

AGE OLD BUILDERS PTY LTD V SWINTONS PTY LTD [2003] VSC 307

Supreme Court of Victoria – 21 August 2003

FACTS

Age Old Builders Pty Ltd ('Age Old') entered into a major domestic building contract with Swintons Pty Ltd ('Swintons') for the construction of four townhouses in Acland Street, South Yarra. Disputes began between the parties and the parties agreed to appoint a building consultant to conduct an independent assessment of the quality of the work, and to provide a determination with respect to the alleged defects. The determination was completed. Additional disputes arose in respect of extensions of time, extension of time costs and liquidated damages, and the parties agreed to appoint the building consultant to determine the disputes. Before the second determination was made Swintons advised the building consultant that the agreement for him to resolve disputes pursuant to the second determination was void on the grounds of section 14 of the Domestic Building Contracts Act 1995 ('the DBC Act') which states "Any term in a domestic building contract or other agreement that requires a dispute under the contract to be referred to arbitration is void."

Swintons then issued proceedings in the Victorian Civil and Administrative Tribunal ('the VCAT'). The building consultant made his determination in favour of Age Old in the amount of \$125,679.30. Age Old then sought to uphold the second determination. VCAT determined that the agreement to have the building consultant make an expert determination was void, for contravening section 14 of the DBC Act. Age Old appealed to the Supreme Court on the grounds that the agreement was not caught by section 14 because it was an agreement referring a dispute to expert determination and not to arbitration.

ISSUES

Can arbitration be employed as the means of determining domestic building disputes?

What is the distinction between arbitration and expert determination?

FINDING

The Court found that parties agree to have an existing dispute under a domestic building contract arbitrated. As to the distinction between an expert and an arbitrator the Court held that the critical characteristic is whether the expert undertakes an inquiry in the nature of a judicial inquiry. The Court also identified a series of attributes including lack of immunity for being given to the expert, the powers given to make orders giving effect to the determination, the requirement to give reasons and the power to govern his own proceedings.

QUOTE

The Honourable Justice Osborn stated at paragraph 53:

"The consequence of construing s.14 in accordance with the view taken by the Tribunal is that parties could never validly agree to have an existing dispute under a domestic building contract arbitrated. This would

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very materially infringe on the right of the parties to contract when fully informed of all relevant considerations. It is not difficult to conceive of circumstances in which parties might agree that arbitration of a specific dispute was the most convenient means of resolving it.”

Further [paragraph 69] “In my opinion the Rules simply do not provide for an inquiry in the nature of a judicial inquiry. After the conclusion of the initial submission process no adversarial process is envisaged. Further the process thereafter is at the discretion of the expert. Most significantly the parties do not have the fundamental right to a hearing. It is not to the point that this process requires a “determination”, no referral to an expert for determination could be expected to do otherwise than envisage a rational determination. Nor is it to the point that the expert is required to make his determination according to law and in accordance with procedural fairness. The parties and the expert are entitled to agree as to these matters and they are subsidiary to his essential role. The notion of procedural fairness is a flexible one applicable to a process which falls short of an inquiry in the nature of a judicial inquiry. Therefore, the fact an expert may be bound to accord procedural fairness (as that notion is applicable to the particular case) to the parties does not necessarily give the process the character of a judicial inquiry or an arbitration.”

IMPACT

This case stands for the proposition that an agreement for expert determination of an existing dispute will be enforceable in resolving domestic building disputes and that the distinction between an expert and arbitrator is one of substance.

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