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STATE OF NEW SOUTH WALES and Others v BANABELLE ELECTRICAL PTY LTD and Others

Equity Division: Einstein J
[2002] NSWSC 178

11, 12, 22 March 2002

Contracts -- Construction and interpretation -- Uncertainty -- Severability -- -- Construction contract -- Dispute settlement procedure -- Submission of dispute to expert determination -- Selection of expert -- By agreement of parties -- Default provision for selection where parties failing to agree -- -- Default provision void for uncertainty -- Default provision essential to give character and certainty to whole clause -- Not severable -- Implication of duty to co-operate in selection unnecessary.

Contracts -- Construction and interpretation -- Implied terms -- Summary of principles governing -- Implied duty to co-operate -- Discussion.

Clause 1.46 of the general conditions of a construction contract set out procedures for the resolution of disputes. Clause 1.46.5, dealing with the submission of disputes to expert determination, contained the following sentence:

> "The expert shall be a person agreed between the parties or, if they fail to agree, a person nominated by the person prescribed in the Annexure."

There was no such person prescribed in the Annexure.

When a dispute arose and the contractors sued the principals, the principals filed for a stay of proceedings on the ground that the dispute resolution provisions should be followed. While both parties agreed that no effect could be given to the default nomination provision, the principals maintained that it could be severed but the contractors claimed the whole clause was void for uncertainty.

Held: Clause 1.46.5 failed for uncertainty, because the default nomination mechanism described in the second part of the sentence was an essential machinery provision giving the entirety of the clause its character and certainty. The suggested implication of a term by way of a duty on the parties to co-operate in agreeing on an expert was not necessary to make the contract effective according to the presumed intention of the parties. Any argument that co-operation was necessary to allow fundamental benefits could only have been put if the default nomination provision had never been in the contract. (528 [70]-[71])

Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596 at 607-608, referred to.

Summary by Einstein J of the principles governing the implication of contractual terms. (520 [42]-[44])

Discussion by Einstein J of the duty to co-operate as an implied contractual term. (524 [54]-[69])

Note:

A Digest (3rd ed) -- CONTRACTS [5], [105], [256].

CASES CITED

The following cases are cited in the judgments:
Aiton Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236
Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349
Ansett Transport Industries (Operations) Pty Ltd v Commonwealth (1977) 139 CLR 54
Beaton v McDivitt (1987) 13 NSWLR 162
Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130
Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Burger King Corporation v Hungry Jack's Pty Ltd [2001] NSWCA 187
Butt v M'Donald (1896) 7 QLJ 68
Butts v O'Dwyer (1952) 87 CLR 267
Byrne v Australian Airlines Ltd (1995) 185 CLR 410
Caltex Oil (Australia) Pty Ltd v Alderton (1964) 81 WN (Pt 1) (NSW) 297; [1964-65] NSWR 456
Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd (1987) 10 NSWLR 468
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

Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226
David Jones Ltd v Lunn (1969) 91 WN (NSW) 468
EJR Lovelock, Ltd v Exportles [1968] 1 Lloyd's Rep 163
Electronic Industries Ltd v David Jones Ltd (1954) 91 CLR 288
Fitzgerald v Masters (1956) 95 CLR 420
Hamlyn & Co v Wood & Co [1891] 2 QB 488
Heimann v Commonwealth (1938) 38 SR (NSW) 691; 55 WN (NSW) 235
Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd [1969] 2 AC 31
Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd (1990) 20 NSWLR 310
Hillas & Co, Ltd v Arcos, Ltd [1932] All ER 494
Himbleton Pty Ltd v Kumagai (NSW) Pty Ltd (1991) 29 NSWLR 44
Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41
Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (1993) 31 NSWLR 91
Hungry Jack's v Burger King [1999] NSWSC 1029
Leighton Contractors Pty Ltd v Hooker Corporation Ltd (Full Federal Court of Australia, 10 August 1989, unreported)
Liverpool City Council v Irwin [1977] AC 239
Luxor (Eastbourne), Ltd v Cooper [1941] AC 108
Mackay v Dick (1881) 6 App Cas 251
Marshall v Colonial Bank of Australasia (1904) 1 CLR 632
McCutcheon v David MacBrayne Ltd [1964] 1 WLR 125; [1964] 1 All ER 430
Meehan v Jones (1982) 149 CLR 571
Moorcock, The (1889) 14 PD 64
Moorhouse v Angus and Robertson (No 1) Pty Ltd [1981] 1 NSWLR 700
New South Wales Cancer Council v Sarfaty (1992) 28 NSWLR 68
Nicolene Ld v Simmonds [1953] 1 QB 543
Racecourse Betting Control Board v Secretary for Air [1944] Ch 114
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596

Shell UK Ltd v Lostock Garage Ltd [1976] 1 WLR 1187
Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 359
Shirlaw v Southern Foundries (1926), Ltd [1939] 2 KB 206
Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444
Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SR (NSW) 632
Trans-Pacific Insurance Co (Australia) Ltd v Grand Union Insurance Co Ltd (1989)

18 NSWLR 675
Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd (t/as Uncle Bens of Australia) (1992) 27 NSWLR 326
United States Surgical Corporation v Hospital Products International Pty Ltd [1982] 2 NSWLR 766
Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd (1990) 20 NSWLR 251

The following additional cases were cited in argument:
Australis Media Holdings Pty Ltd v Telstra Corporation Ltd (1998) 43 NSWLR 104
Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd (1995) 36 NSWLR 709
Godecke v Kirwan (1973) 129 CLR 629
Huddart Parker Ltd v The Ship Mill Hill (1950) 81 CLR 502
IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 466
Kennedy v Vercoe (1960) 105 CLR 521
Life Insurance Co of Australia Ltd v Phillips (1925) 36 CLR 60
Morrow v Chinadotcom Corporation Pty Ltd (2001) ANZ Conv R 341
Newmont Pty Ltd v Laverton Nickel NL [1983] 1 NSWLR 181
Queensland Electricity Generating Board v New Hope Collieries Pty Ltd [1989] 1 Lloyd's Rep 205
Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 76 ALJR 436; 186 ALR 289
Savcor Pty Ltd v State of New South Wales (2001) 52 NSWLR 587
State Bank of New South Wales Ltd v Chia (2000) 50 NSWLR 587
Stirling v Maitland (1864) B & S 840; 122 ER 1043
Triarno Pty Ltd v Triden Contractors Ltd (1992) 10 BCL 305
Tyser Reinsurance Brokers Pty Ltd v Cooper (Young J, 7 December 1998, unreported)
Whitlock v Brew (1968) 118 CLR 445

SEPARATE DETERMINATION OF QUESTIONS

These were six sets of proceedings in the Equity Division arising out of three construction contracts. Under an order made pursuant to Pt 31, r 2 of the *Supreme Court Rules* 1970, a threshold issue as to the validity of a clause in the contracts relating to a dispute resolution process was to be determined first.

M A Pembroke SC, *P F Liney* and *T M Catanzariti*, for the plaintiffs.

M G Rudge SC and *S Goldstein*, for the first and second defendant.

G A Sirtes, for the third defendant.

(2002) 54 NSWLR 503 at 506

Cur adv vult

22 March 2002

The proceedings

[1] EINSTEIN J. The six sets of proceedings presently before the Court arise out of three construction contracts ("the trade contracts" or "the contract") containing materially identical conditions entered into in February and March 1999 between the Minister for Public Works and Services ("the Minister" or "the Principal") as "Principal" and Banabelle Electrical Pty Ltd ("Banabelle"), Fugen Holdings Pty Ltd ("Fugen"), and Automatic Fire Protection Design Pty Ltd ("Automatic Fire Protection") as "Contractors". The trade contracts concerned discrete trade packages involved in the redevelopment of the Sydney Conservatorium of Music and Conservatorium High School.

[2] In the case of three of the sets of proceedings ("the contractors' suits"), the contractors are the respective plaintiffs, the Minister is the first defendant, Walter Construction Group Ltd is the second defendant and any named individual defendants ("the superintendents") are respectively the third and/or fourth defendants.

[3] In the case of three of the sets of proceedings ("the principal's suits"), the Minister and the superintendents are the plaintiffs and the respective contractors are the defendants.

[4] In general terms the contractors' suits involve claims to similar relief. The proceedings brought by Banabelle will suffice to indicate the nature of the claims:

- the claims against the Minister include the following:
  - (a) that prior to entering into the contract, the Minister engaged in conduct that was misleading and deceptive in breach of s 41 and s 42 of the *Fair Trading Act* 1987, such that an order pursuant to s 72(5) of that Act should be made declaring the contract to be void from its beginning;
  - (b) that the Minister repudiated the contract when it wrongfully assigned the contract to Walter Construction Group without the

written approval of Banabelle and when it contracted with Walter Construction Group to undertake the same work that had already been contracted to Banabelle;

(c) that the Minister engaged in conduct that was misleading and deceptive in breach of s 41 and s 42 of the *Fair Trading Act* when it wrongfully represented that the contract had not been assigned; and

(d) that the Minister breached certain terms of the contract by failing to pay a reasonable sum for carrying out the Works including variations, and failed to provide sufficient access to enable Banabelle to complete its work within the required contract period.

- the claims against Walter Construction Group include the following:

(e) that Walter Construction Group engaged in conduct that was misleading and deceptive in breach of s 41 and s 42 of the *Fair Trading Act* and s 51A and s 52 of the *Trade Practices Act* 1974 (Cth), when it wrongfully represented that the contract

(2002) 54 NSWLR 503 at 507

had not been assigned and that it was merely acting as agent for the Minister; and

(f) that Walter Construction Group failed to ensure that its employees, being Mr Tamone and Mr Sutherland acted independently and fairly in accordance with the contract when fulfilling their roles as the nominated superintendents under the contract.

