NEW SOUTH WALES SUPREME COURT

CITATION: Ipoh v TPS Property No 2 & Anor [2004] NSWSC 289

CURRENT JURISDICTION:

FILE NUMBER(S): 55049/03

HEARING DATE{S): 10 March 2004

JUDGMENT DATE: 16/04/2004

PARTIES:
Ipoh Limited (Plaintiff)
TPS Property No 2 Pty Limited (Defendant 1)
Multiplex Limited (Defendant 2)

JUDGMENT OF: McDougall J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
G Inatey SC/B McManus (for plaintiff)
D P F Officer QC/J W Orsborn (for first defendant)

SOLICITORS:
Henry Davis York (for plaintiff)
Holding Redlich (for first defendant)
Minter Ellison (for second defendant)

CATCHWORDS:
BUILDING AND CONSTRUCTION - breach of contract - negligence - expert determination clause - power to stay proceedings - whether claims should be struck out or stayed on basis that they have been the subject of binding expert determination - whether expert determination is final and binding - meaning of "final and binding" - whether alternative tort claim was subject of expert determination

ACTS CITED:
Corporations Act 2001 (NSW)

DECISION:

See paras [105] and [106] of judgment

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
TECHNOLOGY AND CONSTRUCTION LIST

McDOUGALL J

16 April 2004

55049/03 IPOH LIMITED v TPS PROPERTY NO 2 PTY LIMITED & MULTIPLEX LIMITED

JUDGMENT

HIS HONOUR:

Introduction

1 The plaintiff ("Ipoh") sues the defendants (respectively "TPS No 2" and "Multiplex") for damages for breach of contract and negligence in relation to the Galeries Victoria Retail Centre ("the retail centre"), located between Pitt and George Streets, near Park Street, in Sydney.

2 The retail centre was developed pursuant to an agreement known as the Retail Stratum Development Agreement ("RSDA"), made on 6 May 1998 between Ipoh and Trust Company of Australia Limited ("TCA"). On the same date, TCA entered into a building contract with Multiplex ("building contract"), whereby Multiplex agreed to design and construct a complex that included both the retail centre and an office tower.

3 TPS No 2 now stands in the place of TCA. Pursuant to s 601 FT of the *Corporations Act* 2001 (NSW), the RSDA has effect as if TPS No 2 were a party to it.

4 It is common ground that, under the building contract, Multiplex assumed on a "back to back" basis the liabilities of TCA and, now, TPS No 2 to Ipoh under the RSDA.

5 TPS No 2 seeks orders that:

(1) Certain of Ipoh's claims against it, known as the "wind claims", be struck out , or alternatively permanently stayed, upon the basis that they have been the subject of a binding expert determination under clause 21 of the RSDA; and

(2) The balance of Ipoh's claims against it proceed to resolution in accordance with clause 21 of the RSDA, and that those claims be stayed pending such resolution.

The wind claims

6 Ipoh alleges that the retail centre is affected by a number of defects in its design and construction. Those defects include what is called a "wind driven rain and wind tunnel effect". Ipoh says that the retail centre was so designed and constructed that, in certain conditions, rain and wind enter the retail centre, making some of the tenancies and some of the common areas uncomfortable and causing the ambient temperature to fall below the minimum stipulated in the relevant design brief. That is said to be a breach by TPS No 2 of the relevant clauses of the RSDA, namely clause 6.1 (relating to design obligations) and clause 9.1 (relating to construction obligations).

7 Alternatively, Ipoh says that TPS No 2 owed it a duty of care to warn "that a result of the design, procurement of the design and construction of the sheltered laneways within the Retail Centre would be a wind driven rain and wind tunnel effect" having the consequences already referred to. It is said that TPS No 2 "in designing, procuring the design and constructing the retail centre, failed to warn Ipoh that there would be [that] wind driven rain and wind tunnel effect".

8 The particulars of breach of contract refer to a report by Vipac Engineers and Scientists Ltd, dated August 2001 ("the Vipac report"). The particulars of both the duty of care and its breach likewise refer to the Vipac report.

The remaining claims

9 The other claims brought by Ipoh against TPS No 2 allege breach of design obligations in relation to:

(1) Leaks through the glass roof of the retail centre between November 2000 and April 2001;

(2) A defect in the kitchen exhaust and air conditioning system, that is said to cause the introduction of cooking odours into the air conditioning system as return air, so that kitchen exhaust fumes are distributed by the air conditioning centre through the retail centre tenancies;

(3) An alleged failure to provide air conditioning to all areas of the retail centre in accordance with (so it is said) clause 9.1(q) of the RSDA and a document known as the Ryder Hunt Estimate; and

(4) An alleged failure to provide an air conditioning system that operates within "the acceptable performance parameters and the fitness for purpose requirements".

10 Alternatively, Ipoh says that TPS No 2 owed, and breached, a duty of care to Ipoh to exercise reasonable care to ensure that the design obligations of TPS No 2 under the RSDA were properly performed and met. The particulars of breach relate to the remaining claims.

The claims against Multiplex

11 Ipoh alleges that Multiplex owed, and breached, duties of care to Ipoh:

(1) To warn Ipoh of circumstances in which construction in accordance with the RSDA, including the retail design brief, would cause the retail centre to be constructed in a way that it was not fit for its intended purposes; and

(2) To exercise reasonable care to ensure that its obligations under the building contract relating to the construction of the retail centre were properly performed and met. The particulars of breach include both the wind claims and the remaining claims.

12 Ipoh makes a further claim against Multiplex in respect of alleged delay in completing "certain tenancy arrangements with Nike". That claim does not appear to bear any relationship to the claims made (either against TPS No 2 or against Multiplex) in relation to the wind claims or the remaining claims.

13 No one submitted that this claim had any relevance to the determination of the issues. Accordingly having mentioned it once, I shall not mention it again.

Dispute resolution: the contractual provisions

14 Clause 21 of the RSDA provides, so far as is relevant, that:

"**21. DISPUTE RESOLUTION**

21.1 First Stage

If a dispute arises between the parties in relation to any matter under this Agreement (except a right to rescind or terminate this Agreement), the parties agree that before exercising any rights they may have at law (except in regard to urgent interlocutory injunction proceedings) they must use their best endeavours to resolve the dispute as follows:

(a) any party seeking resolution of a dispute must give a notice to any other party in dispute and the parties' representatives must meet within 5 Business Days after that notice is given to attempt to resolve the dispute;

(b) if within a further 5 Business Days the dispute is not resolved then the Chief Executive Officers of the parties (or a representative director if a party does not have a Chief Executive Officer) must meet and use their best endeavours to resolve the dispute within a further 5 Business Days after which period, if the dispute is not resolved or if the Chief Executive Officers have not met, any party may refer the dispute for determination under clause 21.2.

