Case note: *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206

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Summary

In the recent decision in *Fitzpatrick v Emerald Grain Pty Ltd*, Martin CJ of the Supreme Court of Western Australia considered whether the choice by the parties of specialist arbitration rules relating to grain sale disputes limited the scope of disputes that are captured by the arbitration clause.[1] On this issue, the Court held that the parties' choice of specialist arbitration rules did not limit the scope of disputes that were captured by the clause. Having construed the clause and its effect, the Court stayed the proceedings and referred the parties to arbitration.

Overview of Dispute

The case concerns disputes between forty-seven grain growers (the **Growers**) and Emerald Grain Pty Ltd (**Emerald**). Emerald carries on a business as the operator of grain commodity pools, with the Growers placing grain into the pools from which the grain was then sold by Emerald to various purchasers. The disputes arose from separate contracts between each of the Growers and Emerald. Each of the contracts in question contained a provision requiring disputes arising out of, relating to or in connection with its terms to be resolved by arbitration. In essence, at the heart of disputes in this case was the proper approach to construction of contracts incorporating arbitration rules and including arbitration clauses.

Proceedings and Stay Application

The Growers commenced proceedings in the Supreme Court of Western Australia against Emerald alleging that the net proceeds of sale would be held on trust for all suppliers to the pool and that the proceeds would be distributed to each supplier in accordance with the terms of the contract.[2] However, prior to submitting any statement on the substance of the dispute to the Court, Emerald applied for orders referring each of the disputes to arbitration pursuant to s 8 of the *Commercial Arbitration Act 2012* (WA) (the **Act**) and staying the proceedings. The Growers opposed this and relied on clause 47 of the 2010 and 2011 Conditions which provided that the parties submit to the non-exclusive jurisdiction of the courts of Victoria.[3]

Key Provisions of Contracts including Arbitration Clauses and Rules

The contracts between the Growers and Emerald are subject to Conditions covering trade rules and arbitration, where clauses 31 and 32 of the 2010 Conditions relevantly provided that:

> *31. These terms and conditions expressly incorporate the Trade Rules of Grain Trade Australia (GTA) in effect at the time You enter into a Pool Contract or*

1 *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206 (***Fitzpatrick v Emerald Grain***).

2 *Fitzpatrick v Emerald Grain Pty Ltd* at [30].

3 See *Fitzpatrick v Emerald Grain* at [16]-[18].

deliver Commodities to a Pool, except to the extent of any inconsistency, in which case these Terms and Conditions will prevail. The Trade Rules form an integral part of these Terms and Conditions and both parties agree to be bound by them.

32. Any dispute or claim arising out of, relating to or in connection with these Terms and Conditions, a Pool Contract or delivery of Commodities to a Pool, including any question regarding the existence of a contract, the validity or its termination, and which cannot be resolved between the parties, shall be resolved by arbitration in accordance with the GTA Dispute Resolution Rules in force at the commencement of any arbitration.

The 2011 conditions are in nearly identical terms.[4] Further, the second clause of each of the Conditions provides that the terms and conditions which follow are incorporated into a contract made between Emerald and the grower for the supply of a commodity into a pool (**Pool Contract**). The second clause of the 2011 Conditions also provides that if there is any inconsistency in wording or meaning between the Pool Contract and the Conditions, the Pool Contract will prevail. However, the parties have not pointed to any possible inconsistency between any Pool Contract and the 2011 Conditions.[5]

Importantly, for the purposes of the case, the Court noted that clause 31 of the Conditions incorporated the GTA Trade Rules in effect at the time the relevant grower and Emerald entered into their contract.[6] The GTA Trade Rules in effect at the time of entry into all the contracts were the trade rules as at March 2009. Relevantly, the first page of the GTA Trade rules provides:[7]

GTA Trade Rules shall govern all disputes of a mercantile, financial or commercial character connected with grain, feed, oilseeds or other agricultural commodities, as they exist now or as amended from time to time, arising between Members or Allied Members of GTA and related counter-parties, and shall be the basis of arbitration on such controversies, unless otherwise and specifically agreed to at the time of trade, or some subsequent time.