- the claims against Mr Tamone and Mr Sutherland include the following:

(g) that they aided and abetted the misleading conduct by Walter Construction Group; and

(h) that they were negligent and acted in breach of their duty of care.

[5] The principal's suits comprise claims by the Minister, Walter Construction Group and the superintendents for declarations and orders which would effectively restrain the contractors from continuing their proceedings and

compel them to pursue any of their claims by way of cl 1.46 of the contract, being the dispute resolution provision.

[6] The Minister, Walter Construction Group and the superintendents have filed motions in the contractors' suits for a stay of those proceedings.

[7] As a matter of convenience the words "the plaintiffs" were, during the hearing and are hereafter, used to describe the plaintiffs in the principal's suits. The contractors are likewise termed "the defendants".

The separate question for determination

[8] A threshold issue is presently before the Court following an order made pursuant to Pt 31, r 2 of the *Supreme Court Rules* 1970 as follows:

> "Order that there be heard separately from any other question in the several sets of proceedings, the following question:
>
> > Is clause 46.5 of the general conditions of the trade contracts entered into between the Minister for Public Works and Services and each of Banabelle Electrical Pty limited, Fugen Holdings Pty Limited and Automatic Fire Protection Design Pty Limited in respect of the redevelopment of Sydney Conservatorium of Music and Conservatorium High School, void for uncertainty by reason of there being no person prescribed in the annexure to nominate an expert for the purpose of clause 46.5?"

[9] It is common ground that each of the trade contracts included, as s 1.0 of Pt II (Specification), certain General Conditions of Contract ("the general conditions") which were common to all trade contracts on the Conservatorium Project.

[10] It is common ground that Walter Construction Group acted on behalf of the Principal in managing the construction and administering the trade contracts for the Conservatorium Project, including by managing and administering the subject trade contracts.

(2002) 54 NSWLR 503 at 508

[11] Clause 46.1 of the general conditions was in the following terms:

> **"1.46 DISPUTES. (DELETED AND REPLACED WITH)**

CLAIMS GENERALLY AND DISPUTES

1.46.1 Notification of Claims for Extra.

A claim for Extra means any claim whatsoever by the Contractor against the Principal or an employee or agent of the Principal including without limitation:

- a claim specifically provided for in the Contract and a claim arising under or out of the Contract, including claims for breach of contract or rectification of the Contract:
- any other claim whatsoever including a claim for tort, breach of statute, restitution, a declaration, an injunction or any other remedy whatsoever;

But does not include a claim under Clause 1.35.5 for an extension of time, a claim for latent conditions under Clause 1.12.3 or a claim under Clause 1.42 for work which the Principal accepted a lump sum or rates.

If the Contractor wishes to make a Claim for Extra the Contractor must complete a written Notice of Claim for Extra in the following form and must lodge that notice with the Superintendent's Representative not later than 28 days after the first day upon which the Contractor could reasonably have been aware of the breach of contract, direction, act, omission, event, or circumstance which gave rise to the claim. The Contractor must not delay giving notice until an event is complete or the amount of the claim can be ascertained.

If the Contractor fails within the prescribed time to lodge the Notice of Claim for Extra the Principal shall not be liable for any Claim for Extra pursuant to the Notice and the Claim for Extra shall be barred.

[The form of Notice of Claim for Extra was then set out]

1.46.2 Submission of Claims to the Superintendent's Representative.

All claims by the Contractor for money shall be made by way of payment claims under Clause 1.42.

Any claim whatsoever by the Contractor, including without limitation, a payment claim, a claim for extension of time, a claim for latent conditions and a Claim for Extra shall be considered in the first instance by the Superintendent's Representative on behalf of the Principal.

The Superintendent's Representative may accept or reject the claim in part or in full.

If within 28 days after first receipt of a claim the Superintendent's Representative has not made a decision on the claim, the claim shall be deemed to have been rejected on that 28th day.

1.46.3 Submission of Claims to the Superintendent in Clause A5.2 - Annexure Part A.

If within 14 days after rejection in part or in full, or deemed rejection by the Superintendent's Representative of any claim referred to in Clause 1.46.2 , the Contractor does not in writing request a review by the Superintendent in Clause A5.2 - Annexure of that decision, the

(2002) 54 NSWLR 503 at 509

Contractor shall be deemed to have abandoned the claim and the claim shall be barred. In conducting the review, that Superintendent may, on behalf of the Principal, affirm, reverse or vary the decision of the Superintendent's Representative.

If within 28 days after a request to review the decision of the Superintendent's Representative, the Superintendent has not made a decision on the claim, the claim shall be deemed to have been rejected on that 28th day.

1.46.4 Submission of Disputes to the Superintendent in Clause A5.1 - Annexure Part A.

If within 14 days after rejection or deemed rejection by the Superintendent in Clause A5.2 - Annexure the Contractor has not given the Superintendent in Clause A5.1 - Annexure a formal notice of dispute, the Contractor shall be deemed to have abandoned the claim and the claim shall be barred.

In the formal notice of dispute, the Contractor shall request a decision of the Superintendent under this Clause 1.46.4 and set out in writing details of the Contractor's claim and reasons why the Principal is liable. On receipt of the formal notice of dispute, the Superintendent will request the Principal to provide reasons in writing for rejecting the claim. Within 28 days after the formal notice of dispute is given to the Superintendent, the Principal shall provide those reasons to the Superintendent with a copy to the Contractor. The reasons may include claims of set off or cross claims.

If the Contractor has failed to provide full particulars of the claim, then within 14 days after receipt of the claim the Superintendent may request the Contractor to provide further particulars of the claim. If within 14 days after the request the Contractor has not furnished the particulars sought, the Contractor's claim shall be barred.

Within 56 days after receiving the formal notice of dispute, the Superintendent will deliver to each party a written decision on the claims comprising the dispute.

If the Superintendent fails to deliver a decision within the 56 days, the Superintendent shall be deemed to have decided on that 56th day that the claim is not valid.

If, within 14 days after the earlier of the date of receipt of the decision, or the date of the deemed decision of the Superintendent under this Clause 1.46.4 neither party gives notice in writing to the other that the party is dissatisfied with the decision, the parties shall, in respect of each claim which was submitted to the Superintendent, treat the decision as final and binding and give effect to it and, if the decision is that the claim is not valid, the claim shall be barred.

Notwithstanding the existence of a dispute, each party shall continue to perform the Contract. In particular, the Contractor shall continue with the work and the Principal shall continue to comply with Clause 1.42.1.

1.46.5 Submission of Disputes to Expert Determination

Expert Determination is a process in which the parties refer a claim to an Expert for an opinion (the determination). Except as provided below, the parties are bound by the Expert's determination.

(2002) 54 NSWLR 503 at 510

If, within 14 days after the earlier of the date of receipt of the decision or the date of the deemed decision of the Superintendent in Clause 46.4, either party gives notice in writing to the other that the party is dissatisfied with the decision, the decision shall be of no effect and the parties shall, in respect of each claim which was referred to the Superintendent, refer the following questions to the Expert:

1. Was ther (sic) an event, act omission which gave the claimant a right to recompense,
   - (a). Under a term of the Contract;
   - (b). For damages for breach of contract;
   - (c). Otherwise in law.

2. If so,
   - (a). What is the event, act, or omission;
   - (b). On what date did the event, act, omission occur;
   - (c). What is the legal right which give rise to the liability to make recompense;
   - (d). Is that right extinguished, barred, or reduced by a provision of the Contract, estoppel, wavier, accord and satisfaction, set off, cross-claim or other legal right?

3. In the light of the answers to (1) and (2),
   - (a). what is the recompense, if any, due from one party to the other and upon what date did if fall due?
   - (b). applying the agree rate of interest specified in the Contract, what interest, if any, is due at the date of the expert's determination on that recompense?

If the Principal makes a claim including a cross claim against the Contractor under, arising out of or in any way related to the Contract, and the Contractor fails to pay the amount claimed within 28 days, the parties shall similarly refer the above questions to an Expert.

In answer to any claim by the contractor referred to the Expert, the Principal can raise any defence, set-off or cross-claim notwithstanding that it was not raised in the Principal's reason submitted to the Superintendent under clause 46.4. The dispute resolution procedures (as distinct form the outcome) shall not limit any right of the Principal to terminate the Contract or take work out the hands of the Contractor or to deduct from or set off against moneys payable to the Contractor or the Contractor's security, amounts due to the Principal, or to exercise any right of the Principal under the Contract.

The Expert shall be a person agreed between the parties or, if they fail to agree, a person nominated by the person prescribed in the Annexure. The Expert nominated must 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. If the Expert fails, refuses or is unable to make a determination, another expert is to be substituted and can continue from where his or her predecessor ceased.

In respect of each claim which was submitted to the Expert, the parties shall treat the determination as final and binding and give effect to it. If the determination is that a claim is not a valid claim, the claim shall be barred. If the determination is that one party owes the other money, payment shall be made within 28 days of the date of the determination.

(2002) 54 NSWLR 503 at 511

If, however, the determination is that an amount (without interest in respect of one claim or several and being the nett amount after allowing for set offs) exceeding $500,000 is due form one party to the other, within 28 days after the date of receipt of the determination either party may give notice in writing to the other that the party requires the dispute to be referred to arbitration in accordance with Clause 46.7.

1.46.6 Procedure for Expert Determination

When the person to be the Expert has been agreed or nominated, the Principal, on behalf of both parties will request the Expert to sign an agreement. The agreement will set out the claims and the questions upon which the Expert is asked to give an opinion (the Expert's determination), and the Expert's fees and will state that these are the procedures to be adopted by the Expert and the parties. The date upon which the Expert signs the agreement shall be the 'Date of Commencement'.

