SUPREME COURT OF QUEENSLAND

CITATION:	*Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QSC 75
PARTIES:	**CIVIL MINING & CONSTRUCTION PTY LTD** ABN 18 102 557 175 (applicant defendant) **v** **CHESHIRE CONTRACTORS PTY LTD** ABN 75 124 700 385 (respondent plaintiff)
FILE NO/S:	SC No 571 of 2020
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	9 April 2021
DELIVERED AT:	Cairns
HEARING DATE:	12 February 2021
JUDGE:	Henry J
ORDERS:	**1. The parties are referred to arbitration pursuant to s 8(1) *Commercial Arbitration Act* 2013 (Qld).** **2. Cairns Supreme Court proceeding 571/20 is stayed.** **3. I will hear the parties as to costs, if costs have not been agreed in the meantime, at 9.15am 28 April 2021 (out of town parties having leave to appear by telephone or video-link).**
CATCHWORDS:	ARBITRATION – ARBITRATION AGREEMENT – DEFINITIONS AND FORM OF ARBITRATION AGREEMENT – ARBITRATION AGREEMENT AS GROUND FOR STAY OF COURT PROCEEDINGS – where the applicant defendant engaged the respondent plaintiff as sub-contractor for roadwork construction – where the respondent plaintiff complains it was required to complete work and incur associated costs beyond that contemplated by the original agreement – where the respondent plaintiff alleges it is owed money for this additional work – where the respondent plaintiff says the applicant defendant should be estopped by convention from denying that the respondent plaintiff is entitled to reasonable additional remuneration or damages or compensation pursuant to ss 236, 237 *Australian Consumer Law* for loss suffered as a result of the applicant

defendant's alleged unconscionable conduct – where the respondent plaintiff requests an order in relation to the return of a bank guarantee – where the applicant defendant relies upon an arbitration clause in the contract to refer the parties to arbitration and permanently stay the proceeding – where the respondent plaintiff contends the matter ought not be referred to arbitration as its claim does not rely on the contract and rather arises by operation of law outside the contract – whether there is an "arbitration agreement" as per s 8(1) *Commercial Arbitration Act* 2013 (Qld) – whether the application has been "brought in a matter which is the subject of the arbitration agreement" – whether the agreement is "null and void, inoperative or incapable of being performed" – whether the matter should be referred to arbitration – whether the proceeding should be stayed

Australian Consumer Law (Cth), s 20, s 21, s 236, s 237
Commercial Arbitration Act 2013 (Qld), s 7, s 8

Astro Vencedor SA v Mabanaft [1971] 2 QB 588, applied.
Australian Broadcasting Commission v Australasian Performing Right Association (1973) 129 CLR 99, cited.
Commandate Marine Corp v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45, distinguished.
CPB Contractors Pty Ltd v Celsus Pty Ltd (2017) 353 ALR 84, applied.
Duncombe v Porter (1953) 90 CLR 295, applied.
Francis Travel v Virgin Atlantic Airways (1996) 39 NSWLR 160, applied.
Hi-Fert v Kiukiang Carriers (1998) 90 FCR 1, distinguished.
IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 466, explained.
Incitec Ltd v Alkimos Shipping Corporation [2004] FCA 698, cited.
Inghams Enterprises Pty Ltd v Hannigan (2020) 379 ALR 196, distinguished.
McCann v Switzerland Insurance (2000) 203 CLR 579, cited.
Methanex Motonui Ltd v Spellman [2004] 1 NZLR 95; [2004] 3 NZLR 454, cited.
Re Hohenzollern Actien Gesellschaft and City of London Contract Corp (1886) 54 LT 596, applied.
Roose Industries Ltd v Ready Mixed Concrete Ltd [1974] 2 NZLR 246, explained.
TCL Air Conditioner v Federal Court (2013) 251 CLR 533, applied.
Westfield Management v AMP Capital (2012) 247 CLR 129, applied.
Woolf v Collis Removal Service [1948] 1 KB 11, applied.
Yeshiva Properties No 1 Pty Ltd v Lubavitch Magal Pty Ltd [2003] NSWSC 615, distinguished.

COUNSEL:	M.H Hindman QC for the applicant defendant M.A Jonsson QC, with C Taylor, for the respondent plaintiff
SOLICITORS:	Clayton Utz for the applicant defendant O'Connor Law for the respondent plaintiff

Introduction

[1] The applicant defendant, Civil Mining & Construction Pty Ltd (CMC), was contracted by the Queensland Department of Transport and Main Roads (TMR) as principal for roadworks construction (the project). CMC sought the aid of a civil engineering roadworks sub-contractor to perform some of the works.

[2] CMC entered into a written sub-contract (the contract) with the respondent plaintiff, Cheshire Contractors Pty Ltd (Cheshire). A dispute has arisen between CMC and Cheshire, which alleges it is owed money by CMC in connection with the works Cheshire performed for CMC. Cheshire filed a claim against CMC in this court seeking money owing in the sum of $1,393,616.80 plus GST, interest thereon and the return of a bank guarantee.

