NEW SOUTH WALES COURT OF APPEAL

CITATION:
Firedam Civil Engineering Pty Ltd v Shoalhaven City Council [2010] NSWCA 59
This decision has been amended. Please see the end of the judgment for a list of the amendments.

FILE NUMBER(S):
2009/00298443

HEARING DATE(S):
9 March 2010

JUDGMENT DATE:
19 April 2010

PARTIES:
Firedam Civil Engineering Pty Ltd (Appellant)
Shoalhaven City Council (Respondent)

JUDGMENT OF:
Beazley JA Campbell JA Macfarlan JA

LOWER COURT JURISDICTION:
Supreme Court

LOWER COURT FILE NUMBER(S):
SC 55037/09

LOWER COURT JUDICIAL OFFICER:
Tamberlin AJ

LOWER COURT DATE OF DECISION:
12 August 2009

LOWER COURT MEDIUM NEUTRAL CITATION:
Firedam Civil Engineering Pty Ltd v Shoalhaven City Council [2009] NSWSC 802

COUNSEL:
G Inatey SC (Appellant)
J A Steele (Respondent)

SOLICITORS:
Herbert Geer (Appellant)
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CATCHWORDS:

CONTRACTS - building, engineering and related contracts - agreement for expert determination of claims under contract - contractual obligation on expert to give reasons - nature of reasons that expert obliged to give - inconsistency in expert's reasons - expert determination not binding on parties

LEGISLATION CITED:
Commercial Arbitration Act 1984
Suitors' Fund Act 1951
Trade Practices Act 1974 (Cth)
Uniform Civil Procedure Rules

CATEGORY:
Principal judgment

CASES CITED:
Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430
Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2) [1981] 2 Lloyd's Rep 130
Gordian Runoff Limited v Westport Insurance Corporation [2010] NSWCA 57
Holt v Cox [1997] NSWSC 144; (1997) 23 ACSR 590
Integer Computing Pty Ltd v Facom Australia Ltd (Supreme Court of Victoria, Marks J, 10 April 1987, unreported)
Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd [2001] NSWSC 405; (2001) 10 BPR 18,825
Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd [2002] NSWCA 180; (2002) 11 BPR 20,201
Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314
Najjar v Haines (1991) 25 NSWLR 224
Oil Basins Ltd v BHP Billiton Ltd [2007] VSCA 255; (2007) 18 VR 346
Xuereb v Viola (1989) 18 NSWLR 453

TEXTS CITED:

DECISION:
(1) Appeal allowed;
(2) Orders at first instance set aside;
(3) Declare that the Expert Determination of Mr Neil Turner dated 6 February 2009 is not binding upon the parties to these proceedings;
(4) Order the respondent to pay the appellant's costs of the proceedings at first instance and on appeal; and
(5) The respondent to have a certificate under the Suitors' Fund Act 1951 if qualified.

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES
COURT OF APPEAL

CA 2009/00298443

BEAZLEY JA
CAMPBELL JA
MACFARLAN JA

MONDAY 19 APRIL 2010

FIREDAM CIVIL ENGINEERING PTY LTD v SHOALHAVEN CITY COUNCIL

Judgment

1 **BEAZLEY JA**: I have had the considerable advantage of reading in draft the reasons of Campbell JA and Macfarlan JA. I agree with the orders proposed by Macfarlan JA and with his Honour's reasons, subject to the qualifications and additional comments of Campbell JA.

2 **CAMPBELL JA**:

3 I have had the advantage of reading the draft reasons for judgment of Macfarlan JA. Subject to the following qualifications and additional matters, I agree with those reasons.

Analogy to Arbitrators and Referees' Reasons?

4 In my view it is preferable not to try to gain assistance, in determining the extent of the obligation of an expert to give reasons when he is contractually required to do so, from judicial decisions about the circumstances in which the reasons of an arbitrator or a referee are inadequate.

Arbitrators

5 An arbitrator is similar to an expert in that the arbitrator's authority and obligations arise to some extent from the terms of the reference to arbitration and the contractual regime under which the reference to arbitration has occurred, and the expert's authority and obligations arise from the terms of the contract that make provision for there being an expert determination of certain types of question, and the particular question or questions that are submitted to the expert for determination. However, as well, arbitrations take place against the background of the ***Commercial Arbitration Act* 1984**. Section 29(1)(c) of that Act requires an arbitrator, unless the parties otherwise agree, to *"include in the award a statement of the reasons for making the award."*

6 Section 38 of that Act removes the previous power of the court to set aside or remit an award on the ground of error of fact or law on the face of the award and confers a right of appeal to the Court, in some circumstances, concerning an arbitration award. The existence of that right of appeal is one of

the factors that have influenced decisions about the extent of an arbitrator's obligation to give reasons: ***Gordian Runoff Limited v Westport Insurance Corporation*** [2010] NSWCA 57 at [198], [210]; cf ***Oil Basins Ltd v BHP Billiton Ltd*** [2007] VSCA 255; (2007) 18 VR 346 at [50].

7 In the present case, clause 4.1.1 of the Expert Determination Procedure specifically requires that the expert *"acts as an Expert and not as an arbitrator"*. That specific contractual recognition of the difference between the two roles suggests that it might be only fortuitous if the content of the expert's obligation to issue a certificate *"giving reasons"* was identical with the content of an arbitrator's obligation to give a *"statement of reasons"*.

Referees

8 The authority and responsibilities of a referee arise under the regime for referral of questions established by **UCPR** Part 20. Under **UCPR** 20.14 the referee's appointment is made by court order, *"for inquiry and report by the referee on the whole of the proceedings or on any question arising in the proceedings"*. The Court retains the power to *"give such instructions as the court thinks fit relating to the inquiry or report"* (**UCPR** 20.17(1)(c)). The obligations of the referee in making a report are those contemplated by **UCPR** 20. 23(1), namely:

> "Unless the court orders otherwise, the referee must make a written report to the court on the matter referred to the referee, annexing the statements given under rule 20.20 (5) and stating:
>
> (a) the referee's opinion on the matter, and
>
> (b) the referee's reasons for that opinion."