In particular, Rule 24 'Disputes' of the GTA Trade Rules specifies that "Any party or parties who have entered into Terms of Trade subject to these GTA Trade Rules shall be entitled to refer any disputes arising out of such contract and which cannot be resolved between the parties to GTA for Arbitration as per Rule 26 [Arbitration]." Further, Rule 26 of the GTA Trade Rules provides that:

(1) The GTA Dispute Resolution Rules form an integral part of these GTA Trade Rules of which all parties subject to these GTA Trade Rules shall be deemed to be cognisant.

(2) If any dispute arises out of or relates to any contract subject to these Trade Rules or the breach, termination or subject matter of a contract, the dispute shall be submitted to and settled by Arbitration in accordance with the GTA

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4 See *Fitzpatrick v Emerald Grain Pty Ltd* at [15].

5 *Fitzpatrick v Emerald Grain* at [12].

6 *Fitzpatrick v Emerald Grain* at [19].

7 *Fitzpatrick v Emerald Grain* at [19].

Dispute Resolution Rules in the edition current at the date of the establishment of the Terms of Trade in the contract, such rules forming an integral part of the contract and of which both parties to the contract shall be deemed to be cognisant.

(3) Neither party to a dispute, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other in respect to any such dispute until arbitrated in accordance with the GTA Dispute Resolution Rules.

Trust Issue

The relief sought by the Growers pursuant to the *Trustees Act 1962* (WA) was a significant part of their opposition to Emerald's application for a stay and referral to arbitration. One of the issues that arose here was the precise characterisation of the contracts, including whether they are simply contracts for the sale of grain by each grower to Emerald or whether they give rise to a trust relationship between each Grower and Emerald (with Emerald holding funds on trust). Due to the significance of the issue, the Court referred to the relevant provisions of the *Trustees Act 1962* (WA).[8] However, as regards the characterisation of contracts and the trust issue, the Court proceeded on the basis that the trust issue did not need to be resolved as the issue was arguable and the parties were content for the Court to proceed on such basis.[9] Hence, it was not necessary for the Court to resolve the trust issue in order to determine Emerald's application for a stay and referral to arbitration.[10]

Arbitration Questions

The Court referred to the relevant provisions of the *Commercial Arbitration Act 2012* (WA),[11] and stated that the issues which remain to be determined under s 8 of that Act are:[12]

(a) Is there an arbitration agreement between each Grower and Emerald, and, if so, what is the scope of that agreement?;

(b) Do the proceedings include a matter or matters which are within the scope of the arbitration agreement?; and

(c) Is the arbitration agreement incapable of being performed?

<u>*Existence of Arbitration Agreement, its Construction and Scope*</u>

As regards the first issue, the Court held that there was clearly an arbitration agreement.[13] However, the construction and scope of the arbitration agreement required a more extensive

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8 See *Fitzpatrick v Emerald Grain* at [37] where the Court refers to s 77 (New trustees, Court may appoint), s 78 (Vesting orders, when Court may make) and s 93 (Applications to Court, who may make) of the *Trustees Act 1962* (WA).

9 *Fitzpatrick v Emerald Grain* at [10].

10 *Fitzpatrick v Emerald Grain* at [10].

11 See *Fitzpatrick v Emerald Grain* at [38]-[41] where the Court refers to s 1C (Paramount object of Act) and s 8 (Arbitration agreement and substantive claim before court (cf. Model Law Art 8)) of the *Commercial Arbitration Act 2012* (WA).

12 *Fitzpatrick v Emerald Grain* at [41].

13 *Fitzpatrick v Emerald Grain* at [42]-[43].

consideration. The Court stated that arbitration agreements are to be construed by reference to the general principles which apply to the construction of all commercial contracts.

The Court stated that these principles require the application of a broad, liberal and flexible approach to the construction.[14] The Court emphasised that the parties here used expressions of the widest import in the Conditions as well as have also expressly included within the disputes or claims which can be resolved by arbitration "any question regarding the existence of a contract, the validity or its termination".[15] Hence, the language used by the parties in their arbitration agreements supported the conclusion that an ordinary businessperson would understand the arbitration agreements to extend to, and embrace, a very wide ambit of disputes or claims, having at least some degree of connection with, or relationship to, the substantive agreement between the parties for the delivery and sale of grain, or its performance.

