HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ

SHOALHAVEN CITY COUNCIL APPELLANT

AND

FIREDAM CIVIL ENGINEERING PTY LIMITED RESPONDENT

Shoalhaven City Council v Firedam Civil Engineering Pty Limited
[2011] HCA 38
5 October 2011
S216/2010

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of New South Wales made on 19 April 2010 and, in place thereof, order that the appeal to that Court be dismissed with costs.*

3. *The respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with J A Steele for the appellant (instructed by TressCox Lawyers)

Submitting appearance for the respondent

CATCHWORDS

Shoalhaven City Council v Firedam Civil Engineering Pty Limited

Contract – Construction – Dispute resolution clause – Parties to contract agreed to expert determination of claims for damages for breach of contract – Expert contractually obliged to give reasons – Whether inconsistency in expert's reasons – Whether court has power to review expert's determination made under contract.

Words and phrases – "expert determination", "inconsistency", "issue", "valid and sufficient reasons".

Commercial Arbitration Act 1984 (NSW), ss 24, 28, 33, 44.
Corporations Act 2001 (Cth), s 500(2).

FRENCH CJ, CRENNAN AND KIEFEL JJ.

Introduction

1 A person ("the Expert"), appointed under the provisions of a construction contract ("the Contract") to provide an expert determination of issues in dispute between the principal and the contractor, made a determination which the contractor contended was not binding on it. The contractor sought a declaration to that effect in the Supreme Court of New South Wales. The contractor's complaint related to the Expert's refusal to allow certain extensions of time which it claimed as of right arising out of variations to the works. That refusal was said to be inconsistent with the Expert's use of a contractual discretion, conferred on the principal, to extend the time for completion of the works. The discretionary extension was used by the Expert, in assessing the principal's claim for compensation for the contractor's delays, to allocate responsibility for delays between the principal and the contractor. The contractor contended that the Expert's reasons for his determination, burdened with an unexplained inconsistency, meant that the determination did not accord with the requirements of the Contract and was therefore not binding on the contractor.

2 The contractor's summons for a declaration was dismissed by Tamberlin AJ[1]. However, an appeal against that decision was allowed by the Court of Appeal of the Supreme Court of New South Wales (Beazley, Campbell and Macfarlan JJA)[2]. The orders made by Tamberlin AJ were set aside and a declaration made that the Expert's determination was not binding on the parties. Special leave to appeal to this Court against the judgment and orders of the Court of Appeal was granted on 3 September 2010 by Gummow, Heydon and Kiefel JJ. The contractor was wound up by resolution of its creditors on 26 November 2010. The appeal is continued pursuant to leave granted by McDougall J in the Supreme Court of New South Wales on 10 December 2010. The contractor was not represented at the hearing of the appeal.

3 The Expert's use of the principal's discretion to extend time as a device for allocating responsibility for delay caused by the principal was adequately explained and was not inconsistent with his refusal to allow the contractor's claimed extensions of time. The appeal against the decision of the Court of Appeal should be allowed and the orders of Tamberlin AJ reinstated.

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1 *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2009] NSWSC 802.

2 *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2010] NSWCA 59.

The Contract – delay and extension provisions

4 By the Contract dated 18 October 2005, Firedam Civil Engineering Pty Ltd ("Firedam") agreed with Shoalhaven City Council ("Shoalhaven") to design and construct a waste water collection and transport system for the Conjola Regional Sewerage Scheme.

5 The Contract incorporated New South Wales Government GC21 (Edition 1) General Conditions of Contract ("the General Conditions"). The time for completion of the works was 64 weeks from the date of the Contract. Under the General Conditions Firedam was responsible for managing progress to meet the Contract completion date for the works. That date could be adjusted in the following ways:

- Pursuant to cl 41 where Firedam encountered site conditions materially adverse in comparison to those which it should reasonably have foreseen at the date of the Contract. To obtain an extension of time under cl 41, Firedam would have to give Shoalhaven the notice required by that clause. Any extension of time would be granted pursuant to cl 54[3].

- Pursuant to cl 52 where Shoalhaven instructed Firedam to undertake a variation of the works. The parties were required to endeavour to agree in writing on the value of the variation and its effect on time. Absent agreement, the matter could be referred to the issues resolution process under the Contract[4].

- Pursuant to cl 54 where a delay to completion occurred or was anticipated. Firedam was entitled to an extension of time subject to conditions set out in cl 54.1 including:

    1. that Firedam had given Shoalhaven the requisite notices[5]; and

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3 General Conditions, cl 41.4.2.

4 General Conditions, cl 52.4.1.

5 General Conditions, cl 54.1.3.

2. the delay had occurred to an activity on a critical path of the "Contract Program" and the Contract Program had been submitted with the requisite notice[6].

6 Firedam was entitled, under cl 55.1, to recover "delay costs" at specified rates for the number of days by which the time for completion was extended because of a delay caused only by:

> ".1 a *Variation*, other than one for which, under clauses 41.6, 42.4 and 44.3, there is no payment for delays; or
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> .2 a breach of the Contract by the Principal which causes delay, disruption or interference to the Contractor carrying out the Works."

