IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2011-485-2115
[2012] NZHC 472

IN THE MATTER OF	the Arbitration Act 1996
BETWEEN	B J PYE SHEETMETAL 2009 LIMITED Applicant
AND	EDWARD AND MARCIA FORSMAN First Respondent
AND	TMF TRUSTEE SERVICES LIMITED Second Respondent

Hearing: 19 March 2012

Counsel: M Freeman for Applicant
C D Batt for Respondents

Judgment: 21 March 2012

JUDGMENT OF THE HON JUSTICE KÓS

Introduction

[1] An originating application for the appointment of an arbitrator under a building contract. There is a dispute over performance of the contract. The builder (who is claiming further payment) wants to go to arbitration. The owners, presumably, to Court. The contract provides for an "Engineer" to be appointed. His or her principal role is to certify progress payments and completion. But, additionally, all disputes must be referred to the Engineer before they can go on to arbitration. The parties executed the contract naming an individual in that role. They did so despite being advised by him that he would not accept the role.

[2] Now there is a dispute. The builder referred it to the named Engineer. He again declined to act. Is the builder entitled now to refer the dispute to arbitration? Or do the arbitration clauses fall away because there is no Engineer to refer the dispute to in the first place? If so, the dispute must go to Court.

Background

[3] In June 2010 the builder (the applicant, B J Pye Sheetmetal 2009 Limited) and the owners (the respondents, Edward and Marcia Forsman and T M F Trustee Services Limited) entered a building contract. The builder was to modify an ice-making plant at Grenada North, a suburb north of Wellington. The contract price was $44,744 plus GST.

[4] The contract is a lump sum contract. It imports the general conditions of contract in NZS 3910: 2003 Conditions of Contract for Building and Civil Engineering Construction. Clause 13 sets out the dispute resolution provisions. Shorn of inessentials, they are as follows.

[5] First, the *Engineer*: every dispute or difference concerning the contract shall be referred to the Engineer: clause 13.2.1. The Engineer has certain powers to call meetings and (with the consent of the parties) refer any disputed question to an agreed expert. Those powers apart, the Engineer is to give a formal decision within 20 workings days: cl 13.2.4. Subject to cls 13.3 (mediation) and 13.4 (arbitration) that decision is final and binding.

[6] Secondly, *mediation*: if either party is dissatisfied with the Engineer's decision, or if no decision has been given by the Engineer within the time prescribed in cl 13.2.4, then either party may require the dispute to be referred to mediation. Slightly unusually, the mediator may decide the dispute if invited to do so by both parties: cl 13.3.4. That decision will be final unless either party then gives notice within 10 working days rejecting the mediator's decision. In that event, or if no agreement has been reached as a result of mediation within two months of the reference to mediation, either party may refer the dispute to arbitration.

[7] Thirdly, additional or alternative to mediation, there is *arbitration*. Clause 13.4.1 provides that:

> If either: (a) the Principal or the Contractor is dissatisfied the Engineer's decision under 13.2.4 or (b) no decision is given by the Engineer within the time prescribed by 13.2.4; then either the Principal or the Contractor may by notice require the matter in dispute to be referred to arbitration.

If (b) applies – i.e. non-decision – the reference must be made within one month after the time prescribed in cl 13.2.4: cl 13.4.2(a). A sole arbitrator is to be appointed. If the parties cannot agree, the provisions of the Arbitration Act 1996 apply. The contract does not provide a default appointment authority, such as the President of the New Zealand Law Society or of the Institution of Professional Engineers New Zealand. Rather Article 11(4) of the First Schedule of the Arbitration Act 1996 will apply: the High Court has the default power of appointment. Article 11(5) provides that:

> A decision on a matter entrusted by paragraphs (3), (4) or (6) to the High Court shall be subject to no appeal. The Court, in appointing an arbitrator, shall have due regard to any qualifications required by the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator ...

