NEW SOUTH WALES SUPREME COURT

CITATION: Savcor v State of NSW [2001] NSWSC 596

CURRENT JURISDICTION: Equity Division
Construction List

FILE NUMBER(S): 55007/01

HEARING DATE{S): 12/07/01

JUDGMENT DATE: 18/07/2001

PARTIES:
Savcor Pty Limited - Plaintiff
The State of New South Wales - First Defendant
Cooinda Ceramics Pty Limited - Second Defendant

JUDGMENT OF: Barrett J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
Mr M.G. Rudge SC/Mr D.T. Miller - Plaintiff
Mr R.W. Hunt - First Defendant

SOLICITORS:
Colin Biggers & Paisley - Plaintiff
Allens Arthur Robinson - First Defendant

CATCHWORDS:
PROCEDURE - miscellaneous procedural matters - whether proceedings by plaintiff against two defendants should be tried separately - common factual questions - just, quick and cheap resolution better served by refusing application for separate trial ARBITRATION - submission and reference - agreement to submit dispute to arbitration only if expert determination first results in liability of more than $500,000 - whether "arbitration agreement" within Commercial Arbitration Act 1984 - whether claims that contract void for mistake or should be declared void for misleading and deceptive pre-contract representations are "in any way related to" contract - whether such claims may properly be determined by expert - whether proceedings should be stayed pending expert determination and, if applicable, arbitration - only one defendant bound by dispute resolution clause - undesirable multiplicity of proceedings - stay refused

ACTS CITED:
Fair Trading Act 1987
Commercial Arbitration Act 1984
Trade Practices Act 1974 (Cth)

DECISION:
First defendant's Notice of Motion dismissed with costs

JUDGMENT:

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THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
CONSTRUCTION LIST

BARRETT J

WEDNESDAY, 18 JULY 2001

55007/2001 - SAVCOR PTY LIMITED v STATE OF NEW SOUTH WALES & ANOR

JUDGMENT

HIS HONOUR:

1 These proceedings concern re-tiling of the roof of the Sydney Opera House. By contract dated 24 October 1997 (which I shall call "the head contract"), the plaintiff undertook to perform re-tiling works for the first defendant. The head contract specified the ceramic tiles to be used and contained provisions as to the manufacturers from whom the tiles might be sourced. The second defendant was one such manufacturer. The plaintiff entered into a contract with the second defendant ("the sub-contract") on or about 23 December 1997. The sub-contract provided for manufacture and supply of the necessary tiles by the second defendant. In the events which happened, it apparently proved impossible for tiles to be manufactured to the required specification. The plaintiff sues the first defendant seeking various forms of relief in respect of what it alleges to be false and misleading conduct of the first defendant in contravention of s.42 of the **Fair Trading Act** 1987 or, in the alternative, on the footing that the head contract is affected by unilateral mistake. There is, in each case, a claim upon a *quantum meruit*. By way of further alternative, there are claims for payment under the head contract and for damages for breach of it by the first defendant. The plaintiff's claims against the second defendant are for damages for breach of the sub-contract.

2 The proceedings were commenced initially in the Federal Court of Australia where, on 30 June 2000, the plaintiff filed a Statement of Claim against the Department of Public Works and Services for the State of New South Wales. On 16 August 2000, Lehane J held that the correct respondent in the matter was the State of New South Wales and that the Federal Court had no jurisdiction to hear the matter. On 8 December 2000, the plaintiff and the first defendant agreed Short Minutes of Order by which it was ordered, among other things, that the Federal Court proceedings be proceedings in this Court and that leave be given to the plaintiff to join the second defendant and to file an Amended Summons. It was noted in the Short Minutes of Order that the second defendant reserved its right to bring a stay application in the proceedings following the service of the Amended Summons by the plaintiff. The Minister, as a party in the Federal Court, had likewise reserved at all points the right to seek a stay. The basis for the possible stay was that the disputes between the plaintiff and the first defendant could and should be determined according to the dispute resolution procedure set out in clause 46 of the general conditions of the head contract. The

plaintiff's Amended Summons was filed in this Court on 9 May 2001. The second defendant was thereby joined and it was at that point that the plaintiff's case against the second defendant was first articulated.

