

SHOALHAVEN CITY COUNCIL v FIREDAM CIVIL ENGINEERING PTY LIMITED (S216/2010)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 59

Date of judgment: 19 April 2010

Date of grant of special leave: 3 September 2010

Firedam Civil Engineering Pty Ltd ("Firedam") sought a declaration that an expert determination made by Mr Neil Turner on 6 February 2009 was not binding upon it. It also sought a declaration that it was therefore free to commence litigation against Shoalhaven City Council ("Shoalhaven").

Mr Turner was appointed pursuant to a contract ("the Contract") between Firedam (as Contractor) and Shoalhaven (as Principal) for the design and construction of a waste water transportation system. He was appointed to determine the monetary claims made by the parties against each other. This required him to consider, inter alia, whether certain claimed extensions of time should be granted. Firedam contended that Mr Turner's determination was not binding due to mistakes which put it at variance with the Contract. In the alternative it submitted that Mr Turner had failed to give proper reasons for his conclusions.

On 12 August 2009 Justice Tamberlin rejected Firedam's submissions, finding that Mr Turner's determination was binding. His Honour held that there was no inconsistency in Mr Turner's findings concerning the parties' applications for extensions of time. This was because each application concerned distinct claims based upon different criteria, calling for different findings. He further found that the extension of time under cl 54.6 was exercised solely in relation to Shoalhaven's claim for damages. Justice Tamberlin found that Mr Turner displayed no inadequacy of reasoning when determining that Firedam's claim for an extension of time should not be granted.

On 19 April 2010 the Court of Appeal (Beazley, Campbell & Macfarlan JJA) unanimously allowed Firedam's appeal. For broadly similar reasons, their Honours concluded that Mr Turner gave inadequate reasons for rejecting two of Firedam's claims. This was because he had made inconsistent findings about factual matters which were critical to those claims. They found therefore that it was impossible to discern why those claims had been rejected. The Court of Appeal held that since the relevant clauses of the expert determination were not severable, the determination itself fell outside the Contract and was not binding on the parties.

Subsequent to the grant of special leave in this matter, administrators were appointed to Firedam. This led to Firedam being wound-up by its creditors on 26 November 2010. On 10 December 2010 Justice McDougall granted Shoalhaven leave to proceed against Firedam (in liquidation) in the current proceedings in this Court. This was done pursuant to ss 500(2) and 471B of the *Corporations Act* 2001 (Cth).

The grounds of appeal include:

- The Court of Appeal erred in holding that there was an inconsistency between the expert's reasoning in his expert determination in extending time pursuant to cl 54.6 of the Contract dated 18 October 2005 between Shoalhaven and Firedam when considering Shoalhaven's claim for damages for delay on one hand, and on the other hand his reasoning in rejecting Firedam's claim to an extension of time.
- The Court of Appeal erred in taking the view that an exercise of the power conferred under cl 54.6 operated for all purposes, and in particular, for the benefit of Firedam.