21.2 Expert Determination

The following applies in the case of any dispute referred for determination under this clause:

(a) a party may not begin legal proceedings in connection with a dispute under this Agreement (excluding urgent applications for interlocutory injunctions) unless that dispute has first been decided by a person appointed under this clause 21.2;

(b) the dispute must be referred to a person agreed on by the parties but if the parties do not agree within 5 Business Days after the notice of dispute is given, then to a person appropriately qualified to deal with the dispute appointed at the request of any party by the president of The Law Society of New South Wales;

(c) the expert will:

(i) act as an expert and not as an arbitrator;

(ii) proceed in any manner he or she thinks fit;

(iii) conduct any investigation which he or she considers necessary to resolve the dispute or difference;

(iv) examine such documents, and interview such persons, as he or she may require; and

(v) make such directions for the conduct of the determination as he or she considers necessary.

(d) the expert must:

(i) disclose to the parties any interest he or she has in the outcome of the determination; and

(ii) not communicate with one party to the determination without the knowledge of the other.

(e) The expert will determine who pays each parties' [sic] costs and the expert's costs and the parties will comply with the expert's said determination.

(f) Unless otherwise agreed between the parties, the expert must notify the parties of his or her decision upon an expert determination conducted under this clause 21 within 20 Business Days from the acceptance by the expert of his or her appointment.

(g) The expert will not be liable to the parties arising out of, or in any way in connection with, the expert determination process, except in the case of fraud.

(h) The determination of the expert:

(i) must be in writing;

(ii) will be final and binding."

15 Clause 39 of the building contract provides, so far as is relevant, that:

"**39. DISPUTES**

39.1 Notice

In the event of any dispute or difference arising between the Trustee or the Trustee's Representative on the one hand and Multiplex on the other hand at any time as to the construction of the Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith including a decision of the Contract Administrator ("Dispute"), then (except in the case of non-payment to Multiplex of the Contract Sum or any part thereof or any other money) either party must give to the other notice in writing by hand or by certified mail adequately identifying the matter the subject of that Dispute and the giving of such notice is a condition precedent to the commencement by either party of proceedings (whether by way of litigation or arbitration) with regard to the matter the subject of that Dispute as identified in that notice (however, nothing in this clause 39 shall prejudice the right of a party to seek urgent injunctive or declaratory relief in respect of any dispute or difference or any matter arising under the Contract).

39.2 Negotiation or Mediation

As soon as practicable but in any event within the period of 20 Business Days from the receipt by one party of a notice under clause 39.1:

(a) the parties will promptly confer and use all reasonable efforts to resolve the Dispute;

(b) the relevant parties' chief executive officers will promptly meet and endeavour to resolve the Dispute; and

(c) the parties will enlist, if the parties agree, the assistance of a mediator nominated by the Australian Commercial Disputes Centre to assist in the resolution of the Dispute.

39.3 Referral to Expert Appraisal

If after the expiration of the period under clause 39.2 the Dispute has not been resolved, then either party may require the Dispute to be determined by an expert appraisal under the following clauses.

39.4 Selection of Expert

Where the Contract requires or provides for a matter to be referred to or resolved by expert appraisal the matter shall be determined by an independent expert:

(a) agreed between and appointed by the parties; or

(b) in the absence of agreement within 5 Business Days after the date of the relevant notice, appointed by the President of the Institute of Arbitrators, Australia, and administered in accordance with clause 39.5.

39.5 Rules of Expert Determination

(a) The expert shall:

(i) act as an expert and not as an arbitrator;

(ii) proceed in any manner he or she thinks fit without being bound to observe the rules of natural justice or the rules of evidence;

(iii) take into consideration all documents, information and other material which the parties give the expert which the expert in his or her absolute discretion, considers relevant to the determination of the Dispute;

(iv) not be expected or required to obtain or refer to any other documents, information or material but may do so if he or she so wishes; and

(v) make his or her decision within 20 Business days from the acceptance by the expert of the appointment.

(b) The expert may commission his or her own advisers or consultants, including lawyers, accountants, bankers, engineers, surveyors, traffic consultants or other technical consultants, to provide information to assist the expert in his or her decision.

(c) The parties shall indemnify the expert for the cost of retaining those advisers or consultants.

39.6 Expert's Finding

The determination of the expert shall be in writing and will be final and binding on each party unless a party gives notice to the other party of its intention to initiate proceedings in respect of the determination in a court or other tribunal within 10 Business Days of the determination.

The parties are to give effect to the determination of the expert unless and until it is reversed, overturned or otherwise changed by any subsequent litigation proceedings.

…

39.11 Consolidation of Disputes

Where a Dispute arises under the Contract and the facts or circumstances giving rise to it also gives rise to a dispute in respect of:

(a) under [sic] the Project Agreement;

(b) under [sic] the Retail Stratum Development Agreement; and/or

(c) under [sic] the Citibank Agreement for Lease,

either party, if requested by the other party, must consent to:

(d) the consolidation of the determination of the disputes;

(e) the disputes being heard at the same time or one immediately after the other; or

(f) the proceedings on one dispute being stayed until the determination of any of them,

provided that nothing in this clause shall mean that a determination under the Project Agreement, the Retail Stratum Development Agreement and/or the Citibank Agreement for Lease shall be final and binding on a party unless had such a determination been made under this clause 39 it would have been final and binding."

The expert determination

16 The wind driven rain and wind tunnel effect has been the subject of expert determination under clause 21 of the RSDA. The dispute was referred to Incoll Management Pty Ltd ("Incoll"). Incoll gave a written determination of the dispute on 5 December 2001 ("the Incoll determination").

