Supreme Court

New South Wales

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| Case Name: | Empire Glass and Aluminium Pty Limited v Lipman Pty Ltd |
| Medium Neutral Citation: | [2017] NSWSC 253 |
| Hearing Date(s): | 8 March 2017 |
| Decision Date: | 17 March 2017 |
| Jurisdiction: | Equity - Technology and Construction List |
| Before: | Ball J |
| Decision: | The defendant's notice of motion filed 30 January 2017 dismissed with costs. |
| Catchwords: | CONTRACTS – construction – dispute resolution clause – requirement under contract that expert determination be final and binding "unless a party gives notice of appeal" within 15 days – whether contractual right to litigate arises<br><br>PRACTICE AND PROCEDURE – notice of motion – application for permanent stay or dismissal of proceedings – whether dispute resolution clause gives rise to right to have dispute determined by the court |
| Cases Cited: | Cessnock City Council v Aviation and Leisure Corporation Pty Ltd [2012] NSWSC 221<br>Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40; [2008] 1 Lloyd's Rep 254<br>Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160; [1996] ATPR 41-489<br>Lipman Pty Ltd v Emergency Services Superannuation Board [2011] NSWCA 163 |
| Category: | Procedural and other rulings |

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| Parties: | Empire Glass and Aluminium Pty Limited (Plaintiff\|Respondent)<br>Lipman Pty Ltd (Defendant\|Applicant) |
| Representation: | Counsel:<br>I D Faulkner SC (Plaintiff\|Respondent)<br>N Kidd SC with B Le Plastrier (Defendant\|Applicant)<br><br>Solicitors:<br>Dentons Australia Pty Ltd (Plaintiff\|Respondent)<br>Vincent CCL Pty Ltd t/as Vincent Young (Defendant\|Applicant) |
| File Number(s): | 2016/380549 |
| Publication Restriction: | None |

# JUDGMENT

## Introduction

1 The issue with which this judgment is concerned is whether, on the correct construction of a dispute resolution clause contained in a contract between the plaintiff, Empire, and the defendant, Lipman, the determination of disputes between the parties by an independent expert appointed in accordance with the contract is binding on them or whether Empire is entitled to have those disputes determined by the court.

## Background

2 By a contract dated 21 November 2014, Empire agreed to supply Lipman with design, supply, construction and associated works for the refurbishment of the lobby of 580 George Street, Sydney for a contract price of $3,750,000 excluding GST (***the Contract***). Clause 42 of the Contract contains a dispute resolution mechanism. Clause 42.1 relevantly provides:

> **Notice of dispute**
>
> If a difference or dispute (together called a *'dispute'*) between the parties arises out of or in any way in connection with the subject matter of the *Subcontract*, including a *dispute* concerning:
>
> (a) a *Subcontract Superintendent's direction*; or
>
> (b) a claim;

then either party shall, by hand or by registered post, give the other and the *Subcontract Superintendent* a written notice of *dispute* adequately identifying and providing details of the *dispute*.

…

3 The Contract then provides for the dispute to be referred to nominated senior executives who are to meet and to undertake genuine and good faith negotiations. If they fail to resolve the dispute, cl 42.3 requires the dispute to be referred for expert determination. Clauses 42.4 to 42.10 set out certain matters concerning the expert determination process, including how the expert is to be selected, the parties' agreement that the determination is not an arbitration and that the expert not an arbitrator and the procedures to be followed by the expert. They also deal with costs and the liability of the expert.

4 Clauses 42.11 and 42.12 provide:

> **42.11 Determination of expert**
>
> The determination of the expert:
>
> (a) must be in writing;
>
> (b) will be:
>
> (i) substituted for the relevant *direction* of the *Subcontract Superintendent*; and
>
> (ii) final and binding,
>
> unless a party gives notice of appeal to the other party within 15 *Business Days* of the determination; and
>
> (c) is to be given effect to by the parties unless and until it is reversed, overturned or otherwise changed under the procedure in the following subclauses.
>
> **42.12 Litigation**
>
> If the determination of the expert does not resolve the *dispute* then, subject to clause 42.11, either party may commence proceedings in relation to the *dispute*.

5 Disputes arose between Empire and Lipman concerning the performance and termination of the Contract.

6 On 4 March 2016, 27 May 2016 and 12 August 2016, Empire served notices of dispute on Lipman in accordance with cl 42.1 and, on 18 April 2016, Lipman served a notice of dispute on Empire in accordance with that clause. As required by cl 42, the disputes raised by the notices were referred to senior executive negotiation and then to expert determination. Two expert

determinations were made by the expert on 29 November 2016. It is common ground that those determinations were made in accordance with the Contract.

7 On 19 December 2016, Empire, by its solicitors, gave notice of an appeal in accordance with cl 42.11. On the same day it commenced and served these proceedings seeking to re-agitate the issues considered by the expert.

