NEW SOUTH WALES SUPREME COURT

CITATION: CORVETINA TECHNOLOGY LTD v CLOUGH ENGINEERING LTD [2004] NSWSC 700 revised - 17/08/2004

CURRENT JURISDICTION: EQUITY

FILE NUMBER(S): 50029/04

HEARING DATE{S): 29/07/2004 (judgment given 29/07/04 and revised 2 August 2004)

JUDGMENT DATE: 29/07/2004

PARTIES:
Corvetina Technology Limited (plaintiff)
Clough Engineering Limited (defendant)

JUDGMENT OF: McDougall J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
M.A Pembroke SC/D.R. Meltz (Plaintiff)
Dr A.S Bell/ J.A.C Potts/ J.C Sheller (sol) (Defendant)

SOLICITORS:
Mallesons Stephen Jacques (Plaintiff)
Clayton Utz (Defendant)

CATCHWORDS:
PRACTICE AND PROCEDURE
INTERNATIONAL ARBITRATION
proceedings for enforcement of international arbitral award
where plaintiff seeks order that there be no discovery until preliminary question resolved
where defendant alleges that plaintiff performed contract in manner illegal in place of performance
where defendant says that enforcement of award based on that contract is therefore contrary to Australian public policy
whether defendant in claim for enforcement of international arbitral award can raise defence where facts relevant to illegality of performance said to have been raised and argued before and subject to decision of arbitrator

s 8(7)(b) International Arbitration Act 1974 (Cth)
whether Court should hear questions separately.

ACTS CITED:
International Arbitration Act 1974 (Cth)

DECISION:
See para [20] of judgment

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
COMMERCIAL LIST

McDOUGALL J

29 July 2004 Ex tempore (revised 2 August 2004)

50029/04 CORVETINA TECHNOLOGY LIMITED v CLOUGH ENGINEERING LIMITED

JUDGMENT

1 **HIS HONOUR**: By its notice of motion filed on 23 July 2004, the plaintiff seeks an order that there be no discovery ordered in these proceedings until a question, defined in the notice of motion, is resolved.

2 That question is as follows:

> "Whether the Defendant is entitled to allege and seek to prove in these proceedings that the plaintiff performed, purported to perform or intended to perform its obligations under the contracts in a manner which:
>
> (a) was contrary to the public policy and laws of the place of performance, namely, Pakistan;
>
> (b) was contrary to Australian public policy;
>
> by reference to the facts particularised in paragraph 4(b) of the Amended Defence and the matters alleged in paragraph 4(c) of the Amended Defence".

3 The plaintiff's notice of motion is a successor to its notice of motion filed on 25 June 2004. In that notice of motion the plaintiff sought the following relief:

"Pursuant to SCR Part 31 Rule 2 the following questions be determined separately and prior to all other matters in these proceedings:

Having regard to the fact that the Defendant pleaded illegality in the arbitral proceedings and that the arbitrator rendered an award and made findings of fact and law that the contracts between the Plaintiff and the Defendant were not illegal and were not contrary to public policy according to their governing law (England) or according to the law of their place of performance (Pakistan) and were not performed in a manner which was contrary to public policy according to their governing law (England) or according to the law of their place of performance (Pakistan):-

(1) Whether the Defendant is entitled to allege and seek to prove in these proceedings that the Plaintiff performed, purported to perform or intended to perform its obligations under the contracts in a manner which:

(a) was contrary to the public policy and laws of the place of performance, namely, Pakistan;

(b) was contrary to Australian public policy;

by reference to the facts particularised in paragraph 4(b) of the Defence.

(2) If the answer to 1(a) is "yes":

(a) whether the Defendant is entitled to discovery, or

(b) whether the Defendant is entitled to discovery limited to the documents discovered in the arbitral proceedings, or

(c) whether the Defendant is entitled to discovery of additional documents, beyond those discovered in the arbitral proceedings, and if so, what documents.

(3) If the answer to 1 (b) is "yes":

(a) whether the Defendant is entitled to discovery, or

(b) whether the Defendant is entitled to discovery limited to the documents discovered in the arbitral proceedings, or

(c) whether the Defendant is entitled to discovery of additional documents, beyond those discovered in the arbitral proceedings, and if so, what documents".

