable arbitration under the sale agreement. Slattery J held that it was not entitled to a stay.

[22] At [49] to [53], his Honour considered a number of New Zealand decisions on when a party's first statement on the substance of the dispute is made. His Honour extracted the following passage from a learned article[6] summarising those decisions:

> It has been variously held that the following constitute a "party's first statement on the substance of the dispute":
>
> (a) a notice of opposition and affidavit in opposition to an application for an interim injunction;

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4 *Commercial Arbitration Act*, s8

5 *CPB Contractors Pty Ltd v Celsus Pty Ltd* (2017) 353 ALR 84, [43]. The model law was produced under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention".

6 Tómas Kennedy-Grant QC, "The New Zealand Experience of the UNCITRAL Model Law: A Review of the Position as at 21 December 2007" (2008) 4 AIAJ 1.

(b) an originating application for an order setting aside a statutory demand and supporting affidavit;

(c) an affidavit in reply in a summary judgment application in which the plaintiff raises matters which are the subject of an arbitration agreement in reliance on which the plaintiff subsequently seeks to stay proceedings brought by the defendant;

(d) proceeding with a claim after making an application for interim relief with reference to an arbitration agreement but failing then or immediately after the resolution of the interim relief application to apply for a stay, so adopting the statement in the interim relief application as a statement on the substance of the dispute.

[23] Slattery J went on to say:

> the principles stated in a decision in *Pathak v Tourism Transport Ltd*[7] show that a defendant who opposes interim relief in Court and fails to seek a stay or protest jurisdiction in respect of the substantive dispute at an early time under Article 8(1) will be prevented from seeking a stay. … Heath J found that had a stay been sought by the plaintiff immediately after the resolution of the interim relief application it would have been granted … [but] because the plaintiff had proceeded with the Court action and therefore adopted the earlier statement made in the interim relief the plaintiffs had therefore submitted their first statement on the substance of the dispute and that it was too late then to seek a stay.

[24] Notably, in *Pathak*, Heath J referred to a number of other New Zealand decisions on the equivalent provision to s8(1) of the Queensland Act. In one,[8] it was held that, in filing a response to an interim injunction application, the defendant had submitted to the court's jurisdiction. Its notice of opposition to the interim injunction application and its affidavits in support constituted a statement on the substance of the dispute.

[25] In another,[9] the Master held that an affidavit filed on behalf of the applicant to set aside a statutory demand was a "first statement on the substance of the dispute".

[26] Heath J concluded, most relevantly, that "a defendant who opposes interim relief and fails to seek a stay (or protest jurisdiction) in respect of the substantive dispute will also be prevented from seeking a stay."[10]

[27] Slattery J, after referring to those decisions, concluded at [54] that the defendant's opposition to the plaintiff's application for interim relief was its first statement on the substance of the dispute. But even if that were not the case, its failure to seek a stay immediately afterwards and its conduct in cooperating over some two months in bringing the proceeding on for hearing, even before a formal defence was filed, was a continuing adoption by it of its first statement at the interlocutory hearing.

[28] Returning now to *CPB Contractors*, having briefly referred to the New Zealand cases, Lee J concluded at [92] that they –

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7 *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681.

8 *The Property People Ltd v Housing New Zealand Ltd* (1999) 14 PRNZ 66.

9 *Anderson Switchboards & Electronic Ltd v Schneider Electrical (NZ) Ltd* (High Court, Auckland, M 1215-IM00, 16 January 2001), a decision of Master Kennedy-Grant.

10 *Pathak,* 692.

> supported the principle that a respondent which opposes interim relief and fails to seek a stay or protest jurisdiction in respect of a substantive dispute at an early time would be prevented from seeking a stay.

[29] Lee J went on to refer to decisions of courts of Singapore and Hong Kong. In particular, his Honour quoted this observation from the Court of Appeal of Singapore:[11]

> It now seems to be fairly settled that a "step" is deemed to have been taken if the applicant employs court procedures to enable him to defeat or defend those proceedings *on their merits* and/or the applicant proceeds, from a procedural point of view, beyond a mere acknowledgment of service of process by evincing an unequivocal intention to participate in the court proceedings in preference to arbitration.

[30] Lee J concluded that the State in the case before him had not made its application for a stay prior to filing its first response on the substance of the dispute and therefore was not entitled to a stay of the proceeding.

[31] Counsel for the plaintiff in this proceeding submitted that the sworn statements as to the defences available to the defendant in this proceeding were in common with the common feature in all the cases, namely that they constituted statements that "contained what the party in question said about how the substantive dispute in the primary proceedings should be determined."[12]

[32] In its application to set aside the default judgment,[13] the defendant in this case also sought an order that it have 28 days from setting aside the judgement within which to file a notice of intention to defend and defence. It did not seek an order staying the proceeding for the purpose of an arbitration. I have set out above what Mr Robinson deposed to about the defences available to the defendant. On 1 March 2021, the day before the proposed hearing of its application, the defendant consented to an order that it file and serve its notice of intention to defend and defence by 23 March 2021.

[33] It was not until its solicitors wrote to the plaintiff's solicitors on 9 March 2021[14] that the defendant first raised the arbitration agreement, purported to refer the dispute to arbitration and foreshadowed making this application for a stay of the proceeding to enable arbitration to take place.

[34] One might ordinarily think that the phrase "first statement on the substance of the dispute" would be referring to a formal document that makes a claim in court proceedings or responds in detail to the claim. The phrase is used in the Model Law because it applies to many countries with different procedural requirements. In the Australian context, one might consider that it refers to such documents as a statement of claim and a defence, or perhaps an affidavit supporting an originating application. In contrast, one might think, a short description of the bases of defences available in an affidavit to set aside a default judgment might not constitute such a

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11 *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460; [2008] SGCA 34, [55]. Emphasis in the original.