7 The General Conditions made provision, in cl 54.6, for discretionary extensions of time to be allowed by Shoalhaven. That clause provided:

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

As appears later in these reasons, Shoalhaven's entitlement to compensation for delays caused by Firedam was calculated by the Expert by reference to a completion date extended under cl 54.6 in order to exclude delays attributable to Shoalhaven.

The Contract – Expert Determination provisions

8 A dispute resolution procedure was set out in cll 73-76 of the General Conditions. A party to the Contract could give notice to the other party of an issue about any matter arising under the Contract[7]. Senior executives were required to attempt to resolve issues so notified[8]. An issue not able to be resolved by senior executives of the parties could be referred to an Expert for

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6 General Conditions, cl 54.1.4.

7 General Conditions, cl 73.

8 General Conditions, cl 74.

"Expert Determination"[9]. The Contract also provided that, in answer to any issue referred to the Expert by a party, the other party could raise any defence, set-off or cross-claim[10].

9 Firedam claimed an entitlement to variations and payment for additional works, extensions of time in relation to those works and contractual compensation in respect of the extended time. Shoalhaven asserted, by way of cross-claim[11], an entitlement under the Contract to "direct costs incurred due to delayed completion". The parties referred their dispute to Mr Neil Turner for Expert Determination pursuant to the General Conditions.

10 The Contract required the parties to treat the Expert Determination as final and binding if the aggregate liability of one party to the other did not exceed $500,000. If the aggregate amount determined exceeded $500,000, then either party was free to commence proceedings in respect of the determined amount within 56 days after receiving the Determination[12].

11 Firedam submitted to the primary judge, essentially by way of attack upon the Expert's reasons, that the Expert Determination did not accord with the Contract and that there was therefore no Expert Determination and nothing to prevent Firedam from commencing legal proceedings against Shoalhaven[13].

12 Schedule 6 to the General Conditions specified the procedure for Expert Determinations under the Contract. Relevantly to a claim for compensation, the Expert was required to determine, for each referred issue, whether there was any, and if so what, event, act or omission giving the claimant a right to compensation[14]. The dates of any such event, act or omission were to be identified and also the legal right which would give rise to a liability for compensation[15]. The Expert was, in the light of his answers, to state what

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9 General Conditions, cll 74 and 75.

10 General Conditions, cl 75.5.

11 [2009] NSWSC 802 at [7].

12 General Conditions, cll 75.6-75.7.1 read with Contract Information, Item 56.

13 [2009] NSWSC 802 at [10].

14 General Conditions, Sched 6, cl 1.1.1.

15 General Conditions, Sched 6, cl 1.1.2.

compensation, if any, was due from one party to the other, when it fell due[16] and the interest payable[17]. The Expert was required to determine any other questions identified or required by the parties in respect of any referred issue, having regard to the nature of the issue[18]. As appears below, the Expert complied "meticulously" with these requirements.

13 Schedule 6 also provided for submissions and for a conference of the parties. In cl 4 it defined the role of the Expert:

> "**Role of Expert**
>
> .1 The *Expert*:
>
> .1 acts as an *Expert* and not as an arbitrator;
>
> .2 must make its determination on the basis of the submissions of the parties, including documents and witness statements, and the *Expert's* own expertise; and
>
> .3 must issue a certificate in a form the *Expert* considers appropriate, stating the *Expert's* determination and giving reasons, within 16 weeks, or as otherwise agreed by the parties, after the date of the letter of engagement of the *Expert* referred to in clause 75.2 of the General Conditions of Contract."

The terms "Expert", "Expert Determination" and "Issue" were all defined in the General Conditions by reference to their usage in cll 73 and 75. Specifically, the term "Expert Determination" was defined as:

> "The process of determination of an *Issue* by an *Expert*, under clause 75 and the procedure in Schedule 6 (Expert Determination Procedure)."

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16 General Conditions, Sched 6, cl 1.1.3(1).

17 General Conditions, Sched 6, cl 1.1.3(2).

18 General Conditions, Sched 6, cl 1.2.

The Expert's letter of engagement

14 Mr Turner's letter of engagement as Expert under the Contract was dated 10 October 2008. It identified six unresolved issues. Each related to a variation claimed by Firedam. In addition, although it was not mentioned in the letter, Shoalhaven cross-claimed for costs incurred because of delayed completion by Firedam. Three of the variations claimed by Firedam are relevant to this appeal:

1. *Variation 10(a) – additional boring work – Other Structure.*
This claim for a variation related to additional under-boring of sheds, gardens, trees and driveways that Firedam said it could not have been aware of at the time of its tender. Firedam claimed compensation based on 659.5 metres of under-boring and an extension of time of 33 days.

