

Fluor v Santos - Overrun at Curtis Island

The Supreme Court of QLD has recently had to deal with a dispute between Fluor Australia Pty Ltd (Fluor) and Santos Limited (Santos).

Santos has applied for the court to make a binding determination of the meaning of a contractual clause and sought orders to enforce it.

Fluor brought an application to require that the dispute resolution procedures requiring a series of meetings and the possibility of an agreement as to a method to resolve the dispute.

His Honor described the dispute between the parties as involving a large project to involve the transport and processing of Cole seam Gas to Curtis Island in Gladstone from where it is exported for the original lump sum of 3.7 Billion and having increased under a cost reimbursable arrangement to 5.43 Billion.

Clause 41 in the contract provided for Santos to have substantial access to Fluor's records, accounts and data in any way relevant to the work and Santos brought the matter to court to have that Clause interpreted and enforced.

Fluor contended that the dispute resolution clauses in the contract should be complied with before the proceedings continued.

DISPUTE CLAUSES EXPEDITIOUS

The Judge was then required to decide whether the dispute resolution procedures which Santos had described as "hopeless and very unlikely to produce a result" should be imposed on the parties. The dispute resolution procedures were a structured series of steps of escalating negotiations from the contractor's representative to the dispute resolution representative being more senior officers. The Judge calculated that the enforcement of the terms would require approximately 30 business days.

ESTABLISHED PRINCIPLES UPHELD

The Judge considered the endorsed a number of legal principles that had been determined in previous cases. He agreed with Chesterman J in *Zeke Services Pty Ltd v Traffic Technologies Ltd* that the starting for consideration of the courts discretion is a party should be held to their bargain to resolve their dispute in the agreed manner.

However, a stay will not be granted if it would be unjust. Accordingly, there was a heavy burden on the party seeking to avoid following the dispute resolution Clauses.

Despite the submissions by Santos the compliance with the procedure was unlikely to avoid further litigation.

The Judge agreed the principles adopted by Allsop P in *United Group Rail Services* where he described the ADR provisions as “not empty” and it requires the “honest and genuine assessments of rights and obligations” and it requires that a party negotiate by reference to such.

UK APPROACH SIMILAR

His Honor also endorsed the comments by Colman J in *the Cable & Wireless plc v IBM UK Ltd* where Colman J has considered the enforcement of ADR clauses similar to the enforcement of a reference to arbitration and that a strong clause would need to be shown before a court could be justified in declining to enforce such an agreement. The ADR would have to be a completely hopeless exercise before it was abandoned.

COMMERCIAL SOLUTIONS POSSIBLE

The Judge particularly emphasised the comments that the parties that went into an ADR agreement must be taken to appreciate that mediation is a tool for dispute resolution and is not designed to achieve solutions to reflect precise legal rights and obligations but rather solutions which are mutually commercially acceptable at the time.

PUBLIC INTEREST

His Honor therefor ordered that the parties follow the dispute resolution provisions and commented that the public interest lies in avoiding the potentially unnecessary use of court time reducing the cost of civil litigation to both the public and the litigants, even if the dispute principally concerned a question of the construction of the contract.

His Honor was further reinforced in his decision by his finding that there was nothing to suggest that Santos would be prejudiced by being obliged to comply with its agreement.

CONCLUSION

The case presents a strong judicial statement of the benefit and enforceability of ADR Clauses and also reinforces the duty of parties to ADR Clauses to negotiate and seek to resolve the dispute in good faith by reference to the rights and obligations of the parties.

Accordingly, parties should be keen to ensure that the processes that have been agreed for resolving disputes should be carefully designed as they are usually enforceable.