Supreme Court

New South Wales

Case Name:	Broken Hill City Council v Unique Urban Built Pty Ltd
Medium Neutral Citation:	[2018] NSWSC 825
Hearing Date(s):	27 April, 18 May, 2018
Decision Date:	5 June 2018
Jurisdiction:	Equity - Technology and Construction List
Before:	Hammerschlag J
Decision:	Pursuant to s 8(1) of the Commercial Arbitration Act 2010 (NSW), the plaintiff and first defendant are referred to arbitration
Catchwords:	COMMERCIAL ARBITRATION – Commercial Arbitration Act 2010 (NSW) – application for an order that the plaintiff and first defendant be referred to arbitration – arbitration agreement – whether there is an operative agreement between the parties to submit to arbitration – the meaning of inoperative – where the person prescribed in the contract to nominate an arbitrator does not exist – whether non-existence of person prescribed to nominate an arbitrator renders the agreement inoperative; HELD – the parties' arbitration agreement is operative – plaintiff and first defendant referred to arbitration
Legislation Cited:	Commercial Arbitration Act 2010 (NSW)
Cases Cited:	John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451 Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522 Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd [1993] HKCFI 14 Sembawang Engineers and Constructors Pte Ltd v

	Covec (Singapore) Pte Ltd [2008] SGHC 229 Nova West Contracting Pty Ltd v Brimbank City Council [2015] VSC 679 Leighton Contractors Pty Ltd v Hooker Corp Ltd unreported, Full Federal Court of Australia, 10 August 1989 - G10 of 1989
Category:	Principal judgment
Parties:	Broken Hill City Council - Plaintiff Unique Urban Built Pty Ltd - First Defendant Allen Jack + Cottier Architects Pty Ltd - Second Defendant
Representation:	Counsel: F.C. Corsaro SC - Plaintiff/Respondent T. Duggan SC (27 April) with M. Sheldon (27 April, 18 May) - First Defendant/Applicant M. Auld - Second Defendant Solicitors: Redenbach Lee Lawyers - Plaintiff DW Fox Tucker Lawyers - First Defendant Colin Biggers & Paisley - Second Defendant
File Number(s):	2018/34636

JUDGMENT

1 HIS HONOUR: The first defendant builder (Urban) moves under s 8(1) of the *Commercial Arbitration Act 2010* (NSW) (the Act) that it and the plaintiff Council (the Council) be referred to arbitration.

2 References to sections are references to the Act.

3 On 26 April 2016, the Council retained Urban to upgrade the Broken Hill Civic Centre. Their contract is written and in the form AS4000 – 1997 published by Standards Australia (the Contract).

4 The Council retained the second defendant architects (the Architects) to design the upgrade, to be project manager for the works and to administer the Contract.

5 On 1 February 2018, the Council initiated an action by suing out of this Court a Summons and accompanying Technology and Construction List Statement against Urban and the Architects. It alleges that Urban breached the Contract by failing to proceed and complete the works with due diligence and within the time stipulated by the Contract, failing to carry out the works to the required standard, and failing to rectify defects and deficiencies in, and omissions from, the works. It asserts against the Architects that their design was defective.

6 Clause 42 of the Contract, entitled **Dispute Resolution**, provides:

> **42.1 Notice of Dispute**
>
> If a difference or dispute (together called a '*dispute*') between the parties arises in connection with the subject matter of the *Contract*, including a *dispute* concerning:
>
> a) a *Superintendent's direction*; or
>
> b) a claim:
>
> i) in tort;
>
> ii) under statute;
>
> iii) for restitution based on unjust enrichment or other quantum meruit; or
>
> iv) for rectification or frustration,
>
> or like claim available under the law governing the *Contract*,
>
> then either party shall, by hand or by certified mail, give the other and the *Superintendant* a written notice of *dispute* adequately identify and providing details of the *dispute.*
>
> Notwithstanding the existence of a *dispute,* the parties shall, subject to clauses 39 and 40 and subclause 42.4, continue to perform the *Contract*.
>
> **42.2 Conference**
>
> Within 14 days after receiving a notice of dispute, the parties shall confer at least once to resolve the dispute or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference shall be privileged.
>
> If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute shall be and is hereby referred to arbitration.
>
> **42.3 Arbitration**
>
> If within a further 14 days the parties have not agreed upon an arbitrator, the arbitrator shall be nominated by the person in Item 32(a). The arbitration shall be conducted in accordance with the rules in Item 32(b).
>
> **42.4 Summary relief**

> Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the *Contact* or to seek injunctive or urgent declaratory relief.

