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36 Pages

FLETCHER CONSTRUCTION AUSTRALIA LTD v MPN GROUP PTY LTD - BC9705205

SUPREME COURT OF NEW SOUTH WALES COMMON LAW DIVISION
ROLFE J

55028 of 1996

8 July 1997, 14 July 1997

Whether an "expert determination" clause was void as ousting the jurisdiction of the Court: held it was not: Dobbs v National Bank of Australasia (1935) 53 CLR 643 and South Australian Railway Commissioner v Egan (1972-1973) 130 CLR 506 applied.

Whether the clause was void for uncertainty as it did not specify the procedures the expert was to follow: held it was not: Triarno Pty Ltd v Triden Contractors Ltd (1992) B & Cl305.

Held that dispute fell within the terms of the agreement.

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Rolfe J

Introduction

The facts to which I am about to refer are taken from the affidavit of Ms Pamela Margaret Jack, a partner of Messrs Phillips Fox and the solicitor for the plaintiff, Fletcher Construction Australia Ltd, ("Fletcher"), sworn 20 June 1996. On 25 November 1993 Forma Developments Pty Ltd, ("Forma"), and the defendant, MPN Group Pty Ltd, ("MPN"), entered into a written agreement, ("the first agreement"), for the provision by MPN of structural engineering services. The recital to the agreement provided:-

"The Proprietor" (Forma) "engages the professional services of the Engineer" (MPN) "to provide services as specifically

described in Annexure 'A', as amended from time to time, in connection with the Peninsula Tower located at 37 Glen Street, Milsons Point ('Project')."

Cl1.6 provided an acknowledgment and agreement by MPN that on appointment of a building contractor to carry out the works the first

agreement would be novated by Forma to that builder, and that MPN would execute a Consultant's Deed of Covenant, ("the novation agreement), in the form of the copy deed annexed to the first agreement and marked "C" Cl1.6(c) and cl1.6(d) of the first agreement provided that MPN would execute all other necessary documents and do all things necessary to give effect to the novation; and that as and from the date of the novation agreement all payments would be made by the builder.

Cl6.1, which is the subject of the present controversy, provided:-

"6. Dispute Determination

6.1 Expert Determination

If the Proprietor and the Engineer are in dispute regarding any matter arising from the performance or as to the meaning of the Agreement, then either party shall by notice in writing served on the other require that such dispute be resolved by the determination of any independent third party acceptable to both parties. If the parties cannot agree on an independent third party within 7 days of the date of service of the notice then either shall request the President for the time being of The Project Manager's Forum of Australia, to nominate the third party. The third party who has been agreed upon or appointed shall act as an expert and not as an arbitrator and that party's decision shall be final and binding upon the Proprietor and the Engineer."

Cl8.4, which is headed "Governing Law", stated:-

"The Agreement is governed by the law of the State or Territory named in Item 4 of the Schedule" (New South Wales) "and the parties submit to the jurisdiction of the courts of that State or Territory."

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The novation agreement was entered into on 25 November 1993 by Forma, MPN and Fletcher, whereby Forma's rights and obligations pursuant to the first agreement were novated to Fletcher.

On 20 March 1996 Ms Jack wrote to MPN enclosing a document described as a Notice of Dispute pursuant to Cl6.1, which was signed by Mr Selby on behalf of Fletcher. It stated:-

"1. By written agreement ('Agreement') dated 25 November 1993 between Forma Developments Pty Ltd the Proprietor and MPN Group Pty Ltd (Engineer), the Engineer agreed to provide structural engineering services for the construction of Peninsula Tower located at 37 Glen Street Milsons Point ('Works').

2. The Agreement was subsequently novated by the Proprietor to Fletcher Construction Australia Pty Ltd (Builder).

3. A dispute has arisen between the Builder and Engineer as to a matter arising from the performance or as to the meaning of the Agreement.

4. Cl6.1 provides that in the event of a dispute a Notice in writing is to be issued and that the matter is to be resolved by the determination of an independent third party. Cl6.1 provides that the third party shall act as an expert.

5. Disputes have arisen relating to the following matters:-

(a) The performance by the Engineer of design development in providing information for tender purposes which was

inadequate and incorrect;

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(b) The failure by the Engineer to provide accurate and correct reinforcement ratios at tender;

(c) The failure to ensure that the information provided at tender complied with the intent of the drawings;

(d) The loss and damage suffered by the Builder consequent upon the failure of the Engineer.

(All of which are referred to as the Disputes.)

The Builder requires the Disputes to be submitted to an expert for determination in accordance with Cl6.1 of the Agreement."

The letter, which requested a response within seven days, proposed that two experts be appointed. One was stated to be an experienced engineer in the area of pre-stressing and reinforcement in high rise buildings, and the other the chief estimator for quantity surveyors, Rider Hunt.

The letter continued:-

"2. The Agreement the subject of the dispute does not provide any mechanism as to the conduct of an expert determination. Therefore we suggest that the parties reach an agreement for the conduct for the determination, to establish the procedure for the matter.

