TRUST DISPUTE NO BAR TO ARBITRATION

By **Albert Monichino SC & Adam Rollnik**

Arbitration – scope of arbitration agreement – whether a dispute as to an alleged breach of trust constitutes a "matter" within the scope of an arbitration agreement – proper approach to construction of arbitration agreement – whether the arbitration agreement incapable of being performed – application for stay of proceedings under s 8 of *Commercial Arbitration Act 2012* (WA)

Fitzpatrick v Emerald Grain Pty Ltd [2017] WASC 206

The plaintiffs (the **Growers**), comprised 47 grain growers in WA. They commenced proceedings in the Supreme Court of Western Australia in connection with contracts between each of them and the defendant (**Emerald**) in relation to the placement of grain produced by the Growers into a pool of grain held by and sold by Emerald. The precise characterisation of the contracts, and whether they gave rise to a trust relationship, whereby Emerald held funds received from the sale of the grain on trust for each grower, was one of the main matters in dispute.

Each of the contracts contained an arbitration clause which stated, relevantly:

> Any dispute or claim **arising out of, relating to** or **in connection with** these Terms and Conditions, a Pool Contract[ ] or delivery of Commodities to a Pool, including any question regarding the existence of a contract, the validity or its termination, and which cannot be resolved between the parties, shall be resolved by arbitration in accordance with the GTA Dispute Resolution Rules[ ] in force at the commencement of any arbitration. [Emphasis added]

In the Court proceedings, the Growers sought, among other things, an order for payment to each Grower of their entitlement, and relief pursuant to the Trustees Act 1962 (WA), including the appointment of a new trustee to administer the Trust. Emerald applied for orders to stay the court proceedings and to refer the parties to arbitration pursuant to s 8 of the Commercial Arbitration Act 2012 (WA) (**CAA**) which provides, *inter alia*, as follows:

> **8. Arbitration agreement and substantive claim before court (cf. Model Law Art 8)**
>
> (1) 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 on 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.

This section is based on Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (which forms part of the International Arbitration Act 1974 (Cth)). The same provision is found in the domestic Arbitration Acts enacted in each State and Territory including the Commercial Arbitration Act 2011 (Vic). Accordingly, the relevance of this case extends beyond Western Australia.

Chief Justice Martin identified the matters in issue (at [41]), in connection with s 8 in this case, as follows:

> (a) What is the scope of the arbitration agreement?

(b) Do the proceedings include a matter or matters which are within the scope of the arbitration agreement?

(c) Is the arbitration agreement incapable of being performed?

Scope of the arbitration agreement

TThe Court held that the terms of an arbitration agreement are to be construed by the principles that apply to the construction of commercial contracts generally, that is, the terms must be construed objectively and by ascertaining what a reasonable businessperson would have understood the words to mean by reference to the text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose. Importantly, his Honour said at [45]:

> However, the commercial objectives ordinarily attributed, objectively, to rational businesspeople will generally require the court to adopt a broad, liberal and flexible approach to the construction of an arbitration agreement, to the extent that such an approach is consistent with the words used by the parties.

His Honour went on to consider the effect of the words used in the arbitration agreements to denote the necessary connection with the subject matter of the dispute, namely: "*arising out of*", "*relating to*" or "*in connection with*". In relation to each of these the Court said (among other things):

> (a) **Arising out of**: "*is sufficiently broad to include disputes with respect to the existence of the relevant contract*": [48];
>
> (b) **Relating to**: "*is a term of the widest import which should not, in the absence of compelling reasons, be read down*": [49];
>
> (c) **In connection with**: "*should be construed widely so as to include claims which do not arise out of or pursuant to the relevant contract, but nevertheless have a sufficient degree of connection with that contract*": [50].