The parties shall share equally the Expert's fees and shall bear their own costs.

If, as a term of accepting the appointment, the Expert has requested security for costs, the parties shall deposit an equal share of the security.

The Expert is not an arbitrator and shall not be liable for any act or omission done bona fide in the exercise or purported exercise of functions as an expert.

The parties shall make submissions to the Expert as follows:

(a) Within 14 days after the Date of Commencement, the claimant will make a written submission setting out details of the claimant's claim.
(b) Within 21 days after receipt of a copy of that submission, the other party must make a written response. That response can include cross-claims.
(c) Within 21 days after receipt of the response, the claimant may reply to the response but must not raise new matters.
(d) Within 14 days after receipt of that reply, the other party may make comments upon the reply but not raise new matters.

For the purpose of counting days under (a) to (d) public holidays and the period from 24 December to 15 January inclusive shall not be counted.

All submissions must be in writing. Unless the Expert and the parties otherwise agree, the Expert must ignore any submission made later than the time prescribed. A party providing anything to the Expert must at the same time provide a copy to the other party.

The Expert may request further information from either party. The request must be in writing and must provide a time limit for any response. The Expert must send a copy to the other party and give the other party a reasonable opportunity to comment on the response.

Provided that the parties agree, at the request of the Expert an on such terms as the parties may agree, the Expert may arrange a conference. With any request for a conference, the Expert must set out the matters which the Expert wants to discuss at the conference. Any such conference shall be 'Without Prejudice'.

Within 12 weeks after the Date of Commencement, the Expert must deliver to the parties the Expert's written opinion on the questions

referred. Unless the parties agree to extend this time, the Expert cannot deliver a determination after that time. With the determination, the Expert must provide a statement of reasons. If the determination contains clerical or mathematical errors or accidental slips or omissions, the Expert can correct them even after expiration of the time for making the determi-

nation.

The process is not arbitration. The Expert must make the determination on the basis of the submissions of the parties, including documents and witness statements, and the Expert's own expertise.

1.46.7 Arbitration

Where the Principal or the Contractor is entitled, pursuant to Clause 1.46.5, to give notice requiring a dispute to be referred to arbitration, such notice ('Notice') shall:

(a) be given in writing to the other party not later than 28 days after the Expert has given a decision; and
(b) if given by the Contractor, be signed by a Director of the Contractor; and
(c) if given by the Principal, be signed by the authorised delegate of the Principal; and
(d) specify with detailed particulars the matter at issue, including the contractual basis of the claim;

and thereupon the dispute shall be determined by arbitration.

If, however, a party does not, within the said period of 28 days, give the Notice to the other party, the determination of the Expert shall not be subject to arbitration.

Arbitration will be conducted under the Commercial Arbitration Act NSW 1984 (as amended) (Act) subject to the following:

1. With reference to section 14 of the Act, the arbitrator must conduct proceedings in accordance with this clause 46.7, which overrides section 14 of the Act.
2. With reference to section 19 of the Act, the arbitrator is bound by the rules of evidence.
3. With reference to section 19 of the Act, evidence must be in the form of written statements.
4. With reference to section 22 of the Act, all questions that arise for determination in the course of the Arbitration must be determined according to law.
5. With reference to section 29 of the Act, the arbitrator makes the award in writing, signs the award and includes in the award fully detailed reasons to enable the parties to understand adequately the basis for the award and each determination of the arbitrator in the award.
6. With reference to section 34 of the Act, costs of a predominantly successful party must be paid by the other party, pre-agreed to be assessed in the amount of 60 per cent of party-party costs. Costs of the arbitrator, room hire, transcript service and other such costs must be shared equally.
7. Arbitration is to be conducted by an arbitrator agreed by the parties, or, failing agreement, appointed by the President of the

Law Society of NSW. The arbitrator must be an experienced lawyer, who may request technical assistance.

8. Arbitration must be conducted in Sydney.

9. Whenever possible, the arbitrator must apply the following procedure, unless it is clear to the arbitrator after a submission by a party that an injustice might occur:

(a) limited number of lay witnesses (maximum of 5)

(b) limited experts (1 per discipline)

(c) limited hearing (5 days maximum)." [emphasis added]

The critical clause -- an internal dictionary

[12] It is convenient to commence with an internal dictionary. The portion of cl 46.5 of the General Conditions of Contract which lies at the heart of the separate question comprises three sentences, with the first sentence being separated by the disjunctive "or":

> "The Expert shall be a person agreed between the parties or, if they fail to agree, a person nominated by the person prescribed in the Annexure. The Expert nominated must 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. If the Expert fails, refuses or is unable to make a determination, another expert is to be substituted and can continue from where his or her predecessor ceased."

[13] The convenient course is:

- to refer to the sentences by number;
- to refer to so much of the first sentence as precedes the disjunctive as "the first half of the disjunctive";
- to refer to so much of the first sentence as follows the disjunctive as "the second half of the disjunctive".

Common ground

[14] As the separate question makes plain it is common ground that the annexure failed to identify the name of any person as had been envisaged by cl 46.5 of the general conditions, that is to say, there was no person "prescribed in the

Annexure".

[15] The parties were agreed during submissions that effect could not be given to the second half of the disjunctive, whether properly described as "meaningless" or "incomplete". That being the case the arguments centred upon whether and if so how, cll 46.5, 46.6 and 46.7 could operate notwithstanding the effective "reading out" of the second half of the disjunctive. An understanding of how those clauses might so operate is necessary in dealing with the issue raised by the separate question.

[16] In light of the consensus that no effect could be given to the second half of the disjunctive, it was common ground at the bar table that the second sentence could be given no operation

Evidentiary issues

[17] An issue arose during argument as to the admissibility of the following documents

- Exhibit MOT 1 to the affidavit of Mr Tonkin of 12 March 2002 [also being exhibit GBC 1 to the affidavit of Mr Crisp of 20 September 2001] being the contract entered into on 17 February 1999 between the Principal and Banabelle;
- Exhibit MOT 2 to the affidavit of Mr Tonkin of 12 March 2002 being the contract entered into on 24 March 1999 between the Principal and Fugen;
- Exhibit MOT 3 to the affidavit of Mr Tonkin of 12 March 2002 being the contract entered into on 19 February 1999 between the Principal and Automatic Fire;
- Exhibit MOT 4 to the affidavit of Mr Tonkin of 12 March 2002 being the Code of Practice for the Construction Industry referred to in cl 1.1.1 on page 8 of the respective contracts.

[18] The convenient course is to refer to these documents in respect of which a ruling is reserved as "the Code of Practice materials".

[19] A decision on admissibility was reserved to be handed down as part of the final judgment. The question turns on the materials which may be taken into account for the purpose of the decision on the separate question. The matter will be referred to below.

The plaintiffs' submissions

[20] The plaintiffs submitted that regardless of the fact that it was not possible to give effect to the second half of the disjunctive and the second sentence, cll 46.5, 46.6 and 46.7 could continue in effective operation to bind the parties.

[21] The matter was put by the plaintiffs in a number of ways. Centrally the proposition was that the determination of the separate question fundamentally required resolution of the severance question.

[22] In this regard the plaintiffs drew attention to what was put as "the scheme of the dispute determination regime" to which the parties had bound themselves. The plaintiffs submitted that the scheme comprised a number of elements including:

- That an essential part of the parties bargain was to keep disputes out-of-court except as a last resort -- the submission was that so much is clear from cl 46.5 itself, as well as from the Code of Practice materials;
- That there was to be a determination by an expert *only* if there was no resolution by the preceding mechanisms which in turn involved, the several stages of submission through the superintendent's representative, the cl A 5.2 superintendent and the cl A 5.1 superintendent.
- That:

> "... it was [an] important, but subsidiary in the overall context part of that scheme, to identify the expert. As to that process of identification, the parties agreed, firstly, that the primary means of doing so was by the parties reaching agreement. We submit that is evident from the language, and that the secondary means of doing so only if necessary, because that's the grammatical sense of the disjunctive, was to have a third party nominator." [98]

[23] The plaintiffs contended that the second half of the disjunctive was comprised of words which were contingent. The submission was that these words were not "fundamental" and that it was clear from the language and structure of the clause that the intention of the parties was that they may not

need to refer to or rely on those words. The contingency would only be activated if the working out of the express primary obligation did not result in the appointment of an expert.