7 References below to clauses are to clauses in the Contract.

8 The Contract defines *Item* to mean an *Item* in Annexure Part A. *Item* 32 a) referred to in cl 42.3 states that the person to nominate an arbitrator is, if no-one is stated, the President of the Australasian Dispute Centre. No-one is stated.

9 At the time of the Contract, the Australasian Dispute Centre did not exist. There was no President. Apparently, there was once such an organization, but it became defunct as long ago as 3 February 2011. The Council and Urban evidently used an obsolete standard form contract.

10 *Item* 32 b) provides that if nothing is stated, the rules for arbitration are rules 5 – 18 of The Rules of the Institute of Arbitrators, Australia for the Conduct of Commercial Arbitrations (the Rules).

11 The Institute of Arbitrators, Australia (now known as the Institute of Arbitrators & Mediators Australia) exists and it has arbitration rules. The parties are agreed that these are the Rules referred to in *Item* 32 b). The Rules are divided into Articles. The parties are agreed that rules 5 – 18 referred to in *Item* 32 b) are Articles 5 – 18.

12 Article 8 provides:

> **Appointment of one arbitrator**
>
> *Article 8*
>
> 1 If one arbitrator is to be appointed, either party may propose, the names of one or more persons, one of whom would serve as the sole arbitrators.
>
> 2 If within 14 days after receipt by a party of a proposal made in accordance with Article 8, paragraph 1 the parties have not reached on the choice of a sole arbitrator, the arbitrator shall be nominated by IAMA.

13 Article 12 para 1 provides that any arbitrator may be challenged if circumstances exist that give rise to a real danger of bias on that arbitrator's behalf.

14 Article 13 sets out the procedure for a challenge. Article 13 para 4 provides:

If the arbitral tribunal sustains the challenge, a substitute shall be appointed or chosen pursuant to the procedure outlined in Article 8 to Article 13 inclusive.

15 The following are the relevant sections of the Act:

7 Definition and form of arbitration agreement

(1) An *arbitration agreement* is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

8 Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

11 Appointment of arbitrators[1]

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of subsections (4) and (5).

(3) Failing such agreement:

(a) in an arbitration with 3 arbitrators and 2 parties, each party is to appoint one arbitrator, and the 2 arbitrators so appointed are to appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the 2 arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment is to be made, on the request of a party, by the Court, and

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, an arbitrator is to be appointed, on the request of a party, by the Court, and

(c) in an arbitration with 2, 4 or more arbitrators or with 3 arbitrators and more than 2 parties the appointment is to be made, at the request of a party, by the Court.

(4) Where, under an appointment procedure agreed on by the parties:

(a) a party fails to act as required under the procedure, or

(b) the parties, or 2 or more arbitrators, are unable to reach an agreement expected of them under the procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under the procedure, any party may request the Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision within the limits of the Court's authority on a matter entrusted by subsection (3) or (4) to the Court is final.

[1] There is no s 11(1).

> (6) The Court, in appointing an arbitrator, is to have due regard to any qualifications required of 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.

16 By Amended Notice of Motion, Urban moves that the Council and it be referred to arbitration under s 8(1). The Motion seeks an order that one of three nominated Senior Counsel are to be appointed as an arbitrator.

17 The Architects appeared but did not add anything. There is no arbitration agreement between the Council and the Architects.

18 Under s 8(1), if the action has been brought in a matter which is the subject of an arbitration agreement, the court must, if a party requests, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. There is no discretion to do otherwise: *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451.

