Court of AppealSupreme Court

New South Wales

---

| | |
|---|---|
| Case Name: | Lipman Pty Ltd v Empire Facades Pty Ltd (formerly known as Empire Glass and Aluminium Pty Ltd) |
| Medium Neutral Citation: | [2017] NSWCA 217 |
| Hearing Date(s): | 23 August 2017 |
| Decision Date: | 31 August 2017 |
| Before: | McColl JA at [1]<br>Macfarlan JA at [2]<br>Gleeson JA at [3] |
| Decision: | (1) Grant leave to appeal.<br><br>(2) Direct the applicant to file a notice of appeal in the form of the draft notice of appeal in the White Book within seven days.<br><br>(3) Appeal dismissed.<br><br>(4) Applicant to pay the respondent's costs in this Court. |
| Catchwords: | CONTRACTS – where dispute resolution clause provided for progression from senior executive negotiation, expert determination and litigation in relation to disputes between parties – where final and binding nature of expert determination qualified by a party having given notice of appeal within specified timeframe - where right to litigate in relation to the dispute if "the determination of the expert does not resolve the dispute" – whether "litigation" clause should be read as subject to a pre-condition that only an invalid expert determination will not "resolve" the dispute. |
| Legislation Cited: | Supreme Court Act 1970 (NSW), s 101(1)(r) |

| | |
|---|---|
| Cases Cited: | Badgin Nominees Pty Ltd v Oneida Ltd [1998] VSC 188<br>Cessnock City Council v Aviation and Leisure Corporation Pty Ltd [2012] NSWSC 221<br>Empire Glass and Aluminium Pty Ltd v Lipman Pty Ltd [2017] NSWSC 253<br>Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314<br>Lipman Pty Ltd v Emergency Services Superannuation Board [2011] NSWCA 163 |
| Category: | Principal judgment |
| Parties: | Lipman Pty Ltd (Applicant)<br>Empire Facades Pty Ltd (formerly known as Empire Glass and Aluminium Pty Ltd) (Respondent) |
| Representation: | Counsel:<br>Mr D T Miller SC / Mr B Le Plastrier (Applicant)<br>Mr I D Faulkner SC (Respondent)<br><br>Solicitors:<br>Vincent Young CCL Pty Ltd t/as Vincent Young (Applicant)<br>Dentons Australia Pty Ltd (Respondent) |
| File Number(s): | 2017/111351 |
| Publication Restriction: | No |
| Decision under appeal: | |
| Court or Tribunal: | Supreme Court of New South Wales |
| Jurisdiction: | Equity Division |
| Citation: | Empire Glass and Aluminium Pty Ltd v Lipman Pty Ltd [2017] NSWSC 253 |
| Date of Decision: | 17 March 2017 |
| Before: | Ball J |
| File Number(s): | 2016/380549 |

*[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*

## JUDGMENT

1 **McCOLL JA:** I agree with Gleeson JA.

2 **MACFARLAN JA:** I agree with Gleeson JA.

3 **GLEESON JA:** This application for leave to appeal, and an appeal if leave be granted, concerns the final and binding character of determinations by an expert appointed under a dispute resolution clause in a building contract. The applicant, Lipman Pty Ltd (**Lipman**), seeks leave to appeal from the order of the primary judge (Ball J) on 17 March 2017, dismissing Lipman's application for a permanent stay or dismissal of the proceeding commenced by the respondent, Empire Facades Pty Ltd (**Empire**) (formerly known as Empire Glass and Aluminium Pty Ltd), against Lipman in respect of disputes the subject of earlier expert determinations: *Empire Glass and Aluminium Pty Ltd v Lipman Pty Ltd* [2017] NSWSC 253. As that order is interlocutory, Lipman requires leave to appeal: *Supreme Court Act 1970* (NSW), s 101(1)(r).

### Background

4 Lipman and Empire are parties to a contract dated 21 November 2014 pursuant to which Empire agreed to supply Lipman with design, supply, construction and associated works for the refurbishment of the lobby of premises at 580 George Street, Sydney for a contract price of $3,750,000 excluding GST (**the Contract**). The Contract contains a dispute resolution mechanism in cl 42.

5 The relevant parts of the dispute resolution clause provide as follows:

> **42.1 Notice of dispute**
>
> If a difference or dispute (together called a '*dispute*') between the parties arises out of or in any way in connection with the subject matter of the *Subcontract*, including a *dispute* concerning:
>
> (a) a *Subcontract Superintendent's direction*; or
>
> (b) a claim;

then either party shall, by hand or by registered post, give the other and the *Subcontract Superintendent* a written notice of *dispute* adequately identifying and providing details of the *dispute*.