9 Once the report is made, the court deals with it under **UCPR** 20.24:

> "(1) If a report is made under rule 20.23, the court may on a matter of fact or law, or both, do any of the following:
>
> (a) it may adopt, vary or reject the report in whole or in part,
>
> (b) it may require an explanation by way of report from the referee,
>
> (c) it may, on any ground, remit for further consideration by the referee the whole or any part of the matter referred for a further report,
>
> (d) it may decide any matter on the evidence taken before the referee, with or without additional evidence,
>
> and must, in any event, give such judgment or make such order as the court thinks fit.
>
> ..."

10 Thus, though the referee is not an officer of the court (cf ***Najjar v Haines*** (1991) 25 NSWLR 224 at 246 per Clarke JA), the referee performs his or her task as part of a court process, being appointed at the initiative of the court, having his powers defined by court orders and rules, and being subject to the eventual supervision of the court as to whether or in what respects the report is adopted. This close connection with the administration of justice by the court may well bring with it rights and obligations that do not apply to the purely contractual exercise that is involved in reference of a question to an expert for determination. For example, in ***Xuereb v Viola*** (1989) 18 NSWLR 453 at 466–467 Cole J saw the fact that the referee's role was part of the Court's process as influencing the way in which the requirements of natural justice applied to the conduct of the reference. Similarly, in ***Najjar v Haines*** one of the factors influencing the decision that a referee was entitled to immunity from action, was the closeness of the referee's relationship with the court (at 234, 250, 269). Also in ***Xuereb v Viola*** at 468 Cole J noted with approval the statement of Marks J in ***Integer Computing Pty Ltd v Facom Australia Ltd*** (Unreported, Supreme Court of Victoria, Marks J, 10 April 1987) at 5 that in deciding whether to adopt a referee's report, "*[t]he fundamental objective of the Court is to satisfy itself that ends of justice are satisfied.*" In particular, it is a necessary implication from UCPR 20 that the *"reasons"* that **UCPR** 20.23(1)(b) requires must be enough to enable the court to perform its tasks under **UCPR** 20.24.

The Present Case

11 By contrast, the scope of the obligation of the expert in the present case to issue a certificate *"giving reasons"* arises from the contract between the Principal and the Contractor, and the nature of the issues that are submitted to the expert for determination. There is no statutory provision that gives the court any role in determining the adequacy of an expert determination. The role of the court in deciding whether an expert determination is binding is not to decide whether there is a respect in which the expert erred. Rather, it is to determine whether the determination that the expert provided is one that conforms to the contractual requirements. It is quite possible for a determination to conform to the contractual description but also to be in terms that enable a reader to conclude that the expert has erred in the course of making the determination.

12 The Expert Determination Procedure (quoted at [26] below) in clause 1 identifies the questions that the expert must answer in relation to each Issue submitted for determination. However clause 4, which contains the obligation to give reasons, relates to the task of the expert concerning the totality of the issues that are submitted to him or her for determination. The obligation of the expert to give reasons relates to the determination as a whole.

13 As a matter of the construction of the language of the contract, I agree with the conclusion that Macfarlan JA arrived at, that the obligation of '*giving reasons*' has not been complied with if the basic ground for decision has not been identified. Putting it that way, in the negative, does not attempt to state what is the full content of the obligation to give reasons, but is sufficient for determining the present case.

14 Here, the expert has meticulously answered each of the questions identified in clause 1 of the Expert Determination Procedure, concerning each of the issues that have been submitted to him. To that extent he has *"addressed himself to the right questions"*: (*cf* Palmer J in ***Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd*** [2001] NSWSC 405 at [118]). However, when there is an unexplained discrepancy in his conclusions concerning some of those issues, he has not provided reasons for his determination as a whole.

15 The judge found that the claims of the Contractor for an extension, and the claim of the Principal for delay damages, were *"distinct claims based on different criteria"* (at [34]). While that is true, there is still a question of mixed fact and law that is common to them, namely how much of the delay in carrying out the underboring arose from variations or breaches of the Principal.

16 Accepting that the claimant had not demonstrated an entitlement to an extension of time (and thus would have failed to prove his case, if the expert had been acting in the way that a judge acts in deciding a case), there was evidently still material that enabled the expert, acting as an expert, to determine for himself that nine days of delay were attributable to *"acts (variation) or breaches by the Principal"* (at [508] of the Expert Determination). There is no explanation of why the expert failed to allow that nine days when assessing variation claim 10(a).

17 Clause 54.6 enables *"the Principal ... for the benefit of the Principal [to] extend the time for completion ..."*. On reading the reasons of the expert, and in particular paras [509] and [527], one is left wondering whether he thought that if the power under clause 54.6 were used, there was then an extension of time that was treated as existing if the expert was working out an entitlement of the Principal, but not treated as existing if the expert was working out an entitlement of the Contractor. One possible explanation for why the expert allowed the extension of time for the purpose of calculating the entitlement of the Principal to delay costs, but regarded it as not existing for the purpose of the Contractors claim, is that he regarded clause 54.6 as applying only to the former type of claim. Clause 54.6 is of central importance in this particular determination – if the expert had not invoked it, the Principal would have recovered nothing on its claim for damages for delay. For the reader to be left wondering about what construction the expert put on clause 54.6 provides one reason why the expert has not fulfilled his obligation of *"giving reasons"*.

