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Supreme Court

New South Wales

Case Name:	CPB Contractors Pty Ltd v Transport for NSW
Medium Neutral Citation:	[2021] NSWSC 537
Hearing Date(s):	29 April 2021
Decision Date:	14 May 2021
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	Proceedings stayed in respect of claims set out in pars 7 to 37 of Plaintiff's Commercial List Statement
Catchwords:	CONTRACTS – Expert determination regarding contract to perform road widening works on Pacific Motorway – where expert determined issue adversely to plaintiff – where plaintiff commenced proceeding to reagitate that issue – whether plaintiff precluded by the terms of the contract from litigating that issue– whether an expert determination that no further compensation is payable is a determination that does not involve paying a sum of money CONTRACTS – provision for expert determination – whether there was a deficiency or error in determination that disclosed expert did not make a determination in accordance with the contract PRACTICE AND PROCEDURE – expert determination as to part of the claim the subject of the proceedings – whether proceedings commenced in the face of an expert determination should be stayed in part
Cases Cited:	Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332 Electricity Generation Corp v Woodside Energy Ltd; Woodside Energy Ltd v Electricity Generation Corp

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(2014) 251 CLR 640; [2014] HCA 7
John Holland Pty Limited v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451
Lahey Constructions Pty Ltd v State of New South Wales [2021] NSWCA 69
Lepcanfin Pty Ltd v Lepfin Pty Ltd [2020] NSWCA 155
Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited (2015) 256 CLR 104; [2015] HCA 37
Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corp [2018] FCAFC 118
Shoalhaven City Council v Firedam Civil Engineering Pty Ltd (2011) 244 CLR 305; [2011] HCA 38
South Western Sydney Local Health District v Gould (2018) 97 NSWLR 513; [2018] NSWCA 69
Tal Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim (2016) 91 NSWLR 439; [2016] NSWCA 68
Zeke Services Pty Ltd atf Zeke Discretionary Trust v Traffic Technologies Ltd [2005] QSC 135

Texts Cited:	P Herzfeld and T Prince, Interpretation (Thomson Reuters, 2nd ed, 2020)
Category:	Procedural rulings
Parties:	CPB Contractors Pty Ltd (Plaintiff) Transport for NSW (Defendant)
Representation:	Counsel: P S Braham SC with C Roberts (Plaintiff) T J Breakspear (Defendant) Solicitors:
File Number(s):	SC 2020/293681

JUDGMENT

1 By a contract dated 23 March 2017 ("the Contract") made between Roads and Maritime Services ("RMS") and the Plaintiff, CPB Contractors Pty Ltd ("CPB"), RMS engaged CPB to carry out work widening approximately 12.5km of the M1 Pacific Motorway from Tuggerah to Doyalson.

2 The defendant, Transport for NSW ("Transport") is the statutory successor to RMS. I will not refer further to RMS but will refer simply to Transport.

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3 In the course of carrying out the road widening work, CPB accumulated excess non contaminated spoil.

4 Transport issued CPB with a series of Site Instructions to remove that spoil from nominated stockpile sites to a location on Kooragang Island. CPB transported that spoil to Kooragang Island ("the Works").

5 CPB and Transport fell into dispute about the amount that CPB was entitled to be paid for the Works.

6 Transport contended that its Site Instructions constituted a contractual variation and that CPB was to be paid for the Works on a "Dayworks" basis; in effect costs plus a margin. CPB on the other hand contended that it was entitled to be paid for the Works in accordance with a particular schedule of rates ("the Rates") on a per square meterage basis.

7 The amounts involved are large. Transport paid CPB $1.4 million for the Works on the Dayworks basis. CPB claims to be entitled to a total payment of $11.4 million.

8 CPB made six separate "Claims" on Transport in relation to the Works. In those Claims CPB sought to be paid for the Works at the Rates. Transport rejected those Claims and they became "Unresolved Claims" for the purposes of the Contract.

9 The Contract provided for expert determination of such disputes.

10 The dispute concerning four of the six Claims was referred to the Honourable Robert McDougall QC ("the Expert") on 1 May 2020.

11 The Expert issued a determination on 18 August 2020 ("the Determination") the effect of which was that CPB was not entitled to further payments for the Works the subject of those four Claims.

12 On 13 October 2020, CPB commenced these proceedings seeking payment in accordance with the Rates for all six Claims; that is, including the four Claims the subject of the Determination.