The proposed agreement would include the following:

2.1 (i) That the parties jointly confirm to the Experts the appointment and the undertaking to jointly meet the fees of the expert.

(ii) Each party lodge $2,000 on account of experts fees to be held in the trust

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account.

2.2 The matter proceed by way of submissions from the date of agreement as follows:

(i) Plaintiff to provide written submissions within 14 days.

(ii) Defendant to provide its submissions within further 14 days.

(iii) Plaintiff to respond within 7 days.

(iv) Short hearing at which parties will have the opportunity of speaking to their submissions. It is not envisaged that there will be any formal taking of evidence or cross-examination. It may be appropriate for the experts to ask questions of the parties.

(v) Experts to deliver the determination within 7 days."

On 16 April 1996 Ms Jack wrote to Messrs Minter Ellison, the solicitors for MPN, enclosing certain documents specified in the letter and stating that unless there was a response prior to 19 April 1996 "that you have instructions not to proceed in accordance with the appropriate dispute determination as set out in Cl6, we propose to proceed with the required process and request the experts to determine the matter ex parte".

On 30 April 1996 Messrs Minter Ellison wrote to Messrs Phillips Fox referring to that letter and stating:-

"We have now considered the documents enclosed in the above letter and in our view Cl6.1 of the agreement dated 25 November 1993 is not enforceable. That is demonstrated by the need for an agreed mechanism as

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set out in your letter dated 20 March 1996 addressed to our client.

The issues between our respective clients are not appropriate for expert determination in any event. They include questions of law including the standard of care required by our client in the execution of its obligations under the Agreement for Structural Engineering Services as well as the construction of that agreement and the Consultants Deed of Covenant.

Accordingly, our client will not participate in the expert determination suggested by your client and will not consider himself bound by any decision of such expert."

On 23 July 1996 Mr Viktor Mateffy, a director of MPN, filed an affidavit, which annexed a copy of a letter from MPN to Forma dated 20 September 1993. That letter set forth the understanding of Mr Mateffy of the agreement between the parties. After MPN's engagement Mr Mateffy was appointed as the Project Engineer and, by 9 November 1993, the tender drawings were completed. Some amendments were made to them, which amendments were completed by 23 November 1993. This work, which is the subject of the Notice of Dispute, was completed prior to the entry into the first agreement. However, the first agreement provided for that work to be carried out, for the builder to be liable to pay MPN, and for a number of other matters in respect of the work such as copyright, confidential information, publication of articles, and patents and trademarks. As at 25 November 1993 MPN had only been paid $8,400 of the $84,000 owing in respect of the work done and, as I have noted, the obligation was on Fletcher to pay the balance.

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The Present Proceedings

By a Summons filed on 21 July 1996 Fletcher sought declarations that Cl6.1 "is not unenforceable for uncertainty"; that the Notice of Dispute was validly issued in accordance with that clause; and that if MPN does not agree to the appointment of an expert pursuant to that clause, and does not participate in any step in procuring the determination of the matters in dispute in accordance with it, Fletcher would be entitled to request the President of the Australian Institute of Project Management (formerly the Project Manager's Forums of Australia) to nominate a third party to act as an expert, to make submissions to the expert on the matters in dispute in the absence of MPN, and, if the expert determines the matters in favour of Fletcher and makes any monetary award, to enforce such award "as a contract debt". Ancillary relief was sought.

The Summons identified the dispute as relating to the construction of Cl6.1, and the issue likely to arise as being whether it was enforceable. The summary of Fletcher's contentions stated that Fletcher and MPN are bound by the agreement to refer any dispute between them to an expert for determination, which shall be final and binding, and that the dispute referred to in the Notice of Dispute is "amenable for expert determination".

On 22 July 1996 MPN filed a Defence in para1 of which it stated that it agreed that the nature of the dispute was adequately stated in Fletcher's

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Summons and that the issue likely to arise, as identified by Fletcher in the Summons, was an issue. MPN added a further issue as likely to arise namely:-

"Whether Cl6.1 applies to the dispute the subject of the Notice of Dispute referred to in the summons."

MPN responded to para3 of the Summons by denying that it is bound by the agreement to refer any dispute between Fletcher and it to an expert determination, and that any such final determination "is final and binding".

In so far as it was asserted that the dispute was amenable for expert determination MPN denied that the dispute referred to in the Notice of Dispute is a dispute to which Cl6.1 applied, and did not admit that it was amenable to expert determination. MPN also asserted that Cl6.1 was void as being uncertain or as an attempt to oust the jurisdiction of the Court contrary to public policy.

On 23 August 1996 MPN filed a Cross-Claim in Court in which it sought a declaration that Cl6.1 is void or, alternatively, a declaration that in the events which have happened a determination by an expert pursuant to that clause, without the further consent of MPN, would not operate to prevent MPN from having its rights and obligations in relation to the matters referred to in the Notice of Dispute determined by a Court.