Whether Matters in the Proceedings fall within the Scope of the Arbitration Agreement

After referring to a number of authorities in this area,[16] the Court concluded that:

> [T]*he question of whether the proceedings involve a matter or matters which are the subject of an arbitration agreement depends upon whether there are controversies which are to be determined in the course of those proceedings which can be the subject of arbitration pursuant to the arbitration agreement. That question is to be ascertained by reference to the subject matter of the dispute or controversy in the proceedings and the questions that must be determined in the course of the proceedings. If one or more of those questions is a 'matter' which can be determined pursuant to the arbitration agreement, the opening words of s 8 of the Act are engaged irrespective of whether or not the proceedings also raise controversies which cannot be determined by arbitration pursuant to the arbitration agreement, and irrespective of whether the ultimate relief sought in the proceedings cannot be obtained by arbitration.*[17]

The Trust Question

Chief Justice Martin held that "the question of whether or not there is a trust has no bearing upon the existence or ambit of the arbitration agreements".[18] It was held that it was unnecessary and inappropriate to make any assessment of the merits of the trust assertion, with the question rather being whether the issue is a 'matter' which is the subject of the arbitration agreement between each grower and Emerald.[19]

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14 *Fitzpatrick v Emerald Grain* at [45]-[46].

15 *Fitzpatrick v Emerald Grain* at [51].

16 See, eg, *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 per Deane and Gaudron JJ; *Hancock v Rinehart* [2013] NSWSC 1352 per Bergin CJ; *Comandate Marine Corp v Pan Australia Shipping* Ltd [2006] FCAFC 192 per Allsop J; *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* at [49] - [50] per Mitchell J; and *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* [2014] VSCA 166; (2014) 44 VR 64 at [32] - [33] per Warren CJ, at [84] per Nettle J.

17 *Fitzpatrick v Emerald Grain* at [54].

18 *Fitzpatrick v Emerald Grain* at [58].

19 *Fitzpatrick v Emerald Grain* at [59]-[60].

Trade Rules

The Court gave particular focus to the issue of GTA Trade Rules and their impact on the arbitration agreements. The Growers asserted that the broad language of the arbitration agreements should be read narrowly by virtue of the GTA Trade Rules and hence that the arbitration agreements should only apply to disputes of a "technical or mercantile nature".[20] The Court rejected this argument on the basis that:

(i) In the event of inconsistency between the Conditions and the GTA Trade Rules, clause 31 expressly provides that the Conditions prevail.[21]

(ii) The words "mercantile, financial or commercial character" and the language of the introduction and preamble to the GTA Trade Rules do not justify the reading down of arbitration provisions.[22]

(iii) The terms of the arbitration agreement expressly require "any question regarding the existence of a contract, the validity or its termination" to be resolved by arbitration.[23]

(iv) It is not possible to read down the clear and unambiguous language of the arbitration agreement by reference to inferences which might (or might not) be drawn from such things as the composition of the arbitral tribunal.[24] Rather, the provisions simply reflect parties' choices with respect to the mechanisms by which their disputes will be resolved and suggest, if anything, a preference for industry expertise and informality.

(v) For the same reasons as mentioned above, the clear and unambiguous language of the arbitration agreement covering matters such as the applicable time limits and relevant parties cannot be confined by inferences drawn from the GTA Trade Rules.[25]

Thus, the Court ultimately rejected the Growers assertion that the GTA Trade Rules have the effect of confining the arbitration agreements. As a result, the matters in question were not excluded from the scope of the arbitration agreement by virtue of the GTA Trade Rules.

Submission to the Non-Exclusive Jurisdiction of the Courts of Victoria

The Growers also argued that the parties' submission to the non-exclusive jurisdiction of the Courts of Victoria supported a narrow construction.[26] Again, Martin CJ rejected this argument and favoured a broader construction because:

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20 *Fitzpatrick v Emerald Grain* at [64].

21 *Fitzpatrick v Emerald Grain* at [67]-[68].

22 *Fitzpatrick v Emerald Grain* at [69].

23 *Fitzpatrick v Emerald Grain* at [70].

24 *Fitzpatrick v Emerald Grain* at [71].