17 The instructions to Incoll, from both TCA and Ipoh, are set out in Appendix A to its determination. The first matter was:

> "1 Consider and provide an experts [sic] report on the issues known as wind driven rain and wind tunnel effect taking into account findings for appropriate site visits or relevant correspondence and documents previously provided to you including but not limited to:
>
> … "

18 The second matter was:

> "2 Prepare a report addressed to [TCA] ... and [Ipoh] commenting on the following issues:
>
> (i) (Clause 16.2 of the RSDA): whether the "wind-driven rain" effect and "wind tunnel" effect in the Retail Centre (as defined in the RSDA) are:
>
> (a) "defects"; or
> (b) "faults"
>
> relating to the
>
> (c) "design"; or
> (d) "construction"
>
> of the Retail Centre.
>
> (ii) Whether despite the "wind driven rain" effect and "wind tunnel" effect, the design is in accordance with the RSDA and in particular the fitness for purpose provisions.
>
> (iii) Whether, having regard to the Retail Design Brief and the RSDA, the common areas should have been designed and constructed as useable for retail purposes consistent with the Minimum Retail Centre Standard set out in the RSDA."

19 The Incoll determination commences with an "Executive Summary" as follows:

> "Incoll's brief was to provide an expert determination on three issues. Our findings are as follows:
>
> *1. (Clause 16.2 of the RSDA): whether the "wind-driven rain" effect and "wind tunnel" effect in the Retail Centre (as defined in the RSDA) are:*
>
> *(a) "defects"; or*
> *(b) "faults"*
>
> *relating to the*

(c) "design"; or
(d) "construction"

of the Retail Centre.

We conclude that there is no defect or fault to either the design or construction of the Retail Centre.

We consider the of [sic] "wind-driven rain" effect to be as a result of a "fault" arising from operational expectations, the effect of which has been significantly reduced by work carried out by the Builder outside its contractual obligations.

We consider the "wind tunnel" effect to be as a result of a "fault" arising from operational expectations.

Work could be carried out to mitigate this effect but this would appear to conflict with the design and construct obligations.

2. *Whether despite the "wind driven rain" effect and "wind tunnel" effect, the design is in accordance with the RSDA and in particular the fitness for purpose provisions.*

Despite the "wind driven rain" effect and "wind tunnel" effect the design is in accordance with the RSDA and in particular the fitness for purpose provisions.

3. *Whether, having regard to the Retail Design Brief and the RSDA, the common areas should have been designed and constructed as useable for retail purposes consistent with the Minimum Retail Centre Standard set out in the RSDA."*

We conclude that the common areas were not required to have been designed and constructed as useable for retail purposes. In drawing this conclusion we have interpreted useable for retail purposes as equating to retail shops."

20 There follows an "Introduction" that states, among other things:

"In compiling this Report, we have proceeded on the basis that a "defect" is something that relates to specified works not being designed or constructed in accordance with the requirements of the documents; whereas "fault" is something which is either omitted or has been designed or constructed in accordance with the requirements of the documents but has not satisfied its intended purpose. We note that the dictionary definition of "defect" and "fault" are one and the same, but draw the distinction as this is implied by our brief."

21 In a section headed "Conclusion", Incoll states, among other things:

" …

The "wind tunnel" effect in the Retail Centre at ground level is a consequence of the open laneway concept required by the Retail Design Brief.

…

The "wind tunnel" effect is not a defect or fault to [sic] either the design or construction of the Retail Centre.

…

It is our view, based upon our review, that the extent of rain in ingress and/or wind driven rain at high level that has been experienced in certain locations and at certain times during operation of the Retail Centre is in excess of levels that could reasonably be expected in a sheltered environment. However, this (fault) arises from operational expectations not due to a default or fault to [sic] either the design or construction of the Retail Centre

…. If the stakeholders were seeking a fully enclosed environment this could have been specifically stated as a requirement in the Retail Design Brief. In fact the Retail Design Brief is quite specific in stating on page 16 "thus reinforcing the concept of the retail avenue and piazza as 'sheltered' city spaces rather than enclosed rooms or arcades. … "

22 The Vipac report, which had been commissioned by Ipoh before the reference to Incoll under clause 21.2, was considered by Incoll and referred to in its determination. A copy of the Vipac report is appendix E to that determination. Incoll comments on the Vipac report as follows:

"A report commissioned by Ipoh from Vipac Engineers identifies that wind in certain locations within the retail centre and under certain conditions exceeds certain criteria. This arises from operational expectations and not from a failure to comply with design and construction obligations. Vipac have also identified action that if implemented would, in their opinion, reduce the extent of the effect."

Defects: the contractual provisions

23 The RSDA provided relevantly, with respect to defects, that:

"**16. DEFECT LIABILITY PERIOD**

…

16.2 Notification

Any defect or faults in the Retail Centre relating to the design or construction of the Retail Centre not being in accordance with the provisions of this Agreement, faulty materials or workmanship which may appear in the Retail Centre and the performance of Services to the Retail Centre after the issue of the Certificate of Practical Completion and which are notified in writing by Ipoh to the Trustee prior to the expiration of 12 months after the Date of Practical Completion shall be promptly rectified by the Builder at the direction and cost of the Trustee, replaced or made good as reasonably required by Ipoh at no cost to Ipoh. Ipoh shall act reasonably in providing access to the Trustee and

its contractors to enable the carrying out of any such defect rectification Works.

…

16.4 Builder to enforce rights

Without limiting clause 16.2, the Trustee must enforce its rights under any building contract for the Works in relation to the Retail Centre including the rectification of defects in accordance with the defects liability provisions in that contract.

16.5 Disagreement re Rectification

In the event of any disagreement between the Trustee and Ipoh in regard to defects or defect rectification in relation to the Retail Centre, the matter shall be determined in accordance with clause 21 and the Certifier will be appointed by the parties as the expert for the purposes of clause 21.2."

24 There is no definition of "defect" in the RSDA.

25 The building contract provided relevantly, with respect to defects, that:

"**31. DEFECTS LIABILITY PERIOD**

31.1 Defects

Any deficiencies, faults, defects, shrinkages, errors or omissions in the Works as a consequence of Multiplex not executing the Works in accordance with the Contract (Defects), including those which are notified in writing by the Trustee to Multiplex within the Defects Liability Period as requiring rectification, must be dealt with as follows:

(a) the Trustee's Representative may at any time prior to the expiration of the Defects Liability Period give notice in writing to Multiplex providing details of the Defects;

(b) Multiplex must, as promptly as is reasonable to arrange remedy [sic] such Defects; and

(c) the costs to Multiplex of remedying those Defects shall be borne by Multiplex.

…

31.4 Disagreement re Rectification

(a) In the event of any disagreement between Multiplex and the Trustee in regard to Defects or Defect rectification in relation

to the Retail Centre, the matter shall be determined by the Certifier, acting as an expert. The Certifier's decision shall be final and binding on the parties.