18 I agree with the orders proposed by Macfarlan JA.

19 MACFARLAN JA:

Nature of case and conclusion

20 In these proceedings, the appellant sought declarations that an Expert Determination ("ED") made by Mr Neil Turner on 6 February 2009 was not binding upon it and that it was free to commence litigation against the respondent. Mr Turner (the "Expert") had been appointed an expert pursuant to a contract, for the design and construction of a waste water transportation system, between the appellant as Contractor and the respondent as Principal. Mr Turner was appointed to determine monetary claims made by each of the parties against the other. This required him to consider, inter alia, whether claimed extensions of time should be granted. The Contractor contended that the Expert made mistakes that rendered his determination not one in accordance with the contract between the parties and that therefore, in accordance with the principles stated by McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, the Expert Determination was not binding upon the parties and, in particular, not binding upon the Contractor. Alternatively, the Contractor submitted that Mr Turner failed in a critical respect to give proper reasons for his conclusions in the Expert Determination, as the Contract required him to do, and for that reason also his Determination was not binding.

21 For the reasons given below I have concluded that the Expert did not give adequate reasons for rejecting two of the Contractor's claims, because he made inconsistent findings about factual matters of critical relevance to those claims. The consequence is that it is not possible to discern from a consideration of the Determination as a whole why these claims of the Contractor were rejected. As the relevant clauses of the Determination are not severable, the Determination as a whole falls outside the contract and is not binding on the parties to it.

The Contract

22 The contract between the parties was dated 18 October 2005. It provided for a Contract Price of $23,703,325.14 and a time for completion of 64 weeks from the date of contract. The Contract incorporated the New South Wales Government GC21 (Edition 1) General Conditions of Contract of which the following provisions are relevant.

23 Clauses 54 and 55 were in the following terms:

> "**54 Extensions of time**
> Under the conditions set out in clause 54 the Principal will extend the time for *Completion* if there is nothing the Contractor can reasonably do to avert circumstances beyond its control to avoid delay. Refer also to clauses 25 Time management and 69 Completion.
>
> .1 If the Contractor is or will be delayed in reaching *Completion*, the Contractor will be entitled to an extension of time for *Completion* for the number of days assessed by the Principal, if the Contractor satisfies the Principal that all the following conditions apply:
>
> .1 The cause of the delay was beyond the control of the Contractor (including an act, default or omission of the Principal, but not including a *Variation*

instructed or agreed by the Principal or otherwise determined) and the Contractor has not contributed in any way to the delay.

Extensions of time for Variations are dealt with under clause 52 and Schedule 5 (Agreement with Valuer or under clauses 72 to 75).

.2 The Contractor has taken all reasonable steps to avoid and minimise the delay and its effects.

.3 The Contractor has given to the Principal each of the notices required under clauses 54.2 and 54.3.

.4 The delay occurred to an activity or activities on a critical path of the then current *Contract Program*, as provided for in clause 25, and the Contractor has submitted this *Contract Program* with the notice required under clause 54.3.

.2 The Contractor must give the Principal notice of the delay, its cause, relevant facts, and its expected impact, as soon as practicable after the delay commenced.

.3 Within 14 days of commencement of the delay, the Contractor must give the Principal notice of the extension of time claimed, together with the information required under clause 25.11 and other information sufficient for the Principal to assess the *Claim*. If the delay continues for more than 14 days, the Contractor must give a further notice every 14 days thereafter, until after the delay ends, if the Contractor wishes to claim a further extension of time, together with further information of the kind required by this clause 54.3.

.4 An extension of time is only given for delays occurring on days on which the Contractor usually carries out work for the Contract.

.5 When concurrent events cause a delay in reaching *Completion* and one or more of the events is within the control of the Contractor, then to the extent that the events are concurrent, the Contractor will not be entitled to an extension of time for *Completion* notwithstanding that another cause of the delay is such that the Contractor would have had an entitlement to an extension of time.

.6 The Principal may in its absolute discretion for the benefit of the Principal extend the time for *Completion* at any time and for any reason, whether or not the Contractor has *Claimed* an extension of time. The Contractor is not entitled to an extension of time for *Completion* under this clause 54.6 unless the Principal exercises its discretion to extend the time for *Completion*.

.7 This clause 54 is subject to the provisions of any other clause in the Contract which entitles the Contractor to an extension of time for *Completion*.

55 Delay costs

Delays caused by the Principal

Clauses 55.1 and 55.2 prescribe the Contractor's rights when the Principal causes a delay to the Contractor in reaching *Completion*. Where prescribed in the Contract, the Contractor may be entitled to payment of delay costs which are caused by a specified delaying event. Otherwise, the Contractor is not entitled to extra payment for delay, disruption or interference of any nature whatsoever caused by the Principal (including for a breach of the contract by the Principal).

.1 The Contractor is entitled to delay costs at the rate or rates in *Contract Information* item 51A, for the number of days by which the time for *Completion* is extended because of a delay caused only by:

.1 a *Variation*, other than one for which, under clauses 41.6, 42.4 and 44.3, there is no payment for delays; or

Clause 41.6 deals with Site Conditions, 42.4 with ambiguities in the Contract Documents, and 44.3 with Faults in Principal's Documents.

.2 a breach of the Contract by the Principal which causes delay, disruption or interference to the Contractor carrying out the Works.

.2 The Contractor's only remedies for delay, disruption or interference of any nature whatsoever caused by the Principal (including for a breach of the Contract by the Principal, as referred to in clause 55.1.2) whether under the Contract, at law or otherwise, are an extension of time for *Completion* under clauses 41, 52 or 54, and delay costs under clause 55.1.

Delay to Completion

If indicated in *Contract Information* Item 51, the Contract provides for liquidated damages to be payable by the Contractor to the Principal, if the Contractor fails to achieve *Completion* by the *Contractual Completion Date*.

