SUPREME COURT OF QUEENSLAND

CITATION:	*North Goonyella Coal Mines Pty Ltd & Ors v North Goonyella Coal Properties Pty Ltd & Anor* [2002] QSC 368
PARTIES:	**NORTH GOONYELLA COAL MINES PTY LTD** (first applicant) **THIESS NG PTY LTD** (second applicant) **THIESS PTY LTD** (third applicant) **v** **NORTH GOONYELLA COAL PROPERTIES PTY LTD** (first respondent) **RAG AUSTRALIA COAL PTY LTD** (second respondent)
FILE NO/S:	S 10022 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application and cross-application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	13 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2002
JUDGE:	Holmes J
ORDER:	**Proceedings stayed pursuant to s53 of the *Commercial Arbitration Act (Qld)* 1990.**
CATCHWORDS:	CONTRACTS – CONSTRUCTION OF PARTICULAR CONTRACTS – DECLARATIONS – PRACTICE AND PROCEDURE – STAY OF PROCEEDINGS The applicant seeks a declaration that, pursuant to cl 20.3, performance of work under a contract be suspended – the respondent seeks a stay of the applicant's application for declarations pursuant to s53 of the *Commercial Arbitration Act (Qld)* 1999 – whether the application is an appropriate matter for summary determination as to whether a declaration should be made – whether cl 20.3 of the contract, regarding the provision of insurance, is subject to cl 40, relating to dispute resolution mechanisms available under the contract – whether, if cl 20.3 is subject to cl 40, the first respondent is entitled to seek a stay of proceedings under s53 of the *Commercial Arbitration Act* (1999). *Commercial Arbitration Act (Qld)* 1990, s53

Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160, applied
KBRV Resort Operations Pty Ltd v Anthony & Sons Pty Ltd (1999) QSC 139, cited
Manningham City Council v Dura (Australia) Constructions Pty Ltd [1999] 3 VR 13, cited
Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd [2002] 2 Qd R 514, considered
PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service (1995) 184 CLR 301, cited

COUNSEL: Mr P McMurdo QC and with him Mr T J Bradley for the applicants
Mr H B Fraser QC and with him Ms K E Downes for the first respondent
Mr R Bain QC for the second respondent

SOLICITORS: Minter Ellison for the applicants
Clayton Utz, Lawyers for the first respondent
Brian Bartley & Co. for the second respondent

[1] Before me are an originating application for a declaration, involving construction of an agreement titled the "North Goonyella Mine Operations Contract"; and a cross-application for a stay of the proceedings pursuant to s 53 of the CommercialArbitration *Act (Qld)* 1990. The obvious course is to deal with the stay application first.

The contract

[2] The North Goonyella Mine Operations Contract, which for convenience I will refer to simply as "the contract", is expressed to be made between the "principal", the first respondent, North Goonyella Coal Properties Pty Ltd, as agent for "the joint venturers" on the one hand, and North Goonyella Coal Mines Pty Ltd (the first applicant,) described as the "contractor", on the other. The joint venturers are RAG Australia Coal Pty Ltd (the second respondent) and Thiess NG Pty Ltd (the second applicant). Thus, all the parties to this application except for the third applicant, Thiess Pty Ltd, are in one way or another parties to the contract. The third applicant is guarantor of the second applicant's obligations under the joint venture agreement. The respondents contended that it was not a proper party to the application. Mr McMurdo QC for the applicants conceded that the point was well taken, but nothing now turns on its having been joined.

[3] Clause 20 of the contract deals with insurance. It includes the following sub-clause:

"**20.3 Unavailability of Insurance**

If the Principal is unable to effect or maintain the insurances required by **Schedule 6 clause 2** as contemplated by that Schedule, the Principal must:

(a) immediately notify the Contractor; and

(b) use or continue to use its best endeavours to effect or maintain the relevant insurances in accordance with the Contract; and

(c) immediately suspend the performance of the work under the Contract pursuant to **clause 29.1(f).**

If there is a suspension of the work under the Contract as contemplated by **clause 20.3(c),** then, for the period of that suspension, the Contractor will be relieved of the performance of the work under the Contract and of its obligations under **clause 17 and clause 18**."

Schedule 6 requires the first respondent to "use its best endeavours to effect and maintain" insurance which in specific respects - as to the extent of cover for particular items and the amount of "deductibles" - is on terms not less favourable than a policy annexed to the schedule as Annexure "A".

