

FLAKT AUSTRALIA LTD v WILKINS & DAVIES
CONSTRUCTION CO LTD

SUPREME COURT OF NEW SOUTH WALES — EQUITY DIVISION

McLELLAND J

21, 22 August, 5 September 1979

Arbitration — Application for stay of proceedings — Meaning of "matter" — Application prior to close of pleadings — Conditions of stay — Arbitration (Foreign Awards and Agreements) Act 1974 (Com) s 7.

Statute — Interpretation — "Arbitration agreement" — "Agreement in writing" — "Matter" — Arbitration (Foreign Awards and Agreements) Act 1974 (Com) ss 3, 7.

In 1975 the plaintiff, a company incorporated in Australia, was the successful tenderer for the design and construction of four precipitator plants for a proposed power station in New Zealand. Negotiations took place between the plaintiff and the defendant, a company incorporated in New Zealand, with respect to the erection of the plants by the defendant. The defendant by a letter dated 5 November 1975 expressed its agreement to the terms of a "letter of intent" from the plaintiff dated 27 October 1975. On 3 December 1976 the defendant expressed in writing its acceptance of an amended "purchase order" from the plaintiff dated 10 September 1976.

The plaintiff commenced proceedings against the defendant by statement of claim. The defendant applied for an order that the proceedings be stayed.

The statement of claim alleged certain facts from which an offer by the plaintiff and an acceptance thereof by the defendant might be inferred in terms of the accepted amended purchase order. The statement of claim further alleged that the accepted amended purchase order contained the whole of the terms of the contract between the parties.

The relief originally sought by the plaintiff was a declaration that it had been agreed between the parties that the defendant would do certain work for the plaintiff on the terms set forth in the accepted amended purchase order.

During the course of the hearing, the plaintiff amended the statement of claim by adding two further claims for relief: (1) a declaration as to the price payable by the plaintiff to the defendant for the erection of the precipitator plants, and (2) a declaration that the scope of the work to be performed by the defendant in relation to the erection of the precipitator plants was as set forth in the accepted amended purchase order. His Honour refused an application by the defendant for an order that the amendments sought by the plaintiff be disallowed.

The defendant argued:—

(1) That the contract between the parties was constituted by the defendant's written acceptance of the plaintiff's letter of intent; that the contract consisted in those documents and the documents referred to in the letter of intent; and that to the extent that the terms of the accepted amended purchase order differed from the contract as previously constituted, the purchase order operated as a variation of the contract between the parties with the consequence that the defendant was entitled to be paid extra for the extra work introduced into the contract under and as a result of the variation; from the date of its execution.

With the concurrence of the parties I have heard full argument on the first of these bases and at the conclusion of that argument the defendant requested that I defer hearing argument on the second and third bases until after a decision had been given on the first. The plaintiff acquiesced in that course and I acceded to the request since, if the requisite conditions are established under s 7 of the 1974 Act, a stay is mandatory.

The relevant circumstances are briefly these:—

In 1975 the plaintiff (which is incorporated and whose head office is in Australia) became the successful tenderer for the design and construction of four precipitator plants for a proposed power station at Huntly, New Zealand for the New Zealand Electricity Department and the New Zealand Ministry of Works. Negotiations took place between the plaintiff and the defendant (which is incorporated and whose head office is in New Zealand) with respect to the erection by the defendant of these precipitator plants. It is common ground that the negotiations resulted in a contract between the plaintiff and the defendant for the erection by the defendant of four precipitator plants at the Huntly Power Station site but a dispute has arisen as to the terms of the contract. At the risk of over-simplification, it may be said that, in substance, the difference between the parties lies in whether the defendant is entitled to payment over and above what may be called the stated contract price in respect of what it claims to be additional work arising out of variations in the design of the subject precipitation plants which occurred between 5 November 1975 (when the defendant by letter expressed its agreement to the terms of a "letter of intent" of 27 October 1975 from the plaintiff) and 3 December 1976 (when the defendant expressed in writing its acceptance of an amended "purchase order" from the plaintiff).