19 It is not in issue that:

- there is a dispute between the Council and Urban within the meaning of that term in cl 42
- the Council and Urban are parties to an arbitration agreement
- the action has been brought in a matter which is the subject of the arbitration agreement
- Urban has requested that it and the Council be referred to arbitration.

20 The issue for determination is whether the arbitration agreement is inoperative. This requires consideration of:

> (a) what is meant by the term inoperative; and
>
> (b) whether the defect (if that is what it is) in cl 42.3 renders the arbitration agreement inoperative.

21 Urban's first argument is that Article 8, which is incorporated into the Contract by cl 42.3 and *Item* 32 b), is the mechanism for the appointment of an arbitrator.

22 Its second argument is that cl 42.2 is an arbitration agreement within the meaning of s 7(1) in its own right and is capable of standing alone. It argues that if cl 42.3 is ineffective as a mechanism for the appointment of an arbitrator by dint of the non-existence of the named appointor in *Item* 32 a), it and the

Council have failed to agree on a procedure of appointing an arbitrator, in which event, s 11(3)(b) empowers the court to appoint one.

23 The Council's argument is that because the appointor described in *Item* 32 a) does not exist, the arbitration agreement is inoperative.

24 It argues that the parties contemplated a single mechanism for appointment and that their agreement to arbitrate is dependent upon that mechanism not misfiring. Where it does misfire, as it has here, there is no agreement to arbitrate.

25 It argues that the Rules operate so as to govern arbitration procedure and have no role to play with respect to the initial appointment of the arbitrator. The Council did not articulate, with any precision, the constructional route whereby this result is achieved. It will, however, readily be observed that if cl 42.3 read with *Item* 32 was to operate to effect the appointment of the initial arbitrator, giving Article 8 the same operation would result in a direct conflict.

26 The conflict can be resolved as a matter of construction by reference to Article 8 para 1. In my view, the two parts of cl 42.3 were intended to operate sequentially. Once cl 42.3 read with *Item* 32 b) operates, Article 8 does not apply to the appointment because it commences with the words 'if one arbitrator is to be appointed', which will not be the case if the first part of cl 42.3 has already operated. In this way, the provisions of the Contract operate congruently: *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at 529; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117.

27 Article 8 still has a field of operation when there has been a successful challenge to a single arbitrator.

28 Although, as a matter of fact, there is no conflict because the first part of cl 42.3 has no operation, I do not think a construction of the words of cl 42.3 which brings about the initial appointment of the arbitrator by means of the Rules is reasonably open.

29 I accordingly turn to the question of whether the arbitration agreement is inoperative.

30 Section 8 of the Act comes from the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985.

31 I take the term ‘inoperative’ in s 8(1) to mean having no field of operation or to be without effect. Whether an arbitration agreement is in this state is to be determined in the context of, and having regard to, provisions of the Act which may make it operative.

32 In *Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd* [1993] HKCFI 14 (*Lucky-Goldstar*), the parties had agreed that arbitration would be in accordance with the rules of procedure of an association which did not exist.

33 Kaplan J said the following of the phrase ‘inoperative or incapable of being performed’:

> The phrase 'inoperative or incapable of being performed' was taken from the New York Convention of 1958 and no authority on this phrase was cited to me.
>
> Professor Albert Jan van den Berg in his book, The New York Arbitration Convention 1958, in dealing with the word 'inoperative', stated at p 158:
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> > *The word 'inoperative' can be deemed to cover those cases where the arbitration agreement has ceased to have effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons. One reason may be that the parties have implicitly or explicitly revoked the agreement to arbitrate. Another may be that the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of res judicata ...).*
>
> He goes on to give other examples as for instance where the award has been set aside or there is a stalemate in the voting of the arbitrators or the award has not been rendered within the prescribed time limit. Further, he suggests that a settlement reached before the commencement of arbitration may have the effect of rendering the arbitration agreement inoperative, although he notes an American decision which left this issue to the arbitrators.
>
> As to the phrase 'incapable of being performed', Professor van den Berg is of the view that this would seem to apply to a case where the arbitration cannot be effectively set in motion. The clause may be too vague or perhaps other terms in the contract contradict the parties' intention to arbitrate. He suggests that if an arbitrator specifically named in the arbitration agreement refuses to act or if an appointing authority refuses to appoint, it might be concluded that the arbitration agreement is 'incapable of being performed'. However, that would only apply if the curial law of the state where the arbitration was taking place had no provision equivalent to ss 9 and 12 of the Arbitration Ordinance and art 11 of the Model Law.
>
> I also note that in *Gatoil International v National Iranian Oil Co* default (XVII Yearbook of Commercial Arbitration p 587) Gatehouse J granted a stay and refused to hold that the arbitration clause was null and void, inoperative, or