The competing contentions

[4] The applicants say that the material demonstrates that the first respondent has been unable to obtain such insurance and seek accordingly, a declaration that it is required immediately to suspend the performance of the work under the contract. But Mr Bain QC, for the second respondent, argues that this is not a proper matter to proceed by way of originating application, because there are substantial issues of fact to be resolved. Allied to this is the respondents' argument that cl 20 of the contract does not operate as the applicants contend, because there are questions such as the existence of an estoppel and whether rectification is available, so that it is not merely a matter of construction of the clause. Their second major contention is that Part J of the contract, which deals with dispute resolution, contains an agreement to arbitrate. Accordingly, the first respondent seeks a stay of the applicants' proceedings pursuant to s 53 of the *Commercial Arbitration Act (Qld)* 1990, arguing that there is no sufficient reason why the matter should not be referred to arbitration. Against those arguments the applicants say that there is no genuine area of factual dispute; that cl 40 has no application to a dispute as to the effect of cl 20.3 of the contract; and that even if it did the court would exercise its discretion against referring the matter to arbitration.

The parties' dealings as to insurance under the contract

[5] The affidavit material shows that the contract was entered on 10 November 2000. There had previously been in place an insurance policy, effective up to 20 September 2000, which was adopted as annexure "A" to schedule 6 to the contract. A new insurance policy, effective from 30 September 2000, was already in operation at the time the contract was entered. It is asserted by Mr Murray Fox, a director and executive general manager of the first applicant, that the policy effective from 30 September 2000 contained terms less favourable than those of annexure "A". His affidavit contains nothing to suggest that any issue was taken with that situation.

[6] Mr Brackin, a partner of the firm acting for the first respondent, offers an explanation. provided to him by a former partner of the firm, for that inaction. He has been told that at the time the contract was negotiated and executed, no copy of

the current policy was available. Consequently, the policy for the preceding year was used as the annexure, although both parties were aware that the current policy was, in fact, in terms different from, and, as he describes it, "arguably less favourable" than, the annexure. On this version, the first applicant's concern in entering the contract was that there was a policy of insurance in place, rather than as to its terms.

[7] At any rate, it was not, it appears, until September 2001 that the question of any diminution in benefit from the policy's terms became the subject of discussion. Then, an individual named Shane Astbury, whose position is not identified, on behalf of the first applicant agreed to accept the insurance arrangement for the ensuing year (commencing on 30 September 2001) on an agreement that the joint venturers would provide it with an indemnity for any gap in coverage as between its terms and those of annexure "A". Although Mr Garland, the general manager of the first respondent, said in a letter making such an offer of indemnity that it was written with the authority of the joint venturers, a draft letter setting out the terms of the indemnity and sent by the first applicant to the first respondent's solicitors was never executed. Mr Donald Argent, a director of the second applicant, which is one of the joint venturers, has made an affidavit, but it is silent as to any offer of indemnity for that year.

The first respondent wrote to Mr Garland on 16 July 2002, requesting execution of the letter of indemnity, and again on 10 October 2002 requesting a response to its earlier letter. In the letter of 10 October 2002 it also inquired as to whether insurance for the ensuing year (coverage under the current contract ending on 31 October 2002) would meet the requirements of the contract. The response, by letter of 23 October 2002, was that the terms of the renewed policy would be "slightly different from those previously effected"; and there was again an offer of indemnity by the joint venturers to the extent of any diminution in indemnity by comparison with the agreed policy. But the letter refrained from any statement as to whether there is or is not any such change or diminution.

[8] According to Mr Fox's affidavit, on 9 October 2002 there was a conversation between Mr Garland and the operations manager of the first applicant, Mr Monaci, in which Mr Garland advised that the new policy

> "was likely to contain similar terms to (the then current) policy except that
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> (a) the total amount of cover available under the policy would be reduced from 400M to 150M; and
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> (b) in addition to the present deductible for consequential losses of 10M in the first 45 days, a further deductible of 7M would apply to consequential losses suffered after 45 days."

[9] On 21 October 2002 Mr Garland wrote to the joint venturers giving details of the first respondent's endeavours to obtain insurance and "the most likely outcome of the placement". The proposal involved $150 million "industrial special risk" cover; an excess in respect of underground property damage of $2.5 million and 45 days production for the purposes of business interruption; an excess in respect of surface claims of $1 million for property damage and 30 days for business interruption,

together with a further excess of $7 million. There was a sub-limit of $150 million in respect of events arising out of spontaneous combustion.

[10] On 24 October 2002 Mr Argent, for the second applicant, wrote to the managing director of the second respondent advising that the first applicant would not agree as a joint venture to provide any indemnity. The second respondent, on the other hand, indicated it would accept the insurance program and offer an indemnity.