.3 If the Contractor fails to achieve *Completion* by the *Contractual Completion Date* as required by clause 69, the Contractor will be liable to pay the Principal liquidated damages as a debt due and owing at the rate stated in *Contract Information* item 51B for every day after the *Contractual Completion Date* to and including the *Actual Completion Date*. If, however, the Contract is terminated under clauses 78 or 79, before the Contractor reaches *Completion*, any applicable liquidated damages for failure to achieve *Completion* by the *Contractual Completion Date* will run to the date of termination of the *Contract*.

24 Condition 75 provided for the appointment of an Expert to determine issues that were unable to be resolved between the parties. Subject to the following provisions of Clause 75.6, a Determination by an Expert was to be treated as final and binding (see clause 75.7):

"[75].6 If the *Expert* determines that one party must pay the other an aggregated amount exceeding the amount in *Contract Information* item 56 (calculating the amount without including interest on it, and after allowing for set-offs), or if the *Expert's* determination involves a finding which does not involve paying a sum of money, then either party may commence litigation in respect of the amount referred to above (which amount exceeds the amount in *Contract Information* Item 56) or the finding which does not involve paying a sum of money, as applicable, but only within 56 days after receiving the determination".

25 Item 56 of Contract Information specified the amount of $500,000 as the threshold which had to be achieved, for the purposes of Clause 75.6, before litigation was permitted.

26 Clause 75 provided that an Expert appointed under the clause was to follow the Expert Determination Procedure set out in Schedule 6 to the Contract. Of present relevance are the following aspects of the Procedure:

"**1 Questions to be determined by the Expert**

.1 The *Expert* must determine for each *Issue* the following questions (to the extent that they are applicable to the *Issue*):

.1 Is there an event, act or omission which gives the claimant a right to compensation, or otherwise assists in 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 the light of the answers to clauses 1.1.1 and 1.1.2 of this Expert Determination Procedure:

(1) what compensation, if any, is due from one party to the other and when did it fall due?
(2) applying the rate of interest specified in the Contract, what interest, if any, is due 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*.

…

4 Role of Expert

.1 The *Expert*:

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

.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, within 16 weeks, or as

otherwise agreed by the parties, after the date of the letter of engagement of the *Expert* referred to in clause 75.2 of the General Conditions of Contract.

.2 If a certificate issued by the *Expert* contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a mistake in the description of any person, matter or thing, or a defect of form, then the *Expert* must correct the certificate."

The Expert Determination

27 The issues that the parties referred to the Expert for determination arose, so far as the Contractor's claim was concerned, out of six "Variation Claims", each with distinctive numbering. The claims totalled in excess of $2,000,000 before interest. In addition, a claim for damages by the Principal against the Contractor for exceeding the contractual period for construction was before the Expert for determination.

28 The Contractor's contention that the Determination is not binding is based upon its challenge to the way in which the Expert dealt with Variation Claims 10(a), 62 and 12. Its position is that, if adverse findings are made in relation to Variations 10(a) and 62, it does not press its contentions in relation to Variation 12. Accordingly, it is appropriate to confine attention to the way in which the Expert dealt with the first two mentioned claims.

29 The Expert's overall determination was that the Principal should pay to the Contractor $497,142.55 before interest. As this figure did not reach the threshold referred to in [25] above, the Contractor is, if the Determination stands, precluded from commencing court proceedings to enforce its claims.

30 In light of the existence of this threshold and the proximity to it of the amount to which the Expert held that the Contractor was entitled, it is not in my view appropriate to regard the Expert Determination as severable, in the sense that such part of it as the Contractor does not show departed from the Contract between the parties can stand even though the balance falls. This is so because success by the Contractor on any significant aspect of its challenge would be likely to cause the threshold to be exceeded and substantially affect the parties' rights by freeing the Contractor of a restraint on commencement of court proceedings. Accordingly, success by the Contractor in showing a single departure from the Contract, at least one that cannot be regarded as trivial, would render the whole of the Determination not binding upon the parties. The Principal did not on the appeal put any submissions to the contrary of this proposition.

Variation claim 10(a)

31 According to the Expert, this was a claim for an amount of $108,817.50 (including GST) "for additional under-boring of sheds, gardens, trees and driveways that [the Contractor said] it could not have been aware of at the time of the tender" (ED at [22]). An extension of time for completion

("EOT") was also claimed (ibid). As well, the Expert mentioned the possibility of the Contractor being entitled to "delay costs" pursuant to Clause 55 (ED at [77]).

32 The Expert granted part of the Variation and determined that the Contractor was entitled to $25,320, before interest, for extra costs but rejected the extension of time claim for the following reasons:

> "**Extension of Time**
>
> 140. The Claimant has claimed an EOT for Completion of 33 days. Other than this assertion, the claimant has not provided any basis for substantiation of its claim either as to the quantum of the claimed delay or the logic to demonstrate that any additional work extended the critical path for the project such as to cause delay in reaching Completion.
>
> 141. The Respondent contends that:
>
> a. The Contractor has failed to comply with its contractual obligations under Clauses 25 and 54; and
>
> b. The Claimant has no entitlement to an EOT for this cause.
>
> 142. Again, the Respondent has asserted but has not provided any submissions to particularise which aspects of the nominated clauses have not been addressed and its reasons for the assertions.
>
> 143. However, the onus is open the claimant to demonstrate an entitlement to an EOT.
>
> 144. There is nothing in the materials provided by the parties that can assist me to determine whether there is any entitlement to an EOT with regard to additional underboring. I cannot and do not determine this matter".

33 At this point in his Determination, the Expert did not mention again the question of delay costs under Clause 55. However, it can be inferred that he considered them not available because, under Clause 55 of the Contract, they are only available to the Contractor where an extension of time is granted. Here, the Expert took the view that the Contractor was not entitled to such an extension.

