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ELIZABETH BAY DEVELOPMENTS PTY LTD V BORAL BUILDING SERVICES PTY LTD

Common Law Division: Giles J
24 February, 3, 28 March 1995

Contracts -- Building contracts -- Settlement of disputes -- Mediation cause -- Enforceability -- Whether proceedings should be adjourned or stayed -- Principles involved -- Effect of uncertainty in agreement to mediate -- Discretionary nature of orders to adjourn or stay proceedings -- Matters relevant to exercise of discretion.

Held: (1) An agreement to mediate whereby parties merely agree (inter alia) to sign a mediation agreement the terms of which have not been settled beyond the necessity that they be consistent with specified guidelines, is not sufficiently certain to be given effect. (715D-G)

Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194, followed.

(2) Further, a mediation agreement whereby parties commit themselves to attempt in good faith to negotiate towards achieving a settlement of a dispute is equally not sufficiently certain to be given effect. (716D)

Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194, followed.

Consideration of matters which may effect the exercise of the discretion to adjourn or stay court proceedings so as to allow mediation to take place.

Note:

A Digest: CONTRACTS (3rd ed) [256]; BUILDING CONTRACTS (2nd ed) [3]

CASES CITED

The following cases are cited in the judgment:
Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130.
Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1.
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337.
Decker v Lindsay 824 SW 2d 247 (1992).
Ferris v Plaister (1994) 34 NSWLR 474.
Hayman v Darwins Ltd [1942] AC 356.
Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194.
Lewandowski v Mead Carney-BCA Pty Ltd [1973] 2 NSWLR 640.
Walford v Miles [1992] 2 AC 128.

The following additional cases were cited in argument and submissions:
AWA Ltd v Daniels (t/a Deloitte Haskins & Sells) (1992) 7 ACSR 759; 10 ACLC 933.
Blatt v Sochet 606 NYS 2d 11 (1993).
Ferris v Plaister (1994) 34 NSWLR 474.
Geraldton Building Co Pty Ltd v Christmas Island Resort Pty Ltd (1992) 11 WAR 40.
Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd (1992) 1 Lloyd's Rep 81.

Lord & Son Construction Inc v Roberts Electrical Contractors, Inc 624 So 2d 376 (1993).
Perpetual Trustees Co Ltd v Jacobs (Supreme Court of Victoria, Smith J, 17 August 1994, unreported).
Racecourse Betting Control Board v Secretary for Air [1994] Ch 114.

MOTION

R C Nicholls, for the plaintiff.

D M Flaherty, for the defendant.

Cur adv vult

28 March 1995

GILES J. Elizabeth Bay Developments Pty Ltd (Elizabeth Bay) was the trustee of the Elizabeth Bay Development Trust, through which there was developed in joint venture a residential subdivision at Lake Munmorah on the central coast of New South Wales. In September 1993, Elizabeth Bay entered into two written agreements with Boral Building Services Pty Ltd (Boral). One was a construction management contract under which Boral was engaged to provide construction and design management services for the project. The other was a building contract under which, in very general terms, houses were to be built and sold by Boral with division of the nett proceeds of sale after land and construction costs.

In mid-1994 Boral ceased its involvement in the project. Elizabeth Bay treated the cessation as a repudiation and terminated the contracts. It brought these proceedings claiming a declaration that its termination was effective and damages for breach of contract. Boral's substantive defences in the proceedings were that it was not bound to proceed with the contracts and thus was entitled to cease its involvement in the project, and further that if it was in breach of contract Elizabeth Bay had suffered no recoverable loss because continued performance on the basis laid down in the contracts would not have produced any nett profits.

But Boral also invoked mediation clauses in the contracts, and moved for an order that the proceedings be adjourned or stayed until further order so that the mediation could take place. Elizabeth Bay declined to participate in a mediation and opposed any adjournment or stay. Thus there arose a question similar to that considered in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, in which it was held that an agreement to mediate is enforceable if the conduct required of the parties for participation in the process is sufficiently certain and that an agreement to mediate as a pre-condition to arbitration may be indirectly enforced by the adjournment or stay of the arbitration proceedings. These reasons are concerned with Boral's application for an adjournment or stay.