13 By Notice of Motion filed on 4 November 2020, Transport seeks a stay on the proceedings in so far as they concern the four Claims on the basis that, under

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cl 71 of the Contract, CPB agreed to accept the Determination as being "final and binding" in respect of those Claims.

14 By a further Notice of Motion, filed on 18 February 2021, Transport seeks, as an alternative to a stay, a separate determination of the two issues that CPB has raised as reasons why no stay should be granted.

Decision

15 My conclusion is that I should grant a stay as sought by Transport and that it is not necessary that I determine any separate question.

The relevant provisions

16 The Contract included the New South Wales Government GC 21 (Edition 2) "General Conditions of Contract" (the "General Conditions").

17 I will substitute the parties' names when setting out the relevant clauses of the General Conditions.

18 Clause 68.6 of the General Conditions provides that:

> "If a *Claim* is rejected or not agreed within the period referred to in clause 68.4 it will become an *Unresolved Claim*, and [CPB] may notify [Transport] of an *Issue* under clause 69.1"

19 Clause 69.1 to 69.3 provide, relevantly:

> ".1 [CPB] may dispute an assessment, determination or instruction of [Transport], or seek resolution of an *Unresolved Claim*, by giving notice to [Transport]…of an *Issue*…
>
> .2 Either party may give notice to the other…about the meaning or effect of the Contract, or about any matter connected with the Contract, within 28 days after becoming aware of the *Issue*.
>
> .3 Subject to clause 69.6[1], the parties must follow the *Issue* resolution procedures in [clause 71] before either commences litigation or takes similar action."

20 Clause 71 provides for "Expert Determination".

21 Clause 71.5 provides that the "procedure for *Expert Determination*" is as set out in Sch 5 to the Contract. I will return to that below.

22 Subclauses 71.7 to 71.8 provide, relevantly:

[1] Not relevant here.

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".7 Subject to clauses 71.8 and 71.9, the parties must treat each determination of an *Expert* as final and binding and a party that owes money to the other pursuant to the determination must pay that amount to the other party within 28 days after receiving the determination.

.8 Neither party may commence litigation in respect of the matters determined by the *Expert* unless the determination:

.1 does not involve paying a sum of money; or

.2 requires one party to pay the other an amount in excess of [$500,000]…".

23 Clause 1 of Sch 5 of the General Conditions provides:

".1 For each *Issue*, the *Expert* must determine the following questions, to the extent that they are applicable to the *Issue* and unless otherwise agreed by the parties:

.1 Is there an event, act or omission which gives the claimant a right to compensation, or assists in otherwise resolving the *Issue* if no compensation is claimed:

.1 under the Contract,

.2 for damages for breach of the Contract, or

.3 otherwise in law?

.2 If so:

.1 what is the event, act or omission?

.2 on what date did the event, act or omission occur?

.3 what is the legal right which gives rise to the liability to compensation or resolution otherwise of the *Issue*?

.4 is that right extinguished, barred or reduced by any provision of the Contract, estoppel, waiver, accord and satisfaction, set-off, cross-claim or other legal right?

.3 In light of the answers to the questions in clauses 1.1.1 and 1.1.2 of this Expert Determination Procedure:

.1 what compensation, if any, is payable by one party to the other and when did it become payable?

.2 applying the rate of interest specified in the Contract, what interest, if any, is payable when the *Expert* determines that compensation?

.3 if compensation is not claimed, what otherwise is the resolution of the *Issue*?

.2 The *Expert* must determine, for each *Issue*, any other questions identified or required by the parties, having regard to the nature of the *Issue*".

24 Clause 4.1 of the Sch 5 provides, relevantly:

".1 The *Expert*:

.1 acts as an *Expert* and not as an arbitrator;

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.2 must make its determination on the basis of the submissions of the parties, including documents and witness statements, and the *Expert's* own expertise; and

.3 must issue a certificate in a form the *Expert* considers appropriate, stating the *Expert's* determination and giving reasons…".

The Issues – a balancing exercise

25 CBP contends it is not bound by the Determination concerning Claims 1 to 4 and is free to prosecute those Claims as well as Claims 5 and 6 in these proceedings for two reasons.

