Liverpool City Council v Casbee Pty Ltd; Liverpool City Council v Casbee Pty Ltd

[2005] NSWC 590 (24 June 2005, Nicholas J)

Dr John Hockley[1]

The existence of uniform arbitration legislation means that decisions on sections of the Arbitration Act are eagerly awaited. The decisions on the legislation in one State apply to the legislation in all States. Two recent cases heard together give some guidance as to how section 46 of the Arbitration Act should be interpreted. It is also essential that the provisions of the Act be construed or interpreted in the same way in different State jurisdictions in Australia.

Section 46 Delay in prosecuting claims

Section 46 of the Act provides:

'46.

(1) Unless a contrary intention is expressed in the arbitration agreement, it is an implied term of the agreement that in the event of a dispute arising to which the agreement applies it is the duty of each party to the agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in the arbitration proceedings.

(2) Where there has been undue delay by a party, the Court may, on the application of any other party to the dispute or an arbitrator or umpire, make orders:
   (a) terminating the arbitration proceedings;
   (b) removing the dispute into Court; and
   (c) dealing with any incidental matters.

(3) The Court shall not make an order under subsection (2) unless it is satisfied that the delay —
   (a) has been inordinate and inexcusable; and
   (b) will give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings'.

In section 4(1) 'arbitration agreement' is defined to mean an agreement in writing to refer present or future disputes to arbitration.

1 Dr John Hockley is a Barrister, Francis Burt Chambers, Perth.

The Cases

The cases are *Liverpool City Council v Casbee Pty Ltd; Liverpool City Council v Casbee Pty Ltd* [2005] NSWC 590 (24 June 2005, Nicholas J.

The claim relates to arbitration proceedings concerning disputes arising from drainage construction work undertaken by Casbee Pty Ltd ('Casbee') for Liverpool City Council ('the Council') at Hinchinbrook (the Hinchinbrook dispute) and a similar proceedings concerning disputes arising from stormwater pond construction work undertaken by Casbee for the Council at Riverside Park, Chipping Norton (the Riverside dispute). Both disputes were referred to arbitration by Casbee on 10 November 2004. In the proceedings before Nicholas J submitting appearances were filed by the arbitrators for the disputes, Timothy Sullivan and Robert Hunt.

The Council's application for an order pursuant to s 46(2) of the Act raised the preliminary question whether Clause 47.2 of the Contract in each case was on the proper construction an arbitration agreement for the purposes of the Act. Clause 47.2 provided two alternative mechanisms for the resolution of disputes, upon the failure of each of which either party may by notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration or litigation.

Casbee submitted that the effect of Clause 47.2 was to establish a dispute resolution mechanism which permitted a free choice between arbitration or litigation and hence was not an arbitration agreement within the meaning of the Act. It followed that if the Contract contained no such arbitration agreement s 46 did not apply. In support of its submission Casbee sought to rely upon the dissenting judgment of Thomas J in *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd*[2] that considered a contractual provision in similar terms.

Nicholas J rejected Casbee's submission on the basis that it was against the weight of authority with which he agreed. On its proper construction Clause 47 afforded the party's entitlement to make an election to refer the dispute to arbitration and that was sufficient to fall within the definition of an arbitration agreement with in s 4 of the Act.[3]

In the interests of harmony in interpretation of the Act, Nicholas J referred to the apt statement of McPherson J in the *Mulgrave Central Mill Company Limited v Hagglunds Drives Pty Ltd*[4] where he stated that:

> *This is an area of law where the making of subtle verbal distinctions is not to be encouraged, and where it is desirable that standard conditions and uniform legislation should, as far as possible be given the same meaning in jurisdictions throughout Australia.*

The Principles

The approach to the question whether the Court should order the termination of an arbitration under s 46(2) for want of prosecution was explained by Anderson J in *Carob Industries Pty Ltd (in liq) v Simto Pty Ltd* [1999] WASC 258.

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2 [2002] 2 Qd R 514.

3 *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, at pp 310, 323; *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587 at 594.

4 [2002] 2 Qd R 514.

