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HOOPER BAILIE ASSOCIATED LTD V NATCON GROUP PTY LTD

Common Law Division, Construction List: Giles J
13 March, 13 April 1992

Contracts -- Building and engineering contracts -- Settlement of disputes -- Arbitration agreement -- Conciliation a pre-condition -- Whether agreement to conciliate enforceable -- Requirement of certainty -- Indirect enforcement -- By stay or adjournment of arbitration -- Under court's inherent or statutory jurisdiction -- Commercial Arbitration Act 1984, s 47.

Arbitration -- Stay or adjournment of proceedings -- For indirect enforcement of conciliation agreement -- Under court's inherent or statutory jurisdiction -- Commercial Arbitration Act 1984, s 47.

Held: (1) An agreement to conciliate or mediate is enforceable in principle, if the conduct required of the parties for participation in the process is sufficiently certain. (209D-E)

Paul Smith Ltd v H & S International Holding Inc [1991] 2 Lloyd's Rep 127, not followed.

Walford v Miles [1992] 2 WLR 174; [1992] 1 All ER 453, distinguished.

(2) In practical terms, the court may indirectly enforce an agreement to conciliate or mediate as a pre-condition to arbitration by the stay or adjournment of the arbitration proceedings. The court's power to make such orders derives both from its inherent jurisdiction to prevent abuse of its process and from its statutory jurisdiction to make interlocutory orders in relation to arbitration proceedings under the *Commercial Arbitration Act* 1984, s 47. (210E-211E)

Racecourse Betting Control Board v Secretary for Air [1944] Ch 114 and

Proprietors of Strata Plan 3711 v Travmina Pty Ltd (1989) 4 BCL 91, considered.

Note:

A Digest -- CONTRACTS (3rd ed) [256]; BUILDING AND ENGINEERING CONTRACTS (2nd ed) [3]; ARBITRATION (3rd ed) [7], [11], [21]; (2nd ed) [28]

CASES CITED

The following cases are cited in the judgments:
AWA Ltd v Daniels (Rogers CJ Comm D, 24 February 1992, unreported).
Allco Steel (Queensland) Pty Ltd v Torres Strait Gold Pty Ltd (Supreme Court of Queensland, Master Horton, 12 March 1990, unreported).
Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA [1985] 1 WLR 925, [1985] 2 All ER 796.
André et Cie SA v Marine Transocean Ltd [1981] QB 694.
Aztec Mining Co Ltd v Leighton Contractors Pty Ltd (1990) 1 ADRJ 104.
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.

Adelaide Steamship Industries Pty Ltd v Commonwealth (1974) 10 SASR 203; affirming 8 SASR 425.
Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd [1975] 1 WLR 297; [1975] 1 All ER 716.
Dillingham Canada International Ltd v Mana Construction (1985) 69 BCLR 133.
Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The "Golden Bear") [1987] 1 Lloyd's Rep 330.
Fehmarn (Cargo Lately on Board) (Owners) v Fehmarn (Owners), The Fehmarn [1958] 1 WLR 159; [1958] 1 All ER 333.
Gebr Van Weelde Scheepvaartkantor BV v Compania Naviera Sea Orient SA (The "Agrabele") [1987] 2 Lloyd's Rep.
Haertl Wolff Parker Inc v Howard S Wright Construction Co (Oregon District Court, 4 December 1989, unreported).
Hanessian v Lloyd Triestino Societa Anonima di Navigazione (1951) 68 WN (NSW) 98.
Hayman v Darwins, Ltd [1942] AC 356.
Hopkins v Difrax Societe Anonyme (1966) 84 WN (Pt 1) (NSW) 297; [1966] 1 NSWR 797.
Imperial Leatherwear Co Pty Ltd v Marci & Marcellino Pty Ltd (1991) 22 NSWLR 653.

Japan Line Ltd v Himoff Maritime Enterprises Ltd (The "Kehrea") [1983] 1 Lloyd's Rep 29.
Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1983] 1 AC 854.
Paul Smith Ltd v H & S International Holding Inc [1991] 2 Lloyd's Rep 127.
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17.
Proprietors of Strata Plan 3771 v Travmina Pty Ltd (1989) 4 BCL 91.
Racecourse Betting Control Board v Secretary for Air [1944] Ch 114.
Reed Constructions Pty Ltd v Federal Airports Corporation (Brownie J, 23 December 1988, unreported).
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234.
Roussel-Uclaf v G D Searle & Co [1978] 1 Lloyd's Rep 225.
Scott v Avery (1856) 5 HL Cas 811; 10 ER 1121.
Stevens v Trewin [1968] Qd R 411.
Tankrederei Ahrenkeil GmbH v Frahuil SA (The "Multitank Holsatia") [1988] 2 Lloyd's Rep 486.
Walford v Miles [1992] 2 WLR 174; [1992] 1 All ER 453.
Wilson v Compagnie des Messageries Maritimes (1954) 54 SR (NSW) 258; 71 WN (NSW) 207.
Wood Factory Pty Ltd v Kiritos Pty Ltd (1985) 2 NSWLR 105.

No additional cases were cited in argument.

SUMMONS

In this summons the plaintiff sought to prevent the defendant from continuing with arbitration proceedings claiming, inter alia, that it had been agreed between them that arbitration would not continue until a process of conciliation had concluded.

I D Faulkner, for the plaintiff.

R Perry, for the defendant.

(1992) 28 NSWLR 194 at 196

Cur adv vult

13 April 1992

GILES J. Under its then name Cemac Associated Ltd, the plaintiff was the contractor for the construction of dry wall partitions and ceilings for the new Parliament House building in Canberra. By a sub-contract in the form SCNPWC Ed 3 (1981) dated 17 July 1986 the plaintiff sub-contracted that work to the first defendant, then known as Northern Contractors Pty Ltd. I will refer to these parties as Hooper Bailie and Natcon respectively.

Disputes having arisen in relation to the work, in July 1987, Natcon gave notice of dispute pursuant to cl 44 of the sub-contract. In accordance with that clause the disputes were then submitted to arbitration, and an arbitrator was appointed on 22 March 1988. In circumstances of no present significance that arbitrator was restrained from proceeding with the arbitration and, on 23 January 1989, the second defendant was appointed as arbitrator in his place. The second defendant did not participate in the proceedings before me and submitted to any order save as to costs.

At a preliminary conference before the arbitrator held on 10 February 1989 directions were given for interlocutory steps leading to a hearing to commence on 17 July 1989. By its points of claim delivered pursuant to the directions Natcon claimed from Hooper Bailie $3,027,255.31 and interest, in part as money due under the sub-contract and in part as damages. By its points of defence Hooper Bailie denied liability for that sum and contended that it had overpaid Natcon to the extent of $239,105.20. Before me there was reference to a cross-claim, but the points of cross-claim were not in evidence and I do not know whether the cross-claim was confined to recovery of the last-mentioned sum or whether it included other claims against Natcon.