26 First, CBP contends that the Expert made no determination for the purposes of cl 71 of the Contract because there is a "deficiency or error" in the Determination that reveals that the Expert did not make "a determination in accordance with the contract" ("the No Determination Point").[2]

27 Second, CPB contends that, assuming a valid determination has been made, it did not "involve paying a sum of money", and thus falls within the exception stipulated in cl 71.8.1 to the contractual prohibition in cl 71.8 against commencing litigation in respect of matters determined by the Expert ("the Sum of Money Point").

28 I heard full argument on these questions, in effect as if on a separate question.

29 Neither Mr Breakspear for Transport nor Mr Braham SC for CPB contended that there was anything further that could be put on those questions.

30 Questions such as the proper construction of a contract[3] are apt for final determination on a stay application such as this. Questions such as whether there has been a waiver or an estoppel[4] or whether a contract is void for uncertainty[5] have also been finally determined on a stay application.

31 As I have heard full arguments on the No Determination Point and the Sum of Money Point, I am able to decide those questions in the course of dealing with Transports' stay application.

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[2] See, Shoalhaven City Council v Firedam Civil Engineering Pty Limited (2011) 244 CLR 305; [2011] HCA 35 at [27] (French CJ and Crennan and Kiefel JJ).
[3] Lepcanfin Pty Ltd v Lepfin Pty Ltd [2020] NSWCA 155 at [97], [112] (Bell P; Payne and McCallum JJA agreeing).
[4] Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332 at [66] – [72] and [73] – [76] (Hammerschlag J);
[5] John Holland Pty Limited v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451 at [164] – [169] (Hammerschlag J).

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32 However, Mr Braham submitted that I should leave any determination of the No Determination Point or the Sum of Money Point until the final hearing and refuse to grant a stay.

33 First, Mr Braham pointed out that as the Expert was not asked to and did not determine Claims 5 and 6, those Claims will require determination in these proceedings in any event. It follows, as Mr Braham submitted, that a determination of the No Determination Point and the Sum of Money Point favourably to Transport, and the granting of a stay will not be dispositive of the proceedings.

34 Mr Braham submitted that CPB's evidence in relation to Claims 5 and 6 will be of the same nature as will be required in relation to the Claims that were subject of the Determination, that is, Claims 1, 2, 3 and 4.

35 Mr Braham submitted that this, alone, was a sufficient reason to refuse the stay application.

36 Second, Mr Braham pointed out that a decision to stay the proceedings would be amenable to an application by CBP for leave to appeal. Indeed, Mr Breakspear accepted that I should decide Transport's stay application on the assumption that CPB would likely seek to challenge any stay on appeal. Mr Braham suggested that as the contractual terms in question are part of the frequently used form of NSW General Conditions the appeal process may not end at the Court of Appeal.

37 The parties' preparation of the proceedings following a stay as sought by Transport, and pending resolution of any appeal process, would doubtless be by reference only to Claims 5 and 6. Were an appeal to be allowed, the parties would have to revise their preparation to include all six Claims. That would cause inconvenience and cost.

38 A further factor is, as Mr Breakspear accepted, that no hearing date could be allocated to the proceedings until the appeal process was exhausted.

39 However, all these factors are outweighed, in my opinion, by the desirability of determining now the merits of the bases on which CPB contends it is not

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bound by the Determination and thereby deciding whether CPB is bound by the Determination.

40 The two questions are in short compass. There is no suggestion here that the Expert Determination clause is not enforceable. CPB's points are that either there has been no determination all, or that the contractual prohibition against commencing proceedings is not engaged. If Transport is correct, the result is that the Determination is binding on CPB. If that is so, there are strong grounds to grant a stay and thereby hold CBP to its bargain not to litigate issues the subject of a binding determination.[6]

41 I propose to determine the two questions.

The No Determination Point

42 In relation to an expert determination such as that involved here:

> "A deficiency or error in the reasons given by an expert may affect the validity of the determination in two ways:
>
> 1. The deficiency or error may disclose that the expert has not made a determination in accordance with the contract and that the purported determination is therefore not binding.
>
> 2. The deficiency or error may be such that the purported reasons are not reasons within the meaning of the contract and, if it be the case that the provision of reasons is a necessary condition of the binding operation of the determination, the deficiency or error will have the result that the determination is not binding".[7]

43 Mr Braham submitted that there was a "deficiency or error" in the Expert Determination on both these bases and raised three points.

