NEW SOUTH WALES SUPREME COURT

CITATION: Strategic Publishing Group Pty Limited & Anor v John Fairfax Publications Pty Limited [2003] NSWSC 1134

CURRENT JURISDICTION: Equity Division
Commercial List

FILE NUMBER(S): 50116/03

HEARING DATE{S): 1/12/03

JUDGMENT DATE: 04/12/2003

PARTIES:
Strategic Publishing Group Pty Limited (First Plaintiff/Respondent)
Dominion Corporate Holdings Limited (Second Plaintiff/Respondent)
John Fairfax Publications Pty Limited (Defendant/Applicant)

JUDGMENT OF: Einstein J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
Dr AS Bell (Plaintiffs/Respondents)
Mr PM Wood (Defendant/Applicant)

SOLICITORS:
Gilbert + Tobin (Plaintiffs/Respondents)
Freehills (Defendant/Applicant)

CATCHWORDS:
Practice and procedure
Contract
Agreement for referral of dispute to independent accountant
Defendant applicant seeks orders staying proceedings for the purpose of permitting the dispute to be referred to the independent expert-contractual construction
proper exercise of the discretion
Costs
application for security for costs

ACTS CITED:
Contracts Review Act 1980 (NSW)

Fair Trading Act 1987 (NSW)
Frustrated Contracts Act 1978 (NSW)
Insurance Contracts Act 1984 (Cth)
Supreme Court Act 1970 (NSW)
Supreme Court Rules 1970 (NSW)
Trade Practices Act 1974 (Cth)

DECISION:
Application for permanent stay to be dismissed. Security for costs to be provided.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
COMMERCIAL LIST

Einstein J

4 December 2003

50116/03 **Strategic Publishing Group Pty Limited and anor v John Fairfax Publications Pty Limited**

JUDGMENT

The proceedings

1 These proceedings are brought by Strategic Publishing Group Pty Ltd ["Strategic"] and Dominion Corporate Holdings Ltd ["Dominion"] against John Fairfax Publications Pty Ltd ["Fairfax"] and concern two agreements entered into on 9 December 1999:

· An agreement between Strategic and Fairfax entitled "Asset Sale Agreement" ("ASA");

· An agreement between Dominion and Fairfax entitled "Share Sale Agreement" ("SSA").

2 Clause 4 of schedule 11 of the ASA provided that Fairfax would pay Strategic the Retention Amount of $1,000,000 if a "Retention Certificate", as defined in clause 1 of schedule 11 of the ASA, showed that:

(i) the profits of the SPG Business before tax, calculated in accordance with schedule 10 part 1 of the SSA, for the 12 month period ending on 30 June 2000 were more than $2 million; and

(ii) Mr Gordon had, as at the Adjustment Date, which was 7 July 2001, met the Key Performance

Indicators, which were defined in schedule 9 of the SSA ("Key Performance Indicators").

3 Clause 5 of schedule 11 of the ASA provided that Fairfax could retain the $1,000,000 if the "Retention Certificate", as defined in clause 1 of schedule 11 of the ASA, showed that:

(i) the profits of the SPG Business before tax, calculated in accordance with schedule 10 part 1 of the SSA, for the 12 month period ending on 30 June 2000 did not exceed $2 million; or

(ii) Mr Gordon had not, as at the Adjustment Date, met the Key Performance Indicators.

4 The SSA contained substantially identical terms in respect of Dominion: see clauses 1, 7.5, 7.7 and 7.8 of the SSA.

5 The Key Performance Indicators were:

(a) unless otherwise agreed in writing by the Defendant, Mr Gordon prepares, and presents to the Defendant for approval, business plans in a form substantially similar to the business plans prepared by Strategic Publishing Group Pte Ltd prior to 9 December 1999 for the development of:

(i) MIS UK;

(ii) Business Online UK;

(iii) Business Online Australia;

(iv) Marketing Australia;

(v) Marketing Asia;

(vi) MIS China; and

(vii) MIS Web as a business to business web site;

("Business Plan KPI")

(b) during the period commencing on 7 January 2000 and ending on 7 July 2001, the staff quality and effectiveness of the SPG Business are maintained;

("SPG Business KPI")

(c) the continued employment of Mr Gordon with the Defendant at 7 July 2001 or his employment had been terminated by the Defendant prior to 7 July 2001 other than in the circumstances set out in clause 9.3 of the Executive Service Agreement

between Mr Gordon and the Defendant, which is dated 10 January 2000.

6 Both the SSA and ASA provided that:

> "[t]he parties acknowledge and agree that:
>
> …
>
> (c) any dispute between the parties in relation to the Key Performance Indicators [as defined] will be referred to the Independent Accountant [as defined] in accordance the procedure set out":
>
> a) in relation to the ASA, in paragraph 8(c) to 8(f) of schedule 11 of the ASA; and
>
> b) in relation to the SSA, in clause 7.11(c) to (f) of the SSA.

7 The term "Independent Accountant" meant:

> (a) in the ASA, a person appointed jointly by the first plaintiff and the defendant or if they do not agree on the person to be appointed within 7 days of either party requesting appointment, a chartered accountant appointed by the President of the Australian Institute of Chartered Accountants (Sydney branch) at the request of the first plaintiff or the Defendant;
>
> (b) in the SSA, a person appointed jointly by the second plaintiff and the defendant or if they do not agree on the person to be appointed within 7 days of either party requesting appointment, a chartered accountant appointed by the President of the Australian Institute of Chartered Accountants (Sydney branch) at the request of the second plaintiff or the defendant.

8 Clauses 8(c) to 8(f) of schedule 11 of the ASA and clause 7.11(c) to (f) of the SSA were identical save that the ASA referred to Strategic whereas the SSA referred to Dominion. The clauses provided:

> (a) Either party may refer the disagreement *about the Disputed Amount* to an Independent Accountant with a request that the Independent Accountant *make a decision on that matter within 14 days*;
>
> (b) The Purchaser must pay to the Vendor that portion of the Research Business Retention or the Retention (as the case may be) which is not in dispute;
>
> (c) the Independent Accountant will determine absolutely the procedures for settlement of the disagreement and determination of the balance of the Purchase Price (if any);

(d) the Independent Accountant will act as an expert and not as an arbitrator and the decision of the Independent Accountant will be final and binding on the party;

(e) the costs of the Independent Accountant will be paid as determined by the Independent accountant, having regard to the relative positions of the parties on the disagreement; and

(f) the Purchaser and [the first plaintiff or the second plaintiff, as the case may be] must, within 7 days after receipt of the decision of the Independent Accountant, account to each other, as appropriate, in accordance with the decision of the Independent Accountant.

