Arbitration and Domestic Building Disputes - Is The Arbitrator Making a Comeback?

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The recent amendments to the *Queensland Building Services Authority Act* appears to have created great confusion as to whether arbitration of domestic building disputes is still void.

It would now appear that unless the building work in question is for a dwelling home or a duplex then arbitration is again allowable without the assistance of the *Commercial Arbitration Act.* In other words, the parties will have to reach their own terms and conditions regarding the conduct of the arbitration.

1. Home Building Review

In November 1990 the Queensland Home Building Review Report reached the following conclusions concerning arbitration in the home building industry:

(i) There was a perceived lack of impartiality as most arbitrator nominations were made by either the QMBA or the HIA.
(ii) Arbitration had prohibitive costs and delays;
(iii) Unsatisfactory abuses of procedure occurred in arbitration;
(iv) Arbitration was not an appropriate means of resolving home building disputes and arbitration clauses in home building contracts and other arbitration agreements in respect of home building disputes should be void. (Home Building Review Report, November 1990, page 54).

2. Implementation of the Home Building Review Recommendations

In July 1992 the *Queensland Building Services Authority Act* ("the Act") was proclaimed and substantially implemented the Home Building Review recommendations as follows:

- Section 67 provided that a contractual provision requiring the reference of a dispute under a domestic building contract to arbitration was void;
- Section 110 provided that the *Commercial Arbitration Act 1990* did not apply to domestic building work.

These sections appeared to have sounded the death knell for arbitration in relation to contracts for domestic building work.

3. What is domestic building work?

It is submitted that the Queensland Building Tribunal and the Courts have interpreted the definition of "domestic building work" far more widely than the legislature originally anticipated. Domestic building work will include:

- Construction of swimming pools: per Wiley DCJ in *Precision Pools Pty Ltd v Berteaux* (unreported, District Court, Brisbane 18/2/94);
- Landscaping such as pergolas, paving, boulder walls and earthworks: *Lickeen Pty Ltd v Barber* (unreported, Qld Bldg Trib. 11/11/93);
- Construction of over 20 individual dwellings under one contract for an aboriginal council: *Woorabinda Aboriginal Council v Ealesrose Pty Ltd* (unreported, Supreme Court of Rockhampton, 22/11/93);
- Apartment units where a substantial number of units in the apartment building are used for holiday letting: *Habjen v Eclat Painters & Decorators* (unreported, Qld Bldg Trib. 4/8/94).

Because any contracts for the above type of work are contracts for domestic building work, then pursuant to the terms of the Act, arbitration clauses are prohibited and the *Commercial Arbitration Act* does not apply.

Accordingly, given the wide interpretation that the Tribunal and the Courts were giving to "domestic building work" the death knell for arbitrators rang louder and longer.

4. The 1994 Amendments

On 20 May 1994 substantial amendments were made to the Act.

One of the amendments, Section 56A, provided that Part 4 of the Act only applied to a duplex or a single detached dwelling. Section 67 comes within Part 4 of the Act.

Accordingly, as and from 20 May 1994, contractual provisions requiring the reference of a dispute under a domestic building contract to arbitration are void only if that contract is about a duplex or a single attached dwelling. Contracts for the many other types of building work referred

to above can, it would seem, make reference to arbitration.

However, Section 110 does not come within Part 4 of the Act and while parties to such disputes appear to be able to arbitrate, the *Commercial Arbitration Act* will not apply to those disputes.

5. Conclusion

Parties to contracts for domestic building work that are not about a duplex or a single detached dwelling can still arbitrate but must do so without the aid of the Commercial Arbitration Act. That Act lays down procedures for the appointment of arbitrators and the conduct of arbitration proceedings.

It would seem then that the parties will need to reach agreement as to the appointment of the arbitrator and the conduct of any arbitration proceedings themselves without reference to the *Commercial Arbitration Act.*

There is an argument that it was only ever mandatory clauses that "required" the reference of a dispute under a domestic building contract to arbitration that were void and the parties were free to agree to go to arbitration by consent. It does not appear that interpretation has ever been tested by the Tribunal but, in any event, as outlined above, even contracts that have a mandatory requirement for disputes to be referred to arbitration in contracts for domestic building work other than for a duplex or a single detached dwelling can now contain such a clause.

Editorial Note:

If Mr Pyman's analysis is correct, an unfortunate, even untenable, situation seems to be the result. Perhaps, the *Building Services Act* 1992 (Qld) requires further, consequential amendment. ❑