> incapable of being performed in circumstances where the default appointer named in the clause did not exist.

34 The Council relies on the following statement by Nathaniel Khng AR of the High Court of Singapore in *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* [2008] SGHC 229 at [42] (*Sembawang Engineers*), made with respect to the phrase 'incapable of being performed' and quoted, with apparent approval, but obiter, by Vickery J in *Nova West Contracting Pty Ltd v Brimbank City Council* [2015] VSC 679:

> Moreover, if the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, the arbitration agreement could not be effectuated.

35 The Council further relies on what on its face appears to be the transcript of an ex tempore unreported decision[2] of the Full Federal Court of Australia (Jenkinson, Neaves and Von Doussa JJ) in *Leighton Contractors Pty Ltd v Hooker Corp Ltd* unreported, Full Federal Court of Australia, 10 August 1989 - G10 of 1989 (*Leighton Contractors*) where an agreement provided for disputes or differences:

> to be submitted to an arbitration by an (insert "architect member appointed by the Royal") Australian Institute of Architects – ACT Chapter.

36 The Court considered that it was not possible to conclude whether the parties intended to appoint a particular person or body as an arbitrator or to give a power of appointment and that it was not possible to deduce what the parties intended by the quoted words. The Court rejected a submission that:

- the clause should be construed as being in two independent parts, the first being an agreement to submit any dispute or difference to arbitration and the second, as the parties' attempt, which in this event failed, to agree about the appointment of an arbitrator
- the second part could be severed from the first part
- the Court could by way of s 10(1)[3] of the *Commercial Arbitration Act 1986* (ACT), which provided for the Court to fill vacancies in the office of arbitrator, appoint an arbitrator.

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[2] I was informed that no official report of the decision could be found.

[3] That section provided: 'Where there is a vacancy in the office of arbitrator or umpire (whether or not an appointment has previously been made to that office) and (a)neither the provisions of the arbitration agreement nor the provisions of this Act (other than this section) provide a method for filling the vacancy; (b)the method provided by the arbitration agreement or this Act (other than this section) for filling the vacancy fails or for any reason cannot reasonably be followed; or (c)the parties to the arbitration agreement agree that, notwithstanding that the provisions of the arbitration agreement or of this Act (other than this section)

37 The Court considered that the different parts of the one clause were not susceptible to severance and that; in any event, severance would be inappropriate because it was not clear that either party intended to agree to arbitration regardless of the status or identity of the arbitrator. The Court held that it was not for it to frame a clause which the parties might well have made, but did not make.

38 The Court commented that a party to a building contract might be prepared to agree to the resolution of a future dispute by a nominated Chapter of the Royal Australian Institute of Architects, or by an architect member thereof nominated by a particular person, but might be quite unwilling to submit to arbitration by whoever might be appointed by the Court, for example, by a master builder or a lawyer. The qualifications of the arbitrator may be fundamental to the submission to arbitration.

39 In my view, the arbitration agreement is effective even if cl 42.3 does not operate.

40 Section 11(2) provides that the parties are free to agree upon a procedure for appointing the arbitrator. They are also free not to agree on it, in which event, the Act will fill the gap.

41 Under s 11(3)(b), where there is no agreed appointment procedure in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, an arbitrator is to be appointed on the request of a party by the court.

