Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd [2021] QSC 75

and

Great Union Pty Ltd v Sportsgirl Pty Ltd [2021] VSC 277

The Hon David Byrne QC*

Introduction

In each of these cases the application before the Court was brought by a defendant seeking to stay the proceeding and refer it to arbitration pursuant to the uniform Model Law based *Commercial Arbitration Act* s 8(1). In each case the plaintiff resisted the application, raising a question as to the ambit of the arbitration agreement, or as to its validity having regard to its statutory definition in s 7(1).

The relevant statutory provisions are in these terms:

> 7(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. …
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> 8 (1) A Court before which an action is brought in a matter which is the subject of an arbitration agreement must ... refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Cheshire contractors case

Cheshire Contractors Pty Ltd (Cheshire Contractors) and Civil Mining & Construction Pty Ltd (CMC) were participants in a civil engineering project for the construction of roadworks for the Queensland Department of Transport and Main Roads (TMR). CMC was the principal contractor and Cheshire Contractors was its subcontractor. Under the head contract CMC was required to use only material that satisfied certain

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requirements of the specification. On a number of occasions Cheshire Contractors found that the material that was available in the vicinity of the work did not meet these requirements (out of spec materials) and CMC directed Cheshire Contractors as to how it might integrate or otherwise deal with this out of spec material. Cheshire Contractors then told CMC that it would make a claim for extra payment for the extra costs incurred in complying with this direction.

The case of Cheshire Contractors in the Court was based upon an agreement reached between it and CMC about how this claim might be managed. It was alleged that CMC requested Cheshire Contractors to provide it with a letter upon which it could make a latent conditions claim upon TMR seeking the extra cost incurred in using the out of spec material. The agreement further provided that CMC would make payment to Cheshire Contractors for its work in using this out of spec material 'on a basis consistent with any payment it received from TMR for its claim to be made on TMR'.[1] In due course CMC made a latent conditions claim on TMR and, with the assistance of Cheshire Contractors, received from TMR some $5M for the extra cost. When Cheshire Contractors, in turn, made a claim upon CMC for this, it was rejected. First, on the basis that under its subcontract there were imposed temporal and other requirements for the bringing of such a claim, which requirements had not been met. Second, because under clause 2.11 of the subcontract, it was required to 'fully inform itself' about the risks of encountering poor latent soil conditions.

The subcontract also contained in cl 12 a dispute resolution provision which, after the usual provisions for mediation and the like, provided in cl 12.3.3 that 'all disputes or differences shall be referred to arbitration in accordance with and subject to the Institute of Arbitrators and Mediators Australia (Queensland Chapter), Rules for the Conduct of Commercial Arbitrations'.[2] The expression 'dispute or difference' was defined in the subcontract to mean 'dispute or difference arising between the Parties',[3] that is, between CMC and Cheshire Contractors.[4] Attempts to resolve this matter were unsuccessful and Cheshire Contractors brought a proceeding in the Court seeking payment of some $1.4M for its extra work.[5] The nature and basis of the claim is described in para [17] of the judgment as follows:

> Cheshire Contractors complains that 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 Contractors alleges it lost the opportunity to make an alternative claim for damages or remuneration under and in compliance with the contract. Cheshire Contractors argues CMC is, or ought to be, estopped by convention

[1] *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QSC 75, [8] (Henry J) ('Cheshire Contractors judgment').
[2] Ibid (n 1) [25].
[3] Cl 12.3.1.
[4] *Cheshire Contractors* judgment (n 1) [15].
[5] Ibid [17].

> from denying that Cheshire Contractors is entitled to reasonable additional remuneration in respect of excavation and embankment works. Cheshire Contractors claims it is entitled to payment by CMC in the sum of [about $1.4M] plus GST as reasonable remuneration for works done by the respondent or, alternatively, the same sum as damages or compensation pursuant to ss 236 and 237 [of the] Australian Consumer Law … for loss suffered as a result of CMC's allegedly unconscionable conduct.

