NEW SOUTH WALES SUPREME COURT

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

JURISDICTION:
Equity

FILE NUMBER(S):
55037/2009

HEARING DATE(S):
24 July 2009

JUDGMENT DATE:
12 August 2009

PARTIES:
Firedam Civil Engineering Pty Limited (Plaintiff)
Shoalhaven City Council ABN 11 005 357 522 (Defendant)

JUDGMENT OF:
Tamberlin AJ

LOWER COURT JURISDICTION:
Not Applicable

LOWER COURT FILE NUMBER(S):
Not Applicable

LOWER COURT JUDICIAL OFFICER:
Not Applicable

COUNSEL:
G Inatey SC (Plaintiff)
J A Steele (Defendant)

SOLICITORS:
Colin Biggers & Paisley (Plaintiff)
TressCox (Defendant)

CATCHWORDS:
EXPERT DETERMINATION - principles concerning adoption of expert determination - errors - inconsistencies - failure to give reasons - failure to address issues

LEGISLATION CITED:

CATEGORY:
Principal judgment

CASES CITED:
Holt v Cox (1997) 23 ACSR 590
Campbell v Edwards [1976] 1 WLR 403
Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314
Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd [1989] 1 Qd R 22
AGLVictoria Pty Ltd v SPI Networks (Gas) Pty Ltd (2006) Aust Contract Reports 90-241
Adwell Holdings Pty Ltd v Bourne [2007] NSWSC 730
Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd & Ors [2001] NSWSC 405
Peak Constructions (Liverpool) Ltd v McKinney Foundation Ltd (1970) 1 BLR 111
Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211

TEXTS CITED:

DECISION:
The Summons in this matter is dismissed with costs.

JUDGMENT:

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

TAMBERLIN AJ

12 AUGUST 2009

55037/2009 FIREDAM CIVIL ENGINEERING PTY LIMITED v
SHOALHAVEN CITY COUNCIL

JUDGMENT

1 **HIS HONOUR:** This is an application by the plaintiff ("Firedam") for declarations that an Expert Determination arising from a dispute with the defendant ("Shoalhaven") is not binding on it and that, on the proper construction of the contract between the parties, Firedam is entitled to commence legal proceedings against Shoalhaven.

2 The issue, briefly stated, is whether the declarations should be made.

How the issue arises?

3 Firedam as contractor and Shoalhaven as principal on 18 October 2005 entered into a contract in respect of the design and construction of a wastewater collection and transportation system for the Conjola Regional Sewage Scheme.

4 Disputes arose under the contract relating to variation claims by Firedam and consequential extension of time claims. Under the contract, disputes and issues arising must be referred for Expert Determination and there is a threshold amount which, if awarded, permits the parties to proceed to litigation. That amount is $500,000. In the present case, the amount of the determination by the Expert against Shoalhaven was marginally below this, being about $497,142.55.

5 The contract provides that unless a party has a right to commence litigation the parties must treat each determination of the Expert as *final and binding* and give effect to it (Clause 75.7). Under Clause 75.6, where the determination is under $500,000 then litigation can only be commenced within 56 days after receiving the Determination. In this case, the last date on which Firedam could commence legal proceedings was 12 May 2009. Assuming that Firedam had a contractual entitlement to bring the legal proceedings it is said that it is out of time because the proceedings were commenced on 15 May 2009.

6 The Expert engaged was Mr Neil Turner ("the Expert") who was appointed by letter on or about October 2008. The purpose of such a provision is to achieve certainty and finality and to avoid the time, expense and uncertainty of resorting to litigation. For this reason in recent years there has been a trend against setting aside expert determinations except in limited circumstances. This "hardening" of the courts' attitude to reviewing determinations was referred to by the New South Wales Court of Appeal in *Holt v Cox* (1997) 23 ACSR 590 at 596.

7 Six unresolved issues were referred for determination relating to claims by Firedam for variations and consequential extensions of time. The three presently relevant issues are Variation 10a for additional under-boring work, Variation 12 for rock blasting and Variation 62 for a transfer main re-alignment. Shoalhaven has made a cross-claim seeking damages for delayed completion.

8 Under Schedule 6 to the contract, a procedure is prescribed for the Expert which details the matter that must be determined and the role of the Expert. Those provisions are as follows:

> "**Questions to be determined by the Expert**
>
> The Expert must determine for each *Issue* the following questions (to the extent that they are applicable to the *Issue*):
>
> *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:

under the Contract

for damages for breach of the Contract, or

otherwise in law?

