

**FIJI BUILDERS LTD.**

v.

**TIP TOP ICE CREAM CO. (FIJI) LTD.**

[SUPREME COURT, 1966 (Mills-Owens C.J.) 18th March, 6th April]

**Civil Jurisdiction**

*Arbitration—dispute within arbitration clause in contract—application to stay action—construction of arbitration clause—whether engineer thereby appointed arbitrator.*

*Arbitration—engineer agent of one party to contract—whether competent to act as arbitrator.*

*Action—arbitration clause in contract—application for stay—whether engineer appointed arbitrator by arbitration clause—engineer agent of one party to contract—discretion of court.*

The plaintiff company contracted with the defendant company to construct certain road, site and drainage works. The Engineer, who was the agent of the defendant company, allowed extras in the sums of £600 and £767-12-0 which were incorporated in his final certificate, the amount of which the present action was brought to recover. The defendant company applied to stay the action on the ground that the extras were in dispute and that clause 66 of the General Conditions of Contract of the Institution of Civil Engineers (set out in full in the judgment) which was incorporated in the contract, required the dispute to be referred to arbitration.

The application was resisted by the plaintiff company on the ground that clause 66 required the Engineer to act as arbitrator and if he were to hold in favour of the defendant company he would be impeaching his own certificate; also as arbitrator he would be in the position of a witness and a judge in the dispute.

*Held*: 1. That in general, if parties agree on an arbitrator such as the engineer or architect employed by one of the parties they must abide by their agreement.

2. That the case was not one [such as *Bristol Corporation v. Aird* (infra)] which involved the virtual necessity of the engineer-arbitrator giving evidence of the terms of an oral agreement, but moreover—

3. The provisions of clause 66 did not place the Engineer in the position of an arbitrator and the requirement that disputes were to be first referred for his decision was no more than a step in invoking the procedure of arbitration before an agreed or nominated arbitrator.

4. The action would be stayed.

Case referred to: *Bristol Corporation v. Aird (John) & Co.* [1913] A.C. 241; 29 T.L.R. 360.

Summons in chambers to stay action in the Supreme Court on contract containing arbitration clause; reported by direction.

*G. M. G. Johnson* for the plaintiff company.

*R. L. Munro* and *C. D. Singh* for the defendant company.

MILLS-OWENS C.J. : [6th April 1966]—

This is a summons to stay the action on the ground that the subject-matter thereof should be referred to arbitration.

By a contract dated the 27th April, 1964, the plaintiff company undertook to construct certain road, site and drainage works for the defendant company. The contract price was £5,744 and the Engineer was the agent of the defendant company. According to the affidavit of Mr. Mackinnon, a director of the plaintiff company, disagreement arose over the road work, during the course of the work, between the plaintiff company and the Engineer. The plaintiff company maintained that the specifications were inadequate, and that the method of construction directed by the Engineer was unsatisfactory. As a result of the Engineer's insistence on his method being adhered to, the plaintiff company says, the amount of metal and stone fill provided for by the schedule of quantities proved insufficient. Whatever the merits of the dispute as to the mode of construction, additional material was in fact used and the Engineer allowed the sum of £600 as an extra on account thereof. Further, according to the affidavit, the surface area of the finished earthworks proved to be greater than the area contemplated by the Engineer's design with the consequence that extra material and work was required on that account also; additional extras in a sum of £767-12-0 were therefore allowed by the Engineer. The only other item of extras, a sum of £20, does not appear to be material for present purposes. The extras of £600 were allowed in May 1965 and the extras of £767-12-0 were allowed, according to an "Amended Statement of Account" signed by the Engineer, on the 12th July, 1965. Also on the 12th July, 1965, according to Mr. Mackinnon's affidavit, the Engineer said in a letter to the plaintiff company :

"It is my considered opinion that Fiji Builders Ltd. have underestimated the importance of proper and complete consolidation of filling required, and the only alleviating factor which I consider can be taken into account is that the Tip Top Ice Cream Co (Fiji) Ltd. required this work completed by a given date necessitating your working in adverse weather conditions."

It was apparently on this basis that the extras were allowed by the Engineer.

Without going too closely into the dispute, it appears that the plaintiff company's view was that owing to the waterlogged condition of the ground it was impossible to produce, with the quantity and type of metal fill provided for by the contract, a compacted, consolidated area by the method insisted upon by the Engineer; being directed to proceed according to the Engineer's method, the plaintiff company says, the poor results which the company had anticipated

A in fact occurred and hence the occasion for the extras of £600; the extras of £767-12-0 were the result of inadequacy of the specifications and of the method of construction directed by the Engineer. The proper method to adopt, the plaintiff company maintains, having regard to the waterlogged and plastic nature of the ground, was to rip out the area to a depth of 18" and to lay and roll a foundation upon which the roadway should be relaid.