The issues as revealed by the pleadings in evidence involved which of a multitude of alleged variations were in truth variations under the sub-contract, the valuation of any such variations, the validity of various determinations with respect to progress claims, Natcon's entitlement to extensions of time and to costs for the extended time, and whether Natcon had validly terminated the contract pursuant to its terms or by reason of repudiation by Hooper Bailie (on the one hand) or Hooper Bailie had validly terminated the sub-contract pursuant to its terms (on the other hand). It is clear that the sub-contract came to an end in July 1987 save as to the provision for arbitration (*Heyman v Darwins, Ltd* [1942] AC 356; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337), and the arbitration was concerned with the legal responsibility for that position and with the consequences as between the parties of performance to that time.

In the circumstances, which I will relate, the arbitration has not yet come to a hearing. In these proceedings Hooper Bailie sought to establish that Natcon was now unable to continue with the arbitration. It is unnecessary to set out the declarations and orders claimed in the summons, from which there was some departure in the course of submissions. Hooper Bailie's arguments followed two paths, the "conciliation agreement" path and the "repudiation/abandonment" path. I will return to the arguments in more detail after recounting the material facts. The essence of the first argument was that the parties had agreed that the arbitration would not continue until

(1992) 28 NSWLR 194 at 197

a process of conciliation had concluded and that the process had not concluded. The essence of the second argument was that the agreement to arbitrate had come to an end by reason of repudiation by Natcon accepted by Hooper Bailie, or alternatively by mutual abandonment.

There was default in the interlocutory steps directed by the arbitrator. Hooper Bailie's points of defence and counter-claim were delivered late, and Natcon's reply and defence to counter-claim were even later. Neither party delivered affidavits by the dates directed. The illness of a Natcon witness intervened. Over the opposition of Hooper Bailie the arbitrator adjourned the hearing until 11 September 1989 and he gave directions by which Natcon's affidavits were to be delivered by 7 August 1989. That date was not met and, on 4 September 1989, the arbitrator acceded to Natcon's application to adduce oral evidence. He also directed that the parties "convene at a conference under s 27 of the Commercial Arbitration Act", and the parties conferred accordingly but without immediate result. Ultimately, and over the opposition of Hooper Bailie, on 12 September 1989, the arbitrator again adjourned the hearing to 12 March 1990: in a ruling which he made on 7 September 1990 in relation to costs occasioned by the adjournments he said that he was of the view that Natcon had not been in a position to proceed.

Although not officers of the respective companies, Mr Rickard was involved in the arbitration on behalf of Hooper Bailie and Mr Leck was involved in the arbitration on behalf of Natcon. In December 1989, Mr Rickard raised with Mr Douglas Burgess of Natcon that the parties should consider conciliation of some of the issues between them. On 6 February 1990, Mr Rickard wrote to Mr Douglas Burgess suggesting Mr John Burgess as "proposed conciliator"; Mr Leck responded on behalf of Natcon that Mr Schick was its preferred choice as he was located in Canberra and knew the site. The proposal was then taken up between the solicitors for the parties.

By letter dated 16 February 1990 the solicitors for Hooper Bailie wrote to the solicitors for Natcon in the terms:

"As you are aware, discussions have been taking place between our clients regarding the prospect of conciliating some issues prior to the commencement of the arbitration with a view to narrowing the areas of dispute and consequently shortening the arbitration time.

Our client suggests that the conciliator deal with the following issues, in the following order:

1. Measurement of Contract Works.
2. Entitlement to oncosts on variations.
3. The items with a difference in quantum (as assessed by the parties) of $10,000.00 or more (of which there are approximately twenty-nine).
4. In descending order the items where the disputed amount is less than $10,000.00, commencing with quantum only claims and ending with those in which questions of principle are involved.

Our client suggests the parties agree to be bound by the conciliator's determination of items 1 and 2 and 4 insofar as quantum only is in issue.

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The conciliator's view on oncosts will be directive only and not binding on the parties. ...

For the conciliation to have any hope of success, its parameters and functions must be clarified beforehand. Our clients are prepared to agree to the following:

1. The conciliation to be held before Eric Schick in Canberra.
2. The conciliator to conciliate on progress claim 25, then progress claim 27.

3. No lawyers are to be present at the conciliation.

4. No rules of evidence will apply.

5. No transcript will be taken.

6. Evidence will be given orally with the witnesses available to be questioned by the other side.

7. Both parties to submit to the conciliator prior to the commencement of the conciliation a written summary of their case.

8. Each party to be represented by two spokesmen.

9. No more than two qualified experts to give evidence for either party on any particular point.

> 10. The conciliator should make rulings and determinations of each issue as it arises so that some of the disputes can at least be resolved if insufficient time is available to deal with all the matters outlined above.
>
> Finally, may we suggest a meeting between the parties early next week to finalise the terms of the conciliation.
>
> Should the conciliation progress according to schedule, we anticipate the arbitration hearing can be shortened to three weeks to determine the balance of the issues in dispute. If you are in agreement with this assessment, we suggest Mr Morris be apprised of this so that the appropriate amendments to the timetable can be made. In this regard, we would suggest the three week period should be the last three weeks of the period currently allocated that is the three weeks commencing Monday, 2 April, 1990. This will allow a period of time following the conclusion of the conciliation (which we anticipate will commence towards the end of February and last for approximately two weeks) for the parties to reassess their positions and canvass the possibility of resolution of the matter without resort to arbitration."

Mr Leck contacted Mr Schick, who wrote on 19 February 1990 confirming his agreement "to act as Conciliator in relation to disputes resulting from [the sub-contract] ...". On the same day the solicitors for Natcon wrote to the solicitors for Hooper Bailie, saying that Natcon was making arrangements to meet with Hooper Bailie "to discuss and settle the terms of reference for the proposed conciliation" and agreeing that the first three weeks of the arbitration should be cancelled "for the parties to re-assess their positions and canvass the possibility of resolution".

By another letter dated 19 February 1990 the solicitors for Natcon said that they had a number of complaints with respect to the Scott Schedule which they intended to bring before the arbitrator and that they would "reserve our client's rights until after the conciliation"; they also said that Natcon "does not intend to make any decisions with respect to Statements until the conclusion of the conciliation". The solicitors for Hooper Bailie

responded that this was unacceptable. By their letter dated 21 February 1990 they said that the conciliation "may well not resolve the matter, in which case the arbitration should proceed", and they proposed a timetable for continued preparation for the arbitration. However, the arbitrator was requested to cancel the first three weeks of the hearing.