25 *Fitzpatrick v Emerald Grain* at [72].

26 *Fitzpatrick v Emerald Grain* at [74].

(i) Conferral of non-exclusive jurisdiction simply means that the parties have recognised that some disputes may arise which do not fall within the terms of the arbitration agreement.[27]

(ii) Even where both exclusive jurisdiction clauses and arbitration agreements may apply, courts have shown a willingness to construe the relevant provisions in such a way as to give effect to the parties' evident intention to arbitrate their disputes.[28]

(iii) In this case, there was no tension between the parties' agreement to confer non-exclusive jurisdiction on Victorian courts and the broad construction of the arbitration agreement.[29] The Victorian Courts' jurisdiction and role was to supervise and enforce the terms of any award made in accordance with the arbitration agreement and, possibly, to address situations where disputes do not fall within the scope of the agreement.[30]

The Court, therefore, found that the conferral of non-exclusive jurisdiction did not confine the arbitration provisions so as to exclude the matters raised in the case from the ambit of the arbitration agreement.[31]

Other Issues related to what falls within the Scope of the Arbitration Agreement

The Court also rejected a number of other arguments advanced by the Growers to confine the scope of the arbitration agreements. The Court rejected the Growers' argument as to the nature of the asserted rights, including the Growers' arguments to the effect that:[32]

(i) the parties' intention should be construed so as to exclude the application of arbitration where breach of trust issues may be involved;

(ii) disputes involving more than one grower fall outside the arbitration agreements;[33] and

(iii) the parties to the agreements would attach any significance to the legal characterisation of their relationship, or that there should be any basis for attributing to the parties an intention that the mechanism by which their disputes are to be resolved should be determined by that legal characterisation.[34]

With respect to the standard of proof under s 8 *Commercial Arbitration Act 2012* (WA), the Court noted that the relevant question is, whether on the balance of probabilities, there was an

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27 *Fitzpatrick v Emerald Grain* at [75]-[76].

28 *Fitzpatrick v Emerald Grain* at [78] referring to Le Miere J in *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2016] WASC 193 at [61] - [65]; see also, for example, *Ace Capital Ltd v CMS Energy Corp* [2008] EWHC 1843 (Comm); *Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWHC 42 (Comm).

29 *Fitzpatrick v Emerald Grain* at [79].

30 *Fitzpatrick v Emerald Grain* at [79].

31 *Fitzpatrick v Emerald Grain* at [80].

32 See *Fitzpatrick v Emerald Grain* at [81]-[85].

33 See *Fitzpatrick v Emerald Grain* at [81]-[82]; this being so because, amongst other reasons, the arbitration agreements were expressed in the widest possible terms.

34 See *Fitzpatrick v Emerald Grain* at [84].

arbitration agreement to which a matter arising in the relevant court proceedings was subject.[35]

Court's Conclusion as to what Constitutes a Matter subject to an Arbitration Agreement

The Court rejected all the arguments advanced by the Growers to constrain the arbitration agreement. Instead, the Court adopted a broad construction of the arbitration agreement and hence what constitutes a matter and what falls within the scope of the arbitration agreement. This was held to include the trust issues and all the questions in the proceedings. As a result, the Court referred the parties to arbitration and stayed the proceedings, subject to the question of whether the arbitration agreements are incapable of being performed.

Whether the Arbitration Agreement is Capable of being Performed

After having stated the courts' discretion with respect to arbitrability,[36] the Court proceeded to address the question of non-arbitrability. The Court referred to the doctrine of non-arbitrability as described in *ATCO*, being that "some matters so pervasively involve public rights, or interests of third parties, which are the subjects of the uniquely governmental authority, that agreements to resolve such disputes by "private" arbitration should not be given effect".[37]

The Court also referred to the majority in *Rinehart v Welker* which rejected the proposition that disputes with respect to the administration of a trust are inherently non-arbitral.[38] Importantly, Bathurst CJ in *Rinehart v Welker* stated:

> *In these circumstances it does not seem to me to be contrary to public policy for the beneficiaries under the Trust and the trustee to agree to resolve their disputes by arbitration, provided the supervisory jurisdiction of the court contained in the relevant legislation is maintained*.[39]

