VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION
DOMESTIC BUILDING LIST

VCAT REFERENCE: **D582/2009**

CATCHWORDS

Application under s 77 *VCAT Act – Bentley v Cash Resources Australia* considered - application refused- application for a stay in order to allow compliance with contractual dispute resolution procedures – principles applicable when seeking a stay - *Badgin Nominees Pty Ltd v Oneida Ltd and Ors* considered - exercise of discretion to order a stay - dispute resolution procedure unworkable - application for stay refused.

APPLICANT:	Camillo Concrete Structures Pty Ltd (ACN 087 774 301)
RESPONDENT:	Baulderstone Pty Ltd (ACN 002 625 130)
WHERE HELD:	Melbourne
BEFORE:	Her Honour Judge Harbison Vice President
HEARING TYPE:	Hearing
DATE OF HEARING:	12 February 2010
DATE OF ORDER:	23 March 2010
CITATION:	Camillo Concrete Structures Pty Ltd v Baulderstone Pty Ltd (Domestic Building) [2010] VCAT 285

ORDER

1. The application of the Respondent for orders under section 77 of the *VCAT Act* is refused.

2. The application of the Respondent that this proceeding be stayed is refused.

Her Honour Judge Harbison
Vice President

APPEARANCES:

For the Applicant:	Mr E Reigler of counsel
For the Respondent:	Mr M Borsky of counsel

REASONS

Background

1 Baulderstone entered into a design and construction contract on 14 September 2007 with Michael L Yates & Co Pty Ltd. I will refer to this contract in these reasons as "the head contract".

2 The contract sum was over $70 million. It related to construction of an apartment building, an office building and a retail arcade in South Yarra. The development involved many parties and professional advisers, such as a works superintendent, an architect, an engineer and a quantity surveyor, as is usual in contracts of this scale and description.

3 The applicant, Camillo, entered into a subcontract with Baulderstone in respect of the concreting works and other associated works on the project. The contract sum for this subcontract was over $9 million. The subcontract, which is the contract on which the applicant bases its claim in this Tribunal, interlocked in some respects with the head contract, in that some of the rights and obligations of the parties to the subcontract were referrable to, and constrained by, the head contract.

4 A disagreement arose between Camillo and Baulderstone as to Camillo's entitlements under the contract and Camillo issued this proceeding in the Domestic Building List of this Tribunal in August of 2009.

5 The principal areas of dispute identified in the Points of Claim filed in the Tribunal were Camillo's claim for variations under the contract, the outstanding amount of which was said to be just over $2 million, and claims for extension of time, including a claim that the builder did not make available cranes to enable Camillo to carry out its obligations under the contract, resulting in a further claim for $42,000 damages, and reimbursement of a liquidated damages sum deducted by Baulderstone from the sum due under the subcontract.

This application

6 This is an application by Baulderstone that the claim brought by Camillo be struck out pursuant to s 77 of the *VCAT Act*

7 Alternatively, Baulderstone seeks that the proceeding be stayed pending the operation of clause 20 of the contract between the parties which provides for a dispute settlement mechanism to be employed prior to the issue of proceedings in respect of any dispute arising between them.

8 Baulderstone originally also sought an order for specific performance of clause 20 of the contract. However, this application was abandoned at the hearing.

The Section 77 application

9 Section 77 of the *Victorian Civil and Administrative Tribunal Act* 1998 gives the Tribunal power to strike out this proceeding if it considers that the subject matter of the proceeding would be more appropriately dealt with by a tribunal, a court or any other person or body. If such an order is made, then the Tribunal may refer the matter to the relevant court, if it considers it appropriate to do so.

10 Baulderstone relied upon an affidavit filed in support of its application by Paul Lawson, the commercial manager of Baulderstone. In that affidavit he deposes that the application before this Tribunal is but one of many related disputes in relation to the project. He further says that those disputes will involve complex issues of fact and law, extensive expert evidence in relation to programming, engineering, quantum and the like and may well involve multiple parties.

11 He also deposes that there are separate disputes on foot in relation to the project engineer and the project architect, although these disputes have not yet been the subject of any court application.

12 He also asserts that any hearing of the dispute would be of some weeks' duration and would mean substantial costs to the contractor. He submits

that it would be to the contractor's advantage to have the dispute dealt with in the courts where costs generally follow the event, rather than being placed in the position of having to argue that the discretion given to VCAT in s 109 of the *VCAT Act* should be exercised in its favour.

13 By the time of the hearing before me, some of the matters referred to by Mr Lawson had been resolved. In particular, I was told that the dispute between Baulderstone and the principal had been resolved. The dispute with the architect had also settled.

