CASE NOTES

CLAUSE 45 NPWC – ED. 3 – AN AGREEMENT TO ARBITRATE?

Northern Territory Court of Appeal

Australian National Parks and Wildlife Service and PMT Partners Pty Ltd (In Liquidation)

The vexed issue of whether or not the whole or parts of clause 45 of NPWC Edition 3 constitutes an arbitration agreement for the purposes of the Commercial Arbitration Act has again come into the spotlight in a recent decision of the Northern Territory Court of Appeal.

In *Australian National Parks and Wildlife Service v PMT Partners Pty Ltd (In Liquidation)*, the Court of Appeal reversed a decision at first instance made by Kearney J granting the Plaintiff/Respondent, PMT, an extension of time pursuant to Section 48 of the Commercial Arbitration Act to refer a dispute to the Superintendent to clause 45(a) of NPWC.

The Court of Appeal held that Section 48 did not give the court power to provide an extension to the 14 day time limit imposed by clause 45(a) because clause 45(a) was not by itself, and did not form part of, "an act in or in relation to an arbitration."

The leading judgment, a joint judgment delivered by Mildren J and Gray AJ, contains an extensive analysis of clause 45 and concludes that, if there is an arbitration agreement in clause 45, then it is restricted to the second part of clause 45 which commences with the words "if the Contractor is dissatisfied with the decision given by the Principal.."

In doing so, the Court of Appeal has overruled the earlier decision of Angel J in *Trans Australian Constructions Pty Ltd v Northern Territory of Australia* [1991] 104 FLR 358.

In its analysis of clause 45, the court found that, having received a decision from either the Superintendent or the Principal, the Contractor has the choice of either commencing legal proceedings or continuing to proceed in accordance with the clause 45 machinery. It is not until after the Contractor elects to refer to the Principal's decision to arbitration that the parties are locked into an arbitration of the dispute.

The court also suggested (although it did not make a finding) that the time limits incorporated into both clause 45(a) and (b) are directory rather than mandatory. That suggestion in contrary to the view espoused by Fullager J in *Commonwealth v Jennings* and that of Carter J in *Rheem Australia Limited v Federal Airports Corporation.*

Having found the clauses 45(a) and (b) are not part of an arbitration agreement, the court concluded that the time limits imposed by them did

not fall within the purview Section 48 of the Commercial Arbitration Act. Section 48 gives the power to extend the time fixed by an Arbitration Agreement "for doing an act or taking a proceeding in or in relation to an arbitration."

The court said:

"In our opinion, to be an act in relation to an arbitration, the act must be shown to be more than an act which may or may not turn out to be a step towards an arbitration. The expression "in relation to" is doubtless very wide but the essential component is that there must be two subject matters which are to some extent connected... This component seems to me to be missing when one considers the step required by clause 45(a) or (b)"

IAN BRIGGS

APPLICATION TO COURT BY ARBITRATOR UNDER S.18(1)(c)

Supreme Court of New South Wales
O'Keefe CJ Comm D, 30 July 1993 (unreported)

John Langhorn v Jimmy Kim Constructions Pty Ltd and Ors

The arbitration agreement contained in the building contract provided that the arbitrator had the power from time to time to make any order in regard to the provision of further security for the costs of the arbitration proceedings.

His Honour stated:

> ".... the power conferred upon the arbitrator in relation to security for costs involves him in the exercise of a discretion. He exercised that discretion by directing amounts which total $15,000. The break up of this amount is set out in Annexure X to the affidavit of the arbitrator and includes $8,100 in respect of cancellation fees."

He was of the view that the amount of $15,000 was more than was appropriate having regard to the amounts involved in the claim (approx. $50,000) and in the cross claim (less than $100,000) and the fact that a substantial part of the amount was constituted by cancellation fees.

The application to the Court was made by the arbitrator pursuant to s 18 (1) (c) of the *Commercial Arbitration Act.* That subsection reads:

> "Unless a contrary intention is expressed in the arbitration agreement, where any person (whether or not a party to the agreement)
>
> (c) refuses or fails to do any other thing which the arbitrator or umpire may require, a party to the arbitration agreement or the arbitrator or umpire may apply to the court and the Court may order the person so in default to attend before the Court to.... do the relevant thing."

His Honour went on to say:

> "Under the power upon which the applicant relied it was not, in my opinion,