Clause 19 of the construction management contract provided --

> "19. (a) In case any dispute or difference shall arise between the Principal and the Construction Manager either during the progress of the Works or after the determination, abandonment or breach of the Contract as to the construction of the Contract or as to any matter or thing of whatsoever nature arising

thereunder or in connection therewith, then either party shall

(1995) 36 NSWLR 709 at 711

give to the other notice in writing of the dispute or difference and at the expiration of seven days, unless it shall have been otherwise settled, the parties agree to first endeavour to settle the dispute or difference by mediation administered by the Australian Commercial Disputes Centre (ACDC).

(b) In the event that the dispute has not been settled within 28 days (or such other period as agreed to in writing between the parties hereto) after the appointment of the mediator the dispute shall be submitted to arbitration administered by and in accordance with the Arbitration Rules of the ACDC.

(c) The arbitrator shall be a person agreed between the parties. ACDC will assist the parties by providing a list of suggested arbitrators. Failing agreement, the arbitrator shall be a person appointed by ACDC. The arbitrator shall not be the same person as the mediator.

(d) The arbitration shall be held in Sydney or in such other place as the parties may agree in accordance with and subject to the laws of the State of New South Wales.

(e) The decision of the arbitrator shall be final and binding upon the parties."

Clause 16.2 of the building contract provided --

"16.2 (i) If a dispute arises out of or relates to this agreement or the breach, termination, validity or subject matter hereof, the parties agree to first endeavour to settle the dispute by mediation administered by the Australian Commercial Disputes Centre, (ACDC).

(ii) In the event that the dispute has not been settled within 28 Days (or such other period as agreed to in writing between the parties hereto) after the appointment of the mediator the dispute shall be submitted to arbitration administered by and in accordance with the Arbitration Rules of the ACDC.

(iii) The arbitrator shall be a person agreed between the parties. ACDC will assist the parties by providing a list of suggested arbitrators. Failing agreement, the arbitrator shall be a person appointed by ACDC. The arbitrator shall not be the same person as the mediator.

(iv) The arbitration shall be held in Sydney or such other place as the parties may agree in accordance with and subject to the laws of the State of New South Wales.

(v) The decision of the arbitrator shall be final and binding upon the parties."

Boral's application was expressly founded upon the clauses so far as they provided for mediation, not upon the clauses so far as they provided for arbitration: possibly that will have some significance in the future. The parties were agreed that there was no material difference between the two clauses.

By a letter dated 16 February 1995 the solicitors for Boral advised the solicitors for Elizabeth Bay that they gave notice --

> "... on behalf of our client, to your client of a dispute between our clients which our client requires to be referred to mediation administered by the Australian Commercial Disputes Centre if not otherwise settled within 7 days of the date hereof.
>
> The nature of the dispute is as set out in the Summons filed on behalf of your client in proceedings number 55093 of 1994 in the Supreme Court of New South Wales, Common Law Division Construction List and in the Defendant's Statement of Issues forwarded to you under cover of a letter from us today which will be filed in Court on 17 February 1995.
>
> Please also note that our client requires the dispute under the agreement referred to as 'Housing Agreement' in the said Summons to be dealt with in the same mediation pursuant to clause 16.2(i) of the said Housing Agreement."

(1995) 36 NSWLR 709 at 712

The Australian Commercial Disputes Centre (ACDC) had operated continuously since 1986 providing independent dispute resolution procedures to parties in dispute who had referred their dispute to it. At all times it had a set of guidelines for, inter alia, mediation of commercial disputes, which guidelines were reviewed and amended from time to time. The introduction to the guidelines in force as at September 1993 suggested as a typical mediation clause a clause by which in the event of dispute "the parties agree to endeavour to settle the dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC) before having recourse to litigation". It seems that cl 19 and cl 16 had their origin in ACDC's suggestion, but there was no evidence that the parties or either of them had in mind ACDC's guidelines or were even aware of the guidelines at the time. Nonetheless Boral contended, and Elizabeth Bay expressly conceded, that ACDC's guidelines were incorporated by reference into the mediation clauses: I will come back to that concession.

The guidelines extended over four pages, and additional to the guidelines was ACDC's form of mediation agreement extending over seven pages. The mediation agreement was not expressly identified in the guidelines, but par 6 of

the guidelines read --

> "Prior to the mediation, the parties shall sign a mediation appointment agreement which sets out the terms of the mediation. The terms of the appointment agreement are consistent with these guidelines. The appointment agreement is also signed by the mediator."