Although the circumstances in *Rinehart v Welker* were quite different, the Court in *Fitzpatrick v Emerald Grain* nonetheless held that the difference in circumstances did not render the matters raised non-arbitrable.[40] Further, the Court stated that the possible legal

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35 *Fitzpatrick v Emerald Grain* at [57] referring to *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2016] WASC 193 per Le Miere J who followed Gleeson J in *Rinehart v Rinehart [No 3]* (2016) 337 ALR 174. This question in some cases is a matter which can be resolved on the proper construction of the relevant contracts, in a relatively summary fashion. However, where that is not practicable, the court could either direct an issue to be tried by the court, or proceedings could be stayed under the inherent jurisdiction of the court so that the putative arbitral panel could decide the question of its own jurisdiction, see here the decision of Aikens LJ in *Joint Stock Co 'Aeroflot-Russian Airlines' v Berezovsky* [2013] EWCA Civ 784.

36 *Fitzpatrick v Emerald Grain* at [89] referring to *Rinehart v Rinehart [No 3]* (2016) 337 ALR 174 per Gleeson J.

37 *Fitzpatrick v Emerald Grain* at [89] referring to *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 (***ATCO***) at [80].

38 *Fitzpatrick v Emerald Grain* at [91] referring to *Rinehart v Welker* [2012] NSWCA 95 per Bathurst CJ & McColl JA, cf Young JA disagreeing.

39 *Rinehart v Welker* [2012] NSWCA 95 at [177] per Bathurst CJ.

40 *Fitzpatrick v Emerald Grain* at [99]; the circumstances in *Rinehart v Welker* included an express trust created for the benefit of members of a family, an interested third-party corporate entity, and the position adopted by the beneficiaries.

characterisation of the rights, which the Growers assert, as equitable does not lead to the conclusion that the disputes are not arbitrable.[41]

Finally, the Court also noted that it is now well-established that just because an arbitrator cannot grant all the relief a court is empowered to grant does not mean that the dispute is incapable of arbitration.[42] As regards the Growers' submission that proceedings are not arbitrable because it is not possible to join all wheat producers with an interest in the outcome of arbitration, the Court held that it is well-established that a 'matter' may affect the interests of others who are not party to the arbitration agreement. This does not result in the 'matter' falling outside the scope of s 8 of the *Commercial Arbitration Act 2012* (WA).

Based on this, the Court rejected the Growers' arguments that the arbitration agreements are incapable of being performed. As a result, s 8 of the *Commercial Arbitration Act 2012* (WA) applied to the proceedings in question, and hence the Court granted a stay of the proceedings and referred the parties to arbitration.

Comment

The decision in *Fitzpatrick v Emerald Grain* is noteworthy for its consideration of industry specific arbitration rules. Chief Justice Martin's conclusion that the bespoke nature of the arbitration rules in question did not narrow the scope of the arbitration clause should serve as a word of warning to parties to carefully consider what they are actually signing up for when choosing to incorporate industry specific arbitration rules into their arbitration agreements. While there are plainly circumstances where parties would be well advised to use specialist arbitration rules (for example, in disputes where industry knowledge and experience is required), parties should consider reserving the resolution of complex legal disputes in accordance with general arbitration rules. To implement this in practice, parties could split their arbitration agreement to the effect that general commercial disputes involving quality or calculation issues, for instance, are dealt with under industry specific rules and, where a dispute involves complex legal points (either in isolation or in combination with general issues), the dispute be resolved in accordance with non-industry specific arbitration rules. Such an approach takes advantage of the strengths of industry specific arbitration rules (e.g. their procedural efficiency and specialised procedures) without taking on their weaknesses (e.g. their unsuitability for broader disputes and limitations on the selection of arbitrators).

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41 *Fitzpatrick v Emerald Grain* at [99].

42 *Fitzpatrick v Emerald Grain* at [100] referring to *Rinehart v Welker* [2012] NSWCA 95 at [170] per Bathurst CJ; *IBM Australia Ltd v National Distribution Services Ltd* (486) per Clarke JA, Handley JA agreeing; *Re Ikon Group Ltd [No 2]* [2015] NSWSC 981 [23] per Brereton J.