By letter dated 21 February 1990 Hooper Bailie sent to Mr Schick a copy of the letter of 16 February 1990, describing it as a letter setting out its "proposal in regard to the issues to be covered, the status of your

determinations and the parameters of the conciliation". By letter dated 23 February 1990 to Mr Schick, Natcon simply confirmed acceptance of his appointment. Meetings before Mr Schick began on 26 February 1990. The "terms of reference" were confirmed before him on that day. According to Mr Schick, whose evidence was uncontested, he took the role of facilitating the voluntary agreement of the parties and did not make any determinations in relation to disputed items -- when differences arose he suggested a solution which was invariably accepted. Sections of the work were looked at progressively and were "signed off" as agreement on quantum was reached.

Debate over continued preparation for the arbitration resulted in a conference before the arbitrator on 2 March 1990. The arbitrator gave certain directions, and his minutes of the conference begin:

> "The parties notified the arbitrator that they were to be involved in conciliation proceedings during the weeks beginning 12 and 19 March, 1990, in an effort to limit the issues between them, thereby reducing the time requirements of the arbitration hearing.
>
> In general the issues to be considered at conciliation were:
>
> 1. Valuation/measurement of contract works.
>
> 2. On costs of variations.
>
> 3. Variations exceeding $10,000.00.
>
> 4. Variations less than $10,000.00.
>
> The parties are to be bound by any decision reached during conciliation relative to items 1, 2 and 4, but are not bound by anything emanating from the conciliation proceedings relative to Item 3."

Mr Topfer of the solicitors for Natcon said that his file note of the conference "did not add anything" to these minutes.

On 12 March 1990, the solicitors for Natcon wrote to the solicitors for Hooper Bailie:

> "We understand that the parties have finished conciliating the contract works item and that Mr Burgess of our client and Messrs Smith and Rickard representing your client have agreed that:
>
> 1. The conciliation should continue for as long as it takes to complete the four areas previously discussed. We are instructed that the parties are to reconvene on Tuesday 13 March 1990 to continue.

2. The remaining hearing dates will be cancelled. We have couriered a letter to Mr Morris (copy enclosed) and request that you confirm this arrangement with him. ...

Once the conciliation is concluded we suggest that the matter be relisted for further mention to fix new hearing dates and resolve any further procedural difficulties."

The letter to the arbitrator was in the terms:

(1992) 28 NSWLR 194 at 200

"We are instructed that by Thursday 8 March 1990 the parties had only substantially finished the first of the four categories of matters the subject of the conciliation. Accordingly, they have decided to continue with the conciliation for as long as it takes to conclude all four categories. Obviously this will take some time, so the parties have also agreed to ask you to cancel the remaining three weeks hearing time.

We have asked the respondent's solicitors to confirm this with you."

By letter dated 15 March 1990 the solicitors for Hooper Bailie wrote to the solicitors for Natcon:

"As we informed you subsequently, no agreement had been reached between the clients. Certainly, conversations have taken place between them concerning the future conduct of this action. Again, we repeat, no agreement was reached. Accordingly, your letter to Mr Morris should not have been sent. We have advised him of that fact.

Nevertheless, it would seem to the writer that the parties are not far apart in reaching some agreement as to the future conduct of this dispute. We agree with your comments that at least some progress is being made between the parties with the present conciliation. Certainly, the progress is being made at a minimum cost in that no legal representation is involved. It would seem that both parties are content with the way Mr Schick is conducting conciliation and one would expect that he will commence shortly to hand down rulings on various parts of the matters he is conciliating. We agree that the conciliation should proceed until all matters the subject of conciliation have been resolved."

The letter continued by suggesting that Mr Schick should be asked to take on the role of arbitrator at the conclusion of the conciliation. That was discussed between Mr Rickard and Mr Leck, and they had approached Mr Schick, but Mr Schick had said that he would consider doing so once the

conciliation was at an end. It was further discussed between the solicitors and there was a degree of dispute over whether it was agreed that Mr Schick should become the arbitrator at the conclusion of the conciliation. I do not think there was any firm agreement and certainly Mr Schick did not accept such an appointment.

The remaining hearing time before the arbitrator was cancelled. Meetings before Mr Schick continued until June 1990. By letter dated 18 April 1990, with copy to the solicitors for Natcon, the solicitors for Hooper Bailie wrote to the arbitrator:

> "We refer to the arbitration proceedings in the above matter.
>
> As you will recall, the arbitration was adjourned indefinitely while the parties attempted to resolve the dispute by way of conciliation.
>
> We understand the conciliation is proceeding, albeit slowly, and may well result in a finalisation of the matter, in which case the arbitration proceedings will be abandoned altogether."

They then raised with the arbitrator that he should give his ruling on the costs of the adjournments. In due course and after receiving further submissions, the arbitrator made the ruling of 7 September 1990.

On 22 June 1990, it was agreed that the parties would exchange information concerning the outstanding items the subject of conciliation. In August 1990, Mr Leck asked that the conciliation resume. On behalf of

Hooper Bailie, it was said that there should first be responsive information from Natcon concerning certain of the items still outstanding. On 14 August 1990, before any further meetings were held, a provisional liquidator was appointed to Natcon. On 17 August 1990, a receiver was appointed. On 13 September 1990, an order was made that Natcon be wound up.

Within a few days after the appointment of a provisional liquidator, Mr Rickard telephoned the liquidator's office and told someone there that Hooper Bailie "had an arbitration on foot and a significant cross-claim". The person to whom he spoke said that a statement of affairs would be sent to Hooper Bailie, but no such document was received. Mr Rickard attempted to contact Mr Douglas Burgess and Mr Leck but was unable to do so. He also spoke to Mr Schick, and his recollection was that he was told by Mr Schick that the liquidator was "reviewing the matter" with Mr Leck and, later, that Mr Leck had said the liquidator "is not going to go on with the

matter". Mr Leck denied having said this to Mr Schick; Mr Schick said that after the appointment of the receiver he passed on to Mr Rickard Mr Leck's advice that he had been "instructed to continue work on the conciliation", and the understanding asserted by Mr Rickard that what he was told led him to believe that "all proceedings were at an end" is not consistent with the letter of 24 October 1990 to which I next refer. I think that Mr Rickard's recollection is at fault, that at this stage what the liquidator would do was unknown, and that Mr Rickard was not told that the liquidator would not be proceeding.

By letter dated 24 October 1990 the solicitor for Hooper Bailie wrote to the liquidator:

> "We confirm we act on behalf of Hooper Bailie Associated Limited in relation to arbitration proceedings No 29669.
>
> These proceedings have been adjourned indefinitely. We understand you are currently reviewing this matter and will shortly decided [sic] whether or not to resurrect these proceedings.
>
> Please notify our Ms Ruby Nittel once a decision is made.
>
> We note you confirm you are aware of the costs order made against your client by Mr Morris on 7 September 1990 and our client's claim on your client in this regard has been noted."