2. *Variation 12 – Sunset Strip and Bounty rock blasting.*
This claim related to additional costs said to have been incurred by Firedam "as a consequence of encountering extremely hard rock". Firedam claimed an extension of time of 22 days in relation to this variation.

3. *Variation 62 – C1 Transfer Main Realignment.*
This claim related to a realignment of the transfer main pipeline. Firedam claimed an extension of time of 90 days in relation to this variation.

15 The letter set out a program for lodgment of submissions by the parties and specified 30 January 2009 as the date for the Determination. That date was extended by agreement to 6 February 2009, when the Determination was delivered. The Determination was made on the parties' submissions. There was no conference with the parties. The Determination was amended on 17 March 2009 pursuant to the procedures prescribed in the Contract[19].

The Expert Determination

16 The Expert's findings on Firedam's variation and extension of time claims were as follows:

1. *Variation 10(a).*
Part of the claim to variation 10(a), which was defined by reference to the length of the additional under-boring works, was granted. Out of a total length of 659.5 metres claimed, the Expert determined that Firedam was

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19 General Conditions, Sched 6, cl 4.2.

entitled to compensation for 28 metres characterised as variation. He also found Firedam entitled to compensation for 138 metres attributable to breaches by Shoalhaven. The sum was 166 metres. Firedam had not substantiated its claim for delay in relation to the under-boring. The Expert therefore declined to make a determination of an extension of time. The Expert also found that Firedam had encountered materially adverse site conditions within the meaning of cl 41.2 of the General Conditions but held that its rights to an extension of time on that account had been extinguished because of its failure to give the written notice required by cl 41.

2. *Variation 12.*
Firedam was entitled to additional costs incurred by reason of encountering extremely hard rock and to an extension of time of at least 22 days. The Expert rejected Shoalhaven's submission that Firedam had failed to comply with contractual procedures conditioning its entitlement to the extension of time. However, Firedam was not awarded delay costs under cl 55 as none had been "expressly claimed".

3. *Variation 62.*
No amount was awarded for variation 62. Firedam had not demonstrated its actual costs of the realigned line, nor provided a calculation of the reasonable allowance for the under-boring in the original location. The claimed extension of 90 days was refused as Firedam had "not provided any reasoned support" for it.

17 Shoalhaven claimed common law damages in the amount of $783,031.60 due to delayed completion by Firedam. The Expert determined that Shoalhaven had contributed to the delay. He gave effect to that finding by exercising the discretion conferred by cl 54.6 and extending the time for completion by the amount of the delay attributable to Shoalhaven. That extension had the effect of reducing Shoalhaven's entitlement to compensation accordingly. The Expert exercised that discretion in relation to variations 10(a) and 62.

18 In relation to variation 10(a) the Expert had determined that out of a total length claimed of 659.5 metres of additional under-boring, Firedam was entitled to recompense with respect to 166 metres. Firedam had claimed an extension of time of 33 days. The Expert determined, on a pro rata basis, that a delay of nine days should be attributed to Shoalhaven and granted an extension in that amount under cl 54.6.

19 The Expert undertook a similar exercise with respect to variation 62 relating to the realignment of the pipeline route. Although Firedam had not provided any reasoned support for its claim for a 90 day extension of time,

Shoalhaven had not denied that the works were delayed because of the realignment. Firedam had alerted it, in December 2006, to the need to consider realignment. By 10 May 2007, Firedam was aware that there were real difficulties associated with the original design. Shoalhaven gave approval for the realigned route on 13 September 2007. The Expert said it was reasonable to assume that the realignment was delayed for a period at least equal to the period from 10 May 2007 to 13 September 2007, amounting to 89 days. On that basis, he determined an extension of time, under cl 54.6, of 89 days in order to "disentangle" Shoalhaven's acts from other causes of delay.

20 In the event, the Expert determined an amount of $497,142.55 was payable to Firedam after a deduction for Shoalhaven's entitlement to damages for delayed completion. The net amount was below the $500,000 threshold specified in the General Conditions. If the determination stood, Firedam was bound by it and could not take proceedings against Shoalhaven in respect of its claims.

The primary judge's decision

21 It was accepted before the primary judge that his Honour's decision in relation to variation 10(a) would determine, by parity of reasoning, the outcome in relation to variation 62. In the event that Firedam was unsuccessful in those matters, its challenge in respect of variation 12 would not be pressed. His Honour held:

- There was no inconsistency between the reasons of the Expert for rejecting Firedam's claim for an extension of time pursuant to variation 10(a) and his reasons for allowing an extension of time of nine days in the exercise of the discretion conferred on Shoalhaven by cl 54.6. The Expert was dealing with different claims, based on different criteria and calling for different findings[20].

- The Expert had used Shoalhaven's power to extend time under cl 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[21].

- The Expert determined the nine day extension so that there would be a benchmark against which Shoalhaven's claim could be assessed[22].

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20 [2009] NSWSC 802 at [34].

21 [2009] NSWSC 802 at [34].