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In essence MPN's contentions raised the questions of uncertainty and the attempt to oust the jurisdiction of the Court and, also, whether the dispute is a dispute to which Cl6.1 applies.

The matter came before me for the first time on 8 July 1997 and the parties confirmed that the evidence before the Court was contained in the affidavits of Ms Jack and Mr Mateffy, to which no objection had been taken and as to which there was no cross-examination; and that it had been agreed that all the issues raised in the proceedings would be determined on the written submissions furnished by the parties. I have read the evidence and the written submissions and now determine the matter.

Fletcher's Outline Of Submissions

The submission in chief of Fletcher, as contained in its outline of submissions dated 15 August 1996, relied upon the terms of the agreement between the parties and asserted that MPN should be held to the bargain it made as to dispute resolution. Reliance was placed upon the decision of Rogers J in Qantas Airways Ltd v Dillingham Corporation & Ors (1985) 4 NSWLR 113.

Essentially it is for MPN to show that the relief claimed in the Summons should be refused. The written submissions identified three bases why that result should follow, namely:-

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1. Cl6.1 seeks, contrary to public policy, to oust the jurisdiction of the Court, so that either the clause is not binding or is void.

2. Cl6.1 is void for uncertainty.

3. If Cl6.1 is operative and enforceable, it does not apply to the dispute referred to in the Summons.

Ouster Of Jurisdiction - Public Policy

MPN submitted that Cl6.1 has the effect of ousting the jurisdiction of the Court and is, accordingly, contrary to public policy and void, its terms making it clear; "beyond doubt" that disputes are to be resolved by expert determination and not by arbitration. It was submitted that in so far as the clause provides that the decision shall be "final and binding" it is, to take a quote from a case to which I shall refer, "a bare faced attempt to oust the jurisdiction of the Courts": South Australian Railways Commissioner v Egan (1972-1973) 130 CLR 506.

In the alternative it was submitted that any authority of the expert arising from MPN's agreement to refer disputes for expert determination "is countermandable and Cl6.1 cannot operate to make it otherwise". The submission was that MPN's refusal to submit to the expert determination countermanded the authority to determine the dispute such that any purported determination is not binding.

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Several points may be noted immediately. Firstly, it is not part of Fletcher's case that the disputes are to be referred for arbitration. The appointed expert is to act as an expert, not as an arbitrator. Secondly, the agreement of the parties that matters between them shall be determined by a third party, other than the Court or an arbitrator, and that that person's determination shall be final and binding is frequently found in agreements as the contractually agreed means of resolving the issues referred. Thirdly, Cl6.1 does not depend on both parties agreeing upon the expert. If they are in disagreement as to his identity either may request the designated appointor to nominate the expert. Thus the expert derives his or her authority to act either from the designated appointor or from the party requesting the designated appointor to act and his or her doing so. Fourthly, the decision of the expert, although stated to be final and binding, remains amenable to attack, although of a limited nature, before a Court on the basis, for example, that the expert has not asked conformably with the agreement or that the decision is vitiated by a factor, such as fraud. However, if any such attack is not successful, it is not open to the parties to seek to re-litigate the matters determined by the expert. It is against this background that it is convenient to consider whether Cl6.1 purports to oust the jurisdiction of the Court.

In Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643 the High Court considered, inter alia, the effect and validity of a provision

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in a guarantee, which made a certificate signed by the bank manager of the office at which the principal debtor's account was kept, conclusive evidence of the principal debtor's indebtedness at a particular date. At p651 Rich, Dixon, Evatt and McTiernan JJ noted that the production of such a certificate was not mandatory and that the Bank could prove the actual indebtedness "by ordinary legal evidence". They were, however, satisfied that the conclusive evidence clause meant what it said, namely that such a certificate would be conclusive evidence of the indebtedness. At p652 they commenced to consider a submission that upon that construction the clause attempted to oust the jurisdiction of the Court and to substitute for the Court's judgment the determination or opinion of a bank officer. Their Honours were of the view that the submission confused two different things. They said:-

"A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made*or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might have been required to adjudicate*. It has never been the policy of the law to discourage the latter. The former has always been invalid. No contractual provision which attempts 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 to the other party in whom they vest the right to invoke the jurisdiction of the Courts to enforce. Parties may agree in the sense of arriving at a common intention as to their future action but, because they do not contemplate legal relations, avoid the creation of rights and thus preclude resorts to the Courts ....

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Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person. Then no cause of action can arise before the exercise by that person of the functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction (Scott v Avery; Caledonian Insurance Co v Gilmore).