[3] Rather than file a defence, CMC countered with the present application which relies upon an arbitration clause in the contract to refer the parties to arbitration and permanently stay the proceeding.

[4] Cheshire contends the matter ought not be referred to arbitration for reasons including that its claim does not rely on the contract and rather arises by operation of law outside the contract.

Background

[5] In carrying out the subcontracted works, Cheshire was obliged by the contract to comply with the performance requirements of TMR's specifications. The specifications required construction under the contract to use only materials that complied with the material specified therein, and not use any material that did not comply with the specifications (out of spec material). The specifications of material anticipated to be found in the earth in the vicinity of works in a project of this kind will not always meet expectations, resulting in greater than anticipated expense.

[6] During the performance of Cheshire's work, out of spec material was encountered in at least 12 locations on the site of the contract works. On eleven occasions CMC allegedly gave Cheshire a direction on how to integrate or otherwise deal with the out of spec material.

[7] Cheshire notified CMC of its intention to make a claim arising from the use of out of spec material. CMC requested Cheshire provide it with a letter upon which CMC could base a latent condition claim on TMR for the use of out of spec material. Cheshire complied. This is the genesis of Cheshire's current complaint, in effect, that CMC in serving its own interests procured Cheshire to make a claim for remuneration on a basis different than that contemplated by the contract. Following receipt of that letter, CMC stated to Cheshire that the letter would not suffice as a variation claim and suggested amendments to the document. Cheshire amended its out of spec claim letter accordingly and again submitted it to CMC.

[8] Cheshire contends the parties consensually departed from the contract by agreeing that they would progress their dealings on the mutual assumption and convention that the latent conditions encountered by Cheshire in the course of excavation could not have been anticipated by them at the time of tender for the contract works. It was also agreed, allegedly, that the requirement to complete road excavation and road embankment work operations with out of spec material would need to be reasonably remunerated additionally to the remuneration already allowed under the contract in respect of excavation and embankment works. Further, it was allegedly agreed that CMC would make payment to Cheshire for its work involving use of out of spec material on a basis consistent with any payment it received from TMR for its claim to be made on TMR.

[9] In March 2016 CMC made a claim on TMR for use of out of spec material (CMC's Latent Condition Claim), seeking payment for it. In April of 2016, CMC again requested Cheshire to provide further information and Cheshire made a claim on CMC for payment of Cheshire's out of spec claim.

[10] During July and August 2016, CMC and TMR engaged in dispute resolution meetings in regard to CMC's Latent Condition Claim. In the course of those meetings CMC and TMR jointly appointed a third-party engineer to independently assess and value CMC's Latent Condition Claim.

[11] CMC received an approval and payment from TMR for CMC's Latent Condition Claim under the Head Contract, (the TMR Payment). This was the amount of $2,507,975.00 as certified for payment for two of the applicant's progress payments and the amount of $2,597,462.00 approved as 'variations' – being $1,643,975.00 for 'Latent Conditions' and $953,667.00 for 'VVA-092 Latent Condition Claim'.

[12] On about 9 November 2016 Cheshire issued a final progress claim for the amount of Cheshire's out of spec claim. By letter of 23 November 2016, CMC responded saying the amount it proposed to pay was $0.00. The letter explained in denying Cheshire's claim "for a purported latent condition" it relied upon clauses 2.1.1 and 13 of the contract's general conditions. Clause 13 imposed temporal and other requirements for the submission of claims. Clause 2.1.1 provided:

> "2.1.1 The Subcontractor agrees and accepts the obligation to fully inform itself on site conditions and all documents furnished by CMC, prior to it tendering for the Subcontract Works and to fully satisfy itself regarding all the conditions, risks, contingencies and other circumstances which might affect its performance of the Subcontract Works. In particular, the Subcontractor shall accept the obligation to thoroughly investigate all matters regarding the relevant site, surface and sub-surface conditions. No increase in the Subcontract Sum will be allowed for the Subcontractor's failure to ensure that it is fully informed regarding all the circumstances relating to its performance of the Subcontract Works. Also CMC shall not be liable for any additional cost which may be incurred by the Subcontractor in the event that different site, surface and sub-surface conditions

> are experienced by the Subcontractor to those which may be shown in the Subcontract documents provided by CMC, the information in such documents being provided by CMC for indicative purposes only." (emphasis added)

[13] In short, CMC's position was that Cheshire's claim for payment did not conform with the contract's temporal requirements and money was not payable under the terms of the contract because Cheshire assumed the risk of encountering out of spec material.

