SQUIRE PATTON BOGGS

Carving Out

Enforcing Payment Due Under a Payment Certificate Capable of Summary Relief

Introduction

A recent decision of the Supreme Court of Western Australia's Court of Appeal has considered claims to enforce payments due under a contract that are "carved out" from the operation of a dispute resolution provision commonly used in Australian construction contracts that prescribe arbitration.

Clause 42 of AS4902-2000 provides for a dispute resolution process commenced by a notice of dispute, then a conference between the parties and, if the dispute is not then resolved, arbitration. Clause 42.4 provides a "carve-out" from arbitration as follows: "Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the Contract or to seek injunctive or urgent declaratory relief."[1]

The Court of Appeal in *Tianqi Lithium Kwinana Pty Ltd v MSP Engineering Pty Ltd [No 2]* [2020] WASCA 201 found that the reference to "proceedings to enforce payment due under the Contract" is a reference to court proceedings that are capable of summary determination.

The court's decision was given in the context of an appeal from a decision of a Master in *MSP Engineering Pty Ltd v Tianqi Lithium Kwinana Pty Ltd* [2020] WASC 251 where the Master rejected Tianqi Lithium Kwinana Pty Ltd's (Tianqi) application for a stay of court proceedings brought by MSP Engineering Pty Ltd (MSP) to enforce payment of amounts certified in payment certificates.

In its reasons rejecting the appeal, the court also provided its views on the operation of sections 8(1) and 9 of the Commercial Arbitration Act 2012 (WA) (the Act).

Background

Tianqi engaged MSP to design and construct a lithium hydroxide plant in Kwinana, Western Australia (the Project). During the course of the Project, Tianqi failed to pay MSP approximately AU$30 million certified by the Superintendent under two contracts in amended AS4902-2000 form (Contracts).

MSP brought proceedings in the Supreme Court of Western Australia in order to obtain summary relief for payment of the amounts certified by the Superintendent. In doing so, MSP relied upon clause 42.4 of the Contracts.

Tianqi subsequently commenced arbitration under the Contracts, and brought an interlocutory application in the Supreme Court seeking a stay of the court proceedings and a referral of the matter to the newly commenced arbitrations, pursuant to section 8(1) of the Act.[2]

The application asserted that on the proper construction of the Contracts' dispute resolution clause, the claim for payment was required to be referred to arbitration. In particular, Tianqi relied on section 8(1) of the Act, contending it requires the court to refer a matter to arbitration when the matter, as here, is the subject of an arbitration clause.

MSP contended that the proceedings before the court were "proceedings to enforce payment due under the Contract" and, therefore, were expressly carved out of the dispute resolution provision's referral to arbitration.

Having considered the nature of, and need for, timely cash-flow in construction contracts, the Master concluded that once an amount was certified as payable under the Contracts, it was "contractually not in dispute", and, therefore, a party was capable of seeking summary judgement to enforce the payments.

The Court of Appeal Decision

Tianqi appealed the primary decision on four grounds, including that:

- The Master misconstrued the carve-out in clause 42.4
- The Master's interpretation of clauses 37 and 42 of the Contracts and section 8 of the Act gave rise to an error in law and that he should have exercised his discretion to refer the proceedings to arbitration

The Court of Appeal dismissed the appeal after determining that the matters fell within the scope of the arbitration clause's carve-out in clause 42.4.

The Court of Appeal found that the reference to "proceedings to enforce payment due under the Contract" is a reference to proceedings such as those that were before the Master, namely, that are capable of summary determination. The test for this consideration is whether the proceedings were "proceedings in which there is no objectively triable issue that would form a proper basis for defending a summary judgment application."

1 This carve-out clause is common to the suite of conditions of contract in the AS4000-1997 series and is also present in AS2124-1992 and AS4300-1995.

2 By section 8(1) of the Act: "A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement of the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed." An alternative basis for the stay application was the inherent jurisdiction of the court.

The Court of Appeal also considered that it would be inconsistent with the paramount object of the Act to construe it as requiring that a dispute must be referred to arbitration in circumstances where the parties agreed that it could, but was not required to be, referred to arbitration.

As well, it was observed that the real significance of clause 42 is that it is a contractual expression of the parties' intention as to the balance between arbitration and litigation, which transcends the operation of section 9 of the Act.[3]

On the facts before the Court of Appeal, it was held that the Master did not err in failing to find that MSP's claim was not capable of summary determination.[4] The Court of Appeal also found there was no basis to re-exercise its inherent discretion.

Key Takeaways

The Court of Appeal has clarified the scope of the operation of the standard carve-out provision in clause 42.4 of the AS4000 suite of conditions.

When considering the mandatory requirements in section 8(1) of the Act for matters to be referred to arbitration when dispute resolution provisions contain an arbitration agreement, courts will look at the intention of the parties who include express carve-outs for summary relief. That is, the court will look at whether the contract mandates that the particular issue go to arbitration, or whether it prescribes that the matter is of a nature that can be determined by litigation.

When drafting dispute resolution clauses where different processes are intended for different types of disputes, care should be taken to clarify the scope of operation of each process.

This case serves as a timely reminder of the significance of a superintendent's certification of payment claims, and the payment obligations and the dispute process that flow from certification.

Contacts

Greg Steinepreis
Partner, Perth
T +61 8 9429 7505
E greg.steinepreis@squirepb.com

Joseph Perkins
Associate, Perth
T +61 8 9429 7408
E joseph.perkins@squirepb.com

Tenille Kearney
Associate, Perth
T +61 8 9429 7455
E tenille.kearney@squirepb.com

3 By section 9 of the Act, "It is not compatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure or protection and for a court to grant the measure."

4 After the Court of Appeal decision, the pending summary judgement application was heard and determined by the Master, and the Master found in favour of MSP: *MSP Engineering Pty Ltd v Tianqi Lithium Kwinana Pty Ltd [No.2]* [2021] WASC 39. That decision is now on appeal.