What no contract can do is to take from a party to whom a right actually accrues, whether ex contractu or otherwise, his power of invoking the jurisdiction of the Courts to enforce it ... Accordingly a contract providing for an arbitration did not, apart from statute, prevent the institution of an action or suit, even although an actionable breach of contract was committed by the refusal to refer (In re Smith & Service and Nelson & Sons per Bowen LJ). But if, before the institution of an action, an award was made, it governed the rights of the parties and precluded them from asserting in the Courts the claims which the award determined. By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action. His award will do so if it negatives the existence of liability. It will do so if it operates, not merely to ascertain

the existence and measure of the original liability, but to impose a new obligation as a substitute, whether the obligation results from the tenor of the award or from an antecedent undertaking of the parties to give effect to the determination it embodies ... The award given under authority of the parties operates as a satisfaction pursuant to their prior accord of the causes of action awarded upon ... It is true that, apart, from statute, such an authority was revocable. It must subsist up to the making of the award. The authority was by its nature countermandable and no act or contract of the party could make it otherwise ... He might be bound by his own deed or agreement, or by a rule of Court, or a Judge's order, not to revoke his submission, but the result was no more than to make it a breach of duty to countermand the authority of the arbitrator. None-the-less the arbitrator's authority was revoked. But, when an arbitrator, exercising a

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subsisting authority, delivered his award, the law gave full effect to it." (My emphasis.)

After considering, at p654, the effect of a valid award, their Honours continued:-

"What at common law could not be done was to abandon by contract the power of invoking the Court's jurisdiction before the cause of action had been extinguished by an award and the power of countermanding the authority of the arbitrator. But it was never considered that the Court's jurisdiction was ousted by an award, notwithstanding that it concluded the parties with respect to matters which otherwise would be determined by the Court. *It is therefore a mistake to suppose that the policy of the law exemplified in the rule against ousting the jurisdiction of the Court prevents parties giving a contractual conclusiveness to a third person's certificate of some matter upon which their rights and obligations may depend*. In ex parte Young in re Kitchen James LJ says: 'If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it.'

There are many familiar kinds of contracts containing provisions which make the certificate of some person, or the issue of some document, conclusive of some possible question. The most conspicuous example, perhaps, is the certificate of the engineer or architect under contracts for the execution of works on the construction of buildings.

For these reasons we think the certificate of the officer of the bank is conclusive upon the parties of an amount and existence of the customer's indebtedness." (My emphasis.)

Starke J, after considering various circumstances in which there was no ouster of the jurisdiction of the Court by reference of disputes to a third party, said, at p657:-

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"*In none of these cases is the jurisdiction of the Court ousted: all that has been done or attempted is to provide for the ascertainment of rights or facts by the parties or by some agreed person or tribunal. and to leave the enforcement of the parties' rights, so ascertained or flowing from the facts so found, to the determination of the Courts of law*. The clause in question here contains no stipulation, express or implied, that any party shall not resort to the Courts of law: it is an evidentiary stipulation for use before those Courts." (My emphasis.)

The words I have emphasised state clearly that the parties may agree that a person, other than the Judge of a Court, may determine matters in issue. The parties cannot exclude the jurisdiction of the Court, but because of their agreement they have limited the matter for consideration by the Court to the question whether the agreed decider has acted conformably with the agreement of the parties and not in such a way as to vitiate his or her decision.

On behalf of MPN is was submitted that the passages to which I have referred confer a power on one party unilaterally to revoke the authority of the agreed third parry. I do not consider this flows from the passages to which I have referred, save in relation to the position of an arbitrator at common law prior to the issue of an award. The passages make it clear that the decision of an agreed third party is enforceable and the ratio of the decision would be defeated if, for example, the guarantor could countermand the authority of the bank manager to give the certificate. If that had been the position the case would have been decided differently, in my opinion.

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Additionally there are direct statements in both judgments, which I have quoted, that the agreement is enforceable, which is quite contrary to the suggestion that the party could countermand the authority of the agreed decision maker.

Several other points are raised against MPN's submissions, which I consider defeat it. Firstly, it is pointed out that the ultimate appointment of the expert is not dependent on the agreement of the parties, to which submission I have referred and with which I agree. This points away from the submission of MPN. Secondly, if MPN were entitled to withdraw from the agreement the position would be that it could defeat the operation of the contract by its own act. This would be contrary to the accepted law that a party cannot defeat the operation of a contract by refusing to co-operate. Thus, if contrary to the view I prefer, the co-operation of MPN is required, I do not think it is entitled to withhold it. Thirdly, Cl8.4 contemplates that there will remain matters for a Court to decide.

In South Australian Railways Commissioner v Egan the High Court was concerned with a contract which provided that no suit or action should be brought by the contractor or the Commissioner against the other to recover any money for or in respect of, or arising out of, any breach of the contract by the parties, or for or in respect of any matter or thing arising out of the contract, unless and until the party bringing the action "shall have obtained a

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certificate, order or award from the Chief Engineer for Railways for the amount sued for".

At p515 Menzies J concluded that the clause made the obtaining of a certificate a condition precedent to an action and that such a provision did not unlawfully oust the jurisdiction of the Court (Scott v Avery). His Honour continued:-

"The explanation is that neither party undertakes liability unless the certificate, order or award is obtained. Unless the condition is complied with, there is no cause of action."