7... It is the duty of each party to an arbitration agreement to exercise due diligence in prosecuting a dispute referred to arbitration; Commercial Arbitration Act s 46(1) and (2). A court will not terminate arbitration for delay unless it is satisfied that the delay has been inordinate and inexcusable and will give rise to a substantial risk of prejudice to the other party. Commercial Arbitration Act s 46(3). The test is the same as the common law test. If there is inordinate and inexcusable delay, coupled with a substantial risk that it is not possible to have a fair trial of the issues in the action, or there is a likelihood of serious prejudice to the defendant, the proceedings will usually brought an end by the court.

Lewandowski v Lovell (1994) 11 WAR124, especially at 131; Hughes v Gales (1995) 14 WAR 434; Birkett v James [1978] AC 297 at 318; Ulowski v Miller [1968] SASR 277 at 280.

8. It seems that there are five main matters which are to be considered, they being the length of the delay, the explanation for the delay, hardship to the plaintiff if the action is dismissed and the cause of action left statute -barred, the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay and the conduct of the dependant in the proceedings. Lewandowski v Lovell (supra) and 133.

The approach of Anderson J was upheld as being correct on appeal in *Clements v Simto* [2001] WASCA 183 at paras 7 and 8).

In the above cases it was emphasised that even where there had been inordinate and inexcusable delay the court shall not terminate arbitration proceedings unless that the delay came within s 46(3)(b).

Section 43(3)(b) states:

'46(3)(b) will give rise to a substantial risk of it not been possible delay to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings'.

It was common ground that 'inexcusable' means 'without reasonable explanation'.

The five main matters to be considered are:

1. the length of the delay;
2. the explanation for the delay;
3. the hardship to the plaintiff if the action is dismissed;
4. the cause of an action left statute-barred;
5. the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay and the conduct of the defendant in the proceedings.

Casbee's evidence went principally to the issue of delay in each case and the explanation for it (items (1) & (2) above). In regard to both contracts there were floods allegedly resulting in the loss of documents and an inquiry by the NSW Independent Commission Against Corruption (ICAC) from which documents were returned in a disordered state.

The Council's evidence went principally to the issue of prejudice in each case (item (5) above).

The Hinchinbrook Dispute

The parties entered the contract on 29 July 1998 with completion to occur on 15 December 1998. On 15 December 2000 Casbee made a claim on the Council for $230,955.48. Casbee took until 17

October 2001 to provide the details of the claim as requested by the Council. On 4 January 2002 the Council's contract works supervisor advised Casbee that their claims had been rejected. On 21 September 2004, Casbee referred the dispute to arbitration pursuant to the contract.

Nicholas J stated that the even after April 2002 when Casbee engaged a person to undertake the preparation of the claims the matter moved at glacial speed, the slowness of which was attributed in part to the loss of documents in a flood, and to the disorganised state in which many documents were returned by ICAC. This evidence was in very general terms and no attempt was made to identify categories of documents relevant to any component of a claim which was ultimately referred to arbitration.

Nicholas J was not persuaded that the delay during this period was neither inordinate nor inexcusable. The intention and effect of s 46(1) is to require a party to exercise due diligence by taking necessary steps, in the first instance, to refer the dispute to arbitration at the time it arises. Subject to the circumstances of the case it is not ordinarily open to a party to delay taking the positive steps involved in having the dispute referred until after, for example, such time as the preparation of its case for the purposes of a hearing has been completed.

In regard to the issue of delay, Nicholas J was satisfied that the 20 month period between the rejection of the claims on 4 January 2002 and in the notification of the reference to arbitration on 21 September 2001 constituted a delay which was inordinate in the circumstances and for which Casbee provided no reasonable explanation.

In view of this finding the Court then turned to the question under is s 46(3)(b), whether there was a substantial risk of an unfair trial or whether the delay was likely to cause, or to have caused, serious prejudice to the Council in the arbitration proceedings.

