SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

ABIGROUP CONTRACTORS P/L v HARDESTY & HANOVER INTERNATIONAL LLC

[2008] SASC 369

Judgment of The Full Court
(The Honourable Justice Anderson, The Honourable Justice White and The Honourable Justice Kelly)

23 December 2008

PROCEDURE - SUPREME COURT PROCEDURE - SOUTH AUSTRALIA - PROCEDURE UNDER RULES OF COURT - OTHER MATTERS ARISING BEFORE TRIAL

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - RIGHT OF APPEAL - WHEN APPEAL LIES - FROM INTERLOCUTORY DECISIONS - LEAVE TO APPEAL

APPLICATION FOR DETERMINATION OF A PRELIMINARY ISSUE

Application for permission to appeal referred to Full Court - interlocutory application for an issue in the trial to be determined as preliminary issue was not granted - appeal from this interlocutory decision - whether a point of principle arises - whether judge erred in exercise of discretion.

Held: Permission to appeal granted - appeal raises a question of general principle - appeal raises questions of mixed law and fact - order under r 211 for the separate hearing and determination of one discrete issue prior to the trial on other issues - appeal allowed.

Supreme Court (Civil) Rules 2006 (SA) r 211, referred to.
Duke Group Ltd (In Liq) v Alamain Investments Ltd (In Liq) & Ors (No 2) [2006] SASC 33, applied.
Abigroup Contractors Pty Ltd v Hardesty & Hanover International LLC [2008] SASC 244; *Abigroup Contractors Pty Ltd v Hardesty & Hanover International LLC (No 2)* [2008] SASC 272; *Rogers v Baillieu Bullock Wilkinson Pty Ltd* (1981) 28 SASR 595; *Rivers v Rivers* [2002] SASC 197; (2002) 220 LSJS 74; *FAI General Insurance Co Ltd (in liq) v Sherry & Ors* [2002] SASC 431; (2002) 225 LSJS 141; *City of Onkaparinga v Hassell Pty*

On Appeal from SUPREME COURT OF SOUTH AUSTRALIA (THE HONOURABLE JUSTICE GRAY) [2008] SASC 244

Respondent: ABIGROUP CONTRACTORS PTY LTD Counsel: MR S WALSH QC - Solicitor: COWELL CLARKE

Appellants: HARDESTY AND HANOVER INTERNATIONAL LLC Counsel: MR R FENWICK ELLIOTT - Solicitor: FENWICK ELLIOTT GRACE

Hearing Date/s: 10/11/2008

File No/s: SCCIV-08-171

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Ltd & Ors [2007] SASC 163; *State Bank of South Australia v Hellaby* (1992) 59 SASR 304; *Glenauchen Pty Ltd v Circuit Finance Pty Ltd* [2001] SASC 61; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, discussed.

ABIGROUP CONTRACTORS P/L v HARDESTY & HANOVER INTERNATIONAL LLC
[2008] SASC 369

Full Court: Anderson, White and Kelly JJ

ANDERSON J.

Introduction

1 In this matter, Hardesty & Hanover International LLC ("HHI") is seeking permission to appeal from a decision of a judge of this Court. The application for permission was initially made to the judge. However, the judge did not grant permission and referred the application to the Full Court (*Supreme Court Civil Rules 2006*, r 282(2)(b)).

2 Although it was an application for permission to appeal which would normally be heard in private on the papers, an order was made directing that the matter be heard in open court as the hearing of the appeal.

3 The judge who referred the matter to the Full Court published reasons in *Abigroup Contractors Pty Ltd v Hardesty & Hanover International LLC (No 2)* [2008] SASC 272. The reasons explained why the judge did not grant permission to appeal. Earlier the same judge had published reasons in *Abigroup Contractors Pty Ltd v Hardesty & Hanover International LLC* [2008] SASC 244, refusing the interlocutory relief sought by HHI.

4 In the interlocutory proceedings before the judge, HHI had requested a separate trial of a particular issue pursuant to r 211 of the *Supreme Court (Civil) Rules 2006* (SA). The issue concerned the conclusiveness of an expert determination provided for in the contract between the parties. It was argued that such expert determinations must be promptly and strictly enforced. The judge refused to make the order sought.

Extension of time

5 The judge made an order refusing the appellant's application for a separate trial in open court on 30 May 2008. The reasons for this decision were published on 8 September 2008, and a formal order was made on 3 November 2008.

6 The appellant made an application to this Court on 10 November 2008 for an extension of time within which to commence an application for permission to the appeal. The respondent did not object to the application, and insofar as it may be necessary I would grant the extension.

Background

7 The underlying dispute arises from the construction of twin bridges which now span the Port River at Port Adelaide. The plaintiff in the action is Abigroup

Contractors Pty Ltd ("Abigroup"). Abigroup was the head contractor and engaged Hardesty & Hanover LLP ("HHL") through a Tender Services Agreement ("TSA") dated 3 June 2004 to provide engineering designs for the opening sections of the rail and road bridges. HHI and HHL are based in New York.

8 To date, there have been three types of disputes between Abigroup and the two Hardesty companies. The dispute with HHL relates to a professional negligence claim in relation to the design of the bridges. It has been referred to as the ship impact claim and includes a dispute about HHI's entitlement to further consultants fees. This present dispute and another in similar terms relates to fees payable by Abigroup to HHI. Both have been referred for expert determination and the expert has determined in favour of HHI in both cases.

9 Clause SC12 is a special condition within part 3 of the Consultant Services Agreement ("CSA") entered into by Abigroup and HHI. The CSA is incorporated into the TSA as Annexure 4. The clause provides a methodology for dispute resolution, commencing with a meeting of the parties' nominated representatives and progressing through an ascending hierarchy of meetings to a meeting of the parties' respective General Managers. If that procedure is not successful, SC12.1 then provides for an independent expert in the relevant field, to be agreed by the parties, to determine the dispute.