14 However, the application for transfer under s 77 was still pressed by Baulderstone. In particular, counsel for Baulderstone referred me to the fact that this was a proceeding for a significant sum of money and a proceeding which may involve complex questions of fact and law and which may take several weeks of hearing time.

15 I was referred to several well known cases in this Tribunal in which observations have been made about the appropriate use of the power under s 77. In particular, I was referred to the observations of Kellam J (as he then was) in *Bentley v Cash Resources Australia Pty Ltd* [2002] VCAT 1399, a case in which His Honour found the case also to involve a substantial amount of money and some complexity. He said:

> "A case of this dimension is likely (as has already been demonstrated) to severely stretch the judicial resources of the Tribunal."

16 Although Justice Kellam did not ultimately agree to transfer the proceeding, he made the following comment in the course of giving judgment:

> "In my view, if a subject matter is complex, involves difficult issues of fact and law, and requires pleadings and case management processes which are more typical of processes adopted by the Supreme Court, an argument may well be advanced that such a case should be struck out and referred to the Supreme Court."

17 This passage was referred to with approval by His Honour Judge Bowman in *Koster v Giuliano* [2004] VCAT 1046. Once again, His Honour

dismissed the application pursuant to s 77, but indicated that he agreed with these observations, adding that –

> "There may well be matters of such complexity and difficulty that, in the circumstances prevailing, an application pursuant to s 77 will be successful. However, I repeat that His Honour was not laying down rules of law or practice and his observations were just that – observations. Clearly, each application must be viewed on its merits and consideration given to the prevailing circumstances."

18 However, since 2004 there have been many occasions in which this Tribunal has declined to use its power under s 77 to transfer applications issued at the Tribunal to other jurisdictions.

19 The power is not to be used lightly. Applicants have a right to utilise the procedures of this Tribunal. It should not be thought that an application, otherwise appropriately within the jurisdiction of the Tribunal, will be transferred just because the subject matter involves some complexity or the case involves several different parties.

20 The remarks of Kellam J must be placed in the context of the case management pressures existing in the Civil Claims List of the Tribunal at the time the remarks were made. This was recognised to be the case by Judge Bowman in *Maryvell Investments v Sigma Constructions Pty Ltd* [2006] VCAT 1599 where he said this at paragraph 27:

> "Kellam was in no way saying that complex commercial matters brought pursuant to the Fair Trading Act should automatically be referred elsewhere, or that this Tribunal lacked the capacity to deal with them. Obviously each application must be dealt with on its merits and consideration must be given to the prevailing circumstances."

21 I am not persuaded that this proceeding is appropriate for transfer pursuant to s 77. The case before me is subject to pro-active case management as a complex case in the Domestic Building List. Members in that list are accustomed to hearing lengthy, multi-party disputes. Cases in the list frequently involve large sums of money and difficult technical and legal issues.

22 Although the affidavit of Lawson, filed on behalf of Baulderstone, suggested that "*the proceeding would lend itself to case management processes which are more typical of processes adopted in the County Court of Victoria than this Tribunal*", counsel for Baulderstone was unable to outline to me how this was the case, or what particular case management processes would be available to the parties in that forum which are not utilised by the Tribunal.

23 The Domestic Building List employs mechanisms such as conclaves of experts and compulsory conferences chaired by legal and technical experts in building law. It imposes rigorous standards of pre-trial preparation and monitoring of compliance with timetabling orders, designed to elucidate issues and reduce hearing times.

24 It was suggested by Lawson that Baulderstone would prefer to litigate in a jurisdiction in which costs followed the event. There can be no reason of principle for this Tribunal to take such a consideration into account. Camillo should not be deprived of the ability to use an otherwise suitable jurisdiction on this ground.

25 In my view there has been no adequate reason advanced for this proceeding to be removed from the Domestic Building List of this Tribunal.

Does this Tribunal have power to order a stay?

26 The Tribunal has no express power to stay a proceeding. Unlike the courts, it has no inherent equitable jurisdiction to found such a power. However, it is agreed between the parties that the Tribunal does have power to order a stay of proceedings in an appropriate case.

27 The principles giving rise to such a power were set out by Deputy President McKenzie in *Dowie v Northey*, a decision in the Anti Discrimination List of this Tribunal. The learned Deputy President pointed out that s 80 of the *VCAT Act* gives the Tribunal the power to do whatever is necessary to facilitate the fair hearing of proceedings before it. Further, s 97 imposes an

obligation on the Tribunal to act fairly, and s 98(3) of the Act gives the Tribunal the power to regulate its own procedure.

28 She said, and I agree, that those powers in combination confer upon the Tribunal jurisdiction to order a stay if the Tribunal is persuaded that it is appropriate to do so.