[8] It is common ground that the contract named as Engineer a Mr Ignatius Black of Sylvester Clark, consulting engineers. The following points are clear:

(a) Mr Black undertook the design work for the contract;

(b) he is named on the face of the contract as "Engineer";

(c) before the contract was executed Mr Black advised the parties that he was not prepared to accept the role of Engineer under the contract;

(d) the parties nonetheless proceeded to enter the contract naming Mr Black as Engineer – i.e. notwithstanding his declinature of appointment; and

(e) the parties performed the contract. All certification duties which would otherwise have been undertaken by the Engineer were undertaken instead by Mr Forsman, the owners' representative.

[9] Mr Black's position is made clear in an email sent on 1 December 2010, following an attempt by Mr Pye to appoint him to undertake an engineering review under cl 13.2.1 of the contract. Mr Pye is a director of the applicant builder. Mr Black responded:

> I have not been acting in the position of "Engineer" to the contract as per NZS 3910 description. Meetings, programmes and progress payments etc have been between you and Ed Forsman.
>
> I or Sylvester Clark have not been involved in the establishment of the contract or sighted a signed contract agreement. We were involved in the design and documentation of the works. We were also involved in requesting quotes that included a commitment to complete the works to a tight programme. We note that on 19 April you copied us in on an email to Ed Forsman and included a one page "contract" indicating that I was the "Engineer" in the NZS 3910 sense. At the time I discussed this with you and indicated we would only review the works relating to the structure and confirmed to Ice Point that this had been completed. I indicated to you that I was not willing to be "Engineer" for the contract as the contract was between B J Pye Sheetmetal and Ice Point and there were a number of items that were not engineering related and we would not be certifying these.
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> We have not been involved in the review and approval of payments. Our involvement has been construction monitoring relating to the structure and ensuring that these were completed as per our design.

[10] The contract work was performed between May and December 2010. A dispute has arisen between the parties as to whether certain works are to be charged as variations, or form part of the quoted contract works. There is another dispute as to alleged defects. These appear in part to have been rectified by a different builder. Mr Forsman goes into these matters in some detail in his affidavit. Those details do not matter for present purposes. I am concerned only with the dispute resolution process.

[11] On 30 November 2010, as I have already indicated, Mr Pye sought to refer the dispute for "formal review" (under cl 13.2.1) to Mr Black. He did not get very far. Mr Black declined to undertake the review, for the reasons set out in [9] above.

[12] It appears the parties then discussed the possibility of undertaking mediation. The record of emails and exchanges between the parties before me is incomplete. It appears that in December 2010 Mr Pye proposed that the parties go to either mediation or arbitration. On Christmas Eve 2010 Mr Forsman demurred. He insisted that the Engineer's review provided for in cl 13.2 be undertaken. Despite the fact that Mr Black had declined to accept the reference when Mr Pye had referred the dispute to him on 30 November 2010, Mr Forsman proposed that Mr Black undertake that exercise. Mr Pye responded the same day. It appears that frustration levels on both sides were rising. He noted Mr Black's refusal to undertake the review previously. He felt the dialogue between the parties was no longer meaningful. He saw "no alternative" but to engage an arbitrator to determine the issues.

[13] Mr Forsman took two days off for Christmas and then returned to the keyboard on 27 December 2010. His email records his recollection of the exchange of emails regarding the status of Mr Black. He continued, "I tended to agree with the position because he was not a party to our agreement in playing that specific role, up-front." Nonetheless Mr Forsman insisted that an Engineer's review still take place. He regarded it as an "essential pre-requisite" for any meaningful mediation or arbitration. The same day Mr Pye responded. He said:

> The Engineer's review under the terms of the contract cannot take place on the basis that the Engineer as defined in the contract documents has disputed his role in that position, which is now acknowledged by all concerned.

Mr Pye wished to press on with arbitration.

