

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S216/2010

BETWEEN:

SHOALHAVEN CITY COUNCIL
(ABN 59 855 182 344)

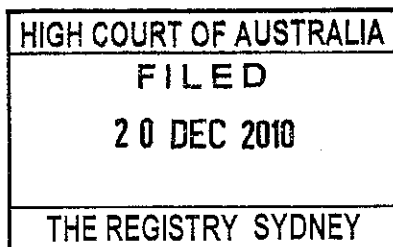
Appellant

and

FIRE DAM CIVIL ENGINEERING PTY
LIMITED (IN LIQUIDATION)
(ABN 84 003 923 377)

Respondent

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20 **APPELLANT'S SUBMISSIONS**

Part I: CERTIFICATION

1. The appellant's submissions are in a form suitable for publication on the Internet.

Part II: ISSUES

2. The appeal concerns an expert determination under a design and construction contract in respect of claims for, on the appellant principal's side, damages for delayed completion; and on the respondent contractor's side, extensions of time, variations and delay costs. Broadly, the issues relate to the nature and extent of the contractual obligation of an expert to give reasons, and the effect
30 of a discretion to extend time conferred for the benefit of one party in a

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construction contract. In particular, the questions the Court must determine in this appeal are:

- (a) Whether there was an inconsistency in the expert's reasoning when refusing an extension of time to the respondent for non-compliance with contractual provisions, and the expert's reasoning extending the time allowed for the respondent to complete its works in assessing a delay claim by the appellant;
- (b) Whether the expert failed to give reasons for any inconsistency in (a) above;
- 10 (c) Whether any inconsistency in (a) above constitutes a failure to give reasons for the expert determination;
- (d) Whether the Court of Appeal misconstrued the contract and the expert determination.

Part III: JUDICIARY ACT 1903, s.78B.

- 3. The appellant has considered the issue and concluded that notice pursuant to s.78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Reports of Reasons for Judgment

- 4. The citation for the decision of the primary judge, Tamberlin AJ, is [2009] NSWSC 802. The citation for the decision of the New South Wales Court of Appeal is [2010] NSWCA 59.

Part V: RELEVANT FACTS

- 5. The respondent was wound up by its creditors under section 500(2) of the *Corporations Act 2001* on 26 November 2010. On 10 December 2010 McDougall J granted leave to the appellant to proceed against the respondent in liquidation in this appeal.
- 6. The background is set out in the reasons for judgment of Macfarlan JA. The contract was for the design and construction of a waste water collection and transportation system between the appellant as principal and the respondent as contractor (AB274.09, CA [20]). The contract incorporates the New South

Wales Government GC21 (Edition 1) General Conditions of Contract (AB274.55, CA [22]).

7. The contract provided for the grant by the principal of extensions of time for completion to the contractor if the contractor satisfied the principal that, relevantly, the cause of the delay was beyond the control of the contractor; all reasonable steps were taken to avoid and minimise delay; and that the notice requirements were complied with (cll. 54.1; 54.2; 54.3, AB275.01-276.10, CA [23]).
8. The contract also provided in cl. 54.6 (AB276.25, CA [23]) that:
 - 10 "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."
9. The contract also provided that the contractor was entitled to delay costs for extensions of time granted because of delays caused by a variation order or a breach of contract by the principal which caused delay, disruption or interference to the contractor carrying out the works (cl. 55.1, AB276.52, CA [23]). The principal was entitled to liquidated damages from the contractor for failure to achieve completion by the contractual completion date (cl.55.3, AB277.35, CA [23]).
- 20 10. Disputes arose between the parties and on 10 October 2008 Mr Neil Turner was appointed as an expert to determine monetary claims brought by each of the parties arising from delays to completion (AB274.01-274.15, CA [20]). The contract provided that an expert determination was to be final and binding unless the monetary sum awarded reaches a specified threshold, namely \$500,000 (cll.75.6; 75.7, AB277.50-278.10, CA [24]).
11. The expert was to address questions in accordance with the procedure set out in the contract. In particular, the expert was to act as an expert and not an arbitrator, to make his determination based on the parties' submissions and his own expertise, and to issue a certificate "stating the Expert's Determination and giving reasons" (cl.75.4.1; Schedule 6, AB279.25-279.50, CA [26]).
- 30 12. The expert determined the issues in dispute on 6 February 2009, amended on 17 March 2009. The expert determination required the principal to pay the contractor an amount below the contractual threshold for review (AB280.21,