There was no immediate response to this letter -- indeed, there was no formal response until almost exactly a year later by the letter dated 25 October 1991 to which I will shortly come. It was part of Hooper Bailie's case that there was total silence from Natcon over this period -- indeed, that such advice as to the liquidator's intentions as was received was to the effect that the liquidator was not going to do anything. As with the communications immediately after the appointment of the provisional liquidator, there was a degree of conflict of fact.

The liquidator engaged new solicitors. Miss Barber assisted Miss Bradford-Morgan within those solicitors. On 7 November 1990, she telephoned Miss Nittel to ask whether Hooper Bailie was registered in Queensland (where the liquidator's offices were located). Miss Nittel answered her inquiry. The evidence did not flesh this out, but Miss Nittel did not suggest that the arbitration had been abandoned.

Miss Bradford-Morgan said that she was telephoned by Miss Nittel on

7 June 1991. Miss Nittel asked whether she had instructions from the liquidator to resume arbitration hearings. She replied that Natcon intended to proceed with the arbitration. Miss Nittel said that Hooper Bailie wished to "reassess the status of those proceedings", referred to a difficulty with witnesses, and said that Hooper Bailie would prefer to resume the conciliation rather than continue with the arbitration. Miss Bradford-Morgan said she would obtain instructions and was instructed that the liquidator "did not intend to resume conciliation as it had been abandoned by the plaintiff". There was no evidence that she then told Miss Nittel of these instructions.

Miss Nittel did not recall these communications, but I see no reason not to accept what was said by Miss Bradford-Morgan and Miss Barber. Her knowledge is knowledge of Hooper Bailie. The letter of 24 October 1990 contemplated that the liquidator might take up the arbitration, the telephone call of 7 November 1990 was at least an indication of the liquidator's continuing interest in the claims between Natcon and Hooper Bailie, and in the telephone conversation of 7 June 1991 it was said that he intended to take up the arbitration. Although Mr Palazzo of Hooper Bailie said that by February 1991 he had formed and thereafter maintained the view that Natcon "had abandoned all arbitration and conciliation proceedings", Miss Nittel must have contemplated that the arbitration would continue -- that is why she telephoned on 7 June 1991. She contemplated that the conciliation might continue -- she said Hooper Bailie would prefer that course. She was told that the liquidator intended to proceed with the arbitration. Whatever may have been Mr Palazzo's state of mind, he was not justified in coming to the view that he asserted and Hooper Bailie's knowledge established by Miss Nittel's activities on its behalf was to the contrary.

By letter dated 25 October 1991 the new solicitors for Natcon wrote to the solicitors for Hooper Bailie stating that they had "been instructed to proceed to arbitration with respect to the adjourned arbitration proceedings No 29669 on behalf of the abovementioned applicant [sic]". They suggested a hearing in early January 1992 and nominated two persons -- not the arbitrator -- in the alternative as arbitrator. There was no direct evidence explaining the passage of time from October 1990 but it appears that it was necessary that the liquidator obtain an indemnity from the Australian Taxation Office before he would take up Natcon's claim and that there was extensive correspondence on that subject.

(a) Conciliation agreement:

Hooper Bailie submitted that there came into existence a legally binding agreement -- either as a variation of the arbitration agreement or standing independently or pursuant to an estoppel -- that the matters identified in the letter of 16 February 1990 would be conciliated before Mr Schick and the arbitration would not resume until the conciliation had concluded. It was an implied term of that agreement, it said, that the parties "would take all reasonable steps to endeavour to resolve the conciliation issues under the chairmanship of Mr Eric Schick, by discussion, consideration and agreement", and it said that the court should order that it do so prior to the arbitration and should stay the arbitration for so long as Natcon refused to participate in the conciliation.

It is necessary to identify the jurisdiction or power on which Hooper Bailie relied for the ultimate relief it claimed. Although the orders claimed in the summons included an order that Natcon "be restrained from continuing the arbitration proceedings", at the hearing, Hooper Bailie expressly disclaimed that it was seeking the exercise of equity's jurisdiction to enforce an agreement to conciliate. It submitted that the power to make the orders lay in s 47 of the *Commercial Arbitration Ordinance* 1986 (ACT) (the Ordinance) (the law of which was agreed to be the proper law of the sub-contract), by which the court has the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the court. This Court, it said, could exercise that power by virtue of s 4(2) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) and s 9 of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987. Natcon did not say otherwise.

(1992) 28 NSWLR 194 at 203

The invocation of s 47 of the Ordinance thus throws up two questions. Does the power to make interlocutory orders extend to orders of the kind sought by Hooper Bailie? If it does, should the orders be made? Fundamental to the answers is the nature and effect of any agreement which may have been made in relation to conciliation.

In my view there was agreement (whether a legally binding agreement is another matter) that the parties would conciliate the issues identified in the letter of 16 February 1990 and, at least as from 15 March 1990, that the arbitration would not resume until the conciliation had concluded. It is clear that even if there were resolved by conciliation the issues identified in the letter of 16 February 1990 other issues would remain to be arbitrated, and that the arbitration remained on foot. But it is also clear that, despite the terms of the letters of 12 and 15 March 1990, the arbitration was not

deferred until the issues identified in the letter of 16 February 1990 were resolved by conciliation, since it was common ground that the conciliation might not be successful -- the terms of those letters did no more than reflect the then optimism that the conciliation would continue to be successful. That is, the conclusion of conciliation was not the same as resolution of the issues by conciliation.

In essence, Natcon said that the conciliation concluded when it declined to continue with conciliation. That was not necessarily in August/September 1990, because the receivership and liquidation adequately explained Natcon's immediate failure to join in a resumption of the conciliation. Indeed, Hooper Bailie was not calling for resumption, apparently being content to await the liquidator's decision whether or not to "resurrect" the arbitration. But Natcon has now declined to continue with the conciliation and Hooper Bailie's case was that it was not entitled to do so but was obliged to take "all reasonable steps to endeavour to resolve the conciliation issues" by the implied term to which I have referred.