[24] The plaintiffs' written submissions had included the following:

> "***Primary obligation***
>
> In the factual context contemplated by clause 46.5, the agreement of the parties that 'The Expert shall be a person agreed between the parties' is an agreement to participate in a simple process which the law recognizes as sufficiently certain: *Hooper Bailie Associated v Natcom Group* (1992) 28 NSWLR 194 at 209, *Aiton Australia v Transfield* (Einstein J unreported 1 October 1999, [1999] NSWSC 996 at paragraphs 52-59), *Con Kallergis Pty Limited v Calshonie Pty Limited* (1998) 14 BCL 201.
>
> That is because the express obligation to 'agree' on an Expert necessarily involves several subsidiary factual steps:
>
> (i) one party must proffer the name of an expert or experts;
> (ii) the other party must consider those experts, and accept or reject one or more, or proffer another name.
>
> Those steps are necessary incidents of the express obligation. They must be undertaken according to a legal standard. Both parties must act reasonably and in good faith in giving effect to those steps. There is an obligation on each party 'to do all that is reasonably necessary to ensure that' agreement may be reached on the identity of the expert. See *Booker Industries v Wilson Parking* (1982) 149 CLR 600 at 606 and *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 at 448-9 (McHugh and Gummow JJ).
>
> ***Implied primary obligations***
>
> Even a contractual obligation to agree on a price will not necessarily be void: *Queensland Electricity Generating Board v New Hope Collieries* [1989] 1 Lloyd's Rep 205 at 210. The error in characterising the express obligation in clause 46.5 as void because it is said to be an 'agreement to agree' is that it overlooks the parties' implied primary obligations, as discussed in *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 476-7; *Queensland Electricity Generating Board v New Hope Collieries* (supra); *Booker Industries v Wilson Parking* (supra). Those implied obligations must be performed according to objective legal criteria requiring reasonableness and good faith in giving effect to them. That involves a willingness to consider such options for appointment as may be propounded by the other party and a willingness to give consideration to putting forward options for appointment (cp per Einstein J in *State Bank of NSW v Chia* [2000] NSWSC 552 at para. 428).
>
> Once the implied primary obligation to 'make reasonable endeavours to agree' (see *Queensland Electricity Generating Board* at 210) is recognised, it will be seen that there is no substance in the Defendants' contention that clause 46 is void for uncertainty. If an obligation to agree

> on price (as in *Queensland Electricity Generating Board v New Hope Collieries* (supra)) is capable of enforcement by reference to established legal principles, then the position is a fortiori in relation to an obligation to agree on the identity of an expert, as in this case."

(2002) 54 NSWLR 503 at 516

[25] As I have understood the submissions advanced on behalf of the Minister by Mr Pembroke QC:

- the proposition that the basic rule is to try to give effect to the intentions of the parties, gathered from the provisions of the whole contract was not in contention. [cf *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251 at 278, per Priestley JA];
- The critical underlying issue is that severance will follow if the provision to which effect cannot be given is subsidiary in the sense of not being *fundamental or essential* to the parties bargain looked at as a whole;
- Severance will be especially appropriate where the provision in contention is merely of a contingent nature.

[26] In support of these submissions Mr Pembroke took the Court to a number of decisions where provisions were found to be severable in part because of their contingent nature. A number of these were decisions where the unenforceability of the entire contract was in issue. The present is not such a case with no party at the bar table contending that the consequence of being unable to give effect to the words following the disjunctive would lead to the unenforceability of the *entirety* of the trade contracts. Mr Pembroke sought however to utilise this line of reasoning in relation to the microcosm comprising the whole of the dispute resolution cl 1.46 running from consideration by the superintendent's representative, the cl A 5.2 and cl A 5.1 superintendents through to the expert and then through to the arbitral provisions. The submission was that:

> "... it is *absurd* to think that the parties intended that unless [the second half of the disjunctive] remained in force and was effective, then they were not otherwise prepared to adhere to their bargain set out in clauses 46.5, 46.6 and 46.7." [emphasis added]

The submissions of Banabelle, Fugen and Automatic Fire Protection

[27] The defendants submissions the subject of address by Mr Rudge QC for Banabelle and Fugen and by Mr Sirtes for Automatic Fire Protection, were generally of substance and are in the main accepted as pervasive in the reasons which follow. In consequence it is strictly unnecessary to repeat the submissions in detail.

The principles

Contract upheld where possible

[28] There is abundant authority in support of the proposition that the Court should strain to adopt a construction which will preserve the validity of the contract and in that regard should strive to avoid holding agreements and most particularly commercial agreements void for uncertainty. ("Courts should be the upholders, and not the destroyers, of commercial bargains", per Kirby P, *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd (t/as Uncle Bens of Australia)* (1992) 27 NSWLR 326 at 332; "the traditional doctrine that courts should be astute to adopt a construction which will preserve the validity of the contract", per Mason J, *Meehan v Jones* (1982) 149 CLR 571 at 589; *Hillas & Co, Ltd v Arcos, Ltd* [1932] All ER 494 at 499, per Lord Tomlin;

(2002) 54 NSWLR 503 at 517

Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130 at 132, per Kirby P.)

Stay of proceedings

[29] Equity will not order specific performance of a dispute resolution clause, notwithstanding that it may satisfy the legal requirements necessary for the court to determine that the clause is enforceable. This is because supervision of performance pursuant to the clause would be untenable: see *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 210. The court may, however, effectively achieve enforcement of the clause by default, by ordering that proceedings commenced in respect of a dispute subject to the clause be stayed or adjourned until such time as the process referred to in the clause is completed.

[30] The court's power to order a stay of proceedings is derived from its inherent jurisdiction to prevent abuse of its process (cf *Supreme Court Rules*, Pt 13, r 5).

[31] As Giles J observed in *Hooper Bailie*, for a party to proceed with litigation in the face of an enforceable agreement to follow a dispute resolution procedure may be an instance of abuse of process in accordance with the

principle stated by MacKinnon LJ in *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114 at 126, having reference to an exclusive jurisdiction clause:

> "... 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 shall be otherwise determined."

Severance

[32] When a contract contains a number of stipulations, one of which is void for uncertainty, the question whether the part which is void ("the offending provision") may be separated so as to not affect the validity of the remainder will depend upon whether the parties intended that if the offending provision could not for any reason take effect, the remainder may, notwithstanding this circumstance, be given effect. This question is a question of construction.

[33] The fundamental proposition has been expressed in a number of alternative ways. The alternatives differentiate between questions raising the possibility of the *entirety* of an agreement failing and questions raising the possibility of *the balance* of a particular clause or group of relevantly related clauses failing. As some of the authorities cited below make plain, alternative ways of putting the fundamental proposition seem to include the following:

> "Where severance is not possible:
>
> - because severance of the clause would result in the remainder failing to reflect the intention of the parties
> - because severance would have the result of disregarding the main purpose and substance of the parties intention
> - because severance would have the result that a provision which is fundamental or essential to the parties bargain will require to be disregarded
> - because severance would alter entirely the scope and intention of either:
>   - the relevant clause or
>
> *(2002) 54 NSWLR 503 at 518*
>
>   - the group of relevantly related clauses or
>   - the whole agreement

> the balance of a clause or group of relevantly related clauses or the whole agreement will fail."

[34] Albeit questions which may be raised as to the difference between a clause which is *meaningless* and a clause which is *incomplete* (cf *Nicolene Ld v Simmonds* [1953] 1 QB 543 at 551, per Denning LJ), the defendants have submitted that the proper approach to problems of the type presently before the Court is reflected in the following passage from the judgment of Sugerman J (with whose reasons Walsh J agreed) in *Caltex Oil (Australia) Pty Ltd v Alderton* (1964) 81 WN (Pt 1) (NSW) 297 at 297; [1964-65] NSWR 456 at 456:

> "... A blank left in an instrument generally renders meaningless the portion of the instrument in which it appears. But this may leave the instrument as one which is capable of being carried into effect and enforced, disregarding the meaningless provision, just as may happen where some *inessential provision* of a contract is so vague and uncertain as to be incapable of any precise meaning." (citing *Nicolene v Simmonds*, (emphasis added))

[35] Later in the judgment reference was made by Sugerman J to preceding words in the particular clause being enforceable, ignoring "the meaningless appendage to them" (at 298; 457).

[36] A quarter of a century later in *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (at 278), Priestley JA (with whom Samuels JA agreed) failed to use words of *essentiality* in terms of the relevant test, but generally described the test in terms of whether the disregarding of the offensive provision would mean disregarding the main purport and substance of the relevant clause or the altering *entirely* of the scope and intention of the agreement.

Dispute resolution clauses as a precondition to litigation -- a particular area of discourse

[37] The subject field of discourse concerns the indirect enforcement of dispute resolution clauses. As Giles J pointed out in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (at 209):

> "... An agreement to conciliate or mediate is *not* to be likened ... 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*." [Emphasis added]

[38] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 involved a close examination of the requirements of certainty in relation to enforceability of dispute resolution procedures. The judgment includes (at 250-252) the following:

> "... [T]he focus ought properly be on the *process* provided by the dispute resolution procedure. Provided that no stage of the dispute resolution mechanism is itself an 'agreement to agree' and therefore void for uncertainty, there is no reason why, in principle, an agreement to attempt to negotiate a dispute may not itself constitute a stage in the process.
>
> *(2002) 54 NSWLR 503 at 519*

Procedure to be certain

In *Hooper Bailie*, Giles J stated (at 206):

'What is enforced is not co-operation and consent but *participation in a process* from which consent *might* come.'

It is for this reason that that the process from which consent might come must be sufficiently certain.

This is not to suggest that the process need be overly structured. Certainly, if specificity beyond essential certainty were required, the dispute resolution procedure may be counter-productive as it may begin to look much like litigation itself.

In *Elizabeth Bay*, Giles J noted (at 714) that apart from the express agreement in cl 11 to enter into negotiation in good faith, the agreement to mediate did not lay down a procedure for the mediation process other than the parties' presence or representation, the mediators discretion to hold private sessions with any party to the mediation and the stipulation that, unless otherwise agreed, the parties would within 14 days of the agreement provide to each other and to the mediator, a short statement of issues outlining the nature of the dispute and the various matters in issue. His Honour concluded that the agreement to mediate being so open-ended, was unworkable, as the '*process to which the parties had committed themselves would come to an early stop when, prior to the mediation, it was asked what the parties had to sign and the question could not be answered*' (at 715).

...

I note that in view of decided Australian case law, commentators such as L Boulle and R Angyal have noted that, for a mediation clause to be enforceable, it must satisfy the following minimum requirements (I interpolate to note that in my opinion, these minimum requirements ought be seen as applying to any stage in a dispute resolution clause as the case may be, not just to mediation):

'*It must be in the form described in *Scott v Avery*. That is, it should operate to make completion of the mediation a condition precedent to commencement of court proceedings.

