Supreme Court of New South Wales

Lipman Pty Limited v Emergency Services Superannuation Board [2010] NSWSC 710 (29 June 2010)

Last Updated: 2 July 2010

NEW SOUTH WALES SUPREME COURT

CITATION:
Lipman Pty Limited v Emergency Services Superannuation Board [2010] NSWSC 710

JURISDICTION:

FILE NUMBER(S):
2009/298863

HEARING DATE(S):
29 June 2010

EX TEMPORE DATE:
29 June 2010

PARTIES:
Lipman Pty Limited - Plaintiff
Emergency Services Superannuation Board - Defendant

JUDGMENT OF:
Hammerschlag J

LOWER COURT JURISDICTION:
Not Applicable

LOWER COURT FILE NUMBER(S):
Not Applicable

LOWER COURT JUDICIAL OFFICER:
Not Applicable

COUNSEL:
M.C. Rudge SC - Plaintiff
M. Dempsey SC with G Ng - Defendant

SOLICITORS:
Kreisson Legal - Plaintiff
Holding Redlich - Defendant

CATCHWORDS:
CONTRACT – construction – building contract – alternative dispute resolution provision – where the parties refer disputes for expert determination which the provision provides is final and binding but subject to an appeal procedure which involves an attempted negotiated settlement – where the provision provides that the expert determination is to be final and binding unless reversed or overturned or otherwise changed under such procedure – where such procedure did not result in reversal, overturning or change – whether the parties intended the same claims to be determined by different tribunals – held expert determination binding

LEGISLATION CITED:
Building and Construction Industry Security of Payment Act 1999
Trade Practices Act 1974 (Cth)

CATEGORY:
Principal judgment

CASES CITED:
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165
International Air Transport Association v Ansett Australia Holdings Ltd (Subject to Deed of Company Arrangement) (2008) 212 ALR 47
Wilkie v Gordian Runoff Limited [2005] HCA 17; (2005) 221 CLR 522
Australian Broadcasting Commission v Australasian Performing Right Association Limited [1973] HCA 36; (1973) 129 CLR 99
Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160
Fiona Trust & Holding Corporation v Privalov [2008] 1 Lloyd's Rep 254
United Group Rail Services Ltd v Rail Corporation NSW [2009] NSW CA 177

TEXTS CITED:

DECISION:
The expert determination is final and binding

JUDGMENT:

- 1 -

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
TECHNOLOGY & CONSTRUCTION LIST

HAMMERSCHLAG J

29 JUNE 2010

2009/298863 LIPMAN PTY LIMITED -V- EMERGENCY SERVICES SUPERANNUATION BOARD

EX TEMPORE JUDGMENT

1 **HIS HONOUR:** These proceedings involve the construction and operation of an alternative dispute resolution provision in a building contract ("the contract") which the parties entered into on 19 March 2002 and under which the plaintiff (as principal) retained the defendant (as contractor) to undertake building work associated with the redevelopment of a shopping centre at Fairfield near Sydney.

2 Clause 42 of the contract is entitled Dispute Resolution. It is a fairly lengthy provision and appears as Schedule A to these reasons.

3 During the course of the contract the plaintiff made a number of claims on the defendant including a claim described as progress claim no. 25 for numerous variations, which the defendant disputed. The plaintiff also made a number of progress claims which went to adjudication under the provisions of the *Building and Construction Industry Security of Payment Act* 1999 ("the Act"). Save to the extent set out below, it is not necessary to trace the history of the claims.

4 On 14 March 2005, an agreement was entered into between the parties and Messrs Norman Fisher and P. Callaghan SC for the appointment of those gentlemen as experts under the provisions of cl 42 to resolve disputed claim no. 25.

5 The experts gave a written determination on 7 December 2005 (although it appears that it was delivered to the parties only about a week later). The experts determined that a small amount was owing by the plaintiff to the defendant. Their determination did not take into account additional payments that had been made by the defendant to the plaintiff in the interim and on 21 December 2005 the superintendent under the contract issued two certificates. One of them (described as Progress Payment Certificate No. 29) took into account additional payments which had been made. The other (described as Clause 37.2(b) Certificate No.1) took into account retention monies which concerned the effect of the release to the plaintiff of retention monies which the experts had not taken into account.

6 The combined effect of these certificates was to reflect an amount of $542,677.33 as being payable by the plaintiff to the defendant. This amount was paid on 28 February 2006.

7 On 23 December 2005 the plaintiff sought an extension of the 21 day time period for giving an "Appeal Notice" pursuant to cl 42.10, to which request the defendant acceded.

8 On 13 January 2006 the plaintiff served on the defendant a document entitled "Notice of Appeal of Determination of Expert Pursuant to Clause 42.10".

9 Between February and June 2006 there were meetings between Mr Moffat of the plaintiff and Mr Dunstan of the defendant with a view to resolving the dispute or differences between the parties or agreeing upon a procedure to resolve the dispute as contemplated by cl. 42.11.