The value of conciliation (or mediation -- sometimes the terms are used interchangeably, sometimes to connote distinct but cognate processes, see for example Street, "The Language of Alternative Dispute Resolution" (1992) 66 ALJ 194) for dispute resolution as an alternative to curial resolution is now increasingly recognised in Australia. Section 27 of the Ordinance, found in other of the uniform Commercial Arbitration legislation, authorises an arbitrator to act as mediator or conciliator if the parties so desire and some time ago the Institute of Arbitrators Australia

promulgated rules for the conduct of conciliations. In 1989 the Law Society of New South Wales published a model dispute resolution clause providing for negotiations to resolve a dispute. The former rules state that conciliation does not prejudice the right of a party "at any time" to submit the relevant dispute to arbitration or litigation, while the latter clause states that a party may not commence court proceedings or arbitration relating to "any dispute arising from this agreement" (presumably the dispute the subject of the clause) unless it has complied with the steps laid down, those steps including that duly authorised representatives shall "seek to resolve the dispute". In some jurisdictions the court has been empowered to refer pending proceedings to mediation, although only with the consent of the parties: Federal Court -- directly by the *Courts (Mediation and Arbitration) Act* 1991 (Cth); Supreme Court of Victoria -- through rules authorised by the *Courts (Amendment) Act* 1990 (Vic). These acts do not purport to regulate the mediation, or define any obligations of the parties therein, but they recognise

it as a process of dispute resolution.

With the discussion of conciliation and mediation as alternative means of dispute resolution has come debate over the enforceability of agreements to conciliate or mediate. Before me the parties said that there was no relevant authority. That is not so, but the cases do not speak clearly or with one voice.

In *Reed Constructions Pty Ltd v Federal Airports Corporation* (Brownie J, 23 December 1988, unreported), the contract provided that after notification of a dispute a notice should be given appointing a time and place "for a conciliation meeting to be held to discuss in detail the disputes or difference" and that if at the conclusion of the meeting the parties failed to resolve the dispute either party could refer it to arbitration. In the course of holding that the provision was an arbitration agreement within the meaning of the *Commercial Arbitration Act* 1984, Brownie J said that each step was mandatory and that the parties were "contractually bound to attempt to mediate [the] disputes, and if mediation fails, to arbitrate them". No question of enforcement of the conciliation meeting arose. His Honour must have thought that there could be a legally binding agreement to mediate but it does not seem the matter received any detailed consideration.

In *Aztec Mining Co Ltd v Leighton Contractors Pty Ltd* (1990) 1 ADRJ 104, Murray J refused an interlocutory injunction restraining Leighton from proceeding with the submission of a dispute to the determination of an expert in accordance with a dispute resolution clause in the contract. The clause provided for a notice specifying the nature of the dispute and calling for "the point or points at issue to be submitted for settlement by an expert". It then made detailed provision for nomination of the expert, the receipt of evidence and submissions and a determination by the expert which was "final and binding upon the parties except in the case of manifest error". Aztec contended that the clause suffered from vitiating uncertainty, but it was held that there was no serious question of uncertainty to be tried. Notwithstanding the significance given to this case in Jacobs, *Commercial Arbitration*, Law Book Co, par 26.175, as a case in which it was held that "the obligation to refer a dispute to an expert facilitator was binding", the clause did not provide for conciliation or mediation but for binding determination by a third party. The expert was not a "facilitator" in any presently relevant sense.

In *Allco Steel (Queensland) Pty Ltd v Torres Strait Gold Pty Ltd* (Supreme

Court of Queensland, Master Horton, 12 March 1990, unreported), Master Horton QC was concerned with a clause in similar terms to that in *Reed*

Constructions Pty Ltd v Federal Airports Corporation. A conciliation meeting had been held, followed by a further meeting. The master considered that Allco had made no bona fide attempt to conciliate and that the meetings "did not comply with 4.5.6 of the contract" (that is, the dispute resolution clause), but refused to stay Allco's prosecution of the proceedings. The reasoning is not entirely clear, but seems to have been that an "obligation to conciliate between themselves with the likelihood of no result" could not stand as a *Scott v Avery* [(1856) 5 HL Cas 811; 10 ER 1121] pre-condition to litigation. The master went on to say that even if that were not so he would refuse the relief in the exercise of his discretion "as it is abundantly clear that the parties have taken up positions which effectively rule out the possibility of compromise and conciliation".

It seems that the master distinguished between a *Scott v Avery* pre-condition by way of a binding decision of a third party (on the one hand) and by way of conciliation (on the other hand). He did not directly address whether there could be an enforceable obligation to conciliate, but clearly enough would not grant relief equivalent to specific performance where he thought it pointless to do so because the parties were at loggerheads. It should be added that in a note of this case in Angyal, "Enforceability of Alternative Dispute Resolution Clauses" (1991) 2 ADRJ 32 it is said that Ambrose J in the Supreme Court of Queensland had earlier stayed proceedings brought by Torres against Allco, apparently because there had been no conciliation meeting. His Honour's reasons are not available to me.

Shortly before the hearing before me Rogers CJ in Comm D gave his decision in *AWA Ltd v Daniels* (Rogers CJ in Comm D, 24 February 1992, unreported). His Honour directed the parties to undertake mediation with the assistance of a mediator to be agreed between them and noted their agreement to enter into the negotiation in good faith. Ultimately the power to give the direction was conceded -- even as a power to direct mediation over the objection of a party -- but his Honour was satisfied by regard to s 23 and s 76A of the *Supreme Court Act* 1970 and the inherent power of the court that he should act on the concession. The judgment contains a valuable discussion of considerations relevant to whether a direction to mediate can be or should be given, in the course of which his Honour recorded that all parties but one "wish to give mediation a chance" and the one party "did not say ... that ... mediation would necessarily be an exercise in futility".

It is apparent that the enforceability of an agreement to mediate was not directly in question. Nonetheless, it is clear enough that his Honour considered that such an agreement would be enforceable. That can be seen

from his observation that there is utility in requiring parties "who are clearly bent on being difficult" to submit to conciliation, his view that Master Horton QC should have required the parties in *Allco Steel (Queensland) Pty Ltd v Torres Strait Gold Pty Ltd* "to adhere to their freely agreed contractual obligations" and his citation with approval of a United States decision (*Haertl Wolff Parker Inc v Howard S Wright Construction Co* (Oregon District Court, 4 December 1989, unreported)) and academic writings (Katz, "Enforcing an ADR Clause -- Are Good Intentions All You Have" (1988) 26 Am Bus Law Jnl 575; Shirley, "Breach of an ADR Clause -- A Wrong

Without a Remedy?" (1991) 2 ADRJ 117 and Rogers and McEwen, *Mediation: Law, Policy, Practice* (1989) at 47 sqq, supporting compulsory mediation.

Conciliation or mediation is essentially consensual and the opponents of enforceability contend that it is futile to seek to enforce something which requires the co-operation and consent of a party when co-operation and consent can not be enforced; equally, they say that there can be no loss to the other party if for want of co-operation and consent the consensual process would have led to no result. The proponents of enforceability contend that this misconceives the objectives of alternative dispute resolution, saying that the most fundamental resistance to compromise can wane and turn to co-operation and consent if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, in particular where a skilled conciliator or mediator is interposed between the parties. What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come. The distinction is evident in the opening words of the chapter dealing with mediation made compulsory by law in Rogers and McEwen (op cit par 5.1): "Although parties to a dispute may ultimately refuse to settle in mediation, they are not always free to decline participation."