*The process established by the clause must be certain. There cannot be stages in the process where agreement is needed on some course of action before the process can proceed because if the parties cannot agree, the clause will amount to an agreement to agree and will not be enforceable due to this inherent uncertainty.

**The administrative processes for* selecting a mediator and in *determining the mediator's remuneration should be included in the clause* and, in the event that the parties do not reach agreement, a mechanism for a third party to make the selection will be necessary

*The clause should also set out in detail the process of mediation to be followed -- or incorporate these rules by reference. These rules will also need to state with particularity the mediation model that will be used.' (Emphasis added.)

(See Australian Law Reform Commission, Review of the Adversarial System of Litigation, Issues Paper 25, June 1998, Chapter 6, par 6.20.)" (some emphasis added)

(2002) 54 NSWLR 503 at 520

[39] Before turning to the ultimate holding in relation to cl 46.5 and because of the detailed arguments addressed in relation to the suggested implication of a duty to co-operate it is convenient to turn to the principles governing implication of terms.

Principles governing implication of terms

[40] It is useful to briefly note the categories, or the points along the spectrum, of differing contractual terms (see *Liverpool City Council v Irwin* [1977] AC 239 at 254, per Lord Wilberforce).

[41] In the first category are terms which are to be found expressly in the contractual statements of the parties or documents into which the parties have reduced their agreement.

[42] In the second category are to be found terms which are not to be found within the express contractual statements of the parties or the documents in which the agreement is to be found, but which are found aliunde.

[43] The second category is subject to a further division:

- terms which the law finds in a certain class of contract, either by common law or statute, although those terms may not find specific expression in the contractual statements or documents of the parties. ("category 'A' terms")·
- terms which are to be implied into a contract to give effect to the presumed intention of the parties: *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468 at 486-487, per Hope JA; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 448, per McHugh J and Gummow J. ("category 'B' terms")

[44] Terms which are to be implied into a contract to give effect to the presumed intention of the parties can be further sub-divided as follows:

- terms implied into a contract to give effect to the presumed intention of the parties can be implied according to a notorious custom or usage in a particular trade, industry or locality: *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 236, per Gibbs CJ, Mason J, Wilson J, Brennan J and Dawson J. ("category 'B(i)' terms")
- terms implied into a contract from a prior course of dealing: *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 at 134; [1964] 1 All ER 430 at 437, per Lord Devlin, *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31 at 90, per Lord Morris of Borth-y-Gest, at 113, per Lord Pearce. ("category 'B(ii)' terms")
- terms implied into certain contracts familiar to courts where the principal terms of the agreement are settled but necessary subsidiary terms are absent: *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 38, per Handley JA. ("category 'B(iii)' terms")
- terms which are implied to give efficacy to the particular contract: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 282-283. ("category 'B(iv)' terms")

Implication of terms ad hoc

[45] The principles upon which a court will imply a term into a contract as a matter of fact are not in doubt and have been stated and re-stated

authoritatively many times. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, the Privy Council, on appeal from the Supreme Court of Victoria,

listed the five requirements necessary to be satisfied as follows (at 282-283):

> "Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

[46] This statement has been approved by the High Court many times: *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605-606; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 347; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 66, 117-118; *Byrne v Australian Airlines Ltd* (at 422, 441). The onus for showing that the criteria have been satisfied lies on the party that asserts the implied term; that onus is heavier where, as here, the subject contract is a detailed and complex one. In *Codelfa Construction Pty Ltd v State Rail Authority* (at 346), Mason J said: "[t]he more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And *then there is the question of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question*". (emphasis added)

Equitable and reasonable

[47] Upon the first requirement -- reasonableness and equitableness -- it is possible to say two things. First, it is clear that such a requirement refers to fairness as between the parties. In *Byrne v Australian Airlines Ltd* (at 442), McHugh J and Gummow J rejected the suggested implication because "[t]he contractual term propounded by the appellants would operate in a partisan fashion". Second, it is clear that reasonableness and equity is to be judged by reference to the benefits and burdens each party can expect to enjoy or undertake under the contract. So, in *BP Refinery v Shire of Hastings* (at 284), the majority of the Privy Council rejected the proposed implication into a rating agreement requiring a continuity of corporate identity on the ground that such an implication would deprive the appellant of a benefit which induced it to make a major capital investment in the defendant's Shire.

Necessary to give business efficacy to the contract

[48] Upon the second requirement, it is clear that the requirement that the term be "necessary to give business efficacy to the contract" is a formula calculated to reject the requirement of mere reasonableness. Thus, in *Codelfa Constructions v State Rail Authority* (at 346), Mason J commented that "[a]ccordingly, the courts have been at pains to emphasize that it is not enough that it is reasonable to imply a term, it must be necessary to do so to give business efficacy to the contract". However, to my mind, the comment in N C Seddon & M P Ellinghaus, Cheshire & Fifoot's Law of Contracts, 7th Australian ed (1997) Sydney, Butterworths, at [10.48] is entirely justified: "[i]t cannot be the

case that a term must be necessary in the sense that the contract cannot be carried out at all without its incorporation. However, the cases offer little explicit analysis of the phrase 'effective operation' or 'business efficacy' ". In *Butts v O'Dwyer* (1952) 87 CLR 267 at 280, Dixon CJ, Williams J, Webb J and Kitto J commented that "the law raises an implication from the presumed intention of the parties where it is necessary to do so in order to give to the transaction such efficacy as both parties must have intended it should have". Their Honours had previously referred to the comments of Bowen LJ in *The Moorcock* (1889) 14 PD 64 at 68, where his Lordship said "what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men". These words were quoted with approval by Gibbs CJ in *Hospital Products v United States Surgical Corporation* (at 66). In *Hamlyn & Co v Wood & Co* [1891] 2 QB 488 at 491, Lord Esher MR commented that a court "has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist". The judgment of Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 257-258 is a recent, and if I may respectfully say so, lucid expression of this view.

[49] To my mind, these authorities indicate that the requirement that a term be "necessary to give business efficacy to the contract" does not mean that the term must be so necessary that without the term the contract would, for all purposes be ineffective, but that the term must be necessary to make the contract effective and workable according to the presumed intention of the parties, as disclosed by the terms of the contract and the admissible surrounding circumstances.

So obvious it goes without saying

[50] The requirement of obviousness has been tested by asking whether the parties would have readily agreed on the proposed implied term if it had been suggested to them in the course of their negotiations: *Shirlaw v Southern Foundries (1926), Ltd* [1939] 2 KB 206 at 227, per MacKinnon LJ; *Codelfa Construction Pty Ltd v State Rail Authority* (at 374), per Aickin J. The requirement involves a considerable degree of overlap with that of business efficacy and in that sense addresses itself not to the *actual* intentions of the parties but to their *presumed* intention as reasonable persons as disclosed by the contract and surrounding circumstances: *Heimann v Commonwealth* (1938) 38 SR (NSW) 691 at 695; 55 WN (NSW) 235 at 237, per Jordan CJ.

Capable of clear expression

[51] The requirement that a term be capable of clear expression is one which has two elements. First, the term upon which the parties would have agreed had the matter at issue been drawn to their attention must be clear. Thus, in *Codelfa* (at 356), Mason J rejected the term which it was contended should be implied because "it was a case in which the parties made a common assumption which masked the need to explore what provision should be made to cover the event which occurred. In ordinary circumstances *negotiation* about that matter might have yielded one of a number of alternative provisions, *each being regarded as*

a reasonable solution". (emphasis added) Similar comments appear in the judgment of Aickin J (at 375).

[52] The second element of this requirement is that the term to be implied must be one capable of being "formulated with a sufficient degree of precision": *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187. In *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 62, Gibbs J nominated the "width and lack of precision" of the suggested implied term as an argument against its implication. It was upon this basis that Viscount Simon LC in *Luxor (Eastbourne), Ltd v Cooper* [1941] AC 108 at 115-117 rejected a suggested implication which applied in the absence of "reasonable cause" because of the difficulty of determining what is a reasonable cause: see also the comments of Rolfe J in *Hungry Jack's v Burger King* [1999] NSWSC 1029 at [432] (5 November 1999). However, given the willingness of the Court of Appeal to imply a qualification of reasonableness on the exercise of certain contractual powers, it seems probable that a less stringent view of the requirement of certainty than that adopted by Viscount Simon is appropriate: *Renard Constructions (ME) Pty Ltd v Minister for Public Works*; *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349. It would appear the modern approach is that

stated by Bridge LJ (as his Lordship then was) in *Shell UK Ltd v Lostock Garage Ltd* (at 1204):

> "It is said that lack of precision in the criterion to be embodied in the implied term is fatal to any implication. But it is no novelty in the common law to find that a criterion on which some important question of liability is to depend can only be defined in imprecise terms which leave a difficult question for decision as to how the criterion applies to the facts of a particular case. A clear and distinct line of demarcation may be impossible to draw in abstract terms; yet the court does not shrink from the task of deciding on the facts of any case before it on which side of the line the case falls. This kind of pragmatism is so deeply entrenched in the common law's approach to a multitude of legal problems that I decline to accept that the difficulty of defining with precision what term is to be implied in this case is an insuperable obstacle to the implication of any term limiting the plaintiffs' freedom to discriminate."

Consistency with express terms

[53] The requirement of consistency with the express terms of the contract requires that the term said to be implied does not contradict the effect of the express terms of the agreement and does not deal with a matter which the contract deals with adequately. In *Moorhouse v Angus and Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700, the defendants argued that a term should be implied into a contract between an author and publisher, to whom the author submits a manuscript to the effect that property in the manuscript, would pass to the publisher. The Court of Appeal rejected this because it was inconsistent with clauses of the contract which (on their proper construction) had the effect of reserving to the author all rights not granted to the publisher ((at 708) per Samuels JA). But an express term which deals with a subject cognate to the implied term does not, for that reason, exclude the implied term: thus a contract of agency which expressly casts on the agent an obligation to use "best endeavours" does not exclude an implied term to render faithful and

loyal service: *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 378, per Dixon J.