[14] In February 2020 Cheshire gave notice of dispute seeking referral to mediation pursuant to clause 12 of the contract which in part provides:

> **"12. Disputes**
>
> **12.1 Early resolution**
>
> It is mandatory that the Parties comply with this clause before a dispute or difference is referred to mediation. Disputes or differences arising between the Parties shall be negotiated between the Parties with the bona fide intention of resolution without unreasonable delay. …
>
> **12.3 Settlement of unresolved disputes or differences**
>
> 12.3.1 If disputes or differences arising between the Parties cannot be resolved pursuant to clause 12.1 then either party shall refer such disputes or differences to a CMC Director and in the case of the Subcontractor means (sic) a Company Director or Partner of the Subcontractor of the respective Parties in writing. Within 7 days of receipt of the written referral of such disputes or differences to Company Directors, Directors shall meet or otherwise confer to hold good faith discussions in an effort to resolve the disputes or differences by amicable agreement.
>
> 12.3.2 Should the parties fail to reach agreement in accordance with clause 12.3.1 the Parties agree that the disputes or differences shall within 14 days from the receipt of the written referral pursuant to clause 12.3.1 be referred to mediation. Either party may refer the dispute or difference to ACDC in writing requesting the appointment of a mediator. The mediation shall be conducted in accordance with the Australian Commercial Dispute Centre ("ACDC") mediation Rules and Procedures, and the Chairperson of the ACDC or the Chairperson's nominee will select the mediator and determine the mediator's remuneration. The Parties agree that the costs of any mediator appointed shall be borne equally between the Parties." (emphasis added)

[15] It will be relevant later in these reasons that where clause 12 refers to "disputes or differences" such references are to the description at the outset of clause 12.3.1, namely "disputes or differences arising between the Parties".

[16] A mediation proceeded on 4 August 2020 but was unsuccessful. Cheshire did not further pursue the dispute resolution process.

[17] Cheshire complains it was required to complete work and incur associated costs beyond that contemplated by the originally contracted Subcontract Works. By making and pursuing what was in effect CMC's out of spec claim, Cheshire alleges it lost the opportunity to make an alternative claim for damages or remuneration under and in compliance with the contract. Cheshire argues CMC is, or ought to be, estopped by convention from denying that Cheshire is entitled to reasonable additional remuneration in respect of excavation and embankment works. Cheshire claims it is entitled to payment by CMC in the sum of $1,393,616.80 plus GST as reasonable remuneration for works done by the respondent or alternatively, the same sum as damages or compensation pursuant to ss 236, 237 *Australian Consumer Law* (*Schedule 2 Competition and Consumer Act* 2010 (Cth)) for loss suffered as a result of CMC's allegedly unconscionable conduct.

[18] Further, Cheshire seeks an order that CMC return a bank guarantee issued by Westpac Banking Corporation in the sum of $48,430.41 or that the applicant notifies Westpac Banking Corporation that Cheshire's bank guarantee has been lost and that the applicant no longer has any interest in that guarantee. Cheshire provided the guarantee as security in satisfaction of clause 7.7.1 of the contract. The defects liability period under the contract expired on 21 October 2016. By a letter dated 9 November 2016, Cheshire requested CMC to return the remaining security. It is alleged CMC has not made a call on the bank guarantee, has failed or refused to release to Cheshire the bank guarantee and failed or refused to confirm that the bank guarantee has been lost but is no longer required.

[19] The ensuing reasons will, for ease of explanation, consider whether the present application should succeed on the premise that the claim is for relief based on estoppel by convention or statutory unconscionable conduct and does not seek the additional order about the bank guarantee. Having done so the reasons will then return to the fact the claim also seeks the order about the bank guarantee and consider whether that makes a difference to the outcome otherwise of the application.

The legislated obligation to refer to arbitration

[20] In bringing its application to refer the parties to arbitration and stay the proceeding, CMC contends it and Cheshire are parties to an arbitration agreement under the contract and the matters the subject of the proceeding fall within the ambit of that arbitration agreement.

[21] If that contention is correct the court is obliged to refer the parties to arbitration pursuant to s 8(1) *Commercial Arbitration Act* 2013 (Qld) (the Act) which provides:

> **"8 Arbitration agreement and substantive claim before court**
>
> (1) 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." (emphasis added)

[22] CMC's application has met the timeframe stipulated by s 8(1) so the determinative questions arising from the remaining elements of s 8(1) are:

(a) Is there an "arbitration agreement"?

(b) Is CMC's Supreme Court claim "brought in a matter which is the subject of the arbitration agreement"?

(c) Should this court find the agreement "null and void, inoperative or incapable of being performed"?

As will become apparent from reasons below, the answers to those questions are, respectively, yes, yes and no.

Definition of an arbitration agreement

[23] Section 7 of the Act relevantly defines an arbitration agreement as follows:

> **"7 Definition and form of arbitration agreement**
>
> (1) An ***arbitration agreement*** is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. …" (emphasis added)

[24] The term "defined legal relationship", used in s 7(1), is not defined by the Act.