34 The Expert then proceeded to set out, and give specific answers in relation to, each of the questions that the Expert Determination Procedure required him to answer (ED at [145] – [146]). He stated that the Contractor's right to compensation arose because the Principal had given relevant variation instructions, because the Contractor had unexpectedly encountered materially adverse site conditions and because the Principal had engaged in misleading and deceptive conduct. He concluded that any rights (to compensation or an EOT) flowing from the Contractor encountering materially adverse Site Conditions had been extinguished by the failure of the Contractor to give a notice prescribed by the provision dealing with such conditions (Clause 41). However, he did not conclude that the other bases for Variation Claim 10(a) (variation instructions and misleading and deceptive conduct) were affected

by any similar problem. In these circumstances, the absence of a notice as to materially adverse site conditions was not of significance.

Variation claim 12

35 The Expert awarded $174,162 in respect of additional costs incurred "as a consequence of encountering extremely hard rock" (ED at [221] and [281]). He also determined that the Contractor was entitled to an extension of time of at least 22 days (ED at [289]) but did not award any delay costs under Clause 55, apparently upon the basis that none had been "expressly claimed" (ED at [278]). It was not contended on the appeal that the Expert was mistaken in thinking that delay costs had not been claimed.

36 Again, the Expert set out the questions which he was required by the Expert Determination Procedure to answer, together with his responses (ED at [299] and [300]).

Variation claim 62

37 The Expert did not award, in response to this claim, any amount in respect of additional costs (ED at [365]) and declined to accept the Contractor's extension of time claim because the Contractor had "not provided any reasoned support for the claimed delay of 90 days" (ED at [367]).

The Principal's claim for damages for delayed completion

38 As to this claim, the Expert said relevantly:

> "496. I consider that the principle supported in *Peninsular Balmain* [that is, *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211; (2002) 18 BCL 322] is that the Principal is obliged to use the power in Clause 54.6 to disentangle any causes of delay by the Principal from those caused by the Contractor or of neutral cause, making a fair and reasonable assessment of the causes, if it wishes to claim damages for the Contractor's breach, that are not tainted by its own preventing acts.
>
> 497. The Principal has not so exercised this power. I could therefore determine that the Principal has not demonstrated a *Contractual Completion Date* that is free from taint and available as a start point for the termination of damages. That would produce the result that the Principal (Respondent) has not demonstrated an entitlement to general damages.
>
> 498. Alternatively, I could accept as authority for the Expert to step into the shoes of the Principal (as contract administrator) in the fair and reasonable exercise of the power contained in Clause 54.6 to extend time, the decision in *Peninsular Balmain*. That is what I now propose to do.
>
> 499. A further alternative (but parallel) path for resolving this situation would be to identify and isolate any causes of delay and consequent delays that are acts of the

> Principal and exclude those periods from calculation of consequential damages. Failure to do so would have me determining damages that are a consequence of the Principal's own actions and not as a consequence of the default of the Contractor. The general damages awarded, if any, must be only for losses or damages that would not have been incurred by the Principal but for the default of the Contractor.
>
> 500. I believe that either of these last two approaches will yield the same result in terms of the Respondent's entitlement to general damages.
>
> **Delay Caused by the Principal**
>
> 501. My analysis above requires that I identify and quantify delays caused by the Principal, at least insofar as it is possible to do so based upon the submissions made by the parties and my own judgement. It is worth noting that, such delays would have entitled the Claimant to an EOT provided it had satisfied the contractual conditions precedent, and such EOTs would reduce the liability for general damages. Neutral causes of delay would likewise have entitled the Claimant to EOT and relief from damages. In this present analysis there is no principle of law that allows the Claimant relief from damages where the cause of delay to Completion is a neutral cause".

39 The Expert then referred again to the six variation claims that the Contractor had made. He did so for the purpose of determining whether they demonstrated that there were any respects in which the Principal had caused delay in completion of the Contract works. If they did, he reasoned that the period of that delay should not be taken into account for the purposes of the Principal's claim for damages for late completion.

40 In relation to variation claim 10(a), he said:

> "506. The subject work is spread across a number of areas of the work and it is reasonable to assume that any additional work, which could not have been allowed for in the tender and for the original Contract period, would cause delay to Completion.
>
> 507. The Claimant has claimed 33 days delay in relation to 659m of additional boring.
>
> 508. I therefore determine, on a pro rata basis, that a delay of 9 days should be attributed to the causes that are acts (variation) or breaches by the Principal.
>
> 509. Following my reasoning above, I determine an EOT, for the benefit of the Principal, pursuant to Clause 54.6, of 9 days, in order to 'disentangle' the acts or breaches of the Principal from other causes of delay".

41 It is difficult to reconcile the Expert's finding in [508] with his findings in [140] - [144] (see [32] above) that the Contractor had not discharged its onus of showing that delay for a defined period had occurred and that the additional work required "extended the critical path for the project such as to cause delay in reaching Completion". The effect of [508] and [509] was that, on the evidence before him, the Expert was satisfied that the Principal had caused nine days' delay to the achievement of Completion. In my view, this was inconsistent with the earlier finding in [140] - [144] that the Contractor had not demonstrated that that had occurred. As a result, the Expert erred in not amending

one or other of the sets of findings to ensure that they reflected a consistent view, whatever that may have been, of what he considered the position to have been.

42 In relation to variation claim 12, the Expert repeated his earlier finding (see [35] above) that the Contractor was entitled to an extension of time of 22 days (ED at [512]).