Duty to co-operate

[54] In *Mackay v Dick* (1881) 6 App Cas 251, it was agreed that the pursuers were to supply to the defenders a machine capable of digging and filling a certain volume of clay per day. The parties also agreed that the subject

machine was to be tested at the defenders' premises and if it satisfied the requirement the defenders were to purchase it. On appeal from the Court of Session to the House of Lords, Lord Blackburn stated that it was impliedly agreed that the pursuers would transport the machine to the defenders' premises and erect it and generally do all that was necessary for the fair test. Similarly, the defenders were to be taken as impliedly agreeing to allow the pursuers access to their premises and to assist in such a way as to allow the machine to be fairly tested. The general principle was expressed by Lord Blackburn (at 263) as follows:

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

[55] The speech of Lord Blackburn presents a difficulty insofar as it is ambiguous as to the basis upon which an implied duty to co-operate is to be founded. While the general principle is expressed by his Lordship as a "general rule" elsewhere the speech proceeds according to what the parties must have been taken to have agreed. The first approach would place the term within what I have called Category A, the second within what I have called Category B(iv).

[56] The basis on which Sir Samuel Griffith proceeds in *Butt v M'Donald* (1896) 7 QLJ 68, a decision of the Supreme Court of Queensland, is clearer. His Honour placed the implied duty to co-operate squarely within terms which are to be implied at law. In that case the plaintiff agreed to sell to the defendant what was described as "a butcher's shop adjoining the Metropolitan Hotel". The freehold on which the shop was located belonged, in fact, to another person and the shop itself was a fixture upon the land. The defendant was entitled to the benefit of a lease upon the freehold. At trial, the jury decided the contract was a contract for the sale of the structure of the shop. The owner of the freehold refused to allow the purchaser to remove the structure of the shop. In effect, it seems the vendor had sold something that was not his. Griffith CJ held that there was to be implied into the contract a warranty on the part of the vendor to the effect that he held good title to the structure of the shop or a promise to attain such title. Stating in general terms the latter obligation, Griffith CJ said (at 70-71):

> "... It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable

> the other party to have the benefit of the contract. In the case of a contract of sale, that rule is applied by implying a promise or warranty that the purchaser shall have a title to the property."

[57] The view of Griffith CJ as to the general applicability of the above principle is re-asserted in his judgment as Chief Justice of Australia in *Marshall v Colonial Bank of Australasia* (1904) 1 CLR 632 at 647.

(2002) 54 NSWLR 503 at 525

[58] In contrast to that approach by Griffith CJ is the approach of Dixon CJ, Williams J, Webb J and Kitto J in *Butts v O'Dwyer*. In that case the appellant leased with an option to purchase land to the respondent. Under applicable statute law a lease was invalid if it was granted without the approval of the relevant Minister. The lease was not so approved. The respondent entered into possession and later purported to exercise the option. The appellant refused and the respondent sought specific performance. In the opinion of Dixon CJ, Williams J, Webb J and Kitto J a lease which was entered into conditional upon approval of the Minister being gained was not invalidated by the statute, but would (at 280):

> "... [p]rima facie ... import an obligation on the part of the person giving the transfer to do all that was reasonable on his part to the end that the Minister's consent might be obtained. Such a condition could be either express or implied. There is in the present case no express condition ... but we think that such a condition should be implied. It has been held in cases too numerous to mention both before and after the classic statement of *Bowen* LJ in the case of *The Moorcock* ((1889) 20 PD 64, at p 68) that the law raises an implication from the presumed intention of the parties where it is necessary to do so in order to give to the transaction such efficacy as both parties must have intended that it should have."

[59] The reference to *The Moorcock* shows clearly that Dixon CJ, Williams J, Webb J and Kitto J considered that the basis of the implied duty to co-operate was founded on the presumed intention of the parties and the necessity to give business efficacy to the contract. As Lord Wilberforce pointed out in *Liverpool City Council v Irwin* (at 253), that is the doctrine, if not of the case of *The Moorcock* itself, of *The Moorcock* as usually applied.

[60] The matter was again considered by the High Court in *Electronic Industries Ltd v David Jones Ltd* (1954) 91 CLR 288. There the plaintiffs and the defendants agreed that the plaintiffs should install and give demonstrations of television in the defendants' store at a particular date. The date set was vacated

by consent due to events beyond the control of both parties. The plaintiffs later sought another date upon which they could gain access to the defendants' store to comply with their obligations under the contract. It was held that the defendants were obliged to set a reasonable time for the defendants to enter the premises to comply with their obligations. The Court (Dixon CJ, McTiernan J, Webb J, Kitto J and Taylor J) said the following (at 297-298):

> "... The fact that there was no longer a fixed date for performance brought into application the principles which impose on parties, in all cases where the performance of their obligations requires co-operative acts, the duty of complying with reasonable requests for performance made by the other. ... By any appropriate demand the plaintiff was entitled to require the defendant to make its store available to the plaintiff to perform its obligation at some proper and reasonable time. It is hardly necessary to repeat the commonplace statement that what is reasonable depends on all the circumstances including the nature and purpose of the express stipulations. ...
>
> Example after example could be given of commonplace contracts for the performance of work or the rendering of services where one man must make himself or his premises or his goods available to another at some mutually convenient time which is left unfixed or if fixed is allowed to pass. A contract to tailor a suit of clothes, to decorate the interior of a
>
> *(2002) 54 NSWLR 503 at 526*
>
> building or to repair a ship's hull is not unenforceable because no time is fixed for the attendance of the customer upon the tailor or for the commencement of the decorator's work or for the entry of the ship into a dry dock when it may become available."

[61] A subsequent decision of the High Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* illustrates the limits of the obligation to co-operate. There the appellant sold to the respondent land on which was situated a large office block. The purchase price was stipulated as a certain amount, but was subject to a reduction if evidence to the reasonable satisfaction of the purchaser was not produced showing that aggregate rents reached a certain sum. If the latter sum was not reached, the purchase price was subject to a reduction equal to the proportion by which the rents fell short of that certain sum. When it appeared that the vendor would not be able to produce evidence showing aggregate rents had reached a certain sum, the vendor offered to lease part of the building itself to permit aggregate rents to reach the stipulated sum. The purchasers refused. It was common ground that the contract imposed an implied obligation on each party to do all that was reasonably necessary to secure performance of the contract. After quoting Lord Blackburn in *Mackay v Dick* and Griffith CJ in *Butt v M'Donald*, Mason J

(with whom Barwick CJ, Gibbs J, Stephen J and Aickin J agreed) said (at 607-608):

> "It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself."

[62] To my mind, Mason J proceeds on the basis that an implied duty to co-operate was one which was inferred as necessary to give business efficacy to the contract in accordance with the presumed intention of the parties. Where the co-operation is necessary for one party to fulfil its fundamental obligations or to attain benefits which are fundamental, such a term is readily inferred without further extensive inquiry. However, where the co-operation is necessary to allow the performance of lesser obligations or to attain lesser benefits, then the term will not be so readily inferred and whether it is to be inferred or not depends upon the intention of the parties as manifested in the contract itself considered in the context of the admissible extrinsic facts. What obligations or benefits are to be considered fundamental is to be determined, in my opinion, by the application of the test enunciated by Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632 at 641-642, viz, "that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor".

(2002) 54 NSWLR 503 at 527

[63] In the subject circumstances, Mason J was satisfied that there was "an obligation on the respondent to do all things reasonably necessary to enable leases to be granted": (at 608). However, there was, in those circumstances, no breach of that term. Because the purchaser reasonably entertained doubts as to the ability of the vendor to pay the rent on the proposed lease, the purchaser did not unreasonably refuse to co-operate by withholding the lease from the appellants which would have enabled it to receive the full amount of the

purchase price.

[64] The following authorities may also be noted as establishing an implied contractual duty to co-operate in the performance of contractual obligations as part of the law of New South Wales: *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 800, per McLelland J; *Beaton v McDivitt* (1987) 13 NSWLR 162 at 185, per McHugh JA; *Trans-Pacific Insurance Co (Australia) Ltd v Grand Union Insurance Co Ltd* (1989) 18 NSWLR 675 at 694, per Giles J; *New South Wales Cancer Council v Sarfaty* (1992) 28 NSWLR 68, per Mahoney A-P; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (at 262), per Einstein J; *Hungry Jack's v Burger King*, per Rolfe J and on appeal -- *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187 at [144], per Sheller JA, Beazley JA and Stein JA.

[65] In *Himbleton Pty Ltd v Kumagai (NSW) Pty Ltd* (1991) 29 NSWLR 44, Giles J, in relation to the duty to co-operate said (at 61):

> "... The principle is not in doubt, although what is reasonable will turn on the particular circumstances. Although it is not always stated in the recognised situations in these and like cases, the source of the obligation is still that stated in *Butts v O'Dwyer*. It is necessary to imply an obligation to act with reasonable diligence to fulfil the condition, since otherwise the agreement can be rendered nugatory by inaction, and it is presumed that the parties did not intend that to be so. But *the express obligations of the parties will still govern the transaction, and will define the efficacy which they intended it to have*, and the implication of a term must satisfy the conditions stated in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26; 16 ALR 363 at 376 and adopted in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337:
>
> > '(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.' " [emphasis added]

[66] The following points should be noted concerning the decision of Giles J in *Himbleton Pty Ltd v Kumagai (NSW) Pty Ltd*. First, his Honour considered that the basis of the duty was the presumed intention of the parties necessary to

give the contract business efficacy: that is, it was a Category B(iv) term. Second, notwithstanding, in certain recognised situations the term was to be implied into a contract without expressly applying the analysis found in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*. His Honour's quotation of the passage in the judgment of Mason J in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* shows clearly that the recognised situations referred to by Giles J are coterminous with the situations

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in which Mason J considered it "easy to imply a duty to co-operate". Third, his Honour considered that the content of the implied duty to co-operate as particularised by the plaintiff was excessive given the scope and weight of the express obligations of the defendant under the contract.