Arbitration clause 12.3.3

[25] The purported arbitration agreement is here said to be in the form of clause 12.3.3 in the contract. It falls within clause 12 about dispute resolution, earlier passages of which are quoted above. Following the mediation clause at 12.3.2, clause 12.3.3 provides:

> "12.3.3 If the disputes or differences have not been settled within six (6) weeks (or such other period as may be agreed to in writing between the parties) after the appointment of the mediator, the disputes or differences shall be referred to arbitration by either Party in accordance with and subject to The Institute of Arbitrators and Mediators Australia (Queensland Chapter), Rules for the Conduct of Commercial Arbitrations. In any arbitration both Parties shall be entitled to be legally represented. The parties shall appoint an arbitrator within 7 days of referral to arbitration. If the Parties fail to agree on the identity of the arbitrator, the Parties agree that the President, for the time being of the Institute of Arbitrators and

> Mediators Australia, is on written request from a Party to appoint an arbitrator to hear and determine the disputes or differences. The Parties agree that they will not be able to proceed to arbitration unless clause 12.3.2 has first been complied with." (emphasis added)

[26] It is not suggested in the present context that the above use of the term "differences" additionally to "disputes" carries any significance. These reasons will approach consideration of the matter on the basis a difference is a form of dispute and refer for convenience to disputes rather than to both disputes or differences.

Consideration

[27] Cheshire argues the purported arbitration agreement at clause 12.3.3 does not meet that aspect of the definition at s 7(1) of the Act which speaks of an agreement to submit to arbitration disputes which have arisen or which may arise between the parties "in respect of a defined legal relationship". It argues clause 12.3.3 fails to define the requisite "disputes or differences" to which it refers by reference to any identified legal relationship, whether contractual or otherwise, and so, absent the articulation of a defined legal relationship within clause 12.3.3, it cannot be an arbitration agreement.

[28] In support of its argument that the defined legal relationship, if there is one, must be ascertainable from the purported arbitration clause, Cheshire referred to the following observation by French CJ and Gageler J in *TCL Air Conditioner v Federal Court*:[1]

> "[P]arties who enter into an arbitration agreement for commercial reasons ordinarily intend all aspects of the defined relationship in respect of which they have agreed to submit disputes to arbitration to be determined by the same arbitral tribunal."[2]

[29] However, that passage does not suggest a requirement that the defined relationship must be ascertainable from the arbitration clause considered in isolation. Such a requirement would be contrary to orthodox principles of construction, particularly that the whole of the relevant instrument is to be considered in construing its meaning.[3] Clause 12.3.3 falls for interpretation in the broader context of the document as a whole, which is that it is a clause within a contract. Clause 12.3.3's references to the "The Parties" is to the parties to the contract, that is, CMC and Cheshire. They have a defined legal relationship in that they are parties to a contract.

[30] This answers only part of Cheshire's argument. Cheshire complains that clause 12.3.3 does not contain any description of the nature of the disputes so as to indicate, consistently with the s 7 definition, that they are disputes arising between the parties in respect of their defined legal relationship as parties to the contract. The purported agreement says nothing as to the nature of the disputes other than that

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1 (2013) 251 CLR 533.

2 (2013) 251 CLR 533, 550 [16].

3 See for instance the oft-cited observations on this principle by Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99, 109.

they are disputes arising between the parties. For this reason, Cheshire contends clause 12.3.3 fails to meet the s 7 definition of an arbitration agreement.

[31] In support of that argument Cheshire emphasised referral to arbitration causes the significant result of denying the right of adjudication by a court. In submitting that ought not occur unless it is clear the denial was intended, Cheshire cited the following observation of Fullagar J in *Duncombe v Porter* about a general principle of interpretation:[4]

> "Rights which exist at common law or by statute are not to be regarded as denied by words of dubious import. Before any such denial is accepted, it must appear with reasonable clarity from the language used that the denial is intended."[5]

[32] In the present case, it is implausible having regard to the language of clause 13.3.3 that no denial at all was intended. It is the breadth of that denial which is the real issue.

[33] In considering whether the language of clause 13.3.3 is sufficiently clear to deny Cheshire the court-based pursuit of its claim it is necessary to consider the meaning of the clause in the context of the contract in which it appears. These reasons earlier concluded the legal relationship of CMC and Cheshire is a defined one, namely the relationship of parties to a contract. Such a relationship is defined not merely by the contract's specific provisions as to the legal rights and obligations existing between the parties but also by the general law applicable to such contracting parties. Indeed, it has been observed it will be sufficient to constitute a defined legal relationship between parties if there exists a relationship which gives rise to "the possibility that one is entitled to some form of legal remedy against the other".[6]

[34] It is a reasonable inference, premised upon the circumstance that clause 12.3.3 forms part of the contract into which the parties entered, that the disputes to which it refers are, at least, disputes in respect of the rights and obligations conferred and imposed by that contract. Cheshire would argue even this inference goes too far and CMC would argue it does not go far enough.