CA [29]). The expert's findings are summarised at CA [31]-[45] (AB281.01-287.10). Relevantly, the expert found that:

- (a) the contractor failed to discharge its onus of establishing that it was entitled to an extension of time in respect of certain claims and the expert was therefore unable to determine those claims (AB281.35-281.50, CA [32]; AB28.28-28.35, ED [141]-[142]; AB285.45, CA [43]; AB80.45, ED [519]);
- (b) the principal's claim for damages for delayed completion was affected by the fact that it had caused or contributed to delay. The expert resolved the latter situation by granting an extension of time pursuant to cl.54.6 'for the benefit of the principal' so as to reduce the principal's entitlement to general damages to the extent of its delay (AB283.30-284.35, CA [38]; AB78.45-79.30, ED [496]-[501]; AB285.01-10, CA [40]; AB80.10, ED [508]; AB286.20-286.50, CA [44], AB81.20, ED [527]).
- 10
13. The contractor commenced proceedings in the Supreme Court of New South Wales seeking a declaration that it was not bound by the determination because the determination was affected by errors (namely, inconsistencies in the findings in relation to extensions of time) such that it was not in accordance with the contract. Alternatively, it claimed that the expert failed to give proper reasons for the determination, in that no reasons were given for the supposed inconsistencies in the expert's findings (AB274.15-274.30, CA [20]).
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14. At first instance Tamberlin AJ held that the expert determination was binding. There was no inconsistency in the findings of the expert in relation to extensions of time relevant to the principal and the contractor, as each concerned distinct claims based on different criteria and calling for different findings (AB250.50-250.60, SC [34]). He found that the expert's extension of time under cl.54.6 was exercised solely in relation to the principal's claim for damages (AB251.35-252.10, SC [35]) and that the expert displayed no inadequacy of reasoning or failure to properly apply his expertise when determining that the contractor's claim for an extension of time should not be granted (AB245.32-246.10, SC [22]).
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15. On appeal Macfarlan JA held that the expert had exercised the power to extend time under cl.54.6, but rejected the contractor's contention that any extension of time automatically entitled the contractor to delay costs in the

absence of the criteria set out in cl.55.1 (AB289.55-290.52, CA [55]-[56]). He therefore held that any appellable defect was limited to the reasons for the expert's exercise of the power to extend time under cl.54.6 (AB290.52-291.10, CA [57]) and that there was an inconsistency in the expert's findings on extension of time as between the claims of the contractor and principal (AB285.15-285.40, CA [41]; AB 291.10-291.25, CA [58]). Macfarlan JA concluded that the inconsistency in the expert's reasoning meant that the contractor was not told why it was not entitled to delay costs and that this amounted to a failure to give reasons (AB291.40-291.50, CA [60], Campbell JA agreeing at AB272.35-272.45, CA [14]; AB273.20- 273.45, CA [17], Beazley JA at AB268.20-268.30, CA [1]).

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16. In the result the respondent's appeal was allowed and the expert determination was held not to be binding on the parties (AB268.20-268.30, CA [1]; AB273.49, CA [18]; AB296.10-296.30, CA [73]).

Part VI: ARGUMENT

17. Whilst the expert in this case issued a certificate and gave reasons as he was required to do, the Court of Appeal incorrectly held that the expert had not given reasons in accordance with the contract because:

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(a) the determination which the expert gave contained conflicting decisions on two issues; and

(b) the expert's reasons did not explain the reason for the conflict.

(Campbell JA at AB272.10-272.20, CA[12]; AB272.33-272.40, CA[14]; AB273.20-273.45, CA [17], Macfarlan JA at AB285.15-285.35, CA [41]; AB291.12-291.50, CA [58]-[60])

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18. **There is no conflict in the reasoning of the expert determination:** Tamberlin AJ was correct to find that there was no inconsistency between the approach or reasoning of the expert in dealing with the contractor's claim for an extension of time and the reasoning used by the expert in determining the principal's claim for delay damages (at AB250.52-252.35, [34]-[36]).