In these circumstances his Honour considered that the attack on the validity of the clause failed.

At p523 Gibbs J, with whom McTiernan and Walsh JJ agreed expressly, noted that the validity of the clause depended "on the theory that the obtaining of the certificate, order or award is a condition precedent to the existence of the cause of action". His Honour continued:-

"If it appeared that a cause of action existed independently of the obtaining of the certificate, order or award, an attempt to exclude the jurisdiction of the Court to enforce it would be contrary to public policy. Obviously Cl35 makes the existence of a certificate, order or award a condition precedent only in the cases to which the clause expressly refers. Other rights and liabilities are left untouched by the clause, which must be strictly construed. The effect of the clause is, therefore, to prevent the continuance of an action only in so far as it involves claims to recover money that fall within the clause."

Stephen J also agreed.

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The submissions for MPN are that the decisions leave room for the operation of expert determination clauses by recognising the validity of Scott v Avery clauses and the conclusiveness of a determination made by an expert with the consent and authority of both parties. However, it was submitted that the present clause is not a Scott v Avery clause and that MPN does not agree to submit the present dispute to an expert pursuant to it.

Fletcher responded that an agreement that has effect of ousting the jurisdiction of the Courts is contrary to public policy and is void. The written submissions stated that neither of the two grounds, namely that the clause provided for expert determination and not arbitration, and that the third party's decision shall be "final and binding", permits a conclusion that Cl6.1 is an "ouster clause".

In my opinion Cl6.1 does not purport to oust the jurisdiction of the Court. It is an agreement between the parties that the specified disputes shall be determined by an expert. There is nothing unusual about such a provision and parties are held to their bargain if they agree to such a clause.

Nor is there anything unusual about the clause providing that the expert's decision shall be "final and binding" or "conclusive", and provisions such as that do not oust the jurisdiction of the Court. The effect of the clause is to make the decision of the expert final and binding provided the matters referred to him are ones which the agreement contemplates. The expert's

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decision is, however, susceptible of attack in a Court if there is a failure to comply with the contract or there is some vitiating factor relevant to the decision.

Uncertainty

It was submitted on behalf of MPN that Cl6.1 is "quite unlike provisions commonly found for expert valuation or expert certification of matters relating to the performance of work" in that it purports to provide for the final and binding determination of any dispute between the parties, but contains no machinery provisions other than those allowing for the appointment of the expert. It was submitted that the appointment of the expert as an expert and not as an arbitrator does not assist in resolving any of the ambiguities as to how the dispute is to be determined, and that in the present case there has been no attempt made to fill the "void" in relation to procedure. The submission continued that if, contrary to the basic submission concerning ouster of the jurisdiction, the appointment of an expert is permissible in the circumstances of this case, the parties must at least define with sufficient certainty the procedures to be adopted to enable the obligations of the parties to be identified and enforced.

In further submissions MPN stated that there was no agreement as to the rules of evidence to apply; the right of the parties to be legally represented; whether the parties could be compelled to furnish information or

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documents "and if so, how"; whether confidentiality is to be preserved; whether transcripts are to be taken; who will bear the costs of the expert determination process; whether the expert can make orders as to costs; and whether security for costs "will be required". It was submitted that Annexure "C" to Ms Jack's affidavit demonstrates the need for further agreement between the parties as to the means by which the experts are to resolve the dispute. The "uncertain" to which the submissions were directed was not that the words used were difficult of interpretation, but rather that the parties had not agreed on procedures to be followed by the expert.

On behalf of Fletcher it was submitted that this point is answered by the decision of Cole J in Triarno Pty Ltd v Triden Contractors Ltd (1992) B & Cl305. Uninstructed by authority I would have concluded that the procedures to be adopted by the expert to reach a conclusion would be procedures agreed by the parties and the expert or, in the absence of agreement between the parties, formulated by the expert having regard to the circumstances of the case, he or she being the contractually agreed dispute resolver. In devising procedures the expert is no doubt obliged to ensure that he or she affords natural justice to both parties but, subject to that, he or she is to enter upon the determinative task as an expert and not as an arbitrator. Ms Jack's letter suggests a form of procedure, which

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may or may not be acceptable to the expert. It outlines a possible way in which the expert may think it appropriate to deal with the matter.

In Triarno his Honour was concerned with Cl25, which provided, in part:-

"If Triden and Triarno are unable to agree as to the value of any claim made by Triarno, Triarno shall be entitled to immediate payment from the bank guarantee for $500,000 of the amount not in dispute (if any) but shall not be entitled

to any amount of its claim in dispute until it receives a determination from an independent expert agreed upon by the parties or failing agreement, appointed by the Chairperson of the Institute of Arbitrators Australia, NSW Chapter, whose decision shall be final and binding. Upon receipt by Triarno's solicitor, of a copy of the independent expert's determination, Triarno shall be entitled to be paid from the bank guarantee for $500,000 any additional amount to which it is entitled...."