[11] On 24 October 2002 Mr Fox wrote to the first respondent, referring to the conversation between Mr Garland and Mr Monaci, and saying that on the basis of the information provided in that conversation:

> "It seems clear that the [policy] will contain terms less favourable to those required by Schedule 6 and Clause 20 of the contract.".

The letter concluded by seeking an immediate confirmation that a direction would be issued pursuant to cl 20.3 suspending the performance of work under the contract. Mr Garland responded by letter dated 25 October 2002 pointing out that the new policy had yet to take effect; that no issue had been taken with the "differing terms" of the current year policy; and that part of the difficulty in renewing the insurance had been the absence of any representative of the first applicant from negotiations. Moreover, his letter pointed out that the areas of the policy concerning the first applicant as contractor were limited, and provided ample cover; and finally, alluded to the dispute resolution provisions in cl 40 of the contract.

[12] On 29 October 2002 Mr Fox wrote to Mr Garland accepting that there was no basis for a suspension under cl 20.3 until the current policy expired on 31 October 2002, but asserting that the insurance program did not comply with the requirements of schedule 6 of the contract and thus triggered the operation of cl 20.3. His letter went on to say that the first applicant had been prepared to make a representative available for negotiations in relation to insurance if the first respondent had accepted the cost of his travel but the latter had declined. On 30 October 2002 Mr Garland responded, maintaining that the insurance negotiated met the requirements of schedule 6 cl 2 so that cl 20.3 had no operation. He contended that cl 20.3 said nothing to the effect that it would become operative in the event of a renewal on terms which were "less favourable", and that, in any event, both parties had proceeded throughout the course of the contract on the basis that the clause would not become operative in the event of changes to the policy terms upon renewal. At no time had the applicant suggested that cl 20.3 might come into operation in such circumstances. The first applicant was not entitled to rely on cl 20.3, either because of its obligation of good faith under the contract or because its conduct had given rise to a waiver or estoppel. In any event it was precluded by the effect of cl 40 from recourse to litigation.

[13] On 1 November 2002 Mr Fox wrote disputing the first respondent's interpretation of the relationship between cl 20.3 and schedule 6, and denying any representation on the first applicant's part that cl 20.3 should be given some artificially restricted effect. The letter pointed out that there had been a denial of indemnity by the second applicant, contended that the good faith obligation could not prevent the first applicant from insisting that the first respondent perform its contractual obligation in cl 20.3, and disputed that there was any bar in the form of cl 40 to the commencement of litigation.

[14] On 7 November 2002 Mr Garland wrote, asserting once more that cl 20.3 had not become operative because the circumstance of inability to effect or maintain the insurances required by schedule 6 had not arisen. The indemnity proposed, both for the preceding year and the current year, had been offered to cover any gap, but in fact the requisite cover had been secured. Clause 20.3 did not become operative in the event of renewal on terms "less favourable". The conduct of the first applicant was consistent with the intention of both parties that there would be differences in the policy on renewal and the absence of any intention that work would be suspended if that were the case. That was manifested by the first applicant's silence prior to its letter of 24 October 2002 as to any question of cl 20.3 being applicable. There were no additional risks to the first applicant in the proposed cover. In any event, the first applicant was required to comply with cl 40 as to the resolution of disputes.

[15] On the same date a notice of dispute was forwarded to the first applicant. It identified the dispute as follows:

1. The interpretation of clause 20.3 of the Contract.
2. The obligation of the Principal to immediately suspend the performance of work under the Contract pursuant to clause 20.3 of that Contract.
3. Whether the Contractor has waived its rights or is otherwise estopped from relying upon clause 20.3 of the Contract.
4. Whether in calling for the works to be suspended in accordance with clause 20.3, the Contractor is cooperating reasonably with, and acting in good faith towards, the Principal.

The issues raised by the respondents

[16] The affidavit of Mr Brackin, solicitor for the first respondent, suggests that it wishes to adduce evidence on a number of issues:

> "a. a comparison between the various versions of the insurance policies that have been in place since the MOC was entered into and the policy referred to in the MOC to show in what respects the policy coverage is both more and less favourable;
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> b. NGCM's attitude to past insurance renewals. I am instructed by Brett Garland and verily believe that, apart from when the possibility arose of no insurance being available for some levels of risk, neither NGCM or Thiess NG suggested that the works should be suspended under clause 20.3 of MOC even though, on those occasions, not all aspects of the insurance (including the insurance in place at the time the MOC was entered into) was as favourable as the policy referred to in the MOC:
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> c. the circumstances surrounding NGCM's failure to participate in the recently completed round of negotiations for the placement of the current insurance and the negative