[35] Three relevant general principles of interpretation tell against Cheshire's argument. The first, already noted, is that the whole of the relevant instrument is to be considered in construing its meaning. The second is commercial contracts should be construed to give effect to their commercial purpose.[7] This contract's purpose was the performance of paid works, which supports the interpretation that disputes about payment should be caught by clause 12.3.3. The third interpretive principle is that arbitration clauses should not be construed narrowly.[8] On this point, in *Incitec Ltd v Alkimos Shipping Corporation*[9] Allsop J, as he then was, observed:

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4 (1953) 90 CLR 295.
5 (1953) 90 CLR 295, 311.
6 *Methanex Motonui Ltd v Spellman* [2004] 1 NZLR 95, 121 [85]; endorsed on appeal [2004] 3 NZLR 454, 471 [62].
7 See for example, *McCann v Switzerland Insurance* (2000) 203 CLR 579, 589.
8 See for example, *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 165; *Commandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.
9 [2004] FCA 698.

> "The clear tide of judicial opinion as to arbitration clauses, where the fair reading of them is not confined, is to give width, flexibility and amplitude to them."[10]

[36] The application of these principles compels the inference that the disputes to which clause 12.3.3 refers are, at least, disputes in respect of the rights and obligations conferred and imposed by the contract in which the clause is found. But how much further does it reach, if at all?

[37] CMC's argument at its most extreme would in effect have it that clause 12.3.3's reference to disputes arising between the parties encompasses any disputes arising between them. However, there is nothing in the contract to fuel the objective attribution of such a free form intention, unconstrained by the context of the contract within which it is found and the limits of the legal relationship it defines.

[38] CMC relied upon some cases in which clauses referring "all disputes" (or disputes described in similarly broad language) to arbitration were upheld, despite the uncertain breadth of their description.[11] Significantly, none of these cases suggest the range of such disputes is to be regarded as unlimited by the context of the source document. To the contrary, the clauses in those cases were read down to conform with that context.

[39] The cases in this field vary in articulating the degree or nature of connection the dispute must have with that context. However, some common threads can be identified.

[40] In *Re Hohenzollern Actien Gesellschaft and City of London Contract Corp*[12] the contract, for the supply of locomotives and boilers, provided for arbitration of "[a]ll disputes". Payment was conditional upon the purchaser's engineer's certification that the locomotives and boilers had been received in working order. Certification was not forthcoming and it was optimistically argued there was no dispute because certification was a condition precedent to entitlement under the contract. Lord Esher MR observed:

> "Now, of course "all disputes" cannot mean disputes as to matters that have no relation at all to the contract. But I think that those words are to be read as if they were <u>"all disputes that may arise between the parties in consequence of this contract having been entered into"</u>. I think that, as my brother Mathew pointed out in the court below, there being all these clauses in the contract as to any of which a dispute might arise, this last clause was added to settle them all."[13] (emphasis added)

[41] In *Woolf v Collis Removal Service*[14] the arbitration clause related to "any claims upon or counterclaim to any claim made by the contractors". The plaintiff claimed damages for a breach of contract and or negligence because of loss and damage of

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10 [2004] FCA 698, [36] (citations omitted).
11 Applicant's submissions in reply [15]; *Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246 (and other cases cited therein).
12 (1886) 54 LT 596.
13 (1986) 54 LT 596, 597.
14 [1948] 1 KB 11.

goods stored in a location other than the warehouse which the plaintiff had contracted with the defendants to have the goods stored at. The decision to stay the action pursuant to s 4 *Arbitration Act* 1889 was upheld on appeal, Asquith LJ observing:

> "The arbitration clause in the present case is, as to the subject matter of claims within its ambit, in the widest possible terms. That clause is not, in terms, limited to claims arising "under" the contract. It speaks simply of "claims". This, of course, does not mean that the term applies to claims of every imaginable kind. Claims which are entirely unrelated to the transaction covered by the contract would no doubt be excluded; but we are of opinion that, even if the claim in negligence is not a claim "under the contract", yet there is a sufficiently close connexion between that claim and that transaction to bring the claim within the arbitration clause, even though framed technically in tort."[15] (emphasis added)

[42] In *Astro Vencedor SA v Mabanaft*,[16] there was a claim in tort for wrongful arrest of a chartered ship, which arrest had occurred to secure damages allegedly owed in connection with a claim the shipowner had wrongfully stopped discharging oil during the charter contract. The claim about stopping the oil was caught by the arbitration clause, which covered "[a]ny dispute arising during the execution of this charter-party". The issue was whether the claim in tort was also within the scope of the arbitration clause. Lord Denning MR, with whom the rest of the court agreed, concluded it was, observing the arrest was "the follow-up to" and "so closely connected to" the claim about stopping the oil as to be within the scope of arbitration.[17] This approach echoes Lord Asquith's test of sufficiently close connection in *Woolf*. Its reference to the chain of causal connection likewise echoes Lord Esher's test of consequential connection in *Hohenzollern.*

[43] In *Roose Industries Ltd v Ready Mixed Concrete Ltd*,[18] a contract for the supply of metal chips and so-called "all-in" materials referred to both categories in a number of its clauses, but the clause relating to quality mentioned metal chips only. The purchaser sought a declaration or alternatively rectification in order to require the "all-in" materials to conform to the same standard specification as for metal chips. An arbitration clause applied to "[a]ny dispute which may arise between the parties to this agreement". However the primary judge refused a stay of the action to permit arbitration on the basis the arbitrator would have no jurisdiction to order rectification, that being "clearly outside the arbitration clause". That decision was reversed by the New Zealand Court of Appeal which observed:

> "In our view, the court should restrict the operation of such a wide clause no further than necessary, and on that reasoning should exclude, in the words of Asquith LJ in *Woolf v Collis Removal Service* …, only claims which are entirely unrelated to the commercial transaction covered by the contract. Here, the essential question in dispute is whether the parties intended that the "all-in" materials should be required to conform to the standard specification.