During the argument before me it emerged as common ground that the accepted purchase order was a contractual document in the sense that its terms constituted at least some of the terms of the contract between the parties. In particular, it was accepted by both parties that, *inter alia*, the following provisions form part of the contract:—

(a) In enclosure No 1 with the accepted purchase order:—

"Conditions of Contract"

"The Contract will be administered in accordance with the terms and conditions of the SF Australia Pty Limited Purchase Order and the New Zealand Electricity Department's General Conditions of Contract for the Supply, Delivery and Erection, pages 1 to 38 inclusive, Special Conditions of Contract pages A1 to A5 inclusive and B1 to B139 inclusive and General Specification Requirements — Miscellaneous, pages C1 to C88 inclusive, all of which shall be deemed to form part of this Purchase Order."

(b) In enclosure No 2 with the accepted purchase order:—

"Arbitration"

"Where any dispute or difference arises between the Purchaser and the Vendor and should agreement not be reached by the parties then the matter will be referred to Arbitration in accordance with Clause 40(i)

and (ii) of the NZED General Conditions of Contract 293C. Work shall, however, continue during Arbitration.

"When applying above-mentioned Clause 40 to this Purchase Order the word "Engineer" as stated therein shall mean Purchaser and the word "Contractor" shall mean Vendor."

(c) In the New Zealand Electricity Department General Conditions of Contract for Supply, Delivery and Erection 293C:—

"40. (i) Any question, dispute or difference arising between the Purchaser and the Contractor touching the construction meaning or effect of the Contract or the rights or liabilities of the parties herein or any matter arising out of same or connected herewith shall unless otherwise specifically agreed in writing between the Purchaser and the Contractor be referred to arbitrators in New Zealand, one to be appointed by each of the parties hereto and in the event of the arbitrators differing to an umpire appointed by agreement between the parties hereto and failing agreement within six weeks to an umpire appointed under the provisions of the New Zealand Arbitration Act 1908 provided that a question, dispute, or difference relating to a decision, instruction, or order of the Engineer shall not be referred to arbitration unless notice has been given by the Contractor in accordance with Clause 20 (Engineer's Decisions). Any such reference shall be in writing, specify the nature of the dispute, and the point at issue and shall be deemed to be a reference to arbitration within the meaning of the said act or any statutory modification or re-enactment thereof which for the time being be in force. The award of the arbitrators or umpire shall be final and binding on the parties. Upon every or any such reference, the costs of and incidental to the reference and award respectively shall be in the discretion of the arbitrator, who may determine the amount thereof or the basis upon which the same shall be ascertained.

"(ii) Performance of the Contract shall continue during arbitration proceedings unless the Engineer shall order the suspension thereof or of any part thereof, and if any such suspension shall be ordered the reasonable expenses of the Contractor occasioned by such suspension shall be added to the Contract Price. No payments due or payable by the Purchaser shall be withheld on account of a pending reference to arbitration.

"41. Unless otherwise agreed the Contract shall in all respects be construed and operate as a New Zealand contract and in conformity with New Zealand law. The marginal notes hereto shall not affect the construction hereof."

The 1974 Act is expressed in its long title to be "An Act to approve Accession by Australia to a Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to give effect to that Convention, and for related purposes."

By s 4 approval is given to accession by Australia to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a copy of which is set out in the Schedule to the Act.

Section 7 is in the following terms:—

"7. (1) Where —

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

(b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;

(c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country";

this section applies to the agreement.

"(2) Subject to this Act, where—

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and

(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration, on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

"(3) Where a court makes an order under sub-section (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

"(4) For the purposes of sub-sections (2) and (3), reference to a party includes a reference to a person claiming through or under a party.

"(5) A court shall not make an order under sub-section (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed."

Section 3 includes the following definitions—

"3 (1) In this Act unless the contrary intention appears — 'agreement in writing' has the same meaning as in the Convention;

'arbitration agreement' means an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention; . . . "

It is evident that the purpose or one of the purposes of s 7 is to give effect to Art II of the Convention which is in the following terms:—

"I. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in

respect of a defined legal relationship, whether contracted or not, concerning a subject matter capable of settlement by arbitration.

"2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

"3. The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

New Zealand is not a Contracting State within the meaning of the Convention and is thus not a Convention country within the meaning of s 7.

