

Brisbane

Before the Hon. Mr Justice Mackenzie

[re: South Bank Corporation v Mostia Constructions P/L & Anor]

BETWEEN:

SOUTH BANK CORPORATION

Plaintiff

AND:

MOSTIA CONSTRUCTIONS PTY LTD (ACN 010 608
009)

First
Defendant

AND:

BRIAN FARMER

Second Defendant

JUDGMENT - MACKENZIE J.

Judgment delivered 11 June 1999

CATCHWORDS:

PRACTICE - Injunction - seeking to prevent arbitration - whether notice of dispute adequately identified and detailed a dispute in accordance with the contract.

Rules of the Supreme Court O 57 r 2

Yendex Pty Ltd v Prince Constructions Pty Ltd (1989) 5 BCL 74

Re: White Industries (Qld) Pty Ltd (1991) 7 BCL 200

Counsel: Mr M Williams for the plaintiff/applicant
Mr PW Hackett for the first
defendant/respondent

Solicitors: Hopgood & Ganim for the plaintiff/applicant

James Byrne & Rudz for the first
defendant/respondent

Hearing 26 May 1999

Date:

IN THE SUPREME COURT OF QUEENSLAND

No. 3639 of 1999

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This is a motion by the plaintiff for an injunction restraining the first defendant from prosecuting or proceeding with an arbitration between the plaintiff and the first defendant. The second defendant is the arbitrator who took no part in the proceedings and acknowledged that he will abide the order of the court.

The writ seeks declarations firstly that the first defendant has not validly referred any dispute to arbitration in accordance with cl 47 of the contract because a notice of dispute dated 25 May 1995 had not been validly delivered or sent to the plaintiff. Secondly, it

seeks a declaration that a second notice of dispute dated 19 June 1996 does not adequately identify and provide details of any dispute in accordance with cl 47.1 of the contract and that therefore the first defendant has not validly referred any dispute to arbitration. Thirdly, it seeks a declaration that the arbitrator has no jurisdiction to embark on or proceed with the arbitration. Fourthly, it seeks an injunction to prevent the arbitration proceeding.

The submissions in support of the injunction focused upon the notice dated 19 June 1996 as to which there was no dispute about service. Although the notice of motion does not specifically ask for such relief, I was invited to give final relief under O 57 r 2 on the basis that the notice of dispute did not comply with cl 47.1 since it did not adequately identify and provide details of the dispute. The relevant part of the notice is as follows:

"NOTICE OF DISPUTE

In Accordance with Contract and A.S.2124-1992

Clauses 47, 47.1, 47.2 Alternative 2

1. Default by the Principal according to Clause 44.7(a) of A.S.2124-1992.
2. Failure to issue Final Certificate in accordance with Clause 42.8 of A.S.2124-1992.
3. Failure to address claim for extra work done in accordance with Clauses 40.1, 40.2, 40.3 and 40.5 of A.S.2124-1992.
4. Failure to pay interest on overdue payments in accordance with the Contract and Clause 42.9 of A.S.2124-1992."

Clause 47.1 relevantly provides that if a dispute between the contractor and the principal arises out of or in connection with the contract... either party shall deliver ... to the other party and to the superintendent a notice of dispute in writing "adequately identifying and

providing details of the dispute". The engineers superintending the project responded saying that three out of the four items failed adequately to identify the details of the disputed event with the consequence that the document did not constitute a valid notice of dispute.

On 21 August 1996 the first respondent ("the respondent") pointed out that the four items in the notice of dispute had been amply expressed in previous correspondence. After further correspondence a "without prejudice" conference was held on 16 October 1996 at which Mr Casagrande, Managing Director of the respondent says he handed to the applicants representatives two manilla folders, one containing a claims summary and the other containing notes on claims and disputes.

It is claimed on behalf of the applicant that the latter document was not handed over on that occasion, but there is no dispute as to the former having been given to its representatives on that day.

In further discussions about the dispute the stance appears to have been taken that since the claims summary file was provided by the respondent on a "without prejudice" basis during that conference it was not open to the respondent to rely on it in order to satisfy cl 47.1 of the contract. However that may be, the applicant maintained its position that the respondent had not identified the disputes which it wished to mediate.

On 31 July 1997 the respondent wrote to the applicant in terms which arguably, at least, invited the applicant to consider them on an open basis as the specific details of each individual dispute. On 5 September 1997 the applicant wrote to the respondent asking whether the claims summary file summarised all the respondent's claims. The letter addressed those claims and rejected them.

One of the difficulties about the matter is that the plaintiff has displayed a somewhat ambivalent attitude towards the matter. On the one hand it has maintained

throughout that the notice of 19 June 1996 did not comply with cl 47.1, while on the other hand enquiring whether the documents which, presumably, Mr Casagrande provided as indicating the matters in dispute contained the totality of the claim and proceeding to consider the validity of the claims and rejecting them.

The sequence of events is set out to illustrate that if the documents in the applicant's hands are the totality of the claim, it may be thought to be taking what is, in commercial if not legal terms, a narrow and rather sterile point, since it was common ground that there is no reason why the respondent could not provide a fresh notice which was, beyond argument, in compliance with cl 41. Nevertheless, I am obliged to consider the adequacy of the notice according to the criteria set out in the authorities. With some reluctance I have come to the conclusion that I should find that the applicant is entitled to the declarations sought. It cannot be said on any view of the matter that the applicant has ever abandoned the stand that the notice of dispute was invalid even though it pursued avenues which may have led to the dispute being resolved. No question of waiver or estoppel arises.

Whether a notice identifies and provides details of a 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. While the context is different, the notion expressed in *Yendex Pty Ltd v Prince Constructions Pty Ltd* (1989) 5 BCL 74 that the notice should convey to those to whom it is delivered what is said to be in dispute so that they may turn their minds to it is the test which is determinative. Further, in *Re: White Industries (Qld) Pty Ltd* (1991) 7 BCL 200, Byrne J in considering the sufficiency of a notice under a clause which required that it specify and detail the default relied on said that such a provision was intended to ensure that the person to whom the notice was addressed was adequately informed of the

allegations of breach of contract. He went on to say that a notice was not effective under the contract unless the detail of the default was clearly identified. He quoted the passage from *Yendex* which I have paraphrased above.

It is a question of degree as to whether the details of the dispute have been adequately identified and provided. It is a question of the point at which sufficiency is reached. In my view, the requirements of the clause have not been satisfied in this case and there being no basis upon which the respondent can succeed it is an appropriate case in which to give final relief. Accordingly I make the following orders:

1. I give judgment for the plaintiff.
2. I declare that the first defendant's notice of dispute dated 19 June 1996 does not adequately identify and provide details of a dispute in accordance with cl 47.1 of the contract made on or about 21 December 1994 between the plaintiff and the first defendant.
3. I declare that the first defendant has not validly referred a dispute to arbitration in accordance with cl 47 of the contract.
4. I declare that the second defendant as nominated arbitrator has no jurisdiction to embark on and/or to proceed with an arbitration in respect of the notice of dispute dated 19 June 1996 between the plaintiff and the first defendant.
5. I order that the first defendant and the second defendant be restrained from prosecuting and/or proceeding with and/or embarking on an arbitration pursuant to the notice of dispute dated 19 June 1996 between the plaintiff and the first defendant.

As to costs, I have given consideration to whether there is any basis upon which the plaintiff should be

deprived of costs. I have come to the conclusion that there is not. Therefore I order that the first respondent/defendant pay the plaintiff's costs of and incidental to the action and the notice of motion to be taxed.