SUPREME COURT OF VICTORIA

CAUSES JURISDICTION

Not Restricted

No. 6620 of 1998

ABIGROUP CONTRACTORS PTY LTD (ACN 000 201 516) — Plaintiff

v.

TRANSFIELD PTY LIMITED (ACN 00 854 688) — First Defendant

AND

OBAYASHI CORPORATION (ARBN 002 932 756) AND ORS — Second Defendant

---

JUDGE:	Gillard J.
WHERE HELD:	Melbourne
DATE OF HEARING:	11 September 1998
DATE OF JUDGMENT:	16 October 1998
CASE MAY BE CITED AS:	Abigroup Contractors Pty Ltd v. Transfield Pty Limited and Obayashi Corporation and Ors
MEDIA NEUTRAL CITATION:	[1998] VSC 103

Building contract - Arbitration - Stay sought of court proceeding - Whether binding contract in law - Pleaded as such - Whether plaintiff bound by pleading - International arbitration - Commonwealth International Arbitration Act not excluded by parties - Section 53 of Commercial Arbitration Act - Discretionary consideration.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr. J.G. DIGBY, Q.C. with MR J.B. DAVIS	Deacons Graham & James
For the Defendants	Mr. B. SHAW, Q.C. with Mr. F. TIERNAN	Minter Ellison

HIS HONOUR:

1 This is an application by summons in a proceeding commenced by writ whereby the first and second defendants seek an order that the causes of action brought by the plaintiff against the first and second defendants be stayed on the ground that there is an arbitration agreement between the parties.

2 The applicants rely upon s.7 of the International Arbitration Act 1974 (Commonwealth) and in the alternative on s.53 of the Commercial Arbitration Act 1984 (Victoria).

Parties

3 The plaintiff Abigroup Contractors Pty. Ltd. carries on the business of construction contractor. The first and second defendants Transfield Pty. Ltd. and Obayashi Corporation also carry on the business, inter alia, of construction.

4 With respect to the issues raised in the proceeding, at all relevant times the first and second defendants carried on the business of designers, project managers and contractors in the construction of the Melbourne Citylink project as joint venturers pursuant to an unincorporated joint venture known as the Transfield Obayashi Joint Venture ("TOJV"). Part of the works included works at Southbank known as the Southbank Interchange Works ("the works").

Background Facts

5 On 24 September 1996 the first and second defendants ("TOJV") invited the plaintiff to submit a tender for the works.

6 In February 1997 the plaintiff entered into a form of sub-contract with TOJV to carry out the Southbank works for a lump sum of M.$14.5.

7 The plaintiff commenced the works in early March 1997 and it is anticipated that it will complete the works by January 1999.

8 A dispute has arisen between the plaintiff and the first and second defendants and others in relation to the works and on 24 July 1998 the plaintiff issued a writ in this Court against eight named defendants.

9 The plaintiff claims against TOJV damages in respect of a number of areas of the works.

10 In support of the application TOJV filed two affidavits.

11 The matter came on before me at a directions hearing on 12 August 1998 and the plaintiff informed the Court that it was not in a position to contest the application. Accordingly I made directions and ultimately fixed 11 September 1998 as the date for the hearing.

12 Since then the solicitors, for the plaintiff, and for the first and second defendants, have filed a substantial number of affidavits and filed some 14 lever arch folders of documents. The affidavit material raises substantial issues concerning the facts.

Nature of Proceedings

13 This application is interlocutory and on affidavit. It is clear from the amount of material filed and submissions that the parties are seeking the determination of a question which is the subject of substantial evidence.

14 In a nutshell the plaintiff asserts that the alleged arbitration agreement between the parties did not exist. Therefore the issue between the parties is whether there is any binding and concluded contract in law concerning arbitration. This question is part of the central issue whether there is a binding concluded contract in law to perform the works? The plaintiff in this application says there is not and asserts that it is performing the works on an implied contract and its true claim is the money count of quantum meruit.

15 It is apparent from a cursory perusal of the documents relied upon and from submissions of counsel that the issue to be determined involves findings of fact which are very much disputed between the parties. If the Court is to proceed to

determine the question, instead of being a summary hearing it becomes a mini trial. As a general proposition the Court is not able to resolve disputed questions of fact where the evidence comprises affidavits and exhibits.

16 At the outset of the hearing I raised the question with counsel as to whether the Court on an application such as the present, on affidavit material, was in a position to resolve the difficult questions of law and fact with respect to the issue of contract or no contract.