It should be noted that no challenge was made to the validity of s 7.

15 It is common ground between the parties that the provisions of the contract between them relating to arbitration set out above constitute an arbitration agreement within the meaning of s 7 and that, by virtue of s 7(2)(b), s 7 applies to that agreement. It is clear that the condition set out in s 7(2)(a) is fulfilled in the present case. The primary question for
20 decision is, therefore, whether within the meaning of s 7(2)(b) the present proceedings "involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration". It is necessary first to examine the nature and scope of the present proceedings. The statement of claim in its form as originally filed alleged
25 in substance:—

(1) the incorporation and relevant status of the plaintiff and the defendant;

(2) facts from which an offer by the plaintiff and acceptance thereof by the defendant might be inferred in terms of the accepted amended purchase order; and

(3) that the accepted amended purchase order contained the whole of the terms of the contract between the parties.

30 The only substantive relief sought was: "Declaration that on or about the 29th day of November 1976, it was agreed between the Plaintiff and the Defendant that the Defendant would do certain work for the Plaintiff on the terms set forth in the amended acceptance copy of the Plaintiff's Purchase Order No 768337 bearing date 10th September 1976, initiated by or on behalf of each of the Plaintiff and the Defendant."

40 During the course of the hearing of the present motion the plaintiff amended the statement of claim as of right pursuant to Pt 20 r 2(1) of the Supreme Court Rules by adding a presently immaterial qualification to one of the allegations of fact and by adding two further claims for relief in the following terms:—

45 "Declaration that the price payable by the Plaintiff to the Defendant for the erection of the said Electrostatic Precipitator Plants referred to in paragraph 3 of the Statement of Claim is the sum of \$N2,000,000.00 adjusted as set forth in the said Purchase Order and in the subsequent variations referred to in paragraph 8 of the Statement of Claim.

"Declaration that the scope of the work to be performed by the Defendant in relation to the erection of the said Electrostatic Precipitator Plants referred to in paragraph 3 of the Statement of Claim is as set forth in the said amended acceptance copy of the Plaintiff's Purchase Order No 768337."

The defendant then applied pursuant to Pt 20 r 3 for an order that the amendment be disallowed. The defendant was unable to demonstrate any prejudice arising from the amendment not sufficiently compensable by an order for costs or by an adjournment, and so far as concerned its claim under the 1974 Act did not desire any adjournment if the application for disallowance were refused. If the amendment were to be disallowed the plaintiff could commence a fresh action by filing a statement of claim in the terms of the amended statement of claim and, in any event, I do not think that the amendment affects the outcome of the present application. The defendant has not, in my opinion, made out any entitlement to an order disallowing the amendment, which I therefore refuse.

The defendant's claim for payment over and above the stated contract price is based on the following contentions:—

the contract between the parties was constituted by the acceptance by the defendant by letter dated 5 November 1975 of the plaintiff's letter of intent of 27 October 1975 and consists in those documents and the documents referred to in the plaintiff's letter of intent;

to the extent that the terms of the amended acceptance copy of the plaintiff's purchase order differed from the contract as previously constituted the purchase order operated as a variation of the contract between the parties with the consequence that the defendant is entitled to be paid extra for the extra work introduced into the contract under and as a result of such variation;

alternatively that:

if from the date of the execution of the amended acceptance copy of the plaintiff's purchase order that document constituted the entire contract between the parties, it is not in accordance with the parties' true intentions at the time of its execution and should be rectified;

alternatively that:

if it cannot be shown that the amended acceptance copy of the plaintiff's purchase order is not in accordance with the parties' true intentions at the time of its execution, the plaintiff was under a duty to the defendant to draw its attention to the material changes in the scope of work that would arise out of the purchase order and failed to discharge that duty.

The plaintiff contends that the word "matter" in s 7(2)(b) denotes the ultimate subject matter at issue between the parties which is said to be how much is the defendant entitled to be paid for the work it has done, and further contends that there could be no "settlement" within the meaning of the section without a complete resolution of that issue which, it is said, is not possible under the arbitration agreement because of the claims foreshadowed by the defendant as alternatives to its primary contentions, for rectification of the accepted purchase order and

for breach of an alleged duty by the plaintiff to draw attention to material changes in the scope of the work that would arise out of the purchase order. Such claims for rectification or for breach of duty it is said, are not capable of being determined by arbitration under the arbitration agreement.