impact that had on the form of the policy put in place on this occasion notwithstanding NGCM's contractual obligation of good faith under the MOC;

d. the endeavours that the NGCP has made on this occasion to comply with its obligations to put insurance in place as required by the MOC;

e. a risk analysis of the project to show the commercial adequacy of the policy currently in place to allow the operations to proceed with no significant deterioration of the overall risk profile the parties have operated under in previous years;

f. the circumstances in which NGCP on behalf of joint venturers (the Second Respondent and the Second Applicant) has provided to NGCM an indemnity to cover any reduced indemnity offered by the current insurance policy in terms of the letter of 23 October 2002, exhibit MF7 to the affidavit of Murray Leonard Fox sworn 1 November 2002;

g. the commercial losses NGCM is suffering while carrying out its obligations under the MOC and the claims it has been making for additional payment in that regard which are relevant to its motivation in bringing its application; and

h. the current state of negotiations between the Second Respondent and the Second applicant over the sale of the Second Applicant's joint venture interest to the Second Respondent."

[17] As to the first, I would doubt the utility of a comparison designed to show that in some respects the cover provided was more favourable as well as less favourable. It seems to me that the former aspect is irrelevant to whether the requirements of schedule A have been met. The relevance of the evidence suggested in paragraph (c) seems dubious, given that nowhere in the contract or schedule 6 is there imposed on the first applicant any obligation to become involved in negotiations to enable the first respondent to meet its obligation under schedule 6 clause 2. Paragraphs (e), (f), (g) and (h) would seem to have no bearing on any obligation imposed by cl 20.3. The significance of the evidence suggested in paragraphs (b), as to past dealings in relation to insurance renewal, and (d), as to endeavours made by the first respondent to effect the necessary insurance, will be dealt with shortly.

[18] Although the policy which presumably was entered and became effective on 1 November is not before the court, the thrust of what emerges from the correspondence is that in some respects its terms are less favourable than those of Annexure "A". The respondents do not suggest otherwise. Mr Fraser QC, for the first respondent, argued that the first issue was whether cl 20 was engaged at all. It provided for insurance to be effected in accordance with schedule 6, which in turn required the first respondent to "use its best endeavours to effect and maintain the

insurance as set out in the schedule". The first respondent had met that obligation; hence cl 20 had not been triggered.

[19] While it is unnecessary (for reasons which will become apparent) and hence undesirable that I decide the point, the argument does not appeal. The operation of cl 20.3 is not dependent on whether the principal has made its best endeavours, but rather whether it has as a matter of fact been able "to effect or maintain the insurances required by Schedule 6, Clause 2". Rather than being contingent on the obligation created by cl 20.1, clause 20.3 creates a different obligation in a specified circumstance, that is the inability to effect or maintain the required insurance. It follows that I doubt the relevance for present purposes of the evidence suggested by Mr Brackin at paragraph (d).

[20] Next Mr Fraser suggested that there were issues about whether the contract reflected the common intention of the parties, giving rise to possible claims for rectification or reliance on estoppel. Mr Bain expanded on those propositions by suggesting an agreement to accept a varied mode of performance or substantial performance. Mr McMurdo, on the other hand, contended that there had been a failure on the part of the respondents to support such submission by evidence of triable issues. I do not think that is so. There is, I think, enough in the affidavit of Mr Brackin concerning Mr Conrick's potential evidence, in the evidence that the applicant has not until recently sought to reply on cl 20.3, and in the correspondence between the parties to at least raise the existence of these issues, although, of course, falling very far short of substantiating the contentions. The issues do therefore, in my view, go beyond the bare legal question identified by the applicants. In those circumstances I do not consider it an appropriate case for a summary determination as to whether a declaration should be made.

Does clause 40 of the contract apply?

[21] The second leg of Mr Fraser's argument was that there was an arbitration agreement contained in cl 40 which applied to disputes as to the application and effect of cl 20.

[22] Clause 40 sets out a regime for dispute resolution which commences with the giving by one party to another of a notice of dispute. Clause 40.1 is in the following terms:

> "**40.1 Notice of Dispute**
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> If a dispute between the Principal and the Contractor (including as to any Review Circumstance) arises out of or in connection with the Contract, then either Party may give to the other Party a notice of dispute in writing adequately identifying and providing details of the dispute.
>
> Notwithstanding the existence of a dispute, but subject to **clause 34**, the Principal and the Contractor must continue to perform and comply with the Contract and the Contractor must continue to perform the work under the Contract. In particular the Contractor must comply with any Direction of the Principal or the Principal's Representative given in accordance with this Contract."