If so:

what is the event, act or omission?

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

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

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?

In the light of the answers to clauses 1.1.1 and 1.1.2 of this Expert Determination Procedure:

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

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

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

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

9 The role of the Expert is prescribed by the procedure as follows:

"**Role of Expert**

The Expert:

acts as an Expert and not as an arbitrator;

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

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."

10 This procedure is important because the basic submission for Firedam is that the Expert's determination in the present case is not in accordance with the terms of the contract with the consequence that there has been no expert determination and therefore there is no bar to the commencement of legal proceedings by Firedam. It is alleged Mr Turner 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 Shoalhaven caused part of the delay to completion. Firedam 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.

11 For the purpose of deciding the issues raised before me, it is convenient to deal with the application by Firedam for an extension of time in relation to Variation 10a and the counter-claim by Shoalhaven for damages due to delayed completion. The reasoning of Mr Turner on these two questions in relation to Variation 10a also crystallised the substance of the case brought by Firedam in respect of Variation 62 and it is common ground that if adverse findings are made with respect to Variations 10a and 62 then Variation 12 is not pressed.

Expert Determinations – Legal Principles

12 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. As Lord Denning MR said in *Campbell v Edwards* [1976] 1 WLR 403 at 407:

> "It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and on good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything."

13 The Court of Appeal in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 363, per McHugh JA said:

> "In each case the critical question must always be: Was the valuation made in accordance with the terms of a 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 valuation complies with the terms of the contract."

14 The observations by McHugh JA were discussed in *Holt v Cox* (supra), where Mason P, with whom Priestley JA agreed, said at 596-597:

> "… At least as a matter of common law, a valuation will stand if it satisfies the description given in the contract between the parties. The readiness in the courts to provide greater latitude for experts to choose between different valuation methods and, within limits, to make

> errors in assessing facts or taking matters into consideration or declining to take matters into consideration, is influenced by the recognition … that the expert who negligently determines the valuation will be held liable in damages to the party suffering loss in consequence of the expert's negligence.
>
> … this recently found duty of care of the expert does not fully explain why the courts have hardened in their attitude to reviewing valuation determinations. For one thing, the modern cases show that a certificate may be 'valid' though it embodies some factual error without necessarily exposing the expert valuer to liability in negligence. It appears to me that the trend in recent years has also been influenced by a recognition that courts have no greater expertise than expert valuers; and that where parties have chosen voluntarily to commit the determination of valuation to an expert, judicial restraint is an appropriate response.
>
> … mistake is not itself a ground of vitiation … . A valuation may contain factual error or embody consideration of matters which should not have been taken into account, but it does not follow that the result is outside that which the contract contemplated would be within the realm of determination by the valuer."

15 The principle has been consistently applied by the Court that it is not sufficient to establish that an expert has acted negligently and that it must be found he has acted in a way that is not in accordance with the agreement: see *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 22. If an expert determination is not in accordance with an agreement it will be subject to review: see *AGLVictoria Pty Ltd v SPI Networks (Gas) Pty Ltd (*2006) Aust Contract Reports 90-241. Such a situation may arise where, for example, the person values the wrong property, or values the wrong number of shares in the wrong company, or fails to address a question which, under the terms of the reference, is required to be determined.

16 The approach is summed up in the remarks of Young CJ in Eq in *Adwell Holdings Pty Ltd v Bourne* [2007] NSWSC 730 at [33] where his Honour said:

> "… I must remark that it is quite clear on the authorities that courts are not to interfere where the parties have set up a system for adjusting rent or providing for valuations, unless the determination is so far removed from the contract that it would be inequitable to have the parties bound by it."

17 In the same case, his Honour considered the question whether adequate *reasons* had been given at [21] where his Honour observed that the real question in relation to the giving of reasons is whether the valuer has actually applied the various criteria and has disclosed them.

18 In *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd & Ors* [2001] NSWSC 405 at [118]-[119] Palmer J said:

> "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 to 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.
>
> In my opinion the reasons given by Mr Norris in his determination are entirely sufficient ... ."

19 In the present case, under the Expert Determination Procedure prescribed by the contract, the Certificate must be based on a determination which states the Expert's determination and gives reasons thereof. The question therefore, in the present case, so far as reasoning is concerned, is whether it can be said Mr Turner gave reasons for his determinations in relation to the extension of time claimed by Firedam and whether he gave reasons in relation to the determination concerning the cross-claim by Shoalhaven for damages against Firedam.