10 The negotiations were unsuccessful and the dispute was neither resolved nor was there agreement upon a procedure to resolve it.

11 On 30 June 2006 Mr Moffat wrote to Mr Dunstan as follows:

> "As referenced in the attached letter, this correspondence is served as confirmation that, as there has been no agreement in relation to an alternative process to resolve the dispute, the default option being exercised by us, is to commence Supreme Court proceedings.'

12 Three and a half years later, on 11 December 2009 the plaintiff sued a summons out of this Court claiming judgment against the defendant for $1,021,782.93.

13 By notice of motion filed on 13 April 2010, the defendant moves the Court for the dismissal or stay of the proceedings on the basis that the plaintiff is bound (as is the defendant) by the expert determination with the consequence that these proceedings cannot be maintained.

14 Mr M Dempsey SC with Mr G Ng of counsel appeared for the defendant. Mr M C Rudge SC appeared for the plaintiff.

15 It is accepted by the plaintiff that the claims made in the summons are for amounts which were the subject of the expert determination, albeit that its causes of action are framed in the alternative in contract, under the *Trade Practices Act* 1974 (Cth) and for quantum meruit. This renders it unnecessary to deal with submissions the defendant made separately, that the Trade Practices and quantum meruit counts are impermissible for other reasons related to the asserted finality of the superintendent's certificates and other provisions of the contract.

16 The plaintiff's sole contention is that on the proper construction of cl 42 (in particular cl 42.10 and cl 42.11) and in the events that have occurred, the expert determination is not binding and that it is free to pursue its claims in this Court notwithstanding that those claims were the subject of that determination.

17 The plaintiff accepts that if the expert determination is binding, these proceedings cannot be maintained.

18 It puts that the effect of cl 42.10 is to make the expert determination final and binding only where a party does not give a notice of appeal.

19 In effect it puts that if a notice of appeal is given, there are three possible outcomes:

a the procedure in cl 42.11 is enlivened and the negotiations contemplated in 42.11(a) result in a resolution in place of the expert determination;
b the negotiations contemplated in cl 42.11(a) do not result in resolution but the parties agree upon a procedure to resolve the dispute which procedure results in a resolution in place of the expert determination; or
c there is no agreement on a resolution or a procedure to resolve the dispute in which event (as happened here) the expert determination earlier obtained is not binding and either party is free to pursue its claims curially.

20 It puts that if failure to agree means that the expert determination is binding, this would be an abrogation of the parties' common law rights for which express words would be required.

21 It will suffice only briefly to set out the legal principles which apply to the construction of a commercial document such as the contract.

22 In construing a commercial contract the Court has regard to the language used, the surrounding circumstances known to the parties, the purpose of the transaction and the objects which it was intended to secure: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179; *International Air Transport Association v Ansett Australia Holdings Ltd (Subject to Deed of Company Arrangement)* (2008) 212 ALR 47 at [8].

23 The whole of the instrument has to be considered. Preference is given to a construction supplying a congruent operation to the various components of the whole of an instrument: *Wilkie v Gordian Runoff Limited* [2005] HCA 17; (2005) 221 CLR 522 at 529.

24 If the words used are unambiguous, the Court must give effect to them. If the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust: *Australian Broadcasting Commission v Australasian Performing Right Association Limited* [1973] HCA 36; (1973) 129 CLR 99 at 109.

25 In relation to alternative dispute resolution clauses in particular, in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165, Gleeson CJ said:

> When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument.

26 More recently in *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254 at 256 Lord Hoffmann said:

> In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

27 For the following reasons, I consider that the plaintiff's construction is untenable.

28 Firstly and somewhat fundamentally, the plain and unambiguous words of cl 42.10(c) require the expert determination to be given effect to unless and until it is reversed, overturned, or otherwise changed under the procedure in cl 42.11.

29 That procedure has done whatever work it could do in the present circumstances and the expert determination has not been reversed, overturned or otherwise changed. It follows that it remains binding. It is not suggested that the parties did not comply with whatever obligations they had under cl 42.11, nor

is it suggested that that procedure has not been exhausted. It may also be observed that cl 42.11 refers to the persons described in Annexure Part A. That annexure contained no such description. Both parties accepted, however, that the clause was given effect to by the negotiations between the parties and no party put that cl 42.11 was void for uncertainty.

30 If this entails an abrogation of the parties' common law rights, it has come about by express provision. In my view, these commercial parties clearly intended by the alternative dispute resolution process agreed to, to abrogate their common law remedies.
31 Secondly, to give cl 42 the plaintiff's construction is to conclude that the parties intended that the same disputes should be resolved before different tribunals. I consider this both unlikely and that if it were correct, it would result in consequences which are unreasonable, inconvenient and costly.

32 Thirdly, the parties chose an expert tribunal to deal with disputes. The plaintiff's construction would permit a party by non-agreement (albeit subject to an obligation of good faith) unilaterally to render a determination by the expert tribunal which they chose, ineffective. I consider it unlikely that the parties had this intention.