42 Under s 11(4)(a), where under an appointment procedure agreed on by the parties, a party fails to act as required under the procedure, any party may request the court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

43 Under s 11(4)(c), where under an agreed appointment procedure, the parties are unable to reach agreement expected of them under the procedure, an arbitrator is to be appointed, on the request of a party, by the court.

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provide a method for filling the vacancy, the vacancy should be filled by the Court, the Court may, on the application of a party to the arbitration agreement, make an appointment to fill the vacancy.'

44 The Act distinguishes between an arbitration agreement under s 7(1) and an agreement on a procedure to appoint an arbitrator as contemplated by s 11(2).

45 An arbitration agreement referred to in s 8(1) is one under s 7(1). If such an agreement is inoperative, the referral under s 8(1) does not happen. The same is not true where the agreement is on a procedure, as opposed to the arbitration agreement, and is inoperative. Indeed, s 11 is directed to ensuring that an arbitration agreement operates where the procedure for the appointment of the arbitrator fails.

46 In this case, cl 42.2 is the arbitration agreement and cl 42.3 is an agreement on a procedure. Section 8(1) does not apply to cl 42.3.

47 It is to be observed that cl 42.3 provides for two possible methods of appointment; agreement upon an arbitrator or, failing agreement, nomination by a specified person. The first method is alive. Only the second does not exist. No question of severance within cl 42.3 itself arises. It is merely that part of it has no application.

48 The present case can, it seems to me, be viewed in one of the following three ways, and the Act caters for each of them:

- the parties have, by virtue of having identified a non-existent appointor, not agreed on an appointment procedure at all – s 11(3) will help
- the parties agreed a procedure which requires them to agree, but one has failed to act, or both have failed to act as required – s 11(4)(a) will help
- the parties have agreed on a procedure, being the agreement contemplated in cl 42.3, but they have been unable to reach the agreement expected of them – s 11(4)(b) will help.

49 The authorities upon which the Council relies pertain to circumstances clearly distinguishable from those here.

50 *Leighton Contractors* concerned an enactment which did not contain provisions empowering the Court to appoint an arbitrator absent agreement on any procedure by the parties for appointment, as does the Act.

51 The Court there was unable to attribute a meaning to the provision which the parties agreed. Here, the words of the Contract are clear. There, the Court ascribed some importance to the fact that the arbitrator was to be, or to be

appointed by, an architect member of the Royal Australian Institute of Architects which, the Court thought, indicated some consensus that the Arbitrator would be a specialist architect. Here, no such indication can be derived from the terms of cl 42.3. There, the Court was being asked to sever part of a clause whereas here, cl 42.3 is a stand-alone provision and is clearly severable from cl 42.2. Cl 42.2 is an arbitration agreement. Cl 42.3 is a machinery provision.

52 Unlike the situation described in the brief statement in *Sembawang Engineers* at [42], the parties have not chosen a specific arbitrator in the agreement. It is not necessary for me to consider whether the example described would come within the meaning of inoperative in the Act in any event.

53 In considering whether reasonable persons in the respective positions of the Council and Urban intended that their agreement would fail because of the non-existence of the President, I echo the sentiment of Kaplan J in *Lucky Gold-Star* where his Honour said at 408:

> I fail to see how it can be argued that either party could have placed any importance on a nonexistent set of rules.

54 I fail to see how it can be argued that either party placed any importance on the role of a non-existent person.

55 In these circumstances, the Court must refer the Council and Urban to arbitration. There is no basis otherwise to stay the proceedings against the Architects.

56 Pursuant to s 8(1) of the *Commercial Arbitration Act 2010* (NSW), the Court refers the plaintiff and the first defendant to arbitration.

57 I will stand the matter over to enable the Court to deal with any remaining issues, including the appointment of an arbitrator and costs.

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Amendments

05 June 2018 - corrected paragraph numbering

07 June 2018 - Amend paragraph 1

07 June 2018 - Amend Jurisdiction

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