620 COLLINS STREET PTY LTD V ABIGROUP CONTRACTORS PTY LTD & ANOR (NO 2) VSC

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In 620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2) Supreme Court of Victoria, Osborn J, Unreported, 14 December 2006, BC 200610448, Justice Osborn affirmed that the principle in Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd (2002) BCL 322 (NSWCA) (Peninsula) applies in Victoria. Justice Osborne's decision follows that of Victorian Chief Justice Warren in Kane Constructions v Sopov (2006) 22 BCL92.

The principle concerns extensions of time (EOTs), in particular clauses that vest in the superintendent the power to grant EOTs even when the contractor is not otherwise entitled to, or has not claimed, an EOT. The courts have held that in contracts containing the Australian Standard style clauses, the power is one that may be exercised in the interests both of a contractor and a principal. A superintendent must act honestly and impartially in exercising the power. Further, if a superintendent fails to grant an EOT, the power to grant an EOT under the clause falls to a court or arbitrator.

A principal wishing to avoid the result reached in this line of cases needs to ensure that in the drafting of the clause that vests the relevant power in the superintendent it is made expressly clear that the superintendent's power to grant EOTs is exercisable at its sole discretion and for the principal's benefit only, and that it owes no duty to the contractor to exercise the power.

BACKGROUND

In August 2001, 620 Collins Street Pty Ltd (Collins Street) and Abigroup Contractors Pty Ltd (Abigroup) entered into a building contract.

The construction of the works gave rise to a series of disputes between Collins Street and

Consider carefully how a superintendent's discretion to grant an extension of time, where the contractor is not otherwise entitled to an extension of time, should be drafted to provide certainty in the application of the clause.

Abigroup. The main issues between the parties turned on the creation of new separable portions and Abigroup's entitlement to EOTs.

The disputes were referred to arbitration. The arbitrator made two interim awards.

Collins Street sought leave to appeal the first interim award on six main grounds under section 38 of the Commercial Arbitration Act 1984 (Vic) (the Act). Collins Street also alleged that the arbitrator was guilty of misconduct in a related proceeding (misconduct proceeding). Several of the grounds of appeal were dealt with in the misconduct proceedings.

JUDGMENT

Collins Street alleged that the arbitrator erred by following the decision in Peninsula. Alternatively, if Peninsula did apply to the present case, the arbitrator erred in exercising the reserve discretion to grant an EOT vested in him by clause 35.5 of the contract.

Clause 35.5 of the contract, a modified version of AS2124 and AS4300, stated the following in its penultimate paragraph:

Notwithstanding that the contractor is not entitled to or has not claimed an extension of time, the superintendent may at any time and from time to time before the issue of the final certificate by notice in writing to the contractor extend the time for practical completion for any reason.'

This clause is often relied on by a principal to grant an EOT where time might otherwise be set at large due to the principal's act of prevention. In Peninsula the court held that the power was one capable of being exercised in the interests both of the owner and the builder, and the superintendent is obliged to act honestly and impartially in deciding whether to use this power, see supra note 2 at 343. Further, the court took the view that there is an implied duty on the superintendent to actually exercise the discretion, when appropriate.

The arbitrator formed the view that Peninsula was decided correctly. Given the use of contracts such as AS 2124 and AS 4300 Australia wide, it was appropriate to apply Peninsula to Victoria where no inconsistent decision existed. Consequently, he exercised his residual power under clause 35.5 to grant an EOT.

Justice Osborn held that the arbitrator was correct in his decision and found that:

- the primary mechanism of clause 35.5 gives the contractor an entitlement to an extension of time, subject to compliance with special conditions;
- the penultimate paragraph reserves a discretionary power to grant an EOT in other circumstances effectively where it is just and equitable to do so;
- such power is expressly directed to situations where 'the contractor is not entitled to or has not claimed an extension of time…';
- the power is expressed to arise on a separate and distinct basis from the provision for the extension of time pursuant to the primary mechanism;
- the grounds for exercise of the reserve power are expressed in the broadest possible terms as 'for any reason'; and
- the potential prejudice to the principal flowing from a failure by the contractor to comply with clause 35.5 is a matter going squarely to the equitable exercise of the arbitrator's discretion.

Justice Osborn rejected Collins Street's argument that clause 35.5 was only to be used in favour of the principal. His Honour found that the parties could have modified the clause to give effect to such a limitation but they did not do so. Further, such a term could not be implied as it did not satisfy the rules in BP Refineries (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (1994) 180 CLR 266. For a term to be implied, it must be necessary to give business efficacy to the contract, so obvious as to go without saying, it must be reasonable and equitable, it must be capable of clear expression and it must not contradict any express terms of the contract. Additionally, Justice Osborn found that it was 'reasonably open' to the arbitrator to deal with certain EOTs under clause 35.5.

Accordingly, the fourth ground for leave to appeal failed.

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