19. The contractor's claims to the expert for extensions of time all stemmed from claimed variations as a result of materially adverse site conditions. Under the

contract, the contractor had two entitlements if it encountered materially adverse site conditions (cl. 41.4, AB160.40-160.50). They were:

- (a) reasonable additional costs necessarily and unavoidably incurred by the contractor in dealing with the materially adverse site conditions; and
- (b) an extension of time pursuant to clause 54.

10 20. In the present case the expert allowed the respondent's claim in respect of the reasonable additional costs for variation 10(a) (AB26.38-26.45, ED [127]) and for variation 12 (AB52.27, ED [281]), but not for variation 62 (AB64.27, ED [365]). The expert declined to value variation 62 as the respondent had neither demonstrated its actual costs nor provided a calculation of a reasonable allowance for the work (AB64.25-64.28, ED [364]). The expert declined to find that the respondent was entitled to an extension of time in respect of any of the three variation claims.

21. The reason why the expert determined that the respondent did not obtain an extension of time in respect of its variation claims were that it had not complied with:

- (a) The notice provisions of cl. 41.2 (AB160.20-AB161.35); and
- (b) The conditions of cl. 54.1 (AB167.55--168.20)

20 22. The expert found that the contractor had not complied with these contractual prerequisites to obtaining an extension of time in respect of variation 10(a) (AB28.20-28.40, ED [140]-[144]; AB31.22-AB31.32, ED [146.d.ii]) and variation 62 (AB64.32, ED [367]; AB80.45, ED [519]). In the case of variation 12, the expert granted the claimed extension of time (AB53.48, ED [289]) but did not allow delay costs as they had not been claimed (AB52.17, ED [278]) and he considered that there may be some allowance for delay costs in the hours claimed by the respondent for its staff (AB51.57-51.60, ED [275]).

23. That meant that for variations 10(a) and 62 the respondent:

30 (a) could not contend, in response to any claim against it for damages for delay in completion, that the contractual completion date had been extended or postponed; and

(b) could not claim damages under cl. 55.1.2 for delay costs for the number of days during which the time for completion might have been extended.

24. The expert determination, however, did turn again to the question of the contractual completion date. It did so for the purpose of determining a date from which the appellant's claim for damages for delay costs commenced (at AB76.10-79.42, ED [470]-[502]; AB81.40-81.50, ED [532]-[534] and in particular at AB81.42-81.48, ED[533]).
- 10 25. The determination was made pursuant to cl. 54.6 of the contract. Such a determination is expressed to be made "for the benefit of the Principal". (cl. 54.6, AB168.36-AB168.41). It does not follow at all that:
- (a) it is also for the benefit of the contractor so that it entitles the contractor to damages under cl. 55.1.2 (AB169.08) to which it would not otherwise be entitled;
- (b) the contractor's failure to satisfy cl. 54.1 (AB168.01-168.20) is to be disregarded;
- 20 (c) the words "for the benefit of the Principal" in cl. 54.6 are to be treated as if they did not exist, or meant "for the benefit of both parties to the contract." It is perfectly possible for a provision to be for the benefit of one party to the contract: *Sandra Investments Pty Limited v Booth* (1983) 153 CLR 153.
26. The Court of Appeal's error arises from a misconception of the proper scope of cl.54.6, and the manner in which the power to extend time pursuant to cl.54.6 is to be exercised. Clause 54.6 is expressed to operate for the benefit of the principal and to be exercisable by the principal. It is of a significantly different nature and operates for a significantly different purpose from the entitlement under cl.54.1. The power to extend time pursuant to cl.54.6 is independent of the contractor's right to an extension of time pursuant to cl.54.1: *Turner Corporation Limited (Receiver & Manager Appointed) v Austotel Pty Ltd* (1994) 13 BCL 378 at 384-5; *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd* (No 2) [2006] VSC 491 at [26].
- 30 27. The discretion is not to be construed as operating in the interests of both the principal and the contractor, as in *Peninsula Balmain Pty Ltd v Abigroup*

Contractors Pty Ltd (2002) 18 BCL 322. Clause 54.6 manifests the parties' intention to ensure that the discretionary power to extend time is exercised for the benefit of the principal so as to overcome the 'prevention principle' and preserve the principal's entitlement to liquidated damages: cf *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114. It was open to the parties to frame the agreement so as to achieve this end: *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd* (2010) 26 BCL 106 at 139 [40].