29 In *De Simone v Bevnol Constructions and Developments Pty Ltd* (2009) VSCA 199, the Court of Appeal accepted that the Tribunal possessed the power to grant a stay, and said that the decision as to whether or not to grant a stay should be governed by a consideration as to whether it was required in the interests of justice.

The Application for a stay

30 The dispute resolution procedure relied upon in the stay application is clause 20 of the subcontract. I will set out the principal features of this clause, and then consider the arguments advanced by each party.

31 **Clause 20.1** provides that if disputes or differences arise between the parties, then either party may give the other notice specifying the facts giving rise to the entitlement, the legal basis of the claim and the relief which that party seeks. The second paragraph of clause 20.1 reads as follows –

> "The subcontractor shall not commence proceedings (other than for injunctive or other urgent relief) unless a valid notice strictly complying with this clause has been served and the procedures in 20.2 and 20.4 have been complied with."

32 **Clause 20.2** provides that a party may require a meeting of representatives to undertake –

> "genuine and good faith negotiations with a view to resolving the dispute."

33 **Clause 20.3** headed "Security for Dispute" provides as follows –

> "Neither party shall refer any dispute to expert determination or commence any proceedings until it has deposited to the trust account of the builder's solicitor, as security for the costs of the other party, an amount equal to 10% of the amount claimed by that party in the expert determination proceedings. The sum so

deposited shall be dealt with in accordance with any agreement of the parties, or in default of agreement, the order of a court or direction of the expert appointed under the subcontract."

34 **Clause 20.4** headed "*Expert determination*" is a clause setting out the ADR procedure which is said to give rise to the need for a stay. I need to set out this clause in full.

> "Either party may by notice to the other within 10 business days after time for meeting in clause 20.2 refer the dispute to determination in accordance with this clause 20.4 of the subcontract. If such notice is given the party giving notice must, if it wishes to pursue the claim, refer it to expert determination in accordance with the subcontract.
>
> (a) The Expert
>
> The expert determination is to be conducted by a person agreed between the parties and if in default of agreement within 5 business days after a notice under the preceding clause has been given, then a person being a qualified grade 3 arbitrator as that term is recognised by the Institute of Arbitrators and Mediators Australia (Victorian chapter).
>
> (b) Not arbitration
>
> An expert determination conducted under this clause 20.4 is not an arbitration. The expert may make a determination as expert and not as arbitrator and may reach a decision from his or her own knowledge and expertise.
>
> (c) Agreement with expert
>
> The parties must enter into an agreement with the expert in the form of the agreement for expert determination customarily used by the expert except that the agreement must oblige the expert to –
>
> (i) disclose to the parties any interest he or she has in the outcome of the determination;
>
> (ii) not communicate with one party to the determination without the knowledge of the other; and
>
> (iii) issue the determination within 21 days after appointment unless both parties in their absolute discretion agree otherwise in writing, which writing must refer to this clause 20.4(c).

(d) Procedure for determination

The expert may –

(i) conduct any investigation which he or she considers necessary to resolve the dispute or difference;

(ii) examine such documents, and in the presence of representatives of both parties, interview such persons as he or she may require; and

(iii) make such directions for the conduct of the determination as he or she considers necessary.

(e) Costs

Each party will bear its own costs in respect of any determination.

(f) Determination of expert

The determination of the expert –

(i) must be in writing; and

(ii) will be final and binding except where both of the following are satisfied –

(A) the claim exceeds $250,000; and

(B) a party commences court proceedings within 7 days after receiving the determination.

35 **Clause 20.5** is the final clause of relevance which is headed "*Related dispute under head contract*".

36 That clause reads as follows –

> "In case the principal or any other person having the authority to do so shall reject or condemn any design, material or workmanship under the subcontract or refuse to include the value of any works performed by the subcontractor in any payment to the builder or if in any dispute under the head contract determinations are made in respect of such issues, then such matters or determinations shall be conclusive as between the subcontractor and the builder and the provisions of clause 20.2 to 20.4 shall not apply and the subcontractor shall be bound by the outcome of any dispute under the head contract (whether by way of expert determination or otherwise).

Arguments advanced on behalf of Baulderstone

37 Baulderstone asserts that the clauses which I have reproduced above clearly provide for the parties to engage in an alternate dispute resolution procedure prior to proceedings being commenced before the Tribunal or in any court.

38 It is common ground that no attempt has been made by either party to utilise the procedures set out under these clauses.

39 Baulderstone says that it wishes to participate in the dispute resolution procedures to which both parties have agreed in this significant transaction and, accordingly, the proceeding before this Tribunal having been brought in breach of this agreed dispute resolution method, should be stayed to give effect to that agreement.