8 On 30 January 2017, Lipman filed a notice of motion seeking a permanent stay or dismissal of the proceedings on the grounds that the disputes between the parties had been resolved by the expert determination and it is not open for Empire to re-agitate those issues before the court. It is that motion which gives rise to the issue to be addressed in this judgment.

**The parties' contentions**

9 It was common ground that the court should give effect to cl 42 so that if, on its true construction, it did not permit the commencement of court proceedings, then these proceedings should be stayed: see *Cessnock City Council v Aviation and Leisure Corporation Pty Ltd* [2012] NSWSC 221 at [31]. The dispute between the parties concerned the correct construction of cl 42 and of cls 42.11 and 42.12, in particular, not whether the court should give effect to those clauses by granting a stay if that is what they require on their correct construction.

10 Lipman, relying on the decision of the Court of Appeal in *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163, contends that the effect of cl 42.11 is to make the determination of the expert binding except to the extent that one party or the other gives notice of appeal within 15 days and the precondition to the operation of cl 42.12 is satisfied. According to Lipman, the precondition is satisfied only if the determination of the expert does not resolve the *dispute*. That will only happen when the determination is not in accordance with the Contract.

11 In *Lipman Pty Ltd v Emergency Services Superannuation Board*, the dispute resolution clause in question (which was also cl 42 of the relevant contract) was in similar terms to cl 42. Clause 42.10 was in the same terms as cl 42.11 of the Contract. Clause 42.11 was in these terms:

**Executive Negotiation**

If a notice of appeal is given under clause 42.10, the dispute is to be referred to the persons described in Annexure Part A who must:

(a) meet and undertake genuine and good faith negotiation with a view to resolving the dispute; and

(b) if they cannot resolve the dispute or difference, endeavour to agree upon a procedure to resolve the dispute.

12 A notice of appeal was given under cl 42.10 and the persons described in Annexure Part A met, but were unable to resolve the dispute or to agree upon a procedure to resolve the dispute. Three and a half years later, the plaintiff commenced proceedings seeking to recover the amount in dispute. The trial judge (Hammerschlag J) concluded that the procedure set out in cl 42.11 had been exhausted. It did not result in the expert determination being reversed, overturned or otherwise changed. The result was that the expert determination remained binding.

13 On appeal, the plaintiff argued that, on the correct construction of cl 42.10, the determination ceased to be binding if a notice of appeal was served. Allsop P (with whom Young JA and Tobias AJA agreed) rejected that argument. In doing so, he approved (at [6]) the trial judge's adoption of the liberal approach to the interpretation of dispute resolution clauses, which he pointed out was consistent with decisions such as *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 and *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254. That approach gave effect to the parties' intention. As Allsop P explained (at [8]):

> To adopt the liberal approach is not to depart from the meaning of the words chosen by the parties. Rather, it is to give effect to a coherent business purpose through an assumption commercial courts around the world will make that parties are unlikely to have intended multiple venues or occasions for the resolution of their disputes unless they say so.

14 In Lipman's submission, consistently with that approach, the precondition to the operation of cl 42.12 of the Contract must be read narrowly to refer to a circumstance in which the determination does not resolve the dispute because it was not in accordance with the Contract and therefore void. In its submission, if the precondition is interpreted as applying in every case where a notice of appeal is served, the result would be that either party would be free to make the expert determination process worthless by the simple expedient of serving

a notice of appeal. The court should not readily conclude that that is what the parties intended. That submission is said to be reinforced by the words "subject to clause 42.11" in cl 42.12. Those words would be unnecessary if the precondition itself was interpreted as making the operation of cl 42.12 subject to cl 42.11.

15 Empire accepts that under cl 42.11 of the Contract, a determination of an expert made in accordance with the Contract is final and binding except to the extent that a notice of appeal is given in the time specified in cl 42.11 and the decision is reversed, overturned or otherwise changed under the procedure in the following subclauses. That procedure involves the commencement of court proceedings in relation to the relevant disputes.

16 The precondition in cl 42.12 is not to be understood as imposing some independent condition which depends for its operation on the dispute not being resolved in some undefined sense. Rather, the words of the precondition are merely words of connection between the two subclauses. On this interpretation, the precondition is to be interpreted as saying that if the dispute is not resolved because one party or the other has triggered the appeal process, then the consequence set out in the subclause follows. The words "subject to clause 42.11" make it clear that the parties are still to give effect to the determination unless it is "reversed, overturned or otherwise changed".

17 The interpretation for which Empire contends is said to be supported by the definition of the "date for practical completion", which specifies a date but then says that "if any *EOT* [extension of time] for *practical completion* is directed by the *Subcontract Superintendent* or allowed in any expert determination or litigation, it means the date resulting therefrom".

18 According to Empire, that definition contemplates the possibility of litigation which could only occur if its interpretation of cl 42.12 is correct. However, whether that is so is doubtful. Even on Lipman's interpretation of cl 42.12, litigation that has the effect of altering the date of practical completion is still possible, but in much narrower circumstances.