Variation Claim 10a

20 Variation claim 10a concerns additional under-boring works in respect of which Firedam claimed a variation and an extension of time for additional under-boring work of 33 days. Mr Turner determined that Firedam was entitled to part of the variation claimed in respect of 166 metres of additional boring. He fixed a figure of $25,320 for this and he awarded interest.

21 In relation to the consequential extension of time claimed by Firedam in relation to this variation Mr Turner refused any extension of time and his reasons were as follows:

> "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 upon 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 under-boring. I cannot and do not determine this matter."

22 It is apparent from the above that Mr Turner did not consider that he had sufficient material on which it was possible to make a finding as to whether there should be an extension of time and he was not

satisfied that the contractual conditions had been carried out. The contractual condition on which extensions of time will be granted are set out at Clause 54.1 – 54.5 of the contract and Mr Turner did not consider they had been satisfied. Although Firedam submits that Mr Turner ought to have exercised his expertise in order to decide this, it is difficult to see how expertise would assist in circumstances where the conditions had not been satisfied and he was simply not satisfied on the material before him that he could make any finding that an extension of time claim should be granted. The above quoted paragraphs in the determination, in my view, do set out sufficiently the reasoning process which he undertook to arrive at his rejection. In other words, that there was no reason given to him to establish the claim or how it should be quantified. The case presented was simply inadequate.

23 The reasoning of Mr Turner in relation to Shoalhaven's counter-claim for costs incurred due to delayed completion is central to Firedam's submissions of inconsistency, lack of reasoning and failure to deal with compensation. The relevant paragraphs are [470]-[509] inclusive.

24 The reasoning of Mr Turner on the counter-claim proceeds as follows. He notes that Shoalhaven has claimed an amount of $783,031.60 due to delayed completion by Firedam, and he then refers to the contractual provisions and he observes that Shoalhaven's recourse is by way of general common law damages. He also notes the provisions of Clause 54.6 which state that:

> "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."

25 He observes that Shoalhaven is given a discretionary right to extend time even where the contractor has not claimed an extension.

26 He also refers to Clause 69.1 which provides for completion by the contractual completion date.

27 He then sets out his consideration of legal principles concerning general damages for delay in which he notes that the breach complained of by Shoalhaven is that Firedam has failed to meet the completion date and that this is not disputed. He notes that there is uncertainty in relation to the contractual completion date, that is to say, whether it is the date claimed by Shoalhaven or whether it has become a "reasonable" date. He finds it necessary to decide whether Shoalhaven has prevented Firedam from achieving the timely completion of the works and to what extent the damages claimed by Shoalhaven is a consequence of any breach by Firedam. He refers to a number of cases related to "the prevention principle" which is that if the failure to complete on time is due to fault of both parties, the Principal cannot strictly comply with a condition where delay arises partly from its own fault: see *Peak Constructions (Liverpool) Ltd v McKinney Foundation Ltd* (1970) 1 BLR 111.

28 After a detailed examination of the case law concerning the prevention principle, Mr Turner refers to Clause 54.6 and notes that it is expressly stated that it is to be exercised for the benefit of Shoalhaven and that it is for the benefit of Shoalhaven for time to be extended so that there is an identifiable

contractual date which is "disentangled" from any taint of delay caused by the acts of Shoalhaven from which damages can be calculated: see [493].

29 Mr Turner refers to the judgment of the Court of Appeal in *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211, and expresses the view that Shoalhaven (and in its place Mr Turner) should use the power in Clause 54.6 to "disentangle" any causes of delay by it from those caused by the contractor and to make a fair and reasonable assessment of those causes if it wishes to claim damages for the contractor's breach which are not tainted by its own preventing acts.

30 The reasoning of Mr Turner then continues in paragraphs [497]-[509] as follows:

> "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 determination 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 of 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 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. (Emphasis added)
>
> **Delay Caused by the Principal Shoalhaven**
>
> 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 has satisfied the contractual conditions* precedent, and such EOTs would 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.
>
> 502. In this Expert Determination process, the Claimant has made the following claims of delay and for EOT's:
>
> a. Issue 1: a claim of 33 days "to complete the additional work" that was not comprehended in the tender;
> b. Issue 2: no delay claimed;

c. Issue 3: a claim of 22 days for MASC;
d. Issue 4: a claim of 6 days for additional concrete encasement;
e. Issue 5: a claim for 90 days due to a directed major change to the pipeline route; and
f. Issue 6: a claim for 51 days due to the redesign of Line C3A.

Issue 1 – Variation 10a – Additional Boring Works

503. The Claimant has claimed an EOT of 33 days "to complete the additional work" that was not comprehended in the tender.