[23] The succeeding subclauses require a conference between the parties within seven days after service of notice of the dispute to attempt resolution. Following that either party may refer the dispute to mediation. If unresolved, the matter must then be referred to the chief executive officers of each party, who are to negotiate in good faith with a view to resolving the dispute. After that the dispute may, by notice, be referred to arbitration. Plainly enough, cl 40 constitutes an arbitration agreement.[1]

[24] If the matter of dispute here, as to the applicability of cl 20.3, is subject to cl 40, the first respondent is entitled to seek a stay of proceedings under s 53 of the *Commercial Arbitration Act* which provides:

> "**Power to stay court proceedings**
>
> **53.(1)** If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied –
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> (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
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> (b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the property conduct of the arbitration;
>
> may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as thinks fit."

[25] Mr McMurdo argued that cl 40 was confined in its effect to disputes which entailed continued performance of the work under the contract. Because cl 20.3 contemplated immediate suspension of the performance of the work, in contrast with the second paragraph of subclause 40.1, which required continued performance by the contractor, the two could not sit together. In addition the protracted nature of the mechanisms for settlement of dispute under cl 40 was at odds with the provision for immediate suspension under cl 20.3. It followed that the dispute resolution provisions had no application to disputes under cl 20.3.

[26] Mr Fraser pointed out that the second paragraph of cl 40.1 was expressed to be subject to cl 34, sub-clause 34.6 of which permitted suspension of work by the contractor for non-payment. No similar qualification was made in respect of sub-clause 20.3. It is also worthy of notice, I think, that the contract elsewhere specifies matters which are not capable of referral for dispute resolution under cl 40. "Changed circumstances reviews" (that is, matters arising which are capable of reducing the rate of return) and anything arising under them are, by cl 37.5, expressed to be incapable of referral, except where there is a failure by the principal

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[1] *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2002] 2 Qd R 514; *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301; *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] 3 VR 13.

to act in good faith in forming an opinion as to the existence of changed circumstances.

[27] The following passage from *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*[2] cited by Chesterman J in *KBRV Resort Operations Pty Ltd v Anthony & Sons Pty Ltd*[3] has resonance here:

> "when the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues …".

In the present case there might, for example, be a dispute as to whether the contractor had complied with the conditions of the policy of insurance put in place by the principal, as it is obliged to do by cl 20.2. No issue of suspension would arise, and the dispute, plainly enough, would fall for resolution pursuant to the dispute resolution clause. Yet, on the applicants' argument, a dispute under the following sub-clause, 20.3, cannot be resolved by that means. That seems an odd result.

[28] Mr McMurdo contends that the need for urgency tells against proceeding by the arbitration mechanism. But there is against that the ordinary and natural meaning of the words of cl 40, which contain no qualification suggesting its inapplicability in circumstances of emergency. The answer may be in this articulation of the position adopted by Mr Fraser from the judgment of Thomas JA in *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd*[4]:

> "Once parties bind themselves to arbitration in a particular place, factors favouring overall convenience are of little consequence as the parties must be regarded as having taken such matters into account when entering into their agreement."

[29] I conclude that questions as to whether cl 20.3 is operative are matters agreed by the contract to be referred to arbitration. The first respondent is, therefore, entitled to seek a stay under s 53 of the *Commercial Arbitration Act (Qld)* 1990.

Should the discretion to stay the proceedings be exercised?

[30] In this regard Mr McMurdo submitted that the question of whether mining operations should continue with what was arguably insufficient insurance should have the benefit of early determination by the court. He also raised the question of whether all the parties who could be heard in the existing proceedings would be parties to the arbitration. As to the latter I should have thought it likely that the second applicant and second respondent fell within the definition of "party" in s 4 of the *Commercial Arbitration Act* as persons "claiming through or under a party to the arbitration agreement"; in this case, the first respondent, who is expressed to be their agent. As to the second point, given that I have concluded that the matter is

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2 (1996) 39 NSWLR 160 at 165.
3 (1999) QSC 139.
4 [2002] 2 Qd R 514.

not an appropriate one for summary disposition, the advantages of continuing in this court are not as pronounced as they might have been; and there is some force in Mr Fraser's argument that it should not be assumed that the dispute will not be resolved by one of the resolution processes preliminary to arbitration. And, once more, against the submission of urgency is the agreement of the parties to proceed notwithstanding the possibility of such a situation by arbitration.

[31] I am satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement. It was not suggested that the first respondent was other than ready and willing to do those things necessary for the proper conduct of the arbitration. I will, therefore, order that these proceedings be stayed pursuant to s 53 of the *Commercial Arbitration Act (Qld)* 1990.