40 A principal Victorian authority on the principles governing the grant of a stay in these circumstances is the decision of Gillard J in *Badgin Nominees Pty Ltd v Oneida Ltd & Oneida Community Pty Ltd* [1998] VSC 188. Baulderstone asserts that the fact situation before His Honour in that case is very close to that before me in this application and the principles which His Honour set out in that case should be applied equally here.

41 At paragraph 29 of the judgment His Honour said this –

> "It is a trite proposition of law that parties may contract about anything and subject to the principles of public policy and illegality the agreement should be enforced unless there is some other vitiating factor such as mistake, misrepresentation or incapacity."

42 And elsewhere in the judgment –

> "It was their common intention that the dispute resolution procedure be applied in the event of a dispute. It is their contract: and it should be enforced."

43 This approach is consistent with public policy in that it encourages parties to utilise alternate dispute resolution and to fashion ways of settling their disputes which specifically take into account issues of commercial and practical importance to the parties, rather than requiring a generic litigation based solution.

44 The principles in *Badgin* have their origin in earlier cases such as *Hubbart Parker Ltd v The Ship Mill Hill* [1950] 81 CLR 502, which confirmed the principles apparent from earlier English cases that there is a "strong bias" in favour of maintaining the bargain which the parties have voluntarily constructed.

45 These principles have become commonplace in contract law. Scott & Avery clauses providing for arbitration, or alternatively clauses providing for expert determination, are an accepted and welcomed feature of building law in the State of Victoria and throughout Australia.

46 Recent examples of the application of the principles expressed in *Badgin* in decisions of the Victorian Court of Appeal have included *Computershare Ltd v Perpetual Registrars Ltd (No. 2)* [2000] VSC 233 and *1144 Nepean Highway Pty Ltd v Leigh Mardon Australasia Pty Ltd* [2009] VSC 226.

47 Particular passages relied upon by Baulderstone from *Computershare* included observations by Warren J (as she then was) at paragraph 15 of the judgment as follows –

> "Furthermore, where parties have made a special agreement requiring them to address a path to a potential solution, there is every reason for a court to say such parties should be required to endeavour in good faith to achieve it."

48 I was also referred to interstate authorities such as *Dance with Mr D Ltd v Dirty Dancing Investment Pty Ltd* [2009] NSWSC 332 and a Western Australian case of *Straits Exploration Australia Pty Ltd v Murchison United NL* [2005] 31 WAR 187.

49 Baulderstone says that in this case, as in the decided cases to which I was referred, the parties should be held to their bargain and required to utilise the procedures set out in clause 20 and that the proceeding should be stayed until this is done.

50 Camillo should not be allowed to resile from its bargain.

Submissions of Camillo

51 Counsel for Camillo did not seek to challenge the principles which I have set out above. However, his submission was that I had a discretion as to whether or not to order a stay, and that my discretion should be exercised in favour of Camillo. There were particular aspects of the dispute resolution clause in paragraph 20 which he relied upon as justifying the exercise of my discretion in refusing to stay the proceedings. I will set out those aspects shortly.

52 Baulderstone agrees that I have a discretion to refuse to stay the proceedings, but submits that there are no grounds in this case to justify the exercise of that discretion.

Who bears the burden of proof

53 Camillo submitted that the burden of proof in this application was borne by Baulderstone. It was said that this was so because it is Baulderstone who is seeking a stay of these proceedings.

54 Relying upon principles set out by the Supreme Court of Victoria in *Philippine Airlines v Goldair* (1990) VR 385, applied by Deputy President McKenzie in *Downie*, he submitted that Camillo was entitled to have its complaint heard in the ordinary course of business of the Tribunal and that it was a grave matter to interfere with an entitlement. A stay of proceedings must therefore be justified and the burden is on the party moving for the stay to show that it is just and convenient for access to the Tribunal to be interfered with.

55 It was submitted that the Tribunal's task in deciding whether or not a stay should be granted was one of considering where the interests of justice lay and the effect of the stay on both parties must be weighed. In this context it is said to be relevant that there was no detriment alleged to Baulderstone by reason of proceedings in the Tribunal.

56 On the contrary, Baulderstone submitted that the burden of proof in this case was on Camillo. Baulderstone relied upon emphatic statements to that

effect in the cases which I have identified, starting with *Badgin* in which the remarks of Dixon J in *Huddart Parker Ltd v The Ship Mill Hill* were adopted. Those remarks were as follows -

> "But the Courts begin with the fact that there is a special contract between the parties to refer, and therefore in the language of Lord Moulton in *Bristol Corporation v John Aird and Co*, consider the circumstances of a case with a strong bias in favour of maintaining the special bargain, or as Scrutton LJ said in *Metropolitan Tunnel and Public Works Ltd v London Electric Railway Co*, a guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it.".