At p6 his Honour noted that the Deed made no express provision for payment of the independent expert, or for the procedures to be followed by him in reaching his decision or for any rights or obligations upon the parties in relation to his determination.

The parties agreed upon two independent experts, but did not reach agreement either between themselves or with the experts concerning "the procedures, the form or the cost of the independent expert's determination". There was a dispute between them as to the sufficiency of the particularisation of Triarno s further claims, Triden asserting that it was unable to present to the experts evidence regarding the claims or to controvert

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evidence, which might be placed before the experts by Triarno. His Honour continued:-

"Thus it wishes for there to be a procedure whereby Triarno first discloses to Triden and the experts, the evidence which it wishes to advance in support of its claims, with Triden then being given the opportunity to cross-examine any witness who may support that evidence, coupled with Triden then being given the opportunity to place additional evidence in rebuttal, if it is available, before the independent experts."

These matters had been placed before the independent experts, one of whom produced an agreement in the form of that drafted by Sir Laurence Street, who was one of the experts in that case, and published in (1990) 1 ADRJ 134-135. Triarno signed the document, but neither Triden nor the independent experts had.

The parties sought declaratory relief as to the rules and procedures for the conduct of the expert determination pursuant to Cl25 and at p307, Cole J said:-

"Whilst recognising that there may be utility in the Court determining procedures to be followed in an expert determination, in my opinion the Court has no jurisdiction to do so. The Court has power in an arbitration subject to the Commercial Arbitration Act 1974 to make interlocutory orders in relation to arbitration proceedings (s47). However, the contemplated proceedings are for determination by an expert and are not intended to be an arbitration. That seems clear from the provisions of Cl25 in the draft agreement advanced either by the experts or Triarno. The difference in function between an independent expert and an arbitrator is well recognised ....

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If the parties have not by their deed agreed the procedures to be followed upon an expert determination, that is not a void the Court can fill. There is no reason to imply a term that the Court will determine procedures. It is a matter for either agreement between the parties, or determination by the independent experts as to the procedures to be followed."

The concluding sentence of this passage reaches the conclusion which I favour.

His Honour then considered the question as to how the costs should be paid, which was not explicitly dealt with by the Deed, and, by reference to Cl28 and cl29 of that agreement, saw an intention on the part of the parties that the costs of independent mechanisms necessary for the operation of that Deed were to be equally shared and, accordingly, he concluded that there was an implied term that each party pay one half of the costs of the independent expert.

His Honour dealt, finally, with the declaration seeking a direction that a party "submit to and co-operate with any expert determination pursuant to Cl25 of the Deed". He said, p308:-

"It is a matter for each party to determine what role, if any, it will take in relation to the expert determination. If the experts determine that there is a role for either party to take apart from notification of the disputes to be determination."

In my opinion, this decision is authority for the proposition, which I consider is correct, that in the absence of agreement as to procedures, they

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are to be decided by the expert. There is, accordingly, no uncertainty of the type for which MPN contended.

In various clauses of the present agreements there is provision for disputes to be determined pursuant to Cl6.1 but, upon a consideration of the whole document, I reach the conclusion Cole J reached, namely that there is nothing in the terms of the agreements, which either suggests or necessarily implies that a determination by the independent expert, which is favourable to one party or the other, should result in the unsuccessful party paying the costs of the independent experts. Nor, in my opinion, is there any express or implied power in the independent expert conferred by the Deed to make an order for costs.

Does Cl6.1 Apply To The Dispute?

A consideration of whether Cl6.1 applies to this dispute requires reference to the evidence of Mr Viktor Mateffy, which appears in his affidavit of 23 July 1996. Mr Mateffy said that in September 1993 MPN was retained by Forma to provide costing and structural engineering services relating to the proposed development and he annexed a copy of MPN's letter to Forma dated 20 September 1993. That letter confirmed various arrangements, commencing with the scope of services to be provided by MPN. It set forth certain matters not included in the proposed services, and referred to fees and to a request for progress payments. The letter concluded by stating that

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preliminary design work was already in hand and that documentation should be completed following appointment of the successful contractor.

After MPN was engaged Mr Mateffy was appointed Project Engineer and undertook supervision of the preparation of the structural tender and construction drawings and various other work to which he refers in para4. In para5 he deposed that between September 1993 and 9 November 1993 he supervised the preparation of the tender drawings for the structural design of the building which drawings were completed by 9 November 1993. Annexure "B" to his affidavit is a copy of a transmittal from MPN of a set of tender drawings to the development consultant. Thereafter some amendments were made to some of the drawings, which were completed by 23 November 1993. Annexure "C" is a copy of a transmittal from MPN to the Project Manager of the revised tender drawings.

Neither the first agreement nor the novation agreement was entered into until 25 November 1993.

It was submitted by MPN that Cl6.1 does not apply to the dispute referred to in para5 of the Notice of Dispute because the work the subject of complaint was carried out prior to entry into the first and the novation agreements.