[67] In the light of this examination of the authorities, I think the following compendious statement of the existence of and content of the implied duty to co-operate can be made. The implied duty to co-operate is a term implied in accordance with the presumed intention of the parties as necessary to give business efficacy to the contract. Depending on the circumstances, the duty may apply so as to prevent one party hindering performance or the occurrence of a condition precedent on which performance depends. Alternatively, it may consist of a duty to take steps to allow the performance of the contract by the other party so as to permit the full realisation of the benefits which the contract contemplates to accrue to that party: see S J Stoljar, "Prevention and Co-operation in the Law of Contract" (1953) 31 Canadian Bar Review 231 at 232.

[68] Where the obligation or benefit is of a fundamental nature such that the relevant party would not have entered into the contract without an assurance of strict or substantial performance of the obligation or an assurance of the benefit or a real and genuine chance to gain the benefit, then the term will be implied as satisfying the test for the implication of terms in fact without further analysis. Where the obligation or benefit is not of a fundamental kind, the proposed implied term must satisfy the five point test enunciated by the Privy Council in *BP Refinery (Westernport) v Shire of Hastings* -- see *Secured Income v St Martins Investments Pty Ltd* (at 607-608), per Mason J.

[69] The duty to co-operate is regulated by the requirement that the specified co-operation be reasonable. If such co-operation is reasonable, it is not to the point to say that such co-operation is commercially disadvantageous. However, what is reasonable is to be determined according to the express obligations and benefits contemplated in the subject contract. Co-operation may not be reasonable if it requires one party to assume a risk extraneous to the risk

inherently contained in the transaction or to assume burdens excessive with regard to the benefits it could reasonably contemplate under the contract. Reasonable co-operation does not extend to inducing or compelling a third party to perform acts where benefits under the contract depend on those third party acts. Co-operation may also not be reasonable where that co-operation is likely to be utilised by the other party for purposes extraneous to the contract and detrimental to the co-operating party.

Holding

[70] In my view cl 46.5 is uncertain and the uncertainty infects the entire clause. The reasons are as follows:

- The proper construction of cl 46.5 is that the nomination mechanism comprising the second half of the disjunctive was an *essential* machinery provision giving the entirety of the clause its character and certainty;
- Whilst depending upon the context and the particular circumstances, the Court may imply a duty to co-operate, that duty is a term implied in the manner outlined above, generally the usual approach being to imply the term in accordance with the presumed intention of the parties as necessary to give business efficacy to the contract; *(2002) 54 NSWLR 503 at 529*
- In the present context the specified co-operation was not reasonable;
- In every circumstance it is necessary to pay very close regard to the words used in the relevant contract or instrument. The fundamental rule is that "a court should give the words of a written agreement the natural meaning that they bear": *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313, per Kirby P;
- The provision presently in focus, namely the first half of the disjunctive, does not impose any obligation upon either party to use best endeavours to agree upon an expert to whom relevant claims are to be submitted or to act in good faith in such an endeavour. To the contrary, the provision simply provides that the *expert* "shall be a person agreed between the parties", going no further than in effect making such an announcement. If the parties have not agreed upon an expert then the first half of the disjunctive is simply not satisfied;
- Very importantly, the nomination mechanism provided for in the second half of the disjunctive, far from being a "meaningless appendage", provides the critical fulcrum which serves to give the clause the necessary certainty and, at the same time, to provide a

valuable insight into the extent to which the court may infer that the party's intention was that there be a *legal* (as opposed to a *moral*) obligation upon each:

- to co-operate in the matter of seeking to agree upon the identity of an expert or
- to use good faith in the matter of seeking to agree upon the identity of an expert.

- The nomination mechanism provides precisely such a valuable insight which clearly results in the contra inference namely, that the parties had no such intention. As put by Mr Sirtes in his written submissions: "The existence of the default nomination provision, and its enlivenment upon the failure of any agreement, militates against any such intention";
- Severance of the offending section of the clause is inappropriate as the remainder, after the severance, would not reflect the intention of the parties;
- Severance is further inappropriate as the remainder following severance, must be capable of independent operation. In context the remainder here, at highest:
  - could be said to constitute an agreement to agree; and therefore is itself void;
  - was uncertain in relation to the process from which consent might come [cf *Hooper Bailie* (at 206)]

[71] The suggested implication of a term by way of a duty to co-operate is at the end of the day simply not necessary to make the contract effective and workable according to the presumed intention of these parties, as disclosed by the terms of the contract [particularly the second half of the disjunctive] and the admissible surrounding circumstances. Any argument to the effect that co-operation is necessary to allow benefits which are fundamental can only be put if the second half of the disjunctive had never been there in the first place. Once the question is posed in the light of the existence of the second half of

the disjunctive, it can no longer be put that co-operation is necessary to allow the performance of fundamental obligations.

[72] There is quite arguably a further problem posed by the suggested implication of the suggested duty to co-operate and this relates to the requirement that the term be capable of clear expression. A duty to co-operate is one thing. A duty to act reasonably is another. A duty to use best endeavours may be another. A

duty to use good faith may be another, although as noted in the joint judgment of a Sheller JA, Beazley JA and Stein JA in *Burger King Corporation v Hungry Jack's Pty Ltd*, the Australian cases make no distinction of substance between the implied term of reasonableness and that of good faith. Negotiation about the matter as to what provision should be made may have yielded a number of alternatives each being regarded as reasonable.

[73] Likewise it seems to me that there is a further problem posed by the suggested implication of the duty to co-operate in terms of the requirement of consistency with the express terms of the contract. The term to be implied must not only not contradict the express terms of the agreement but also must not deal with the matter which the contract deals with adequately. To my mind once one takes into account the second half of the disjunctive it becomes quite clear that the suggested duty to co-operate endeavours, by reference to the present context, to deal with a matter with which the contract already deals adequately for the reason that the contract in the second half of the disjunctive entirely overcomes any possible difficulties with the first half of the disjunctive. A bootstrap's approach is to take as a given that the second half of the disjunctive is effectively to be disregarded, and then to put this forward as the (or a) reason for the court being required to imply the duty to co-operate said to inhere in the first half of the disjunctive.

A reference to certain of the authorities

[74] Both parties cited a large number of authorities during the course of the argument. It is not necessary to refer to all of these. The following paragraphs deal with a selection of the cases only.

Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd **(1982) 149 CLR 600**

[75] The present case is to be clearly distinguished from the circumstances before the High Court of Australia in *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600. As was made plain in the joint judgment of Gibbs CJ, Murphy J and Wilson J, whilst it is well established that the courts will not lend their aid to the enforcement of an incomplete agreement which is no more than an agreement of the parties to agree at some time in the future, it is equally well established that the parties to a contract may leave terms to be determined by a third person. In that case the lessee had the option of a new term at a rent to be agreed with the lessor or failing agreement to be determined by an arbitrator appointed by a named person, such rent not to be less than that payable in the last year of the first term. The lessee exercised the option, but the lessor refused to grant a new lease. The holding was that the

lease itself provided the entire mechanism for determining the rental for the renewed term. There was no further agreement required of the parties. In order to give business efficacy to the relevant provisions it was necessary to imply a term that once the anterior conditions specified in the relevant clause had been performed, the parties would do all that was reasonably necessary to procure

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the nomination there in focus namely a nomination by the President for the time being of the Queensland Law Society Inc of an arbitrator. In stark contradistinction to the circumstances in *Booker* where there was no further agreement required of the parties, the circumstances presently before the Court (in terms of so much of the relevant clause as precedes the disjunctive) do require a further agreement of the parties, namely an agreement as to the expert who is to determine the dispute.

***Nicolene v Simmonds* [1953] 1 QB 543**

[76] An alleged contract for the sale of steel bars contained the clause: "We are in agreement that the usual conditions of acceptance apply". The issue was whether the contract was concluded, there being no consensus ad idem with regard to what were the usual conditions of acceptance. It was held that the clause was so vague as to be meaningless. Consequently, as there was nothing else left for the parties to agree on or negotiate, the clause could be ignored while still leaving the contract good.

***Fitzgerald v Masters* (1956) 95 CLR 420**

[77] In *Fitzgerald v Masters* (1956) 95 CLR 420, the respondent (plaintiff) entered into a written contract with the deceased, of whose will the appellants (defendants) were executors, for the purchase of the deceased's farm. The final clause stated: "The usual conditions of sale in use or approved by the Real Estate Institute of New South Wales ... shall so far as they are inconsistent (sic) herewith be deemed to be embodied herein". In fact, no such usual conditions existed. The respondent sought specific performance of the agreement. On appeal, the relevant issue was whether an effective contract existed. The Court recognised that the word "inconsistent" in the clause was an obvious error and should be read as "consistent" or "not inconsistent". With that in mind, the whole contract was not rendered ineffective because no "usual conditions" existed. No inference could be drawn that the parties did not intend to contract unless the clause was given effect. Hence, the clause could be severed and the contract remained good.