[14] There is then a gap in the correspondence until March 2011. It then appears that Mr Forsman had proposed mediation (with a Mr Miller[1] as mediator) – but on the basis that his decision be final. That was not what the contract provided. It will be recalled[2] that although the parties could invite the mediator to make a decision, either party could nonetheless challenge that decision and go to arbitration. Mr Forsman had no appetite for immediate arbitration. He insisted that the contract

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1 Another of the members of the Sylvester Clark engineering firm.

2 See [6] above.

did not permit arbitration unless an Engineer's review had occurred. He again pressed the case for Mr Black to be appointed to undertake that task.

[15] On 24 March 2011 Mr Pye wrote to the respondents serving notice that he wished to proceed to arbitration.

Application

[16] Almost 12 months to the day after the builder requested appointment of an arbitrator, the disputed question of whether an arbitrator should be appointed is before me.

[17] On 13 October 2011 an application was filed by the builder. It was brought under Article 11 of the First Schedule of the Arbitration Act 1996 and High Court Rules 7.23 and 19.5. It seeks an order appointing an arbitrator to determine the disputes, and costs.

[18] The owners oppose. The grounds set out in their notice of opposition are that the contract requires every dispute to be referred for Engineer's review, and that an arbitrator may only be appointed after reference of dispute to the Engineer. The notice of opposition contends:

> An Engineer has not been appointed and an enforceable contractual right to arbitration does not arise.

It also submits that the time for referral of a dispute to an Engineer has now expired.

Issues

[19] This application raises four issues:

(a) Issue 1: Does the dispute have to be referred to an Engineer before it can be referred to arbitration?

(b) Issue 2: If "Yes", was that done?

(c) Issue 3: Was the reference to *arbitration* made within the prescribed time?

(d) Issue 4: If "No", is the delay excusable?

Issue 1: Must dispute be referred first to an Engineer?

Submissions

[20] For the builder, Mr Matthew Freeman submits that the parties have nominated an "Engineer". For contractual purposes the Engineer is Mr Black of Sylvester Clark. Mr Black's consent is not needed; he is not a party to the contract. The parties appointed him knowing that he did not wish to be appointed. The dispute was duly referred to Mr Black by email on 30 November 2010. Mr Black declined involvement. Accordingly he "made no decision" as provided for in cls 13.2.4 and 13.4.1. The builder is entitled to proceed to either mediation or arbitration. It has opted for the latter.

[21] Mr Freeman submits that the case of *Con Dev Construction Limited v Financial Shelves (No 49) Limited*,[3] on which the respondent relies, is distinguishable. I will discuss that case in more detail shortly. Mr Freeman submits in short that in that case no Engineer had ever been agreed upon, to whom a dispute could be referred. Here one had, even if it was likely that he would not act.

[22] Alternatively, Mr Freeman submits if there has not been a reference to the Engineer, then the parties have "by their communication and conduct ... waived the requirement of an Engineering review as a pre-requisite to proceed to the next stage of the dispute resolution process". Mr Freeman submits that the parties' action in moving towards mediation between December 2010 and March 2011 "evidences a mutual reliance on the understanding that the Engineer review stage had either been fulfilled or was not a necessary prerequisite to move into the next stage".

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[3] *Con Dev Construction Limited v Financial Shelves (No 49) Limited* HC Christchurch CP 179/97, 22 December 1997.

[23] For the owners, Ms Christine Batt submits (consistently with the notice of opposition) that Mr Black was not the Engineer for the purpose of the contract. That is because he refused to accept appointment before the contract was entered. She submits that a refusal by Mr Black to undertake the review on the basis that he was not the Engineer was "not the equivalent of the appointed Engineer making no decision." Ms Batt submits that the builder is trying to have it both ways in submitting that there *was* an Engineer, and yet on the other hand saying in Mr Pye's affidavit that:

> The contract on 2 June 2010 was signed by the parties despite Mr Black's role not being determined and no other Engineer being involved.