9 Both the ASA and the SSA provided that the Purchase Price of each agreement included the payment of any Retention Amount under each agreement, as determined by schedule 11 of the ASA and clause 7 of the SSA respectively.

10 Clause 7.15 provided: "If there is dispute between the parties *as to the amount* of the reduction which is reasonable under clause 7.14, the parties may refer the dispute to the Independent Accountant in accordance with the procedure set out in clause 7.11.

11 Clause 18, headed "Governing law and Jurisdiction" provided: "This agreement is governed by the law applicable in New South Wales, Australia and *each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales*".

The motion presently before the court

12 Fairfax seeks an order staying the proceedings permanently. Alternatively, orders that:

(i) the plaintiffs provide security for the defendant's costs of and incidental to defending the proceedings in such amount and in such form as the Court deems fit; and

(ii) the proceedings be stayed until security for the defendant's costs has been provided in accordance with Order 2(a).

13 The plaintiffs oppose the application for a stay, and submit that the dispute the subject of the application, properly understood in light of the pleadings, does not fall within the scope of the expert determination clauses, properly construed in the context of the entirety of the two subject agreements.

The defendant's submissions – reference to an independent expert

14 The defendant put forward the following written submissions in support of the proposition that the stay should be granted for the matter to be referred to an independent expert:

Nature of dispute between the parties

· The first and second plaintiffs claim that they are entitled to be paid the Retention Amounts: Part A of the Summons.

· The defendant has admitted that the profits of the SPG Business before tax, calculated in accordance with schedule 10 part 1 of the SSA, for the 12 month period ending on 30 June 2000 were more than $2 million: paragraphs 13 and 44(a) of the Defence.

· The defendant submits that, accordingly, this is a dispute in relation to the Key Performance Indicators, and the defendant's obligations pertaining thereto.

· The first and second plaintiffs' entitlement to the Retention Amounts depends on whether the Retention Certificate stipulated that the Key Performance Indicators had been satisfied. This is acknowledged by the plaintiffs in the Summons at paragraph 15:

> *"As a result of Fairfax agreeing to the fact specified in paragraph 13 above [that the profits of the SPG Business before tax, calculated in accordance with schedule 10 part 1 of the Share Sale Agreement, for the 12 month period ending on 30 June 2000 were more than $2 million], the First and Second Retention Amounts became due and payable upon Mr Gordon satisfying the KPIs…"*

· The plaintiffs' contentions in relation to the satisfaction of the Key Performance Indicators are set out at paragraph 23 to 53 of the Summons. The plaintiffs claim that the Defendant was obliged to do each of the matters referred to in the particulars at paragraph 57(i) to (xiv) of the Summons, and not do the matters the matters referred to in the particulars at paragraph 57(xv) to (xvi) of the Summons.

· The gravamen of the plaintiffs' claim is demonstrated by their only particulars of damages which provide (paragraphs 63 and 71 of the Summons) that:

(a) "the Auditor, acting reasonably, would have reached the conclusion that the [Key Performance Indicators] had been satisfied and *accordingly* that the plaintiffs were entitled to the First and Second Retention Amounts"; (emphasis added) or

(b) "the plaintiffs lost the opportunity that the Auditor, acting reasonably, would have reached the conclusion that the [Key Performance Indicators] had been satisfied and *accordingly* that the Plaintiffs were entitled to the First and Second Retention Amounts." (emphasis added)

· Accordingly, on the plaintiffs' case, if the Auditor determined the Key Performance Indicators had not been satisfied, they would have no entitlement to the sums claimed.

Jurisdiction to grant stay

· The Court has inherent jurisdiction to grant a stay in order for the matter to be referred to an independent expert: *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587 at [41]; *New South Wales v Banabelle Electrical Pty Limited* (2002) 54 NSWLR 503 at [29] to [31]; *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 at [36] to [44] per Gillard J, citing *Channel Tunnel Group Limited v Balfour Beatty Construction Limited* [1993] AC 334.

Interpreting the breadth of the dispute resolution clause

· The relevant clause in the ASA and the SSA is as set out at paragraph 6 above.

· In *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, the Court of Appeal considered a clause which provided "[a]ny controversy or claim arising out of or related to [the relevant] Agreement or the breach thereof will be settled by arbitration." Kirby P regarded the words "or related to" as extending the meaning of "arising out of" (at 477). Clarke JA said (at 483), with whom Handley JA agreed generally:

> *"The phrases "in relation to" or "related to" are of the widest import and should not, in the absence of compelling reasons to the contrary, be read down: Fountain v Alexander (1982) 150 CLR 615 at 629; Dowell Australia Ltd v Triden Contractors Pty Ltd [1982] 1 NSWLR 508 at 511 and Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488. In its context I would, in the absence of contrary indications in the contract, understand the clause to be sufficiently wide to encompass claims that pre-contractual misrepresentations induced the complaining party to enter the contract."*

· Handley JA said at 487:

> *"However that may be this clause contains, in addition, an agreement to refer controversies and claims "related to this Agreement or the breach thereof". These are wide words which should not be read down in the absence of some compelling reason for doing so: see Perlman v Perlman (1984) 155 CLR 474 at 489 and Inland Revenue Commissioners v Maple & Co (Paris) Ltd [1908] AC 22 at 26. These words can only have been added to include within the submission claims other than in contract such as claims in tort, in restitution, or in equity. I can see no basis for excluding claims arising under statutes which grant remedies enforceable in or confer powers on courts of general jurisdiction. For example, the Contracts Review Act 1980, the Frustrated Contracts Act 1978 or the Insurance Contracts Act 1984 (Cth). Once this position is reached there is no basis, in my opinion, for excluding claims arising under the Trade Practices Act 1974 (Cth)."*

· The claim in that case concerned claims under section 52 of the *Trade Practices Act 1974 (Cth)* ("***Trade Practices Act***") that a contract had been entered into based upon misrepresentations: at 470-471.

· Barrett J has also noted that the meaning of "in any way related to" is wide: *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587 at 597-598.