The guidelines began with the rather curious paragraph, curious because it is not easy to see how it could have effect of itself:

> "Upon agreement to mediate through ACDC, the parties are deemed to have incorporated these guidelines, as amended from time to time, as part of their agreement."

They then provided (par 2) that any party to a dispute might initiate mediation by notifying ACDC, and that where all parties had not already agreed to mediation, by contract or otherwise, ACDC would contact the other parties to the dispute and attempt to obtain an agreement to mediate. By par 3, upon agreement to mediate ACDC would send the parties career details of appropriately qualified mediators and the parties would select the mediator; in default of agreement upon a mediator, ACDC would appoint one. After references to the mediator's qualifications and neutrality and after the paragraph dealing with signing a mediation agreement, the guidelines stated (par 7) that the mediation should be fixed for a time, date and place agreeable to the parties and the mediator and should take place as soon as practicable

after ACDC received "necessary documentation and security payment from parties".

It was then provided (par 8) that unless otherwise agreed at least fourteen days prior to the mediation each party should provide ACDC with a brief statement "outlining important issues", which would be forwarded to the mediator and the other parties, and that the mediator and ACDC would decide whether copies of the documents upon which each party sought to rely should be forwarded to the mediator and each other party prior to the mediation. In par 9 it was stated that the mediator did not have authority to impose a settlement on the parties but would help them reach a satisfactory resolution of their dispute, and (inter alia) that the mediator could end the mediation when in the mediator's judgment further efforts at mediation would not contribute to a resolution. By par 10, if a party was an individual that individual had to attend the mediation and if the party was a company an authorised company

representative had to attend the mediation, with each party being entitled to bring its legal representative and other people with information or knowledge relevant to the resolution of the dispute. Paragraph 11 provided for confidentiality (including the signing of "confidentiality forms" before the mediation commenced), and then par 13 provided that the mediation should be terminated in the manner or on the events described.

At the conclusion of the guidelines were paragraphs referring to payment of a registration fee of a stated amount upon referral of a dispute to ACDC for mediation, payment of an administration fee of a stated amount per hour, and payment of mediator's fees varying from a stated lower figure to a stated higher figure per hour, and to payment of a security deposit in an amount determined by ACDC "with reference to the mediator's fees, estimated length of the mediation and estimated administration time".

The mediation agreement, which provided for signature by the mediator as well as the parties, included in its first recital that the parties "wish to resolve a dispute between them by way of mediation" and in the second recital that the parties "have requested the mediatior, and the mediator has agreed, on the terms and conditions of this agreement to meet with the parties or their representatives to assist them to resolve the dispute". In a number of clauses it provided for the appointment of the mediator and the mediator's acceptance of the appointment "to meet with the parties or their representatives to assist them to explore options for and, if possible, achieve the expeditious resolution of the dispute by agreement between them", for the presence or representation of the parties before the mediator, and for confidentiality and the without prejudice status of communications within the mediation. It recorded that any settlement achieved would be final and binding. Other provisions in the mediation agreement included:

(a) that the parties agreed to share equally all costs relating to assistance provided by ACDC including room hire (unstated), an administration fee (a stated amount), and the mediator's fee (an amount to be inserted in the agreement);

(b) that upon execution of the mediation agreement the parties thereto would return it or a copy to ACDC with their half share or other such proportion as agreed between them of the security payment, being the amount of money equal to ACDC's estimate of the mediator's and ACDC's fees for the conclusion of the mediation;

(c) that each party would bear its own costs of the mediation and that the parties were jointly and severally liable for all costs relating to the mediation; and

(d) that the parties released ACDC, its employees servants and agents, and the mediator and any third party or stranger, from any liability of any kind whatsoever and indemnified them from and against any claim for negligence which may arise in connection with or resulting from the mediator's appointment or any act or omission pursuant to the agreement.

The mediation agreement did not lay down a procedure for the mediation other than as to the presence or representation of the parties, a statement that the mediator would be free at the mediator's unfettered discretion to communicate and discuss the dispute privately with any of the parties or other persons brought within the mediation by them, and a stipulation that unless otherwise agreed the parties would within fourteen days of the agreement provide to each other and to the mediator a short statement of issues outlining the nature of the dispute and the various matters in issue. There was, however, an express agreement (cl 11) that: "Each party confirms that it enters into this mediation with a commitment to attempt in good faith to negotiate towards achieving a settlement of the dispute."