43 In relation to variation claim 62, the Expert repeated the opinion that he had expressed earlier (see [37] above) that the Contractor had not provided "any reasoned support" for a claimed extension of time (ED at [519]). He also referred to the fact that whilst the Principal had submitted that the Contractor had not provided any evidence that the works were delayed, the Principal had not denied that the works were delayed (ED at [520]). After referring to the Principal's knowledge of the need for varied work to occur, the Expert said the following:

> "523. On this basis, it is reasonable to assume that the C1 RM was delayed for a period of time at least equal to 10 May 2007 to 13 September 2007. That period is 18 weeks or 89 days, almost the 90 days claimed by the Claimant and probably also calculated on this basis (not adjusted for one public holiday).
>
> …
>
> 527. Following my reasoning above, I determine an EOT, for the benefit of the Principal, pursuant to Clause 54.6, of 89 days, in order to 'disentangle' the acts of the Principal from other causes of delay".

44 It is arguable that in relation to this variation claim, unlike the position in relation to variation claim 10(a), the Expert's conclusions when dealing with the Contractor's claims (paragraphs [365] and [367] – see [37] above) and the Principal's claim (paragraphs [523] and [527]) were not inconsistent because in each instance the Expert was finding against the relevant party on the basis that it had not discharged its onus, without making a positive finding as to what he thought the true position was. In other words, it is arguable that, when considering variation claim 62 for the purposes of the Principal's damages claim, the Expert was simply saying that the Principal had not shown that the delay in question was not caused by it and for that reason that period should not be considered in determining the Principal's claim. On balance, however, I do not consider this to be the case as paragraph [523] (see [43] above) seems to me to be a positive finding of fact rather than as a finding on the basis of onus. In these circumstances, there is a deficiency in the reasoning in the Expert's determination in relation to this variation claim also.

Conclusion or Extension of Time

45 The Expert expressed his conclusion as to the contractual completion date as follows:

> "533. In this determination, I have determined that the *Contractual Completion Date* should be further extended by a total of (9+22+89) 120 days, as a reasonable entitlement to EOT and in order to disentangle Principal caused causes of delay from other causes, so that

> the Principal (Respondent) can have a determinate date from which general damages may be determined. I therefore determine that the *Contractual Completion Date* that is to be used for the purposes of determining general damages, as a consequence of the Claimant's breach of contract, is 15 November 2007".

The judgment at first instance

46 The primary judge, Tamberlin AJ, described the Contractor's contentions in support of its claim for a declaration that the Expert Determination is not binding upon it as ones that the Expert "did not use his own expertise in relation to the grant of an extension of time in respect of the variations which he found and also because he did not address the question of compensation arising from a finding that the act of [the Principal] caused part of the delay to completion. [The Contractor] alleges that there were inconsistent findings made by Mr Turner in relation to extensions of time and that no reasons were given to explain the inconsistencies" (Judgment at [10]).

47 The judge then said that the "approach that courts adopt in relation to an agreement that an expert determination shall be 'final and binding' is that the circumstances in which a party may challenge the determination of an expert are very restricted" (Judgment at [12]). He referred to a number of authorities including the well-known statement of McHugh JA in *Legal & General Life of Australia v A Hudson Pty Ltd* (Judgment at [13]), which is in the following terms:

> "In each case the critical question must always be: Was the valuation made in accordance with the terms of the contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether or not there is error in the discretionary judgment of the valuer. It is whether the valuer complies with the terms of the contract" (at 336).

48 The judge took the view that paragraphs [140] - [144] of the Expert Determination (see [32] above) sufficiently set out the Expert's reasoning process which led him to reject the Contractor's claim under variation claim 10(a) for an extension of time. In relation to the Contractor's claim that the Expert ought to have used his expertise in order to decide this issue in the Contractor's favour, the judge said: "it is difficult to see how expertise would assist in circumstances where the conditions had not been satisfied and [the Expert] was simply not satisfied on the material before him that he could make any finding that an extension of time claim should be granted" (Judgment at [22]).

49 The judge then recorded the following submissions made by the Contractor:

> "31 [The Contractor] contends that in the above quoted paragraphs dealing with the counter-claim, Mr Turner has made a determination [in relation to variation claim 10(a)] that there should be an extension of time for its benefit pursuant to Clause 54.6, of nine days. The making of such a finding is said to be directly inconsistent with the earlier determination that on Firedam's claim for an extension of time, he could not be satisfied that any claim had been made out and [the Contractor] says that no reasons are given to explain the clear 'inconsistency' between the two determinations in relation to an extension of time".

50 The judge concluded that there was no inconsistency in the approach or reasoning of the Expert in dealing with the Contractor's claim for an extension of time and the Principal's damages claim. He said:

> "They are distinct claims based on different criteria and they call for different findings. Mr Turner, in dealing with the cross-claim by [the Principal], on a proper interpretation of his reasons, was referring to the power to extend time under Clause 54.6 in order to arrive at a reasonable and fair means by which general damages, the subject of [the Principal's] cross-claim, could be calculated" (Judgment at [34]).

51 He took the view that reading the two sections of the Determination together, the Expert "was not intending in paragraph [509] to make a grant of an extension of time so as to give rise to a claim for compensation based on an extension of time but rather he was engaged in estimating the nature and extent of any reduction in the cross-claim by [the Principal] for damages" (Judgment at [35]).

52 The judge said that this reasoning applied also to variation claim 62 and noted that variation claim 12 was not pressed in the event that he found against the Contractor in respect of the other two claims (Judgment at [38]). As a result, his Honour dismissed the Contractor's summons (Judgment at [39]).

Consideration

53 The submissions that the Contractor put on appeal included those put at first instance (as to which, see [46] above). In addition, the Contractor contended that, contrary to the primary judge's findings, the Expert had, in his Expert Determination, extended the time for Completion and that this had occurred by the Expert "stepping into the shoes" of the Principal in order to exercise the power conferred upon the Principal by Condition 54.6 (see above at [23]), as distinct from an extension of time being granted in favour of the Contractor under Clause 54.1. The Contractor submitted that, however an extension might have come about, it operated for all purposes and was one of which the Contractor was entitled to take advantage.