· In *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, a claim that the purported termination of the contract was wrongful based on representations made during the course of the contract (involving representation, estoppel and misleading conduct in contravention of the *Trade Practices Act*) was held to be a dispute

"arising out of" the contract. Gleeson CJ (with whom Meagher and Sheller JJA agreed) said that (at 166):

> *"... consistent with the modern policy of encouragement of various forms of alternative dispute resolutions, including arbitration, mediation and conciliation that courts should facilitate, rather than impede, agreements for the private resolutions of all forms of dispute, including disputes involving claims under statutes such as the Trade Practices Act."*

· In *Timic v Hammock* [2001] FCA 74 at [9], Sundberg J stated that:

> "... an expression such as [arising out of or relating to this Agreement] is to be broadly construed so as to include more than disputes about the interpretation or performance of the agreement. By force of the words "or relating to" it includes issues beyond the agreement itself, such as misrepresentation allegedly made before the agreement was entered into, claims in tort and claims under the Fair Trading Act and the Trade Practices Act (Cth)."

· Einstein J stated in *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [26]:

> *"A positive approach to Expert Determination can also be implied from the decisions in Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture (1979) 146 CLR 206 and IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 466, both cases dealing with the construction of arbitration clauses. Each of these cases indicates an acknowledgement of the commercial utility of alternative dispute resolution processes and a willingness on the part of courts to construe dispute resolution clauses in an expansive manner."*

· Consistent with these authorities, the expression "any dispute between the parties in relation to the Key Performance Indicators" should be construed widely.

The dispute falls within the expert determination clause

· These proceedings focus on whether the Auditor should have produced a Retention Certificate which stated that the Key Performance Indicators were satisfied. If such a Certificate was produced, the Plaintiffs were entitled to the Retention Amounts. If not, they were not so entitled.

· The Summons indicates that the Plaintiffs claim:

(a) that some of the Key Performance Indicators were in fact fulfilled;

(b) the facts were such that the Key Performance Indicators should be regarded as being fulfilled.

> This aspect embraces the *Trade Practices Act* claims in paragraphs 64 to 71 of the Summons; and
>
> (c) that the Auditor should have been informed of certain factual matters. This is related to the Key Performance Indicators in two ways: not only is the claim that the Auditor should have been informed of factual matters in order to determine whether the Key Performance Indicators were met, but also because those matters represent a dispute as to proper meaning of the Key Performance Indicators. A dispute as to the meaning of the Key Performance Indicators is a dispute in relation to the Key Performance Indicators.

· These proceedings are embraced by the expression "any dispute between the parties in relation to the Key Performance Indicators".

· The fact that there are elements of the dispute which are based on *Trade Practices Act* rather than the contracts themselves is no impediment to granting the stay: see *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466*; Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160*; Savcor v State of New South Wales* (2001) 52 NSWLR 587; *Timic v Hammock* [2001] FCA 74.

Discretionary factors

· The Court retains a discretion whether to order a stay. However, the Court starts with the proposition that the parties should be held to their agreement. As Barrett J stated in *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587 at [42], citing Dixon J in *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502:

> *"I start with the general proposition that, where parties have by contract agreed to follow a particular dispute resolution procedure, they should be required to adhere to that procedure unless the party wishing to abandon it in favour of resort to the courts can show good reason for that course."*

· Barrett J quoted Gillard J in *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 at [36] that:

> *"the court clearly has a jurisdiction to stay a court proceeding on the simple basis that "a contract is a contract" and the parties should abide by it."*
> See also *Aztec Mining Co Ltd v Leighton Contractors Pty Ltd* (unreported, Murray J, Supreme Court of Western Australia, 23 February 1990).

· It is incumbent on the plaintiffs to show why the matter should not be referred to the Independent Accountant if the Court finds the dispute is embraced by the terms of the clause.

> **Referral to an expert would lead to a more efficient determination of the dispute**

· As Einstein J stated in *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [16]:

> *"Expert Determination is a process where an independent Expert decides an issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the Expert. Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind."*

· Einstein J in *Heart Research Institute v Psiron Ltd* [2002] NSWSC 646 referred to the court's positive attitude to alternative dispute resolution clauses. In particular, he stated (at [24] to [25]):

> *"Clearly the New South Wales Courts have responded positively to the benefits which Expert Determination can entail. In Public Authorities Superannuation Board v Southern International Developments Corp Pty Ltd, NSWSC, 19 October 1987 (unreported), Smart J stated that, in relation to Expert Determination::*
>
> > *"There are many reasons why they may take such a course. They may prefer to have a relatively informal process which they may think is likely to be cheaper and quicker and the decision of an independent consultant who is likely to be familiar with the problems...It is not for the Court to re-write their contract." (at 10)*

· His Honour was prepared to extend the matters which may be considered by Expert Determination to issues of liability and quantum. The arguments that the role of an Expert under such agreements should be limited to those "usually dealt with by experts, for example, questions of value, questions of the work to be done prior to practical completion, quality of work and, presumably, extensions of time" (at 7) were rejected."

· Einstein J expounded the positive contribution that alternative dispute resolution clauses add to the development of case management in Australia (at [81] to [82]):

> *"The positive perception of alternative dispute resolution in case law has accorded with the development of case management in Australian jurisprudence. In New South Wales, for example, the Courts are now guided by Pt1 r3(1) of the Supreme Court Rules 1970 (NSW) which provides that:*
>
> > *"The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings."*
>
> *Indeed, the aims of case management, for example such as ensuring that the parties are on an equal footing; saving expense; dealing with cases in ways which are proportionate to the amount*

> *involved, the importance, the complexity, and the financial position of each party; ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the Court's resources, can seemingly be promulgated through a positive approach to alternative dispute resolution." (see also [83] to [86])*

· It is consistent with the practice of this List, as recognised in Practice Note 100 (at paragraph 24), that alternative dispute resolution be encouraged.

· The Supreme Court of New South Wales' Administrative Guideline entitled "Alternative Dispute Resolution - Mediation and Neutral Evaluation" states:

> "**Benefits of ADR**
>
> There are numerous benefits to using [alternative dispute resolution], including:
>
> - an early resolution of the dispute
> - less cost to the parties involved
> - greater flexibility in resolving the dispute.
>
> ADR can be beneficial even if a resolution is not achieved and the dispute ultimately ends in court, as the process can help to define the real issues in dispute. By better focussing on these issues, the eventual court hearing time and costs to the parties can be reduced."