Alleged "incorrect" answer to Question 1.1

44 Mr Braham's first point related to the manner in which the Expert answered the question in cl 1.1 of Sch 5 of the Contract.[8]

45 The Expert answered Question 1.1 in Sch 5 to the Contract: "no".

46 Thus, the Expert expressed his "conclusion and determination" as follows:

> "96 For the reasons that I have given, [CPB's] claim fails.

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[6] For example, see Lepcanfin Pty Ltd v Lepfin Pty Ltd (supra) at [112]; Zeke Services Pty Ltd atf Zeke Discretionary Trust v Traffic Technologies Ltd [2005] QSC 135 at [19] and [21] (Chesterman J); Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corporation [2018] FCAFC 118 at [19] (Besanko, Barker and Colvin JJ).
[7] Shoalhaven City Council v Firedam Civil Engineering Pty Ltd (2011) 244 CLR 305; [2011] HCA 38 at [27].
[8] See [23] above.

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> 97 In terms of clause 1 of schedule 5 to the [C]ontract, I determine the questions referred to me as follows:
>
> 97.1 is there an event, act or omission which gives the claimant a right to compensation, or assists in otherwise resolving the *Issue* if no compensation is claimed:
>
> (a) under the Contract,
>
> (b) for damages for breach of the Contract, or
>
> (c) otherwise in law?
>
> 97.2 Determination: no.
>
> 98 I certify accordingly".

47 Mr Braham submitted that this answer was "plainly incorrect" because "the parties were in agreement that at least some compensation was payable".

48 Mr Braham's point was that, in its submissions to the Expert, Transport stated:

> [Transport] accepts that an event occurred that gives rise to an entitlement under the Contract to compensation for [CPB].

49 CPB made the same submission.

50 These submissions reflected the fact that it was common ground that CPB had performed the Works and was entitled to payment for having done so.

51 The dispute was between the parties as to the basis on which that payment should be made.

52 Transport asserted that CPB was entitled to be paid for the Works at the Dayworks rate and, prior to the dispute being referred to the Expert, had paid CPB on that basis.[9]

53 CPB, on the other hand, contended that it was entitled to be paid for the Works at the Rates.

54 The Expert's Determination was that CPB was not entitled to be paid for the Works at the Rates and that, as Transport had paid CBP for the Works at the Dayworks rate, no further "compensation" was due.

55 The Expert's answer "no" to Question 1.1 must be seen in that context, and in the light of his statement at [96] of the Determination that CPB's "claim fails".

[9] As the Expert noted at [4] and [6] of the Determination.

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The Determination was that CPB had not made out its case to be paid at the Rates.

56 In effect, the Expert was upholding Transport's position and rejecting CPB's position.

57 I see no basis to conclude, in these circumstances, that the answer given by the Expert to this question was "plainly wrong", nor that he thereby failed to make a determination in accordance with the Contract.

Alleged failure to give reasons

58 As I have set out, cl 4.1.3 of Sch 5 of the General Conditions obliged the Expert to give reasons.[10]

59 Mr Braham submitted that the Expert had not given reasons for rejecting Claims 2, 3 and 4.

60 The Expert dealt with Claim 1 from [54] to [84] of the Determination, and said, at [54]:

> "I commence consideration of the dispute by looking at the operation of the contract and considering the consequences for [Claim 1]. To the extent that [Transport's] submissions on that point are accepted, the outcome would flow through to [Claims 2,3 and 4]".

61 Having rejected CPB's contentions concerning Claim 1 the Expert concluded, under the heading "Consequences for [Claims 2, 3 and 4]":[11]

> "It follows from what I have just said that it was open to [Transport] to issue [the Site Instructions relevant to Claims 2,3 and 4] as variations even though, by then, [CPB] had asserted its position that the appropriate basis for payment was pursuant to [the Rates]. Each of the [Site Instructions] expressly directed the work to be done as a variation. Each of the [Site Instructions] was accepted (although in effect under protest). The work was done. Payment claims were submitted on the daywork basis. They were assessed and paid accordingly. Thus, in my view, there was in each case a contract between the parties for the performance of the works directed as variations.

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[10] See [24] above.
[11] At [85] and [86].

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> It must follow that [CPB's] claim fails in respect of these three [Site Instructions] also".

62 These are the Expert's reasons for rejecting Claims 2, 3 and 4. The Expert was saying, quite clearly in my opinion, that Claims 2, 3 and 4 failed for the same reasons as Claim 1 failed.