4 The notice of motion of 25 June 2004 was argued in front of Bergin J on 1 July 2004. The transcript of the argument (to which the parties agreed I could refer) indicates that her Honour expressed the view that the notice of motion was "too early" (T 15 .21). Her Honour further said:

> "There are a number of problems that have been thrown up, not the least of which is, albeit that Lord Justice Mantell has been described as robust, there is, it seems to me, a lacuna because of his fresh evidence point. Now, if there is to be that sort of thing occur in this case then I should not cut it off at its knees at the moment, and there is arguably a defence here prima facie. I am of the view that the matter should go forward. You can be protected for the moment, unless Mr Bathurst wants to be more robust about this, with having the application for a separate question not dismissed but adjourned, but I will hear what the has to say about that. It seems to me that because of the way in which the English court has approached it and the tantalising 7.11, I am of the view it should continue."

5 In the result, her Honour stood over the notice of motion and gave directions, among other things, for the filing of any amended defence.

6 An amended defence was filed on 14 July 2004, and a reply thereto was filed on 21 July 2004. The essential argument which is thrown up is whether it is open to the defendant, in the hearing of a claim for enforcement of an international arbitration award, to raise the defence of illegality (said to enliven the discretion set out in s 8(7)(b) of the *International Arbitration Act* 1974 (Cth)) in circumstances where, it is said, the relevant facts were argued before and were the subject of the decision of, the arbitrator.

7 The parties have suggested that this is a question of substantial practical importance. I am not sure that this is so.

8 The plaintiff founds its claim upon some remarks in *Soleimany v Soleimany* [1999] QB 785 at 800. The court said:

> "It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality."

9 It is important to note that, before the court said what I have set out, it said on the same page "[w]e do not propound a definitive solution to this problem": a remark that I understand to indicate that the passage that I have set out was not intended to be definitive.

10 It is clear that, upon an application for an enforcement of an international arbitral award, the discretion that is conferred (in Australia) by s 8(7)(b) of the Act is wide. It may also be, although I express no concluded view, that there is, in addition, a general discretion: see *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406.

11 The plaintiff relies upon the remarks in *Soleimany*, to which I have referred, and upon the dissenting judgment of Waller LJ in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] 1 QB 288. Although his Lordship was part of the court that decided *Soleimany*, his views did not find favour with Mantell LJ and Sir David Hirst . Indeed, of the passage in *Soleimany* that I have referred to and that Waller LJ relied upon, Mantell LJ said at 316-317:

> "For my part I have some difficulty with the concept and even greater concerns about its application in practice, but, for the moment and uncritically accepting the guidelines offered, it seems to me that any such preliminary inquiry in the circumstances of the present case must inevitably lead to the same conclusion, namely, that the attempt to re-open the facts should be rebuffed."

12 In *Westacre*, the court, by majority, dismissed an appeal from Colman J. His Lordship's judgment is reported at [1999] QB 740. At pages 767-768 of the report, his Lordship summarised what he said was the effect of the authorities. He said:

> "The effect of the authorities is in my judgment as follows.
> (i) Where it is alleged that an underlying contract is illegal and void and that an arbitration award in respect of it is thereby unenforceable the primary question is whether the determination of the particular illegality alleged fell within the jurisdiction of the arbitrators. (ii) There is no general rule that, where an underlying contract is illegal at common law or by reason of an English statute, an arbitration agreement, which is ancillary to that contract is incapable of conferring jurisdiction on arbitrators to determine disputes arising within the scope of the agreement including disputes as to whether illegality renders the contract unenforceable. (iii) Whether such an agreement to arbitrate is capable of conferring such jurisdiction depends upon whether the nature of the illegality is such that, in the case of statutory illegality the statute has the effect of impeaching that agreement as well as the underlying contract and, in the case of illegality at common law, public policy requires that disputes about the underlying contract should not be referred to arbitration. (iv) When, at the stage of enforcement of an award, it is necessary for the court to determine whether the arbitrators had jurisdiction in respect of disputes relating to the underlying contract, the court must consider the nature of the disputes in question. If the issue before the arbitrators was whether money was due under a contract which was indisputably illegal at common law, an award in favour of the claimant would not be enforced for it would be contrary to public policy that the arbitrator should be entitled to ignore palpable and indisputable illegality. If, however, there was an issue before the arbitrator whether the underlying contract was illegal and void, the court would first have to consider whether, having regard to the nature of the illegality alleged, it was consistent with the public policy which would, if illegality were established, impeach the validity of the underlying contract, that the determination of the issue of illegality should be left to arbitration. If it was not consistent, the arbitrators would be held to have no jurisdiction to determine that issue. (v) If the court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal and by the award the arbitrators determined that it was not illegal, prima facie the court would enforce the resulting award. (vi) If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, on the basis of facts not placed before the arbitrators, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular."