(b) In the event of any disagreement between Multiplex and the Trustee in regard to any other Defect or Defect rectification, the matter shall be settled in accordance with clause 39.

…"

26 Multiplex accepts that the effect of clause 31.1 of the building contract is to define "defects" and that "[t]he definition expressly incorporates defects notified either within the defects liability period, or at some other time".

History of dispute

27 In May 2002 – ie, after Incoll made its determination on the wind driven rain and wind tunnel effect claim – Ipoh made demand on TCA for more than $11 million in relation to what were called "unresolved issues". Those unresolved issues included the remaining defects and (notwithstanding the Incoll determination) a claim relating to the wind driven rain and wind tunnel effect. TCA's response referred to the dispute resolution procedures under the RSDA, pointed out that any liability of TCA to Ipoh under the RSDA would be passed on to Multiplex, and requested "that any dispute as between TCA and [Ipoh], and as between TCA and Multiplex, in respect of defects in the Retail Centre be consolidated pursuant to clause 39.11 of the Building Contract". TCA also passed on Ipoh's demand to Multiplex, pointed out that liability of TCA to Ipoh would be referred on to Multiplex, and made the same request for consolidation.

28 After Ipoh commenced these proceedings, TPS No 2 served:

(1) A notice of dispute dated 10 December 2003 on Ipoh, invoking clause 21.1(a) of the RSDA; and

(2) A notice of dispute dated 10 December 2003 to Multiplex, invoking clause 39.1 of the building contract.

29 There is no evidence that Ipoh, in relation to the remaining defects, has taken any of the steps referred to in clause 21.1 of the RSDA. However, as I point out in para [76] below, Ipoh says that it has taken steps that, functionally, are at least equivalent to those required under clause 21.1.

The power to stay

30 It was common ground between TPS No 2 and Ipoh that:

(1) The Court has power to order a stay of proceedings, for the purpose of enforcement of an agreement for expert determination of disputes.

(2) The power to stay is discretionary.

(3) Nonetheless, the Court starts with a presumption that the parties should be held to their contract.

(4) The onus is on the party seeking to abandon the process of expert determination to show good reason for this course.

(5) Without limiting the generality of the discretion (including the discretion to refuse a stay), a stay of proceedings may be refused where the dispute involves the determination of complex legal issues, or where the stay might result in a multiplicity of proceedings.

31 In relation to this last point, Ipoh submitted that there were other bases on which a stay might be refused, including that the stay might lead to the risk of inconsistent findings, or duplication of effort and cost, or where some of the respondents to the application for a stay were not a party to any of the relevant agreements. Ipoh acknowledged that the first of these suggested bases was related to the "multiplicity of proceedings" basis for refusing a stay. On analysis, I think, the same may be said of the further bases suggested by Ipoh. That is to say, I think that they are refinements, or consequences, of the "multiplicity of proceedings" basis.

32 In my view, the agreed position taken by TPS No 2 and Ipoh, as summarised above, is correct. It is therefore unnecessary for me to look in detail at the authorities. I will do no more than note that they were summarised by Barrett J in *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587 and, more recently, by Einstein J in *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134. I agree with, and adopt, their Honours' analyses of the relevant principles.

33 The parties were also, in substance, agreed as to the principles relevant to the impeachment of the outcome of expert determination. In substance, the determination must be made in accordance with the contract and may be set aside if it is not. It may also be set aside if it is vitiated by factors such as mistake, misrepresentation, incapacity, fraud or collusion. As to the first point: see *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314. As to the latter point: see the decision of Palmer J in *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSWSC 405, where his Honour reviewed the relevant principles. Again, because the common position of TPS No 2 and Ipoh is, in my view, correct, I need do no more than say that I agree with, and adopt, Palmer J's analysis of the relevant principles.

The position of Multiplex

34 Multiplex was not a respondent to TPS No 2's notice of motion. Nonetheless, it was represented at the hearing of the notice of motion. At the conclusion of the hearing of argument, I gave directions for the filing of an amended summons (it having become apparent, in the course of argument, that the summons as filed was defective because it did not allege the material facts said to give rise to a duty of care in respect of the wind claims). I also gave directions for the filing of further written submissions and extended to Multiplex an opportunity to put submissions if it wished to do so.

35 Multiplex availed itself of that opportunity. The focus of Multiplex's submissions was, not surprisingly, on the claims relating to the remaining defects. I have already referred, in para [26] above, to one of the submissions that it made. I shall refer to other of its submissions, so far as is necessary, when I deal with the competing arguments on TPS No 2's notice of motion.

The wind claims : the competing submissions

36 Because, as was accepted, Ipoh bears the burden of showing that a stay should not be granted, it is convenient to start with Ipoh's submissions. In considering those submissions, it is necessary to bear in mind that Ipoh puts its claim both in contract and (as clarified by the amended summons) in tort.

37 Ipoh did not submit that the Incoll determination was affected by any vitiating factor, or that it did not comply with the relevant terms of the RSDA. Ipoh's primary submission was that, on the proper construction of clause 21 of the RSDA, Incoll's determination "is not final and binding where a party decides to commence legal proceedings in connection with the dispute following the determination being made."

38 Ipoh submitted further that the claim in tort had not been the subject of expert determination. Thus, if its submissions as to the proper construction of clause 21 were not accepted, Ipoh submitted that any stay, in relation to the wind claims, should be limited to its contractual claims.

39 Ipoh submitted further that it had "identical or near identical claims to the wind claims" that were brought directly against Multiplex and noted that, because Multiplex had not sought to stay the proceedings (wholly or in part), the claims against it would survive any stay order and would be heard and determined by the Court in the normal course. Thus, Ipoh submitted that a stay in respect of the wind claims would lead to "multiplicity of proceedings, duplication of work and costs and the prospect of inconsistent findings or results." (I interpolate that the submissions that I have summarised in this paragraph were made in respect of both the wind claims and the remaining defects.)

40 The submissions for TPS No 2 were in effect the reverse of those for Ipoh. TPS No 2 submitted that the final words of clause 21 mean what they say and that the Incoll determination was "final and binding" in relation to the wind claims. It submitted that the only litigation that was permissible, following expert determination, was litigation either to enforce the result or to impeach the determination on the well recognised grounds to which I have referred in para [33] above.

41 TPS No 2 submitted that, because Incoll had found that there was no breach of contract in relation to the relevant aspects of the design and construction of the retail centre, and because that finding was final and binding, the negligence claim could not succeed.