10 Clause SC 12 reads:

> SC12. ALTERNATIVE DISPUTE RESOLUTION
>
> In substitution of the provisions of clauses GC 12(c) and GC 12(d) of the Agreement, within 7 days of a party receiving the notice referred to in clause GC 12(b) of the Agreement, the Abigroup Representative and the Consultant's Representative must meet and, in good faith, attempt to resolve the dispute or difference. If, within 14 days of this meeting, the dispute or difference is not resolved, the Division Managers (or their equivalents) of the parties must meet within 7 days of the expiry of that 14 day period and, in good faith, attempt to resolve the dispute or difference. If, within 21 days of the Division Manager's meeting (sic), the dispute or difference is not resolved, the General Managers (or their equivalents) of the respective parties must meet within 7 days of the expiry of that 21 day period and, in good faith, attempt to resolve the dispute or difference.
>
> SC 12.1 Dispute resolution
>
> (a) Unless otherwise agreed, if, within 14 days of the General Managers' meeting under Clause SC 12, the dispute or difference is not resolved, it must:
>
> (i) be dealt with in accordance with this Clause SC 12.1; and
>
> (ii) be determined by an Independent expert in the relevant field agreed upon and appointed jointly by Abigroup and the Consultant.
>
> (b) If, within 7 days of the end of the period referred to in Clause SC 12.1(a) Abigroup and the Consultant cannot agree on the appointment of a person to act as the

independent expert, they must appoint the person nominated (on the application by either party) by the Chairperson or other senior officer for the time being of the Institution of Engineers, Australia or his or her nominee.

(c) The dispute or difference must be referred to the expert (agreed or nominated pursuant to Clause SC 12.1(b)) by written notice in the form of Attachment 1 signed by both Abigroup and the Chief Executive Officer of the Consultant.

(d) The expert determination must be made in accordance with the rules for the expert determination process in Attachment 2.

(e) The expert must act in accordance with the code of conduct for an expert in Attachment 3.

(f) The expert:

(i) acts at all times as an expert and not as an arbitrator; and

(ii) may open up, review, decide again and substitute any Direction of Abigroup's Representative under this Agreement.

(g) Abigroup and the Consultant must share equally the costs of the expert determination process.

(h) Any determination made by an expert pursuant to this Clause SC 12.1 is final and binding upon Abigroup and the Consultant except where the determination:

(i) requires a party to pay an amount in excess of $500,000; or

(ii) relates to a dispute or difference with respect to a Claim for greater than $2,000,000,

in which event the expert is deemed to be giving a non-binding appraisal and either party may commence litigation in respect of the dispute if it has not been resolved within 28 days of the expert giving his or her decision.

(i) If a dispute or difference between Abigroup and the Consultant which is referred to an expert under this clause is not determined within 90 days of the date of the expert's acceptance of appointment, Abigroup and the Consultant may agree to arbitrate, or either party may commence litigation in respect of, that dispute or difference.

(j) Any arbitrator agreed upon or court of competent jurisdiction in which litigation is commenced under Clauses SC 12.1(h) or SC 12.1(j) may open up and review any Direction of Abigroup's Representative under this Agreement.

11 A determination made by the expert pursuant to clause SC12 is final and binding subject to limitations on either the amount to be paid or the amount of the dispute (clause SC12(h)).

12 Clause 8 of the general conditions of the CSA is headed "Dispute Resolution". It too provides a mechanism for settlement of disputes but its terms are materially different from those contained in SC12.1. It seems that the CSA was put together without regard to the duplication of dispute settlement

procedures in these provisions. Clause 9.13 specifies the order of precedence of the various clauses in the interpretation of the agreement. It provides that the order of precedence is, first, the formal instrument of agreement; second, the special conditions; and, third, the general conditions. On the face of it, as clause 8 is part of the general conditions, it would not take precedence over clause SC12.

13 Abigroup issued a summons on 4 February 2008 seeking a declaration that clause SC12 of the contract between it and HHI was void and that any expert determination of the dispute which had arisen between the parties should be conducted in accordance with clause GC8.

14 This summons followed an earlier attempt between the parties to mediate their differences. By agreement, the mediation included the topics of resolution of the dispute between Abigroup and HHL regarding the design claim in relation to potential ship impact with the piers of the bridges and also involving a claim by HHI for outstanding fees. The mediation was unsuccessful. Nothing was resolved in relation to either matter.

15 After the failed mediation, HHI sought to avail itself of the procedure in SC12 relating to expert determination. HHI issued a Notice of Dispute in accordance with SC 12 which was limited to the question of its outstanding fees. The amount of the dispute was within the limit prescribed by clause SC12(h).

16 The summons issued by Abigroup was amended on 11 February 2008. Abigroup now sought a permanent injunction to restrain the expert from proceeding under clause SC12. The injunction was not granted.

17 On 7 March 2008 HHI issued a cross-action and counterclaim and sought a declaration that the determination of the expert was final and binding upon Abigroup.

18 The expert determination was delivered on 28 February 2008. It required Abigroup to pay $499,839.88. HHI took out an interlocutory application on 17 March 2008. It sought an order that the issue as to whether the expert determination was binding be tried separately.

19 Abigroup filed a statement of claim on 28 March 2008.

20 In its statement of claim, Abigroup alleged that HHL failed to provide in its design for the occurrence of a ship impacting with piers of the bridge. Abigroup alleged that this design work did not comply with the invitation to tender for the project. It was claimed that this resulted in a tender price much less than would have been the case had proper allowance been made for the possibility of ship impact. Abigroup alleges that HHL was in breach of a duty of care owed to Abigroup.

