NEW SOUTH WALES

INTERPRETATION OF CONTRACT – CIRCUMSTANCES TO ESTABLISH MEANING OF A TERM*

LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd ([2003] NSWCA 74, New South Wales Court of Appeal, 10 April 2003 per Meagher, Hodgson JJA and Young CJ in Eq)

Interpretation of contract – Evidence of surrounding circumstances to establish meaning of a term – Holding company inducing breach of contract by subsidiary

Facts

The construction group Baulderstone Hornibrook ("Baulderstone") was, through various group companies, part of a consortium established for the purpose of bidding for the development of Melbourne's Colonial Stadium (the "Consortium"). On 30 June 1997, the Consortium submitted two bids to the Victorian government, one of which was a conforming bid and the other a non-conforming bid.

The Baulderstone group companies involved in the Consortium were Baulderstone Hornibrook Pty Ltd ("BH"), Baulderstone Hornibrook International Pty Ltd ("BHI"), Stadium Operations Ltd ("SOL") and Docklands Stadium Consortium Pty Ltd ("DSC"). SOL was a wholly owned subsidiary of BH, and DSC was a wholly owned subsidiary of BHI.

Under a Heads of Agreement entered into on 27 June 1997 between DSC and LMI Australasia Pty Ltd ("LMI"), DSC agreed to appoint LMI as the manager of the Stadium if any of the bids by the Consortium were "successful". Accordingly, LMI was listed in both bids as the Consortium's nominee for manager of the Stadium.

The Victorian government raised two concerns regarding the bids. Firstly, there was a concern that the Consortium had insufficient equity funding and this would expose the government to financial risk. The Consortium addressed this by introducing Seven Network Limited as a substantial equity contributor. Secondly, LMI did not have any direct Australian stadium management experience. The Consortium addressed this second concern by notifying the government that it would approach a venue management company called Spotless to become involved in the management.

Shortly thereafter, on 1 September 1997, the Victorian government announced the Consortium as the successful bidder. On 3 September 1997, the Consortium, through its bid company SOL, entered into an agreement with the Victorian government (and various other parties) that was entitled Stadium Development Agreement. This Agreement set out the terms upon which the Consortium would develop the Stadium.

Under the Stadium Development Agreement, the Consortium was required to appoint a Stadium manager. Despite the Heads of Agreement, LMI was not appointed as manager. On 10 August 1998, a subsidiary of Spotless was appointed manager and LMI was appointed merely as a consultant to the manager.

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LMI made several claims in the Supreme Court against BH, BHI and DSC. For present purposes, there were two key claims.

- That DSC breached the Heads of Agreement by failing to ensure LMI was appointed manager of the Stadium.
- That BH and BHI induced the breach by DSC of the Heads of Agreement. (Note: as DSC was a $2 company, LMI sought to recover damages from BH and BHI).

Barrett J, the trial judge, dismissed the first claim. As the second claim relied on the first one being successful, Barrett J stated that it was unnecessary for him to rule on the second claim. However, his Honour found that even if the first claim was established, the second claim would have been dismissed.

LMI appealed to the Court of Appeal.

Issues

The key issues for the Court of Appeal to determine were the same as two of the issues considered at first instance by Barrett J. These were as follows.

- Were either of the two bids by the Consortium "successful" within the meaning of the Heads of Agreement, such that DSC breached the Heads of Agreement by failing to ensure LMI was appointed manager of the Stadium?
- Were BH, BHI and DSC, all being part of the Baulderstone corporate group, of a "common corporate mind" such that BH and BHI induced the breach of the Heads of Agreement by DSC?

Decision

The Court dismissed the appeal. Young CJ in Eq delivered the main judgment for the Court. In a separate judgment, Hodgson JA stated that he agreed substantially with the reasons of Young CJ. Meagher JA agreed with Hodgson JA.

Breach of Heads of Agreement

In respect of the first issue, the Court agreed with Barrett J's judgment. Barrett J had held that neither of the bids submitted by the Consortium on 30 June 1997 were "successful" within the meaning of the Heads of Agreement. Therefore, DSC had no obligation to ensure the appointment of LMI as Stadium manager and did not breach the Heads of Agreement.

The reason for Barrett J's decision was that the Consortium's arrangements ultimately accepted by the Victorian government and which were reflected in the Stadium Development Agreement were materially different from the arrangements proposed in the bids. They were different in two respects.

- Firstly, a substantial change in the Consortium's funding and financial structure was brought about to alleviate the Victorian government's concerns about financial risk.
- Secondly, the bids had proposed LMI as the Stadium manager whereas the arrangements embodied in the Stadium Development Agreement did not adopt that proposal and left the choice of manager for future decision.

In agreeing with Barrett J's judgment, the Court acknowledged that the word "successful" was ambiguous because of the need to ascertain the aim for which success might be claimed. LMI submitted that due to this ambiguity the Court should consider evidence of surrounding circumstances. LMI argued that the surrounding circumstances established that the mutual intention of the parties to the Heads of Agreement was that the phrase "if the bid is successful"

should be equated with "if we (the Consortium) win the contract", irrespective of whether the arrangements ultimately accepted by the Victorian government differed from the submitted bids.