33 In my view, the outer limit of the protection given by cl 42.11 to an aggrieved party to an expert determination is to require the other party to engage in genuine and good faith negotiations in relation to an expert determination or to endeavour to agree (perhaps in good faith although this is not expressly imposed in cl 42.11(b)) on a further procedure which might result in a different outcome, but no more: see *United Group Rail Services Ltd v Rail Corporation NSW* [2009] NSWCA 177.

34 The consequence is that the expert determination is final and binding and the proceedings in this Court are not maintainable, and must be dismissed as disclosing no cause of action.

35 The exhibits are to be returned.

ANNEXURE A

42 DISPUTE RESOLUTION
42.1 Notice of Dispute

If a dispute or difference (dispute) between the Contractor and the Principal arises in connection with the Contract or the subject matter thereof, including a dispute concerning:
(a) a direction given by the *Superintendent*; or
(b) a claim:
(i) in tort;
(ii) under statute;
(iii) for restitution based on unjust enrichment; or
(iv) for rectification or frustration,

then either party must deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

Despite the existence of a dispute, the Principal and the Contractor must continue to perform the Contract and, subject to **clause 39**, the Contractor must continue with WUC and the Principal and the Contractor must continue to comply with **clause 37**.
42.2 Expert Determination

The dispute must, if it is not resolved within 14 days after a notice is given under **clause 42.1**, be submitted to expert determination.

42.3 The Expert

The expert determination under **clause 42.2** is to be conducted by:
(c) the independent industry expert specified in Annexure Part A; or
(d) where:
(i) no such person is specified; or
(ii) the independent industry expert specified in Annexure Part A or an independent industry expert appointed under this **clause 42.2**:
(A) is unavailable;
(B) declines to act;
(C) does not respond within 14 days to a request by one or both parties for advice as to whether he or she is able to conduct the determination; or
(D) does not make a determination within the time specified by clause **42.8**,

an independent industry expert appointed by the person specified in Annexure Part A.

42.4 Not Arbitration

An expert determination conducted under this **clause 42** is not an arbitration and the expert is not an arbitrator. The expert may reach a decision from his or her own knowledge and expertise.

42.5 Procedure for Determination

The expert will:
(e) act as an expert and not an arbitrator;
(f) proceed in any manner he or she thinks fit;
(g) conduct any investigation which he or she considers necessary to resolve the dispute or difference;
(h) examine such documents, and interview such persons, as he or she may require; and
(i) make such directions for the conduct of the determination as he or she considers necessary.

42.6 Disclosure of Interest

The expert must:
(j) disclose to the parties any interest he or she has in the outcome of the determination; and
(k) not communicate with one party to the determination without the knowledge of the other.

42.7 Costs

Each party will:
(l) bear its own costs in respect of any expert determination; and
(m) pay one-half of the expert's costs.

42.8 Conclusion of Expert Determination

Unless otherwise agreed between the parties, the expert must notify the parties of his or her decision upon an expert determination conducted under this **clause 42** within 28 days from the acceptance by the expert of his or her appointment.

42.9 Agreement with Expert

The expert will not be liable to the parties arising out of, or in any way in connection with, the expert determination process, except in the case of fraud.

The parties must enter into an agreement with the appointed expert on the terms prescribed by Annexure Part A (if any) or such other terms as the parties and the expert may agree.

42.10 Determination by Expert

The determination of the expert:
(n) must be in writing;
(o) will be:
(i) substituted for the relevant direction of the Superintendent; and
(ii) is final and binding

unless a party gives notice of appeal to the other party within 21 days of the determination; and
(p) is to be given effect to by the parties unless and until it is reversed, overturned or otherwise changed

under the procedure in the following clauses.

42.11 Executive Negotiation

If a notice of appeal is given under **clause 42.10**, the dispute is to be referred to the persons described in Annexure Part A who must:
(q) meet and undertake genuine and good faith negotiation with a view to resolving the dispute; and
(r) if they cannot resolve the dispute or difference, endeavour to agree upon a procedure to resolve the dispute.

42.12 Survive Termination

This clause 42 will survive the termination of the Contract.

42.13 Continuation of Works

Despite the existence of a dispute between the parties, the Contractor must:
(s) continue to carry out WUC; and
(t) otherwise comply with its obligations under the Contract.

42.14 Adjudication under the Security of Payment Act

The parties agree that a determination made by an adjudicator under the Security of Payment Act is binding on the party who has applied for the adjudication.

42.15 Nominating Authority

The parties agree that, for the purposes of section 17(3)(a)(ii) of the Security for Payment Act, the agreed authorised nominating authorities are:
(u) the Chartered Institute of Arbitrators; or
(v) the Institute of Arbitrators and Mediators Australia (NSW Chapter).

**********_

LAST UPDATED:
1 July 2010
