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CONSTRUCTION LAW BULLETIN

AMBIT OF ARBITRATOR'S JURISDICTION

Introduction

What disputes is an arbitrator entitled to deal with in an arbitration?

Defendants often challenge the arbitrator's jurisdiction or power to deal with disputes and claims raised by a claimant on the grounds that the disputes fall outside the scope of the dispute originally declared by the claimant at the inception of the arbitration.

At the end of last year the KwaZulu-Natal High Court in Durban delivered a judgment which provides helpful insight into this vexed question.[1]

The Facts

Charles Diamond ("Diamond") appointed OMM Design Workshop CC ("the Architect") to render architectural and related services in connection with the construction of an elaborate residence in East London.

The agreement was concluded in Durban and included an arbitration clause reading as follows:

> *"Should any disagreement arise either party may declare a dispute by notice to the other party. The parties may resolve the dispute by mediation, failing which it shall be referred to arbitration. The architect shall select an arbitrator from a list of 3 persons nominated by the Association of Arbitrators at the request of either party. The arbitration shall be conducted*

[1] OMM Design Workshop CC v Stanley Segal and Another, Case No 828/2012, date of judgment 29 November 2012, per Gorven J.

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according to the latest edition of the Rules for the Conduct of Arbitrations published by the Association of Arbitrators."

During the course of the contract Diamond felt that he had been overcharged by the Architect and demanded a refund of fees paid. The Architect disagreed and a dispute arose between the parties.

At the request of Diamond, the Association of Arbitrators (Southern Africa) provided the names of three possible arbitrators, one of whom was Stanley Segal, an architect based in Johannesburg.

At the same time that he wrote to Segal requesting him to accept appointment, Diamond wrote to the Architect stating that Segal was his preferred arbitrator and that the scope of the dispute to be subjected to arbitration would be fully defined by him.

At a pre-arbitration meeting the parties agreed in writing to the appointment of Segal and that the dispute fell within the ambit of the agreement to arbitrate and was ready for arbitration. At this meeting Diamond gave a general outline of the issues in dispute.

Diamond thereafter delivered his statement of claim which set out complaints relating to the fees charged by the Architect and incorporated a claim for a refund of fees paid.

The arbitration was scheduled for hearing at the end of November 2009. However, shortly before this, Diamond gave notice of an intention to amend his claim so as to include a host of new claims. The claims had the effect of dramatically increasing the amount being claimed by Diamond by R4,4m.

The new claims were for compensation as a result of an alleged failure by the Architect to perform its contractual services correctly, including a failure to have issued construction information timeously, giving incorrect information as to the location of the building, instructing the demolition of certain work without authority, providing the professional quantity surveyor with inadequate information resulting in an underestimate of the budget, effecting changes to the design of the house without approval, certifying payments to the contractor which ought not to have been certified, failing to have certified penalties against the contractor and failing to ensure timeous completion of the works.

The Architect objected to the introduction of these claims on the grounds that they did not fall within the scope of the dispute as originally declared which was the genesis of the arbitration.

Eventually the issue was argued before the arbitrator who made an interim award in December 2011 allowing Diamond to amend his statement of claim to introduce the new claims.

The Architect applied to the KwaZulu-Natal High Court in Durban for the review and setting aside of the arbitrator's interim award.

Argument and Counterargument

The Architect's case was that the interim award fell to be set aside in terms of section 33(1) of the Arbitration Act[2] which provides for the review and setting aside of an arbitration award if an arbitrator exceeds his powers.

[2] Act 42 of 1965.

The Architect argued that it is the declaration of a dispute that gives rise to an arbitration and it is only that dispute that an arbitrator is permitted to deal with in an arbitration. The only exception to this is if the parties agree to broaden the scope of the arbitration and add additional claims. Absent such agreement, the arbitrator has no jurisdiction to deal with any claims other than those falling within the ambit of the original declaration of dispute.

The Architect accepted that the new claims fell within the ambit of the original arbitration agreement. In other words they were disputes that if properly declared would fall to be determined by arbitration.

Diamond, on the other hand, argued that:

- the new claims were all covered by the arbitration agreement and therefore amenable to arbitration;
- at the time that the arbitrator was appointed, the full ambit of the dispute had not been defined and he, Diamond, had reserved the right to fully define the dispute;
- the Association of Arbitrators (Southern Africa) Rules for the Conduct of Arbitrations which had been incorporated expressly allow a party to amend its statement of claim with the leave of the arbitrator.

Court's Decision

The court took the view that the nature and scope of the dispute was not fixed with any precision and that Diamond had reserved the right to define the scope of the dispute. As such it was permissible for him to amplify the scope of the dispute and add new claims.

More importantly, however, the court held that even absent that quirk, it would have been competent for Diamond to have added the new claims on the basis of the correct interpretation of the arbitration clause in the contract.

The court referred to a recent decision of the Supreme Court of Appeal[3] on the interpretation of contracts where the court said that:

> *"a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document".*

The court held that the narrow interpretation being advanced by the Architect would potentially lead to multiple arbitrations running in tandem on different claims, and possibly before different arbitrators, which was clearly an unbusinesslike approach to the matter.

The essence of the court's judgment was that if the dispute that is sought to be added is one that is covered by the original arbitration agreement, then there should be no reason why it cannot be added absent the usual grounds for refusing an amendment.

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[3] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 SCA, para 18,

The court also pointed out that the Architect's approach would prevent a defendant from raising a counterclaim in an arbitration and require the defendant to declare a dispute and conduct a separate arbitration in relation to the counterclaim. Clearly an undesirable and impractical approach.

In summary the court held that once a dispute has been declared, all claims and counterclaims between the parties which would be covered by their agreement to arbitrate can be dealt with in one arbitration subject to the usual discretion of an arbitrator to refuse an amendment.[4]

In the event the court dismissed the Architect's application for a review of the arbitrator's interim award.

Side Issues

Diamond challenged the court's jurisdiction to review the arbitrator's award on the grounds that the pre-arbitration meeting and the hearing regarding the amendment took place outside of the court's jurisdiction, that the house is situate outside of the court's jurisdiction and that the arbitrator is based outside of the court's jurisdiction.

The court rejected this argument and pointed out that the agreement incorporating the arbitration clause was concluded in Durban and as such the court had jurisdiction to deal with the matter.

The Architect also argued that if the court refused the application for review, it should nonetheless order that the arbitration be terminated so that the new claims could be dealt with by a court because the arbitrator, being an architect, was not properly qualified to deal with legal issues and it would be preferable for a court to take over.

The court also gave short shrift to this argument and re-emphasised the court's approach in such matters that it is only where a very strong case has been made out to set aside an arbitration agreement that a court will override an agreement to arbitrate. The court found that the Architect had not made out any case let alone a strong case for such relief. The court pointed out that in a number of cases it has been held that the fact that the main dispute primarily involves a legal issue does not in itself afford grounds for avoiding an arbitration agreement where the arbitrator is not a lawyer.

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[4] See Rule 17(1) which provides for an arbitrator to refuse an amendment if it is inappropriate to allow it having regard to delays or prejudice to the other party.