57 In the judgment at first instance in *1144 Nepean Highway,* Davies J considered the approach to be taken to the construction of dispute resolution clauses in commercial contracts. She followed a decision of the High Court in *PMT Partners Pty Ltd (in liquidation)v Australian National Parks and Wildlife Service* (1995)184 CLR 301 in holding that the approach to such clauses should be -

> "an approach which treats (the) clause as requiring the parties to have their disputes decided in accordance with the procedures specified – and only in accordance with those procedures- unless there is something which clearly indicates to the contrary."

58 She concluded that the approach to construction should be –

> "to give effect to the intention of the parties as expressed, unless there is something which clearly indicates that the ambit of the clause should be limited in some way."

59 Cases cited by her, such as *Incitec Ltd v Alkimos Shipping Corporation* (2004) 2006 ALR 558 confirm that the discretion not to grant a stay to allow a dispute resolution clause to be utilised –

> "requires substantial grounds" more than just convenience, "recognising that the starting point is the fact that the parties. should, absent strong countervailing circumstances, be held to their bargain."

60 These cases indicate a strong bias in favour of a stay and comments indicating that a party seeking not to be held to their bargain bear a very heavy burden must be given significant weight

61 Baulderstone, relying on *Badgin*, submitted that in exercising the discretion I should *"bear steadily in mind"* that the parties had chosen this method of dispute resolution, and that the parties were accustomed to the world of major construction projects.

62 In my view the observations in *Philippine Airlines* as to the burden of proof in stay applications must be tempered by the extensive authority cited by Baulderstone, which imposes a heavy burden on a party seeking to avoid compliance with its contractual responsibilities to engage in alternate dispute resolution.

63 I propose to apply those authorities to this case, and to start from the presumption that this being a commercial transaction, in which all parties were represented by lawyers and in which all parties have extensive commercial experience, the parties should be held to their bargain unless significant matters can be established to persuade me to exercise my discretion to the contrary.

Camillo's submissions relating to the exercise of discretion

64 Camillo submitted that there were many unsatisfactory features of the dispute resolution clause, and that the combination of those features rendered the clause productive of unfairness and uncertainty.

Uncertainty

65 Camillo drew my attention to various clauses in which precise procedures were not specified for the operation of the dispute settlement procedure.

66 One example was that the second sentence of paragraph 20.1 provides that Camillo is not entitled to commence proceedings unless the provisions of clause 20 have been complied with. However, it creates an exception for proceedings seeking "*injunctive or other urgent relief*".

67 It is not unusual to have a clause such as this where relief sought by way of injunction is expressly excluded. However, I was invited to find that the words "*or other urgent relief*" made this clause so uncertain as to be unenforceable. Who is to say what is urgent and what is not?

68 In *1114 Nepean Highway*, Davies held that a clause allowing for proceedings to be issued for injunctive relief, did not render the agreement unenforceable. She said a party could not take advantage of such a clause as a "back door" method of circumventing the dispute resolution process.

69 I know of no case in which a clause with the exact wording as here has been judicially considered. However, I would expect that, given the practical reality that an application for urgent relief would need to be made by way of an injunction application, the difference in wording is of little significance. I do not consider this a persuasive argument against the enforceability of the dispute resolution procedure.

70 There are however, some more significant problems of enforceability.

71 Camillo submitted that the clause was unenforceable as clause 20.4 (a) provided no mechanism for the appointment of an independent expert, if the parties were unable to agree as to who the expert should be.

72 Clause 20.4 (a) simply provides that the determination is to be conducted by a person agreed between the parties and, in default of the agreement, by a qualified grade 3 arbitrator.

73 It is usual that such a clause would provide for an institution or body to make an appointment of the expert in the event of disagreement between the parties. There is substantial law as to the capacity of such a body to make a determination and the manner of its exercise. Camillo submitted that the absence of any such provision in this agreement made the agreement simply unenforceable, as there would be a large number of persons holding the qualification of grade 3 arbitrator and no mechanism was contained in the clause as to how to choose between them.

74 In addition Camillo pointed out that clause 20.4 provided no guidance at all as to the area of expertise of the independent expert (in contrast to what was said to be the usual practice in drafting clauses of this description).

75 Camillo agrees with Baulderstone that the subject matter of the proceeding involves complex issues of fact and law requiring both interpretation of the contract and determination of technical issues.