63 The Expert then dealt with an estoppel argument raised by Transport and concluded:[12]

> "That would still leave a very difficult question as to whether, there apparently being a genuine difference of views as to the entitlement to be paid, the issue of further [Site Instructions] directing the work to be done as variations and the acceptance of those [Site Instructions] (and performance of the work) would nonetheless have constituted an enforceable contract, having regard to the principles outlined at [70], [75] above. Since the parties did not address that point, I say no more."

64 Mr Braham submitted that what the Expert said in this passage meant that CPB was unable to understand why they had not been successful in relation to Claims 2, 3 and 4.

65 But this passage does not touch on the reasons the Expert rejected Claims 2, 3 and 4. Those reasons were set out in the passage I have set out at [61] above. In the passage set out at [63] the Expert was doing no more than mentioning an issue which had not been raised by the parties.

Alleged failure to answer Question 1.3

66 Mr Braham submitted that the Expert's reasoning did not address the answer to Question 1.3 in Sch 5 to the Contract being, in light of the answers given to Question 1, "what compensation, if any, is payable by one party to the other and when did it become payable?"

67 But as the Expert rejected CPB's claim, this question did not arise.

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[12] At [94].

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Conclusion

68 For these reasons I do not accept that there was any "deficiency or error" in the reasons given by the Expert.

69 The "No Determination Point" fails.

The Sum of Money Point

70 The Expert determined that CPB was entitled to no further compensation for the Works.

71 The question is whether the Determination that CPB had no right to compensation was a determination that "does not involve paying a sum of money" for the purpose of cl 71.8.1 of the Contract.

72 If it was, the Expert's Determination was not "final and binding" on CPB, the prohibition in the chapeau to cl 71.8 against commencing litigation does not apply and CPB is free to bring these proceedings.

73 The Court of Appeal recently considered cl 71.8 of the General Conditions in *Lahey Constructions Pty Ltd v State of New South Wales*[13] albeit in relation to cl 71.8.2, rather than cl 71.8.1.

74 Speaking generally of cl 71.8, Gleeson JA[14] said:[15]

> "Clause 71.8 is a jurisdictional provision which precludes either party from commencing litigation in respect of the issues determined by the expert unless one of two exceptions apply".

75 For Transport, Mr Breakspear submitted that:

(a) the Determination "involved" the Issue that was referred to the Expert;

(b) the Issue involved a claim for money;

(c) the parties have used the word "involve" in cl 71.8.1 and "requires" in cl 71.8.2 and must have intended that those words have different operation; and

(d) the use by the parties of the word "involve" rather than "requires" in cl 71.8.1 suggests it is directed to circumstances where the

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[13] [2021] NSWCA 69.
[14] With whom Bathurst CJ and Bell P agreed.
[15] At [48].

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issue does not involve a claim for money, an example being an issue as to the proper construction of the Contract.[16]

76 For CPB, Mr Braham submitted that the question is what the Determination, not the "matters for determination", "involves" and that in a case where the issues involve a claim for payment of money, a determination that no money is payable is in effect a dismissal or rejection of the claim, and does not and cannot involve "paying" a sum of money; as the Determination is that no money is to be paid.

77 The critical question is whether a determination dismissing or refusing a money claim "involves" paying a sum of money.

78 The Macquarie Dictionary defines "involve" as: "to include as a necessary circumstance, condition or consequence; to entail"; "to affect, as something within the scope of operation" and "to include, contain, or comprehend within itself or its scope".

79 The Concise Oxford English Dictionary defines "involve" as to "include as a necessary part or result". It also defines "concern" as "affect or involve".

80 There is a limit to the extent to which it is permissible to have regard to dictionary definitions in construing the meaning of a contract[17] and a dictionary definition will not itself resolve a dispute about construction. A word in a contract must take the meaning that its context requires, having regard to the usual principles of contractual construction: text, context, commercial purpose and what a reasonable person in the position of the parties would understand the word to mean.[18]

81 In the context in which "involve" is used in cl 71.8.1 it cannot in my opinion mean "require". The parties have used the words "involve" and "requires" in the same clause and must have meant those words to have different meanings.