3 It is against this background that the first defendant now seeks an order that, despite its apparent consent in December 2000 to the joinder of the second defendant, the proceedings against the second defendant be tried separately from the proceedings against the first defendant and an order that the proceedings against the first defendant itself be stayed. The application for separate trial of proceedings is pursuant to Part 8 rule 6 of the Supreme Court Rules. The application for a stay is based on s.53 of the **Commercial Arbitration Act** 1984 or, alternatively, the inherent jurisdiction of the Court.

The separate trial question

4 I should say at once that I do not consider it appropriate to make an order for separate trials.

5 Mr Hunt, counsel for the first defendant, took me through the claims made by the plaintiff against the first defendant and the claims made by the plaintiff against the second defendant. He submitted that, when the elements of the respective cases are examined, there is not, in the words of Part 8 rule 2(a)(i), "some common question of law or of fact" which would arise. He said that while, in each instance, resort will necessarily be had, in large measure, to a common set of facts, the reality is that those facts are not contested. He instanced the content of particular documents such as the Technical Specification. Furthermore, Mr Hunt submitted, such contested questions of fact as there may be are not common to the two proceedings.

6 Mr Miller who, with Mr Rudge SC, appeared for the plaintiff referred in particular to appendix 1 to the Amended Summons which constitutes, in its entirety, the particulars of the plaintiff's claim against the second defendant. Significantly, that same appendix 1 constitutes the whole of the particulars to both paragraph 18 and paragraph 27 of the Amended Summons, each being a claim by the plaintiff against the first defendant. Appendix 1 itself (which became exhibit B on the hearing of the motion) demonstrates the extent to which there is a substantial connection between the matters in controversy between the plaintiff and the first defendant and those in controversy between the plaintiff and the second defendant. Put shortly, the allegations of the plaintiff are that it was induced to enter into the contract by a misrepresentation of the first defendant (or, at all events, in a mistaken belief) that each of two companies nominated by the first defendant as potential sub-contractors (and, it seems, the only sub-contractors acceptable to it) had the capability to supply tiles to the necessary specification whereas, in the events which happened, it became clear that neither of those suppliers had that capability. Furthermore, the second defendant, being one of the nominated parties, had contracted to supply tiles to specification and failed to do so.

7 Mr Miller identified several factual issues he saw as common to the two proceedings:

- how was the technical specification for the tiles developed?
- what role did the first defendant play in the research and development process?
- what role did the second defendant play in that process?
- what role did the first defendant's experts play in the process?
- what testing was undertaken by the first and second defendants?
- what representations were made by the first and second defendants as to the results of testing?
- what was the knowledge of the parties, their employees and representatives as to the feasibility of the method of manufacture?

8 Mr Hunt thought that this cast the net too widely. He also pointed to possible prejudice to the first defendant by way of additional time and expense while the issues concerning the sub-contract are dealt with.

9 It is, to my mind, highly likely - perhaps virtually inevitable - that there will, as Mr Miller submitted, arise in both proceedings technical questions as to why tiles could not be produced to the required specification, as well as questions about the financial consequences, for the various parties, of unavailability of the necessary tiles, not to mention questions of responsibility for the specification of tiles incapable of being manufactured.

10 When the defences (and any cross-claims) are seen, it may emerge that there is some way in which it is possible to plot a course in each proceeding which avoids any overlapping of the various considerations. As the matter appears to me, however, that is very doubtful and, while each case obviously has its own discrete elements, I think that the common factual territory is of itself sufficient to cause the plaintiff's claims against both defendants to be seen as effectively constituting, to a significant extent, one dispute in the sense discussed in **Qantas Airways Ltd v A F Little Pty Ltd** [1981] 2 NSWLR 34. The proper course, as I see it, is therefore to leave matters as they are, so far as joinder is concerned. While I appreciate the points Mr Hunt makes about possible prejudice, I think the objective of just, quick and cheap resolution will be best served by the form the proceedings now take.

Arbitration agreement

11 The first defendant's application for an order that the proceedings against the first defendant be stayed pursuant to s.53 of the **Commercial Arbitration Act** 1984 raises the threshold question whether clause 46 of the general conditions of the head contract is, on its proper construction, an "arbitration agreement" for the purposes of that Act. By virtue of the definition in s.4, an "arbitration agreement" is "an agreement in writing to refer present or future disputes to arbitration". The term "arbitration" is not defined.