76 Camillo says that the clause gives no comfort to either party that the person to be appointed as expert would have particular expertise in these areas and this is a significant fact to be taken into account in the exercise of my discretion.

77 Baulderstone suggested that the parties could easily solve this problem. The reference in the clause to the Institute of Arbitrators could be used by the parties as a starting point for good faith negotiations as to who should make the appointment in the event of disagreement.

78 Following the first instance decision of Davies J, in *1144Nepean Highway*, one of the parties refused to accept the nomination of any expert who required an indemnity from the parties as a condition of appointment. The dispute resolution procedure did not deal with the question of whether an expert appointed pursuant to it could insist on such an indemnity.

79 Ultimately injunctive orders were made in the same proceeding as was before Davies J by a different judge. Those injunctive orders were the subject of appeal to the Court of Appeal in *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd* (2009) VSCA 308.

80 In determining that appeal, the Court of Appeal considered the question of whether terms could be implied into an agreement governing the terms of appointment of an expert, and made some general observations on the capacity of a Court to imply reasonable terms into a dispute resolution clause.

81 In order to give effect to the dispute resolution clause, the Court of Appeal was prepared to imply a term into the contract that the expert was to be appointed on reasonable terms. It further held there was plenty of evidence that the experts' insistence on obtaining of such a release was in accordance with industry practice. It held such a term to be "*reasonable and equitable*" It went on to say at para 29 –

> "It is necessary for the effective operation of the agreement. On the evidence, it is so obvious that it 'goes without saying.' It is capable of being clearly expressed and it contradicts no express term of the contract."

82 In the course of setting out the applicable principles, the judgment cited with approval the following passage from an 1881 decision of Lord Blackburn in *Mackay v Dick* (1881)6 Ap Cas 251 at 263 -

> "as a general rule… where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

83 In *1144 Nepean Highway* Davies J remarked –

> "the absence of procedures itself is no reason for refusing the stay."

84 In the words of Sir Robin Cooke in the *Queensland Electricity Generating Ward v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Reports 205210 –

> "at the present day, in cases where parties have agreed on an arbitration or valuation clause in wide enough terms, the courts accord full weight to their manifest intention to create continuing legal relations. Arguments invoking alleged uncertainty, or alleged inadequacy in the machinery available to the courts for making contractual rights effective, exert minimal attraction."

85 Counsel for Baulderstone also relied upon *Computershare* as authority that the parties having agreed upon a dispute resolution procedure, should be required to deal with each other in good faith to overcome such difficulties in order to give effect to their own agreement

86 In *Australian Pacific Airports (Melb)Pty ltd v Nuance Group (Australia)Pty Ltd* (2005) VSCA 133, a case in which it was argued that terms in a lease providing for a process of review of the tenants business operations were uncertain, Nettle J observed that -

> "it is preferable to approach the construction of the lease on the basis that expressions and particularly elliptical expressions are to be read in no narrow spirit of construction but rather as the court would suppose honest business people would understand the words they have actually used with reference to their subject matter and surrounding circumstances."

87 His Honour added later in the judgment –

> "and despite such uncertainty as that may create, these days arguments about uncertainty rendering commercial agreements unenforceable tend to be given the short shrift which they usually deserve."

88 Thus Baulderstone submitted that a contract term was not void for uncertainty just because it did not specify procedures to be used in a dispute resolution procedure. The objections raised by Camillo were described as "semantic" and I was urged to find them unpersuasive, particularly as Camillo did not, until shortly before the hearing of this application, offer any explanation at all for its failure to utilise the procedures set out in the clause.

89 Baulderstone suggested that there was no uncertainty in the procedure which could not be resolved by good faith negotiations between the parties.

Security for costs

90 The second feature of clause 20 was the requirement in clause 20.3 that a party using the procedure must deposit an amount equal to 10% of the amount claimed as security for the costs of the proceeding. It was said that this security clause was a significant barrier to use of the clause, particularly as it bore no relation to the amount in dispute.

91 It was said that this clause is in direct conflict with clause 20.4 (e) of the contract which expressly states that each party should bear its own costs in

respect of any expert determination and was a significant barrier to a party exercising its rights under clause 20.

92 The use of a clause such as this by Baulderstone was considered by Vickery J in the trial division of the Supreme Court of Victoria in *Materials Fabrication Pty Ltd v Baulderstone* (2009) VSC 405. In that case the clause was judged to have the effect of ousting the jurisdiction of the Court.

93 It is true, as pointed out by Baulderstone in argument before me, that in the case before Vickery J the clause could not be described as a dispute resolution clause, and therefore the protection afforded by the legitimate public policy considerations applicable to alternate dispute resolution techniques had no application.