There was also a further Cheshire Contractors claim for the return of its bank guarantee.

Cheshire Contractors contended that cl 12.3.3 was not an arbitration agreement within the meaning of s 7 of the *Commercial Arbitration Act 2013* (Qld) because it purported to refer to arbitration all disputes and differences without qualification. First, the arbitration clause did not satisfy the statutory definition as it did not identify the legal relationship in respect of which the dispute to be referred to arbitration arose. Nor did it contain a description of 'the nature of the disputes referred 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.'[6]

His Honour accepted that, as a provision in a commercial contract, arbitration clauses should be interpreted so as to give effect to their commercial purpose and that they should not be construed narrowly. He held as follows: '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.'[7]

Nevertheless, notwithstanding that the arbitration clause here contained no description or limitation as to the nature of the dispute to be referred to arbitration, the context in which the clause was found led to the conclusion that there was a defined legal relationship between CMC and Cheshire Contractors — that established by the subcontract that bound them — and that Cheshire Contractors' claim for extra payment for work that it was contracted to perform clearly fell within the arbitration clause.[8]

Cheshire Contractors' further contention that the arbitration clause was inoperable for uncertainty was rejected for the same reasons. Its arguments to the effect that the estoppel by convention claim and those based on unconscionability should be rejected because they were not based on the contract were also rejected. This was because the arbitration clause contains an implied term that 'the arbitrator should reach

[6] *Cheshire Contractors* judgment (n 1) [30].
[7] *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496, 504 [36] (Allsop J), adopted in *Cheshire Contractors* judgment (n 1) [35].
[8] *Cheshire Contractors* judgment (n 1) [52].

a decision according to the existing law of the land and should exercise every right and discretionary remedy given to a court of law.'[9]

His Honour's conclusion, then, was that all of Cheshire Contractors' claims must be referred to arbitration in accordance with cl 12.3.3. These claims included that for the return of the bank guarantee, notwithstanding that it was not a claim for payment for work performed under the subcontract. This was because this claim was part of Cheshire Contractors' unconscionability case.[10]

Great Union case

In 2017 the plaintiff, Great Union, leased to the defendant, Sportsgirl, commercial premises in the Centrepoint Mall in Melbourne. The lease in cl 37 made provision for the consequences to the lessee where the premises were damaged or the means of access to it were altered so that they became unfit for the lessee's occupation or inaccessible. Sub-cl 37.3(a) permitted the lessee to reduce its rental payments during such period of damage or loss of access and, in para (b) made provision for arbitration in these minimalist terms: If the parties do not agree on the reduction to apply under the previous clause, within seven days after the damage or interference with access occurs, then the proportion must be decided under the *Commercial Arbitration Act 1984*.[11]

The Great Union claim before the Court was for some $2.3M for unpaid rent. Sportsgirl denied this and defended the claim, relying upon its entitlement to abate the rental and seeking damages for unconscionable conduct in contravention of the Australian Consumer Law. It also sought a declaration that the lease was terminated for frustration arising out of the government regulations consequent upon the COVID-19 pandemic. Finally, it sought that the proceeding be stayed pursuant to s 8(1) of the *Commercial Arbitration Act 2011* (Vic) pending the determination of its rent abatement claim.[12]

In the course of argument, counsel for Sportsgirl accepted that the Great Union claim, and the defences raised by Sportsgirl, other than the rent abatement defence, should be heard and determined in the Court,

[9] *Cheshire Contractors* judgment (n 1) [59], referring to *Government Insurance Office v Atkinson Leighton Joint Venture* (1981) 146 CLR 206, 234-235 (Stephen J), 246-7 (Mason J).

[10] *Cheshire Contractors* judgment (n 1) [62].

[11] The reference to now repealed 1984 Act is taken to be a reference to the current 2011 Act; see *Commercial Arbitration Act 2011* (Vic) s 43(1).