17 Mr. Brian Shaw Q.C., who appeared with Mr. F. Tiernan of counsel for the first and second defendants, conceded that it was not open to the Court on the affidavit material to resolve that issue. It was very apparent that if that issue was to be properly determined it would require a trial with witnesses giving oral evidence and being cross-examined over some days. Indeed, a fair proportion of the trial of the proceeding will involve the very question of the contract and its terms.

18 Mr. Digby Q.C., who appeared with Mr. J.B. Davis of counsel for the plaintiff, submitted that that was its very case. There was no formal binding sub-contract in law which contained an arbitration agreement. It was implicit in what he said that the plaintiff accepts that it would not be possible for the Court to determine the issue on the face of the affidavit material and the exhibits, but made it clear that in those circumstances the first and second defendants should fail in their application because they had failed to prove that there was an agreement to arbitrate disputes.

19 Mr. Shaw Q.C. countered this argument by submitting that the question of contract or no contract had already been answered by the plaintiff's statement of claim. It is clear from the statement of claim that the plaintiff has pleaded a written sub-contract between the plaintiff and the first and second defendants - see paragraph 35 of the statement of claim. He submitted that the Court did not have to go into the difficult question of contract or no contract because the very proceeding the plaintiff wishes to continue with asserts there was a written sub-contract between the parties, breach of same and entitlement to damages. He contended, so long as the plaintiff relies

upon the written contract which contains an arbitration clause, the TOJV defendants are entitle to stay those proceedings.

20 As Mr Shaw, Q.C. put it, if the plaintiffs want to drop those claims based on a formal sub-contract, they may do so and TOJV's application must fail. But if the plaintiff continues to rely on the claims TOJV are entitled to rely upon the arbitration clause to stay those claims.

21 The rival contentions of the parties raise six questions to be determined -

(i) Was there a binding and concluded contract in law between the plaintiff and the first and second defendants which contained an agreement to arbitrate?

(ii) Was the plaintiff precluded from submitting there was no sub-contract containing an arbitration clause despite its pleading?

(iii) If there was an arbitration agreement binding the parties, did the Commonwealth International Arbitration Act 1974 apply?

(iv) If the Commonwealth Act prima facie applied, had the parties excluded its operation?

(v) If not, is TOJV entitled to a stay?

(v) If the parties had excluded the operation of the Commonwealth Act, did the Commercial Arbitration Act of Victoria apply?

(vi) If the Commercial Arbitration Act applied should the plaintiff's causes of action against the first and second defendants be stayed pending an arbitration?

Basic facts

22 It is important to set out the basic facts leading up to the date of the alleged sub-contract which was 20 February 1997.

23 The third defendant in the proceeding Hyder Consulting (Victoria) Pty. Ltd. and the fourth defendant C.M.T.S. & F. Pty. Ltd. formed a joint venture known as ACER/CMP ("the design consultants") and entered into an agreement with TOJV to provide design and engineering services for works at Southbank. The design joint venture was known as Hyder/CMP after 19 February 1996.

24 The fifth defendant in the proceeding Golder Associates Pty. Ltd. ("Golder") carries on the practice of geotechnical consultancy and it undertook certain testing at the site and provided reports to both the design consultants and TOJV.

25 The plaintiff contends that the works carried out by the design consultants and Golder were negligently performed and resulted in providing misleading information to them in the pre-contract stage.

26 It was in those circumstances, according to the plaintiff, that it commenced negotiations with TOJV with respect to the works. On 24 September 1996 TOJV invited the plaintiff to submit a tender for the works. The tender documents included reports and designs prepared by the design consultants and Golder.

27 The plaintiff asserts that in reliance of the design work and works carried out by Golder and representations and warranties made by the design consultants and Golder and TOJV, it agreed in February 1997 "to enter into a form of sub-contract with TOJV in accordance with the said representations and warranties, the design of the SBIW and its tender for the design construction commissioning completion of the SBIW for the lump sum price of M.$14.5." - see paragraph 35 of the statement of claim. "SIBW" is defined as the Southbank Interchange Works.

28 The statement of claim describes the contract as the "the sub-contract".

29 The plaintiff provided particulars of the sub-contract.

30 The particulars read:

Particulars

"The Subcontract was partly written, partly oral and is partly to be implied. Insofar as it was written it included the following documents -

(a) Letter of Award dated 19 February 1997 from TOJV to the Plaintiff including particular documents referred to or incorporated by reference in the letter;

(b) Letter dated 20 February 1997 from the Plaintiff to TOJV responding to Letter of Award;

(c) Invitation to Tender dated 24 September 1996.

Copies of the above documents may be inspected at the offices of the Plaintiff's solicitors upon appointment.