22 [2009] NSWSC 802 at [35].

- By parity of reasoning Firedam's submissions in relation to variation 62 were rejected. In light of the rejection of its claims in relation to variations 10(a) and 62, it did not press its claims in relation to variation 12[23].

The decision of the Court of Appeal

22 The principal reasons for judgment in the Court of Appeal were delivered by Macfarlan JA. Beazley JA concurred, as did Campbell JA subject to qualifications and additional matters expressed in his Honour's separate reasons for judgment.

23 Macfarlan JA's reasons involved the following steps:

- The Expert Determination in relation to variation 10(a), that a delay of nine days should be attributed to Shoalhaven, was inconsistent with his finding, in relation to that variation, that Firedam had not discharged its onus of showing that delay for a defined period had occurred and that the additional work required caused delay in reaching completion[24].

- The Expert Determination in relation to variation 62, granting an extension of 89 days pursuant to cl 54.6, reflected a finding of fact inconsistent with the Expert's conclusion in dealing with Firedam's claims[25].

- It could be assumed, without deciding, that the Expert had the power to grant an extension of time under cl 54.6 – that proposition was not in issue[26].

- The Expert's extension of time under cl 54.6 was granted because of a variation or breach of contract by Shoalhaven, which would have attracted the application of cl 55.1. Yet he awarded no delay costs under cl 55.1 to Firedam[27].

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23 [2009] NSWSC 802 at [38].

24 [2010] NSWCA 59 at [41].

25 [2010] NSWCA 59 at [44].

26 [2010] NSWCA 59 at [54].

27 [2010] NSWCA 59 at [57].

- The Expert did not tell Firedam why it was not entitled to delay costs and thus "failed to give proper reasons for his decision"[28]. The Determination did not answer the contractual description[29].

24 Campbell JA accepted that the Expert had "meticulously answered" each of the questions identified in cl 1 of the Expert Determination Procedure concerning each of the issues which had been submitted to him. His Honour added, however, that[30]:

> "when there is an unexplained discrepancy in his conclusions concerning some of those issues, he has not provided reasons for his determination as a whole."

The discrepancy identified by Campbell JA was the Expert's determination that nine days of delay were attributable to Shoalhaven with no explanation of the Expert's failure to allow that nine days as an extension of time when assessing variation 10(a). The Expert had failed to fulfil his obligation of "giving reasons" because the reader of his reasons was left wondering about what construction he had put on cl 54.6[31].

The validity of the Determination

25 *Hudson's Building and Engineering Contracts* refers to the increasing diversity of dispute avoidance and resolution mechanisms in modern contracts. It points to the need to give careful consideration "to the true nature of the specific role described in the contract, because the consequences of the different nature of the roles can be radical"[32]. The range of issues able to be entrusted to Expert Determination under the Contract was wide. That width, and the associated procedures, might be thought to indicate proximity to an arbitral function[33]. In this case, however, the Contract expressly provided that the Expert

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28 [2010] NSWCA 59 at [60].

29 [2010] NSWCA 59 at [60], [63].

30 [2010] NSWCA 59 at [14].

31 [2010] NSWCA 59 at [17].

32 *Hudson's Building and Engineering Contracts*, 12th ed (2010) at 706 [4-102].

33 The distinction between expert and arbitrator was enunciated in *In re Dawdy and Hartcup* (1885) 15 QBD 426 at 430; *In re Carus-Wilson and Greene* (1886)

(Footnote continues on next page)

was to act "as an expert and not as an arbitrator"[34]. "Expert Determination" was defined in the Contract by reference to the procedures set out in the Contract. Nevertheless, the history of the term suggests the way in which the function to which it refers will be discharged. As Chesterman J said in *Zeke Services Pty Ltd v Traffic Technologies Ltd*[35]:

> "The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditious because they are informal and because the expert applies his own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar."[36]

26 In this case, the Expert determined, as required by the Contract, the issues identified by the parties. He answered "meticulously", as Campbell JA put it[37], each of the questions identified in the Expert Determination Procedure set out in Sched 6 to the General Conditions. The contested question, whether the Determination accorded with the Contract, reduced to an inquiry about whether the Expert had given "reasons" within the meaning of cl 4 of Sched 6. The content of the requirement to give reasons must reflect the nature of the expert determination process, which is neither arbitral nor judicial[38]. It must also be

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18 QBD 7 at 9 per Lord Esher MR, 10 per Lindley LJ and Lopes LJ. Recent decisions include *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646; *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134; *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563.

34 General Conditions, Sched 6, cl 4.1.1. This formula apparently first appeared in *Dean v Prince* [1953] Ch 590 at 591; [1954] Ch 409 at 415 – see Kendall, Freedman and Farrell, *Expert Determination*, (2008) at 4 [1.1.8]. The label is not always determinative of the true character of the function created: *Age Old Builders Pty Ltd v Swintons Pty Ltd* (2003) 20 VAR 200 at 217 [68].