It was submitted that the first agreement sets out the services to be provided in Annexure "A", but does not purport to have any retrospective

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operation, such that work performed prior to the agreement's being entered into is not governed by its terms. The submission continued that it follows that a dispute relating to work carried out prior to the date of the agreement is not a dispute "arising from performance or as to the meaning of the Agreement" and, accordingly, is not covered by Cl6.1.

In the alternative it was submitted that the novation agreement is not expressed to operate as an assignment to Fletcher of Forma's rights under the original contract, but that it operates to terminate that contract and to create a new contract

between Fletcher and MPN. So much was not in issue and I have referred to the relevant provisions of Cl1.6.

It was submitted that the novation agreement is not expressed to operate retrospectively, such that rights and obligations of Fletcher and MPN in relation to work carried out prior to its being entered into are not governed by "the new agreement" with the consequence that the dispute is not caught by Cl6.1.

The basis for the submission is to be found in the novation agreement. Cl2(a) provides that the parties agree that Forma and MPN:-

"mutually agree to terminate the Contract" (the first agreement) "and to release each other from all obligations and liabilities under the Contract."

Subcl(b) records an agreement between Fletcher and MPN to enter into a new contract on the same terms and conditions as the first agreement save and except that:-

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"(i) the Builder shall be named therein in lieu of the Proprietor; and

(ii) the rights, obligations and liabilities of the Builder and the Consultant will be as if the Builder had executed the Contract in lieu of the Proprietor."

Cl2(c) provides:-

"the Consultant shall indemnify the Builder against all claims, costs, expenses, losses or damages suffered or incurred by the Builder arising out of or incidental to any work which may have been performed by the Consultant under the Contract prior to its termination."

The "Contract" is identified in the recital as the one whereby Forma engaged MPN to effect certain design works, brief particulars of which are set out in Item 2 of the Schedule, which are defined as "the Design Works", ie the first agreement.

The basic submission on behalf of MPN was that no work was carried out under the first agreement, all the work having been carried out prior to its being entered into, or, alternatively, that upon the proper construction of the novation agreement there was no assignment of rights against MPN from Forma to Fletcher. It was submitted that Cl2(c) distinguishes between work carried out under the first agreement and the novation agreement, and, further, that the indemnity is in respect of work carried out under the first agreement, and that Cl6.1 only applied to work carried out after the two agreements of 25 November 1993 were made.

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It was submitted on behalf of MPN that it is not correct to assert that the effect of the novation agreement is to put Fletcher into "Forma's shoes for all purposes" as Cl2 of the novation agreement does not assign existing rights of action but, rather, Cl2(b) provides for the entry into a new contract and the rights of Fletcher and MPN "will be" as if Fletcher had executed the contract of 25 November 1993 in lieu of Forma.

The extent of the indemnity provided by Cl2(c) was then stressed and the submission was made that the dispute, which Fletcher seeks to have determined pursuant to Cl6.1, does not arise out of any rights or obligations owed as between MPN and Forma, but rather from its alleged reliance, as a tenderer, on the accuracy of plans prepared by MPN and made available in the tender process. It was submitted that is not a cause of action, which lay as between Forma and MPN, and that it cannot be asserted that the claim is now being pursued because Fletcher "stands in the shoes of" Forma.

It should also be noted that in the novation agreement it is acknowledged that as at "the date hereof" Forma had paid

MPN pursuant to the first agreement the sum set out in Item 5 of the Schedule, namely $8,400, in respect of the services provided up to 23 November 1993. The contract sum was $84,000, the balance being payable by Fletcher to MPN after 25 November 1993.

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Cl3.1 of the first agreement provided that in consideration of the proper performance by MPN of the Services, Forma promised to pay it the fee and reimbursable expenses in accordance with Annexure "B" at the times and in the manner set out in the agreement. Cl3.2 provided that the amount of the fee for the services is as set out in that annexure. Annexure "B" states that the fee is $84,000 of which $8,400 is payable upon the appointment of a builder and the balance progressively as set forth. It was also provided that additional re-design and re-documentation work, which MPN may incur and which was due to alteration requirements initiated other than by it "shall have to be charged for, additionally to the above sums, at the Engineer's man-hour rates".

On behalf of Fletcher it was submitted that Forma engaged MPN to provide structural engineering services on 20 September 1993 and that between that date and 23 November 1993 MPN performed those services giving rise to the matters the subject of the Notice of Dispute. So much is common ground, as is the fact that on 25 November 1993 the first agreement, which is described in Fletcher's submissions as the "formal agreement" for the provision of structural engineering services, was executed by Forma and MPN.

The submission continued that one had to ask whether the work done by MPN from 20 September 1993 to 23 November 1993 was done "in

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performance of the (consultancy) agreement" and, if so, whether the novation agreement had the effect of putting Fletcher into Forma's shoes for the purposes of that agreement.

The submission noted MPN's reliance upon the fact that the "actual performance of the work by it pre-dated the formal execution of the written Consultancy Agreement" and that notwithstanding MPN's willingness, after the work was done, to execute the agreements, it ought not to be bound by its terms in so far as they pertain to the actual performance of the work because the agreements do not purport to have any retrospective operation.