21 Abigroup alleges that when it discovered that the piers of the bridge were not sufficient to withstand ship impact it advised HHL. HHL acknowledged that modifications to the design were required.

22 In the statement of claim Abigroup also sets out in detail the fee arrangements and method for recovery of outstanding fees pursuant to the contract.

23 In a cross-action filed on 7 March 2008, HHI and HHL have counterclaimed in respect of fees alleged to be owing as a result of the expert determination. By interlocutory application on 17 March 2008, HHI and HHL sought summary judgment on the counterclaim.

24 Abigroup has maintained that the claim which was referred for expert determination was a "sham". The alleged sham is pleaded in some detail in the statement of claim. Abigroup also claimed the expert appointed did not have jurisdiction.

25 It is the issue of whether the expert determination should be declared binding on Abigroup that is the subject of the suggested separate trial. The key issues in any separate trial would be whether HHI correctly implemented the procedure for expert determination, whether the expert has made a binding determination and if so whether Abigroup is precluded from any further argument relating to the enforcement of the expert determination.

26 The proceedings before the judge involved detailed argument and included extensive written submissions filed by the parties. Those written submissions and copies of the transcript of hearings before the judge were part of the papers made available to this Court.

Application for permission to appeal

27 The application for permission to appeal is said by the applicant to raise issues of public importance relating to the enforcement of expert determinations. It is submitted by HHI that the question of the enforceability of the expert determination can be resolved on the documents. It is said that all of the material necessary to decide the issue is contained within the documents. It was agreed by both parties, that on the topic of enforceability, questions of mixed law and fact were involved.

28 The separate issue, if the court were to allow a separate trial, is stated by the applicant in its submissions as follows:

> If the court will not promptly and separately determine these enforceability issues, then the whole point of expert determinations is negated, since a loser can simply challenge the result, and postpone the day of reckoning whilst he puts the opposite party to the delay and cost of full scale litigation. The principle of prompt and robust enforcement of expert determinations and other similar processes is now universally applied in other

common law jurisdictions, and to deny it in this jurisdiction will prejudice the objective of reducing the time and cost of commercial dispute resolution.

29 In its argument to support the grant of permission to appeal, HHI argued that permission to appeal should be granted, as the order appealed from, although interlocutory in substance, is final in form. Whilst the order is final to the extent that, on the basis of the present order, the issue of the expert determination is not to be decided as a separate issue, it is my view that it is nevertheless an interlocutory decision.

30 Abigroup submitted that permission to appeal should only be granted where a point of principle arises. Mr Fenwick Elliott, counsel for HHI, submitted that the point of principle which arose in this matter was whether expert determinations or their enforcement may be easily avoided by issuing proceedings seeking a reopening of the matter the subject of the expert determination.

31 Mr Fenwick Elliott submitted that the parties are bound by their agreement under the contract and the court should enforce the agreement, which was intended to promote a speedy and cost-effective procedure for resolving disputes.

32 HHI estimated that the enforceability issue, if heard as a separate issue, could be dealt with in two days, without the need for substantive oral evidence. On the other hand, it was submitted that the ship impact claim would require approximately ten weeks of hearing and a re-agitation of the issues before the expert.

33 It was submitted that there was no overlap of any issue between the enforceability of the expert determination on the one hand and the ship impact claim by Abigroup relating to the additional design costs on the other.

34 Mr Fenwick Elliott submitted that if the enforceability issue was not heard separately, his client would be burdened by having to prepare for a long trial. He submitted that there was a substantial cost burden to have to prepare for a full trial on the underlying fees issue without knowing whether or not the determination is binding.

35 Mr Walsh QC for the respondent emphasised in his submissions that the decision by the judge refusing the application for a separate trial was an order involving a matter of practice and procedure on an interlocutory matter, and involving the exercise of discretion by the judge. He submitted that there was no error in the reasoning of the judge and therefore the permission to appeal should be refused.

Is evidence required to resolve the question of enforceability?

36 Mr Fenwick Elliott challenged Mr Walsh to demonstrate any areas where he could point to an overlap between the issues to be decided on the suggested

preliminary point and the issues to be decided later in the trial. He suggested that there was no evidence required to argue the enforceability point. Mr Walsh was unable to direct the court to any specific evidence which he said would be called. Mr Walsh submitted that several witnesses may have to be called to dispute matters which had been raised by the appellant. He made only general references to questions of credibility of witnesses and the complexity of the issues raised for consideration on the separate issue of the expert determination.

37 Mr Fenwick Elliott submitted that the judge did not in his reasons identify any overlap of issues and did not consider issues of evidence or credibility of witnesses. It was argued by him that the judge was occupied with the totality of issues and the fact that those issues were complex.

38 Mr Walsh referred to the plea in the statement of claim seeking to recover amounts which had been paid by Abigroup to HHI for construction support services. He submitted that this was clearly an area which would involve evidence. He referred to the fact that there were detailed designs involved and that the services provided in relation to those designs would also require evidence. He was, however, restricted to talking in general terms and could not be specific as to what evidence would be led. He made his submissions on the basis that these matters would be issues on the preliminary hearing, but it seems that would not be so if the narrower view taken by Mr Fenwick Elliott prevails.

39 Mr Walsh then referred to the plea which related to the recovery of the amounts which Abigroup had expended on what he called the sham expert determination. He submitted that the expert determination, because of the contractual provisions, required that all issues constituting any dispute must be referred to the expert. He submitted that this therefore included Abigroup's claim for the additional work and costs associated with the ship impact protection which was not accounted for in the preliminary work.

40 In my view, those submissions miss the point that although there was a combination of issues for the mediation, HHI is claiming its right under the agreement to have an expert determination on separate and discrete issues.

