Supreme Court

New South Wales

Case Name:	711 Hogben Pty Ltd v Tadros; Tadros v 711 Hogben Pty Ltd
Medium Neutral Citation:	[2016] NSWSC 1238
Hearing Date(s):	2 September 2016
Decision Date:	2 September 2016
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	Matter referred to list judge for allocation of a hearing date
Catchwords:	PRACTICE AND PROCEDURE – apprehension of bias – whether judge should recuse himself from hearing the balance of the proceedings – where judgment on separate question expresses opinion that expert had made no manifest error in relation to interpretation of "landlord's works" – where plaintiff intends to argue expert determination contained other manifest errors
Cases Cited:	711 Hogben Pty Ltd v Tadros [2016] NSWCA 244 711 Hogben Pty Ltd v Tadros; Tadros v 711 Hogben Pty Ltd [2016] NSWSC 697 Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724 Walton Homes Ltd v Staffordshire County Council [2013] EWHC 2554 (Ch)
Texts Cited:	R Banks, Lindley and Banks on Partnership, (19th ed 2013, Sweet & Maxwell)
Category:	Procedural and other rulings
Parties:	711 Hogben Pty Ltd (Plaintiff/Third Cross Defendant) Anthony Tadros (First Defendant)/Second Cross Claimant) Sharon Tadros (Second Defendant/Third Cross

	Claimant) George Tadros (Third Defendant/First Cross Claimant) Dennis Bluth (Fourth Defendant) Bill Panapoulos (First Cross Defendant) Peter Panapoulos (Second Cross Defendant)
Representation:	Counsel: C J Bevan (Plaintiff/Third Cross Defendant) M Hadley (First, Second and Third Defendants/Cross Claimants) Solicitors: One Group Legal (Plaintiff/Third Cross Defendant) Harrington Maguire & O'Brien (First, Second and Third Defendants/Cross Claimants)
File Number(s):	SC 2015/330101

EX TEMPORE JUDGMENT (REVISED)

1 The background to this matter is set forth in my judgment of 1 June 2016 and in the judgment of the Court of Appeal of 1 September 2016 refusing leave to appeal from my decision: *711 Hogben Pty Ltd v Tadros; Tadros v 711 Hogben Pty Ltd* [2016] NSWSC 697 at [9]ff and *711 Hogben Pty Ltd v Tadros* [2016] NSWCA 244 [3]ff.

2 On 11 December 2015 Hammerschlag J made this order:

> "I order that there be heard before all other issues in these proceedings, all issues arising on the plaintiff's Commercial List Summons and Statement, that is, in substance whether the expert determination of Dennis Bluth is an expert determination in accordance with the Deed of Agreement for Lease and whether any part [or all] of the defendants' Cross-Claim should be stayed because of cl 14 of that agreement. I fix those issues for hearing on 18th May 2016 on an estimate of two days."

3 I heard argument on those matters on 18 May 2016 and delivered judgment on 1 June 2016. In that judgment I recited that the matter to be determined "separately" was:

> '[W]hether the [Determination] of [the Expert] is an expert determination in accordance with the [Deed]'."

4 The plaintiff's point on that question was that the expert had misapprehended the nature of the "landlord's works" as defined in the Deed of Agreement for Lease. During argument, Mr Bevan, who appeared for the plaintiff, stated that

he was proceeding upon the basis that he was not permitted by the orders of 11 December 2015 to argue that the expert's alleged misapprehension of the nature of the "landlord's works" also bespoke a "manifest error" on his part for the purposes of cl 14 of the Deed of Agreement for Lease.