· The affidavits of Geoffrey Alan McClellan indicate that the costs of conducting litigation by the Defendant may be substantial.

· If the proceedings are stayed and the matter is resolved by the Independent Accountant, there would be no residual dispute between the parties, apart from any dispute that may itself arise from the Independent Accountant process.

· Referring the matter to an Independent Accountant would be conducive to a just, quick and cheap resolution of the real issues of the dispute.

The issues in dispute are susceptible to expert determination

· The matters in dispute between the parties, as defined by the Summons and Defence, are capable of resolution by an Independent Accountant acting as expert.

· The plaintiffs' case is, at its most fundamental level, that if the Auditor had been informed of the matters particularised at paragraph 57 of the Summons, then the Auditor would have, or at least may have, issued a Retention Certificate which certified that the Key Performance Indicators had been met. The Independent Accountant could be informed of these matters, or of the parties' competing views in relation to those factual matters. The fact that parties may have competing views about a matter, and provide those views to an expert, has been considered as not disentitling the reference of a dispute to an expert: *Himbelton Pty Limited v Kumagai (NSW) Pty Limited* (1991) 29 NSWLR 44 at 63E-F (dispute as to terms of a contract to be resolved by Senior Counsel).

· The expert would also be in a good position to apply his or her expertise. The Independent Accountant will for example be able to apply his expertise as an accountant in relation to the following matters:

(a) whether any or all of the business plans prepared and presented by Mr Gordon were substantially similar to those plans prepared prior to the date of the SSA; and

(b) the appropriate criteria to apply concerning the SPG Business KPI, in particular, how to determine whether Mr Gordon "maintained the effectiveness of the SPG Business".

· In relation to questions of law raised in the pleadings as matters in dispute between the parties, the referral of the dispute to the Independent Accountant would either make those matters irrelevant or the Independent Accountant would be capable of resolving those matters.

· The plaintiffs claim that a number of terms should be implied into the relevant agreements that would have compelled the Defendant to inform the Auditor of the matters particularised at paragraph 57 of the Summons. However, it would not be necessary for the Independent Accountant to determine whether those terms should be implied if the Independent Accountant decides to consider the information referred to at paragraph 57 of the Summons: see Gillard J in *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 at [119]. That being the case, the Independent Accountant would need to determine whether the matters particularised at paragraph 57 of the Summons are true and relevant to the Independent Accountant's determination. The Independent Accountant may also wish to consider other factual matters, and his or her own expertise. In effect, whether those terms are to be implied becomes an irrelevant matter. Even if it were relevant, an expert is capable of determining that question (see Gillard J in *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 at [133] to [134] and Barrett J in *Savcor v State of New South Wales* (2001) 52 NSWLR 587 at [44]).

· In relation to the *Trade Practices Act* claims, numerous authorities have held that such claims are susceptible to being referred to expert determination: (see paragraphs ? to ? above.) In addition, an expert may grant the remedies under sections 82 and 87 of the *Trade Practices Act*: *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587 at [36] to [37]. In *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587, Barrett J, in considering an expert determination clause, rejected the submission that *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 could be distinguished on the basis that that case concerned arbitration. As Barrett J stated at [36] to [37]:

> *"The various statutory incidents of and adjuncts to the role of an arbitrator were not in any way the source of the conclusions in GIO v Atkinson-Leighton and IBM Australia. Nor was any underlying assumption that an arbitrator would preside over some form of quasi judicial inquiry. Those decisions turned wholly on what Mason J described in the former as "the real question", namely: "... whether there is to be implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter."*
>
> *That is also "the real question" here in relation to expert determination. It is quite conceivable that parties will refer to an expert the question whether, in the circumstances in which they are*

> *placed, a court would make an order, pursuant to s72(1) and s72(5)(a) of the Fair Trading Act, declaring their contract void, and that they will agree to abide by the expert's decision on that question as if it were an order made by a court under those sections. If such an agreement may be made expressly, it may also arise by implication if the terms of the referral clause so warrant."*

· In *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587, Barrett J stated at [31]:

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

· Barrett J did not refuse to refer the matter to an expert for these reasons: see [40], [48].

No uncertainty in the procedure to be followed

· There is no uncertainty as to the procedure to be followed here – that procedure is to be set by the Independent Accountant: see clause 8(c) of schedule 11 of the ASA at page 70 of exhibit "GAM1"; clause 7.11(c) of the SSA at page 111 of exhibit "GAM1"; *Triarno Pty Ltd v Triden Contractors Ltd* (1992) 10 BCL 305 at 307 per Cole J; *Fletcher Construction Australia Ltd v MPN Group Pty Ltd* (Unreported, NSW Sup Ct, 14 July 1997 per Rolfe J).

Dealing with the referral to an independent expert issue

15 In my view the submissions of the plaintiffs on this issue are of substance. They are generally adopted in what follows.

The matter to which the instant dispute relates

16 One commences by focusing upon the matter which the instant dispute in fact relates to. As the plaintiffs have submitted:

· The plaintiffs sue for both breach of contract and in respect of contravention of the Trade Practices Act.

· It is alleged that various express and implied terms of the relevant contracts were breached by Fairfax and that those breaches deprived Strategic of the opportunity of obtaining the valuable retention amounts under the ASA and SSA. The dispute does not relate to the question of whether *Strategic* satisfied the Key Performance Indicators. Rather, it is about whether *Fairfax* breached its contractual and statutory obligations to Strategic in the manner alleged in the Summons.

· Underpinning these alleged breaches is a set of facts which in truth have nothing to do with the satisfaction or otherwise of Key Performance Indicators or the ascertainment or adjustment of amounts due by one party to the other or any dispute in relation to the calculation of such amounts. Rather they have to do with how the parties dealt with each other over a particular time period, and in particular, whether or not certain representations were made or conduct took place.