12 Quoting from Mitchell J in *Australian Maritime Systems Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52, [93].

13 Court document no 9, filed on 24 February 2021.

14 Affidavit of Paul Jason Hick filed by leave on 19 March 2021, "PH-6", pp 339-341.

statement. This is particularly so when courts have decided that a plaintiff's application for, or opposing, an interim injunction, which must include evidence setting out the factual basis for the application, does *not* comprise such a statement.

[35] However, the almost unanimous weight of authorities in which equivalent provisions have been considered is to the effect that a party who submits to a court's jurisdiction in a proceeding concerning the subject matter of an arbitration agreement and, in that proceeding, makes some statement of the nature of its claim or defence, except where a proposed claimant invokes a court's jurisdiction and power to grant interim relief, is thereafter prevented from seeking a stay under s 8 or its equivalents. While I am not bound by those authorities, I am not persuaded that they are clearly wrong. In the circumstances, I should follow them.

[36] In its application to set aside the judgment, it was not necessary for the defendant to demonstrate to the court that it has a good arguable defence, because the application was based on the basis that the judgment was irregularly entered.[15] It could have sought to set aside the judgement on that basis and, at the same time, sought a stay. It did not do so. Instead, it sought to set aside the judgment and to seek an order that it file its unconditional notice of intention defend and a defence. In support, Mr Robinson described, although in short compass, the defences on which the defendant apparently intended to rely.

[37] Having regard to the weight of authority, I conclude that Mr Robinson's description of those defences do constitute the defendant's first statement on the substance of the dispute. It is therefore now too late for it to seek a stay under s 8.

[38] That conclusion makes it unnecessary for me to consider and determine the plaintiff's third ground of opposition to the application. However, I will record that the defendant's application, by which it not only sought to set aside the default judgment but also sought an order that it file a notice of intention to defend and a defence, as well as its consent to that latter form of order, seem clearly to constitute an election to defend the litigation in this proceeding rather than by arbitration. This third ground therefore does seem to have merit.

[39] The defendant's application must be dismissed. I shall hear from the parties on costs and directions for the next step in the proceeding.

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15 A defendant may almost always have an irregularly entered judgment set aside as of right: *Cusack v De Angelis* [2008] 1 Qd R 344, [36].

Subcontract clause 25

25 Dispute Resolution

25.1 Except to the extent that any litigation that may be commenced for injunctive relief in relation to any matter arising out of or in connection with the Subcontract Agreement, the requirements of this clause are a condition precedent to either party commencing (or, if wrongly commenced, continuing) litigation.

25.2 If a dispute or difference arises out of, or in connection with, the Subcontract, either party may give the other party a written notice of dispute setting out the details of the dispute including any amount in dispute.

'Without Prejudice' Conference

25.3 The parties shall arrange, and participate in, a 'without prejudice' conference between them, or their authorised representatives, in an attempt to resolve the dispute or difference set out in the notice of dispute within 7 Days after the giving of the notice of dispute..

25.4 Subject to one of the parties being a member of the Queensland Master Builders Association:

(a) if either party gives a written notice to the Queensland Master Builders Association and the other party requesting that the Queensland Master Builders Association appoint a person to facilitate discussion in a 'without prejudice' conference, the Queensland Master Builders Association may appoint such a person; and

(b) On any appointment of a person by the Queensland Master Builders Association under Clause 25.4(a), the parties shall permit that person to make suitable arrangements for, and to facilitate discussion in, the 'without prejudice' conference.

Mediation or Arbitration

25.5 If the parties fail to resolve all of the dispute or difference set out in the notice of dispute during the 'without prejudice' conference, or if the party given the notice of dispute fails to participate in a 'without prejudice' conference within 7 Days after the giving of the notice of dispute, then either party may give the other party a written notice of dispute setting out the details of the dispute including any amount in dispute and may refer all or any part of the dispute or difference to mediation or arbitration.

25.6 If the parties refer all or any part of the dispute or difference set out in the notice of dispute to mediation or arbitration but fail to agree on the person to be appointed as the mediator or the arbitrator, then either party may give a written notice to the President of the Queensland Master Builders Association and the other party requesting that the President appoint (as the case may be):

(a) a mediator to facilitate the mediation; or

(b) An arbitrator to decide all or that part of dispute or difference referred to arbitration.

25.7 If either party gives a notice under Clause 25.6, the President shall give to the parties a written notice setting out the name and contact details of (as the case may be):

(a) the mediator appointed by the President to facilitate the mediation; or

(b) The arbitrator appointed by the President to decide all or that part of the dispute or difference referred to arbitration.

25.8 On the giving of a notice under Clause 25.7, the parties shall:

(a) request the mediator or the arbitrator named in the notice to make suitable arrangements for (as the case may be) the mediation or the arbitration; and

(b) Participate in (as the case may be) the mediation or the arbitration and pay the costs of the mediation (including the costs of the mediator) or the costs of the arbitration (including the costs of the arbitrator) in equal shares unless otherwise agreed by the parties or decided by the arbitrator.

25.9 If the parties fail to:

(a) agree to refer any part of the dispute or difference set out in the notice of dispute to mediation or arbitration within:

(i) 7 Days after the 'without prejudice' conference; or

(ii) If the party given the notice of dispute fails to participate in a 'without prejudice' conference 14 Days after the giving of the notice of dispute, or

(b) resolve all of the dispute or difference set out in the notice of dispute during any mediation,

Then either party may commence litigation in relation to any part of the dispute that is not:

(c) agreed to be referred to mediation or arbitration under Clause 25.6; or

(d) Resolved during any mediation.

25.10 Notwithstanding the giving of a notice of a dispute, the parties shall, subject to the Subcontract, continue to perform the Subcontract.