[24] Ms Batt relies on the decision of Master Venning (as he then was) in *Con Dev Construction*. That case, she says, involves similar contractual provisions to ours. No Engineer was specified in the contract, none was appointed, and no dispute or difference was referred to an Engineer (there being no one to refer to). She submits that the effect of the decision is that strict compliance with the dispute resolution provisions of the contract is required before the right to arbitrate can be exercised.

[25] As to waiver, Ms Batt submits that the exchange of correspondence shows there was no intention by Mr Forsman to waive the Engineer's review. So it could not be said that there was unequivocal evidence of the waiver of contractual rights by the owners.

Analysis

[26] It is convenient to start with a decision in *Con Dev Construction*. The parties had entered into a contract of the construction of 12 townhouses in Christchurch. General Conditions of Contract NZS3910:1987 were to apply. Special conditions of contract provided for an Engineer to be agreed by the parties. That appointment of necessity was to post-date entry into the contract. The scheme of cl 12 of NZS 3910: 1987 is otherwise similar to the contract in the present case. Every dispute or difference had to be referred to the Engineer in the first instance. Following the entry into the contract the parties discussed who the Engineer might be. The owner

promoted a Mr Bluck as Engineer. The builder would not accept him. No Engineer was agreed upon or appointed in fulfilment of the special conditions of contract. No dispute or difference under the clause was ever referred to him. Master Venning said:

> ... in my view the failure to appoint the Engineer and refer the dispute to him creates a fundamental difficulty ... which the plaintiff cannot overcome. The parties primarily agreed to be bound by the conditions of contract. Those conditions of contract require the appointment of an Engineer. The [builder] apparently took no steps to appoint an Engineer and did not accept the Engineer promoted by the [owner].
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> The standard NZS3910: 1987 clearly contemplates that the appointment of an arbitrator only follows on the occurrence of one of two events – first, if one of the parties is dissatisfied with the Engineer's decision or second, if the Engineer fails to give a decision within ten working days. It is not enough to say that failure to appoint an Engineer is equivalent to the Engineer failing to make a decision.

[27] Later he said:

> For the above reasons I conclude that if the parties had not appointed an Engineer and referred their dispute to an Engineer there was no contractual right on the plaintiff's behalf to seek arbitration. Accordingly the plaintiff cannot rely on the general provisions of cl 11 of the First Schedule to provide for the appointment of an arbitrator. The parties agreed upon procedure. The plaintiff, who failed to comply with that appointment procedure, cannot now be entitled to insist upon the appointment of an arbitrator by the Court.

[28] It will be seen there are some key points of distinction between the contract and the circumstances in *Con Dev Construction* and those applying in this case. First, the contract in *Con Dev Construction* provided for ex post facto appointment of an arbitrator. There was no agreement as to the identity of the arbitrator in that case. There was no one to whom the dispute could be referred. Secondly, in the present case, however, the parties had purported to appoint Mr Black. They agreed in the contract entered on 2 June 2010 to appoint him to that role, despite knowledge that he would not accept or perform the role. I will discuss, shortly, the significance of that and how as a matter of law it is to be regarded. Thirdly, in *Con Dev Construction* the builder (the party seeking to refer the dispute to arbitration) had completely failed to engage on the question of who should be appointed as Engineer. The owners had proposed Mr Bluck. The builder neither agreed to Mr Bluck nor

proposed someone else, nor yet engaged on the appointment process. Despite that it sought to bypass that stage and arbitrate. No such criticism can be pointed at the builder in this case. For those reasons, the *Con Dev Construction* case is somewhat different to the present case.

[29] How then should the law look at an agreement where (1) the terms of that agreement require nomination of an Engineer (who is not to be party to the contract); (2) the Engineer is integral to the dispute resolution process in cl 13 of the contract (as well as undertaking other tasks provided by the contract); and (3) the parties know in advance of entering into the contract that their joint nominee is unwilling to accept appointment?