Chief Justice Martin concluded at [51] that:

> [A]n ordinary businessperson would understand the arbitration agreement to extend to, and embrace, a very wide ambit of disputes or claims **having at least some degree of connection with**, or relationship to, **the substantive agreement** between the parties [...] [emphasis added]

Do the proceedings involve a "matter" which is the subject of the arbitration agreement?

Next, Martin CJ held that if one or more of the disputes or controversies to be determined in the course of the Court proceedings is a dispute or controversy which can be determined pursuant to the arbitration agreement (the burden of which rests on the applicant for the stay, on the balance of probabilities), then section 8 of the CAA is engaged.

One of the arguments advanced by the Growers as to why the proceedings should proceed in Court was that, on a proper construction of the arbitration agreements, they should not be construed as attributing an intention that claims by growers based on an alleged breach of trust should be resolved by arbitration. In rejecting this argument, the Court said (among other things) that:

- the arbitration agreements are expressed in the widest possible terms;
- the fact that the arbitration agreements do not extend to all persons with an interest in the dispute does not mean they should not be enforced by the Court;
- whether Emerald is a trustee of the proceeds of sale, and if so, whether Emerald is in breach of trust, is clearly a dispute arising out of, relating to, or in connection with the Growers' agreements with Emerald,

and so, unless the arbitration agreement is incapable of being performed (discussed below), the proceedings must be stayed and the parties must be referred to arbitration.

Are the arbitration agreements incapable of being performed?

Finally, the Growers submitted that the nature of the issues raised in the proceedings with respect to the proper administration of the trust, the relief sought with respect to the removal of Emerald as trustee, and the appointment of another trustee in place of Emerald, were not arbitrable, and therefore the arbitration agreements were incapable of being performed (within the meaning of s 8(1) of the CAA). The Growers also submitted that the dispute was not arbitrable because all necessary and appropriate parties could not be joined to the dispute.

The Court noted that the doctrine of non-arbitrability is recognised by Australian law and has been described as:

> resting on the notion that 'some matters so pervasively involve public rights, or interests of third parties, which are the subjects of the uniquely governmental authority, that agreements to resolve such disputes by "private" arbitration should not be given effect'

However, the Court confirmed that it is only in extremely limited circumstances that a dispute that the parties have agreed to refer to arbitration will not be arbitrable. The Court said that the equitable rights in issue in this case depended entirely on the construction of the relevant contracts and in those circumstances the possible characterisation of those rights as equitable did not mean the disputes were not arbitrable.

The Court also held that it is well established that the fact that:

- an arbitrator cannot grant all the relief a court is empowered to grant does not mean that the dispute is incapable of arbitration (and whether the arbitration agreement empowers the arbitrator to grant all the relief which a court might have granted is best determined by the arbitral tribunal); and
- the fact that a "matter" (the subject of proceedings falling within s 8 of the CAA) may affect the interests of others, who are not party to the arbitration agreement, does not result in the "matter" being non-arbitrable.

Accordingly, Martin CJ stayed the proceedings and referred the parties to arbitration.

Comment

This case is important for at least two reasons. First, it reinforces the Courts' preparedness to hold parties to their arbitration agreements. Second, the Court made it clear that a broad, liberal and flexible approach should be adopted in construing arbitration agreements. This approach will help to ensure that parties to disputes who have agreed to arbitrate will be held to their agreement, thereby ensuring that Australia remains an attractive jurisdiction for arbitration.

End Notes

1- A pool contract is a contract between wheat growers on the one hand and the operator of a grain commodity pool on the other, whereby wheat growers pool their wheat with wheat grown by others in order to form large exportable parcels, which are then sold by the operator on behalf of the wheat growers.

2- The dispute resolution rules of Grain Trade Australia.

3- Relying on Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104, 116 [46]-[47].

4- At [90], referring to Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd [2014] WASC 10 at [80] and GB Born, International Commercial Arbitration (Kluwer Law International, 2009) 768.

5- Section 16 of the CAA and Article 16 of the UNCITRAL Model Law.

6- John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451 at [72].

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