In *AWA Ltd v Daniels*, the parties were required to participate: the process was not defined other than by the nature of mediation and the agreement to participate in good faith. There may still be such uncertainty in what the parties are required to do by way of participation that an agreement to conciliate does not give rise to a legally binding agreement. The writings to which Rogers CJ in Comm D referred show that mandatory mediation under statute, rules of court or individual court order is well recognised in the United States, and as I have indicated the first steps along that path have been taken in Australia. That suggests caution in denying legal effect to an agreement to do the same thing. According to Rogers and McEwen (op cit

par 5.3) a general mandate has sometimes been interpreted as requiring not just attendance but preparation for and good faith participation in a mediation; sometimes the statute or rule expressly calls for participation in good faith. It can not be said that a clear doctrine has emerged and much must depend on the precise statute, rule or order. This will apply also to agreements to conciliate. Thus the same authors say (op cit par 6.1):

> "The prospects for court enforcement of mediation clauses are favourable. Courts have dismissed litigation because of non-compliance with mediation and other non-binding dispute resolution clauses inserted in a business contract, a pre-nuptial agreement, and a consent judgment. However, with only a few court rulings, it is unclear what other remedies will be provided when a party fails to honour a mediation clause. In contrast to arbitration clauses, there is no explicit statutory authority for the courts to order compliance with the mediation clause in face of a party's refusal. Moreover, it is unclear whether the courts will use specific performance doctrines or analogies to arbitration statutes to require parties to comply with mediation clauses."

The authors point out that a clause specific enough to warrant enforcement may still leave it unclear what actions, beyond mere

(1992) 28 NSWLR 194 at 207

appearance, constitute adequate participation in mediation. They suggest that requiring mere attendance may be enough and go on to express doubt concerning how a general requirement like "good faith" bargaining might be interpreted.

United States experience does not necessarily point to the position as I should hold it to be in New South Wales and in any event is unsettled but it demonstrates that an enforceable agreement to conciliate is not unknown to the law. It should not be assumed that statutory provisions for court-annexed mediation such as that now available in the Federal Court and the Supreme Court of Victoria are exercises in futility. Nor in the face of provisions such as s 37 and s 46 of the *Commercial Arbitration Act* (by which parties are obliged to do all things the arbitrator or umpire requires to enable a just award to be made, not to wilfully do or cause to be done any act to delay or prevent an award and to exercise due diligence in the taking of steps necessary to have the dispute dealt with in the arbitration) can it readily be said that participation in a process of dispute resolution by conciliation or mediation has no meaning capable of enforcement.

Yet that appears to be the position in England. In *Paul Smith Ltd v H & S*

International Holding Inc [1991] 2 Lloyd's Rep 127 at 131, Steyn J said that it had been rightly conceded that provisions that the parties should strive to settle the matter amicably and that the dispute should in the first place be submitted for conciliation, do not create enforceable legal obligations. His Lordship referred to *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297; [1975] 1 All ER 716, in which it was held that the law did not recognise a contract to negotiate because it was too uncertain to have any binding force. *Courtney & Fairbairn v Tolaini Brothers (Hotels) Ltd* was approved by the House of Lords in *Walford v Miles* [1992] 2 WLR 174; [1992] 1 All ER 453, in which the plaintiffs relied on an implied term to continue to negotiate in good faith: Lord Ackner, with the concurrence of the other members of the House, said (at 181-182):

> "... While accepting that an agreement to agree is not an enforceable contract, the Court of Appeal appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, *subjectively*, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith.' However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the
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> *(1992) 28 NSWLR 194 at 208*
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> hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question -- how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement'? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly a bare agreement to negotiate has no legal content."

Of immediate relevance are those parts of his Lordship's speech which emphasise that a party to negotiations can withdraw at any time and for any reason. If the conciliation between Hooper Bailie and Natcon be equated with negotiations, this would mean that there could not be the implied term for which Hooper Bailie contends and that Natcon was entitled to return to the arbitration at will.

The law in New South Wales in relation to a contract to negotiate is not so uncompromising. In *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, Kirby P, with whom Waddell A-JA agreed, considered that a contract to negotiate in good faith was known to the law and in some circumstances would be enforceable.

Kirby P stated that the proper approach to be taken in each case depended upon the construction of the particular contract, and continued (at 26-27):

> "... In many contracts it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should then be held. The clearest illustration of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties: see *Foster v Wheeler* (1888) LR 38 Ch D 130; *Axelsen v O'Brien* (1949) 80 CLR 219 and *Biotechnology* (at 136). But even in such cases, the court may regard the failure to reach agreement on a particular term as such that the agreement should be classed as illusory or unacceptably uncertain: *Godecke v Kirwan* (at 646f) and *Whitlock v Brew* (1968) 118 CLR 445 at 456. In that event, the court will not enforce the arrangement.
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> In a small number of cases, by reference to a readily ascertainable external standard, the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory: see, eg, *Powell v Jones* [1968] SASR 394 at 399; *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699; cf *Meehan v Jones* (1982) 149 CLR 571 at 589; *Jillcy Film Enterprises* (at 521); *Ridgeway Coal Co* (at 408).
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> Finally, in many cases, the promise to negotiate in good faith will occur in the context of an 'arrangement' (to use a neutral term) which by its nature, purpose, context, other provisions or otherwise makes it clear that 'the promise is too illusory or too vague and uncertain to be
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> *(1992) 28 NSWLR 194 at 209*
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> enforceable': see McHugh JA in *Biotechnology* (at 156) and *Adaras Development Ltd v Marcona Corporation* [1975] 1 NZLR 324 at 331."

Handley JA took a different view, concluding (at 42) that a promise to

negotiate in good faith is illusory and therefore cannot be binding, and in the result Kirby P held that the contract in question was of the illusory kind. It may be thought from the President's references to third-party determination and a readily ascertainable external standard, which he emphasised were absent on the facts before him, that it will only be in a rare case that such a promise will be enforced. Yet in many other contexts the law calls for decision upon the presence or absence of good faith, and the difficulty may not be that good faith is in itself incapable of certain meaning but that there is a 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. (This distinguishes negotiation in good faith from a possible duty of good faith in the performance of a contract, a learned discussion of which can be found in the judgment of Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.)

Strangely, in none of the Australian cases concerning dispute resolution clauses or mediation was there mention of the enforceability (or lack thereof) of a contract to negotiate, or to negotiate in good faith. Although Steyn J in *Paul Smith Ltd v H & S International Holding Inc* regarded unenforceability of such a contract as fatal to an agreement to conciliate, enough has been said in these reasons to indicate why I do not think that is so. An agreement to conciliate or mediate is not to be likened (as Lord Ackner likens an agreement to negotiate, or negotiate in good faith) to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interests. Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement.