94 But His Honour also said that the clause may operate to deter a claimant from pursuing a legitimate claim for the full amount of its losses if it did not have the financial resources to meet the requirements of the clause. Camillo says this case supports its argument that the clause is a substantial bar to effective utilisation of the dispute resolution procedure.

95 Baulderstone submitted that if I was to find clause 20.5 or, indeed, any of the other clauses objected to by Camillo had the capacity to work injustice, they may easily be severed from the agreement. It was pointed out that there has been no suggestion that Baulderstone will rely on section 20.3.

Lack of resolution

96 The most persuasive argument put by Camillo related to two aspects of the procedure which created uncertainty, but were also said to have the capacity to work substantial injustice, and perhaps render the dispute resolution process a sham.

97 Counsel first drew my attention to the provisions of section 20.5. This clause comes into operation in the event there is a dispute between Baulderstone and the principal or other persons having authority to reject work done under the contract.

98 That clause is not easy to follow. It appears to provide that if such a dispute arises, then a determination made in respect of that dispute by the principal or its agent is binding as between Camillo and Baulderstone. If such circumstances arose, then the dispute resolution procedure contained in clause 20 is expressly excluded.

99 Camillo relies on affidavit material filed on behalf of Baulderstone by Mr Lawson, as establishing that there was indeed a live dispute between Baulderstone and the principal. The subject matter of that dispute on Baulderstone's own evidence overlapped or interlocked with the subject matter of the dispute between Baulderstone and Camillo .

100 In such circumstances Camillo suggests that by the operation of clause 20.5 the dispute resolution mechanisms may not be available in any event to either side to use.

101 This is said to be either because the resolution of the dispute between Baulderstone and the principal (which I was told from the bar table has in fact now been resolved) has automatically resulted in conclusive determinations in relation to this dispute or because it is very difficult for the applicant to determine how much of the dispute has been left over for determination under the clause after resolution of the head contract dispute.

102 Thus section 20.5 may prevent the dispute resolution process from being accessed by Camillo.

103 Even if these difficulties could be overcome, Camillo argued that paragraph 20.4 (f) rendered the entire ADR process potentially valueless because that clause provides that the expert determination would only be final and binding if the claim was less than $250,000 or the other party did not commence court proceedings within seven days after receiving the determination.

104 Thus, Camillo submitted that it would be required under the clause to undertake the process of dispute resolution without any certainty at all that

the dispute resolution process would resolve any of the issues in dispute in any final way.

105 Accordingly, Camillo submits that these various aspects of the alternate dispute resolution mechanism contained in clause 20 make the entire procedure so onerous to Camillo and so uncertain as to outcome that I should not exercise my discretion in the way suggested by Baulderstone.

Ouster

106 Finally Camillo argued that I should find that insistence on Clause 20 would be against public policy. It was said that this was so because the clause attempted to oust the jurisdiction of the courts (or this Tribunal).

107 It particularly submits that clause 20.5 seeks to stifle Camillo's ability to prosecute a civil claim against the Respondent – removing an otherwise unalienable right to bring civil proceedings.

108 Camillo relies on *Dobbs v National Bank of Australasia Limited* (1935)53 CLR 643 for the proposition that –

> "No provision which tends to disable a party from resorting to the Courts of Law was ever recognised as valid. It is not possible for a contract to create rights and at the same time to deny the other party in whom they invest the right to invoke the jurisdiction of the courts to enforce them."

109 However, as I have earlier outlined, since the time of that judgment there has been a recognition by the common law that provisions in a contract requiring compulsory arbitration or expert determination prior to commencing proceedings are not, by reason of that fact alone, liable to be struck down as being contrary to public policy

110 In the arbitration context, *Scott v Avery* clauses have been held not to oust the jurisdiction of the Court, but provide for a mechanism to be exhausted before the jurisdiction of the Court can be invoked.

111 Baulderstone relies on this long line of authority to counter this argument, and submitted that in any event there was no ouster as clause 20.4 (f) (ii) retained to each party the right to commence proceedings.

112 However, Camillo says that clause 20 is not the type of clause protected by these principles. This is said to be because clause 20, viewed in its entirety, is an attempt to dissuade Camillo from taking advantage of its terms.

113 I should characterise clause 20 as creating a complete bar to legal action, rather than being just a precondition to it.

Conclusion

114 As I have said, Baulderstone pointed out that some of the effects argued for by Camillo have not, in fact, come to pass. There is no suggestion in this proceeding that Baulderstone wishes to rely on clause 20.5. There is no suggestion yet that the parties have not agreed upon an expert. Indeed, there has been no discussion yet of who the expert should be.