12 Clause 46 of the general conditions provides for a staged system of review of disputes arising from claims by the contractor. It begins, in clause 46.1, by stating that the principal shall not be liable upon "any claim by the Contractor in respect of or arising out of a breach of Contract" or "any other claim by the Contractor arising out of or in connection with the Contract" unless, in either case, the contractor has given notice to the superintendent within a particular period. There are, however, exceptions and it is clear that not all claims by the contractor are within the purview of clause 46.1. The same cannot be said of clause 46.2. It relates to "[a]ny claim by the Contractor under, arising out of or in any way related to the Contract". Every such claim "shall be considered in the first instance by the Superintendent's Representative on behalf of the Principal". This is compulsory.

13 When a claim by the contractor thus referred to the superintendent's representative is rejected (or deemed rejected), the contractor may request review by the superintendent and, if at that stage the claim is rejected or deemed rejected, the contractor may give to the superintendent "formal notice of dispute" under clause 46.4. That leads in to a process under which the contractor and the principal furnish to the superintendent detailed reasons for their assertions in relation to the claim. The superintendent is then to deliver "a written decision on the claims comprising the dispute". Failure to decide is treated as a decision against the contractor.

14 The next stage is provided for in clause 46.5. Following the outcome under clause 46.4, either party may give notice to the other that it is not satisfied with the decision, whereupon:

> **"… the parties shall appoint an Expert to determine the dispute in accordance with the expert determination process set out in the Contract ('the Process')."**

15 It is at this clause 46.5 stage that claims by the Principal may enter the picture. The third paragraph of clause 46.5 begins:

> **"If the Principal has a claim against the Contractor under, arising out of or in any way related to the Contract, and the Contractor disputes liability, the parties must submit the claim to the Expert for determination in accordance with the Process."**

16 The "Process" is thus applied at the clause 46.5 stage to both claims by the contractor (being claims which have already been through the processes involving the superintendent) and claims by the principal. After stating that the appointment of an expert is conclusive evidence that the subject matter is properly the subject of expert determination under clause 46.5, the clause continues:

> **"The determination of the Expert shall be made as an Expert and not as an Arbitrator and shall be final and binding on the parties except where the**

Expert's determination relating to a dispute is that one party shall pay to the other an amount in excess of $500,000 (such amount to be calculated excluding any amount of the determination comprising interest or cost). If the amount is in excess of $500,000, the principal or the Contractor may give notice requiring the dispute to be referred to arbitration in accordance with the provisions of Clause 46.7."

17 Detailed provision with respect to "the Process" involving expert determination is made by clause 46.6:

"Where, pursuant to Clause 46.5, a dispute is to be determined by an Expert in accordance with the Process:

(a) The process shall be effected by an Expert in the relevant field agreed upon and appointed jointly by the parties.

(b) In the absence of agreement as to the appointment of an Expert, either party may request the person specified in the Annexure to nominate an Expert. If a person is not specified in the Annexure, the person to nominate an Expert shall be the Chief Executive officer of the Australian Commercial Disputes Centre Limited at Sydney. The request shall indicate that the nominee shall not be an employee of the Principal or the Contractor, a person who has been connected with the work under the Contract or a person in respect of whom there has been a failure to agree by the Principal and the Contractor.

(c) The Expert shall be appointed by letter of appointment issued by the Principal in the form set out in Schedule 3 hereto.

(d) The parties shall be bound by the Rules of the Expert Determination Process set out in Attachment 1 to Schedule 3 hereto.

(e) The parties agree that the Expert shall be bound by the Code of Conduct for an Expert set out in Attachment 2 to Schedule 3 hereto.

(f) The Expert shall be deemed not to act as an Arbitrator and the determination of the dispute in accordance with the process set out in the Rules for the Expert Determination process is not a process of arbitration within the meaning of the Commercial Arbitration Act 1984 (NSW).

(g) Monies that are or become due and payable by the Principal in respect of work carried out under the Contract and which are not subject to a dispute, shall not be withheld because of the process but the Principal may, at the Principal's discretion, and pending determination by the Expert withhold payment of monies in respect of the matter that is the subject of the Process.

Notwithstanding Clause 42.9, the Expert may determine whatever interest the Expert considers reasonable.

If one party has overpaid the other, whether pursuant to a Superintendent's certificate or not and whether under a mistake of law or fact, the Expert may determine that repayment together with interest, shall be made."

18 Schedule 3, referred to in these paragraphs, occupies four typewritten pages and makes quite detailed provision for the conduct of "the Process", including in relation to written submissions and conferences.