The judge's reasons for declining to order a separate trial

41 The judge isolated five areas in his reasons to which he indicated he had paid particular regard in refusing the application for a separate trial. The items are set out at [18] of the reasons published on 8 September 2008, [2008] SASC 244. They are as follows:

> In reaching my conclusions with respect to the application of HHI, I have had regard to all of the submissions advanced and in particular the following:
>
> – An apparently reasonable and sensible offer has been made by Abigroup to pay disputed claims as assessed by the expert. The only difficulty with the arrangement appears to be with the problems in giving security, and that appears to be within the control of HHI.

- The initiating proceedings related to Abigroup's claim concerning defective design work. HHI elected to not only defend those proceedings, but to counterclaim in the same proceedings with respect to their money claim the subject of the expert determination. It would have been open to HHI to issue separate proceedings with respect to their claim. They did not do so.

- The legal issues concerning the expert determination are not simple. The contractual documents, part only of which have been provided to the Court, are complex and to the uninitiated, suggest there may be considerable ambiguity and lack of clarity in relevant terms. For example, two sets of competing clauses deal with expert determination and involve material levels of conflict and, with a clause in the contract, suggesting precedence to one set over another. This technique of simply lumping together apparently conflicting procedures in the contract, and then suggesting precedence to one over another, provides a circumstance that may give rise to potential confusion.

- The claim, as finally submitted to the expert, as earlier observed, is said to be manipulated in a way that distorts the true dispute, so as to bring the amount claimed under the $500,000 cap. These are potentially complex and difficult issues to resolve.

- Attempts by Courts to separate out discrete issues for determination often lead to complication and confusion, and have the consequence of delaying ultimate judicial determination of a dispute. The splintering of the case, consequent appeals, cost and delay are unattractive. The Court has a responsibility to provide an expedient and cost effective procedure for the resolution of disputes. The Court must be mindful that the procedure of the Court may be used to attempt to gain a commercial advantage, and its processes should not be unfairly used in this way.

I do not suggest that the above considerations are the only considerations, but they are issues of particular concern.

42 Mr Fenwick Elliott addressed each of those matters in his argument, and noted that the first consideration mentioned by the judge referred to the consent order between the parties. The consent order was for payment of the disputed amount into an Australian bank account to abide the result. However, this does not allow HHI access to the funds. It merely provided a form of security to HHI pending the hearing and determination of the disputes.

43 As to the second point, Mr Fenwick Elliott acknowledged that it was open to the appellant to issue separate proceedings. He maintained that HHI believed that the right course was to issue proceedings for the separate cause of action in the same proceedings.

44 It was submitted that the judge was wrong to say that HHI had in any sense "blotted its copy book", to use counsel's words, by issuing the cross-claim in the same proceedings. The judge was saying that as a matter of history HHI chose to raise the matter in the same proceedings. However, he does appear to regard that as an important factor against an order for a separate trial. It is one of the five matters mentioned.

45 In the third point, the judge referred to the complexity of the contractual documents and the legal issues, and noted the competing clauses in the contract relating to expert determination. Counsel emphasised that unless the court promptly enforces expert determinations by separating them from complex underlying issues, the policy behind expert determinations is lost.

46 The competing clauses issue should be easily clarified by ordinary principles of construction and I doubt whether this should be a factor against a separate trial. At a preliminary level the clauses appear capable of rationalisation. Although it is apparent that there are errors in clause SC12 by reference to non-existent sections, the competing clauses should be capable of a commercial interpretation, especially in the light of clause 9.13 which provides an order of precedence, as I have discussed earlier.

47 The judge's fourth point refers to the respondent's alleged sham claim. Mr Fenwick Elliott did not address this point other than to claim the enforceability issue must be determined separately in order to simplify and expedite the underlying ship impact claim.

48 Mr Fenwick Elliott argued that following the unsuccessful mediation, his client did no more than it was permitted by its contractual rights. The contract envisaged taking individual disputes to an expert for determination. These disputes as to fees did exist before the mediation started, and when not resolved by the mediation, Mr Fenwick Elliott argued, it was appropriate to deal with them in the manner provided in the contract.

49 Again this issue should be capable of resolution as a preliminary point on the basis of the history of the matter revealed through the correspondence between the parties and the formal documents.

50 The judge finally referred to the responsibility of the court to provide an expedient and cost effective procedure for the resolution of disputes. However, Mr Fenwick Elliott submitted that the separate resolution of the enforceability issue would in fact be the most expedient and effective means of resolving this dispute. I cannot see how it could be said that the resolution of a separate issue in a short trial could create any unfair commercial advantage, as the judge suggested. The resolution of the preliminary point may assist the parties in attempting either to reach a compromise, or at worst, it is likely to assist with the planning and conduct of the trial by reducing and clarifying the issues in dispute.

51 Mr Fenwick Elliott argued further that the judge gave no consideration to the policy point in his reasons. He suggested that if the court does not promptly enforce expert determinations the concept will founder. He submitted that this consideration was paramount. It is correct that the judge did not appear to take this matter into account. It is an important point in the resolution of this type of commercial dispute.

52 The judge has made statements in his reasons which Mr Fenwick Elliott suggested were inconsistent with His Honour's conclusions.

53 His Honour said at [14]:

> Another matter of concern raised by HHI was the cost of preparing its money claim for trial. It was said that if its legal contentions were correct concerning the expert determination this work would be unnecessary. However, it was acknowledged that if monies were paid under the earlier referred to arrangement, the question of the quantification of any money claim could be deferred to follow the determination of the question of whether the expert's decision was final and binding.