Insofar as the Subcontract was oral it was constituted by each of the representations referred to in paragraphs 30, 31 and 32 above and particularized in Schedule 1 to 5. Insofar as the Subcontract is to be implied it arises from the following facts, namely, the plaintiff entered upon and commenced the SBIW on the 20 February 1997, carried out works from time to time thereafter for the purpose of constructing the SBIW and by the need to give business efficacy thereto."

31 The Invitation to Tender forwarded by TOJV to the plaintiff appeared the following -

> "Under any contract arising out of this invitation to tender you will be required to execute and complete your sub-contract works in accordance with all of the documents referred to hereunder as will comprise the sub-contract."

32 One of the specified documents was "The Southbank Interchange Sub-contract incorporating General Conditions of Sub-contract". The latter contains the dispute resolution clause relied upon by TOJV.

33 I now turn to the questions raised for determination.

Was there a contract in law?

34 Whether or not a binding concluded contract in law has come into existence is a question of fact. In determining the question the court considers all relevant facts both before and after the date of the alleged contract.

35 The issue requires a two-fold enquiry. First, did the parties agree to make a contract? - Has it been established that the parties have agreed on the essential terms to make the contract, i.e., was there consensus ad idem?

36 Secondly, if the parties did agree, did the parties intend that their agreement would be binding in law?

37 As a general proposition the court is concerned with the objective manifestation of both the fact of agreement and intention. As a general rule it is not appropriate to

look into the minds of the parties to seek what they actually intended. The general test of objectivity is of importance in the law of contract and Lord Diplock illustrated the importance of the objective test when he said in Gissing v. Gissing (1971) A.C. 886 at 960 the following -

> "As in so many branches of English law in which legal rights and obligations depend upon the intention of the parties to a transaction, the relevant intention of each party is the intention which is reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party."

38 That is not to say that there may be rare cases where subjective intention may be directly in question. For example, something may have been said which showed that the parties were not serious, were not intended to be taken at face value or there are issues such as mistake, misrepresentation, duress or undue influence.

39 The court considers all circumstances leading up to and subsequently to the date of the alleged contract. This involves considering the background facts, the setting in which negotiations took place, the facts objectively known to the parties, what they said wrote and did or did not do, and any other matters which bear on the question whether they intended to and did reach a concluded agreement in law.

40 In considering both enquiries, a relevant matter to determine is whether the parties reached a point of agreement on all essential matters or were there matters still subject to negotiation? To be binding the parties much have reached a concluded bargain. See May v. Butcher (1934) 2 K.B. 17 at 21. The law does not recognise an agreement to make an agreement, nor does it recognise a contract to negotiate. See Thorby v. Goldberg (1964) 112 C.L.R. 597 at 603. If any alleged term is uncertain and/or vague, this would be a relevant factor pointing against a binding contract in law. See Brew v. Whitlock (1968) 118 C.L.R. 445 at 456-7 and at 460-1.

41 It is clear that the mere fact that the parties have agreed to the essential terms is insufficient and it must also be established that the parties intended to enter into a

binding contract in law. In other words, they intended that their agreement bound them and had legal effect. See Toyota Motor Corporation v. Ken Morgan Motors (1994) 2 V.R. 106 at 130.

42 Uncertainty or vagueness with respect to a term are factors to take into account when considering the question whether there is a binding contract in law. This is so because a term may be so uncertain or vague that it leads to the clear conclusion that the parties did not intend to be bound by the arrangement reached at that point but intended to further negotiate. See Toyota, supra at p.130.

43 Another factor of some importance is that the parties have agreed on the essential terms necessary to constitute the particular contract and to give effect to the commercial object of the exercise. See Australian Broadcasting Corporation v. XIVth Commonwealth Games Ltd (1988) 18 N.S.W.L.R. 540 at 548. A failure to agree on what would be considered an essential term to give effect to the commercial purpose tells against the existence of the necessary intention to make a binding contract in law.

44 There is a degree of overlap between the two fields of enquiry, but nevertheless they have to be considered separately. The point was made in the Australian Broadcasting Corporation case, supra, by Gleeson, CJ at 548 when he said -

> "It is to be noted that the question in a case such as the present is expressed in terms of the intention of the parties to make a concluded bargain: see, eg, *Masters v Cameron* (at 360). That is not the same as, although in a given case it may be closely related to, the question whether the parties have reached agreement upon such terms as are, in the circumstances, legally necessary to constitute a contract. To say that the parties to negotiations have agreed upon sufficient matters to produce the consequence that, perhaps by reference to implied terms or by resort to considerations of reasonableness, a court will treat their consensus as sufficiently comprehensive to be legally binding, is not the same thing as to say that a court will decide that they intended to make a concluded bargain. Nevertheless, in the ordinary case, as a matter of fact and common sense, other things being equal, the more numerous and significant the areas in respect of which the parties have failed to reach agreement, the slower a court will be to conclude that they had the requisite contractual intention."