…

6 Clause 42.2 then provides for the dispute to be referred to nominated senior executives who are to meet and to undertake genuine and good faith negotiations "with a view to resolving the *dispute* or agree in writing on a method of resolving the *dispute*". If the *dispute* is "not resolved or the parties have not agreed on a method of resolving the *dispute*" within a specified period, cl 42.3 requires that "the *dispute* shall be referred to expert determination".

7 The nature of the expert determination and the process is dealt with in cl 42.4 to 42.10.

8 Clauses 42.11 and 42.12 provide as follows:

42.11 Determination of expert

The determination of the expert:

(a) must be in writing;

(b) will be:

(i) substituted for the relevant direction of the Subcontract Superintendent; and

(ii) final and binding,

unless a party gives notice of appeal to the other party within 15 Business Days of the determination; and

(c) is to be given effect to by the parties unless and until it is reversed, overturned or otherwise changed under the procedure in the following subclauses.

42.12 Litigation

If the determination of the expert does not resolve the dispute then, subject to clause 42.11, either party may commence proceedings in relation to the dispute.

9 Clause 42.14 provides that cl 42 will survive the termination of the *subcontract*.

10 Part P of the General Conditions annexed to the Contract included a form of expert agreement, the terms of which relevantly provide in cl 7:

**DECISION BINDING**

> **Unless** provided by the Subcontract, the Expert's determination of the Dispute is final and binding on the Main Contractor and Subcontractor. [emphasis in original]

11 Disputes arose between Empire and Lipman concerning the performance and subsequent termination of the Contract. Notices of dispute were issued by the parties pursuant to the dispute resolution clause in the Contract. As required by cl 42, the disputes were referred to senior executive negotiation and subsequently to expert determination. The expert appointed under the Contract entered into an agreement with the parties dated 4 October 2016 (the Expert Agreement) in the form of Part P to the General Conditions to the Contract, including cl 7 as referred to at [10] above. Two expert determinations were made by the expert on 29 November 2016. After off-setting the amounts the subject of those awards, the expert found in favour of Lipman in an amount of $106,943.63.

12 On 19 December 2016, Empire, by its solicitors, gave notice of an appeal in accordance with cl 42.11. On the same day Empire commenced and served proceedings against Lipman in the Technology and Construction List of the Equity Division seeking to re-agitate the issues considered by the expert.

13 By notice of motion filed 30 January 2017, Lipman sought a permanent stay or dismissal of the proceedings on the ground that the disputes between the parties had been resolved by the expert determination and it was not open for Empire to re-agitate those issues before the Court. It was not in dispute before the primary judge that the court has a discretionary power to stay proceedings where the parties have, by contract, agreed to have their disputes determined by an expert: *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 at [36] (Gillard J); *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163; *Cessnock City Council v Aviation and Leisure Corporation Pty Ltd* [2012] NSWSC 221 at [31] (Hammerschlag J).

*The parties' competing arguments below*

14 Lipman identified the issue of construction as whether Empire is permitted by cl 42 to litigate in court disputes that have already been resolved (adversely to it) by expert determination pursuant to cl 42.11.

15 Lipman contended that cl 42 does not permit a party to litigate disputes unless "the determination of the expert does not resolve the dispute" (those words being described by Lipman as the express condition in cl 42.12). Lipman argued that if the "determination" of the disputes has been made by an expert in accordance with the requirements of the Contract or Expert Agreement, it must follow that the determination of the expert does "resolve the disputes" for the purposes of cl 42. In such circumstances, neither party is entitled to litigate the disputes.

16 On Lipman's preferred construction, the giving of a notice of appeal under cl 42.11 is a necessary step in order for a party to become entitled to commence proceedings in relation to disputes, but it is not a sufficient step; the condition in the introductory words to cl 42.12 must also be met. Lipman contended that the condition in cl 42.12 ("if the determination of the expert does not resolve the dispute") will be met if the expert makes a determination that is not in accordance with the requirements of the Contract, or that is made in circumstances where the expert has not carried out the task he was required to undertake under the Contract and the Expert Agreement.

17 In response, Empire advanced two reasons why the "Litigation" procedure in cl 42.12 should not be limited to the recognised avenue of challenge where a determination is not in accordance with the requirements of the agreement. First, a party does not need cl 42.12 to invoke a common law right to challenge an expert determination that is not in conformity with the agreement. Second, the reference in cl 42.11(c) to an appeal procedure that could result in the expert determination being "reversed, overturned or otherwise changed", does not on a natural reading of those words include a proceeding for a declaration of nullity with respect to the expert determination.

18 Empire contended that by prescribing for an "appeal" by the cl 42.12 procedure in cl 42.11, the parties were expressly agreeing to litigation as a part of an appeal process "in relation to the *dispute*", words that were to be broadly construed.