35 [2005] 2 Qd R 563 at 570 [27].

36 See also *Straits Exploration (Australia) Pty Ltd v Murchison United NL* (2005) 31 WAR 187 at 192 [14].

37 [2010] NSWCA 59 at [14].

38 *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2002) 11 BPR 20,201 at 20,208-20,209 [61].

informed by the nature of the issues to be determined. Judicial observations in other cases about contractual requirements to give reasons in expert determinations or in arbitrations must be read according to their context[39]. It may be accepted, as a general proposition, that a mistake in the reasons given for an expert determination does not necessarily deprive them of the character of reasons as required by the relevant contract nor deprive the determination of its binding force[40]. There are mistakes which may have that effect and others that will not.

27 A deficiency or error in the reasons given by an expert may affect the validity of the determination in two ways:

1. The deficiency or error may disclose that the expert has not made a determination in accordance with the contract and that the purported determination is therefore not binding.

2. The deficiency or error may be such that the purported reasons are not reasons within the meaning of the contract and, if it be the case that the provision of reasons is a necessary condition of the binding operation of the determination, the deficiency or error will have the result that the determination is not binding.

It appears to have been an unstated premise in the proceedings leading to this appeal that the contractually binding effect of the Determination between the parties was conditional upon the giving of reasons as required in cl 4 of Sched 6 to the General Conditions. In this case it was held by the Court of Appeal that the reasons for the Determination disclosed an inconsistency and did not account for it. The question whether there was an unexplained inconsistency is a threshold question. If answered in the negative, the further question whether the reasons were**,** on that account, insufficient to support a binding Determination will not arise.

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39 *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130 at 132-133; *Halifax Life Ltd v The Equitable Life Assurance Society* [2007] 1 Lloyd's Rep 528 at 542 [85].

40 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 331-337 per McHugh JA; *Holt v Cox* (1997) 23 ACSR 590 at 596-597; *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* (2006) Aust Contract Reports ¶90-241 at 89,425-89,426 [51]-[54].

28 In relation to variation 10(a) the Expert declined to determine Firedam's claim for an extension of time which appears to have been based upon cl 52 read with cl 54. He did so because Firedam had not provided any "basis for substantiation of its claim". The Expert also found that, while the conditions which required additional under-boring were materially adverse site conditions within the meaning of cl 41, there was no entitlement to an extension of time on that account because no notice had been given under that clause.

29 In determining Shoalhaven's cross-claim for damages for delayed completion, the Expert considered what delays were attributable to Shoalhaven. In considering variation 10(a) he had found Firedam entitled to compensation for a total of 166 metres of under-boring out of its total claim for 659.5 metres. Firedam had also claimed an extension of 33 days, which the Expert found unsupported. Nevertheless, he took that claim as a basis for calculating a pro rata delay of nine days attributable to Shoalhaven. That assessment favoured Firedam because it took Firedam's claimed but unsubstantiated extension of time as a basis for calculating the delay attributable to Shoalhaven.

30 The Expert gave contractual effect to the delay attributable to Shoalhaven by exercising, at least notionally, the discretion of Shoalhaven to extend time under cl 54.6. The question whether he could exercise that power in the way he did was not in issue in the Court of Appeal.

31 There was no inconsistency between the Expert's finding of delay attributable to Shoalhaven and his rejection of Firedam's substantive claim for an extension of time in relation to variation 10(a). Nor was there any relevant deficiency in the explanation given in the Expert Determination of the process of reasoning adopted. Firedam was the beneficiary of an assumption in its favour.

32 In relation to variation 62, Firedam failed to provide reasoned support for an extension of time arising out of the necessary realignment of the main transfer pipeline. Its claimed extension of time of 90 days in connection with the proposed variation would have had to be related to the realignment requirements. Shoalhaven's delay of 89 days in responding to the clear need for realignment approval appears to have been in a different category. The use by the Expert of the discretion to extend time under cl 54.6 was again an application of that provision in favour of Firedam. By extending the completion date by 89 days Shoalhaven's claim for common law damages for delay on Firedam's part was reduced correspondingly. There was no inconsistency in the Expert's reasoning in relation to variation 62. The attack upon the Expert's reasons in the Court of Appeal should not have succeeded.

Conclusion

33 For the preceding reasons the following orders should be made:

1. Appeal allowed with costs.

2. The orders of the Court of Appeal made on 19 April 2010 be set side and in place thereof the appeal to that Court be dismissed with costs.

34 GUMMOW AND BELL JJ. After the grant of special leave on 3 September 2010, the respondent ("Firedam") was wound up on 26 November 2010. On 10 December 2010 the Supreme Court of New South Wales (McDougall J) granted leave under s 500(2) of the *Corporations Act* 2001 (Cth) to the appellant ("Shoalhaven") to proceed in this appeal against Firedam. However, the liquidator has played no part in this appeal and Shoalhaven thus has prosecuted the appeal in the absence of a contradictor. Several grounds are advanced by Shoalhaven, and they are of varying width in their general application to other cases. The above circumstances, and for reasons which follow, indicate that the appeal be decided in favour of Shoalhaven on a narrow ground.