115 In view of the heavy burden placed upon Camillo, and the fact that this was a substantial commercial contract governed by detailed contractual documentation, counsel for Baulderstone asked me to take it into account as relevant that no explanation was given as to the reason for Camillo's past lack of attempt to use the dispute resolution procedures which they had previously agreed to, or to raise any of the issues of uncertainty on which it now relies.

116 However in my view this is not an appropriate case for a stay.

117 I am not convinced that the matters of uncertainty raised by Camillo would of themselves compel that conclusion. But it is the combination of each of the matters of uncertainty raised by Camillo together with the operation of clauses 20.3, 20.5 and 20.4 (f) which brings me to this position.

118 In my view the arguments as to unworkability and unfairness should be assessed as at the time that this proceeding was issued in the Tribunal, and should not depend on concessions made by counsel for Baulderstone in

argument, or on whether or not Baulderstone has in fact sought the benefit of the offending clauses.

119 In exercising my discretion, I should take into account the apprehended risk to Camillo at the time the decision was made to issue this application. In order for the dispute resolution clause to be of assistance in resolving this dispute, Camillo would have to have been confident that each of the matters raised by it would not have in fact been presented as obstacles to its effective use.

120 First, it would have been required to comply with clause 20.3 and deposit security for costs in the manner outlined by that clause, despite the fact that the procedure does not otherwise envisage payment of costs to a successful party. Those costs would bear no necessary relationship to the amount in dispute between the parties.

121 Then agreement would have to have been reached as to an appropriate expert, and the procedures to be adopted by that expert notwithstanding that there is no description in the clause of the appropriate expertise required except for a generic qualification, and no procedure for independent appointment of an expert in the case of dispute about the particular person to be appointed and the area of expertise.

122 This could be done with a modicum of good sense and cooperation on both sides.

123 But in order to be sure that the process would be binding on the parties, Camillo would have had to have been confident at the outset of referral of dispute that its claim would not exceed $250,000. It would also have to be confident that Baulderstone would not commence court proceedings within seven days after receiving the determination from the expert. How could either Camillo or Baulderstone satisfy themselves of these requirements in advance?

124 Finally, it would have to be confident that Baulderstone (or possibly even another party, such as the principal) did not intend to use the provisions of s 20.5 to render the dispute resolution process nugatory.

125 Counsel for Baulderstone told me that although the dispute between Baulderstone and the principal has now resolved, there is still a live dispute with the engineer on the project. He said that to some extent this dispute overlaps with its dispute with Camillo. He identified item 15 on the schedule produced by Camillo – involving a variation claim for $477,318.90 - as covering works common to the dispute between Baulderstone and the engineer.

126 Thus, it seems to me that even if the dispute resolution process was utilised, it may well even now not lead to a final resolution of what may now be a tri-party dispute as to the issues in the litigation.

127 Certainly it would have been difficult for Camillo to make a judgment as to these matters prior to issuing these proceedings. At that time, or shortly thereafter, Baulderstone's evidence is that there were a number of disputes between the Principal and other parties. These disputes are detailed in the affidavit of Paul Lawson, Commercial Manager of Baulderstone.

128 As I have said, only the dispute between Baulderstone and the engineer now remains unresolved.

129 But it is significant that at paragraph 26 of his affidavit, sworn 18 September 2009, Lawson says this -

> "I note that pursuant to clause 20.5 of the subcontract, the determination of disputes between the Principal and the Contractor are conclusive as between the contractor and the subcontractor and the Subcontractor is bound by the outcome of any dispute under the head contract."

130 This is a clear indication from Baulderstone, given a month after the issue of proceedings at the Tribunal, that had an attempt been made at that time by Camillo to utilise the dispute resolution procedure the provisions of paragraph 20.5 would have been relied on .

131 De Nuzzo, Construction Manager for Camillo, attests that Camillo did not follow the dispute resolution processes because it believed them to be unworkable.

132 Given the matters to which I have referred above, I consider this to be a reasonable conclusion. Baulderstone in effect now wishes to rewrite the dispute resolution clause, not only to give certainty to the procedure for appointment of an expert, but also to delete the security for costs clause, and to modify the effect of clauses 20.5 and 20.4 (f).

133 The public policy arguments compelling the underlying use of agreed alternate dispute resolution mechanisms rely upon those mechanisms providing a sensible and coherent manner of resolving disputes outside of litigation.

134 In my view, clause 20, in the form contained in this contract, is not a coherent dispute resolution process and it is thus appropriate that I exercise my discretion by declining to make orders to give effect to its terms.

135 Accordingly, the application of Baulderstone for a stay is refused.

HER HONOUR JUDGE HARBISON
VICE PRESIDENT