5 Thus, during argument the following exchanges occurred between me and counsel:

> "HIS HONOUR: Would you say also that it's a manifest error?
>
> BEVAN: If I were permitted to, yes. If I were permitted to I would say it is a manifest error but my view is we only get the manifest error it your Honour answers Hammerschlag J's first question in the affirmative. That is to say it is a valid determination. We then move to whether he's committed manifest error but I am still at the antecedent stage of saying the answer to Hammerschlag's question, your Honour, is no.
>
> HIS HONOUR: I had the impression from Mr Hadley's submissions that he does. I think he's coming here to argue about manifest error. Is that right?
>
> HADLEY: Yes, your Honour.
>
> HIS HONOUR: You spent a few pages telling me what it means.
>
> …
>
> HIS HONOUR: I'm not sure that Mr Bevan says I need to even look at the expression manifest error. He's just saying Mr Bluth misidentified the premises like a valuer misidentifies
>
> HADLEY: Well, that would be a manifest error, but that's really what his submission amounts to.
>
> HIS HONOUR: But I don't think he uses the - he's not inviting me to make that conclusion. He invited me to conclude he got the premises wrong, therefore, it's not an expert determination. I mean, my current view is that it must follow from that that there's a manifest error, but you ask me to simply make findings and then invite the party to make submissions as to what further should be done to resolve the real issues, is that –
>
> …
>
> Just so we are also clear, therefore, the only basis – when I say only, you said there a substantial basis – but the only basis upon which it is said that Mr Bluth has gone outside the contract is because he has, on the proper construction of the contract, misapprehended what the premises are. Mr Bevan, is that right? That's it?
>
> BEVAN: Yes, your Honour.
>
> HIS HONOUR: There we go.
>
> HADLEY: Which seems to be –
>
> HIS HONOUR: It must follow, I would have thought, there's a manifest error, if that's true, but I'm not asked to decide that so –

> HADLEY: No, I accept that. If Mr Bluth has misunderstood what the demised premises were, then that would be a manifest error…".

6 I concluded that the expert had not misapprehended the nature of the "landlord's works" and that his determination was an expert determination for the purpose of the Deed of Agreement for Lease.

7 I went on to say at [50] in the judgment:

> "The conclusion most certainly did not bespeak 'manifest error' on the Expert's part, namely an 'oversight [or] blunder so obvious as to admit no difference of opinion' R Banks, *Lindley and Banks on Partnership*, (19th ed 2013, Sweet & Maxwell) at 10-73, cited with approval by Peter Smith J in *Walton Homes Ltd v Staffordshire County Council* [2013] EWHC 2554 (Ch) or a conclusion 'obviously wrong' and 'apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument' (*Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 742H per Lord Diplock)."

8 My intention in making those remarks was to express the opinion that the expert had made no "manifest error" in relation to his interpretation of the definition of "landlord's works".

9 Mr Bevan submits today that on 18 May 2016 he did not argue the question of "manifest error" in relation to the question of "landlord's works" (or at all), and stated that the plaintiff wishes to contend that the expert did make manifest errors other than in relation to any other alleged misapprehension of the nature of the "landlord's works".

10 Mr Bevan submits that a reasonable bystander might conclude that I may have prejudged the question of "manifest error" by reason of my remarks at [50] of my reasons and, thus, by notice of motion filed on 15 August 2016 seeks an order that I recuse myself from further involvement in the matter.

11 I certainly did not intend by my reasons to express any opinion about "manifest error" otherwise than in relation to the question of "landlord's works". I doubt that any reasonable reader of my reasons would come to a different conclusion.

12 However, as there are other judges likely to be available, I accept it would be better (to avoid any suggestion of predisposition of mind) if another judge was to deal with the balance of the plaintiff's proceedings.

13 Having had discussion with Mr Bevan and Mr Hadley today about the sensible course to now be adopted, the conclusion to which I have come is that I should refer the matter to the list judge so that the entirety of the balance of the plaintiff's case can be fixed for hearing as early as is convenient to the Court and to counsel.

14 Mr Hadley, who appears for the defendants/cross-claimants has told me that it would not be convenient, from the defendants/cross-claimant's point of view, to have the cross-claim fixed for hearing at the moment for two reasons. The first is that the cross-claim is not ready for hearing. The second is that if Mr Hadley's case, as to what the parties call the "cl 14 issue" in the plaintiff's case, fails that may be an impediment to the cross-claim proceeding.

15 The only order I will make is to refer this matter now to the list judge for allocation of a hearing date and I will note that the hearing will be conducted by a judge in the list other than me.

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