19 Clause 46.7 deals with arbitration. It begins:

> **"Where the principal or the Contractor is entitled, pursuant to Clause 46.5, to give notice requiring a dispute to be referred to arbitration, such notice ('Notice') shall [comply with stated requirements] and thereupon the dispute shall be determined by arbitration."**

The remainder of clause 46.7 makes detailed provision with respect to the arbitration.

20 The structure of clause 46 in relation to claims by the contractor is such that, once dispute resolution attempts based on negotiation and the superintendent have been exhausted, there will be, in the first instance, a determination by an expert. Such a determination is the first step where the claim is a claim by the principal. Whether the claim originates with the principal or with the contractor, there can never be arbitration under clause 46.7 unless there has first been resort to expert determination. The expert determination may or may not be final and binding. It will not be final and binding if the expert's decision is that one party must pay to the other a sum exceeding $500,000 (excluding interest and costs). Otherwise it will be final and binding. Where the expert's determination is not final and binding, either party may require the dispute to be referred to arbitration.

21 Returning to the definition of "arbitration agreement" in s.4 of the **Commercial Arbitration Act**, it is clear enough that, viewed as a whole, clause 46 makes provision for disputes to be referred to arbitration. That is made clear by these words in clause 46.5:

> **"… the Principal or the Contractor may give notice requiring the dispute to be referred to arbitration in accordance with the provisions of Clause 46.7."**

22 But that right is exercisable only in certain circumstances or, more precisely, where a process of expert determination has been completed and has produced a result of a particular kind. The right of either party to require a dispute to be referred to arbitration is denied in two circumstances: first, where the expert determination process has not been undertaken or, if undertaken, has not been completed; and, second, where the outcome of the expert determination is of a particular description. It follows that clause 46 operates as an agreement to refer to arbitration only some disputes. It is not possible to say whether or not the clause so operates in relation to a particular dispute unless and until the preliminary expert determination has occurred and its outcome is known.

23 In approaching the question whether clause 46.7 is an "arbitration agreement" as defined, both parties relied on the following passage in the joint judgment of Brennan, Gaudron and McHugh JJ in **PMT Partners Pty Ltd v Australian Parks and Wildlife Service** (1995) 184 CLR 301:

> **"The words 'agreement … to refer present or future disputes to arbitration' in s.4 of the Act are, in their natural and ordinary meaning, quite wide enough to encompass agreements by which the parties are bound to have their dispute arbitrated if an election is made or some event occurs or some condition is satisfied, even if only one party has the right to elect or is in a position to control the event or satisfy the condition."**

24 To the same effect are observations of Toohey and Gummow JJ:

> **"However in our view, the terms of the definition of 'arbitration agreement' in s.4 of the Act extend to an agreement whereby the parties are obliged if an election is made, particular event occurs, step is taken or condition is satisfied (whether by either or both parties) to have their dispute referred to arbitration. This result is within the ordinary and natural meaning of the**

> **terms of the definition and there is no sufficient reason to cut down that meaning."**

25 Against that background and consistently with the decision of Hunter J in **Fletcher Construction Australia Ltd v State of New South Wales** (unreported, NSWSC, 1 December 1997), it must follow that clause 46 is an "arbitration agreement", as defined. It requires a dispute to be referred to arbitration in accordance with clause 46.7 if two events occur: first, a party gives notice requiring referral to arbitration; and, second, an expert, acting under clause 46.5, has determined in relation to the dispute that one party shall pay to the other an amount exceeding $500,000 excluding interest and costs.

26 This view is, I think, consistent with the approach taken by the House of Lords in **Channel Tunnel Group Ltd v Balfour Beatty Constructions Ltd** [1993] AC 334. Lord Mustill, with whom Lord Keith of Kinkel, Lord Goff of Chieveley, Lord Jauncey of Tullichettle and Lord Brown-Wilkinson agreed, there described a two-tiered resolution process similar to that now under consideration as "an agreement to submit such differences to resolution by a panel of experts, the arbitrators providing no more than a contingent form of appeal". Although it was not necessary for Lord Mustill to decide whether this was within the definition of "arbitration agreement" in s.7 of the **Arbitration Act** 1975 which, as here, refers to "an agreement … to submit to arbitration present or future differences", his Lordship said:

> **"… if the words of the section were the only source of uncertainty, I would have been prepared without undue difficulty to hold that clause 67 is 'an arbitration agreement'."**

Is s.53 of the *Commercial Arbitration Act* available?