45 In the famous case of Masters v. Cameron (1954) 91 C.L.R. 353, the High Court at p.362 stated that where there had been negotiations and the question arose whether there was to be a formal contract, the case may belong to one of three classes.

46 In the present application the plaintiff and TOJV have relied upon different classifications.

47 TOJV submit that the case falls into the first category, namely, that the parties had reached finality in their bargain and intended to be immediately bound but at some stage thereafter proposed to have the terms re-stated in a formal document.

48 On the other hand, the plaintiff submits that the case falls within the third category, namely, that the intention of the parties was not to make a concluded bargain at all until they executed a formal contract.

49 As the High Court has stated, it is a question of intention disclosed by the language the parties have employed - supra at p.362.

50 One matter of importance is that if the parties did intend to make a contract which was binding in law, the court will, if possible, give effect to their intention by overcoming difficulties said to result from uncertainty or incompleteness. See Toyota v. Ken Morgan, supra at p.130, lines 29-31.

51 The plaintiff asserts that there is no binding concluded contract in law because it was the intention of the parties to enter into a formal document and until that was done there was no binding contract in law. One substantial obstacle which faces the plaintiff in this submission is paragraph 35 of its statement of claim which asserts with particulars that there was a binding sub-contract in law.

52 Indeed, the scheme of the Statement of Claim demonstrates that the primary causes of action against TOJV are in respect of alleged breaches of the pleaded sub-contract covering some 66 paragraphs of the Statement of Claim with the last paragraph of the Statement of Claim alleging -

> "124 Alternatively, in the premises the plaintiff and TOJV failed to reach a concluded agreement in respect of the design construction commissioning and completion of SBIW and TOJV has been unjustly enriched at the expense of the plaintiff and by reason thereof the plaintiff is entitled to reasonable remuneration; further or alternatively, restitution in respect of the benefit or enrichment which accrued to TOJV by reason of the plaintiffs' performance of the SBIW."

53 What is pleaded is quantum meruit claim as an alternative to alleged breaches of the written sub-contract.

54 The reference to "in the premises" at the beginning of clause 124 is apt to mislead. There is no suggestion in the Statement of Claim that the parties had not reached an express concluded sub-contract. The clause is to be viewed as raising a true alternative claim.

55 There is also quantum meruit claim in paragraph 102 which is a claim in the alternative for additional works.

56 In one of the letters relied upon by the plaintiff, TOJV wrote on 19 February 1997 a detailed letter which commenced as follows -

> "We have pleasure in advising Abigroup Contractors Pty Ltd (address) of our acceptance of your tender for the design and construct Southbank interchange package (tender package MCL/SBI/7034) as amended in accordance with the following post-tender agreements as from the date of this letter."

57 The letter then continued to set out in considerable detail the documents which were part of the sub-contract and the letter concluded on p.6 as follows -

> "Upon your acceptance of this offer progressive possession of the site shall be granted, and your response is required, by 5.00 p.m. Thursday 20th February 1997."

58 On 20 February 1997 the plaintiff replied as follows -

"Thank you for your letter of 19 February 1997. Subject to the following paragraph we have pleasure in accepting your offer dated 19 February 1997 (initial copy attached).

As discussed with Dean Eden-Jones and due to later award, we are unable to meet the milestone dates for Stage B.

We thank you for this opportunity to provide a portion of the Citylink Project and look forward to a mutually rewarding and successful relationship."

59 It is pertinent to observe that the said two documents are alleged by the plaintiff to form part of the written sub-contract. It is also asserted in its statement of claim that the contract is implied by reason of the fact that the plaintiff commenced the works on 20 February 1997 and has continued to do so.

60 In an endeavour to overcome the inference of a binding sub-contract, Mr Digby, Q.C. referred the court to a number of letters which passed between the parties and other documents which showed that the parties were discussing and negotiating on a whole variety of matters and were discussing the question of entering into a formal sub-contract document.

61 I do accept that on the face of the documents it does show that the parties were discussing and negotiating a variety of matters relating to the performance of the works and discussing the execution of a formal sub-contract document.

