THE FUNCTION OF PLEADINGS IN ARBITRATION HEARINGS

Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd, **Western Australian Supreme Court [2000 WASC 141] & [2000 WASCA 255] Ipp, Wallwork, Anderson JJ**

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Ortiz Investments Pty Ltd ('Ortiz') brought an arbitration against Oldfield Knott Architects Pty Ltd ('Oldfield Knott') under a contract for architectural services. This arbitration became the subject of an application to the Supreme Court of Western Australia for removal of the Arbitrator on the ground of technical misconduct. Hasluck J refused this application on 31 May 2000, but on Appeal the Full Court took a different view and on 12 September 2000 allowed the Appeal and removed the Arbitrator. This case demonstrates the importance of pleadings in a formal arbitration where both parties put forward detailed pleadings.

THE FACTS

Ortiz engaged Oldfield Knott in connection with the construction of a proposed residence for the Principals of the company. To carry out the building work, Ortiz entered into a standard form building contract dated 18 September 1997 with Gatt Constructions Pty Ltd ('Gatt').

Gatt commenced the building work, but in the course of construction of the residence became insolvent and went into voluntary liquidation. This posed problems for Ortiz, both as to the adequacy of the work already carried out by Gatt and in regard to the cost to complete the building.

This naturally led to disputes arising between Ortiz and Oldfield Knott as to the responsibility for the costs involved. Those disputes were referred to arbitration under the contract between the parties for architectural services.

THE PLEADINGS

The primary claim pleaded by Ortiz against Oldfield Knott alleged that Oldfield Knott (in breach of its contract, negligently and in contravention of the *Trade Practices Act*) had represented to Ortiz that Gatt was financially and technically competent to carry out the building work on the residence and was a suitable builder to include in the tender list, whereas in fact it had done bad work and collapsed financially. It was claimed that if Oldfield Knott had carried out an appropriate technical and financial investigation of the suitability of Gatt, Oldfield Knott could and should have discovered that Gatt was unfit to carry out the project and advised against allowing Gatt to tender.

THE HEARING

The hearing commenced on 5 May 2000 as scheduled. Counsel for Ortiz began the case for the Claimant with an opening address in which he outlined the nature of the case being brought against Oldfield Knott.

However, in the course of the opening address, Counsel for Ortiz went on to outline a further claim against Oldfield Knott. According to Counsel for Ortiz, it was the Claimant's case that Oldfield Knott in conjunction with the quantity surveyor induced Ortiz to accept the tender from Gatt, despite knowing at the time that Gatt was not the lowest tenderer when savings were taken into account.

Counsel for Oldfield Knott objected to the address at its conclusion, as seeking to put forward a claim based upon collusion. Nothing in the Points of Claim alleged impropriety on the part of Oldfield Knott, so that the opening address for the Claimant seemed to foreshadow a case being brought on the evidence and in submissions, which had not been pleaded and which Oldfield Knott should therefore not have to meet.

DEALING WITH THE OBJECTION

Counsel for Ortiz countered the objection in two ways as follows:

(a) He expressly disclaimed any intention of making a case based upon collusion against Oldfield Knott, pointed out that he had not

used the term 'collusion' and stated that collusion was not being alleged. He was prepared to withdraw the words 'in conjunction with the builder's quantity surveyor' used by him in his address.

(b) However, he maintained that what he had said in his opening address could be supported on the basis that there was a claim pleaded in the Points of Claim under Section 52 of the *Trade Practices Act*. The claim under the *Trade Practices Act* was for misleading and deceptive conduct and Oldfield Knott had deceived Ortiz as to whether Gatt was indeed the lowest tenderer.

The Arbitrator made no definite ruling on the objection, but he seems to have considered the assurances given by Counsel for Ortiz that collusion was not being alleged were sufficient to clear the matter up and that the objection was no longer being pressed. The Arbitrator also seemed to accept what had been said about the claim under the *Trade Practices Act* being sufficient to support the terms used in the opening address.

Instead of making any definite ruling on the objection (and he does not seem to have been pressed to do so) the Arbitrator simply asked Counsel for Ortiz to proceed with calling his witnesses.

THE APPLICATION TO REMOVE THE ARBITRATOR

When the Arbitration resumed on 8 May 2000, Counsel for Oldfield Knott advised the Arbitrator that an application would be made to the Supreme Court for his removal on the grounds of technical misconduct. He was requested to adjourn the arbitration, which he refused. An injunction to prevent him from proceeding the arbitration was granted by the Supreme Court and an application to remove him was heard as a matter of urgency on 12 and 15 May 2000 before Hasluck J.

Before Hasluck J, it was submitted on behalf of Oldfield Knott that the Arbitrator had only two proper courses before him in dealing with the objection on behalf of Oldfield Knott to the opening address by the Counsel for Ortiz, being either to rule that fraud or collusion was not open to Ortiz on the pleadings and direct that no evidence intended to put forward a case of fraud or collusion would be accepted or alternatively to invite Counsel for Ortiz to amend his Points of Claim to clearly plead whatever case of fraud or collusion he intended to raise. However, the Arbitrator failed to make such a ruling, thus leaving Oldfield Knott in the position of facing the case alleging fraud and collusion in a nebulous and unpleaded fashion.

Whilst the Arbitrator's remarks were not entirely clear, Hasluck J considered that the Arbitrator viewed the opening address by Counsel for Ortiz as not raising a new case of fraud or collusion and there was therefore no new, unpleaded issue of that nature introduced. Although the Arbitrator had not expressed his ruling to that effect clearly, this was not unfair to Oldfield Knott in view of the fact that Counsel for Ortiz had expressly disclaimed any intention to allege fraud or collusion.