27 This conclusion that the relevant part of clause 46 is an "arbitration agreement" does no more, in the present context, than to introduce the question whether the Court has jurisdiction under s.53 of the **Commercial Arbitration Act** to order a stay of the proceedings against the first defendant. The s.53 jurisdiction arises if:

> **"… a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement."**

28 Consistently with the approaches taken in the High Court in **PMT Partners**, I read "agreed to be referred to arbitration by the agreement" as if there appeared after "agreed" the words "whether unconditionally or upon an election being made, an event occurring or some other condition being satisfied". That being so, I regard the present dispute between the plaintiff and the first defendant as a matter agreed by the final sentence of clause 46.5 to be referred to arbitration, even though the agreement to refer is subject to the dual contingencies of a particular outcome of the preliminary expert determination and the giving of notice by a party.

29 Section 53 empowers the Court to stay proceedings if two conditions are satisfied. No issue arises here in relation to the second condition (laid down by s.51(1)(b)) that the applicant for a stay was at the commencement of the proceedings and still remains ready and willing to do everything necessary for the proper conduct of the arbitration. That leaves the question posed by the condition in s.53(1)(a), namely, whether there is a sufficient reason why the matter should not be referred to arbitration under the agreement. Any enforced resort to arbitration under clause 46 carries with it, as a necessary corollary, enforced resort in the first instance to the expert determination procedure provided for in that clause. The s.53(1)(a) question therefore turns in part on whether it is appropriate to require, in the indirect way which a stay would effect, that the dispute between the plaintiff and the first defendant be submitted to that expert determination procedure. That, in turn, leads to consideration of the question whether the expert determination process is capable of producing a result which is both useful and meaningful in the circumstances.

30 The plaintiff's case against the first defendant is that it entered into the head contract under a serious misapprehension about the availability of the necessary tiles which, it says, are impossible to make and therefore could not have been produced by the two manufacturers specifically identified by the first defendant (one of the two being the second defendant) or at all. That misapprehension, says the plaintiff, was induced by misleading and deceptive conduct on the first defendant's part or, in the alternative, was known to the first defendant, actually or constructively, when the head contract was made so that the contract is affected by mistake on the part of the plaintiff. The plaintiff claims that the head contract is void (or should be declared void under the Act) and that damages should be awarded on a *quantum meruit* basis. In the alternative (and assuming that the head contract is neither void nor declared void) the plaintiff makes a number of claims against the first defendant for breaches of the head contract.

31 Determination of the dispute between the plaintiff and the first defendant will therefore involve a decision as to the content and quality of the representations made by the first defendant and its representatives in the process of contract negotiation and formation and a decision on the legal questions whether the head contract is void for mistake and, in the alternative, whether an order should be made declaring it void. Are these decisions which it is appropriate to leave to the process of expect determination provided for in the head contract?

32 The first defendant says that this question should be answered "yes". The plaintiff disagrees. Two strands of authority about arbitrators are relevant, together with the question whether they should be regarded as applicable also to experts. First, it has been the law in this State since **Ferris v Plaister** (1994) 34 NSWLR 474 that, under an appropriately drafted arbitration clause, an arbitrator may determine that a contract is void *ab initio* without depriving himself or herself of jurisdiction. The notion that, as in **Heyman v Darwins Ltd** [1942] AC 356, such a determination amounts to *ex post facto* self-destruction by the arbitrator is no longer accepted. The arbitration clause is seen as severable. Second, it has been the law in this State since **IBM Australia Ltd v National Distribution Services Ltd** (1991) 22 NSWLR 466 that,

subject always to the terms of the particular arbitration clause, an arbitrator may make awards and orders of the kind contemplated by the **Trade Practices Act** 1974 (Cth). Such a power of an arbitrator can, of course, derive only from the relevant arbitration clause. That clause must be such that, upon its proper construction, the parties intend an unknown person who might in future become arbitrator to dispense remedies of a kind which a statute puts in the hands of courts. In **Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture** (1981) 146 CLR 206 it was held that, even though an arbitration provision contained no express reference to the awarding of interest, the scope of the power was sufficient to imply a power to award interest in accordance with the **Supreme Court Act**. The same reasoning caused the Court of Appeal to conclude in the **IBM Australia** case that an arbitrator might give remedies which the **Trade Practices Act** allows a court to give.