- 10 28. Tamberlin AJ correctly held at first instance that the exercise of the discretion to extend time for this purpose was not inconsistent with the rejection of the contractor's claim for an extension of time and delay costs (AB251.15-252.10, SC [35]). It was clear from the expert's reasons that the extension of time was granted in order to provide a starting point for the determination of the principal's claim for damages. That issue was factually and legally distinct from the contractor's entitlement to an extension of time pursuant to cl.54.1. Campbell JA erred in finding that one was left wondering what construction the expert had put on cl.54.6 (AB 273.20-48, CA [17]). The reasoning in the expert determination sufficiently explains that the expert in utilising cl.54.6 was clearly working out an entitlement of the principal, which the expert did not consider translated to an entitlement for the contractor.
- 20 29. The expert was properly entitled to say, as he did for variation 10(a) (AB28.20-28.25, ED [140]; AB28.38-28.40, ED [143]-[144]), and for variation 62 (AB64.32, ED [367]; AB80.47, ED [519]) that the respondent had not satisfied the requirements of cl. 54.1. He did not have to do the respondent's work for it. He was also entitled to say, when he came to the appellant's claim for damages for delay, that he determined (using amongst other things his "own expertise") under cl. 54.6, in each case "for the benefit of the Principal," extensions of time of 9 and 89 days (AB80.12-80.15, ED [509]; AB81.20-81.23, ED [527])).
- 30 30. **The reasons provided were adequate:** The function of the expert was to determine for each "Issue" the questions in cl.75.1.1 (AB278.30-278.45, CA [26]). In doing so the expert's role was relevantly to "issue a certificate ... stating the Expert's determination and giving reasons": cl.75.4.3 (AB279.37-279.45, CA [26]).

31. In the past the circumstances in which a party may challenge an expert determination agreed to be final and binding have been regarded as very restricted. Mistake, error or negligence is not of itself sufficient; the error must have been of such a nature that the determination was not in accordance with the contract. So much was held by McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335C-G-336A-B, and followed since.
- 10 32. The reasons to be expected of a contractually appointed expert need not attain the standard of reasons expected of a judicial officer. Nor need they attain the standard expected of an arbitrator or court appointed referee. Experts appointed under a contract are often, as here, expressly required to act as an expert and not as an arbitrator. In such a case the expert is entitled to form his own opinion based on the matters before him and his own expertise, subject to the procedures set down in the contract: see *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563 at 569-570 [23]; and the authorities cited in *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134 at [20] per Einstein J.
- 20 33. Campbell JA rightly held that there is no useful analogy between the standard of reasons to be expected of an arbitrator or a referee and that of a contractually appointed expert because of the absence of a relevant nexus with the supervision of the Court in the latter case (AB 268.45-272.08, CA [4]-[11]). Even if it were the case that an expert were required to disclose reasons analogous to those expected of an arbitrator, authority suggests that arbitral reasons need not attain the standard of judicial reasoning: *Bremer Handelsgesellschaft mbH v Westzucker GmbH* (No 2) [1981] 2 Lloyd's Rep 130 at 132-133; *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57 at [216]-[224] per Allsop P; cf *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 at 363-366 [49]-[54].
- 30 34. Where an expert is required by the terms of the contract to act as an expert and not an arbitrator there can be no expectation that *detailed* reasons will be provided: *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2002) 11 BPR 20,201 at 20,208-9 [61]. The standard of reasons required of an expert in a particular case should be considered by reference to the nature of the question to be determined, in the context of the qualifications and attributes of the expert appointed. Where the parties have approved a non-lawyer expert

they should accept the reasons given by the expert subject to such 'deficiencies' as one would expect from such an expert: *The Commonwealth of Australia v Wawbe Pty Ltd* (1999) V Conv R 54-599 at 67194 [17].