Does the contract between Hooper Bailie and Natcon do so? Reverting to the letter of 16 February 1991, it called for:

(a) attendance before Mr Schick;

(b) the giving of "evidence" and the making of submissions;

(c) rulings or determinations.

It seems that Mr Schick's determinations were to be binding on some matters but not on others, and in this respect the agreement to conciliate went beyond the ordinary understanding of conciliation or mediation. It is not necessary to decide just what was intended, but that adds point to the

fact that there was a clear structure for the conciliation by which Natcon was to attend before Mr Schick, put before him such "evidence" and submissions as it desired, and receive his determinations. As has been seen, ancillary to this arose an exchange of information between the parties for the purposes of the conciliation, and there were no determinations in any sense other than in the sense of suggested solutions. In my opinion Natcon promised to participate in the conciliation by doing those things, and the conduct required of it is sufficiently certain for its promise to be given legal recognition.

(1992) 28 NSWLR 194 at 210

Subject to whether some of Mr Schick's determinations were to be binding, that does not mean that Natcon was obliged to compromise the issues the subject of conciliation, nor did it dictate that it had to put any particular "evidence" or submissions before Mr Schick. I doubt that the term of the agreement to conciliate for which Hooper Bailie contended was to be implied, since that term suffers from the compounded uncertainty of "reasonable", "endeavour" and "discussion, consideration and agreement". It is unnecessary to decide, or to express any view on, whether there was an implied term that Hooper Bailie and Natcon should participate in the conciliation in good faith. Natcon has declined to participate at all -- it has declined to attend again before Mr Schick (who is still willing to act as conciliator), to put further "evidence" and submissions before him, and to receive his determinations. It has not done so in terms, but has clearly enough done so by seeking to resume the arbitration and opposing Hooper Bailie's claims in these proceedings.

Moreover, Natcon gave no explanation before me for its wish to resume the arbitration rather than continue the process of conciliation to its conclusion. The conciliation had been successful in the period to late June 1991. There was nothing to suggest why it should not continue to be successful, and nothing to warrant a view similar to that of Master Horton in *Allco Steel (Queensland) Pty Ltd v Torres Strait Gold Pty Ltd*, that it would be pointless to conciliate because the parties were at loggerheads. They disagree over whether there should be resumption of the arbitration rather than continuation of the conciliation, but that does not mean that Natcon will refuse to participate in the conciliation if required to do so or that the conciliation will be fruitless. In the absence of evidence demonstrating why conciliation now will fail where it succeeded before the receivership and liquidation of Natcon, there must be value in continuation of the conciliation.

In my opinion, therefore, if there be power to do so I can and should stay

the conduct of the arbitration until the conclusion of the conciliation. I do not think any question arises of ordering Natcon to continue the conciliation. It was, I think, common ground that equity would not order specific performance of the implied term for which Hooper Bailie contended, because supervision of performance would be impossible. That was why Hooper Bailie disclaimed the exercise of equitable jurisdiction, and the cases which Hooper Bailie mentioned but then put aside on this topic (*André et Cie SA v Marine Transocean Ltd* [1981] QB 694 and *Japan Line Ltd v Himoff Maritime Enterprises Ltd (The "Kehrea")* [1983] 1 Lloyd's Rep 29) were concerned with injunctions to restrain an arbitration on the ground that it had been abandoned entirely. But there may be a stay of proceedings having the consequence that a party to the proceedings must give effect to an arbitration agreement, even against its will (see s 53 of the *Commercial Arbitration Act* 1984), and that illustrates that there is nothing offensive in indirectly requiring participation in a process of dispute resolution provided there is sufficient certainty in the conduct required by way of participation.

This is not a case in which it must be asked whether there is power to direct that the parties undertake conciliation (the power conceded in *AWA Ltd v Daniels*), because there is already an agreement to conciliate. The question is whether there is power to order a stay of the arbitration by reason of that agreement. In *Proprietors of Strata Plan 3771 v Travmina Pty Ltd* (1989) 4 BCL 91, Bryson J held that s 47 of the *Commercial Arbitration Act* gave power to stay arbitration proceedings pending the resolution of curial proceedings. In *Imperial Leatherwear Co Pty Ltd v Macri & Marcellino Pty Ltd* (1991) 22 NSWLR 653 at 667, Rogers CJ Comm D expressed reservations about that conclusion. His Honour nonetheless described the section as one giving "power to make ancillary orders of the first importance" and I consider it empowers a stay in the present case.

(1992) 28 NSWLR 194 at 211

If there were on foot in this Court proceedings equivalent to the arbitration, those proceedings could be adjourned if the parties had agreed that they would not continue until the conciliation had concluded. In my view it would be open to the Court to adjourn the proceedings on the application of Hooper Bailie, over the opposition of Natcon, in aid of the agreement to conciliate which I have found to exist. The Court can do so in aid of mediation ordered under the legislation which I have mentioned, the power to do so must accompany the power to order mediation, and the same power must exist where the conciliation or mediation is consensual and the agreement to conciliate or for mediation is enforceable in the manner I have described. Alternatively, for Natcon to proceed with the arbitration in the

face of an agreement to conciliate enforceable in the manner I have described would attract the inherent jurisdiction of the court to prevent abuse of its process in accordance with the principle stated by MacKinnon LJ in *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114 at 126:

> "... namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them will be otherwise determined."

The inherent jurisdiction has been exercised or recognised in relation to a stay of proceedings brought contrary to an agreement to submit disputes to the jurisdiction of a foreign court (*Hanessian v Lloyd Triestino Societa Anonima di Navigazione* (1951) 68 WN (NSW) 98; *Wilson v Compagnie des Messageries Maritimes* (1954) 54 SR (NSW) 258; 71 WN (NSW) 207; *Hopkins v Difrax Societe Anonyme* (1966) 84 WN (Pt 1) (NSW) 297; [1966] 1 NSWR 797; *Fehmarn (Cargo Lately on Board) (Owners) v Fehmarn (Owners), The Fehmarn* [1958] 1 WLR 159; [1958] 1 All ER 333) and contrary to an arbitration agreement (*Roussel-Uclaf v G D Searle & Co* [1978] 1 Lloyd's Rep 225; *Dillingham Canada International Ltd v Mana Construction* (1985) 69 BCLR 133; possibly *Stevens v Trewin* [1968] Qd R 411; cf *Adelaide Steamship Industries Pty Ltd v Commonwealth* (1974) 10 SASR 203; affirming 8 SASR 425 (per Bright J).

