Court of Appeal
New South Wales

Case Title:	Lipman Pty Ltd v Emergency Services Superannuation Board
Medium Neutral Citation:	[2011] NSWCA 163
Hearing Date(s):	27 May 2011
Decision Date:	27 May 2011
Jurisdiction:	
Before:	Allsop P at 1, Young JA at 17, Tobias AJA at 18
Decision:	1. Application for leave to appeal allowed. 2. The draft notice of appeal contained within volume 1 of the application books stand as a filed notice of appeal. 3. Appeal dismissed with costs. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*
Catchwords:	CONTRACT - construction - dispute resolution clause - requirement under contract that expert determination be final and binding "unless a party gives notice of appeal" within 21 days - whether determination never final and binding where notice issued. ADR - dispute resolution clauses to be construed broadly to give effect to business purpose - parties unlikely to have intended

multiple venues or occasions for resolution of disputes.

CASE MANAGEMENT - conduct of appeal - filing of unnecessary material - need for practitioners to play their part in providing efficiency of service through the courts.

Legislation Cited:

Cases Cited: Comandate Marine Corporation v Pan Australia Shipping Pty Ltd [2006] FCAFC 192; 157 FCR 45
Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40; [2008] 1 Lloyd's Rep 254
Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160
United Group Rail Services Ltd v Rail Corporation of New South Wales [2009] NSWCA 177; 74 NSWLR 618

Texts Cited:

Category: Principal judgment

Parties: Lipman Pty Ltd (Applicant)
Emergency Services Superannuation Board (Respondent)

Representation

- Counsel: Counsel:
Mr M G Rudge SC, Mr H Bevan (Applicant)
Mr M Dempsey SC, Mr N Kidd (Respondent)

- Solicitors: Solicitors:
Kreisson Legal (Applicant)
Holding Redlich (Respondent)

File number(s): 2009/298863

Decision Under Appeal

- Court / Tribunal:	Supreme Court
- Before:	Hammerschlag J
- Date of Decision:	29 June 2010
- Citation:	Lipman Pty Limited v Emergency Services Superannuation Board [2010] NSWSC 710
- Court File Number(s)	2009/298863
Publication Restriction:	

Judgment

1 **ALLSOP P:** This is an application for leave to appeal and an appeal should leave be granted from an order in the nature of a declaration made by the Construction List judge, Hammerschlag J, as to the final and binding character of a determination by an expert appointed under a dispute resolution clause of a building contract.

2 The relevant parts of the clause provide as follows:

> **" 42.10 Determination by Expert**
>
> The determination of the expert:
>
> (a) must be in writing;
>
> (b) will be:
>
> (i) substituted for the relevant direction for the Superintendent; and
>
> (ii) is final and binding
>
> unless a party gives notice of appeal to the other party within 21 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 clauses.

42.11 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."

3 The contested facts can be taken from the succinct and clear judgment of the learned primary judge:

"[4] On 14 March 2005, an agreement was entered into between the parties and Messrs Norman Fisher and P. Callaghan SC for the appointment of those gentlemen as experts under the provisions of cl 42 to resolve disputed claim no. 25.

[5] The experts gave a written determination on 7 December 2005 (although it appears that it was delivered to the parties only about a week later). The experts determined that a small amount was owing by the plaintiff to the defendant. Their determination did not take into account additional payments that had been made by the defendant to the plaintiff in the interim and on 21 December 2005 the superintendent under the contract issued two certificates. One of them (described as Progress Payment Certificate No. 29) took into account additional payments which had been made. The other (described as Clause 37.2(b) Certificate No.1) took into account retention monies which concerned the effect of the release to the plaintiff of retention monies which the experts had not taken into account.

[6] The combined effect of these certificates was to reflect an amount of $542,677.33 as being payable by the plaintiff to the defendant. This amount was paid on 28 February 2006.

[7] On 23 December 2005 the plaintiff sought an extension of the 21 day time period for giving an 'Appeal Notice' pursuant to cl 42.10, to which request the defendant acceded.

[8] On 13 January 2006 the plaintiff served on the defendant a document entitled 'Notice of Appeal of Determination of Expert Pursuant to Clause 42.10'.

[9] Between February and June 2006 there were meetings between Mr Moffat of the plaintiff and Mr Dunstan of the defendant with a view to resolving the dispute or differences between the parties or agreeing upon a procedure to resolve the dispute as contemplated by cl. 42.11.

[10] The negotiations were unsuccessful and the dispute was neither resolved nor was there agreement upon a procedure to resolve it.

[11] On 30 June 2006 Mr Moffat wrote to Mr Dunstan as follows:

> 'As referenced in the attached letter, this correspondence is served as confirmation that, as there has been no agreement in relation to an alternative process to resolve the dispute, the default option being exercised by us, is to commence Supreme Court proceedings.'

[12] Three and a half years later, on 11 December 2009 the plaintiff sued a summons out of this Court claiming judgment against the defendant for $1,021,782.93.

[13] By notice of motion filed on 13 April 2010, the defendant moves the Court for the dismissal or stay of the proceedings on the basis that the plaintiff is bound (as is the defendant) by the expert determination with the consequence that these proceedings cannot be maintained."

4 The reasoning of the primary judge is contained in the following paragraphs of his Honour's reasons:

"[27] For the following reasons, I consider that the plaintiff's construction is untenable.

[28] Firstly and somewhat fundamentally, the plain and unambiguous words of cl 42.10(c) require the expert determination to be given effect to unless and until it is reversed, overturned, or otherwise changed under the procedure in cl 42.11.