**Consideration**

19 I prefer the interpretation advanced by Empire.

20 In my opinion, this is a case where the parties have made it clear that they intended the appeal process to involve a rehearing by a court.

21 It is relevant to bear in mind that the question in this case is not whether the parties should be taken to have agreed that the dispute resolution process they have chosen should apply in some situations, but not others or that it should operate in parallel with normal court processes. As Allsop P pointed out in *Lipman Pty Ltd v Emergency Services Superannuation Board*, in cases such as those, there are compelling reasons for adopting a liberal approach to the construction of the relevant clause so that it applies to all disputes between the parties which are connected with the contract in question.

22 However, in the present case, there is no question that the dispute resolution clause is broadly drafted and applies to all the disputes between the parties. Rather, the issue is what that dispute resolution clause requires. Although there are commercial reasons for thinking that the parties may have preferred to avoid the necessity of re-agitating the issues between them, it is plain that it was also important to them to incorporate an appeal process in the mechanism they adopted. An appeal process that involves a fresh hearing is not uncommon, particularly in the context where the initial decision is undertaken by a specialist tribunal. It is not obvious that the parties must be taken to have intended to reject that process in this case. The Contract was for a substantial sum of money. Empire was liable for liquidated damages of $3,000 per day capped at 30 percent of the contract sum and liquidated damages payable under the head contract at $3,000 per day. It would not be commercially unreasonable to incorporate a substantive right of appeal into their dispute resolution process in those circumstances.

23 In my opinion, the difficulty with the interpretation advanced by Lipman is that it does not sit easily with the words of the Contract and does not really provide for a right of appeal at all.

24 Clause 42.11(c) states that the parties must give effect to the determination until it is "reversed, overturned or otherwise changed" under the procedure in cl 42.12. If Lipman is right, cl 42.12 only operates if the determination does not resolve the dispute in the sense that the determination is itself not effective to

do so because it was not made in accordance with the Contract and is therefore void. But it seems odd in those circumstances that the parties should agree that they would nevertheless give effect to it until it is reversed, overturned or otherwise changed under cl 42.12. If the true position is that a right of appeal only exists in respect of a determination that is void because it does not comply with the Contract, it is difficult to make sense of an agreement that the parties are bound by the determination until it is reversed, overturned or otherwise changed.

25 Moreover, Lipman accepts that if the determination does not resolve the dispute in the sense for which it contends then, irrespective of the operation of cl 42.12, one party or the other would be liable to commence court proceedings for a declaration that the determination was void because it did not comply with the Contract. Consequently, on its interpretation, the appeal rights conferred by cl 42.12 do not extend the circumstances in which the determination of the expert could be challenged, but only the relief that could be obtained. In claiming that the determination does not comply with the Contract, the court could only declare the determination void. It could not substitute its own views for those of the expert. However, it could do so under cl 42.12. It is doubtful that the parties intended to confer on themselves a right of appeal which effectively only expands the remedies otherwise available to them. It is unclear what the commercial purpose of such a limited right of appeal is. What is the rationale of extending the remedies that a party can seek if the party gives a notice of an appeal within 15 business days of the expert's determination if the same party is entitled to commence proceedings to have the determination declared void even if it has not given a notice of appeal?

26 In addition, it is more natural to read the words "If the determination of the expert does not resolve the *dispute*" as connecting words referring back to the previous subclause rather than as words that introduce a completely new condition on the exercise of a right of appeal arising from the service of a notice of appeal within the timeframe specified in cl 42.11. The conditions for the exercise of a right of appeal are set out in cl 42.11. The nature of the appeal is set out in cl 42.12.

27 Lastly, the precondition is expressed as a condition on the right to *commence* court proceedings. That precondition makes sense where the condition is the service of a notice within the specified time. It makes less sense where the condition is a failure on the part of the expert to comply with the requirements of the Contract, which on Lipman's interpretation is a question that would be determined as part of the court proceedings rather than as a precondition to their commencement.

28 Lipman submitted that the interpretation I prefer makes the words "subject to clause 42.11" redundant. I have already explained why that is not the case. Those words make it clear that notwithstanding the commencement of court proceedings the parties remain bound by the determination until it is reversed, overturned or otherwise changed. That makes commercial sense where the right is a general right of appeal.

29 It might be thought that if the words of the precondition were merely connecting words then the parties would have used words more closely aligned to the connection that is sought to be made. So, for example, they might have said "If a party serves a notice of appeal in accordance with clause 42.11 then …". But equally, if what was intended was that the right to commence court proceedings depended on the expert's failure to comply with the Contract, they might have specifically said so. As Mr Kidd SC, who appeared for Lipman, acknowledged, the fact that the parties could have expressed themselves more clearly is of little assistance in this case in determining the meaning of the words they chose to use.

**Orders**

30 It follows that the defendant's notice of motion filed on 30 January 2017 must be dismissed with costs.

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