**The judgment below**

19 After summarising the parties' competing arguments, the primary judge expressed his preference for the interpretation advanced by Empire. It is convenient to set out his Honour's dispositive reasons in full at [20] – [29].

> [20] In my opinion, this is a case where the parties have made it clear that they intended the appeal process to involve a rehearing by a court.
>
> [21] It is relevant to bear in mind that the question in this case is not whether the parties should be taken to have agreed that the dispute resolution process they have chosen should apply in some situations, but not others or that it should operate in parallel with normal court processes. As Allsop P pointed out in Lipman Pty Ltd v Emergency Services Superannuation Board, in cases such as those, there are compelling reasons for adopting a liberal approach to the construction of the relevant clause so that it applies to all disputes between the parties which are connected with the contract in question.
>
> [22] However, in the present case, there is no question that the dispute resolution clause is broadly drafted and applies to all the disputes between the parties. Rather, the issue is what that dispute resolution clause requires. Although there are commercial reasons for thinking that the parties may have preferred to avoid the necessity of re-agitating the issues between them, it is plain that it was also important to them to incorporate an appeal process in the mechanism they adopted. An appeal process that involves a fresh hearing is not uncommon, particularly in the context where the initial decision is undertaken by a specialist tribunal. It is not obvious that the parties must be taken to have intended to reject that process in this case. The Contract was for a substantial sum of money. Empire was liable for liquidated damages of $3,000 per day capped at 30 percent of the contract sum and liquidated damages payable under the head contract at $3,000 per day. It would not be commercially unreasonable to incorporate a substantive right of appeal into their dispute resolution process in those circumstances.
>
> [23] In my opinion, the difficulty with the interpretation advanced by Lipman is that it does not sit easily with the words of the Contract and does not really provide for a right of appeal at all.
>
> [24] Clause 42.11(c) states that the parties must give effect to the determination until it is "reversed, overturned or otherwise changed" under the procedure in cl 42.12. If Lipman is right, cl 42.12 only operates if the determination does not resolve the dispute in the sense that the determination is itself not effective to do so because it was not made in accordance with the Contract and is therefore void. But it seems odd in those circumstances that the parties should agree that they would nevertheless give effect to it until it is reversed, overturned or otherwise changed under cl 42.12. If the true position is that a right of appeal only exists in respect of a determination that is void because it does not comply with the Contract, it is difficult to make sense of an agreement that the parties are bound by the determination until it is reversed, overturned or otherwise changed.
>
> [25] Moreover, Lipman accepts that if the determination does not resolve the dispute in the sense for which it contends then, irrespective of the operation of cl 42.12, one party or the other would be liable to commence court proceedings for a declaration that the determination was void because it did not comply with the Contract. Consequently, on its interpretation, the appeal

rights conferred by cl 42.12 do not extend the circumstances in which the determination of the expert could be challenged, but only the relief that could be obtained. In claiming that the determination does not comply with the Contract, the court could only declare the determination void. It could not substitute its own views for those of the expert. However, it could do so under cl 42.12. It is doubtful that the parties intended to confer on themselves a right of appeal which effectively only expands the remedies otherwise available to them. It is unclear what the commercial purpose of such a limited right of appeal is. What is the rationale of extending the remedies that a party can seek if the party gives a notice of an appeal within 15 business days of the expert's determination if the same party is entitled to commence proceedings to have the determination declared void even if it has not given a notice of appeal?

[26] In addition, it is more natural to read the words "If the determination of the expert does not resolve the dispute" as connecting words referring back to the previous subclause rather than as words that introduce a completely new condition on the exercise of a right of appeal arising from the service of a notice of appeal within the timeframe specified in cl 42.11. The conditions for the exercise of a right of appeal are set out in cl 42.11. The nature of the appeal is set out in cl 42.12.

[27] Lastly, the precondition is expressed as a condition on the right to commence court proceedings. That precondition makes sense where the condition is the service of a notice within the specified time. It makes less sense where the condition is a failure on the part of the expert to comply with the requirements of the Contract, which on Lipman's interpretation is a question that would be determined as part of the court proceedings rather than as a precondition to their commencement.

[28] Lipman submitted that the interpretation I prefer makes the words "subject to clause 42.11" redundant. I have already explained why that is not the case. Those words make it clear that notwithstanding the commencement of court proceedings the parties remain bound by the determination until it is reversed, overturned or otherwise changed. That makes commercial sense where the right is a general right of appeal.

[29] It might be thought that if the words of the precondition were merely connecting words then the parties would have used words more closely aligned to the connection that is sought to be made. So, for example, they might have said "If a party serves a notice of appeal in accordance with clause 42.11 then …". But equally, if what was intended was that the right to commence court proceedings depended on the expert's failure to comply with the Contract, they might have specifically said so. As Mr Kidd SC, who appeared for Lipman, acknowledged, the fact that the parties could have expressed themselves more clearly is of little assistance in this case in determining the meaning of the words they chose to use.