Where there is an arbitration for the purposes of and in relation to which the court has power to make interlocutory orders, the same orders can be made. The effect of an adjournment and a stay in the present case will be the same, and I do not think it matters whether what is done is described as a stay or as an adjournment over the opposition of Natcon.

(b) Repudiation/abandonment:

The stay is limited -- until the conclusion of the conciliation. Even if the conciliation is wholly successful, other issues must be arbitrated. By the

repudiation/abandonment path Hooper Bailie sought to prevent Natcon from continuing with the arbitration at any time.

Until amended by the *Commercial Arbitration (Amendment) Act* 1991 (ACT), s 46 of the Ordinance provided that it was an implied term of an arbitration agreement that in the event of a dispute arising to which the

agreement applied it should be the duty of the claimant to exercise due diligence in the prosecution of the claim; after the amendment s 46 provides that it is incumbent on each party to the agreement to exercise due diligence in the taking of steps necessary to have the dispute referred to arbitration and dealt with in arbitration proceedings. In both its unamended and its amended form, s 46 empowered and empowers the court to terminate the arbitration proceedings in the event of undue delay by a party, provided that the delay was inordinate and inexcusable and would give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration or was such as was likely to cause or to have caused serious prejudice to the other party to the arbitration.

Hooper Bailie did not invoke the power thus conferred, but used the duty to exercise due diligence as the starting-point for its submission in relation to repudiation. The submission was that from August 1990 Natcon had failed in its duty to exercise due diligence in the prosecution of its claim in the arbitration and had thereby and in other respects evinced an intention no longer to be bound by the agreement to arbitrate. It was said that Natcon had repudiated that agreement and that the repudiation had been accepted by Hooper Bailie, whereby the agreement to arbitrate was at an end. There are a number of answers to this submission.

First, I do not think that Natcon did show the necessary repudiatory intention -- something not to be lightly inferred: *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 32 per Mason J. Hooper Bailie certainly did not see the interruption to the conciliation in August-September 1990 as affecting the arbitration -- indeed, the letter of 24 October 1990 assumed that the arbitration would be resumed. By Miss Nittel, Hooper Bailie still contemplated the resumption of the arbitration in June 1991, and I consider that was rightly done. While the liquidator did not respond promptly to the inquiry in the letter of 24 October 1990, in June 1991 it was made clear that Natcon intended to proceed with the arbitration. Its inactivity until October 1991, given that receivership and liquidation had intervened, could not be seen as repudiatory.

For the intention no longer to be bound by the agreement to arbitrate Hooper Bailie relied on a number of other matters, but its case really depended upon my finding that there was total silence from Natcon over the period October 1990-October 1991. I have found otherwise. The principal other matters were termination of the services of Natcon's former solicitors and of Mr Leck, failure to tell Mr Schick what was or would be occurring, and even the nomination of the two arbitrators in the alternative in the letter

of 25 October 1991 (on the ground that Natcon thereby put aside the appointment of the arbitrator). Hooper Bailie also sought to gain assistance from what it said was Natcon's failure to explain its delay and from the refusal to resume conciliation, a course which seems to ignore the fact that the refusal to resume conciliation was because Natcon wished to arbitrate. I do not think there is anything in these other matters. Dealing specifically

with the nomination of the two arbitrators in the alternative, I do not think anything more was done than suggest for Hooper Bailie's consideration that one of them might replace the arbitrator.

Secondly, even if there had been a repudiation it was not accepted by Hooper Bailie. Mr Palazzo said that he did not seek to tax the costs awarded by the arbitrator or to prosecute the cross-claim in the arbitration because of his belief that Natcon had abandoned all arbitration and conciliation proceedings. If that was Mr Palazzo's view, for the reasons I have given it was not justified and it can not be taken as Hooper Bailie's view. Further, it is not easy to see why that belief would have so restrained Mr Palazzo. Hooper Bailie's claim to costs was put before the liquidator by the letter of 24 October 1990 and, that Hooper Bailie may have let its cross-claim rest does not seem to indicate acceptance of a repudiation even if Mr Palazzo had thought the arbitration was at an end -- certainly it does not do so when it was known that the liquidator intended to proceed with the arbitration. There was nothing else which could amount to an acceptance of a repudiation and there was no communication of any acceptance to Natcon. In reliance upon observations of McHugh JA in *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105 at 146, Hooper Bailie suggested that communication of the acceptance of the repudiation was unnecessary, but at most his Honour's observations envisaged indirect communication as distinct from a direct notification: in the present case there was not even indirect communication.

In the alternative Hooper Bailie submitted that there had been mutual abandonment of the arbitration and the agreement to arbitrate. The course of decisions concerning consensual abandonment of an arbitration and in particular concerning a finding of abandonment from silence and inactivity, has not been smooth: see *André et Cie SA v Marine Transocean Ltd*; *Japan Line Ltd v Himoff Maritime Enterprises Ltd (The "Kehrea")*; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854; *Allied Marine Transport Ltd v Vale do Rio Doce Navageacao SA* [1985] 1 WLR 925; [1985] 2 All ER 796; *Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The "Golden Bear")* [1987] 1 Lloyd's Rep 330; *Gebr Van Weelde Scheepvaartkantor BV v*

Compania Naviera Sea Orient SA (The "Agrabele") [1987] 2 Lloyd's Rep 223; and *Tankrederei Ahrenkeil GmbH v Frahuil SA (The "Multitank Holsatia")* [1988] 2 Lloyd's Rep 486 (and see Owsia, "Consensual Abandonment of Contract" (1991) 8 J Int Arb 55). It is unnecessary to go into these decisions. Essential to a finding of abandonment is that it should be clearly inferred from Natcon's acts or, more relevantly, inactivity that it did not wish or intend to proceed with the arbitration provided that Hooper Bailie concurred in its abandonment. On the facts I have related, that inference could not be drawn. The silence and inactivity in the period immediately after August 1990 was explicable on the basis that Natcon had suffered the appointment of a receiver and a liquidator, and Miss Nittel's letter of 24 October 1990 and subsequent inquiry in June 1991 show that Hooper Bailie did not infer that the arbitration was not to proceed. The response to the inquiry made it plain that Natcon did intend to proceed. Put shortly, and despite what Mr Palazzo said, neither party took the arbitration as abandoned.

The orders I make are:

(1992) 28 NSWLR 194 at 214

1. Stay the proceedings in the arbitration between the plaintiff and the first defendant the subject of the reference to the second defendant until the conclusion of the conciliation between the plaintiff and the first defendant.

2. Otherwise dismiss the summons.

So ordered

Solicitors for the plaintiff: *Tocchini & Worthington*.

Solicitors for the defendant: *Bartier Perry & Purcell*, as Sydney agents for *Carter Newell* Solicitors Brisbane.

C SAKKAS,
Solicitor.