35 On 18 October 2005 Shoalhaven wrote to Firedam that it accepted Firedam's consolidated tender dated that day for the design and construction of the Wastewater Transportation System for the Conjola Regional Sewerage Scheme; the site was located in various parts of the Conjola Lake region, the majority of which were in or near private residential properties. The time for completion of the whole of the works was 64 weeks from the date of contract. The Contract Documents (a defined term) incorporated the General Conditions of Contract of the New South Wales Government (GC21 (Edition 1)) ("the General Conditions"). This was a document of some length. Clause 41 provided for an adjustment of the Contract Price, and for an extension of time under cl 54, upon certain conditions, by reason of adverse site conditions. However, cl 55.2 stipulated that the only remedies available to Firedam for delay caused by Shoalhaven were for an extension of time and for delay costs under cl 55.1.2. For its part, Shoalhaven reserved its rights to claim "general damages" if Firedam failed to achieve completion by the Completion Date. The parties might agree to variations to the work required by the contract, but if they did not agree, cl 52.6 provided that all issues relating to the claimed variation were to be dealt with under cll 72-75.

36 Clauses 72-76 were headed "Claim and Issue resolution" and provided for the determination of issues by an Expert, who was to follow the procedure for Expert Determination in Sched 6. Subject to a qualification to which further reference will be made, the determination by the Expert was to be treated by the parties as "final and binding" and given effect to by the parties.

37 The issues on this appeal, from the Court of Appeal of the Supreme Court of New South Wales (Beazley, Campbell and Macfarlan JJA)[41], essentially turn upon matters of construction of the contractual documents, in particular of the General Conditions, and their application to the relevant events. There are two

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41 *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2010] NSWCA 59.

basic questions[42]. They are: (i) what the parties agreed that the Expert was to do; and (ii) whether the determination made by the Expert satisfied those requirements.

38 Clause 4 of Sched 6 to the General Conditions was headed "Role of Expert" and stated:

> "4 Role of Expert
>
> .1 The *Expert*:
>
> .1 acts as an *Expert* and not as an arbitrator;
>
> .2 must make its determination on the basis of the submissions of the parties, including documents and witness statements, and the *Expert's* own expertise; and
>
> .3 must issue a certificate in a form the *Expert* considers appropriate, stating the *Expert's* determination and giving reasons, within 16 weeks, or as otherwise agreed by the parties, after the date of the letter of engagement of the *Expert* referred to in clause 75.2 of the [General Conditions].
>
> .2 If a certificate issued by the *Expert* contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a mistake in the description of any person, matter or thing, or a defect of form, then the *Expert* must correct the certificate."

39 Two provisions of cl 4 require immediate comment. First, the certificate must state the determination and give "reasons". Secondly, the Expert "acts as an Expert and not as an arbitrator". The character and quality of the "reasons" in any particular instance may be expected to respond to the nature of the issues before the Expert for determination. Decided cases in which there is consideration by a court of alleged failure in performance of an express or implied requirement for the giving of reasons by a valuer of land or shares, or by an appraiser on a rent review, will not readily assist in dealing with provisions of

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42 cf *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8 at 39-40.

a contract for building public works[43]. In many instances, as in the present case, the issues before the Expert may require consideration of many and detailed claims of a factual and evaluative nature.

40 Further, as Campbell JA emphasised in the Court of Appeal[44], immediate assistance in determining the extent of the obligation of the Expert to give "reasons", within the meaning of cl 4.1 of Sched 6, is not provided by what has been said by the courts when considering the adequacy of reasons given by arbitrators. Clause 4.1.1 is apt to differentiate the role of the Expert from that of an arbitrator. And, as is emphasised by French CJ, Gummow, Crennan and Bell JJ in *Westport Insurance Corporation v Gordian Runoff Ltd*[45], with respect to arbitrations conducted under the *Commercial Arbitration Act* 1984 (NSW) ("the Arbitration Act"):

> "An award, subject to the Arbitration Act and to any contrary criterion in the arbitration agreement, is final and binding on the parties to the agreement (s 28). The award may order specific performance of a contract if the Supreme Court would have power to decree specific performance (s 24). By leave of the Supreme Court, judgment may be entered in terms of an award and an award may be enforced in the same manner as a curial judgment or order to the same effect (s 33). The Supreme Court is empowered by s 44 to remove an arbitrator who has misconducted the proceedings or who is incompetent or unsuitable to deal with the particular dispute.
>
> These statutory provisions indicate that the making of an award in arbitration proceedings is more than the performance of private contractual arrangements between the parties which yields an outcome which rests purely in contract. They also suggest the importance which the provision of reasons by arbitrators has for the operation of the statutory regime. That statutory regime involves the exercise of public authority, whether by force of the statute itself or by enlistment of the jurisdiction of the Supreme Court. It also ... displays a legislative concern that the jurisdiction of the courts to develop commercial law not be restricted by the complete insulation of private commercial arbitration."