Nicholas J stated that the effect of the delay is to be determined objectively by reference to the nature of the issues in the arbitration proceedings, and to the ability of Council to advance its case and to meet that of its opponent. It was important to keep in mind the legislative requirement that the degree of risk to be established is substantial, and the degree of prejudice is serious. His Honour referred to the dissenting judgment of Mahoney JA in *Gill v Walton*[5] where it was stated:

> *As was indicated in Jago (Jago v District Court of New South Wales (1989) 168 CLR 23), it is not every disadvantage accruing to a party which will constitute for this purpose unacceptable injustice. Records may be lost, witnesses may die, and recollections may fade in ordinary cases. And these are matter which, as I have indicated, a tribunal will be expected to take into account in any trial or proceeding. It is only where the disadvantages which have accrued are of such an order that the injustice to the party would be of such dimensions as to be, notwithstanding such matters, unacceptable. In Jago (at 34, 60, 78); cf (and 53) per Brennan J; the situation was described by terms such as 'special' and 'exceptional'. It is necessary that the doctors established such a case.*

Thus more will be required than a demonstration that delay may result in less than perfect justice in the proceedings.

In order to prove either a substantial risk of impossibility of fair trial, or the likelihood of serious prejudice, it would ordinarily be necessary to demonstrate the disadvantage caused by the delay, for

5 (1991) 25 NSWLR 190 at 212.

example, the unavailability of the testimony of a potential witnesses, or the loss of documents, or that sources of information had dried up. In this case it was necessary for the Council to show that the likely consequence of the delay is to deprive it of the opportunity of a fair trial, or that it was so seriously prejudiced that justice would not be done in the proceedings. The question posed under is s 46(3)(b) requires an evaluation the evidence of the extent to which the delay is likely to disadvantage, or had in fact disadvantaged, the Council.[6]

In its reliance on the issue of disadvantage counsel claimed that the number of persons involved with the projects could not be found or were unwilling to assist. There was no evidence other than in the most general terms, which demonstrated the nature of the involvement of any of these persons in any particular matter referrable to a claim, or that he was a witness to events whose testimony was relevant to an identified issue. There was no evidence to suggest that the outcome of an issue would turn on the oral evidence of a witness who was unavailable. There was no explanation in any depth of the issues under the claims or whether proof of matters relevant to such issues would require oral evidence. In regard to witnesses who were reluctant to attend the hearing there was no evidence that they would not attend under a subpoena for examination before the arbitrator or, if necessary, before a court pursuant to the procedures under s 17 and s 18 of the Act. It was suggested by the Council either by reason of the loss and/or incompleteness of any of its records it will be disadvantaged in defending the claims, that details of particular events relevant to a claim are unavailable.

It was relevant to take into account that in regard to the preparation of the claims on behalf of Casbee that reliance was to be placed entirely upon the documentary evidence available to it and then there was no evidence to indicate reliance upon oral testimony, or which identified a representative of either party as a potential witness on any issue.

In the circumstances, Nicholas J was not satisfied that the unavailability of any witnesses or rather conveniences resulting from delay gave rise to a substantial risk that a fair trial would not be possible, or was likely to cause serious prejudice to the Council.

The Council could not satisfy the court that the matters contained in s 46(3)(b) had been made out and thus the court was unable to make an order under s 46(2) and ordered that the summons be dismissed.

The Riverside Dispute

On 14 December 1998 the parties entered into a contract for construction and landscaping work on urban stormwater and treatment ponds at Riverside Park to be completed in stages. The date for practical completion for stage 1A was 15 February 1999, for stage 1B was 8 February1999, and for stage 2 was 11 January 1999.

Delay

There were two separate and lengthy periods during which there was no communication between the parties. The first period was between 23 December 1999, when practical completion of the landscaping works was certified, and 6 November 2002 when Casbee made a claim for $13,556 and requested return of the bank guarantees. The second period was between 11 February 2003 when

6 See, McHugh JA in *Herron v McGregor* (1986) 6 NSWLR 246 at pp 265-266.

Casbee sought advice from the Council as to whether it would be required to remove surplus soil at its cost and as to the resolution of the dispute, and 29 April 2004 when a meeting took place to discuss the question of the removal of surplus material.

In regard to the first period, Nicholas J. was not satisfied that it was a period of undue, inordinate and inexcusable delay on Casbee's part within the meaning of s 46(2) and (3) of the Act.

In Nicholas J's opinion, a dispute which attracted the application of s 46 of the Act was not generated until, by its letter to dated 20 November 2002, Council rejected Casbee's claim of 7 November 2002 and directed it to remove surplus material within 30 days. This letter triggered a chain of correspondence until 11th February 2003. In the circumstances it cannot be said that during this first period a dispute had arisen which Casbee should have referred to arbitration.