· As a result of Fairfax having filed its defence in these proceedings, it is possible to appreciate the true nature of the areas of factual dispute in this case. In particular, Fairfax denies the following allegations [the references are to paragraphs of the Summons]:

> 23. In or about February 2000 Mr Gordon was instructed by Mr Gill of Fairfax to hire two new Business Development Managers to assist in the preparation of the business plans specified in the First KPI (the Business Plans).
>
> Particulars
> Various conversations between Michael Gill and Alistair Gordon in or about February 2000.
>
> 24. The two people employed by Mr Gordon to assist in the preparation of the Business Plans were Daphne Chung and David Penman (the Team).
>
> 25. It was agreed that the Business Plans were to be developed by the Team working with each of the Group Publishers for each suite of magazines within the SPG Business (as defined); namely, Justin Randles for the *Marketing* titles, Peter Roberts for the *BusinessOnline* titles, and Grant Heinrich for the *MIS* titles.
>
> Particulars
> Various conversations between Michael Gill and Alistair Gordon in or about February 2000.
>
> 26. In or about early 2000 the Team produced a template for the Business Plans in a form substantially similar to that previously used by Mr Gordon in preparing business plans for the SPG Business (as defined) prior to the Completion Date (the Template), the purpose of which was to ensure compliance with the First KPI. This template was approved by Mr Gill and his business development officer Mahesh Ramanathan in early 2000.
>
> Particulars
> Various meetings between Michael Gill and Alistair Gordon during early 2000.
>
> 27. In or about January 2000 the business plan for *Marketing Australia*, which was prepared in accordance with the First KPI, was submitted to Fairfax by Mr Randles and Tom Iggulden, the launch editor for approval in accordance with the First KPI.

Particulars

Meeting in or about January 2000 in Mr Gill's Sydney office.

30. In or about July 2000 Mr Gordon and Mr Davison were made responsible for, in addition to their existing responsibilities as outlined in paragraph 29 above, the launch of the following magazines: *Business Online Australia*, *Business Online New Zealand, Strategic Research* in the United Kingdom and *Asset* magazine in Australia (the Launches).

Particulars

1. Various meetings between Michael Gill, Alistair Gordon and Ken Davison during July 2000.

2. The budgets for 2000/2001 for the Strategic Publishing Group Division of Fairfax which make allowance for the Launches.

31. On or about 20 July 2000 the business plan for *Business Online Australia*, which was prepared in accordance with the Template and the First KPI, was submitted to Fairfax for approval in accordance with the First KPI.

Particulars

The business plan was submitted by Peter Roberts during a conference held in Sydney on or about 20 July 2000 which was attended by 40 Fairfax executives including Michael Gill and Jeff Harvie.

32. In or about September 2000, the business plan for *Marketing Asia,* which was prepared in accordance with the Template and the First KPI, was submitted to Fairfax for approval in accordance with the First KPI.

Particulars

Meeting in Singapore in or about September 2000 between Alistair Gordon, Daphne Chung, Kenneth Phua, Jeff Harvie and Michael Gill.

35. On or about 3 October 2000 Mr Gill informed Mr Gordon that:

(a) all work on the development of the Business Plans was to cease;

Particulars

Telephone conversation between Michael Gill and Alistair Gordon or about 3 October 2000.

· In addition to these denials, the Fairfax defence is seen to raise a number of other factual issues which it is to be expected will be highly contentious: see, for example, paragraph 36 of the defence and paragraph 43. It is as I accept, scarcely to be assumed that the parties intended that an accountant would be the person who would determine such factual disputes. An accountant's training lies in completely different areas.

· So also, as I accept, is it fair to say that difficult questions of construction and legal principle are likely to be involved. Fairfax has, for example, denied the existence of the two implied terms relied upon by Strategic.

Construction of the expert determination clause

17 The substantial question for determination on the defendant's motion involves a decision as to construction of this clause. Here again the plaintiffs' submissions are adopted as of substance.

18 As the plaintiffs have submitted, in every case in which a stay of proceedings is sought, the critical task is to analyse the language of the clause – whether it be a jurisdiction, arbitration, ADR or expert determination clause – in the light of the contract as a whole in accordance with the objective theory of contract to discern the parties' proper intentions.

19 I accept as correct the plaintiffs' submissions that the clause invoked in the present case is different *in kind* from most of those clauses in issue in the cases referred to in the Fairfax submissions. It is not a jurisdiction clause; it is not an arbitration clause (cf. *IBM, Francis Travel, The Mill Hill*); nor is it an ADR clause (cf. *The Heart Research Institute*, *Hooper Baillie*, *Savcor*).

20 I further accept as correct the proposition that the nature of the clause as an 'expert determination clause', bears upon its proper construction: *Badgin Nominees Pty Limited v Oneida Limited* [1998] VSC 188, *Cott UK Ltd v F.E. Barber Ltd* [1997] 3 All ER 540. In the former case, Gillard J. [52-54] said:

> "The distinction between arbitration and expert valuation was considered by Lord Esher MR in two cases at the end of the last century. In Re *Dawdy and Hartcup* (1885) 15 QBD 426 at 430 his Lordship said -
>
> > "It has been held that if a man is, on account of his skill in such matters, appointed to make a valuation, in such manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially: he is using the skill of a valuer, not of a judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators but only valuers. They have to determine the matter by using solely their own eyes and knowledge and skill."
>
> In the later case his Lordship said -
>
> > "If it appears, from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him,

> then the case is one of arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner. On the other hand there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of mere valuation. There may be cases of an intermediate kind where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence and arguments." [cf *Re Carus v Wilson and Greene* (1887) 18 QBD 7 at 9. Gillard J also referred to *Ajzner v Cartonlux Pty Ltd* [1972] VR 919 especially at pp.927-931].

21 Further and as the plaintiffs also submitted, the clause invoked in the present case is also different *in form* from most of those clauses in issue in the cases referred to in the Fairfax submissions:

· It is limited in its scope by reference to a particular subject matter, namely Key Performance Indicators.

· It may be compared, for example, to the familiar language of the arbitration clauses in *IBM* and *Francis Travel* which referred to disputes arising out of or in relation to this *agreement* i.e. no attempt was made by the parties to limit the subject matter or scope of the submission other than by reference to the agreement as opposed to a concept to be found within the agreement.

· This is only accentuated in the present case by reason of the presence of a jurisdiction clause by which the parties expressly contemplate litigation in the Supreme Court of New South Wales, a key textual indicator that they did not contemplate that all disputes would come before the Independent Accountant.

22 Other textual indications militating against a finding that the parties objectively intended a dispute of the kind disclosed by the pleadings would be resolved by the Independent Accountant are, as I accept:

· the profession of the expert (an accountant); and

· the references in the clauses extracted above to disputes as to the *amounts* and *balance* payable.