42 TPS No 2 further submitted that a finding in the Incoll determination, to the effect that the wind claims were the result of "an operational problem within the Retail Centre", was a complete defence to the negligence claim.

43 TPS No 2 further submitted that:

(1) Ipoh should not be permitted to revisit substantially the complaint that had been dealt with by Incoll, by "dressing it up" as a failure to warn case; and

(2) In any event, there could be no duty to warn of something that was not a defect.

44 Finally, TPS No 2 submitted that it was not open to Ipoh to pursue fresh claims without first having complied with the relevant requirements of clause 21.1; or, alternatively, that notwithstanding the failure of TPS No 2 to comply with the relevant requirements of clause 21.1, TPS No 2 had, nonetheless, validly referred the dispute to expert determination so that the ban in clause 21.1(a) was in place. (The submission was put generally, as I understood it, in relation to both the wind claims and the remaining defects.)

The proper construction of clause 21

45 Clause 21 provides for a two-stage process of dispute resolution. The "First Stage", described by clause 21.1, is mandatory. The second stage, namely "Expert Determination" in accordance with clause 21.2, is not (in the sense that it is not mandatory to proceed to expert determination if the clause 21.1 procedures have been followed through fully without producing resolution of the dispute).

46 Clause 21.1 prohibits the exercise of rights at law (with an irrelevant exception in relation to urgent interlocutory injunctions) until after the parties have used their best endeavours to resolve the dispute, by following through the consecutive procedures described in paragraphs (a) and (b).

47 If the first stage procedures have been worked through - ie, if there have been meetings of the parties' representatives and of their chief executive officers – without resolving the dispute, then the prohibition against the exercise of rights at law no longer applies.

48 Alternatively, the dispute may be referred for expert determination under clause 21.2. That may also happen if there has not been a meeting of chief executive officers. In the latter case, the prohibition against the exercise of rights at law would, prima facie, continue (I do not need to consider whether the prohibition could be enforced in the hypothetical situation that a party had frustrated the procedures set out in paragraphs (a) or (b) of clause 21.1), and the only further avenue of dispute resolution would, prima facie, be that provided by clause 21.2.

49 It follows that clause 21.2 will not automatically be engaged (assuming, of course, that the parties remain interested in procuring a resolution of the dispute) where the clause 21.1 process has failed. Depending upon the events that occur, clause 21.2 will be either an alternative or the only available means of dispute resolution.

50 What is significant is that, where clause 21.2 is engaged, there is:

(1) A prohibition against the institution of legal proceedings in connection with the dispute (again, with the presently irrelevant exception relating to interlocutory injunctions), and

(2) A provision that the outcome of the expert determination "will be final and binding".

51 In essence, the submission for Ipoh is that clause 21.2(a) contains an implied permission to commence proceedings once the process of expert determination in accordance with the steps set out in the following paragraphs of clause 21.2 has concluded. It follows, Ipoh submitted, that if the words "final and binding" are read at face value and unqualified, then the implicit permission in clause 21.2(a) is meaningless.

52 In essence, the submission for TPS No 2 was that the words "final and binding" mean what they say and should not be qualified by the implication of some words such as "unless a party decides otherwise". TPS No 2 submitted that the only proceedings that could be instituted, following the making of the expert determination, were proceedings to enforce the determination or proceedings to set it aside (because, for example, it did not accord with the terms of the contract or was affected by some vitiating factor).

53 The approach advocated by Ipoh involves reading in a substantial limitation on the concluding words of clause 21.2. Ipoh says, in substance, that the words "will be final and binding" should be read as

"will be final and binding unless a party decides to challenge it". It may be correct to say, as Ipoh submits, that "[i]t is not uncommon for parties to agree that a determination will be final and binding in limited circumstances". However, it is usual for the circumstances to be defined in the contract, rather than to be no more than the whim of a party. Ipoh referred to *Savcor* at 593 [20]. In that case, expert determination was final and binding unless the decision was that one party pay the other in excess of $500,000 (excluding interest and costs); it was only if the amount of the determination exceeded that threshold that there was a right to arbitrate.

54 In my view, there is a fundamental inconsistency between the proposition that an expert determination of a dispute between the parties is final and binding on those parties, and the proposition that such an expert determination is final and binding only if the parties accept it (or if neither of them wishes to challenge it). The submission for Ipoh not only requires that words be read into clause 21.2; its subverts, in a fundamental way, the clear meaning of the existing words.

55 Ipoh submitted that similar consequences applied to the construction advocated by TPS No 2. I do not think that this is correct. The introductory words of paragraph (a) are not in terms permissive; they are prohibitive. They prohibit the institution of legal proceedings in connection with the dispute under the RSDA unless that dispute has been the subject of expert determination in accordance with clause 21.2. The clause does not thereafter provide that, once the expert determination has taken place, the parties are free to commence legal proceedings. (Indeed, one might think, by providing that the expert determination is final and binding, clause 21.2 says precisely the opposite.) The "permission" upon which Ipoh relies is, at best, implied. The implication must arise on the footing that the prohibition is not expressed to be permanent, but is of limited (although uncertain) duration. In effect, it reads the word "unless" as "until".

56 The underlying philosophy of clause 21 is clear. It is seeking to promote what might in general terms be called alternative dispute resolution. Thus, the "first stage" processes are a precondition of litigation. It is only if they are followed but fail, and if (having failed) there is no reference to expert determination, that proceedings may be commenced. Once the clause 21.1 processes fail, the parties have a choice. It they choose (or one of them chooses) the path of expert determination, that has to be followed through, and is a bar to litigation whilst it is current.

57 The outcome of the process of expert determination is expressed to be "final and binding". The whole purpose of clause 21.2(a) is to ensure that the process of expert determination can be worked through, leading to the contractually stipulated result. To the extent that clause 21.2(a) is to be read as containing not merely a prohibition (as obviously it does), but also an implied permission, the extent of that which is permitted must, in my judgment, be determined having regard to the purpose of the paragraph. If, as I think is the case, the purpose of the paragraph was to enable the expert to produce a determination, then any implicit permission to litigate once that determination is produced must recognise the stipulated character of the determination. That is so because, on a proper construction of clause 21.2(a), proceedings cannot be commenced until there exists something that answers the description "the determination of the expert"; and that determination is, as the parties have stipulated, "final and binding". A purposive approach to the construction of clause 21.2(a) setting it in context must, in my view, lead to the result that any implied permission is restricted by the agreed final and binding character of the expert determination.

