

Corrected 13 February 2008

JUDGE LUNN

NO.171/2008

TUESDAY, 12 FEBRUARY 2008 AT 3.11 P.M.

ABIGROUP CONTRACTORS PTY LTD

V

HARDESTY & HANOVER INTERNATIONAL LCC AND COLIN
FULLERTON

HIS HONOUR: There is urgency in deciding this application and I do not pause to recite any of the background facts which can be gleaned from the voluminous papers on the court file.

I have before me an application to injunct the second defendant from conducting an expert determination of a particular dispute which has been referred to him under the contract. That is all I am required to determine. I am not determining any appeal against his determination of jurisdiction, I am not determining any application for a stay of the proceedings and I am not determining whether if there are any further references for expert determination under the clauses of the contract, whether they are valid or not.

I need not go into the intricate questions of whether the plaintiff has made out a prima facie case. There are arguments both ways and if I needed to decide it, I would decide the plaintiff did have a prima facie case on what's been put to me, however the application can be determined on the other considerations, and particularly of balance of convenience.

The effect of what is sought by the plaintiff is that any expert determination by Mr Fullerton of the matter referred to him, will be deferred, and the defendant will lose whatever benefit it might be able to obtain under the contract, if indeed it does have the contractual right to have such an issue determined by Mr Fullerton as an expert.

If the defendant is wrong and Mr Fullerton does not have jurisdiction or it is not appropriate that he should exercise the jurisdiction, the plaintiff can have those points resolved by a court when the defendant, assuming it is successful before Mr Fullerton, sues to enforce any determination which he makes, and indeed all the matters which have been put before me today as I understand it, can be ventilated then and the court will at that point have to decide upon them.

The detriment to the plaintiff is that it will incur the expense and inconvenience of having to continue with the expert determination procedure

before Mr Fullerton and put in its written submissions and do what else is necessary to enable Mr Fullerton to reach his determination. However, I do not see that that creates any irreparable harm for the plaintiff, and indeed it may produce some resolution at least to some part of the matter, that may be of benefit to the plaintiff.

If the defendant is right in what it now contends can be done through an expert determination by Mr Fullerton, it is entitled to pursue it. I do not consider that the costs which will be involved for the plaintiff in pursuing the determination by Mr Fullerton are so great so that it puts the balance of convenience into the plaintiff's favour. The expert determination by Mr Fullerton as I understand it, from the contractual documents should be completed within just over another month, although I presume that is subject to the parties giving him extensions of time if it was otherwise appropriate.

The fact is that if this action is pursued, and the plaintiff is quite entitled to pursue it, nothing definitive is going to happen in that month. If Mr Fullerton delivers his decision which is adverse to the plaintiff, presumably other issues relating to that will then come back into this Court and be caught up in either this action or other actions which will be dealt in tandem with it.

For those reasons, I consider that the balance of convenience favours the defendant and the application for interlocutory injunction is refused.

RULING COMPLETED 3.15 P.M.