- 10 35. In the case of an expert determination, the relevant consideration is the identification of any available grounds for review of the decision under the contract. The standard of reasons is therefore that which will enable the parties to the contract to ascertain whether the expert has performed the task required by the contract, so as to identify whether the binding nature of the determination is open to challenge. If there is a mistake in the expert's determination, the parties' remedy is to sue the expert for damages in negligence.
- 20 36. Reasons for an expert determination are sufficient where they enable the parties to determine whether the expert complied with his obligations under the contract: *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2001) 10 BPR 18,825 at 18,844 [118]; (2002) 11 BPR 20,201 at 20,208-20,209 [61]-[62]. An expert complies with his obligations when he follows the instructions under the contract in the sense that the expert has done what he was appointed to do: *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 at 287A-B per Dillon LJ; *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] 1 Lloyd's Rep 295, 300-301 per Simon Brown LJ; *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* (2006) Aust Contract R 90-241 at 89,429 [72]-[73]. This is the case even where the expert has misdirected himself as to a point of law so long as the expert has not departed from his instructions in a material respect: *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 28 EG 86; *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] 1 Lloyd's Rep 295 at 301 [28]. A contractual obligation to give reasons is met if the reasons are sufficient to allow the parties to see that their instructions have been complied with: *Halifax Life Ltd v Equitable Life Assurance Society* [2007] 1 Lloyd's Rep. 528 at 538 [50].
- 30 37. The expert in the present case met this requirement: (AB 272.33-272.48, CA [14]). The expert provided lengthy and detailed reasons for his determination on each of the disputed issues referred to him, setting out the questions he was required to determine, the evidence and submissions placed before him on each issue and the contractual framework within which he was to make his determination. The factual and legal bases for each of the expert's findings

are clearly described. The reasons provided were sufficient to enable the parties to know that the expert had addressed himself to the right questions under the contract.

10 38. The primary judge was correct to hold that the grant of an extension of time was in the exercise of an absolute discretion (AB252.20-252.25, SC [36]). In *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* (2006) Aust Contract R 90-241, the Victorian Court of Appeal distinguished between errors in the exercise of an expert's discretionary judgment and errors involving objective facts or a mechanical or arithmetical exercise. Errors of the latter kind were identified as being far more susceptible to review (at 89,425 [51]-[52] per Nettle JA). Here, the expert was not required to apply a formula but to exercise a discretionary judgment on the basis of the evidence and submissions and his own expertise. He did so consistently with the requirements set out in Schedule 6. The Court of Appeal's decision required the expert to give reasons justifying the exercise of his discretion. In doing so, the Court of Appeal erroneously departed from the position enunciated in *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* (2006) Aust Contract R 90-241.

20 39. The Court of Appeal has, with respect, impermissibly conflated what they identified as an error in the reasoning of the expert with a failure to give reasons explaining that error. However, the decision of the Court of Appeal is itself based upon an incorrect interpretation of the provisions of the contract. The expert gave reasons for his finding that the Contractor was not entitled to delay costs (see [22] above). Macfarlan JA held that the grant of an extension of time did not automatically entitle the contractor to delay costs under cl.55.1 (AB290.30-290.33, CA [56]). It was apparent from the reasoning of the expert that he considered that the contractor was not so entitled because of its failure to demonstrate, first, that it was entitled to an extension of time, and second, that the conditions for the grant of delay costs pursuant to cl.55.1 were made out. The reasons given by the expert were sufficient in the sense described in *Kanivah*. The very fact that the Court of Appeal identified what it saw as an error in the process of reasoning suggests that reasons were given as required by the contract.

Part VII: RELEVANT PROVISIONS

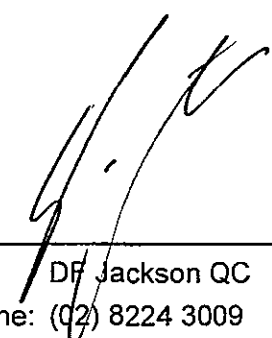
40. There are no relevant legislative provisions.

Part VIII: ORDERS SOUGHT

41. Appeal allowed with costs.
42. Judgment and orders of the Court of Appeal be set aside and in lieu thereof it be ordered that the respondent's appeal to that Court be dismissed with costs.
43. The respondent to pay the appellant's cost of the appeal in this Court, including the costs of the application for special leave to appeal.
44. Such further or other order as the Court thinks fit.

10 Dated: 17 December 2010

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