The submissions turned to the letter of 20 September 1993 and noted that as at 25 November 1993, notwithstanding that the design services had been performed, the parties did not confine the work to be undertaken to work to be performed in the future, but to all aspects of the services provided and to be provided by MPN. It was also pointed out that the progress payments schedule in the letter of 20 September 1993 is identical to that set forth in Annexure "B" to the novation agreement.

It was nextly submitted that Cl2(b)(ii) of that agreement, on its proper construction, does have a retrospective operation in the sense that as from the date the agreement was entered into the rights, obligations and liabilities of MPN will be as if Fletcher had executed the contract in lieu of Forma.

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It seems to me that notwithstanding that the work which is the subject of the present dispute, was carried out prior to the agreements of 25 November 1993 being entered into, it was intended by the parties that the first agreement would regulate the provision by MPN to Forma of the services described in Annexure "A". Of particular significance, for present purposes, is that the parties included in those services work which had already been done and there was an agreement in Cl1.1 that in performing the services MPN would exercise appropriate skill, care and diligence. As I have noted Cl1.6(d) provides that as from the date of the novation agreement all payments due under the first agreement shall be made by Fletcher and, in Cl3.1, express provision is made for payment, which includes payment of all but $8,400 of the $84,000 payable for the services already rendered. In these circumstances the party to which MPN was required to look for payment of the balance of the amount owing for the services performed prior to the entry into the agreements

was Fletcher.

In my opinion the proper analysis of what transpired is that notwithstanding that MPN carried out the work, which is the subject of the present dispute, prior to the entry into the agreement of 25 November 1993, it none-the-less entered into that agreement for the carrying out of that work on the terms and conditions therein set forth. Put another way, it agreed on 25 November 1993 that the services it had provided prior to that date were

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provided on the basis of the contractual arrangements in the first agreement. Many of the provisions of that agreement were for the benefit of MPN. It agreed that the terms and conditions of that agreement would govern its obligations in respect of the work it had carried out and, no doubt very importantly from its point of view, the terms on which it was to be paid. In these circumstances, notwithstanding that the work the subject of the present dispute had already been carried out, MPN agreed that its rights and obligations were governed by that agreement. In my opinion the provisions as to payment set out in Cl3 make it clear that the entitlement to and the terms of payment were to be governed by that clause and, by way of example, Cl3.6 provides that if Forma disputed the whole or any portion of the amount claimed in an account submitted by MPN, Forma should pay that portion of the amount which was not in dispute and notify MPN in writing of the reasons for disputing the account. The clause continued:-

"If the parties are unable to reach agreement within seven days of the Proprietor's notice, the dispute shall be determined in accordance with this Agreement."

This made very clear that the first agreement was to operate in respect of services already provided and, of particular relevance for present purposes, that Cl6.1 was to operate.

Cl5 is concerned with copyright and confidential information. Cl5.1 provides that copyright in all drawings etc prepared or provided by MPN in connection with the project was to vest in Forma subject to Forma

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having paid all fees in accordance with the amounts contained in the agreement. Cl5.2 provided that all drawings etc supplied by or on behalf of Forma or by MPN should be regarded as confidential to MPN and shall not be disclosed by it "except as may be necessary for the performance of the Services, to a third party except with the prior written consent of the Proprietor". Cl5.3, cl5.4 and cl5.5 deal with matters relating to the performance of past services, but regulating the situation into the future.

The view to which I have come is assisted by the definition of "agreement" as meaning "the entire contractual agreement between the parties". On the submissions of MPN it carried out the services prior to the agreement being entered into on 25 November 1993. On the other hand it is not suggested that the work was not carried out pursuant to any agreement between the parties and, clearly enough, there was at least an implied agreement that MPN would be paid for the services. The method of that payment was set out in the first agreement and the obligation to pay the balance became, with the consent of MPN, the obligation of Fletcher by dint of the novation agreement.

I have come to the view that considered objectively the parties intended that the first agreement should govern the provision of the services, which are expressly referred to in Schedule A, in all respects. If that be correct it follows that all the provisions of that agreement, which are relevant to the

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provision of those services, operated in relation to the provision of those services and, in consequence of the novation agreement, the rights and obligations of Forma were undertaken by and made available to Fletcher, on the same terms and conditions.

Order

Conclusions

In the result I have come to the conclusion that Cl6.1 did not purport to oust and did not oust the jurisdiction of the Court; that it is not uncertain in the manner suggested; and that the matters in dispute are covered by the several agreements of 25 November 1993 such that Fletcher is entitled to have those disputes determined by an expert pursuant to Cl6.1. I invite the parties to bring in Short Minutes of Order to give effect to these reasons. The Short Minutes of Order should provide for MPN to pay Fletcher's costs of the proceedings and for MPN's cross-claim to be dismissed with costs.

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