504. In this claim, the Claimant claimed an amount of $108,817.50 (incl GST) for additional under-boring of sheds, gardens, trees and driveways that it says it could not have been aware of at the time of tender.

505. In my determination of that Issue, I determine that the Claimant was entitled to recompense with respect to:

a. 28m of underboring characterised as variation; and

b. 138 m of underboring as a consequence of various breaches by the Respondent; out of a total length claimed of 659m.

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 causes that are acts (variation) of 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."* (Emphasis added)

31 Firedam contends that in the above quoted paragraphs dealing with the counter-claim, Mr Turner has made a determination 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 Firedam says that no reasons are given to explain the clear "inconsistency" between the two determinations in relation to an extension of time.

32 The case put by Mr Inatey SC was that if the Expert was able to make a determination of nine days by bringing his expertise to bear in relation to the disentanglement of the principal's responsibility for the delay and the variation on the counter-claim, then he should have used that expertise to arrive at a conclusion in relation to the claim for extension of time but failed to do so and he was not entitled to dismiss the claim for an extension of time simply on the basis that he was not satisfied that there was anything to support the claim.

33 A further submission for Firedam is that Mr Turner failed to act in accordance with the contract because having accepted that an allowance of nine days was appropriate for delay caused by Shoalhaven he failed to determine whether Firedam was entitled to compensation for delay as required by the Expert Procedure.

34 In my view, there is no "inconsistency" between the approach or reasoning of Mr Turner in dealing with the Firedam claim for an extension of time and the reasoning used in determining damages on the claim for Shoalhaven for delay damages. They are distinct claims based on different criteria and they call for different findings. Mr Turner, in dealing with the cross-claim by Shoalhaven, 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 Shoalhaven's cross-claim, could be calculated.

35 Having examined the case law he considered it was appropriate to take into account the breaches of Shoalhaven to reduce the general damages sought against Firedam. Some difficulty is caused by the fact that in assessing the damages in this way he concluded that the relevant period was a nine day period and referred to the expression as "an extension of time." In my view, having regard to his reasoning as a whole on the cross-claim by Shoalhaven and the fact that he was directing his consideration to apportioning damages, I do not consider that there is any inconsistency in his reasoning in relation to the fixing of a nine day period to the set-off against the claim by Shoalhaven. He fixed the nine day period so that there would be a benchmark against which Shoalhaven's damages claim could be fairly and reasonably assessed. The whole purpose of his reasoning was directed to ascertaining Shoalhaven's entitlement to general damages as is shown particularly by the language of paragraphs [500], [501] and most importantly [509]. In [501] he notes that delays by Shoalhaven *would have* entitled a claimant to an extension of time provided it has satisfied the contractual conditions. However, it is clear from the reasoning in relation to the extension of time claim made by Firedam at [502] that the contractual conditions and basis had not been satisfied in the view of Mr Turner and therefore no extension could be granted. Reading these two sections of the award together it is clear that Mr Turner 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 Shoalhaven for damages. I find therefore that Mr Turner did not fail to make a finding as to compensation as a consequence of his determination on the counter-claim by Shoalhaven.

36 It is evident that in making his determinations in relation to Firedam's claim and in dealing with the damages claim by Shoalhaven, Mr Turner was dealing with different matters involving different criteria and therefore, in my view, there was no inconsistency between his findings, reasoning, or exercise of expertise in these two different parts of his determination. In addition, insofar as Clause 54.6 was referred to in Shoalhaven's counter-claim, it was not a determination based on a contractual

right but rather was used in exercising the absolute discretion conferred by whether or not there was a claim for an extension of time. The finding of non-entitlement on the claim by Firedam and the finding of a period of nine days delay attributable to Shoalhaven in the cross-claim cannot be said to be "inconsistent" because they are directed to different considerations and distinct determinations. I consider that Mr Turner has given valid and sufficient reasons for his conclusions in this matter.

37 Accordingly, for the above reasons I reject the submissions of Firedam in relation to Variation claim 10a.

38 In relation to the other claims, by parity of reasoning, I reject the submission for the plaintiff in relation to Variation 62. In relation to Variation 12, I note the concession by Firedam that if its submissions based on Variations 10a and 62 are rejected then the remaining claim in relation to Variation 12 is not pressed. In view of my conclusions it is not necessary for me to deal with these claims.

Conclusion

39 The Summons in this matter should be dismissed with costs.

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LAST UPDATED:
19 August 2009