13 His Lordship's judgment was considered by the Court of Appeal in *Soleimany*. At 803, their Lordships said, of what Colman J had said:

> "But, in an appropriate case it [the court] may inquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found that there was no illegality. We thus differ from Colman J., who limited his sixth proposition to cases where there were relevant facts not put before the arbitrator."

14 It seems to be clear, from what the Court of Appeal said in *Soleimany* as to the sixth proposition of Colman J in *Westacre* at first instance, that it is open in principle to a defendant, in the position of the present defendant, to seek to rely on illegality, pursuant to s 8(7)(b), or its equivalent, even if the illegality was raised before and decided by the arbitrator. I do not see anything in the decision of Mantell LJ in *Westacre* to the contrary. Indeed, I read what Mantell LJ said in *Westacre* as expressing, at the very least, a slight scepticism as to the passage in *Soleimany* at 800 upon which the plaintiff relies.

15 For my part, I do not think that the Court should be quick to adopt the practice of hearing questions separately. Experience suggests that it is often productive of, rather than saving, expense. As Kirby and Callinan JJ said in *Tepko Pty Limited v Water Board* (2001) 206 CLR 1 at 55:

> "The attractions of trials of issues rather than of cases in their totality, are often more chimerical than real. Common experience demonstrates that savings in time and expense are often illusory, particularly when the parties have, as here, had the necessity of making full preparation and the factual matters relevant to one issue are relevant to others, and they all overlap.
>
> The second and related comment is this. A party whose whole case is knocked out on a trial of a preliminary or single issue, may suspect, however unjustifiably, that an abbreviated course was adopted and a decision reached in the court's, rather than the parties', interests.
>
> Thirdly, there is an additional potential for further appeals to which the course of the trial on separate issues may give rise. Indeed, that could occur here were this appeal to be allowed and a retrial had in which the remaining issues of causation and damages were decided. Single-issue trials should, in our opinion, only be embarked upon when their utility, economy, and fairness to the parties are beyond question.

16 It will be observed from what I have already said that, on 1 July 2004, Bergin J was of the view that the matter should go forward. It was submitted for the plaintiff that matters had changed since then because the illegality issue had been refined and because the reply had been filed. I do not agree. I do not think that it is appropriate for an arguable defence (and I interpolate that no application has been made to strike out the defence, although I accept that Practice Note 100 counsels against such applications) should be determined on a preliminary basis. In my view, it should be determined on a final hearing when the evidence is complete.

17 I express no view as to whether the discovery in fact sought by the defendant is excessive. I express no view whether, if the parties are unable to agree, the Court would order discovery either as sought or on some more limited but similar basis. It may, however, be noted that discovery has been ordered and that, to date, it has not been given. I would conclude, contrary to what I said in the course of argument, that that reflects simply the fact that the parties are unable to agree on the categories of discovery.

18 It was suggested in the course of argument that if I did not accede to the plaintiff's notice of motion then, in substance, it would send a warning signal to those who wish to enforce international arbitrations in Australia. Again, I do not agree. The very point of provisions such as s 8(7)(b) is to preserve to the court in

which enforcement is sought, the right to apply its own standards of public policy in respect of the award. In some cases the inquiry that it required will be limited and will not involve detailed examination of factual issues. In other cases, the inquiry may involve detailed examination of factual issues. But I do not think that it can be said that the court should forfeit the exercise of the discretion, which is expressly referred to it, simply because of some "signal" that this might send to people who engage in arbitrations under the Act. There is, as the cases have recognised, a balancing consideration. On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy. The resolution of that conflict, in my judgment, should be undertaken at a final hearing and not on an interlocutory application.

19 I have not dealt with the many other submissions that the parties put. I should not be taken, in leaving those submissions to one side, to be suggesting that they did not raise serious and important issues. However, I think, the core question is that which I have identified and which, in substance, I have answered.

20 I order that the notice of motion filed on 23 July 2004 be dismissed. I order the plaintiff to pay the defendant's costs of that notice of motion.

21 I stand the proceedings over to the directions list on Friday 6 August 2004.

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LAST UPDATED: 17/08/2004