23 Further such textual indications sought to be relied upon were:

· the time frame (14 days) within which all disputes were to be settled, a matter which gives insight into the nature of the disputes likely to fall to be resolved by the accountant; and

· the finality of the procedure in a context where millions of dollars hang upon whether or not Fairfax has breached its obligations under the ASA and the SSA and under the TPA – it is not lightly to be assumed that the parties intended that so serious a financial consequence would be resolved once and for all within 14 days with no rights of appeal etc.

24 The defendant submitted that upon the proper construction of the subject agreements, the references in clause 7.11 (a) and (b):

· as to subclause (a), to either party having an entitlement to refer the disagreement to an independent accountant with a request that the independent accountant make a decision on that matter within 14 days; and

· as to subclause (b), to the obligation of the purchaser to pay to the vendor that portion of the research business retention or the retention which was not in dispute,

are insofar as the bracket of 'retention' provisions [dealt with by clauses 7.5, 7.5A, and 7.6-7.10] are concerned, seen to be inapplicable to disputes between the parties in relation to the key performance indicators .

25 The close submissions advanced by the defendant in this regard sought to distinguish between on the one hand, the above described bracket of the retention provisions and on the other hand, the bracket of retention amount provisions dealing with obligations in relation to the 'research business target' [dealt with by clauses 7.1, 7.1A and 7.2-7.4] ["the research business target bracket"].

26 The particular significance of this close examination was for the reason that clause 7.6 includes an acknowledgement [clause 7.6 (c)] that any dispute between the parties in relation to the key performance indicators would be referred to the independent accountant in accordance with the procedures set out in clause 7.11 (c) to (f).

27 To my mind the matter is effectively foreclosed by the fact that clause 7.11 in terms deals with any disagreement by the vendor with any amount contained *either* in the Certificate or in the Retention Certificate. If the parties cannot agree on that amount within seven days of the 'adjustment date' either party may refer the disagreement about the disputed amount to an independent accountant with a request that the independent accountant make a decision on that matter within 14 days.

28 The document has to be construed in its entirety and the reference in clause 7.6 (c) to a dispute of the type described, being required to be referred to the independent accountant *"in accordance with the particular procedure"* simply differentiates for relevant purposes, aspects of what the draughtsman regarded as the operative "procedure". Clause 7.11 (a) is clearly engaged where the parties cannot agree on an amount to be contained in the '*retention certificate'*.

29 The analysis does throw up a question as to what work if any, on the plaintiffs' submissions, would be left for clause 7.6 (c). Dr Bell responded by positing for example, the possibility that the auditor during the course of carrying on his or her work had indicated that he or she, in the task of the certification under way, was to announce a particular mode of measuring staff quality and effectiveness of the particular business required to be maintained. In the event that one of the parties did not agree with this approach as a fair working definition it seems to me, as Dr Bell submitted, a clause 7.6(c) situation would have occurred. A dispute would be seen to have arisen "*in relation to key performance indicators"* so that the view of the auditor could be referred to an independent accountant for an assessment in accordance with clause 7.6 (c).

30 Ultimately this construction is by no means determinative of the motion presently before the court. And even if the 14 day reference could not be seen *in terms* to apply to clause 7.6 (c), it remains a clear indicator that the parties intended *generally* that the independent accountant would deal *expeditiously* with *accounting type* issues.

31 In addition, the very fact that the Independent Accountant was appointed as an expert and expressly not as an arbitrator gives a strong insight into the role and types of disputes that he or she was intended to perform: cf *Re Dawdy and Hartcup; re Carus v Wilson and Greene*; *Ajzner v Cartonlux*.

32 Mr Wood submitted as follows:

> "We say, ultimately, the way it's pleaded and the truth is pleaded accurately, that really one is driving ultimately at the key performance indicators and their satisfaction. I say that because the way in which the parties have dealt with each other in terms of the allegations of the plaintiff in large measure, not [exclusively], I agree, will disappear if the expert determination clause is triggered and enforced by way of a stay. Because everything to do with the auditor in terms of communication or miscommunication to him or not providing him with something that was alleged to be obligatory to provide, it simply falls away.
>
> What will remain, and we don't pretend that it will not be an issue if it goes via the independent expert clause, is that the independent expert will have to determine the way in which he or she proposes to resolve a contention by my learned friend that his clients were told they didn't have to prepare a plan or more than one plan and *he can do that by arbitration*; he can do it by submissions. It's entirely within his province because the clause picks up a full empowerment for him to do that or, indeed, he could do it simply upon the provision of the material or in any way that he sought fit."
> [Transcript 40] [emphasis added]

33 Clearly the submission insofar as suggesting that the independent expert may act as an arbitrator cannot be accepted. Clause 7.11 (d) expressly provides that the independent accountant is to act as an expert and *not* as an arbitrator. And in that capacity it is plain that he or she will simply not have as a matter of expertise, the specialised knowledge with which to resolve the cross contentions as to the precise communications between Mr Gordon and Mr Gill, and other like factual issues.

34 In *Cott,* a stay of proceedings by reason of an expert determination clause was refused on reasoning which is clearly analogous to the circumstances of the present case. Of particular relevance in the decision declining to stay the proceedings was the fact that the case involved difficult questions of contractual construction (cf. clause 7.6 (b) in the present case), that there were questions involving breach of contract and damages and that the issues generally raised a number of complex legal and factual matters. In addition, the valuer had no experience in the matters in dispute. As the plaintiffs have pointed out, in *Bagdin*, Gillard J in commentating on *Cott* said:

> "… the dispute raised something more than the mere issue of valuation. There were complex legal and factual issues raised which were to be left to a layman who was not qualified to deal with them and without any guidance as to how he was to proceed. Where there are a number of issues involving questions of law and fact may be the court should not grant a stay especially if the issues are the type of issues which are not suitable for determination in an informal dispute resolution procedure."