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43 cf *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314; *Holt v Cox* (1997) 23 ACSR 590; *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2002) 11 BPR 20,201.

44 [2010] NSWCA 59 at [4]-[7].

45 [2011] HCA 37 at [18]-[19].

41 Disputes arose, and claims were made by Shoalhaven for damages for delayed completion, and by Firedam for extensions of time, variations and delay costs. By letter of engagement dated 10 October 2008, Mr Neil Turner was appointed the Expert to determine six unresolved issues raised by Firedam. These were identified as claims 10(a), 11, 12, 59, 62 and 143. Shoalhaven, on its part, cross-claimed for direct costs due to delayed completion. The amended reasons of the Expert dated 17 March 2009 is a document of 84 pages and 572 paragraphs.

42 The determination which the reasons supported was that Firedam was to pay Shoalhaven $308,000 (including GST) for damages for late completion, and interest of $13,501.37 payable to 6 February 2009. These sums were to be carried forward to the collection, with the final result that Shoalhaven was to pay Firedam $569,595.96 (including GST), being a principal amount of $497,142.55 plus interest. This principal amount was below the contractually stipulated threshold of $500,000, above which review by litigation was permitted, and below which the determination of the Expert was final and binding.

43 Firedam was dissatisfied with that outcome and by Summons filed in the Supreme Court of New South Wales on 15 May 2009 it sought declarations that: (1) the determination was not binding upon it, and (2) it was at liberty to commence proceedings against Shoalhaven in respect of certain claims which it had made. One of the grounds upon which declaration (1) was sought was that the Expert had failed to give reasons complying with the obligation imposed by cl 4.1.3 of Sched 6, set out above.

44 Tamberlin AJ, on 12 August 2009, ordered that the Summons be dismissed, and ruled[46] that the Expert had given valid and sufficient reasons for his conclusions in the matter. However, the appeal by Firedam to the Court of Appeal succeeded and a declaration was made that the determination by the Expert was not binding upon the parties.

45 For the reasons which follow, the appeal to this Court by Shoalhaven should succeed and the orders by Tamberlin AJ should be restored.

46 There were three claims by Firedam which were dealt with in the Supreme Court, identified as claims 10(a), 12 and 62.

47 Clause 41.4, subject to a qualification not presently relevant, provided as follows:

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46 *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2009] NSWSC 802.

> ".1 [Firedam] will be entitled as an adjustment to the *Contract Price* to its direct, reasonable additional costs (including costs of delay or disruption), necessarily and unavoidably incurred by [Firedam] in dealing with materially adverse *Site Conditions*, from the date of provision to [Shoalhaven] of the written notice required by clause 41.2, having taken all reasonable steps to minimise the costs in dealing with materially adverse *Site Conditions*; and
>
> .2 [Firedam] may also be entitled to an extension of time for *Completion* under clause 54 for delays caused by the materially adverse *Site Conditions* occurring from the date of provision to [Shoalhaven] of the written notice required by clause 41.2."

48 Clause 54 was headed "Extensions of time". It provided in cl 54.1 that in certain circumstances Firedam would be entitled to an extension of the completion time for a number of days to be assessed by Shoalhaven. In addition, a special provision with respect to extension of time by and for the benefit of Shoalhaven was made by cl 54.6. Clause 54.6 is set out later in these reasons.

49 Claim 10(a) was made in respect of additional under-boring of sheds, gardens, trees and driveways of which Firedam claimed it could not have been aware at the time of tender. By claim 12 Firedam sought an amount for additional costs incurred as a consequence of encountering extremely hard rock, this being said to be a materially adverse site condition within the meaning of cl 41. By claim 62 Firedam sought an amount for additional costs incurred as a consequence of the realignment of a mainline across the waterway at Pattimores Lagoon. Firedam succeeded in obtaining some additional costs for extra work in respect of claim 10(a) and claim 12, but it failed in relation to claim 62.

50 Firedam failed to obtain an extension of time in relation to claim 10(a) and claim 62, but did succeed in obtaining the claimed extension of time under claim 12. In the case of claim 12, while the Expert did allow the claimed extension of time, he did not allow delay costs. These had not been claimed and the Expert considered that there may be some allowance for delay costs in the hours claimed by Firedam for its staff.

51 The Expert determined that Firedam should not obtain extensions of time with respect to claims 10(a) and 62 because it had not complied with the notice provisions of cl 41.2; this had obliged Firedam to notify Shoalhaven in writing within seven days of encountering the relevant adverse site condition. Nor had Firedam complied with the requirements of cl 54, which set out various conditions to be satisfied before it was entitled to an extension of time for the number of days to be assessed by Shoalhaven. The result with respect to claims 10(a) and 62 meant that in response to any claim by Shoalhaven against

Firedam for damages for delay in completion, Firedam could not say that the contractual completion date of 64 weeks, from the contract date, had been extended or postponed. Nor could Firedam claim damages under cl 55.1.2 for delay costs in respect of the number of days during which the completion date might have been extended.