[12] *Great Union Pty Ltd v Sportsgirl Pty Ltd* [2021] VSC 277 (Riordan J) [4] ('Great Union judgment').

but that, since these claims depended upon the outcome of the rent abatement defence, they, too, should be stayed pending the determination of that claim.[13]

With respect to the Sportsgirl rent abatement defence, it was put on behalf of Great Union that there were in fact two distinct issues: whether the factual basis for the lessee's entitlement to abate the rent had occurred (the entitlement issue), and, if so, what should be the amount of the abatement (the quantification issue)? It was then said that only the quantification issue might be arbitrable under cl 37(3)(b).[14] On behalf of Sportsgirl it was put that these two issues were intertwined so that the arbitration agreement should be interpreted in a way that led to both being referred to arbitration.

His Honour approached the question of construction of the arbitration agreement on the basis that it was a commercial document and that it should be approached with a predisposition to achieve the parties' purpose, and to do so in a commercially convenient way.[15] He noted that the quantification issue must involve the arbitrator forming a view about the existence and severity of the damage or interference with the leased premises. It would be inherently unlikely, his Honour observed,[16] that the parties would have intended that the resolution of the abatement claim to be bifurcated by having these two issues determined by different tribunals with the consequent risk of a duplication of evidence and cost and the risk of inconsistent or incompatible decisions. Accordingly, he rejected the Great Union submission and observed: 'Arbitration clauses should be read against the sensible presumption (in effect a rational assumption of reasonable people) that the parties do not intend the inconvenience of having possible disputes being heard in two places.' [17]

His Honour also rejected a further Great Union submission that a referral order should not be made unless the applicant, Sportsgirl established that its claim for abatement of rent was arguable or likely to succeed. To undertake that task would be for the Court to usurp the role of the arbitrator for the arbitrator. It is not the role of the Court under s 8(1) 'to act as a court of summary disposal filtering the matters that are suitable for arbitration'.[18] Both aspects of the rent abatement claim, therefore, were referred to arbitration, but not the other Sportsgirl claims.

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[13] Ibid [21].
[14] Ibid [10]
[15] Ibid [13].
[16] Ibid [16].
[17] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, 489 [166] (Allsop CJ, Besanko and O'Callaghan JJ).
[18] Ibid 483 [149].

On the question of a stay his Honour accepted that, where one of a number of claims in Court are referred pursuant to s 8(1), the Court might, in the exercise of its power to control its own proceedings, stay the unreferred claims pending the resolution of the referred claim.[19] This was put on the basis that, in the arbitration, Sportsgirl might succeed to the extent that the other claim might not be pursued. His Honour, however, concluded that the prospects of this were no more than speculative.[20] Accordingly a stay of those claims was refused.

Comment

The interest of these cases for arbitrators lies in their being examples of the modern approach of the Court to the construction of arbitration clauses in commercial agreements. It has three aspects:

First, it has been well established, at least since 1982,[21] that the interpretation of these agreements requires, not only a consideration of the words used, but also the circumstances known to all parties to the agreement at the time of contract. These circumstances will include the commercial purpose and objective of the agreement as may be inferred from the context of the passage to be construed, the genesis of the transaction, its background and the market in which parties were operating.

While an arbitration clause in such an agreement will be construed in accordance with these principles, this has in the past led to a careful examination of what disputes were covered by the terms of the clause. In the *Hancock Prospecting* case referred to above, for example, the relevant issue was whether a clause in a deed referring to arbitration 'any dispute under this deed' required a dispute as to the validity of the deed itself to go to arbitration. That case went to the High Court[22] where the decision of the Full Federal Court already referred to and its reasons were upheld and endorsed. The conclusion set out in that case, and applied in the present cases, was that the application of the conventional principles of construction of commercial agreements will apply to an arbitration clause in such agreements, but in a particular way.