Despite the first paragraph of the guidelines, there was not complete consistency between the guidelines and the mediation agreement: for example, the guidelines called for attendance by the individual or an authorised company representative but the mediation agreement permitted attendance by a representative, the statements of issues required differed, the mediation agreement did not call for the signing of "confidentiality forms", and the events of termination of the mediation differed. More generally, there were differences in scope and terminology, and the relationship between the guidelines and the form of mediation agreement was far from clear.

As I have said, Elizabeth Bay expressly conceded that ACDC's guidelines were incorporated by reference into the mediation clauses. Because of the conclusion to which I have come in any event, I am prepared to act on that concession, but I am by no means certain that the concession was correctly made. The mediation clauses referred only to "mediation administered by" ACDC, and did not confine that administration to administration in accordance with the guidelines. In contrast with what they said about arbitration ("arbitration administered by and in accordance with the Arbitration Rules of the ACDC"), the guidelines were not mentioned in the clauses, and I repeat that there was no evidence that the parties or either of them had in mind the

guidelines or were even aware of the guidelines in September 1993; nor was there evidence that the guidelines were of such common knowledge that it could be taken that both Elizabeth Bay and Boral were aware of them or subjected themselves to them notwithstanding that they were not aware of them. The guidelines themselves cannot improve this position by their statement that the parties are deemed to have incorporated the guidelines upon agreement to mediate through ACDC. The concession makes it unnecessary to express a final view, and also makes it unnecessary to express any view upon whether a mediation clause having no greater content than an agreement to settle the dispute by mediation administered by a named person or body would require of the parties participation in a process of mediation of sufficient certainty for legal recognition of their agreement. It may be that a conclusion

favourable to incorporation or sufficient certainty would not be warranted, and that ACDC should give further consideration to its suggested mediation clause.

Although the construction management contract and the building contract had come to an end, one way or another, in the middle of 1994, it was common ground that the provisions for mediation survived in the same manner as the provisions for arbitration: see *Hayman v Darwins Ltd* [1942] AC 356, *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, and more generally as to severability *Ferris v Plaister* (1994) 34 NSWLR 474. Elizabeth Bay acknowledged that there was power in the Court to enforce indirectly an agreement to mediate in the manner considered in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*, and that it bore the practical burden of persuading the Court that it should not be held to an apparent agreement to endeavour to settle its dispute with Boral by mediation. Both parties took as their starting point that an agreement to mediate might be indirectly enforced in the manner discussed in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* if it required of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement, and addressed whether in the present case there was sufficient certainty and, if there was, whether the Court's discretion should be exercised in favour of or against an adjournment or stay. No submissions were made that what was said in that case was incorrect, nor do I see any reason to depart from what was there said.

In the present case, even on the assumption that the guidelines were incorporated by reference into the mediation clauses it seems to me that there are compelling reasons to decline to adjourn or stay the proceedings.

At first sight the guidelines did not take up ACDC's form of mediation agreement, since although par 6 of the guidelines spoke of terms which "are"

consistent with the guidelines it did not otherwise identify that form and the form was not wholly consistent with the guidelines. In par 6 and elsewhere the guidelines contemplated some kind of agreement, but its terms were left to be settled. If this be so, then by the incorporation of the guidelines the parties had agreed (inter alia) to sign mediation agreements the terms of which were not settled beyond the necessity that they be consistent with the guidelines. The agreements to mediate were open-ended, indeed unworkable because the process to which the parties had committed themselves would come to an early stop when, prior to the mediation, it was asked what the parties had to sign and the question could not be answered.

No doubt it would be possible to prepare an agreement consistent with the guidelines, but there would be an infinite combination of provisions which would not be inconsistent with the guidelines, and for this reason alone the agreement of the parties fell down for lack of certainty in the process which they should follow in their mediation. The deficiency was not overcome by regard to other provisions in the guidelines, because the guidelines themselves called for signature of a mediation agreement as to what was clearly an important step in the process. Whether the guidelines otherwise stipulated with sufficient certainty the conduct required of the parties for the process of mediation itself was perhaps open to question, but it is not necessary to express a view upon that.