54 The first point to note about these submissions is that the ability of the Expert to "step into the shoes" of the Principal for the purpose of granting an extension of time under Clause 54.6 was not put in issue in the proceedings. It is accordingly appropriate to assume, without deciding, that such power existed.

55 Secondly, I do not agree with the primary judge's view that the Expert did not exercise the power granted to the Principal under Clause 54.6 to extend time but, instead, was calculating appropriate reductions to the Principal's cross-claim for damages (see above [50]). Assuming (as I have said is appropriate) that the Expert was entitled to exercise the power to extend time on the Principal's behalf, he clearly purported to do so. This can be seen from a number of parts of the Expert Determination ([498], [509], [527] and [533]). It is sufficient to refer in terms to [498] (quoted in [38] above) where, in relation to the possibility of stepping into the Principal's shoes to exercise that power, the Expert

said "[t]hat is what I now propose to do", and [509] (quoted in [40] above) where he said, in connection with variation claim 10(a), "I determine an EOT, for the benefit of the Principal, pursuant to Clause 54.6, of 9 days …". I appreciate that, as the primary judge pointed out, the Expert took this course for the purpose of enabling him properly to assess the Principal's damages claim. The fact that he may have done it for this reason does not, however, in my view require the conclusion that he did not make an extension of time. Having (so it should be assumed) the power to do it and having purported to do it, he should in my view be taken to have done it.

56 Thirdly, the grant of an extension of time under the Contract (whether the extension is granted under Clause 54.1 or Clause 54.6) does not of itself entitle the Contractor to delay costs under Clause 55. In so far as the Contractor's submissions suggested that there was an automatic inconsistency between the Expert's grant of an extension of time and his non-award of delay costs in respect of variation claim 10(a), that submission should not be accepted. Clause 55.1, upon which the Contractor relied to claim delay costs, required not only an extension of time but also that such extension came about as a result of a delay caused by a variation order by the Principal or a breach of contract of the nature described in that clause. Clause 54.6 confers a broad discretionary power on the Principal enabling it to extend time "for any reason", that is, not simply for the reasons referred to in Clause 55.1.

57 In these circumstances it is apparent that, if the Contractor's appeal is to succeed, consideration must focus upon the reason or reasons why the Expert exercised the Clause 54.6 power on the Principal's behalf. When this occurs, it can be seen that the reason that the Expert gave is of a type referred to in Clause 55.1, that is, either a variation or a relevant breach of contract (see ED at [508] quoted in [40] above and ED at [517]). This raises the question of why the Expert did not then award the Contractor delay costs under Clause 55.1.

58 As I have pointed out above (see [41]), there is an inconsistency between the Expert's reasoning in extending time under Clause 55.6 and his reasoning in rejecting the Contractor's claim to an extension of time (see [140] – [144] of the Expert Determination quoted in [32] above). It is apparent that the Expert regarded his rejection of the Contractor's claim to an extension of time as having the corollary that the Contractor was not entitled to delay costs (see [33] above; see also [35] above).

59 What one is left with is, on the one hand, a finding made in the context of considering the Principal's claim for damages, that nine days' delay to completion was caused by the Principal issuing variation instructions or breaching the contract. On the other hand is the inconsistent finding, made in the context of considering the Contractor's variation claim 10(a), for, inter alia, an extension of time and consequential delay costs, that no such delay had been established.

60 In these circumstances, I consider that the Contractor can fairly say, as it does, that it has not been told by the Expert why it is not entitled to delay costs. One is left in a state of ignorance as to why the delay

costs claim in respect of variation claim 10(a) was rejected. It follows from this that the Expert has in this respect failed to give proper reasons for his decision.

61 The Expert's reasoning is not clarified by reference to [501] of the Expert Determination (quoted in [38] above) which suggests that the Contractor's claim failed because it did not satisfy "contractual conditions precedent". This is presumably a reference to the topic dealt with in [34] above but, as that paragraph points out, the Expert did not suggest that there was any failure to give any relevant notice in respect of the Principal's variation instructions or misleading and deceptive conduct. Both of these provided a proper basis for an extension of time in relation to the elements of variation claim 10(a) with which they were concerned. The variation instructions would also have founded a consequential award of delay costs, although the misleading and deceptive conduct would not, because Clause 55.1, concerning delay costs, is only triggered by variations and breaches of Contract, not by misleading and deceptive conduct in contravention of the *Trade Practices Act*.

62 In any event, attributing failure of the Contractor's claim for delay costs under variation claim 10(a) to a failure to fulfil conditions precedent appears inconsistent with the reasons given for that failure in [140] to [144] of the Expert Determination (see [32] above and in particular ED [141] and [142]).

63 The Expert Determination Procedure quoted in [26] above imposed an obligation upon the Expert to give reasons for his Determination (see paragraph 4.1.3). An expert's determination that does not contain reasons for the determination is not a determination of the contractual description. Accordingly, consistent with the reasons given by McHugh JA in *Legal & General Life v A Hudson* (see [47] above) the Expert Determination is not binding upon the parties. As pointed out in *Holt v Cox* [1997] NSWSC 144; (1997) 23 ACSR 590, the reasoning of McHugh JA had, to that time, been followed in New South Wales and elsewhere on a number of occasions (see at 595). More recently, the reasoning was applied by this Court in *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2002] NSWCA 180; (2002) 11 BPR 20,201.

64 It is unnecessary in this case to consider whether the contractual requirement for the Expert to give reasons requires reasons to be given to the standard with which those exercising judicial functions must comply. Even assuming that the standard was a lesser one, the Expert's reasons nevertheless did not comply with it. At a minimum, experts who are required to give reasons "should explain succinctly why, in light of what happened, they have reached their decision and what that decision is" (*Bremer Handelsgesellshcaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130 at 132-3 referring to the obligations of arbitrators; compare *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255; (2007) 18 VR 346 and *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57). This standard is not complied with if the ultimate basis for a decision cannot be discerned because of inconsistency of reasoning or findings.