In regard to the second period the correspondence between 20 November 2002 and 11 February 2003 demonstrated that the parties were in dispute as to whether agreement had been reached in mid-1999, and if so as to its terms. In a letter from Casbee dated the 11 February 2003 it sought Council's suggestions for the resolution of the dispute and referred to the relevant contractual procedures. Thereafter, nothing was done until a meeting on 29 April 2004.

Nicholas J stated that Casbee knew a short time after sending the letter on 11 February 2003 that the dispute was unlikely to be resolved otherwise than under the terms of the contract. In accordance with s 46(1) it was required to exercise due diligence by taking the necessary steps to refer a dispute to arbitration at the time it arises. The suggestions that floods and ICAC were reasonable explanations for the delay in referring this dispute to arbitration were rejected for the same reasons as they were in regard to the Hinchinbrook dispute.

After having considered all of the evidence on the issue of the delay Nicholas J was satisfied that the 14 month period, which elapsed between 11 February 2003 and the meeting on 29 April 2004 constituted a delay which was inordinate in the circumstances and for which Casbee provided no reasonable explanation.

His Honour then had to turn to the question under s 46(3)(b). Council again submitted that the delay was likely to cause it disadvantage or prejudice in the arbitration proceedings in the relevant sense. In regard to this dispute counsel submitted that it was further prejudiced by its inability to call witnesses.

After considering these submissions Nicholas J concluded that he was not satisfied that the apprehended unavailability of witnesses or other inconveniences resulting from the delay gave rise to a substantial risk that a fair trial would not be possible. He was not convinced that these factors were likely to cause serious prejudice to the Council. Accordingly, Nicholas J was not satisfied that the matters in s 46(3)(3)(b) had been met and he was unable to make an order under s 46(2). He ordered that the summons be dismissed.

Section 46(2)

Casbee submitted that upon the proper construction of s 46(2) a court may not make an order simply terminating the arbitration proceedings, and may only make an order for termination and removal of the dispute into court. The Council had failed to satisfy the court in each case the delay had

the consequences required under is 46(3)(b), and that no orders had been made under s 46(2) it was unnecessary to consider this issue.

Nevertheless, Nicholas J rejected this issue and in doing so, indicated his full agreement with the reasons of Wilson J in *Re John Holland Construction and Engineering Pty Ltd*[7] that:

> *The use of the singular 'an order' in subs (3) and the factors of which it requires the court to be satisfied lead me to conclude that the Legislature intended the Court have power to terminate arbitration proceedings without necessarily also removing the dispute into court.*

Nicholas J further stated that the presence of the word 'and' where appearing between subsections (b) and (c) in s 46(2) is, in its context is to be construed disjunctively. His Honour relied upon the principles of construction considered in *Victims Compensation Fund v Brown*;[8] and *Re Peat Resources of Australia, Pty Ltd; Ex parte Pollock*.[9] In addition, his Honour stated that the above construction was consistent with a discernible intention of the legislature that upon satisfaction of the requirement of delay and disadvantage under s 46(3) the court should have the discretion to make any or all of the orders under subsections (a), (b), and (c), as the justice of the case requires.

Conclusions

The cases are the first on s 46 of the Uniform Arbitration Act.

Parties to an arbitration agreement are required to use due diligence and refer the matter to arbitration promptly, something that Casbee did not do. The factors to be considered are: the length of the delay; the explanation for the delay; the hardship to the plaintiff if the action is dismissed; the cause of an action left statute-barred; the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay; and the conduct of the defendant in the proceedings.

To obtain an order under s 46(2) both parts (a) and (b) of s 46(3) must be satisfied. Casbee's inaction met s 46(3) (a) in that the delay was inordinate and inexcusable. Section 46(3)(b) required a substantial risk of a fair trial of the issues not being possible in the arbitration process or that a serious prejudice would be caused to the other parties to the arbitration process. The Council failed to satisfy the Court that the requirements of s 46(3)(b) were met.

Although not necessary for the decision in these cases a judicial view on s 46(2) was given that an order could be made terminating the arbitration proceedings (s 46(2) (a) without also removing the dispute into court (s 46(2)(b) & (c)).

7 [1999] 2 Qd R 593 at para 25.

8 (2002) 54 NSWLR 668 at 680-685.

9 (2004) 181 FLR 454.