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15 [1948] 1 KB 11, 18.
16 [1971] 2 QB 588.
17 [1971] 2 QB 588, 595.
18 [1974] 2 NZLR 246.

> That seems to be very much a question arising out of that commercial transaction. With great respect …, we cannot agree that the particular dispute is not within the arbitration clause."[19] (emphasis added)

[44] In *IBM Australia Ltd v National Distribution Services Ltd*,[20] IBM agreed to supply systems integration services, including IBM hardware and software. A dispute arose regarding the suitability of the hardware and software which manifested as an alleged breach of the *Trade Practices Act* 1974 (Cth) for misleading or deceptive conduct. The relevant arbitration clause was expressed to govern "any controversy or claim arising out of or related to this agreement or the breach thereof". In concluding there was no basis to exclude from arbitration claims arising under the *Trade Practices Act*, Handley JA observed the words "related to this agreement or the breach thereof" should not be read down, noting:

> "These words can only have been added to include within the submission claims other than in contract such as claims in tort, and restitution, or in equity. I can see no basis for excluding claims arising under statutes which grant remedies enforceable in or confer powers on courts of general jurisdiction."[21]

[45] In the same case, after engaging a lengthy review of the authorities, Kirby P observed:

> "From the foregoing trend of authority, both in Australian and overseas courts, it can be seen that an arbitration clause, expressed in the language of the clause here under consideration, is not to be narrowly construed. It is sufficiently wide to include claims for rectification and for relief on the ground of misrepresentation or mistake. … Whilst it is true that the conduct complained of as being in breach of the *Trade Practices Act* (Cth) is alone sufficient to enliven the provisions of that Act and whilst such provisions do not depend upon the agreement of the parties, such considerations do not determine the simple question posed. That question is whether the misrepresentations alleged are "related to this agreement or the breach thereof". It is enough to say that, in this case, it was open to … determine that the relationship was made out on the pleadings."[22] (emphasis added)

[46] In *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways*,[23] an agency agreement between an English principal and an Australian agent for air passenger transport contained an arbitration clause referring "[a]ny dispute or difference arising out of this Agreement" to arbitration. The dispute arising was a claim for damages for breach of contract, alternatively equitable damages "arising out of an unconscionable departure from representations and/or a common assumption made and induced by the defendant". A clause of the agreement had provided the agreement could be terminated at any time on three months' notice, however it was

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19 [1974] 2 NZLR 246, 249.
20 (1991) 22 NSWLR 466.
21 (1991) 22 NSWLR 466, 487.
22 (1991) 22 NSWLR 466, 477.
23 (1996) 39 NSWLR 160.

allegedly subsequently promised or represented by the English principal there would be no termination until the end of 1995. Notwithstanding this, the English principal gave notice of termination in 1994. The English principal's alleged representation was said to have induced a common assumption that there would be no termination until the end of 1995 and was also said to have been a representation involving misleading or deceptive conduct under the *Trade Practices Act*. The primary issue for determination by the New South Wales Court of Appeal was whether the claims concerning the purported termination having regard to the alleged representation, estoppel and misleading conduct gave rise to a dispute or difference arising out of the agency agreement.

[47] Gleeson CJ, with whom Meagher JA and Sheller JA agreed, distinguished *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc*[24] where Beaumont J held an arbitration clause did not cover a dispute under the *Trade Practices Act*, the agreement merely being part of the background to the alleged contraventions so that the dispute did not arise out of it. Gleeson CJ observed:

> "In the present case the alleged contravention of the Act arose out of a representation concerning the duration of the agreement, and the appellant's claims concern its purported termination. The agreement is not merely the background to the dispute. The dispute is about the agreement, and its performance, and whether it was properly and lawfully brought to an end."[25]

[48] That reasoning has the effect that a dispute pursuing rights said to arise outside a contract should nonetheless be regarded as arising out of or closely connected with the contract where the dispute turns upon whether or not the parties' rights are constrained by the strict operation of the terms of the contract. The present case appears to involve just such a dispute, in that CMC relies upon the strictures of the contract's payment provisions in contending Cheshire is not owed more, whereas Cheshire relies on CMC's conduct to ground a right to further payment notwithstanding the contractual provisions upon which CMC relies.