It is further contended for the plaintiff that, in so far as the present application is founded upon s 7 of the 1974 Act, it is premature. It is argued that it is not until after the pleadings have closed that one can properly determine whether the proceedings fall within s 7(2)(b).

In my opinion, the word "matter" in s 7(2)(b) denotes any claim for relief of a kind proper for determination in a court. It does not include every issue which would or might arise for decision in the course of the determination of such a claim. The use of the word "settlement" provides support for the view. "Settlement" is an apt term to be used in relation to a claim for relief—it is less apt in relation to a mere issue. Furthermore, it is significant that if the prescribed conditions are fulfilled a stay is mandatory, notwithstanding that the governing law of the arbitration agreement is that of a country not a party to the Convention, and under the law of that country a stay of proceedings on

the basis of an agreement to arbitrate may be discretionary (as it is under the law of New Zealand). In such circumstances I would not, in the absence of compelling language, attribute to Parliament an intention to require that proceedings be stayed unless the claim made in those proceedings was capable of resolution by arbitration.

Although it is legitimate to look at the terms of the Convention to resolve any ambiguity of expression in the Act, and one finds the expressions "subject matter" and "matter" used in Art II sub-articles 1 and 3 respectively of the Convention, each of these expressions seems to be there used in a fairly loose way, to which the way in which "matter" is used in s 7(2)(b) has no necessary relationship. Section 7(2) by no means reflects the exact language of the Convention, but there is nothing in the Convention which suggests that s 7(2) does not, on the view of its effect which I have expressed, operate to fulfil Australia's relevant obligation under Art II.

I see no reason to read into s 7 an unexpressed qualification as to the time when an application thereunder can be made. If, before the pleadings are closed, a party can show that the conditions of the section are satisfied, then the prescribed consequence should follow.

The claims for relief in the present proceedings, whether in the original or in the amended form, are in my view claims which are capable of settlement by arbitration pursuant to the arbitration agreement in the present case. It is not necessary to decide whether a claim for rectification or a claim for breach of duty would be capable of settlement by arbitration, because the present proceedings are independent of any such claim. On its true construction the amended statement of claim does not, in my opinion, include or involve a claim for what might be called a pre-emptive declaration that the defendant is not entitled to have the accepted purchase order rectified or to make a claim for some breach of duty by the plaintiff. If these proceedings were to be determined in favour of the plaintiff and relief granted in the

terms sought, the defendant would not, in my opinion, be thereby estopped from obtaining rectification of the amended purchase order or relief based on some alleged breach of duty by the plaintiff, assuming it to be otherwise entitled to such relief. In this respect the case is analogous to *Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68.

These conclusions are sufficient to require the court to make an order staying the proceedings.

It would I think be appropriate to impose a condition designed to ensure that the defendant did not unduly delay the arbitration. It would be unwise to formulate a condition in terms which would result in the stay automatically terminating by the operation of events, the occurrence of which might be open to dispute.

I therefore make orders in the following terms.

(1) Order pursuant to s 7 of the Arbitration (Foreign Awards and Agreements) Act 1974 Cth) —

(a) that these proceedings be stayed upon the condition that such stay may be terminated upon application made by the plaintiff in the event that the defendant does not do all things necessary to be done on its part to have the matters referred to hereunder determined in accordance with the arbitration agreement between the parties with reasonable expedition;

(b) that the parties be referred to arbitration in respect of the matters the subject of these proceedings.

(2) Order that the plaintiff pay the defendant's costs of this application up to and including the date of this order.

(3) Order that the further hearing of the application under notice of motion of 25 June 1979 stand over generally with liberty to either party to restore it to the list on three days notice.

(4) Reserve liberty to apply.

Solicitors for the plaintiff: *Ebbsworth & Ebbsworth*.

Solicitors for the defendant: *Allen, Allen & Hemsley*.

KIMBER SWAN
SOLICITOR