[29] That procedure has done whatever work it could do in the present circumstances and the expert determination has not been reversed, overturned or otherwise changed. It follows that it remains binding. It is not suggested that the parties did not comply

with whatever obligations they had under cl 42.11, nor is it suggested that that procedure has not been exhausted. It may also be observed that cl 42.11 refers to the persons described in Annexure Part A. That annexure contained no such description. Both parties accepted, however, that the clause was given effect to by the negotiations between the parties and no party put that cl 42.11 was void for uncertainty.

[30] If this entails an abrogation of the parties' common law rights, it has come about by express provision. In my view, these commercial parties clearly intended by the alternative dispute resolution process agreed to, to abrogate their common law remedies.

[31] Secondly, to give cl 42 the plaintiff's construction is to conclude that the parties intended that the same disputes should be resolved before different tribunals. I consider this both unlikely and that if it were correct, it would result in consequences which are unreasonable, inconvenient and costly.

[32] Thirdly, the parties chose an expert tribunal to deal with disputes. The plaintiff's construction would permit a party by non-agreement (albeit subject to an obligation of good faith) unilaterally to render a determination by the expert tribunal which they chose, ineffective. I consider it unlikely that the parties had this intention.

[33] In my view, the outer limit of the protection given by cl 42.11 to an aggrieved party to an expert determination is to require the other party to engage in genuine and good faith negotiations in relation to an expert determination or to endeavour to agree (perhaps in good faith although this is not expressly imposed in cl 42.11(b)) on a further procedure which might result in a different outcome, but no more: see *United Group Rail Services Ltd v Rail Corporation NSW* [2009] NSWCA 177.

[34] The consequence is that the expert determination is final and binding and the proceedings in this Court are not maintainable, and must be dismissed as disclosing no cause of action."

5 The applicant submitted that his Honour erred by failing to recognise and give proper weight to the words of cl 42.10 and in particular the phrase commencing with the word "unless" which operated, it was said, to make the expert determination never final and binding should a notice of appeal be filed.

6 I disagree. I find the reasons of the primary judge to be correct. His Honour approached the construction of the dispute resolution clause by reference to a liberal approach expressed in *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 . The approach is also reflected in the reasons of the Full Court of the Federal Court in *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; 157 FCR 45 and can now as Lord Hope of Craighead said in *Fiona Trust* be seen as part of the law of international commerce (at 260 [31]). This is of course domestic commerce but the principle applies equally.

7 Further, that these cases were concerned with arbitration clauses and not expert determination clauses does not detract from their equal force to the type of dispute resolution clause that the parties agreed here.

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.

9 Here there occurred what the commercial parties would plainly have anticipated as likely could have been the case, that is a major dispute: the conduct of a detailed case before people experienced in the building industry and the production of a careful and detailed expert determination - all this at considerable expense. Is it to be thought likely that the mere statement by one side that they wish to seek to discuss and negotiate the result in good faith would mean that the product of the expert determination would never be binding? Far more likely is the construction favoured by the primary judge that the clause as a whole meant that the expert determination was to be fully given effect to subject to it not being final and binding if the parties were able to give substance and effect to the good faith negotiations that were anticipated and provided for by cl 42.11.

10 In my view, substantially for the reasons his Honour gave and for these additional reasons the expert report and determination is to be given effect to, not in a provisional way, but in a way the balance of the clause identifies.

11 Before concluding, I wish to make some remarks about the conduct of the appeal. The arguments prepared by counsel were short and, if I may respectfully say, efficiently presented. The appeal in substance has taken slightly under an hour. That efficiency is no doubt the product of the work not only of counsel but skilled solicitors. The remarks that follow should not detract from this recognition. Four volumes of paper have been prepared, photocopied and given to the Court. It is difficult to understand how more than one volume was ever needed. The contract is a large one being a building contract and it could be perhaps said that the argument might range over other clauses; but a significant body of material was unnecessary and should always have been viewed as unnecessary.

12 I recognise immediately that there are circumstances where it is cheaper to copy than to expend time working out what is a marginally smaller bundle. That really is not this case. The cost of commercial litigation is an ever present problem and unless the profession, at all times, views things such as photocopying in a mean and parsimonious way, subject to my earlier remarks about the costs of reducing the material, the costs of litigation will forever increase.

13 Neither client, in my view, unless it gave specific instructions for the preparation of all four bundles contrary to advice, should have to pay for the totality of this material. In my opinion, to a significant degree, it was wasteful. I would leave it to the solicitors, however, and their clients to work out an appropriate arrangement subject to the orders for costs that I would make.

14 Secondly, the appeal was set down for half a day. I am not going to be critical in relation to the parties about that, but the reality is that if these commercial parties, through their expert advisers, had undertaken communication with the Registrar on the basis that this was a matter which would be dealt with in under two hours, an earlier hearing date could well have been given. The Construction and Commercial Lists and the Court of Appeal provide a service to the Australian and international commercial communities of real efficiency, but that service requires practitioners at all times to play their part in that efficiency. If a case is in short compass, it should be so prepared and the Registrar given a precise and accurate summary and a request made for a short hearing after another half-day case as if it were a leave application. Leave applications in the ordinary course are listed for hearing within one to two months.

15 I make one other comment. I was intending to make an order requiring in terms the provision of these reasons to the clients. Given the explanations that have been made, I will leave it to the good sense of the solicitors but I would expect the clients to be apprised of the terms of the judgment insofar as it refers to both the substance of the matter and the conduct of the appeal.

16 The orders that I would make are:

1. Application for leave to appeal allowed.

2. The draft notice of appeal contained within volume 1 of the application books stand as a filed notice of appeal.

3. Appeal dismissed with costs.

17 **YOUNG JA:** I agree.

18 **TOBIAS AJA:** I also agree.

19 **ALLSOP P:** The orders of the Court are as I have pronounced.

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