[49] In this respect both the present case and *Francis Travel* are distinguishable from *Hi-Fert v Kiukiang Carriers*,[26] on which Cheshire placed reliance. In that matter the issue of current relevance was whether a cargo owner's claims met the requirement of the arbitration clause of the charter contract that they arose from the contract. The claims alleged the charterer of a vessel conveying the cargo had engaged in misleading and deceptive conduct, made negligent misrepresentations and breached collateral warranties. Those claims related to conduct said to have induced the cargo owner to have entered into an addendum contract. The Full Court of the Federal Court considered the alleged loss would not have been suffered but for the entry into the addendum contract, as distinct from the charter contract, and concluded the claims did not arise out of the charter contract.[27] In contrast, in the present case there is only said to be one contract and the work performed by Cheshire would not have been performed but for the entry into that contract.

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24 (1985) ATPR 40-636.

25 (1996) 39 NSWLR 160, 166-167.

26 (1998) 90 FCR 1.

27 (1998) 90 FCR 1, 17, 22 (per Emmett J with whom Branson J agreed and Beaumont generally agreed).

[50] Cheshire also relied upon *Inghams Enterprises Pty Ltd v Hannigan*,[28] where the New South Wales Court of Appeal reversed a primary judge's determination that a claim for damages for breach of contract fell within the scope of the arbitration subclause of the dispute resolution clause in the contract. The clause was relevantly worded as, "the Dispute concerns any monetary amount payable and/or owed by either party to the other under this Agreement" (emphasis added). The New South Wales Court of Appeal concluded Mr Hannigan's claim for unliquidated damages was not a claim for an amount payable or owed "under" the contract. Meagher JA, agreeing with Bell P, observed:

> "The distinction between monetary amounts which are payable or owed "under a contract" and remedies which arise by operation of law is a recognised and meaningful one. Whereas 'liquidated damages' are recoverable in satisfaction of a right of recovery created by the contract itself and accruing by reason of breach, unliquidated damages for breach of contract are compensation assessed by the court in accordance with common law principles for loss occasioned by breach. …
>
> It follows that the notified dispute does not concern a monetary amount payable or owed by Inghams to Mr Hannigan under their agreement and accordingly it is not a dispute referred to arbitration by clause 23.6.1."[29]

[51] That conclusion was an inevitable result of the arbitration clause's specific confinement to disputes concerning any monetary amount payable or owing "under" the agreement. The present clause has no such specificity. There is nothing in it to suggest it ought to be read down as applying only to amounts payable under the contract as distinct from amounts payable by operation of law. Indeed, the parties' decision to impose no qualification on the nature of the disputes referred to in clause 12.3.3 of the contract supports a liberal width being given to the degree of connection the disputes should have with the contract in order to come within the clause's reach.

[52] Section 8 of the Act directs attention to the matter which is the subject of Cheshire's claim in the Supreme Court. That matter might be stated in various ways but at its most fundamental it is the question of whether Cheshire should be paid more than it already has been for works it was contracted to perform. Admittedly, that question arises out of the conduct relied upon to raise an entitlement to payment other than pursuant to the contract. But it is also, to adopt the language of *Roose Industries*, very much a question arising out of the commercial transaction to which the contract gave rise.

[53] A dispute about the question is a dispute arising between the parties out of the commercial relationship created by the contract. But for that relationship, Cheshire would not have been performing the works for CMC for which it seeks more payment. The connection between the contract and the performance of the work gives the dispute the degree of close and consequential connection with the contract which is contemplated by authorities such as *Hohenzollern, Woolf* and *Astro Vencedor*. Further, consistently with the quality contemplated in *Francis Travel*,

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28 (2020) 379 ALR 196.

29 (2020) 379 ALR 196, 245 [150] – [151] (citations omitted).

the dispute turns upon whether or not the parties' rights are constrained by the strict operation of the terms of the contract or whether events between the parties should found a right to payment beyond the terms of the contract. These features in combination compel the conclusion that Cheshire's claim has been brought in a matter which is the subject of an arbitration agreement.

[54] That conclusion must result in the application succeeding, unless the court finds the arbitration agreement is null and void, inoperative or incapable of being performed. Cheshire argued clause 12.3.3 is inoperative.

[55] In part that argument relied upon the same arguments unsuccessfully advanced in contending the clause is too vague or uncertain to meet the s 7 definition. In support of that contention Cheshire additionally cited *Yeshiva Properties No 1 Pty Ltd v Lubavitch Magal Pty Ltd*,[30] apparently as an example of a case considering reference to "all" disputes where such language was considered too uncertain to leave the matter to arbitration. However, consideration of that matter does not assist by parity of reasoning because its relevant facts were considerably vaguer than the present case, including the absence of a formal document and lack of intention to be bound until such a document was executed. For reasons already given as to the proper interpretation of clause 12.3.3, the clause was not so vague or uncertain that contractual effect ought not be given to it.