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[16] As contemplated by cl 69.2: see [19] above.
[17] See South Western Sydney Local Health District v Gould (2018) 97 NSWLR 513; [2018] NSWCA 69, [81] (Leeming JA; Basten and Meagher JJA agreeing); Tal Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim (2016) 91 NSWLR 439; [2016] NSWCA 68 at [80] (Leeming JA, Beasley P and Emmett AJA) and see, P Herzfeld and T Prince, Interpretation (Thomson Reuters, 2nd ed, 2020) [2140] and [20.40].
[18] Lahey Constructions Pty Ltd v New South Wales at [37]ff citing the familiar authority of Electricity Generation Corp v Woodside Energy Ltd; Woodside Energy Ltd v Electricity Generation Corp (2014) 251 CLR 640; [2014] HCA 7 at [35] and Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37 at [46]-[49].

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"Involve" thus cannot mean "include as a necessary part" or as a "necessary circumstance"[19] because so to construe "involve" would, in effect, give it the same meaning as "require".

82 In the context of the scale of work called for by the Contract, the scheme of the clause appears directed to ensuring that determination of Claims that are relatively small, that is, under $500,000, are binding; whereas the parties are free to litigate claims where the determination "requires" one party to pay the other more than $500,000.

83 Thus, in *Lahey* Constructions Gleeson JA observed, of cl 71.8.2:

> "An arbitrary threshold of $500,000 has been chosen by the parties for what might be described as minor claims, which following an expert determination, are subject to the preclusion of litigation".[20]

84 However, the clause, and cl 71.8.1 in particular, works awkwardly in a case where the determination is that a money claim is refused or, in effect, dismissed.

85 On Transport's case, a dismissal of a money claim is binding no matter how big the claim.

86 In this case, CPB's claim before the Expert was for some $8.2 million dollars. Had it succeeded, the Determination would not have been binding because it would "require" the payment of more than $500,000, and cl 71.8.2 would be engaged. Yet, on Transport's case, the Expert's Determination that the claim be dismissed is binding.

87 On CPB's case, a dismissal of a money claim is not binding no matter how small the claim.

88 Thus, on CPB's case, were the claim to be $50, a determination dismissing the claim would not be binding because it would not "involve paying a sum of money". And yet a determination upholding the claim would be binding because it would not "require" payment of more than $500,000 and thus would not engage cl 71.8.2.

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[19] See [78] and [79] above.
[20] At [56].

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89 Despite these matters, and because of the evident overall object of the clause as I have set out at [82] above, an interpretation of cl 71.8 that leaves as final and binding a determination of a money claim that has the effect that the amount payable is $500,000 or less, including nothing, appears to me more closely to accord with what a reasonable business person in the position of the parties would understand the clause to mean.

90 For that reason, my opinion is that, in the context in which it appears in cl 71.8.1, "involve" means something like "concern" or "have to do with" so that a determination involves "paying a sum of money" if it concerns or has something to do with the paying of a sum of money. This meaning of involve is something like the expression "comprehend within itself" referred to in the Macquarie Dictionary and is consistent with the Oxford Dictionary's definition of "concern" as including "affect or involve".[21]

91 A determination dismissing a claim for money does "involve" "paying a sum of money" in this sense as it deals with the claim that, if successful, would have resulted in the paying of a sum of money; and rejects that claim.

92 In my opinion, that is the preferable way of reading cl 71.8.1 so far as concerns determinations in relation to a claim for payment of money. Its focus is not on the *amount* to be paid or not paid pursuant to the determination, as that threshold has already been set in cl 71.8.2, but on the *nature* of the determination: whether it does or does not "involve" in the sense of "concern" paying a sum of money.

93 The effect of reading the clause this way is that a determination of a money claim will be binding if the determination is either to dismiss the claim (in which event the exclusion in cl 71.8.1 will not be available as the termination will "involve paying a sum of money") or is for $500,000 or less (in which case the exception in cl 71.8.2 will not be available).

94 This construction would leave as not final and binding a determination of a money claim in excess of $500,000 and the distinct category of determinations that are not in respect of money claims; such as a dispute about the

[21] See [78] and [79] above.

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construction of the Contract or the General Terms, as expressly contemplated by cl 69.2 of the General Terms.[22]

Conclusion of the Sum of Money Point

95 The Determination did "involve the paying of sum of money". The exception to the "preclusion of litigation"[23] does not apply. The proceedings should be stayed to that extent.

Conclusion

96 The parties should bring in short minutes to give effect to these reasons.

97 If there is any dispute as to costs, the parties should confer and agreed on a timetable for short submissions.

98 I will deal with that question on the papers.

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[22] See [19] above.
[23] See [83] above.

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