REPUDIATION OF ARBITRATION AGREEMENTS—THE SLEEPING DOG BARKS

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The Supreme Court of New South Wales has recently decided that long established English principles concerning repudiation of arbitration agreements apply in New South Wales. In Auburn Council v Austin Australia Pty Limited (Liquidators Appointed), Mr Justice Einstein dealt with the circumstances where an arbitration can be terminated for delay.

Auburn council (council) engaged Austin Australia Pty Limited (Austin) as construction manager for the construction of a new building housing council chambers and police station. The project was to be completed to accommodate increased police activity during the Sydney Olympic Games.

The parties fell into dispute and a long and trenchantly fought arbitration ensued. In January 2004, as time for submissions approached, Austin went into voluntary administration. Liquidators were appointed to the company in March 2004. On the application of council, the Supreme Court stayed the arbitration pending provision of security for costs in the sum of $325,000. No time limit for delivery of the security was sought or ordered. council's cross claim in the arbitration was not stayed.

Over the next two years, the liquidators attempted to fund the security. From time to time, the liquidators advised council and the arbitrator of their expectations about when the security would be delivered. This advice proved optimistic. During this time council did not prosecute its cross claim.

In 2006, the liquidators proffered the security and it was accepted by council. The arbitration recommenced.

Council then filed a Summons seeking among other things:

(a) a declaration that the arbitration agreement had been terminated following the acceptance by council of alleged repudiatory conduct by Austin, and

(b) orders under s46 of the Commercial Arbitration Act 1989 (NSW) that the arbitration be terminated.

The judgment deals with a range of issues including election, the obligations of liquidators and the performance of contractual obligations by a party where a court order prevents it from performing.

The court held that the delay was explicable and that the liquidators had acted with diligence. One significant feature was the court's acceptance of the principles set down by the House of Lords in the 1981 case of Bremer Vulkan v South India Shipping Corp Ltd. As His Honour put it:

… the decision in Bremer is authority for the proposition that there can be no effective termination of an arbitration agreement by reason of one party's repudiatory delay where the other party has failed to take steps to have such delay addressed (the implied obligation to progress the arbitration being mutual).

His Honour quoted with approval from the speech of Lord Diplock about a failure to make an application for directions to deal with the issue of delay.

For failure to apply for such directions before so much time had elapsed that there was risk that a fair trial of the dispute would not be possible, both claimant and respondent were in my view, in breach of the contractual obligations to one another; and neither can rely upon the other's breach as giving him a right to treat the primary obligations of each to continue with a reference as brought to an end. Respondents in private arbitrations are not entitled to let sleeping dogs lie and then complain that they did not bark.

His Honour accepted that the decision of the majority in Bremer was correct and although Austin was otherwise guilty of delay, council itself was guilty of such delay through failing to take steps to address the delay in the progress of the claim and failing to take steps to prosecute its cross claim.

His Honour also observed that it was open to council to apply for a permanent stay of the arbitration proceedings and the evidence established that the council's failure to so apply was solely due to a forensic tactical decision.

One clear lesson to be drawn from the case is that when seeking an order for security a party should also seek a specified timeframe for delivery of that security so that the issue may be addressed actively during any period of delay.
Another clear lesson is that neither party to an arbitration can let sleeping dogs lie and hope that they do not bark.

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