54 His Honour also said at [19]:

> In my view, the whole of the proceedings should be addressed with expedition, and as indicated to the parties, I am prepared to set in place a procedural timetable designed to that end. I do not accept that the litigation, if properly resourced and treated as urgent by both parties, could not be addressed within 12 months. I reject the suggestion that the obtaining of independent experts would necessarily involve lengthy delays. HHI's concerns about unnecessary duplication and the preparation of its money claim in the event that it is decided that the expert determination is not conclusive can be accommodated by deferring that aspect of the case to the end of the trial. If HHI have received the disputed monies in the meantime, subject to a secured obligation to repay, their position would not appear to be substantially prejudiced. The question of discovery of material relating to that aspect of the claim, insofar as it may be burdensome, could be deferred.

55 It is unclear whether the judge is indicating in those remarks that the enforceability issue should be heard as a separate trial. If he is suggesting that the enforceability issue should be heard separately, then this is contrary to His Honour's ultimate conclusion. When read together, those two paragraphs in the judge's reasons tend to indicate that he was favourably disposed to hearing the enforceability issue separately. It was at least an indication that some aspects of the case could be dealt with separately.

56 Mr Fenwick Elliott argued that these comments by His Honour were inconsistent with the result he reached, and that the logical result from the reasoning employed by the judge was to order a separate trial.

The relevant principles

57 There are several recent decisions in relation to the relevant principles as to determining preliminary issues on questions of law. White J in *Duke Group Ltd (In Liq) v Alamain Investments Ltd (In Liq) & Ors (No 2)* [2006] SASC 33 summarised these decisions at [23] to [26].

58 In *City of Onkaparinga v Hassell Pty Ltd & Ors* [2007] SASC 163 White J referred to a decision of Bleby J in *Rivers v Rivers* [2002] SASC 197 and his own decision in *Duke Group*.

59 His Honour in *City of Onkaparinga* distinguished the situation of separate trials on questions of law and those involving mixed law and fact. As His Honour pointed out in *City of Onkaparinga* at [27], where there are matters of mixed law and fact there is the additional difficulty of "specifying precisely all the facts upon which the decision is to be determined".

60 White J in *Duke Group* referred also to *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334. The High Court in that matter, after setting out the difficulties relating to hypothetical questions, dealt with the relevant principles. The court said at [51]:

> It cannot be doubted that in many cases the formulation of specific questions to be tried separately from and in advance of other issues will assist in the more efficient resolution of the matters in issue. However, that will be so only if the questions are capable of final answer and are capable of being answered in accordance with the judicial process.

61 Although the decisions in South Australia were dealing with the 1987 Rules, r 211 of the 2006 Rules, in my view, is for relevant purposes without distinction. The present rule deals with separate trials generally. It deals with each of issues of fact, law or mixed questions of fact and law.

62 In this matter, although there are questions of mixed law and fact, there are really no factual issues in dispute, and the questions of law arise from the documents and can be determined without the need for any evidence other than perhaps formal matters.

63 Bleby J in *Rivers v Rivers* referred to the principles summarised by Walters J in *Rogers v Baillieu Bullock Wilkinson Pty Ltd* (1981) 28 SASR 595. I will set out those principles for convenience. Although dealing with a point of law, the principles should apply, in my view, to the situation of mixed law and fact in this matter.

> 1. An order that a point of law be set down for hearing and disposal before trial ought only to be made when the objection in point of law raises a question which, if decided in favour of the party objecting, would dispense with further trial of some substantial issue in the action. His Honour did not go as far as to say, as some judges have, that the point must be conclusive of the whole matter, whichever way the point is decided.
>
> 2. Such a reference ought only to be made where there is no dispute on the relevant facts giving rise to it.
>
> 3. It will seldom be an appropriate procedure where facts have to be decided by the trial Judge in order to determine the preliminary point.
>
> 4. The procedure should not be adopted when assumptions must be made as to the correctness of allegations of fact made in the statement of claim or defence.
>
> 5. If the procedure is adopted, there should be a clear definition of the point of law raised for determination.

6. It is not the function of the Court to advise parties as to what would be their rights under a hypothetical state of facts. "The function of the Court is not to decide abstract questions of law, but to decide questions of law when arising between the parties as the result of a certain state of facts". (*Stephenson Blake & Co v Grant, Legros & Co* (1917) 86 LJ Ch 439 per Warrington LJ at 440).

Should permission to appeal be granted?

64 The judge was of the view in his reasons published on 14 October 2008, [2008] SASC 272, that there should be an expedited hearing of all issues. His Honour believed that because "the legal issues concerning the expert determination were complex", it would be difficult to separate them from other issues in the proceedings. I have indicated that I consider that the matter is capable of being separated and I have set out my reasons for that.

65 His Honour next considered that there was no "relevant commercial urgency". This was apparently because of the agreement to pay the monies into a bank account in Australia. In reality, HHI cannot access those funds until the dispute is resolved. There is, in that sense, considerable commercial urgency in attempting to dispose of that issue.

66 Finally, the judge said the proceedings, because they were complex commercial proceedings, should be referred to a panel of judges. His Honour was there referring to a judge of this Court managing a matter in the long and complex civil list. As Mr Fenwick Elliott points out, that is not a valid reason for refusing to order a separate trial. There is no reason why the matter should not be managed in the long and complex list, and the decision as to ordering a separate trial is unrelated to how the matter is eventually managed.

67 It was for those reasons that His Honour declined to grant permission to appeal and referred the matter to this Court.

Conclusion

68 It is my view that Mr Walsh is unable to point to anything specific regarding the need to call evidence on the enforceability issue. He was only able to speak in general terms of the possibility of evidence having to be called.