58 Whichever approach one takes involves some difficulty with the drafting of clause 21.2. However, the approach for which TPS No 2 contends involves, in my view, less drastic consequences than does the approach for which Ipoh contends. More importantly, it is in my judgment more consistent with clause 21 as a whole than is the approach for which Ipoh contends.

59 There are two other considerations that, I think, support the conclusion to which I have come.

60 First, if the matter is looked at in terms of implication (see para [55] above), then the implied permission for which Ipoh contends would be inconsistent with the express provision, in clause 21.2(h)(ii),

that the outcome is "final and binding". On ordinary principles, a term will not be implied that is inconsistent with an express provision of the contract.

61 Secondly, circumstances may arise where clause 21.2 provides the only means of dispute resolution: see paras [48] and [49] above. A party that has frustrated the first stage of dispute resolution under clause 21.1 (for example, by failing to make its chief executive officer available for a meeting as required by para (b)), cannot commence proceedings. The other party could, however, obtain a "final and binding" resolution of the dispute by referring it to expert determination. It would be an extraordinary outcome if a party, having frustrated the operation of clause 21.1 (so that the "first stage" barred commencement of proceedings by that party), became thereafter able to commence proceedings, notwithstanding its default, because the other party, in order to obtain a resolution of the dispute, had taken the only course available to it, namely referring the dispute to expert determination. In those circumstances (if Ipoh's submission be correct), the party in breach would obtain a benefit from the breach – namely, the right to commence litigation – that was otherwise denied to it. If, however, the words "final and binding" mean what they say then this could not arise.

62 In substance, I think, clause 21 gives the parties a choice after the first, and mandatory, stage of dispute resolution has been worked through unsuccessfully. They can choose the path of litigation, or they (or one of them) can choose the path of expert determination. But each path is final: self evidently so, in the case of litigation; and contractually so, in the case of expert determination. The scheme, so understood, seems to me to be entirely rational.

63 I therefore conclude that, where there has been an expert determination under clause 21.2, and where that expert determination is not assailed on the ground that it does not accord with the contract, or on grounds of fraud, collusion, misrepresentation etc, then that expert determination is, as the clause says, final and binding. I conclude further that it is only proceedings to enforce the determination, or to set it aside on grounds of the kind that I have mentioned, that may thereafter be commenced.

64 The first submission for Ipoh fails. I now turn to the others.

The claim against TPS No 2 in tort

65 In considering the contractual claim against TPS No 2, it has not been necessary to differentiate between it and TCA, given the matters referred to in para [3] above. However, it is by no means clear that the same can be said in relation to the claims against TPS No 2 in tort.

66 It is correct to say, as Ipoh submitted, that the claim against TPS No 2 in tort does not assume, or depend upon proof, that the wind driven rain and wind tunnel effect is, or is the result of, a breach of the RSDA. However, the claim does appear to depend upon the proposition that TPS No 2 can owe, and breach, a duty of care to Ipoh not because of its own acts or omissions but because of the acts or omissions of TCA. I say "appears to" because the amended summons adopts the convenient practice of describing "the relevant responsible entity at any time ... as the "Trustee"." However, TPS No 2 does not raise this point in support of its argument that the claim should be struck out or stayed.

67 Leaving aside the difficulty to which I have just adverted, the real question is whether the fate of the claim against TPS No 2 in tort has been decided by the Incoll determination.

68 The Incoll determination focussed on a number of contractual obligations under the RSDA, and the executive summary dealt only with those contractual matters. However, as can be seen from para [19] above, the executive summary did not in terms deal with the first matter that was referred to Incoll, namely to consider and report on "the issues known as wind driven rain and wind tunnel effect …". I have set out some of the further findings of Incoll in paras [20] and [21] above. They include the conclusion that the

report "identifies an operational problem within the Retail Centre" without concluding "that the design and construction obligations have not been met".

69 It is very difficult to see how a claim in tort, for failure to warn, could be sustained. First, there is the issue, relied upon by TPS No 2, as to whether there could be a duty of care to warn of something that is not a defect. Further, having regard to the conclusions reached by Incoll, there is a more significant hurdle; namely, how could there arise a duty of care to warn of a "fault" arising "from operational expectations" and not from a defect or fault in design or construction. But I think that there is a different, and complete, answer to the proposition that the claim in tort (relating to the wind claims) should, despite the Incoll determination, proceed.

70 The reality is that the substance of the wind claims was referred to Incoll for expert determination. Incoll produced a determination saying, in effect, that neither TPS No 2 nor Multiplex was liable. Not unnaturally, attention was focussed on the contractual obligations of TPS No 2 and Multiplex. I do not accept that it was, reasonably or otherwise, open to Ipoh to reserve (for whatever reason) an alternative claim in tort based upon the very same circumstances. In my judgment, on a fair reading of the Incoll determination and its supporting documentation (including, in particular, the letter of instruction) the "dispute" that was referred to Incoll, and that was determined by Incoll, was whether TPS No 2 (or Multiplex) had any liability to Ipoh in respect of the wind claims (or, to use the longer formulation, the wind driven rain and wind tunnel effect).

71 The prohibition in clause 21.1(a) (as I have construed it) is against commencing "legal proceedings in connection with a dispute" that has been the subject of expert determination under clause 21.2, except for the limited purposes of enforcement or impeachment. The wind claims now advanced by Ipoh against TPS No 2 in tort are, in my view, claims "in connection with" the dispute that was referred to and determined by Ipoh. I do not think that the necessary element of connection is lost because, as a matter of legal technicality, the rights and obligations that were considered in their contractual context for the purposes of expert determination are now advanced, based on exactly the same facts, as the claim in tort.

72 I therefore conclude that the second submission for Ipoh fails.

Multiplicity of proceedings

73 It may very well be that Ipoh's claims against Multiplex will proceed because Multiplex has not sought to strike them out or to stay them. That is no reason for permitting the proceedings to continue (in respect of the wind claims) as against TPS No 2, in circumstances where TPS No 2 does rely on clause 21.2.

74 The multiplicity of proceedings and duplication of work and costs, to which Ipoh points, should not be inflicted on TPS No 2 against its will. The possible risk of inconsistency in findings or results does not seem to me to be a sufficient justification for depriving TPS No 2 of the benefit of its bargain and for subjecting it to duplication of work and costs.