The clause will not be interpreted narrowly. The Court, as part of its task of giving effect to the parties' commercial purpose, should give width, flexibility and amplitude to them. The High Court in the *Hancock Prospecting* case found it unnecessary to decide whether to follow the House of Lords in the UK[23] in

[19] *Great Union* judgment (n 12) [22], referring to *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420, 434-5 [65]-[66] (Merkel J).

[20] *Great Union* judgment (n 12) [24(a)].

[21] When *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337 was decided.

[22] (2019) 267 CLR 514.

[23] *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254.

deciding that there should be a special presumption in construing an arbitration clause, that the parties should be taken to have intended that all disputes arising out of the relationship between the parties to the agreement should be decided by the same tribunal.[24] The High Court was of the view that the orthodox approach to construction, with a focus on the commercial objective of the clause would suffice. The two cases here demonstrate the fulfillment of that expectation.

Second, the cases show a readiness to accept the effectiveness of an arbitration clause which requires the details of its implementation to be worked out. It will be recalled that the clause in the *Great Union* case was very spare: the dispute 'must be decided under the *Commercial Arbitration Act*'.

Third, they show a readiness to imply terms to give effect to the expectation that a bifurcation of the dispute should be avoided. In the *Cheshire Contractors* case where the relationship between the parties was established by the contract which they had entered into, the clause was construed to include claims that were not based on the contract. In the *Great Union* case, the liability issue was found to be arbitrable notwithstanding that cl 37(3)(b) did not in terms include it.

Finally, in these cases, as in the *Hancock Resources* case, the question of the arbitration agreement arose in a s 8(1) application for a referral to arbitration with a consequent stay. The approach of the Court in such circumstances to the construction of arbitration clauses may be seen by practising arbitrators as being interesting, but of little practical importance. Likewise, where the question arises in an application to the Court to set aside the award under s 34(2)(a)(iii) or to refuse to recognise or enforce it under s 36(1)(a)(iii). It may, however, arise where the arbitrator is required to deal with a challenge to jurisdiction under s 16(1) and to determine the existence, validity or ambit of the arbitration clause.

The High Court in the *Hancock Resources* case, however, remarked that the principles involved in the determination by the arbitrator of its own jurisdiction are 'not determinative of the issues raised in the appeals before it',[25] namely, the issues as to whether the proceeding in Court to set aside the deed because it was void, fell within the ambit of the arbitration clause so that the proceeding should be stayed under s 8(1). It is not at all clear what the High Court had in mind in making that observation.

It might be directed to the question how the arbitrator, in the exercise of the power conferred by the agreement of the parties to determine a dispute, may determine finally and conclusively, or at all, that the

[24] (2019) 267 CLR 514, 527-8 [19]-[21] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
[25] Ibid 526 [13].

conferral was ineffective because the arbitration agreement was void or invalid, or because the dispute did not fall within its terms. This puzzle is further complicated by the fact that, if the arbitrator rejects such a jurisdictional challenge, the question may be passed to the supervising court for a 'final' determination under s 16(10). And, further. it seems that the arbitrator's determination rejecting the challenge does not create an issue estoppel preventing a party from later renewing the challenge upon an application to enforce, recognise or set aside the resultant award.[26] Professor Jones' solution is that the determination of the arbitrator does not oust the jurisdiction of the Court as the final arbiter of jurisdiction questions; it is simply to resolve the matter as between the parties sufficient to enable the arbitral process to continue.[27]

And, what then is the status, in these circumstances, of a final decision made by the supervising court upholding the arbitrator's jurisdiction under s 16(10)? It appears, that, upon an application for the enforcement of a foreign award at least, where the jurisdiction of the foreign arbitrator is challenged before it, an Australian Court will determine the jurisdiction of the arbitrator afresh in accordance with the provisions of Australian law.[28] But this is a difficult area that may have to await further judicial consideration.

[26] See Dullah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2011] 1 AC 763, 810 [23]-[24] (Lord Mance).
[27] Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2nd ed, 2013) [6.320].
[28] IMC Aviation Solutions Pty Ltd v Altain Khuder LLC (2011) 38 VR 303.