69 The principles emerging from the judgment of Walters J in *Rogers*, although in relation to a point of law only, are in my view relevant. I am persuaded that this is a case where there is much to be said for Mr Fenwick Elliott's approach. I take account of the warnings as to ordering separate trials expressed in the decisions referred to, but consider it appropriate in this matter.

70 I have formed the view that the question of enforceability of the expert determination is a discrete issue which should be argued in advance of the main trial. There are no conflicting factual issues involved in determining the question of enforceability.

71 It is a matter of importance that expert determinations should be given effect to if the parties have agreed to be bound by such determinations.

72 I consider that the judge erred in his decision not to order a separate trial. Although his decision involved discretionary considerations in an interlocutory matter, it is my view that the discretion has miscarried for the reasons I have given.

73 Although it is my view that, given the history of this matter, the unsuccessful party in any determination of the preliminary point may appeal, it is still appropriate to have the separate point dealt with. This will not impede the progress of the matter generally towards the main trial. Procedural steps can be ordered to progress the main trial while at the same time setting down a time for the hearing of the separate issue.

74 It seems to me that it is important to start channelling the parties' energies in the direction of the ultimate trial but at the same time disposing of the separate issue. The matter is a complex commercial matter and I would request the Chief Justice to consider placing it in the Long and Complex List, to be managed by a judge so that a timetable can be set to expedite the matter for trial.

75 In the circumstances outlined earlier, I would extend to 29 September 2008 the time within which the appellant may commence its application for permission to appeal.

76 I would therefore allow an extension of time to appeal, grant permission to appeal and allow the appeal.

77 I would order that there be a separate trial limited to the issue of whether the expert determination made by Mr Fullerton on 28 February 2008 is final and binding on the parties. I would hear the parties as to costs.

WHITE J: The circumstances giving rise to this application for permission to appeal are set out in the reasons of Anderson J. I agree that permission to appeal should be granted and that the appeal should be allowed. In my opinion, an order should be made under r 211 of the *Supreme Court Civil Rules 2006* (the 2006 Rules) for the separate hearing and determination of one of the issues between the parties to this action. I agree generally with the reasons of Anderson J.

78 Because this differs from the decision of the Judge at first instance, I add the following.

79 As the reasons of Anderson J indicate, the dispute between the parties in this action arises out of the construction of the pair of opening bridges which now span the Port River at Port Adelaide. The respondent to the appeal, Abigroup, was engaged by the State of South Australia to build the two bridges. Before obtaining the contract, Abigroup engaged the second defendant, Hardesty and Hanover LLP (the Hardesty Partnership), to provide certain design services in relation to its tender, and the Hardesty Partnership did so. Abigroup's agreement with the Hardesty Partnership is entitled the Tender Services Agreement (the TSA). After Abigroup entered into the contract with the State Government, it engaged Hardesty & Hanover International LLC (HHI) to provide specified consultancy services to it in relation to its performance of the contract. Abigroup's agreement with HHI is entitled the Consultancy Services Agreement (the CSA). It was a term of the CSA that the obligations of the Hardesty Partnership under the TSA were also obligations of HHI under the CSA.

80 There are three principal disputes between the parties. At the risk of oversimplification, I summarise those disputes as follows. First, Abigroup alleges design deficiencies in the design produced by HHI or for which it is responsible. In particular, it alleges inadequacies in the ship impact protection in the design provided to it. Abigroup seeks to recover the additional costs of constructing ship impact protection which it incurred and for which it made no allowance in its tender to the State Government. This is the Design Defect Dispute.

81 Secondly, Abigroup asserts an entitlement to recover from HHI certain of the consultancy services fees which were claimed by HHI and paid. Abigroup also disputes HHI's entitlement to further fees which have been claimed, but not yet paid. This is the Fee Dispute. As part of the Fee Dispute, Abigroup also alleges that HHI engaged in misleading or deceptive conduct prior to entering into the CSA in relation to a cap on the consultancy service work which had then been performed and which was to be subject to the CSA.

82 The third area of dispute concerns the validity and binding effect of a determination made by Mr Fullerton, acting as an independent expert, on 28 February 2008. I will describe that determination in more detail shortly. HHI

asserts that the determination is final and binding upon Abigroup and Abigroup disputes that contention. This is the Expert Determination Dispute. It is the Expert Determination Dispute which HHI wishes to have heard separately from the other issues in the trial.

83 The Expert Determination Dispute arises in the following way. Special Condition 12 of the CSA provides, under the heading "Alternative Dispute Resolution", a means by which the parties should address and resolve any dispute which may arise between them. The content of SC 12 is set out in the reasons of Anderson J.

84 In July 2007, the parties were in disagreement about the Design Defect and Fee Disputes. Abigroup alleges, and I did not understand HHI to dispute the assertion, that the parties agreed to refer the Design Defect Dispute, concerning the cost of construction of ship impact protection, and the Fee Dispute to mediation. A mediation did occur but was unsuccessful.

85 Subsequently, HHI issued a document entitled "Notice of Dispute No. 1". That notice referred to only part of the dispute which had been referred to mediation. HHI arranged for that dispute to be referred to expert determination. In doing so, it purported to act under SC 12.1. Abigroup objected to the process but its objections were overruled. After hearing representations from the parties, the expert issued a determination in respect of Dispute No. 1 on 28 February 2008, finding that HHI was entitled to be paid $499,839.88.

86 Since that time, HHI has issued a document entitled "Notice of Dispute No. 2". As I understand it, this notice concerns a different part of the dispute which had been referred to mediation in July 2007. HHI has followed the same course in relation to Dispute No. 2 as it did in relation to Dispute No. 1.

