PARTIES:	THE COMMONWEALTH OF AUSTRALIA v SKONIS HOUSING AND DEVELOPMENT (NT) PTY LTD (In Liquidation) (Receiver Appointed)
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE №:	№ 419 of 1990
DELIVERED:	Delivered at Darwin 28 May 1993
HEARING DATES:	Heard at Darwin 21 May 1993
JUDGMENT OF:	Mildren J

REPRESENTATION:

Counsel
Plaintiff: J Lunn
Defendant: A Wyvill

Solicitors
Plaintiff: Australian Government Solicitor
Defendant: Philip and Mitaros

Judgment Category classification: C
Court Computer Code: 9015360
Judgment ID Number: MIL93006
Number of pages: 7
Local Unpublished Distribution

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

№ 419 of 1990
(9015360)

BETWEEN:

THE COMMONWEALTH OF AUSTRALIA

Plaintiff

AND:

SKONIS HOUSING AND DEVELOPMENT (NT) (In Liquidation) (Receiver Appointed)

Defendant

CORAM: Mildren J

REASONS FOR DECISION
(Delivered 28 May 1993)

This is an application by the defendant to strike out certain paragraphs of the plaintiff's Statement of Claim and certain paragraphs of the plaintiff's Reply to the defendant's Defence.

Each of the relevant paragraphs raises for issue the question whether by virtue of the provisions of clause 45 of the contract, the defendant is precluded from presently claiming monies under the contract entered into between the plaintiff and the defendant.

The contract in question is the standard form contract NPWC Edition 3. Clause 45 is entitled "Settlement Of Disputes." The relevant parts of the clause are as follows:

> "All disputes or differences arising out of the Contract or concerning the performance or the non-performance by either party of his obligations under the Contract whether raised before or after the execution of the work under the Contract shall be decided as follows -

(a) The Contractor shall, not later than fourteen days after the dispute or difference arises, submit the matter at issue in writing, specifying with detailed particulars the matter at issue, to the Superintendent for decision and the Superintendent shall, as soon as practicable thereafter, give his decision to the Contractor.

(b) If the Contractor is dissatisfied with the decision given by the Superintendent, he may, not later than fourteen days after the decision of the Superintendent is given to him, submit the matter at issue in writing, specifying with detailed particulars the matter at issue, to the Principal for decision and the Principal shall, as soon as practicable thereafter, give his decision to the Contractor in writing.

If the Contractor is dissatisfied with the decision given by the Principal pursuant to the last preceding paragraph, he may, not later than twenty eight days after the decision of the Principal is given to him, give notice in writing to the Principal requiring that the matter at issue be referred to arbitration and specifying with detailed particulars the matter at issue, and thereupon the matter at issue shall be determined by arbitration. If, however, the Contractor does not, within the said period of twenty eight days, give such a notice to the Principal requiring that the matter at issue be referred to arbitration, the decision given by the Principal pursuant to the last preceding paragraph shall not be subject to arbitration.

Where a notice is given by the Contractor to the Principal pursuant to the last preceding paragraph requiring that the matter at issue be referred to arbitration no proceedings in respect of that matter at issue shall be instituted by either the Principal or the Contractor in any court unless and until the arbitrator has made his award in respect of that matter at issue."

The defendant's argument was that clause 45 is a *Scott v Avery* clause, and the only remedy now available to the plaintiff where the defendant in breach of such a clause issues proceedings, is to apply for a stay of proceedings pursuant to s53 of the *Commercial Arbitration Act*. The basis for this submission is s55(1) of the *Commercial Arbitration Act* which provides as follows:

"55. EFFECT OF *SCOTT v. AVERY* CLAUSES

(1) Where it is provided (whether in an arbitration agreement or some other agreement, whether oral or written) that arbitration or an award pursuant to arbitration proceedings or the happening of some other event in or in relation to arbitration is a condition precedent to the bringing or maintenance of legal proceedings in respect of a matter or the establishing of a defence to legal proceedings brought in respect of a matter, that provision,
notwithstanding that the condition contained in it has not been satisfied —

(a) shall not operate to prevent —

(i) legal proceedings being brought or maintained; or

(ii) a defence being established to legal proceedings brought,

in respect of that matter; and

(b) shall, where no arbitration agreement relating to that matter is subsisting between the parties to the provision, be construed as an agreement to refer that matter to arbitration."

The defendant says, and the plaintiff concedes, that the plaintiff has indicated that it does not intend to apply for a stay of proceedings pursuant to s53 of the *Commercial Arbitration Act*. Further, reliance is placed upon the judgment of Angel J in *TransAustralian Constructions Pty Ltd v Northern Territory of Australia & Anor* (unreported, Supreme Court of the NT, 31/7/91) in which his Honour held that clause 45 constitutes an arbitration agreement within the meaning of s4 of the *Commercial Arbitration Act*. His Honour concluded that clause 45 was an agreement to refer future disputes to arbitration rather than an optional alternative dispute mechanism. In arriving at his conclusion, his Honour read the word "may" in clause 45 as meaning "shall." Accordingly, although a party to the contract could institute proceedings at any time, the other party to the action was entitled only to apply to the court for a stay pursuant to s53; noncompliance with clause 45

could no longer be pleaded as a defence.