The Court rejected these submissions. It held that the case law (especially the leading authority of *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 per Mason J at 347-352) established that evidence of surrounding circumstances is only admissible for an *objective* assessment of what the parties understood the words to mean, and not for assessing the *actual and subjective* intentions of the parties – the latter being what LMI effectively asked the Court to do.

However, the Court noted that under present High Court authority there is uncertainty for trial judges as to how much evidence of surrounding circumstances should be admitted. The Court stated that, as a result, trial judges are virtually prevented from excluding this evidence and that the only way to deter people from unduly extending the length of cases by introducing unusable surrounding evidence is for trial judges to make special orders as to costs.

Finally, the Court stated that even if it was accepted that the phrase "if the bid is successful" should be equated with "if we (the Consortium) win the contract", this would be of no assistance to LMI because LMI was at no stage a member of the Consortium.

Inducing breach of contract

In respect of the second issue, which was an academic one given that Barrett J was not required to rule on it, the Court was split on whether to agree with Barrett J's comments.

The trial judge, Barrett J, had held that, if he were to decide the point, neither BH or BHI induced a breach of contract by DSC. In reaching this decision, Barrett J referred to the established principle that the directors of a company cannot be held liable for inducing breach of contract by the company when, acting in the position of directors, they commit the company to a course that results in the breach. This was because directors are *agents* of a company and not in the position of *outsiders* who are able to influence the independent acts of the company.

According to Barrett J, this principle also applies to holding companies within a corporate group context where a holding company has the sole capacity to control all aspects of its wholly owned subsidiaries. Barrett J stated that in such a situation the holding company is not in the position of an *outsider* but exercises its powers "within and through the subsidiary, rather than upon it." Accordingly, neither BH or BHI, as the holding companies of SOL and DSC, induced the breach of contract by DSC.

What his Honour effectively did was equate a holding company with acting as a director of one of its subsidiaries.

Young CJ disagreed with Barrett J's comments, stating that such a rule as suggested by Barrett J could lead to the avoidance of contracts by companies simply acting via subsidiaries. Young CJ stated that the established principle referred to by Barrett J is based on the fact that there is an agency between the directors and a company, and that the company can only act through its agent, the directors. His Honour went on to state that the present case was not one of agency and that equating a holding company with the directors of its subsidiaries is an "imperfect analogy".

However, his Honour was unable to determine whether a breach of contract was induced in this case because:

- firstly, an inducement of breach of contract requires that active steps be taken by the alleged wrongdoer, and in this case anything that the directors of the holding companies did was inaction rather than action; and
- secondly, it was very difficult to determine which company within the Baulderstone group was the wrongdoer.

Although Hodgson JA (with whom Meagher JA agreed) did not refer to the comments of either Barrett J or Young CJ, it appears that he agreed with Barrett J. Hodgson JA stated that "the directors of DSC and SOL are not liable as such for inducing breach of contract" and then referred to the same case authority that Barrett J relied upon for the established principle concerning inducement of contract. Hodgson JA went on to say that in any event, it was not proven that the directors of BH and BHI knew the relevant facts of the breach.

Conclusion

This decision is significant for two reasons.

1. It is a reminder that, when drafting agreements, it is important to always consider the context. Words which appear to have a generally understood meaning may be ambiguous in certain contexts. Where possible, such words should be clearly defined in the relevant agreement.
2. It raises the issue of whether a holding company can be held liable for inducing a breach of contract by a subsidiary company in circumstances where the holding company and the subsidiary have common directors. As the Court did not express a firm view on the issue, there is uncertainty as to the current state of the law.

JUST AND EQUITABLE COMPENSATION – WEDNESBURY UNREASONABLENESS*

The Nardell Colliery Pty Ltd v NSW Coal Compensation Review Tribunal and NSW Coal Compensation Board (NSW Supreme Court, Sperling J, 29 May 2003)

Coal Acquisition Act 1981 – Coal Acquisition (Re-Acquisition Arrangements) Order 1997 – Just and equitable compensation – Wednesbury unreasonableness

Facts and Nature of Action

This case concerned a judicial review of the determination of factor "r" made by the Coal Compensation Review Tribunal on 17 April 2002. The decision of the Tribunal was reported in (2002) 21 AMPLJ at pp 114 to 118.

Factor "r" was part of a formula set out in Schedule 1 of the 1997 Order which provided for the determination of compensation on the basis of a discounted cash flow. Factor "r" was part of the cash flow calculation. It was the revenue received or expected to be received in respect of the coal which would be applied against the reasonably expected tonnage of saleable coal to determine the cash flow prior to it being discounted.

The Tribunal determined that factor "r" should be based on a value of 7/8 of $1.70 per tonne royalty rate for coal adjusted according to the applicable corporate tax rate and no findings were made in respect of front end payments and super royalty. A front-end payment, prescribed base

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