**Disposition of application**

20 The argument by Lipman in this Court essentially repeated the argument which the primary judge had rejected. Lipman contended that the opening words of cl 42.12 ("If the determination of the expert does not resolve the *dispute* then") impose a pre-condition on the right to litigate. These words are, Lipman

submitted, to be read as meaning "if it is by agreement or by finding established that the determination of the expert did not resolve the dispute".

21 According to Lipman, the purpose of cl 42.12 is to set up an option for the party giving the notice of appeal to litigate the dispute, rather than have the dispute referred to another expert for determination, if two conditions are satisfied: first, a notice has been given under cl 42.11 within the specified time period, and second, that it is found (by a court) or agreed (between the parties) that the expert determination was not in accordance with the agreement. Senior counsel for Lipman submitted that on this construction, the reference to the "determination of the expert" in the opening words to cl 42.12 means a purported determination by the expert that is not valid, that is, a determination that is not made in accordance with the terms of the contract: *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336 (McHugh JA).

22 I do not agree. For the reasons given by the primary judge, cl 42 does not preclude Empire litigating the disputes the subject of the earlier expert determinations. As his Honour correctly observed, the fundamental difficulty with the construction advanced by Lipman is that it does not sit easily with the words of the Contract and does not really provide for a right of appeal at all.

23 I would add the following brief observations. Ordinarily, the meaning conveyed by the expression "determination of the expert" is a valid determination in the *A Hudson* sense, that is, a determination in accordance with the terms of the contract. By contrast, acceptance of Lipman's argument would give the expression "determination of the expert" in cl 42.12 an unusual meaning because a purported determination not done in accordance with the terms of the contract is not a determination at all.

24 It would also involve giving that expression a different meaning in cl 42.12 to the meaning of the same expression in the preceding sub-clause - cl 42.11 – where, as Lipman correctly accepted, the expression "determination of the expert" refers to a valid determination in the *A Hudson* sense. When cls 42.11 and 42.12 are read together, and in linear sequence, the expression

"determination of the expert" is plainly intended to have the same meaning in both sub-clauses.

25 That the opening words of cl 42.12 should be given their usual meaning of a valid determination in the *A Hudson* sense is supported by the terms of cl 42.11(c). That sub-clause contemplates that the appeal may result in the determination being "reversed, overturned or otherwise changed". That is, curial proceedings may result in a different outcome to the determination. However, nothing in cls 42.11 or 42.12 suggests that reversing, overturning or otherwise changing the outcome of the determination of the expert is contingent upon the prior agreement of the parties or finding by a court that the determination of the expert is a nullity.

26 Lipman's preferred construction that the right of appeal in cl 42.12 is subject to a pre-condition that the expert determination is a nullity, involves reading the opening words of cl 42.12 as saying "if the purported determination of the expert does not resolve the dispute because it is not a valid determination in accordance with the contract, then". That is an unreasonable and unnatural reading of cl 42.12, because it is inconsistent with the language of cl 42.12 and would substantially constrain the right of appeal which the parties have expressly agreed to.

27 Finally, insofar as Lipman contended that his Honour's construction would have an unbusinesslike consequence, I do not agree. Here, cl 42.11(b) qualifies the final and binding nature of the expert determination by the "appeal" procedure in cl 42.12, which expressly contemplates a party commencing proceedings "in relation to the *dispute*". In the present case, unlike the dispute resolution clause considered by this Court in *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163 (which did not include a sub-clause like the "litigation" cl 42.12 in the present case), the parties may be taken to have intended by the progression of the different chosen methods of dispute resolution in cl 42 (senior executive negotiation, expert determination and litigation), that the expert determination does not "resolve" the dispute if either party gives the requisite notice of appeal within the specified timeframe.

28 This is consistent with the language of cl 42.3, which speaks of the dispute being "referred" to expert determination, not that the dispute will be "resolved" by expert determination. There is nothing unbusinesslike in giving effect to this bargain that the parties have chosen.

**Conclusion and orders**

29 In my view, Lipman has not demonstrated error in his Honour's construction of the dispute resolution clause in cl 42 of the Contract. As the matter has been fully argued there should be a grant of leave to appeal, but the appeal should be dismissed with costs.

30 I propose the following orders:

(1) Grant leave to appeal.

(2) Direct the applicant to file a notice of appeal in the form of the draft notice of appeal in the White Book within seven days.

(3) Appeal dismissed.

(4) Applicant to pay the respondent's costs in this Court.

**********