35 In *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1998) 90 FCR 1, [Full Court of the Federal Court], the Court refused to refer to arbitration (as being outside the scope of the

clause) a claim under section 52 of the Trade Practices Act. The Court referred to the inherent unlikelihood, as a matter of the parties' contractual intentions, *objectively derived*, that such a dispute would have been intended to be resolved by the type of arbitrators who would be appointed under the charter party in London to resolve the parties' dispute. Beaumont J. said:

> "This conclusion is reinforced by a consideration of the practicalities which the parties clearly had in mind. In choosing arbitrators with commercial backgrounds, the parties indicated a choice for the practical solution of disputes of the kind referred to the arbitrators. But to read cl 34 as contemplating a reference to such persons of a problem of considerable private international legal complexity, let alone the application of a foreign (Australian) law in the form of the trade practices legislation, would seem to contradict a desire for a practical outcome. We should not attribute such a bizarre intention to these parties. It is not likely that they intended to refer to these arbitrators in London any dispute however remotely connected with the charter party or the bill of lading and however special its legal characteristics in terms of English law. " (at 7)

36 It may be observed that the point of principle flowing from *IBM* and *Francis Travel* is not raised here, *viz.* whether or not an arbitrator *may* entertain a TPA claim. The clause here invoked is not an arbitration clause nor anything like it. The parties plainly did not intend that an accountant would resolve a TPA claim upon which millions of dollars potentially turn, whether within 14 days or at all.

The dispute is outside the clause in whole or at least in part

37 The Court's holding is that on a proper understanding of the parties' dispute (now clarified by the defence) and on a proper construction of the expert determination clause, *that dispute* does not or, alternatively does not *as to its entirety*, fall within the scope of the expert determination clause.

38 The claim properly characterised and understood, is not one "relating to Key Performance Indicators".

39 The objective intention of the parties, as gleaned from the terms of their agreement, was that the types of dispute which were set forth in the dispute resolution clause were those capable of being appropriately resolved in a very short space of time by an independent accountant who was not to act as an arbitrator. The disputes in the present case are simply not of that character.

40 Putting the matter in another way, looking at the matter objectively, the intent of the parties was not that claims of the kind made in the Summons including claims under the TPA would be resolved by an accountant in accordance with the procedure set down in clause 7.11 or *at all*.

Discretion

41 I note the plaintiffs' submission that the Court has no power to refer any parts of the dispute falling outside the scope of the clause to the independent accountant, the submission being that power in this regard ultimately derives from the parties' agreement, on its proper construction.

42 Even if the Court has this power [as to which it is unnecessary to express a view] and even if it be correct to say that *some* aspects of the dispute fall within the expert determination clause whilst others do not, it would be inappropriate to exercise that power as to part of the proceedings for the reason that the proceedings would then be inappropriately fragmented.

Security for costs

43 There is no issue but that it is appropriate for an order for security for costs to be made. The only question concerns the precise regime and importantly the amount which the proper exercise of the discretion should require be paid by the plaintiffs.

44 The principles which obtain are not in issue. They were set out in *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 (at [744] et seq and are presently adopted.

45 The formal position is that:

· The defendants have made an open offer to accept an amount of $400,000 as security for costs by way of bank guarantee upon the basis that the amount is to relate only to the period up to one month prior to trial and that the defendant be at liberty to apply for further security in relation to the period up to one month prior to trial at any time;

· The plaintiffs have made an open offer to provide security for costs by way of bank guarantee in the amount of $200,000 which amount is offered in relation to work carried out in the period leading up to the commencement of the trial.

46 The defendant in overview written submissions identifies its current estimate of its costs (including trial) as $1,413,250. Mr McClellan who is a partner at Freehills has made two affidavits which are relied upon in support of this estimate. He has been cross-examined in relation to certain of the assumptions said to underpin this estimate. Standing back from all of the detail it must be said that the estimate appears to be particularly excessive. The difficulty of course concerns the detail and the cross-examination threw up a real issue between the parties as to which matters would be likely to be litigated and for what reasons and to what extent and as to how would it be appropriate for the defendant to conduct itself in preparing for the litigation.

47 Ms Platford, a partner at Gilbert + Tobin solicitors for the plaintiffs has sworn an affidavit in these proceedings dated 27 October 2003. In paragraphs 8 to 33 of her affidavit, Ms Platford challenges the estimates put forward by Mr McClellan. Ms Platford asserts that some of the estimates are excessive, both as to time and as to cost. In general terms the reasons put forward by Ms Platford to support her assertions include concern about duplication of tasks, unreasonable estimations of size of tasks to be carried out and a comparison of the costs and tasks undertaken in the preparation of the plaintiffs' case. Ms Platford's affidavit travels through an analysis of each of the seven items identified by Mr McClellan in his affidavit of 7 November 2003. This analysis is dealt with in greater detail in what follows.

48 It should be noted that in her affidavit of 27 October 2003, Ms Vine-Hall made the following observation:

> "The categories of work described by Mr McClellan are very broad and it is not possible for me to assess whether the time estimate would be reasonable." (para 22)

49 Ms Vine-Hall highlighted a number of queries she had with the bases for the calculation of Mr McClellan. These include:

· the fact that there is no indication as to how much time has been spent on each task within the categories or by which level of practitioner (para 24);

· the inclusion of tasks such as "strategic advice" and "project management", which would be unlikely to be allowed by an assessor (para 23);

· the fact that there has been no indication of the actual cost of the work already undertaken (para 26); and

· a question of what constitutes work within the vague category of "preparation for trial" in light of separate categories covering discovery and preparation of witness statements (paras 29-30).

50 Even in approaching the detail it has to be recalled that it is generally appropriate to discount the amount of security to be the subject of an order to cope with uncertainties.

51 There were in evidence before the Court two tables estimating costs up to and including trial. These were prepared by Mr McClellan and annexed to his affidavit of 7 November 2003.

52 The first table (annexure F to the affidavit of 7 November 2003) provides a revised estimate of Mr McClellan ("the McClellan Estimate") calculated on the basis of the following charge out rates (per hour):

Senior counsel	$500
Junior counsel	$300
Partner	$600
Senior lawyer	$350
Junior lawyer	$250
Paralegal	$150

53 The second table, prepared "for the sake of comparison", creates an estimate based on the charge out rates Ms Vine-Hall considers the defendant would by likely to recover for work undertaken ("the Vine-Hall Estimate"). These rates (per hour) are as follows:

Senior counsel	$500
Junior counsel	$300
Partner	$350
Senior lawyer	$275
Junior lawyer	$200
Paralegal	$100

> [I note that in Ms Vine-Hall's affidavit of 27 October 2003 at para 16, the rate for senior counsel was stated at $550. Mr McClellan applied the rate of $500 in the Vine-Hall Estimate, being the actual rate charged by senior counsel]

54 The two estimates are based on time estimates put forward by Mr McClellan. The time estimates require to be approached with some care as the cross-examination exposed a degree of imprecision on a number of matters