Alternative submission for TPS No 2

75 The conclusions to which I have come on the wind claims mean that they should be struck out or permanently stayed. It is therefore unnecessary for me to express a conclusion on the alternative submission for TPS No 2 recorded in para [44] above. However, against the possibility that I am wrong in what I have said so far, I will set out in brief my conclusion on that submission as it relates to the wind claims.

76 It appears to be the case that there have not been meetings of the kind referred to in clause 21.1. If that be correct then, in any event, Ipoh should not have commenced these proceedings. I should note however that Ipoh submits that it has gone beyond what is required by clause 21.1. As I understand it, the

submission was not that there had been strict, or full, compliance with the requirements of clause 21.1, but that the steps that the parties had taken (including mediation) had the same functional consequence.

77 I do not think that this is an answer. The purpose of clause 21.1 is to impose a ban on legal proceedings whilst the steps contemplated are taken; and to give any party to the dispute an opportunity thereafter to refer the matter for expert determination, rather than to proceed with litigation. If the effect of what has happened has been to deprive TPS No 2 of the opportunity to refer the dispute to expert determination, then it cannot be permissible to regard what has happened as sufficient compliance with the requirements of clause 21.1.

78 Of course, TPS No 2 says that it has referred the dispute to expert determination. It relies on steps taken after the present proceedings were commenced. But the prohibition on legal proceedings under clause 21.2(a) only "applies in the case of any dispute referred for determination under this clause". In context, the reference to "this clause" is clearly to the whole of clause 21. If TPS No 2 has referred the matter to expert determination outside the framework of clause 21, then there is no entitlement to a stay. And there can only be a valid referral for expert determination within the framework of clause 21 if the procedures of clause 21.1 have been followed and have failed to produce a result (or, as noted in para [48] above, if there has not been a meeting of chief executive officers and there has been no resolution of the dispute).

79 I would therefore have concluded that the proceedings, in so far as they relate to the wind claims, should have been stayed to enable the clause 21.1 processes to be followed. I would, however, have concluded that they should not be stayed upon the basis that, notwithstanding the apparent failure of Ipoh to comply with clause 21.1, there has nonetheless been a valid reference to expert determination under clause 21.2.

80 Having so concluded, it would have been necessary to give consideration to whether the stay should be temporary or permanent. If the stay were granted only on a temporary basis – pending the working through of the clause 21.1 processes – then TPS No 2 might be deprived of the opportunity to refer the dispute to expert determination. Clause 21.2(a) prohibits the commencement of proceedings if the relevant circumstances apply. It does not, in terms, prohibit the continuation of proceedings. Nor, I think, is there any basis for construing it as having this effect. On this analysis, the result of a temporary stay would be effectively to permit these proceedings to continue as valid if the clause 21.1 processes did not produce a resolution of the dispute. Prima facie, that would mean that Ipoh had obtained a substantial tactical benefit through the premature commencement of these proceedings in breach of clause 21.1. Those considerations would suggest that the stay should be permanent, so as to permit both parties the opportunity to consider their position if (hypothetically) the clause 21.1 procedures were followed through without producing a resolution of the dispute. In my view, anything less than a permanent stay would fail to protect the contractual right that TPS No 2 seeks to enforce.

Conclusion on the wind claims

81 TPS No 2 is entitled to an order that the wind claims against it be struck out or permanently stayed.

The remaining claims: the competing submissions

82 In relation to the remaining claims, Ipoh submitted that it had in substance complied with the requirements of clause 21.1 and, that having been done, that expert determination was not mandatory. It therefore submitted that it had been open to it to commence proceedings in relation to the unresolved defects.

83 Ipoh further submitted that, because Multiplex was not a party to the RSDA, the present proceedings could continue against Multiplex. It therefore submitted that to stay the proceedings, in relation to the remaining claims as against TPS No 2, would lead to multiplicity of proceedings. This in turn, Ipoh

submitted, would create a serious risk of inconsistent findings or results and would result in duplication of effort and cost.

84 TPS No 2 submitted, additionally to the general submission noted in para [44] above, that on the proper construction of the RSDA and the building contract there was "an agreed facility to resolve all the disputes between [all] the parties", namely "a facility for tripartite expert determination."

85 TPS No 2 submitted that tripartite expert determination would have utility because the only possible remaining claim outstanding between the parties would be Ipoh's residual claim in tort against Multiplex. That claim, TPS No 2 submitted, would be decided on different principles to the basis upon which the expert would decide the unresolved disputes and would, in any event, be decided without the participation of TPS No 2.

86 Multiplex accepted that the building contract provided "a mechanism for consolidating disputes where the facts or circumstances giving rise to the dispute under the Building Contract also give rise to a dispute in respect of, amongst others, the [RSDA]."

Tripartite expert determination

87 I have set out the relevant contractual provisions, in so far as they relate to dispute resolution, in paras [14] and [15] above. I have set out the relevant contractual provisions, relating to defects, in paras [23] and [25] above.

88 It is apparent that, as between TPS No 2 and Multiplex, the determination of a dispute under the building contract could be consolidated with the determination of a dispute under the RSDA where both arise from the same facts or circumstances.

89 Ipoh submits that there is no equivalent provision for consolidation under the RSDA, and that this must be taken to have been deliberate. However, it may also be noted that there is no express provision in the RSDA entitling Ipoh to refuse to consent to consolidation. Nor is it apparent why there would be any such right, given the legal structure that was put in place for the development of (relevantly) the retail centre.

90 Ipoh further points out that the provisions relating to expert determination are not "back to back". However, I think, with one perhaps significant exception the schemes are substantially similar.

91 The exception to which I have referred relates to the way in which each clause deals with the character of the expert determination once it is made. Clause 21.2(h)(ii) provides that the determination will be "final and binding". Clause 39.6 provides that the determination "will be final and binding … unless a party gives notice to the other party of its intention to initiate proceedings in respect of the determination … ". I have already indicated that, in my view, clause 21.2(h)(ii) means what it says. However, it is at least arguable that the conclusive character for which clause 39.6 provides is conditional, the condition being, of course, that no proceedings are commenced "in respect of the determination" within the relevant time period. If this be correct, then it could be argued that the outcome of a tripartite reference might be an unconditionally binding determination as between Ipoh and TPS No 2, but a determination that (because proceedings had been commenced) was not binding as between TPS No 2 and Multiplex.

