Article Information

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Supreme Court upholds the "contractual bargain" – failed circumvention of alternative dispute resolution process in WestConnex deed

Rees J's decision in *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)* [2022] NSWSC 505 provides us with further confirmation of the Court's reluctance to interfere with or modify contractual alternative dispute resolution processes (such as referral to expert determination or arbitration).

Key takeaways:

- A "tiered" dispute resolution clause can still be an arbitration agreement despite including other steps such as negotiation or expert determination.
- "Inoperative" in CAA s 8(1) means "ceasing to have effect for the future".
- An arbitration agreement is not "inoperative" under CAA s 8(1) merely because it has not yet been exercised.
- The power in CAA s 17J ("Court-ordered interim measures") is to be exercised only very sparingly.
- The Court declined to grant an urgent interlocutory injunction based on assertions that an expert would lack jurisdiction, in part because the expert has power to determine jurisdiction.
- Properly drafted determinative alternative dispute resolution clauses are again shown to be reliable and well supported by the courts.

Background

The decision relates to the M4-M5 Link Tunnels project. The Plaintiffs (the **Asset Trustee**) describe themselves as a "pass through" vehicle through which Transport for NSW (**TfNSW**) pays the Defendants[1] (collectively, the **Contractor**) to design and construct the M4-M5 Link Tunnels.

This relationship was comprised in "back to back" deeds: a Project Deed between the Asset Trustee and TfNSW and a D&C Deed between the Asset Trustee and the Contractor. If the Contractor claimed for a variation, the Asset Trustee would make a corresponding claim against TfNSW and, if approved, the money would flow back to the Contractor. If a dispute arose, it could be deemed a **"linked dispute"**, meaning any determination would apply equally to both deeds.

The dispute resolution process under the deeds was a "tiered" process, requiring: negotiation, expert determination, arbitration and then possibly an appeal to the Court on points of law.

"Durability Solution" – who pays?

A dispute arose over who was to pay for works (**Durability Solution**) required to prevent incursion of contamination from a disused rubbish tip. The Contractor claimed a variation for the Durability Solution, but TfNSW asserted the works to be within scope.

The parties referred the dispute (deemed as a "linked dispute") to expert determination. The expert determined that the Durability Solution was within scope, which meant the Contractor had to bear its cost.

Second expert determination and application to the Court

Some months later, the Contractor re-agitated the dispute over the Durability Solution in a different form, alleging that two communications it had received from the Asset Trustee constituted directions to carry out the Durability Solution as a variation (for which the Asset Trustee would need to pay, as TfNSW still considered the Durability Solution to be within scope) (**Directions Dispute**).

The Contractor sought to refer the Directions Dispute to expert determination as an "un-linked dispute", hoping to separate it from the dispute the subject of the first expert determination. In response, the Asset Trustee contended that an expert would lack jurisdiction to determine the Directions Dispute because it overlapped with the original dispute which had already been determined (**Jurisdiction Dispute**).

The Asset Trustee applied to the Supreme Court seeking to injunct the Contractor from referring the Directions Dispute to expert determination until the Jurisdiction Dispute was determined. In response, the Contractor sought to stay the Asset Trustee's application pursuant to s 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**CAA**) which provides that:

> "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 the agreement is null and void, **inoperative** or incapable of being performed." [emphasis added]

Was the arbitration agreement "inoperative"?

The parties agreed that the tiered dispute resolution clause was an arbitration agreement. However, the Asset Trustee argued that the arbitration agreement was "inoperative" because it was a condition precedent to arbitration that one of the parties issue a notice of dissatisfaction following expert determination, and this had not yet occurred.

The Asset Trustee relied on *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 (***John Holland***) in which a tiered dispute resolution clause was held to be presently "inoperative" because negotiation (being a condition precedent to arbitration) had not yet occurred.

The Contractor argued that "inoperative" was equivalent in meaning to "null and void" and "incapable of being performed", and that, but for the Asset Trustee's application to the Court, the parties were capable of fulfilling the condition precedent, meaning the arbitration agreement was not "inoperative".

Her Honour agreed with the Contractor and held that the arbitration agreement was not "inoperative". Her Honour reviewed the authorities, noting that Australian courts have generally considered the word "inoperative" to mean "ceasing to have effect for the future", and that *John Holland* was at odds with this and should not be followed.

Her Honour reasoned that an agreement allowing referral to arbitration is not "inoperative" merely because it has not yet been exercised, otherwise this would offer a "a backdoor for a party wanting to escape the arbitration agreement". Moreover, the words "refer the parties to arbitration" in CAA s 8(1) should be understood as referral to a process of arbitration, and that process may involve preliminary steps (e.g. negotiation) before the actual arbitration part of the process begins.

Her Honour noted examples of ways in which an arbitration agreement might be rendered "inoperative" (none of which applied) including where it is: amended by further agreement; the subject of res judicata; set aside by a court; frustrated or discharged by breach or by reason of waiver, estoppel, election or abandonment or has otherwise been repudiated.

"Interim measures" and "urgent interlocutory" injunction

Her Honour rejected the Asset Trustee's reliance on CAA s 17J (being "court-ordered interim measures")[2] as a basis for restraining the Contractor from referring the Directions Dispute to expert determination until the Jurisdiction Dispute is determined. The Court noted that the power in s 17J is to be exercised only very sparingly and the Asset Trustee failed to articulate why it was justified in this instance.

The case based on urgent interlocutory injunction was that the Asset Trustee would be prejudiced if it were dragged through an expert determination on the Directions Dispute if the expert did not in fact have jurisdiction, and so the Court should determine this issue first. The Asset Trustee advanced various legal grounds to justify the interlocutory injunction sought, including breach of contract, election and estoppel said to arise from the Contractor's attempt to refer the Directions Dispute to expert determination (all of which the Contractor denied).

The Contractor submitted that the injunction sought was neither urgent nor interlocutory. An injunction would mean the Jurisdiction Dispute was determined on a final basis prior to referral of the Directions Dispute, and this would subvert the contractually agreed process, as the expert was capable of determining jurisdiction.

The Court agreed with the Contractor that there was no urgency, as the expert could determine jurisdiction. The Asset Trustee would undoubtedly incur costs in defending the Directions Dispute if the expert incorrectly determined they had jurisdiction, but the contractually agreed process envisaged that the parties would bear such costs. Granting the injunction would permit the Asset Trustee to resile from the "contractual bargain" and should not, therefore, be granted.

Conclusion

The Asset Trustee advanced several creative legal arguments in the hope of circumventing or modifying the agreed contractual process, none of which were accepted by the Court.

This decision is a timely reminder that courts will look to hold parties to their "contractual bargain" where they have agreed an alternative dispute resolution process.

The decision demonstrates the resilience and reliability of nominating determinative alternative dispute resolution options in the context of large procurement contracts.

Disclosure

Piper Alderman acted for the Fourth Defendant in this litigation, Resolution Institute, which filed a submitting appearance.

This article has been written for general educational purposes only, and is not to be taken as legal advice. Should you require legal advice on your specific situation, ***please contact Robert Riddell on +61 2 9253 3858 or rriddell@piperalderman.com.au.***

[1] Not including the Fourth Defendant, Resolution Institute, which filed a submitting appearance.

[2] "***Court-ordered interim measures*** *(1) The Court has the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts. (2) The Court is to exercise the power in accordance with its own procedures taking into account the specific features of a domestic commercial arbitration.*"