[56] Cheshire's written outline of argument indicated inoperability would be argued on the basis that Cheshire's reliance upon estoppel by convention precluded reliance upon the contract including the arbitration agreement,[31] citing *CPB Contractors Pty Ltd v Celsus Pty Ltd*[32] and that case's reference to the Singapore High Court decision in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd.*[33] In *CPB Contractors*, after referring to *Dyna-Jet*, Lee J concluded an arbitration agreement will be inoperative where it has ceased to have effect, though how it may cease to have effect will vary in individual cases.[34] His Honour concluded a construction arbitration agreement did not cease to have effect by reason of a mediated agreement not involving the builder or a completion deed clause establishing a further consolidated arbitration process.

[57] In the present case Cheshire's reliance upon estoppel by convention merely seeks to establish a right to payment not provided for by the contract. The pursuit and existence of such a right does not appear to be inconsistent with the continued operation of the contract and its arbitration clause.

[58] In oral argument Cheshire's argument broadened to the submission that its complaints of statutory unconscionability were non-arbitrable.[35] It was argued there is an implicit public interest dimension to the category of unconscionability relied upon in ss 20 and 21 *Australian Consumer Law*. It was highlighted, for example, that those sections allow the court to have regard to industry codes of conduct (not that such codes are said to be relevant to Cheshire's claim). Cheshire placed

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30 [2003] NSWSC 615 [52]; Plaintiff's outline of argument [18].
31 Plaintiff's outline of argument [19].
32 (2017) 353 ALR 84, 98-100.
33 [2016] SGHC 238 [166].
34 (2017) 353 ALR 84, 100.
35 T 1-33 L 11 (the submission included reference to the complaint of estoppel by convention but the argument which developed focussed upon the complaints of statutory unconscionability).

reliance upon an observation of Allsop J in *Commandate Marine Corp v Pan Australia Shipping Pty Ltd*[36] that a common element to the notion of non-arbitrability in the context of international arbitration is that a sufficient element of legitimate public interest in the disputed matters makes the enforceable private resolution of the dispute outside the national court system inappropriate. However, that is not the context with which the present matter is concerned.

[59] It is uncontroversial that, as the plurality observed in *Westfield Management v AMP Capital*,[37] the policy of the law is against enforcing contractual arrangements which "operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone". However, is also well established it is an implied term of an arbitration clause that the arbitrator should reach a decision according to the existing law of the land and should exercise every right and discretionary remedy given to a court of law.[38] Cheshire has not demonstrated how reference to mediation in the present context would deprive it of the protection of the provisions of the *Australian Consumer Law* on which its claim relies. The arbitrator will be obliged to determine Cheshire's disputed right to payment considering those provisions to the extent they are relevant to the facts as found by the arbitrator.

[60] The above analysis demonstrates there is no substance to Cheshire's arguments as to inoperability. On the materials presently before the court[39] it has not been shown the court should make a finding pursuant to s 8 that the arbitration clause is inoperative.

[61] If follows s 8 of the Act requires this court to refer the parties to arbitration pursuant to clause 12.3.3 of their contract.

[62] That conclusion has been arrived at on the premise that the claim is for relief based on estoppel by convention or statutory unconscionable conduct and does not seek the additional order about the bank guarantee. Enlarging consideration now to the matter of the bank guarantee does not alter the conclusion, indeed it fortifies it. In oral submissions Cheshire's counsel categorised the foundation of the order as being part of its unconscionability case.[40] That is not apparent from Cheshire's pleading. In any event the provision of the bank guarantee was a contractual requirement, so any dispute as to its return inevitably involves a sufficiently close and consequential connection with the contract that it is a matter which is subject to clause 12.3.3.

Conclusion

[63] CMC has made good its argument that the parties should be referred to arbitration pursuant to s 8 of the Act.

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36 (2006) 157 FCR 45, 98.

37 (2012) 247 CLR 129.

38 *Government Insurance Office v Atkinson Leighton Joint Venture* (1981) 146 CLR 206, 234-235, 246-247.

39 A qualification added in deference to the possibility this court is not presently possessed of all information which may be put before an arbitrator - see *Rinehart v Rinehart (No 3)* (2016) 257 FCR 310, 347.

40 T 1-34 L 42.

[64] CMC's application also sought a "permanent stay" of Cheshire's proceeding. In the present context the integrity of the reference can be safeguarded simply by a stay. It will in effect operate as a stay of permanent effect unless, in consequence of some event or decision in the arbitration process, the dispute cannot be determined by arbitration. Such a development could ground an application to lift the stay.

[65] On the face of it costs should follow the event but I will allow the parties an opportunity to be heard.

Orders

[66] My orders are:

1. The parties are referred to arbitration pursuant to s 8(1) *Commercial Arbitration Act* 2013 (Qld).
2. Cairns Supreme Court proceeding 571/20 is stayed.
3. I will hear the parties as to costs, if costs have not been agreed in the meantime, at 9.15am 28 April 2021 (out of town parties having leave to appear by telephone or video-link).