87 Abigroup contends that the expert determination of Mr Fullerton is not binding. It does so on a number of bases. In the first place, it submits that SC 12 is so uncertain as to be unenforceable. In the alternative, it submits that the procedure outlined in the introductory words to SC 12 has not been followed, as there have not been any meetings of directors or managers as contemplated by that condition. In the further alternative, Abigroup submits that if the referral of the dispute to mediation is to be regarded as a substitute for those meetings, then the dispute referred to the expert for determination was not the same dispute. Finally, Abigroup contends that HHI's invocation of SC 12.1 was a sham, resulting from its manipulation of the identification of a dispute so as to keep it within the limits of SC 12.1(h). These contentions are set out in Abigroup's Statement of Claim.

88 By paragraph 31 of its Cross Action, HHI asserts that the expert determination by Mr Fullerton is 'final and binding'.

89 By an interlocutory application filed on 17 March 2008, HHI sought the following orders:

> 1. That the following issue, namely whether the expert determination of the Second Defendant of 28th February 2008 is binding upon the Plaintiff, be tried separately pursuant to Rule 211.
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> 2. That such trial proceed of the basis on affidavits rather than evidence, pursuant to R 168(2).
>
> 3. That such separate issue be determined as a matter of urgency and that formal pleadings be dispensed with pursuant to R119.

90 On 30 May 2008, a Judge of this Court refused that application and said that he would publish reasons later. The reasons were published on 8 September 2008. HHI lodged a notice of appeal on 29 September 2008. An application for permission to appeal was included in that notice.

91 The 21 day period fixed by r 283 of the 2006 Rules for the commencement of the appeal commenced to run on 30 May 2008. HHI's notice of appeal was filed well outside that 21 day period. However, Abigroup did not oppose the grant of an extension of time to HHI in which to commence the appeal and, having regard to the fact that some time elapsed before the Judge's reasons were published, it is appropriate for that extension to be granted.

Relevant Principles

92 In my opinion, the principles stated in the authorities concerning r 75.02 of the *Supreme Court Rules 1987* are equally applicable to the exercise of the Court's power under r 211 of the 2006 Rules. Those principles are well settled. I refer to the decisions in *FAI General Insurance Co Ltd (in liq) v Sherry & Ors,* [1] *Rivers v Rivers,* [2] *Duke Group Ltd (in liq) v Alamain Investments Ltd (in liq) (No 2)* [3] and in *City of Onkaparinga v Hassell Pty Ltd and Ors.* [4]

93 The general rule is that all issues should be dealt with in a single trial. The trial process should not be unduly fragmented. In particular, it is inappropriate that one judge be asked to hear and determine disputed issues of fact, which involve an assessment of the credibility and reliability of the same witnesses, in more than one trial arising from the one action. Further, the experience of the courts has been that splitting issues arising from the one action for separate determination with a view to shortening proceedings and saving costs frequently results in a prolongation of the proceedings and the incurring of additional costs. In this regard I respectfully agree with the following remarks of the Judge at first instance:

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1 [2002] SASC 431; (2002) 225 LSJS 141.
2 [2002] SASC 197; (2002) 220 LSJS 74.
3 [2006] SASC 33.
4 [2007] SASC 163.

> Attempts by Courts to separate out discrete issues for determination often lead to complication and confusion, and have the consequence of delaying ultimate judicial determination of a dispute. The splintering of the case, consequent appeals, cost and delay are unattractive. The Court has a responsibility to provide an expedient and cost effective procedure for the resolution of disputes.[5]

94 Those considerations seem to be particularly pertinent in the present circumstances. They count against the submission of HHI that the decision of the Judge declining to order a separate trial of the Expert Determination Dispute was wrong.

95 However, there is one feature in particular in this case which inclines me to the view that the appeal should be allowed. HHI's claim is that one part of the Fee Dispute which Abigroup wishes to agitate at the trial has already been resolved. Its claim is that this part of the Fee Dispute has been resolved in a way agreed by the parties for the resolution of disputes arising between them. HHI asserts that the benefit of the alternative dispute resolution regime in SC 12.1, and the result of an expert determination under that regime, was one of the benefits for which it contracted in the CSA. It submits that once a dispute has been resolved using the agreed regime, neither party should be put to the expense and delay of re-litigating that dispute.

96 There is plainly an issue about the binding effect of the expert determination of 28 February 2008. It is inappropriate to address the merits of the parties' respective positions in relation to that dispute. However, the effect of the Judge's decision refusing a separate trial of the issue is, in a practical sense, to resolve it adversely to HHI. If HHI must litigate in the one trial both the binding effect of the expert determination of 28 February 2008 and its underlying claim to fees then, by reason of being required to conduct the litigation in that way, it will have been denied the benefit for which it contracted and which it claims to have invoked. Put more shortly, HHI will lose the benefit of the agreement for which it contends without having had a hearing about its entitlement to that benefit. That is because, while the decision of the Judge stands, HHI will have to prepare for, and participate in, a full trial in which the Fee Dispute is agitated.

97 In my opinion, it is that feature of this case which distinguishes it from many of the cases in which one or more parties seek the separate determination of an issue in a trial. HHI is not seeking the separate determination of an issue of fact or an issue of law arising from a pleaded cause of action or from a pleaded defence. It asserts instead that an issue which Abigroup seeks to have determined by this Court has already been finally determined by an exercise of the alternative dispute resolution mechanism agreed upon by the parties.