92 At one stage, Ipoh suggested that there was no mechanism to ensure that the same expert would be appointed under the two agreements. If this were the case then, clearly, it might be a substantial impediment to tripartite resolution. However, I do not think that this is correct. By clause 16.5 of the RSDA, any disagreement "in regard to defects or defect rectification in relation to the Retail Centre is to be determined under clause 21 by the Certifier acting as expert for the purposes of clause 21.2." Incoll was the Certifier. Under clause 31.4 of the building contract, any dispute "in regard to Defect or Defect

Rectification in relation to the Retail Centre … [will] be determined by the Certifier, acting as an expert". The Certifier's decision was to be "final and binding". Again, Incoll was the Certifier.

93 Although clause 16 of the RSDA is headed "DEFECT LIABILITY PERIOD", that heading does not necessarily qualify or limit its contents: see clause 1.3 of the RSDA, providing that clause headings do not affect its construction. In any event, clause 16.5, in differentiating between defects and defect rectification, makes it clear that it is not limited to defects notified within the defect liability period.

94 As I have noted in para [26] above, Multiplex accepts that clause 31 of the building contract applies to all defects, and not just to defects that are notified within the defect liability period.

95 Accordingly, I do not think that it is necessary for me to express a concluded view on the character of an expert determination that is made under clause 39 of the building agreement. Where (as is the case with the remaining claims) the particular matter in dispute relates to defects, the expert determination that is required is unconditionally binding, by virtue of clause 31.4.

96 The position, therefore, is that under each of the contracts a dispute in relation to defects is to be determined by Incoll, acting as expert. Under each of the contracts, the decision of Incoll is final and binding. Under the building contract, Multiplex can be required to consent to the consolidation of the determination of the dispute with the determination of the equivalent dispute under the RSDA.

97 In my judgment, it must follow that, as TPS No 2 submits, there is substantial utility in referring the remaining claims to expert determination. The same expert will make the determination and will make it as part of the same overall process. The determination will resolve the issues as between Ipoh and TPS No 2 on the one hand, and as between TPS No 2 and Multiplex on the other. It is correct to say that the determination would not, in point of legal theory, resolve the current claim by Ipoh against Multiplex. However, and even accepting (for the purpose of argument) that there is a real likelihood that the proceedings will continue as between Ipoh and Multiplex, that does not seem to me to be a reason for depriving TPS No 2 of the opportunity to terminate its involvement in those proceedings by substituting for them the process of conclusive expert determination for which, with both Ipoh and Multiplex, it bargained.

98 Nonetheless, Ipoh submitted that the mechanism that has been put in place was not an agreed mechanism for the resolution of disputes. That is because, it submitted, it could not be compelled to consent to consolidation, and indeed it could, should it wish, withhold that consent. There was a debate between Ipoh and TPS No 2 as to whether Ipoh could be compelled to consent to consolidation. The mechanisms to which TPS No 2 pointed were implied terms that Ipoh would do all things necessary to enable TPS No 2 and Multiplex to perform their obligations under the building contract, and that Ipoh would not unreasonably withhold its consent to tripartite dispute resolution as provided for by clause 39.11 of the building contract.

99 Ipoh's response was that the well known conditions for implication of a term have not been made out. There is considerable force in Ipoh's response. However, it is not necessary to decide the point. I am prepared to assume, for the purpose of argument, that Ipoh's position, on implication of the terms, is correct.

100 If (putting the matter at its highest) Ipoh is entitled to withhold its consent to consolidation, without being required to justify that position, the result would still be that there are two disputes as to the same subject matter to be determined by the same person acting as expert. Under each of the agreements, the expert is entitled to conduct the determination as it thinks fit and, in substance, having regard to whatever information it thinks appropriate. There is no reason why the expert could not conduct two parallel determinations, taking into account, in each, the material received in the other. At most, the expert would be required to disclose to the parties in one determination any material that it was proposing to take into account that it had received in the other determination, so as to afford them the opportunity to reply. (I say "at most" referring in particular, as between TPS No 2 and Multiplex, to clause 39.5(a)(ii) of the building contract.) In reality, given that TPS No 2 and Multiplex have in effect a common position as against Ipoh in

relation to the remaining claims, it is likely that TPS No 2 would in any event, regardless of the expert's approach, rely (as against Ipoh) on material emanating from Multiplex. But regardless, and whether one looks at considerations of legality or considerations of practicality, it would not matter if Ipoh withheld its consent to consolidation of the expert determination processes. If the expert were to take into account all relevant material provided by any interested party, then there would be no likelihood that the expert would produce different, let alone inconsistent, determinations of each dispute.

101 As between Ipoh and TPS No 2, an expert determination in relation to defects, under clause 16.5, is to be resolved on the lines set out in clause 21. That means, I think, the whole of clause 21 and not just clause 21.2. If there is a "disagreement … in regard to defects or defect rectification in relation to the Retail Centre" then, at first, the processes of clause 21.1 are engaged. If those processes, having been worked through, do not bring about a resolution of the dispute, then either Ipoh or TPS No 2 may refer the dispute to Incoll for expert determination in accordance with clause 21.2.

102 On the assumption that there has been no compliance with clause 21 then, as I have already said in relation to the wind claims (see paras [77] and [78] above), TPS No 2 would have been deprived of its entitlement to have the dispute proceed in accordance with the clause 21 mechanism. However, and for the reasons given in para [78] above, clause 21.2(a) would not be engaged if the requirements of clause 21.1 have not been worked through.

103 For these reasons, I think that the remaining claims against TPS No 2 should be stayed. As I have noted in para [5(2)] above, TPS No 2 claims an order that the proceedings relating to the remaining claims be stayed pending resolution in accordance with clause 21 of the RSDA. It is therefore unnecessary to consider further, in the context of the remaining claims, what I have said in para [80] above relating to the wind claims.

Conclusion on the remaining claims

104 TPS No 2 is entitled to an order that the remaining claims against it be stayed until there has been compliance with the requirements of clause 21 of the RSDA.

Conclusions and order

105 I have not dealt separately with TPS No 2's claims for declaratory relief. However, it follows from what I have said that the Incoll determination is final and binding as between Ipoh and TPS No 2. I have however dealt with the substance (although not the precise form) of the orders to which TPS No 2 is entitled both in respect of the wind claims (see para [81] above) and the remaining claims (see para [104] above). In substance, TPS No 2 is entitled to the relief that it seeks by its notice of motion.

106 I direct the parties, on or before 30 April 2004, to bring in short minutes of order to give effect to these reasons. If the parties cannot agree on the question of costs, then the matter may be listed for argument on costs at a time arranged with my associate.

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