

BARROB PTY LTD (IN LIQUIDATION) V OV PETERS PTY LTD (1992) BC9301177

WA Supreme Court - 19 January 1993

FACTS

This was an application by the defendant to stay proceedings in proceedings commenced by the plaintiff. The application was made pursuant to section 53 of the Commercial Arbitration Act 1985 (WA).

The plaintiff had agreed to carry out civil works for the defendants and the relevant contract was AS2124-1986. A dispute arose, and various breaches of contract were alleged by both parties. Clause 46 of the contract provided for disputes between the parties to be referred to the superintendent and then provided for arbitration when one party was dissatisfied with the decision of the superintendent.

The plaintiff alleged that the superintendent had failed to comply with the requirement to resolve the dispute by arbitration.

The plaintiff opposed the application for a stay on the basis that there was no valid arbitration agreement for the purpose of the Act between the parties.

ISSUES

The court had to decide whether the dispute resolution clause in AS2124-1986 giving a dissatisfied party a right to elect to proceed to arbitration was a valid arbitration agreement within the meaning of section 53 of the Act.

FINDING

Clause 46 of AS2124-1986 was not an arbitration agreement for the purpose of the Act. Therefore, the Court could not stay the proceedings.

In any event the defendant was not, at the time the proceedings were issued or at judgment, able to do all things necessary for an arbitration to be conducted.

QUOTE

Master NG said:

“CL 46 in my view, does not bar either party from resorting to an action; however, only the party who is dissatisfied with the decision of the superintendent, may refer the matter to arbitration and the circumstances under which such referral may be made are clearly set out in clause 46. The plaintiff could not have made an election by merely referring the matter to the superintendent because the election whether to go to arbitration or not only arises after the matter has been referred to the superintendent.” – page 14 of BC9301177 “No notice was issued by either party referring the matter to arbitration as at the date of issue of the writ of summons in this action. The defendants did not, prior to the issue of the writ, elect to refer any dispute to arbitration, nor did they, since October 1991, when they alleged that the plaintiff had breached

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the contract by ceasing work, elect to refer the matter to the superintendent and therefore to arbitration. They have merely indicated they desire to refer the matter to arbitration.” - page 14 of BC9301177

IMPACT

The courts will not view a decision to refer a dispute to a superintendent appointed under a building contract as an election for the purposes of the Commercial Arbitration Act.

A party who wishes to take such a matter to arbitration must first have the superintendent attempt to resolve the dispute and then refer the matter to arbitration. Only then will the dispute resolution clause be considered an arbitration agreement for the purposes of the Act.

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