If, on the other hand, the guidelines did take up ACDC's form of mediation agreement, so that by the (assumed) incorporation of the guidelines the parties agreed to sign a mediation agreement in that form, the parties went some way

towards sufficient certainty of conduct in the process of mediation (although perhaps they would be surprised to learn of the commitments to costs and fees which they had accepted, a commitment to fees in an amount which could only be made certain on the reasoning found in *Lewandowski v Mead Carney-BCA Pty Ltd* [1973] 2 NSWLR 640 and *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130). But by cl 11 the parties also confirmed that they "enter[ed] into this mediation with a commitment to attempt in good faith to negotiate towards achieving a settlement of the dispute". What did this mean?

On one view it was merely declaratory, a statement of the parties' states of mind. It is difficult to regard the parties as having undertaken in 1993 to declare at a future time that they had (at the future time) a commitment to good faith negotiations: first, other than being a laudable emotion the declaration itself would not advance the process of mediation, and secondly by the future time one or other of the parties may well not have had that commitment. It is more

likely that, as one of a number of paragraphs expressing rights and obligations in a formal legal agreement, cl 11 was intended to impose an obligation to attempt to negotiate in good faith. The obscurity in cl 11 is to be regretted, since it brought to the mediation agreement either a legally peripheral declaration likely to be disproved at the very time cl 11 was invoked or a purported obligation the recognition of which involved formidable legal difficulty: the cumulative uncertainty of "commitment", "attempt", "negotiate" and "in good faith" is forbidding.

I do not think it matters which view is taken of cl 11. It is not easy to take a course requiring a party to assert a state of mind which it may well not have, and even less easy to take a course which compels a party to commit itself to the vagueness of attempting in good faith to negotiate with the other party to the dispute. The latter difficulty lies not so much in the ascertainment of the presence or absence of good faith, or even in the uncertainty of attempting, but rather in the necessary tension between negotiation, in which a party is free to, and may be expected to, have regard to self-interest rather than the interests of the other party, and the maintenance of good faith: see *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (at 209); *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 26-27; *Walford v Miles* [1992] 2 AC 128 at 138. The difficulty is greater than that under the rules for the court-ordered mediation in a Texas case cited by Boral, *Decker v Lindsay* 824 SW 2d 247 (1992): see generally, Rogers & McEwen, *Mediation: Law, Policy, Practice* (1989) at 49-52.

In my opinion, to adjourn or stay the proceedings so that Elizabeth Bay would be required either to sign an unknown agreement as an important step in the process of mediation, or to commit itself to attempting in good faith to negotiate towards achieving a settlement of the dispute, would require of Elizabeth Bay conduct of unacceptable uncertainty. In the alternative presently under consideration, the mediation clauses would go beyond requiring of the parties participation in the process of mediation by conduct of sufficient certainty for legal recognition of the agreement. Mediation is a valuable means of resolution of disputes, and agreements to mediate should be recognised and given effect in appropriate cases. Even assuming the incorporation of ACDC's guidelines, however, the contracts in this case do not in my opinion meet the requirements considered in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*, and in this respect also it may be appropriate for ACDC to give further consideration to what appears to be its standard documentation.

I should add that, apart from the matters thus far considered, Elizabeth Bay

opposed an exercise of discretion in favour of an adjournment or stay of the proceedings for other reasons, the principal of which were that it considered that mediation would be futile (which it supported by reference inter alia to antagonistic conduct on the part of persons who might be involved in the mediation on behalf of Boral) and that Boral had ceased its involvement in the project without justification and in a high-handed manner. I do not think the first of these matters would be of significant weight, for reasons indicated in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (at 206), and I have difficulty in seeing the independent relevance of the latter. However, both matters would provide additional grounds for the conclusion to which I have otherwise come, rather than stand opposed to it, and it is unnecessary to consider further Elizabeth Bay's other reasons.

I order:

1. that the defendant's notice of motion be dismissed with costs;

2. that the proceedings be adjourned for further directions to 9.30 am on Friday, 31 March 1995.

Notice of motion dismissed

Solicitors for the plaintiff: *Horowitz & Bilinsky*.

Solicitors for the defendant: *Verekers*.

R J DESIATNIK,
Barrister.