B The action is brought to recover the sum of £1,246-3-0 representing the amount of the Engineer's final certificate which takes into account extras in the aggregate sum of £1,387-12-0 (being the £600, £20 and £767-12-0 referred to above).

The contract incorporates the General Conditions of Contract etc. of the Institution of Civil Engineers (3rd Edn. — March 1951). Clause 66 of these Conditions is as follows—

C "If any dispute or difference of any kind whatsoever shall arise between the Employer or the Engineer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works (whether during the progress of the Works or after their completion and whether before or after the determination abandonment or breach of the Contract) it shall be referred to and settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor. Such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor until the completion of the work and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether notice of dissatisfaction is given by him or by the Employer as hereinafter provided or not. If either the Employer or the Contractor be dissatisfied with any such decision of the Engineer then and in any such case either the Employer or the Contractor may within 28 days after receiving notice of such decision require that the matter shall be referred to an arbitrator to be agreed upon between the parties or failing agreement to be nominated on the application of either party by the President for the time being of the Institution of Civil Engineers and any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1950 or the Arbitration (Scotland) Act 1894 as the case may be or any statutory re-enactment or amendment thereof for the time being in force. Such arbitrator shall have full power to open up review and revise any decision opinion direction certificate or valuation of the Engineer and neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the Engineer for the purpose of obtaining his decision above referred to. The award of the arbitrator shall be final and binding on the parties. Such reference except as to the withholding by the Engineer of any certificate or the withholding of any portion of the retention money under Clause 60 hereof to which the Contractor claims to be entitled or as to the exercise of the Engineer's power to give a certificate under Clause 63(1) hereof shall not

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be opened until after the completion or alleged completion of the Works unless with the written consent of the Employer and the Contractor. Provided always:—

- (i) that the giving of a Certificate of Completion under Clause 48 hereof shall not be a condition precedent to the opening of any such reference A
- (ii) that no decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator on any matter whatsoever relevant to the dispute or difference so referred to the arbitrator as aforesaid.” B

The defendant company maintains that the matters in dispute are within the scope of the clause. By a letter dated the 2nd December, 1965, addressed to the plaintiff company (copied to the Engineer) the defendant company invoked the procedure laid down by the clause. It is contended on behalf of the plaintiff company that in the circumstances of the case the Court should, in the exercise of its discretion, permit the action to proceed; in particular, it is argued, the Engineer is called upon by clause 66 to act as an arbitrator and if he were to hold in favour of the defendant company he would be impeaching his own certificate; further, if the matter were to come before him in his capacity as an arbitrator he would be in the position, in effect, of a witness and a judge in respect of the dispute. C

With regard to the first point there is clear authority that, in general, if the parties agree on an arbitrator such as the engineer or architect employed by one of the parties and who therefore might be said to be incapable of being completely disinterested or impartial they must abide by their agreement (3 *Halsbury*, 3rd Edn., para. 1041). Further, such an arbitrator is not disqualified by reason of the fact that he has expressed an opinion during the progress of the works as to the matters in dispute, or has complained of the manner in which the contractor is performing the contract (*ibid*). D

On the second point the plaintiff company rely on the decision in *Bristol Corporation v. Aird* (1913) A.C. 241. That in my view was a different case, involving as it did the virtual necessity for the engineer-arbitrator to give evidence as to the terms of an agreement made orally by him with the contractor during the course of the works and as to their intentions in arriving at that agreement — whether the varied work agreed upon was ordered as a concession to the contractor or to remedy a deficiency in the engineer's design. In the case now before me the Engineer has made it plain in his letter of the 12th July, 1965, why the extras were approved by him. The dispute as it appears to me is substantially technical, arising on differing views as to the proper or best method of achieving the desired result in the conditions obtaining at the time and on differing views as to the adequacy of the design and specifications. E

Moreover, I do not accept that the Engineer is placed in the position of an arbitrator by clause 66. In my view the requirement that disputes are to be first referred for his decision is no more F

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A than a step in invoking the procedure of arbitration before an agreed or nominated arbitrator. This, I think, is made clear by the provision that the reference to an agreed or nominated arbitrator is expressly stated to amount to a 'submission' whereas there is no such provision in relation to the Engineer, and by the absence of the conferment on the Engineer of powers specifically conferred by the clause on the arbitrator; possibly also by the provisions of the second proviso with regard to the Engineer's position as a witness. Further, it has been said that precise words are required to make the agent of one of the parties an arbitrator, and as I see B it the fact that there may be a second or final arbitrator makes no difference to the application of that rule.

In the result I hold that the action should be stayed.

Order in terms of the summons with costs to the defendant company.

*Order for stay of action.*