52 The Expert did, however, return to the question of the completion date. But this was because he also had to deal with the cross-claim by Shoalhaven for damages for delay by Firedam and to fix a time from which such entitlement should commence. The Expert considered that there were delays attributable to Shoalhaven which would have entitled Firedam to an extension of time had it complied with the conditions precedent to obtaining that extension. He determined in par 533 of the reasons that the contractual completion date should be further extended by a total of 120 days:

> "as a reasonable entitlement to [an extension of time] and in order to disentangle [Shoalhaven] caused causes of delay from other causes, so that [Shoalhaven] can have a determinate date from which general damages may be determined."

The date of completion so fixed by the Expert was 15 November 2007. Completion in fact had been achieved on 30 May 2008, and this was not denied by Firedam. The Expert went on to determine the cross-claim on the footing that the breach by Firedam in failing to achieve due completion extended from 15 November 2007 to 30 May 2008.

53 The determination in par 533 was made pursuant to cl 54.6 of the General Conditions. This stated:

> "[Shoalhaven] may in its absolute discretion for the benefit of [Shoalhaven] extend the time for *Completion* at any time and for any reason, whether or not [Firedam] has *Claimed* an extension of time. [Firedam] is not entitled to an extension of time for *Completion* under this clause 54.6 unless [Shoalhaven] exercises its discretion to extend the time for *Completion*."

54 There was no issue in the litigation which challenged the ability of the Expert to "step into the shoes" of Shoalhaven for the purpose of granting the extension of time under cl 54.6.

55 In his reasons, Tamberlin AJ concluded that there was no "inconsistency" between the approach or reasoning of the Expert in dealing with the Firedam claims for an extension of time, and the reasoning used by the Expert in determining damages on the claim by Shoalhaven for delay. His Honour added:

> "They are distinct claims based on different criteria and they call for different findings. [The Expert], 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."

56 His Honour restated that conclusion in the fourth last paragraph of his reasons, and then said that he considered that the Expert had "given valid and sufficient reasons for his conclusions".

57 The Court of Appeal allowed the appeal essentially on the ground that the Expert had not given reasons as required by cl 4.1.3 of Sched 6 to the General Conditions and that this was so because: (i) the determination contained conflicting decisions on two issues, and (ii) the reasons did not explain how this had arisen. In particular, there was said to be an "inconsistency" between the rejection by the Expert of the claim by Firedam to an extension of time for claim 10(a), and the exercise of the power in cl 54.6, so that Firedam was left in a state of ignorance as to why its delay costs claim in claim 10(a) was rejected. Thus, the Expert had failed to give "proper reasons" for his decision.

58 The short answer is that cl 54.6 is expressed to operate for the benefit of Shoalhaven and is distinct from the provision in cl 54.1 respecting the entitlement of Firedam[47]. It is clear from the reasons given by the Expert that the extension of time was granted under cl 54.6 to provide a starting point for the determination of Shoalhaven's claim for damages, an issue factually and conceptually distinct from any entitlement of Firedam to an extension of time under cl 54.1.

59 The primary submission by Shoalhaven is to this effect and should be accepted. It alternatively submitted that it would have been sufficient compliance with the task entrusted to the Expert that he gave clear reasons for the course he took, even if this was one on which different minds could have taken different views or even if the course he took was erroneous. It is unnecessary to consider this alternative submission.

60 The appeal should be allowed with costs, the orders of the Court of Appeal made 19 April 2010 set aside and in place thereof the appeal to that Court be dismissed with costs.

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47 cf *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd* (2010) 26 BCL 130 at 139 [40].

61 HEYDON J. It is unfortunate that this appeal will not decide the issues which arise in relation to the construction of the requirement in cl 4.1.3 of Sched 6 to the contract in question that the Expert's certificate was to state his determination "giving reasons". That is because, although in form they present themselves as only relating to the construction of a particular standard form contract, they have a much wider significance. They are extremely important. If ever those issues are examined in this Court, the written and oral submissions advanced in this appeal by the appellant will be a valuable reference source. But a decision ex parte on particularly important legal questions is an evil to be avoided as far as possible. Even if an ex parte decision is binding, it is extremely vulnerable to overruling in a later case which is fully argued. In a practical sense an ex parte decision could not settle the law. The same is true, a fortiori, of dicta on questions of that kind. Hence the better course in the circumstances is to say nothing about them.

62 The Court of Appeal of the Supreme Court of New South Wales erred in considering that the determination was internally inconsistent and in departing from the contrary view of Tamberlin AJ. That contrary view of the somewhat confusing factual and contractual position is correct for the reasons which Tamberlin AJ gave[48]. The appeal must be allowed with costs.

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48 *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2009] NSWSC 802, in particular at [34]-[36].