65 In *Kanivah*, at first instance ([2001] NSWSC 405; (2001) 10 BPR 18,825), Palmer J said in relation to a contractual requirement that a valuer give "sufficient written reasons" for his determination of the current market rental of leased premises:

> "[118] I cannot accept Kanivah's submission. In my view, the requirement of cl 1(f) for 'sufficient reasons' obliged Mr Norris to disclose what he did and why only to the extent necessary to enable the parties, with the assistance of their experts, to see whether he had complied with the requirements of cl 1(d) by having regard to the matters to which he was obliged to have regard, and by disregarding the matters which he was obliged to disregard. If it was apparent from the face of the determination that Mr Norris had addressed himself to the right questions, as the contract required, the parties would know that the process and calculations by which he produced his answers could not in law found a claim of vitiating error. On the other hand, if it was apparent from the face of Mr Norris' determination that he had not addressed himself to the right questions, as the contract required, then the parties would know that the determination would be of no effect regardless of what process and calculations had been used. This was all the contractual requirement to give sufficient reasons was intended to achieve.
>
> [119] In my opinion, the reasons given by Mr Norris in his determination were entirely sufficient to enable Holdsworth and Kanivah, with the assistance of their experts, to know whether he had addressed himself to the right questions under cl 1(d) of the lease. In this respect, I repeat what I have said in paragraphs [110] to [118] of this judgment".

66 In the Court of Appeal in *Kanivah*, Stein JA (with whom Beazley and Giles JJA agreed) said:

> "[60] As to the submission concerning the sufficiency of reasons of the valuer, I can see no error in his Honour's approach. In my opinion, the valuer's reasons were quite sufficient for the purposes for which they were required by the lease.
>
> [61] The reasons the valuer gave were sufficient to enable the parties to see whether cl1(d) had been complied with in the valuation exercise. Detailed reasons, such as to be provided by a judicial officer or arbitrator, are not required. This valuer was appointed to act as an expert and not as an arbitrator. Gillard J discussed the standard of reasons usually required of a valuer in *The Commonwealth v Wawbe Pty Ltd* (Unreported, Supreme Court of Victoria, 25 September 1998). I agree with his Honour's observations. The form of the particular clause in this lease requiring 'sufficient reasons' does not detract from the force of what Gillard J said.
>
> [62] In any event, even a judge does not have to detail every factor seen as relevant or irrelevant or itemise every fact taken into account. Judicial reasons are not required to be elaborate. Rather they need to be such as indicate to the parties why and on what basis the decision was made. Step by step reasons to a conclusion are not required".

67 I do not read the comments of Palmer J, or any implicit acceptance of them by Stein JA, as constituting an exhaustive statement of the possible rationales for parties including in their contract a requirement that an expert give reasons for his or her determination. It might simply be that the parties included such a requirement to enable the unsuccessful party to know why it was unsuccessful. In any event, speculation as to the parties' motives in requiring reasons is of little value in a case such as the present where, reading the Expert's Determination as a whole, it cannot be ascertained why the relevant conclusions have been arrived at. It is not a matter of requiring any particular detail of the reasoning process to be given but simply of requiring the basic ground for decision to be identified. If that basic ground is not discernible, the contractual requirement for reasons for the Determination has not in my view been complied with.

68 In *Xuereb v Viola* (1989) 18 NSWLR 453, one of the reasons that Cole J gave for rejecting a referee's report was that the referee had answered questions in opposite or inconsistent ways. He said that "[i]n consequence, the Court can have no satisfaction that any appropriate process of reasoning was applied in reaching the opinion contained in the answers to the questions referred [to the referee in that case]" (at 473). To similar effect was the approach of Mason P (with whom Meagher and Sheller JJA agreed) in *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 where his Honour, in reaching his conclusion that the trial judge had not given adequate reasons, treated it as significant that there were internal inconsistencies in the trial judge's reasoning (at 440).

69 As I pointed out earlier (see [30] above), in the circumstances of this Contract and this Expert Determination, provisions of the Expert Determination which depart from the contract should not be regarded as severable from those which do not. A departure from the Contract having been demonstrated by the Contractor, the whole of the Expert Determination must therefore be regarded as being outside the contemplation of the Contract. The Contractor is thus entitled to a declaration that the Expert Determination is not binding upon the parties to these proceedings.

70 The conclusions I have reached are sufficient to dispose of the appeal in favour of the Contractor. It may be added, however, that the conclusion I have reached as to the existence of inconsistency in the Expert's reasoning in connection with variation claim 10(a) applies equally to variation claim 62. As a result, the Expert Determination does not, in this respect also, provide the reasons contemplated by the Contract.

71 Where the bases of the Expert's decision are not known with certainty it is inappropriate to embark on a consideration of whether particular possible bases for decision would or would not have rendered the Determination not in accordance with the Contract.

Orders

72 One of the orders that the Contractor sought at first instance and in its Notice of Appeal was a declaration that the Contractor is not precluded from commencing proceedings against the Principal in respect of the matters the subject of the Expert determination. At the hearing of the appeal, the Contractor indicated that it did not ask this Court to "concern itself" with the question raised by the claim for this declaration.

73 For the reasons I have given, I propose the following orders:

(1) Appeal allowed;

(2) Orders at first instance set aside;

(3) Declare that the Expert Determination of Mr Neil Turner dated 6 February 2009 is not binding upon the parties to these proceedings;

(4) Order the respondent to pay the appellant's costs of the proceedings at first instance and on appeal; and

(5) The respondent to have a certificate under the *Suitors' Fund Act* 1951 if qualified.

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AMENDMENTS:

22/04/2010 - Typographical error - Paragraph(s) [10]

LAST UPDATED:
22 April 2010