The plaintiff, on the other hand, submits that in an application to strike out a pleading, the applicant must establish - before being entitled to the order - that it is plain and obvious that the plaintiff is unable to succeed: see *Drummond-Jackson v BMA* [1970] 1 All ER 1094 at 1101; and that it is equally well established that the court will not make any order under r23.02 where the pleading raises a debatable point of law. The plaintiff's argument was that, notwithstanding the judgment of Angel J, it was still arguable that his Honour's decision was wrongly decided, that the word "may" in clause 45 was permissive and not mandatory; that the procedure laid down by clause 45 provided as conditions precedent to the right to issue proceedings, compliance with both subparagraphs (a) and (b) of that clause; and that thereafter if the Contractor was dissatisfied with the decision given by the Principal, the Contractor had a right to elect to sue or to require the Principal to refer the matter in dispute to arbitration.

There are formidable difficulties in the way of the plaintiff's argument. The first is the judgment of Angel J to which I have referred. Generally speaking, a single judge of this Court will follow the judgment of another single judge of this Court, either because he happens to agree with it or because as a matter of judicial comity he takes the view expressed by Wilberforce J in *Re Howard's Will Trusts* [1961] 2 ALL ER 413 at 421 that it is "undesirable ... that different judges of the same Division should speak with different voices"; see also *Attorney-General v Wurrabadlumba* (1991) 74 NTR 5 at 8 per Asche CJ. However, as the authorities to which Asche CJ referred indicate, the modern practice is that a judge of first instance will, as a matter of judicial comity, usually follow the decision of another judge of first instance *unless he is convinced that that judgment was wrong*: see

Halsbury, 4th ed, Vol 26, para 580, and cases there cited.

As Angel J himself recognised in *TransAustralian Constructions Pty Ltd v Northern Territory of Australia and Anor, supra,* the questions which he had to decide depended upon the correct construction of clause 45, and as his Honour put it, "it is a matter of regret that the drafting of this widely used clause is so sloppy and that as a consequence its true construction is a question of some difficulty" (at 6-7). As his Honour's judgment points out, the question of whether the word "may" is to be read as "shall" in clause 45 has resulted in conflicting decisions by courts in Australia. I do not think that the point is so unarguable that another judge sitting at first instance in this Court would necessarily be bound to follow his Honour's reasoning.

However, that is not the end of the matter. If the word "may" is permissive, the plaintiff has the difficulty that the word appears also in subclause (b) of clause 45 with the result that, unless the word "may" in subclause (b) is held to be mandatory and the word "may" in the clause immediately following subclause (b) is held to be permissive, a party to the contract could at the very least institute proceedings if he had complied with subclause (a). This seems to be a very unlikely possibility given that the draftsman has used the word "shall" in subclause (a). Another difficulty that faces the plaintiff is that there is no specific provision in the contract prohibiting the bringing of proceedings, or deferring the right to bring proceedings, except the words appearing in the last part of the clause which I have quoted above which apply on their face only where a notice has been given by the Contractor to the Principal requiring the matter at issue to be referred to arbitration. The plaintiff submits that, nevertheless, the conclusion that compliance with (a) and (b) is a condition precedent to the right to bring

proceedings, flows from the requirement that "all disputes or differences arising out of the Contract ... **shall** be decided as follows ..."; but the difficulty with that argument is that it is precisely the same argument which lead Angel J to conclude that the whole of the provisions of clause 45 amounted to an arbitration agreement. Be that as it may, the plaintiff pleads that the defendant in purported compliance with clause 45(b) submitted claims to the Principal for his decision, so that if subclause (b) merely gave the plaintiff an election as to whether to sue, having complied with (a), the defendant had elected to proceed by virtue of (b) but it failed to comply with the requirement of that clause to specify with detailed particulars the matter at issue. In consequence, so the argument goes, the defendant, having elected to proceed in that manner, is not entitled to sue until the Principal has had a proper opportunity to consider the claims. In support of these contentions the plaintiff relies on the observation of Fullagar J, with whom Beach and Kaye JJ agreed in *Commonwealth of Australia v Jennings Construction Ltd* [1985] VR 586 at 595:

> "The present contract however does not expressly prohibit legal proceedings outside cl.44 unless the final step is taken of giving a notice to the director-general [Principal in this case] requiring that the matter at issue be referred to arbitration, although legal proceedings are probably prohibited by implication from the words 'shall be decided.'"

I do not think that the construction which the plaintiff contends, namely that at the very least if the defendant elects to proceed by virtue of clause 45(a) and (b), the defendant cannot commence legal proceedings until clauses 45(a) and (b) are both complied with, and the Principal has had a proper opportunity to consider the claim, is so clearly wrong as a matter of law that the relevant provisions in the pleadings should be struck out.

So far as s55 of the *Commercial Arbitration Act* is concerned, I think it is arguable that the only part of clause 45 which is a *Scott v Avery* clause is the last paragraph of the clause which I have quoted above, and that s55(1) does not apply to that part of clause 45 that deals with the procedure prior to the giving by the Contractor to the Principal of a notice requiring the matters at issue be referred to arbitration. In consequence, it seems to me to be arguable that having elected to proceed under clause 45 to the stage where the defendant has chosen to proceed according to its terms in accordance with subclauses (a) and (b), that the effect of the clause is to preclude the bringing of legal proceedings until there has been a proper compliance with those provisions and the matter has reached the stage that the defendant is dissatisfied with the plaintiff's decision. Put another way, it seems to me that it is arguable that the procedure up to the point where the Principal has properly had an opportunity to consider the claim and has rejected it is not "the happening of some other event <u>in or in relation to arbitration</u> [which] is a condition precedent to the bringing or maintenance of legal proceedings in respect of a matter." (Emphasis mine).

I therefore decline at this stage to strike out any of the relevant paragraphs of the Statement of Claim or of the Reply to the Defence.

The application is therefore dismissed with costs. I certify fit for counsel.