33 Does the same hold good in the case of expert determination? It was argued by Mr Rudge SC, senior counsel for the plaintiff, that while an arbitrator and the functions and role of an arbitrator have characteristics which justify the conclusions in **GIO v Atkinson-Leighton** and **IBM Australia**, the same cannot be said of an expert acting under an expert determination clause. He pointed to provisions of the **Commercial Arbitration Act** which facilitate the proceedings of arbitrators and assimilate them in certain respects to court proceedings. Arbitrators may compel the attendance of persons and the production of documents. They may administer oaths. They must give reasons for their decisions. All these things are provided for in the Act.

34 Mr Rudge also referred to the distinctions drawn between arbitration and expert determination in **Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd** (1997) 14 BCL 277. Heenan J there observed that, as Lord Esher MR said **in In Re Carus-Wilson and Greene** (1886) 18 QBD 7, arbitration is "a judicial enquiry worked out in a judicial manner". An arbitrator, it was said, "must not only be impartial but, unlike an expert, must decide the dispute in accordance with the substantive law".

35 Mr Rudge also made reference to the cases which have examined the enforceability of the determinations of experts and the grounds on and extent to which those determinations may be reviewed or corrected by courts. He referred to the decision of Rolfe J in **Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co Ltd** (unreported, NSWSC, 12 February 1998) and to the cases there cited, particularly the decision of the Court of Appeal in **Legal & General Life of Australia Ltd v A Hudson Pty Ltd** (1985) 1 NSWLR 314. The relevant authorities on this are conveniently collected and discussed by Palmer J in **Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd** [2001] NSWSC 405 and by Mr M S Jacobs QC in "Impugning Expert Determinations in Australia" (2000) 74 ALJ 858. It is sufficient to note, for present purposes, that there is no equivalent, in relation to a determination of an expert, of the judicial review and judicial enforcement jurisdiction conferred by ss.38 and 33 of the **Commercial Arbitration Act** in the case of an arbitrator's award. In the absence of factors such as fraud and collusion, an expert determination declared by contract to be final and binding is open to challenge only to the extent that it is not in conformity with the enabling contract, including such implied terms as there may be as to the conduct and procedures of the expert.

36 The various statutory incidents of and adjuncts to the role of an arbitrator were not in any way the source of the conclusions in **GIO v Atkinson-Leighton** and **IBM Australia**. Nor was any underlying assumption that an arbitrator would preside over some form of quasi judicial inquiry. Those decisions turned wholly on what Mason J described in the former as "the real question", namely:

> **"… whether there is to be implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter."**

37 That is also "the real question" here in relation to expert determination. It is quite conceivable that parties will refer to an expert the question whether, in the circumstances in which they are placed, a court would make an order, pursuant to ss.72(1) and 72(5)(a) of the **Fair Trading Act**, declaring their contract void, and that they will agree to abide by the expert's decision on that question as if it were an order made by a court under those sections. If such an agreement may be made expressly, it may also arise by implication if the terms of the referral clause so warrant.

38 In the present case, it is necessary to look only at the parts of clause 46 which concern disputes arising from claims made by the contractor. Under the first sentence of clause 46.5, the thing which is to be determined in accordance with "the Process" is the "dispute" which arises from notification of one party's dissatisfaction with the "decision" (which includes "deemed decision") of the superintendent. That decision will arise with respect to the claim initially made by the contractor being, in terms of clause 46.1 or clause 46.2, a "claim by the Contractor in respect of or arising out of a breach of Contract" or a "claim by the Contractor under, arising out of or in any way related to the Contract".

39 A claim by the contractor that the formation of the contract was affected by mistake or that pre-contractual representations had involved misleading and deceptive conduct attracting, via s.42, remedy by way of cancellation as envisaged in ss.72(1) and 72(5)(a) of the **Fair Trading Act** would be within the clause 46.2 description if it could properly be said to be a claim "under" or "arising out of" or "in any way related to" the contract. Such a claim would, to my mind, be beyond the scope of the "under" and "arising out of" connectors. It was held by the Court of Appeal in **Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd** (1996) 39 NSWLR 160 that a claim based on misleading and deceptive conduct was a claim "arising out of" a contract where the conduct was engaged in during performance of the contract. In **Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc** (1998) 90 FCR 1, Emmett J considered an arbitration clause referring to any dispute arising "in connection with" the relevant contract. He observed that this more expansive "in connection with" connector "as a matter of construction, is wide enough to include a claim alleging contravention of Part V of the **Trade Practices Act** inducing the contract in question". In **O'Connor v LEAW Pty Ltd** (1997) 42 NSWLR 285, Rolfe J held that a clause extending to any dispute or difference "concerning this agreement" applied to a claim on a *quantum meruit*. The same conclusions are, I think, even more clearly dictated where, as here, the words denoting the necessary connection between the claim or dispute and the contract are "in any way related to". This is confirmed by the following passage in the judgment of Sundberg J in **Timic v Hammock** [2001] FCA 74:

> **"The opening part of clause 10 recites that the provisions that follow apply to the resolution of any disputes or claims 'arising out of or relating to this Agreement'. An expression such as this is to be broadly construed so as to include more than disputes about the interpretation or performance of the agreement. By force of the words 'or relating to' it includes issues beyond the agreement itself, such as misrepresentations allegedly made before the agreement was entered into, claims in tort and claims under the *Fair Trading Act* and the *Trade Practices Act*."**

This is also consistent with what was said in the **IBM Australia** case (above).

40 It follows that the dispute which is now the subject of litigation between the plaintiff and the first defendant is within the purview of the "Process" of expert determination provided for in the head contract. This conclusion means that the requirement for resort to that process before arbitration (which, apart from anything else, is necessary in order to know whether the arbitration regime applies) should not be regarded as a barrier to arbitration of the kind contemplated by s.53(1)(a) of the **Commercial Arbitration Act**. The expert determination process can, on the view I have taken, produce an outcome which in turn identifies the parties' dispute as one which is within the arbitration clause part of clause 46 or outside it. In saying this, I am conscious of the fact that the distinguishing feature is whether the expert determines "that one party shall pay to the other an amount in excess of $500,000" (excluding interest and costs) and that the plaintiff's case, in its various formulations, has a common thread of money claim so that it is of the kind contemplated.

Discretionary factors

41 Having found that the discretion conferred by s.53(1) of the **Commercial Arbitration Act** is available in this case, I must turn to the factors I see as relevant to the discretionary question whether a stay should be granted in respect of the proceedings against the first defendant. In doing so, I should say that, as I see things, the discretionary question under s.53(1) (which, in contrast to its English counterpart, uses the words "may make an order staying the proceedings") is essentially the same as the question whether a stay should be ordered by the Court in the exercise of its inherent jurisdiction. The considerations I am about to mention are therefore common to the alternative bases on which the stay application is advanced.

42 I start with the general proposition that, where parties have by contract agreed to follow a particular dispute resolution procedure, they should be required to adhere to that procedure unless the party wishing to abandon it in favour of resort to the courts can show good reason for that course. It is sufficient to refer to the well-known statement of Dixon J in **Huddert Parker Ltd v The Ship Mill Hill** (1950) 81 CLR 502:

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

43 In **Badgin Nominees Pty Ltd v Oneida** [1998] VSC 188, Gillard J said that "the court clearly has jurisdiction to stay a court proceeding on the simple basis that 'a contract is a contract' and the parties should abide by it". This assumes, of course, that the contractual process is certain in its operation. I have no reservations on that score here.

44 In some cases, the fact that a dispute involves questions of law has been considered sufficient to justify keeping it before the court rather than requiring it to be submitted to the parties' contractual resolution process. In **Petersville Ltd v Peters (WA) Ltd** [1997] ATPR 41-566, for example, Lockhart J declined to stay proceedings where the dispute turned upon issues arising under Part IV of the **Trade Practices Act**, including questions of market definition, competition within markets and anti-competitive behaviour. He regarded these as "better dealt with by a court having appropriate jurisdiction, rather than an arbitrator". It would, of course, be wrong to say that every dispute involving questions of law should be dealt with by means of court proceedings rather than arbitration or expert determination. The fact that a particular dispute is seen by the complaining party as warranting discretionary remedies may nevertheless be one factor tending in favour of judicial determination. The remedies sought by the plaintiff in respect of the head contract are of that description.

