VBIDP

VICTORIAN BUILDING INDUSTRY DISPUTES PANEL
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IJF AUSTRALIA PTY LTD

AND

CFMEU

VARIOUS PROJECTS

RE: ALLEGED RESTRICTIONS AND BANS ON ALL SUBCONTRCTORS OF IJF AUSTRALIA PTY LTD

04 April 2012

011-2012

DECISION

[1] On 26 March 2012, the Master Builders Association of Victoria ("the MBAV") notified a dispute between IJF Australia Pty Ltd ("the employer") and the Construction Forestry Mining and Energy Union ("the CFMEU") seeking that the Panel make a ruling in relation to the specific consultation/sham contracting clause (Clause 22) of the *IJF Australia Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015* ("the Agreement") [Agreement ID: AE891241; Print No: PR519516].

[2] The matter came on for hearing before the Panel on 28 March 2012.

[3] At the commencement of the hearing, the CFMEU raised a preliminary issue as to the jurisdiction of the Panel to deal with the alleged dispute. In determining any matter before it, the Panel must always be conscious of its jurisdiction to do so. It is not unusual for a party to raise a

question of jurisdiction at a Panel hearing. It is also not unusual for a party to agree to a matter being dealt with by the Panel by way of conciliation even if that party has raised a question of jurisdiction. However, if a question as to the Panel's jurisdiction is raised in respect to an arbitration of a matter, the Panel must decide that issue before proceeding to finally determine the matter.

[4] After hearing the parties as to the jurisdictional issue, the Panel adjourned to consider the submissions of the parties as to the question of the Panel's jurisdiction. The Panel members having discussed that matter amongst themselves, upon the resumption of the hearing, the Panel made the following statement:

> *In this matter, the CFMEU has raised a jurisdictional issue – namely whether or not there is a dispute between the parties with which the Panel can deal. What may or may not have been the position when the alleged disputes was notified to the Panel, it now appears to the Panel from what the parties have put to it today that there is no current dispute between the parties in relation to the proper application of Clause 22 of the Agreement and that there is otherwise no dispute between the parties arising under the Agreement. The Panel therefore has no jurisdiction to deal with the matter as notified. We will issue our reasons for this decision as soon as possible and provide them to the parties.*

[5] It is agreed that the parties are bound by the terms of the Agreement. Clause 22 of the Agreement is in the following terms:

> ***22. Sham Contracting, Supplementary Labour and Employment Security***
>
> *The parties to this Agreement acknowledge that sham contracting has the potential to undermine fair employment practices, erode employee entitlements and affect the job security of employees covered by this Agreement.*
>
> *In this clause, "sham contracting" means sham arrangements as described in Division 6 of Part 3-1 of the FW Act.*
>
> *If the company wishes to engage supplementary labour to perform work performed by its employees under this Agreement, the company must first consult in good faith with the parties to this Agreement and take reasonable steps to ensure that all such workers are engaged on lawful terms and conditions.*
>
> *Following consultation and subject to this clause, the decision whether to engage supplementary labour is a decision of the company alone.*
>
> *Any use of sham .contracting is a breach of this Agreement.*
>
> *Any dispute over the application of this clause will be dealt with under the dispute resolution procedure.*

[6] The relevant disputes resolution procedure is set out in Clause 11 of the Agreement in the following terms:

> ***11. DISPUTES RESOLUTION PROCEDURE***
>
> *11.1 A major objective of this Agreement is to eliminate lost time and/or production arising out of disputes or grievances. Disputes over any work related or industrial matter or any matters arising out of the operation of the Agreement or incidental to the operation of the Agreement should be dealt with as close to its source as possible. Disputes over matters arising from this Agreement (or any other dispute related to the employment relationship or the National Employment Standards, including subsections 65(5) or 76(4) of the FW Act) shall be dealt with according to the following procedure.*
>
> *11.2 In the event of any work related grievance arising between the Company and an employee or employees, the matter shall be dealt with in the following manner:*
>
> *a. The matter shall be first submitted by the employee/s or his/her shop steward/employee representative or other representative to the site foreperson, supervisor or the other appropriate site representative of the Company, and if not settled, to a more senior Company representative.*
>
> *b. Alternatively, the Company may submit an issue to the employee/s who may seek the assistance and involvement of the shop steward/employee representative or other representative.*
>
> *c. Work shall continue without interruption from industrial stoppages, bans and/or limitations while these procedures are being followed. The pre-dispute ·status quo shall prevail while the matter is being dealt with in accordance with this procedure.*
>
> *d. If still not resolved, there may be discussions between the relevant Union official (if requested by the employee/s), or other representative of the employee, and senior Company representative.*
>
> *e. Should the matter remain unresolved either of the parties or their representative shall refer the dispute at first instance to the Victorian Building Industry Disputes Panel (which shall deal with the dispute in accordance with the Panel Charter).*
>
> *f. Either party or their representative may, within 14 days of a decision of the Panel, refer that decision to Fair Work Australia (FWA) for review. FWA may exercise conciliation and/or arbitration powers in such review.*
>
> *11.3 Any outcome determined by the Victorian Building Industry Disputes Panel or FWA pursuant to this procedure will not be inconsistent with the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, the Fair Work Act 2009 or the Building and Construction Industry Improvement Act 2005.*
>
> *11.4 This procedure shall be followed in good faith without unreasonable delay.*

11 .5 If any party fails or refuses to follow any step of this procedure the non breaching party will not be obligated to continue through the remaining steps of the procedure, and may immediately seek relief by application to FWA.

[7] According to the representative of the employer, on or about 22 March 2012, the CFMEU raised with the employer an issue as to whether or not the employer was engaging in "sham contracting" in respect to the engagement by it of certain persons at a number of sites. It is alleged that the employer's direct employees and the persons it engaged as sub-contractors at about the same time refused to attend work. A meeting was said to have been held between the employer and the CFMEU at which the CFMEU alleged that the employer had breached the consultative requirements of Clause 22 of the Agreement, an allegation then and now denied by the employer. By the time of the hearing, the employer's direct employees had recommenced work on the various sites but, it was alleged by the employer, sub-contractors had not been "*allowed*" to recommence work.

[8] The employer contends that it is not engaging supplementary labour "*to perform work performed by its employees under* [the] *Agreement*". It contends therefore that there is and was no requirement for it to consult with the CFMEU as provided for in Clause 22.

[9] At the hearing, the CFMEU's representative stated that the CFMEU agreed that none of the work being performed by the persons engaged by the employer as sub-contractors was work that would be performed by the employer's direct employees under the Agreement. The CFMEU representative stated that, if the CFMEU had been of the view that the provisions of Clause 22 were being abused, it would have itself notified a dispute to the Panel.

[10] In light of the consensus between the parties as to this issue, the Panel was compelled to conclude that there was no current dispute between the parties as to the proper application of Clause 22 of the Agreement. The Panel did not, therefore, have jurisdiction to deal with the dispute as notified. Neither party could point to the existence of any dispute arising under the Agreement. There being no dispute with which the Panel could deal, the hearing was concluded.

[11] The Panel notes the allegation that some form of work stoppage appears to have occurred on or about 22 March 2012 in respect to the four sites at which its employees were working. If that did occur, there may well have been some non-compliance with the provisions of the dispute resolution procedure set out in Clause 11 of the Agreement. However, that is not the subject matter of the dispute notified to the Panel and, in any event, on the material before it, the Panel is not able to reach any definitive conclusion as to this allegation.



Simon Williams	***Fergal Doyle***	***Daniel Hodges***
Chairperson	***Panel Member***	***Panel Member***

Date: 04 April 2012