[30] No question of mistake arises; the parties know exactly what the score is before they enter the agreement. They are not mistaken as to anything. Nor is it a case of frustration: it is not a case of an unforeseen contingency arising after entering into an agreement, and nor does the event (Mr Black's ultimate refusal to perform as Engineer) make a "radical difference" to the intended performance of the contract.[4] His is an essentially mechanical role which does not underpin the whole contract. And nor is it a case where the parties have in effect varied the formal contract *before* conclusion. That was the case in *Brikom Investments Limited v Carr*,[5] but not here. That case concerned a pre-contractual representation inconsistent with the formal contract subsequently entered. The pre-contractual representation was treated by a majority of the Court of Appeal as being enforcable as a prior collateral contract.[6]

[31] To give any sensible effect to the contract within this factual matrix, either of two possibilities must apply. The first possibility is that Mr Black was indeed the Engineer for the purposes of the contract – in the sense that the parties agreed that reference could be made to him. If he accepted reference, contrary to his prior intimation otherwise, the substantive provisions of cl 13.2 would apply. If not (and clearly the parties could not compel him to perform the role as he was not a party to

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4 *Davis Contractors Limited v Fareham UDC* [1956] AC 696, 729 per Lord Radcliffe.

5 *Brikom Investments Limited v Carr* [1979] QB 467 (CA).

6 See *Chitty on Contracts*, (30th ed, Sweet & Maxwell, London 2008) at [3-080]; Treitel *The Law of Contracts* (13th ed, Sweet & Maxwell, London 2011) at [3-065] and Wilken & Villiers *The Law of Waiver, Variation and Estoppel* (2nd ed, Oxford University Press, Oxford, 2002) at [2.10]–[2.13].

the contract), then no decision would be made by the nominated Engineer within the time required in cl 13.2.4. The parties would then be free to proceed either to mediation or arbitration in accordance with cls 13.3.1(b) or 13.4.1(b).

[32] The alternative option is that there is no Engineer for the purposes of the contract at all. But in that case the formal expression of the contract will need to be rectified. It provides for an Engineer. There is no Engineer. The Court would need to consider carefully how to go about the exercise of rectifying the contract. I received no submissions on that possibility and I forbear from undertaking the exercise even indicatively. However the object of any rectification is to revise the defective written form to best achieve the presumed mutual intent of the parties. In doing so there is no reason apparent to me why the consequence would be to remove cl 13 – the dispute resolution provisions – altogether. More likely cl 13.2 only would fall away. The rest would be revised modestly to reflect the absence of the Engineer wrongly provided for.

[33] In this case the builder contends for the former option – i.e. that in [31]. The owners, on the other hand, take a position that I find fundamentally unsatisfactory. The owners contend that there is no Engineer for the purpose of the contract, but the contract must still be read as if there was one. No Engineer (who would now have to be agreed on anew), no arbitration. That stance really makes little sense. Certainly it cannot accord with a sensible objective inference of the parties' mutual intentions. It is prey to the very difficulties incurred in *Con Dev Construction.* The parties would need to agree on the new Engineer. What would happen if they could not? There is no default mechanism for that role in the contract.

[34] I have little difficulty in concluding that the former position – i.e. in [31] – is the correct interpretation of the contract. First, it gives as much effect as possible to the parties' joint decision to nominate Mr Black as Engineer despite his unwillingness to perform the role. As I have already said, they could not compel him to perform the role. But nominating him left open a mechanism to bring back into the role the engineer most familiar with the project – if he later changed his mind and was prepared to act. Secondly, it appears that Mr Black's stance may not have been one of outright rejection. I have set out at [9] what he said when the

dispute was referred to him in November 2010. It appears that he was at least willing to undertake a limited review. And, as the evidence shows, Mr Forsman continued to hold out hope that Mr Black could be prevailed upon to undertake the cl 13.2 review in December 2010, and again in March 2011. Thirdly, the Courts are reluctant to conclude that the parties will have erred in expressing their contractual bargain if an objectively logical and attractive alternative meaning can be found. One which is at least consistent with the apparent intent of the parties to provide for alternative dispute resolution in the terms provided in cl 13, regardless of their preferred nominee's reluctance to participate.