45 A second factor to be mentioned is that, if the Court holds the parties to their bargain in this case, there will in all probability be duplication of effort in relation to the dispute between the plaintiff and the first defendant. That dispute will, in the first instance, be referred to an expert. If the expert determines that the first defendant must pay a sum exceeding $500,000 (excluding interest and costs), the only purpose the expert determination will have served is to demonstrate that the arbitration regime is available. The parties will then start again before an arbitrator. That duplication factor, although relevant, is not of itself sufficient to warrant a stay. As Lord Mustill said in **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd** (above) in relation to such a two-tiered dispute resolution process:

> **"It is plain that clause 67 was carefully drafted, and equally plain that all concerned must have recognised the potential weaknesses of the two-stage procedure and concluded that despite them there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. … The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point."**

46 The third matter to be recognised is that there is no suggestion that the plaintiff's claims against the second defendant can be brought within, or linked to, the two-tiered dispute resolution process applicable between the plaintiff and the first defendant. I have already said that, on the view I take of matters, the two proceedings should, as a matter of efficient resolution, be tried together. If the stay the first defendant now seeks were granted, an expert would determine the controversy between the plaintiff and the first defendant in accordance with the contractual determination process they have adopted, following which an arbitrator would, in all likelihood, again determine the same controversy by a process of arbitration. Both these processes would be undertaken in the absence of the second defendant and the results, although binding on the plaintiff and the first defendant, would not affect the second defendant.

47 The fact that alternative dispute resolution will give rise to a multiplicity of proceedings with a risk of inconsistent concurrent findings has been a powerful factor in decisions by courts not to compel adherence to the alternative procedure. Reference may be made to the decisions of the Federal Court in **Thomas v Star Maid International Pty Ltd** [1999] FCA 911 and **Moussa v Eski Export Pty Ltd** [2000] FCA 1670. In each case, the first defendant was a company which was alleged by its contractual counterparty to have engaged in misleading and deceptive conduct contrary to s.52 of the **Trade Practices Act** and claims of accessorial liability under s.75B were made against company officers who were not privy to the dispute resolution provision of the contract. Neither Finkelstein J nor Marshall J had any hesitation in refusing a stay of the proceedings brought by the plaintiff against the first defendant. Such a decision reflects the application of principles which commended themselves to the Full Court of the Supreme Court of Tasmania in **Tasmanian Pulp & Forest Holdings Ltd v Woodhall Ltd** [1971] Tas SR 330. The principles also emerge from the following passage in the judgment of Gillard J in **Abigroup Contractors Pty Ltd v Transfield Pty Ltd** [1998] VSC 103:

> **"I have considered the statement of claim. In my opinion the issues concerning the four parties are inextricably bound up. The result would be that there would be two pieces of litigation being conducted involving much the same issues with parties present before the particular forum seeking to blame parties who may not be present.**
>
> **There is the ever present risk of inconsistent findings and/or results. This would reflect upon the administration of justice. Further, there will be a substantial increase in the overall legal costs involved.**
>
> **It is clear that the one tribunal should hear causes of action based on the pre-contract events.**
>
> **In addition, if the court stayed the court proceeding against the first and second defendant and the plaintiff exercised its right to continue against the other defendants, the other defendants would seek contribution from TOJV. This would involve TOJV in the court proceeding at a time when the claims brought against it by the plaintiff are stayed.**
>
> **All these factors lead to the conclusion that the one forum should hear all the plaintiff's claims against the defendants named in the proceeding."**

48 While not all of these comments are applicable to the case before me, I do think that the grant of a stay of the plaintiff's proceedings against the first defendant would be quite at odds with my decision that the proceedings against both defendants should be linked because of what I have described as the common factual territory. A stay would produce the kind of undesirable multiplicity which was referred to by Gillard J and avoidance of which was the basis of the decisions of Finkelstein J and Marshall J.

49 This undesirable multiplicity of enquiries - even beyond the multiplicity already involved in the two-tiered dispute resolution process in the head contract - is enough, in my view to justify refusing the stay the first defendant seeks, particularly where, as here, the remedies sought by the plaintiff against the first defendant are in part discretionary. Although an expert or an arbitrator may make the necessary discretionary judgments, it is probably better that a court do so where the multiplicity considerations point clearly in that direction in any event.

Conclusion

50 In my judgment, the proceedings against the first and second defendants should be heard and determined together. Because no basis has been shown on which the claims the plaintiff has against the second defendant can effectively be brought within the contractual dispute resolution process applicable as between the plaintiff and the first defendant, the way of ensuring that the proceedings are heard and determined together in an appropriate forum best able to deal with all matters in issue is for the action in this Court to proceed as presently constituted.

51 The first defendant's notice of motion is therefore dismissed with costs.

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