55 The tables are broken down into 7 items/stages. Each of these items and the estimated costs in the McClellan Estimate and the Vine-Hall Estimate [to which I have added the time estimate in parentheses] are as follows:

1. **Pleadings and initial steps** (including drafting defence, considering cross-claim, meeting with client, counsel, witnesses, legal research; strategic advice; project management)

McClellan Estimate:	$73,000.00
Vine-Hall Estimate:	$55,500.00

Time estimates	*number of hours*
Senior Counsel	30
Partner	40
Senior lawyers	60
Junior lawyers	40
Paralegal	20

2. **Discovery** (including settling categories of discovery, reviewing documents, considering claims for privilege, preparing list, providing inspection, inspecting documents provided by the plaintiffs)

McClellan Estimate:	$141,500.00
Vine-Hall Estimate:	$105,500.00

Time estimates	*number of hours*
Partner	10
Senior lawyers	80
Junior lawyers	250
Paralegal	300

3. **Preparation of evidence** (including meeting with client, counsel, witnesses and expert; reviewing documents; preparing statements; settling statements)

McClellan Estimate:	$217,000.00
Vine-Hall Estimate:	$170,250.00

Time estimates	*number of hours*
Senior Counsel	20
Junior Counsel	60
Partner	50
Senior lawyers	250
Junior lawyers	250
Paralegal	60

4. **Interlocutory hearings** (including directions hearings)

McClellan Estimate:	$64,000.00

Vine-Hall Estimate: $52,000.00

Time estimates	*number of hours*
Senior Counsel	20
Junior Counsel	40
Partner	20
Senior lawyers	40
Junior lawyers	40
Paralegal	40

5. Preparation for trial (including meeting with client, counsel, witnesses and expert; legal research; strategic advice; preparing further evidence)

McClellan Estimate: $297,250.00
Vine-Hall Estimate: $244,875.00

Time estimates	*number of hours*
Senior Counsel	40
Junior Counsel	40
Partner	20
Senior lawyers	50
Junior lawyers	70
Paralegal	40

6. Conducting trial (including attendance at court, meeting with client, counsel, witnesses and expert)

McClellan Estimate: $370,500.00
Vine-Hall Estimate: $297,000.00

Time estimates	*number of hours*
Senior Counsel	50
Junior Counsel	50
Partner	50
Senior lawyers	60
Junior lawyers	100
Paralegal	50

7. Disbursements (general disbursements)

McClellan Estimate: $250,000.00
Vine-Hall Estimate: $250,000.00

TOTAL

McClellan Estimate: $1,413,250.00
Vine-Hall Estimate: $1,175,125.00

56 The issues of concern raised by Ms Platford in relation to the estimates for each item can be summarised as follows:

Item 1 – pleadings and initial steps

Based on a comparison of the number of hours spent (junior counsel – 7 hours; partner – 25 hours; mid-level lawyer – 45 hours) and the cost ($33,350) of the work undertaken in preparation of the plaintiff's case during the "pleading and initial steps" stage, Mr McClellan's time estimate is said to be questionable. (paras 11-14)

Item 2 - discovery

Based on the scope of issues for determination in the proceedings and the time period relevant to the issues, the estimate of time and resources to discovery tasks is said to be "particularly excessive". In particular, Ms Platford deposes:

> "…I believe that the estimate of time for junior lawyers at 250 hours and paralegals at 300 hours, which equates to approximately 69 full days, is not only unlikely to be necessary, but also involves duplication as the tasks performed by them are likely to be substantially the same." (para 19)

Item 3 – preparation of evidence

The time estimate for this item is said to be excessive, when examined in light of the key people whom the defendant is said to be likely to require to give evidence, and their relative availability. In particular she deposes:

> "23. In the Estimate, allowance is made in Item 3 for time spent interviewing witnesses. Allowance is also made in Item 1 for interviewing witnesses. Whilst I accept that the preparation of evidence will require further and more detailed interaction with witnesses, I believe that the estimate of 250 hours for both a senior lawyer and a junior lawyer at the preparation of evidence stage is excessive. This equates to 31 days for each. That is especially so in circumstances where a further 50 hours, or nearly 7 full days, is permitted for a partner, 60 hours, or nearly 8 full days, for junior counsel, and 20 hours, or nearly 3 full days, for senior counsel."

Item 4 – Interlocutory hearings

Concern is expressed about the allocation of tasks between the levels of practitioners (for example, counsel and partners) and the possibility of duplication of work. Ms Platford also expresses the view that there are unlikely to be any more substantive interlocutory proceedings in this matter. (24-25)

Item 5 – preparation for trial

Ms Platford estimates that the trial will take one week. However, looking at Mr McClellan's three week estimate Ms Platford challenges the proposition that senior and junior counsel will spend three weeks preparing for a three week hearing and also questions the possible overlapping of tasks by junior lawyers and paralegals. (26-29)

Item 6 – conducting the trial

In paragraph 32 of her affidavit, Ms Platford states:

> "In my experience, a party would not usually be able to recover the costs incurred in having a partner, senior lawyers, junior lawyers, and paralegals, in addition to junior and senior counsel, working exclusively on the one matter during the period of a trial."

Item 7 - disbursements

A Challenge is made to the lack of explanation given about the type of disbursements that might be incurred to warrant an estimate of $150,000. Ms Platford puts forward an estimate of $50,000.

[I note that Mr McClellan's estimate for disbursements has been increased to $250,000 since Ms Platford swore her affidavit]

57 Standing back from the detail in my view the proper exercise of the Court's discretion is to presently order that security for costs in the sum of $600,000 be provided in two tranches:

· An initial amount of $300,000 by way of bank guarantee to be provided within 14 days;

· A further payment or bank guarantee covering an amount of $300,000 to be provided on or before 31 May 2004.

58 Parties are always at liberty to apply for additional security for costs in the event that circumstances change. One must however recall that the amount in issue in the proceedings is only $2 million.

I certify that paragraphs 1 – 58 are a true copy of the reasons for judgment herein of the Hon. Justice Einstein given on 4 December 2003

_____

Susan Piggott
Associate
4 December 2003

Corrigendum: to substitute the date 31 May 2004 in place of the date 31 March 2004 in paragraph 57

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Susan Piggott
Associate
4 December 2003

LAST UPDATED: 09/12/2003