98 I find support for my view that a separate trial of the Expert Determination Dispute may be appropriate in some of the Judge's own reasons. The Judge

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[5] *Abigroup Contractors Pty Ltd v Hardesty & Hanover International LLC* [2008] SASC 244 at [18].

himself contemplated that arrangements for a split hearing may have to be made by the trial judge if the trial proceeds on all issues. I refer in particular to the following passages:

> Another matter of concern raised by HHI was the cost of preparing its money claim for trial. It was said that if its legal contentions were correct concerning the expert determination this work would be unnecessary. However, it was acknowledged that if monies were paid under the earlier referred to arrangement, *the question of the quantification of any money claim could be deferred to follow the determination of the question of whether the expert's decision was final and binding.* [Emphasis added]
>
> ...
>
> HHI's concerns about unnecessary duplication and the preparation of its money claim in the event that it is decided that the expert determination is not conclusive can be accommodated by *deferring that aspect of the case to the end of the trial.* If HHI have received the disputed monies in the meantime, subject to a secured obligation to repay, their position would not appear to be substantially prejudiced. The question of discovery of material relating to that aspect of the claim, insofar as it may be burdensome, *could be deferred.*[6] [Emphasis added]

It can be seen in these passages that the Judge himself contemplated that it would be appropriate, given the Expert Determination Dispute, for aspects of the trial of the Fee Dispute to be deferred.

99 The Judge also considered that the fact that HHI had raised the Expert Determination Dispute in a cross action to Abigroup's claim in respect of the Design Defect Dispute, and had not made the claim in separate proceedings, to be a relevant matter counting against a separate trial of the Expert Determination Dispute. I agree that that is a relevant matter. That is because of the ordinary principle that all issues in a proceeding should be resolved in the one trial. However, recognition that the Expert Determination Dispute could have been the subject of quite separate proceedings also serves to emphasise that the issue is discrete and capable of being separated from the trial of the other issues.

100 HHI submitted that the Expert Determination Dispute, if tried separately, would occupy about two days of court time. It submitted that the case of both parties would be essentially documentary, but it did allow for the possibility that there may be some short oral evidence. HHI's estimate of the court time required for all issues is in the order of 15 weeks. It contends that if the Expert Determination Dispute was, in such a trial, resolved in its favour, the majority of the expense it would incur in a 15 week trial would have been unnecessary.

101 Abigroup contests the estimate that the Expert Determination Dispute would occupy only two days of court time. It asserts that much more oral evidence will be required than contemplated by HHI. It asserts, in addition, that if a separate trial is ordered, some witnesses will have to be called by it, and

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6 *Abigroup Contractors Pty Ltd v Hardesty & Hanover International (LLC)* [2008] SASC 244 at [14], [19].

possibly by HHI, at both hearings. This raised the undesirable prospect of a Judge having to assess at different times within the one trial the credibility and reliability of the same witnesses.

102 It is this feature of the matter in particular which has caused me concern about allowing the appeal. However, on my present understanding of the matter, HHI's submission that the trial of the Expert Determination Dispute will be almost entirely documentary appears to be correct. Abigroup was challenged by HHI on the appeal, to identify the areas in which oral evidence would be required and the witnesses who would be called so that some assessment of the asserted overlap could be made. Abigroup's responses were at a level of considerable generality, rarely extending beyond an assertion that there was "potential" for oral evidence to be called or for a particular witness to attend. That is not a satisfactory basis upon which to assess this aspect of the matter. In those circumstances, I am not satisfied that the possibility of overlapping evidence or witnesses militates sufficiently strongly against an order for a separate trial of the Expert Determination Dispute.

103 There is the prospect of some fragmentation of the trial resulting from an appeal by either party against the decision on the Expert Determination Dispute. That could be avoided in part by the Court directing that the hearing of any appeal by HHI against a decision which was adverse to it, deferred until after completion of the whole trial. All aspects of the Fee Dispute would then be determined in that trial. The position is a little more complex if Abigroup wishes to appeal against an adverse decision on the Expert Determination Dispute, but given the time frames involved, I consider that providing the hearing is expedited, such an appeal may be able to be accommodated without too much disruption to the trial as a whole.

104 I recognise that this decision involves the allowing of an appeal from an interlocutory decision on a matter of procedure. The Court should exercise caution before allowing such an appeal. That is because of the usual restraint exercised by appellate courts when reviewing an exercise of discretion relating to practice and procedure. I refer in this respect to the judgments in *State Bank of South Australia v Hellaby*;[7] *Glenauchen Pty Ltd v Circuit Finance Pty Ltd*[8] and to the decision of the High Court in *Adam P. Brown Male Fashions Pty Ltd v Philip Morris Incorporated and Another.*[9]

105 However, although the decision of the Judge may properly be characterised as concerning an issue of procedure, it is an issue of a distinctive kind. The Judge's decision concerns the manner in which the trial should be conducted and not, as with most matters of practice and procedure, a matter concerned with the preparation for trial. It is for this reason that the Masters will commonly, as I

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7 (1992) 59 SASR 304 at 312.
8 [2001] SASC 61 at [3].
9 (1981) 148 CLR 170 at 176-177.

understand it, defer determining an application of the present kind and refer it for consideration by the trial judge, or at least by a judge.

106 In any event, I am satisfied that the appeal does raise a question of general principle. That general principle relates to the way in which this Court should take into account, in its trial arrangements, the private arrangements made by parties for the resolution of disputes arising between them.

107 For the reasons given by Anderson J, and these additional reasons, I would grant HHI an extension of time in which to commence the appeal. I would grant permission to appeal and would allow the appeal. I would set aside paragraph one of the orders made by the Judge on 8 September 2008 and would direct, under r 211, that there be a separate trial of the issue raised by paragraph 31 of HHI's cross claim, namely, whether the expert determination of Mr Fullerton of 28 February 2008 is binding upon both parties. I would reserve to the trial judge the right to vary, if appropriate, the description of the issue to be separately tried. I agree with the Judge at first instance and with Anderson J that this action should be referred for management in the Long and Complex Trial List. I would hear the parties as to costs.

108 **KELLY J.** I agree with the orders proposed by Anderson J and for the reasons given by Anderson and White JJ.