[35] The contract provides for initial reference of disputes to an Engineer, and the parties had indeed appointed one.

[36] It follows that the answer to Issue 1 is "Yes".

[37] In the circumstances it is unnecessary for me to deal with Mr Freeman's argument that the parties waived the obligation to refer the dispute to an Engineer. But I can say that it is not an argument I would have acceded to.

Issue 2: Was the dispute referred to an Engineer?

[38] There can be no doubt as to this issue. Mr Pye wrote to Mr Black on 30 November 2010. He referred the dispute with the owners to his review, expressly pursuant to cl 13.2.1. That Mr Black declined the reference is no more material for the purposes of cl 13.2 than if he had accepted the reference but not produced his decision within 20 working days.

[39] The answer to Issue 2 is "Yes"

Issue 3: Was the reference to arbitration made within the prescribed time?

[40] Again, there can be no doubt as to this issue. Where the Engineer fails to make a decision within the requisite 20 working days in cl 13.2.4, any reference to arbitration must be made within one month of the expiry of that period:

cl 13.4.2(a).[7] That is, more or less, within two months of the dispute first being referred to the Engineer.

[41] It is self-evident that that has not occurred. The dispute was referred to Mr Black on 30 November 2010. The reference to arbitration occurred only on 24 March 2011. It was out of time.

[42] The answer to Issue 3 is "No".

Issue 4: If the reference to arbitration is out of time, is the delay excusable?

[43] Clause 7(1) of the Second Schedule of the Arbitration Act 1996 provides:

> Where an arbitration agreement provides that no arbitral proceedings are to be commenced unless steps have been taken to commence the proceedings within the time specified in the agreement, the High Court or a District Court, as the case may be, may, notwithstanding that the specified time has expired, extend the time for such period as it thinks fit, if, in its opinion, undue hardship would otherwise be caused to the parties.

The Second Schedule applies to domestic arbitrations unless the parties expressly exclude them.[8] There was no such exclusion here. Accordingly cl 7(1) applies here. I should add that cl 7(2) provides that "an extension may be subject to any such conditions as the justice of the case may require".

[44] I received no submissions specifically on this power. However I discussed with Ms Batt at some length just why it was that the owners were opposed to arbitration. That, after all, is the net position they are taking: see [18] and [23] above. Yet if this dispute goes to Court, it will take longer and the parties will not have the benefit of a technically-trained decision-maker. It is fair to say that a good reason for the owners' stance did not readily emerge. They are opposed to the cost of arbitration. However not so long ago they wanted an Engineer's review as a prerequisite to arbitration. They are said to be frustrated by the delays that have occurred. However they will be more frustrated still if this case has to be litigated rather than arbitrated.

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7 See [7] above.
8 Arbitration Act 1996, s 6.

[45] No prejudice from extension of time under cl 7(1) can be identified. The period involved is not long. Not more than seven weeks. The arbitration notice has already been served. It is not as if the owners have been waiting for it from the beginning of February 2011. There was good and excusable reason for the delay given the dispute as to process that developed after Mr Black's email of 1 December 2010. The builder did exactly the right thing to issue its arbitration notice regardless in March 2011. The real delays in this case have been due to the owners' insistence on a legal position that I have found cannot be sustained.

[46] The answer to Issue 4 is "Yes". I extend time for issue of the arbitration notice served on or about 24 March 2011 accordingly.

Disposition

[47] The builder's application is granted.

[48] Anticipating that event, counsel asked me to reserve formal exercise of my power to appoint under Article 11(4). Parties are to confer. They are either to agree an appointee, or file memoranda as to appropriate candidates.

[49] The applicant will have costs on a category 2 band B basis.

Stephen Kós J

Solicitors:
Thomas Dewar Sziranyi Letts, Lower Hutt for Applicant
Tripe Matthews & Feist, Wellington for Respondents