Hasluck J felt (with the benefit of hindsight) that Counsel for Oldfield Knott could have raised the matter again before the Arbitrator again on 8 May, bearing in mind that the previous discussion on the subject had been inconclusive and confusing. In that situation, Counsel for Oldfield Knott could have asked for a clear ruling from the Arbitrator as to how these issues could be resolved.

On the subject of the application for an adjournment on 8 May, Hasluck J found that the Arbitrator was justified in refusing the adjournment, having regard to the fact that after many months of

preparation, it was suggested that a previously arranged hearing date should be abandoned for an indeterminate period, in order to canvass a supposed case of fraud and collusion which Counsel for Ortiz had expressly disclaimed.

THE APPEAL

On appeal, Oldfield Knott contended before the Full Court (Ipp, Wallwork & Anderson JJ) that:

1. Although Counsel for Ortiz had stated that no cause of fraud or collusion was being alleged, it was implied that Oldfield Knott had been guilty of impropriety or dishonesty in the tendering process and that it was open for the Arbitrator to make a finding of that kind. This implied case of impropriety or dishonesty was naturally not disclosed in any detail and the implied allegations were necessarily vague.

2. Although the Arbitrator had directed pleadings, he had manifested an intention to allow Ortiz to lead evidence intended by Ortiz to support a case of dishonesty or impropriety raised by implication and not specified in the pleadings.

IPP J

In his reasons for Judgment, Ipp J observed that although the Arbitrator need not have ordered pleadings, given the complexity of the case it was sensible to rule that pleadings should apply. Once pleadings are ordered, the ordinary rules applicable to pleadings apply to the arbitration. In particular, the issues in the arbitration are to be only those identified in the pleadings.

During the opening by Counsel for the Claimant in an arbitration, if Counsel informs the Arbitrator that he or she intends to rely upon dishonesty or impropriety and there is an objection by opposing Counsel, Ipp J regarded it as of the utmost importance that the Arbitrator should make an immediate ruling, before the hearing proceeded further. A party should not have to meet a cause of fraud or collusion based upon an unpleaded cause of action which involved generalised allegations of dishonesty or impropriety.

After reviewing the opening address by Counsel for Ortiz, Ipp J came to the conclusion that the opening address did indeed make such a case. The Judge referred (at p.21) to 'clouds of suspicion that were being invoked, indirectly and by innuendo, as to improper conduct on the part of Oldfield Knott'. Ipp J found that Counsel for Ortiz was going beyond the pleaded issues in so doing and that the Arbitrator understood the case being put by Ortiz as being one of improper conduct by Oldfield Knott in the tender process.

Although Counsel for Ortiz had advised that Ortiz was not alleging fraud or collusion, his comments about the Arbitrator being free to make inferences constituted an implicit assertion that the suspicions that he had previously mentioned continue to apply and would be significant in the determination of the arbitration. This effectively negated any apparent disclaimer.

In considering the conduct of the Arbitrator, Ipp J noted that the Arbitrator appeared to be under the legally erroneous view that the allegations of misleading or deceptive conduct in the Points of Claim were sufficient to allow Ortiz, without more, to put forward evidence intended to show impropriety on the part of Oldfield Knott. In fairness to the Arbitrator, Ipp J considered that in taking this view, the Arbitrator was simply adopting the submissions made to him by Counsel for Ortiz.

Consequently Ipp J, with whom Wallwork J agreed, upheld the appeal and removed the Arbitrator.

ANDERSON J

Anderson J noted that the Arbitrator was in error in believing that the

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pleadings did raise fraud and collusion because there was a claim of misleading and deceptive conduct, contrary to the *Trade Practices Act*. In so considering, the Arbitrator had failed to take into account *Hornsby Building Information Centre Pty Ltd & Anor v Sydney Building Information Centre Limited* (1978) 140 CLR 216, particularly what was said by Stephen J at 223.

Ultimately, Anderson J concluded that Ortiz was attempting to make a case of deceit and collusion against Oldfield Knott which had not been set out on the pleadings but was being raised by implication and that the Arbitrator was countenancing this course of conduct.

In taking the view that deceit was an element of the Trade Practices cause of action and in accepting evidence on that basis, the Arbitrator was requiring Oldfield Knott to meet a case which had not been pleaded against them and this was substantially unfair. Accordingly, Anderson J agreed that the Arbitrator should be removed.

SUMMARY

An analysis of the Judgments show that there was no difference in legal principle between Hasluck J and the Court of appeal. All the Judges agreed that Oldfield Knott could not be required to meet an unpleaded case of collusion. The observations of Counsel and the rulings (or lack of them) from the Arbitrator as recorded in the transcript were so confusing that they led Hasluck J and the Judges of the Full Court to different opinions as to what had actually occurred, but all Judges were clear as to the legal principles involved.

The Arbitrator's approach stemmed from his understanding of the *Trade Practices Act* pleading. It does not seem, from the reports, that Counsel from either side drew his attention to *Hornsby Building Information Centre Pty Ltd & Anor v Sydney Building Information Centre Limited*. Had this error of law been corrected, the Arbitrator would have appreciated that the *Trade Practices Act* plea in the case did not support the leading of evidence of fraud or collusion and this may have affected his entire approach to the evidence being tendered.