***Update Constructions Pty Ltd v Rozelle Child Care Centre* (1990) 20 NSWLR 251**

[78] A building contract was entered into between the parties requiring written notice to be given by the builder to the proprietor of any additional works to be carried out. Furthermore, provisions of the contract made reference to a clause that had already been struck out by the parties, with no steps taken to amend these provisions to recognise this. Without giving written notice, the builder then performed additional works and claimed payment. On appeal to Court of Appeal, the issues appear to have been:

(i) whether the absence of written notice was fatal to builder's claim for payment;

(ii) whether the provisions that referred to the struck out clause were inoperative.

The Court held firstly, that acceptance by the respondent's architectural agent of the builder's proposed variations made without written notice estopped the respondent from relying on the requirement for written notice and secondly, that the effect of striking out the clause was to render the references to the

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clause elsewhere in the contract as meaningless. Those references could be ignored without altering the scope or intention of the agreement.

***David Jones Ltd v Lunn* (1969) 91 WN (NSW) 468**

[79] In *David Jones Ltd v Lunn* (1969) 91 WN (NSW) 468, a clause in an option agreement to purchase property stated "... the purchaser will offer [the defendants] a suitable area to carry on a business when and if a shopping complex is erected in this location at terms which are acceptable to both parties". The plaintiff sought to exercise its option to purchase. While both parties agreed that the clause was uncertain and unenforceable, the issue was whether the uncertainty of the clause rendered the option agreement unenforceable or whether the clause could be severed. The holding was that the clause could be severed, with the remainder of the agreement constituting a valid option to purchase.

***Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444**

[80] In *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, leases containing a substantively identical clause conferred on the appellant tenants an option: "To purchase the reversion in fee simple in the premises hereby demised ... at such price ... as may be agreed upon by two valuers, one to be nominated by the lessor and the other by the lessee and in default of such an agreement by an umpire appointed by the said valuers". The respondent lessors argued that the options were void for uncertainty as they contained no formula by which the price could be fixed in the event of no agreement being reached;

in essence, they amounted to nothing more than an agreement to agree. The appellants exercised the options, however, the respondents declined to appoint a valuer.

[81] On the issue of whether the option was enforceable, the House of Lords held that the option clause clearly intended to create legally enforceable rights and obligations. It was not a mere agreement to make an agreement. Where the mode of valuation is a non-essential term of the contract, should the mechanism for valuation break down, the court will substitute its own mechanism. Furthermore, the only reason the option was not executed was because of lessors' breach of contract in refusing to appoint their valuer. The options were valid and effectively exercised, with the court ordering an inquiry into the fair valuation of the demised premises.

***Leighton Contractors Pty Ltd v Hooker Corporation Ltd* (Full Federal Court of Australia, 10 August 1989, unreported)**

[82] In *Leighton Contractors Pty Ltd v Hooker Corporation Ltd* (Full Federal Court of Australia, 10 August 1989, unreported), a clause in a building agreement provided that any dispute arising under the agreement would be, if unresolved after one week from notice of the dispute being given, "submitted to an arbitration by an Australian Institute of Architects - ACT Chapter". A dispute under the agreement arose between the contractor and the proprietor. In construing the clause, the contractor argued that the ACT Chapter of the Institute was an unincorporated body comprising the members of the Chapter. In this regard, the contractor argued it was absurd for the clause to be read as submitting disputes to arbitration before the Chapter itself. Instead, the contractor contended it must have been the intention of the parties to give a power of appointment to the Chapter, with a further power to appoint an

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architect member. Hence, the contractor contended that the words "architect member appointed by the" should be read into the clause before the word "Australian". Furthermore, the contractor argued that if the Court were to find it impossible to deduce what were the intention of the parties, the clause should be construed in two parts; the first part indicating a clear intention to submit disputes to arbitration, and the second as the parties' attempt (which failed) to agree on the appointment of the arbitrator. In which case, the second part of the clause could be severed, leaving the balance of the clause as an arbitration agreement in respect of which the Court was empowered to appoint an arbitrator. On appeal, the Court held it was not possible to deduce what the parties intended by the term "submitted to an arbitration by an Australian Institute of Architects - ACT Chapter". Furthermore, it was not possible to

adopt the contractor's construction of the clause, as that would impose on the parties a position when it was *unclear* that the parties intended to agree on arbitration regardless of who was the appointed arbitrator. The whole clause was invalid. Of note, the Court stated (at [17]):

> "... upon reflection we have concluded that to so construe clause 10(a) would amount to the Court reforming the contract to impose on the parties a compromised position when it is not clear that either party intended to agree to arbitration regardless of the status or identity of the arbitrator. It is not for the Court to frame a clause that the parties might well have made, but did not make: *Putsman v Taylor* [1927] 1 KB 637 at 639-640."

[83] With reference to the decision in *EJR Lovelock, Ltd v Exportles* [1968] 1 Lloyd's Rep 163, in which an arbitration clause containing two distinct modes of arbitration was held to be ambiguous and uncertain to the point that it was meaningless, the Court went on to state (at [17]):

> "... There was no suggestion [in *EJR Lovelock*] that only part or parts of the clause should be severed so that what remained would provide for arbitration, leaving it to the law of the contract to provide for the appointment of an arbitrator and for the procedure to be followed. In that case, the structure of the clause did not lend itself to any simple blue pencil textual deletion and the two modes of arbitration mentioned were very different. It is not surprising that the whole clause was held to be meaningless. However the case provides an illustration of the importance in the notion of arbitration to be attached to the manner in which the arbitration is to occur. In the instant case the parties have failed to unambiguously express their agreement on a matter which could be of central importance to the kind of arbitration which each intended."

Returning the question of admissibility of the Code of Practice materials

[84] It seems to me that the Code of Practice materials are not admissible on the question of construction presently before the court.

[85] The essential question is simply whether or not these materials are a part of the trade contract. It seems relatively clear that they are not.

[86] The Tender Document commences with an introduction which is followed by a "Table of Contents" which describes Pt 1 and ss/cl 1.0 as "Conditions of

Tendering". Those conditions are followed by Pt II entitled "Specification". Part 1, commences at page 8 of the document where one finds the following:

> **"1.0 Conditions of Tendering**
>
> This section includes notices to Tenderers.
>
> The Conditions of Tendering section *will not form part of the Contract*
>
> **1.1 General**
>
> **1.1.1 Code of Practice and Code of Tendering**
>
> All Tenderers must comply with the NSW Government Code of Practice and Code of Tendering for the Construction Industry, July 1996 Edition. Lodgement of a tender will be evidence of the Tenderer's agreement to comply with the Codes for the duration of any subsequent contract that may be awarded. If any Tenderer fails to comply, the failure may be taken into account by the Principal when considering this or any subsequent tender by the Tenderer and may result in such tender being passed over.
>
> Copies of the Codes may be obtained from the Tenders Section [and an address is given]. [emphasis added]
>
> Clause 1.1.2 is entitled 'Collusive Arrangements'.
>
> Clause 1.2 is entitled 'Contract Information'
>
> Clause 1.3 is entitled 'Current Policies'
>
> Clause 1.4 is entitled 'Further Information'
>
> Clause 1.5 is entitled 'Preparation of Tenders'
>
> Clause 1.6 is entitled 'Submission of Tenderers'
>
> Clause 1.7 is entitled 'Procedures after Closing of Tenders'."

[87] The curious circumstance which apparently obtains, or so I infer, is that the original Invitation to Tender included this form of wording which became common ground in what I presume were "conforming" Tenders, received from the trade contractors and in due course, as I have said, were sent out by the Principal with the acceptance letters.

[88] Where the express terms of cl 1.0 of s 2.0 made plain that the Conditions of

Tendering section *would not* form part of the contract, it seems to me that this constitutes the clearest evidence available to this regard. Notwithstanding the wording in cl 1.1.1 and the use in that clause of the *usually* prescriptive or mandatory words "must comply", the context constitutes an adequate rebuttal of the otherwise presumption that these words meant what they said.

[89] Having said that, Mr Pembroke sought to rely upon the Code of Practice materials upon the basis that even if not forming part of the trade contract, the documents were "relevant parts of the extrinsic circumstances which can be taken into account in construing the contract". The submission is rejected. Where an offer included a page which made clear that it was not to be regarded as part of the offer or an acceptance included a page which made clear that it was not to be regarded as part of the acceptance or as part of the contract, it seems to me that such page must be excluded from the catchment area of materials to which the court may pay regard when engaged in the construction of a contract. In like vein albeit when dealing with the admissibility of evidence that parties have refused to include in the contract a provision which would give effect to the presumed intention of the parties, Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (at 353) appears to have recognised that this may be a situation in which evidence of the actual intention of the parties should be allowed to prevail over the presumed intention: "But is it right to carry that exercise to the point of placing on the words of the contract a meaning which the parties have united in rejecting? It is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an inference sought to be drawn from surrounding circumstances. See *Heimann* ((1938) 38 SR (NSW), at 695)".

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[90] If I be wrong in the holding that the Code of Practice materials are inadmissible on the issue raised by the separate question and upon the basis that those materials ought to have been taken into account as part of the facts, matters and circumstances available to the court on the construction issue, my views earlier expressed in this judgment would be no different. The Code of Practice materials, which on this basis are to be regarded as part of the factual matrix in which the Contract was entered into, do not advance the position at all. These materials do not elevate into a legal obligation that which *explicitly and in terms* was not to be a legal obligation.

Short minutes of order

[91] The parties are to bring in short minutes of order providing for an

affirmative answer to the separate question. Costs may be argued.

Orders accordingly

Solicitors for the plaintiffs: *Mallesons Stephen Jaques*.

Solicitors for the first and second defendants: *Crisp & Associates*.

Solicitors for the third defendant: *Luchetti & Co*.

C SAKKAS,
Solicitor.