62 The documents relied upon by the plaintiff do cover the period up to late August 1997, but in a letter written some time at the beginning of August 1997 TOJV stated to the plaintiff the following -

"1. Sub-contract documentation We advise and confirm that the various anomalies in the sub-contract documentation presented to Abigroup on 14/3/97 are being addressed by discussion between Mr J. McNeil of Abigroup and Mr W. Pritchard of TOJV. The original sub-contract documentation remains in place with its various rights and obligations for the parties

whilst the anomalies are resolved."

[My emphasis]

63 It is the sentence emphasised which focuses on the real dispute between the parties.

64 In my opinion, it is not possible in the determination of the present application to resolve the question whether or not a binding concluded contract in law has come into being. The facts are very much in dispute between the parties and it would require a full investigation of all relevant facts, before the court could make a decision.

65 However, it must be pointed out that it is possible to have a situation where parties do agree to a binding contract in law but expect thereafter to discuss and negotiate other matters, such as matters in the first contract leading to a second contract or even a contract that is in substitution for the first contract.

66 The point is made in Sinclair Scott Co v. Noughton (1929) 43 C.L.R. 310 at p.317 where the majority of the court said -

> "We think as a matter of construction, that the execution of the further contract was a condition or term of the bargain and not a mere expression of the desire of the parties as to the manner in which a transaction already agreed to will in fact go through ... The case is not one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms."

67 Despite the inability of the court to make a decision on the affidavit material, Mr Shaw, Q.C. submits that it is irrelevant and the plaintiff is precluded by its statement of claim from relying upon the fact that the binding sub-contract has not been proven on this application.

Is the plaintiff precluded by its pleading?

68 Mr Shaw, Q.C. submits that the bulk of the causes of action pleaded by the plaintiff are alleged breaches of the sub-contract which it pleads and relies upon in paragraph 35 of its statement of claim.

69 A perusal of the statement of claim and in particular the relief clause demonstrates that that is correct.

70 As already stated, it has, in the alternative, two quantum meruit claims. It also seeks some declaratory relief.

71 Mr Shaw, Q.C. makes the point. He submits that the application by the TOJV is to stay the very proceedings that are presently before the court. He submits that it is not open to the plaintiff to now deny the existence of the sub-contract being a binding and concluded contract in law because the plaintiff's causes of action are based upon the existence of the very contract. The stay sought is with respect to those causes of action.

72 His argument can be tested this way. If the plaintiff now wishes to abandon all those claims based upon a breach of the sub-contract then there is nothing to stay. What TOJV is seeking to stay are the very claims which are the alleged breaches of a sub-contract.

73 In my opinion, it is not open to the plaintiff to argue on this application that there is not in existence a binding and concluded sub-contract in law containing a dispute resolution clause. It is bound by its pleading.

74 It was also submitted by the plaintiff that it is claiming relief under s.87 of the Trade Practices Act 1974, which gives the court power to set aside an agreement and indeed to declare it void. The plaintiff does in fact assert that there have been breaches of the provisions of the Trade Practices Act. It is correct that relief may in a suitable case be granted to set aside a contract.

75 But until a declaration is made and an order giving effect to it that the agreement should be declared void and set aside, the agreement still exists.

76 Accordingly, in my opinion, this does not alter my decision, namely, that the plaintiff is not entitled to argue that for the purposes of this application there is no sub-contract binding in law.

Does the International Arbitration Act 1974 apply?

77 It was common ground between the parties that the conditions of what is described as the Southbank Interchange Design and Construct Sub-contract applied to the sub-contract pleaded by the plaintiff. If there was a binding sub-contract, the invitation to tender dated 24 September 1996 expressly incorporated the "General Conditions of Sub-contract".

78 TOJV rely upon s.7 of the Commonwealth International Arbitration Act 1974.

79 If certain prerequisites are satisfied then the court is bound to stay the proceedings and refer the parties to arbitration.

80 The words of the section are mandatory and once the prerequisites are satisfied then the court is bound to refer the matter to arbitration unless the court finds "that the arbitration agreement is null and void, inoperative or incapable of being performed." See s.7(5).

81 There was no contest that TOJV had established the necessary statutory requirements and accordingly, prima face, the section applied. There was no submission made by the plaintiff that the arbitration agreement was null or void, inoperative or incapable of being performed. It sought to rely upon s.87 of the Trade Practices Act to mount an argument that the arbitration agreement may be null and void but for reasons which I have already stated, in my opinion the claim for the relief does not preclude the application of the Act.

82 However, Mr Digby, Q.C. submitted on behalf of the plaintiff that the parties had agreed expressly or impliedly to exclude the application of s.7 of the Commonwealth Act. He submitted that the wording of the conditions of the sub-contract made it clear that the parties intended that any arbitration should be conducted in accordance with the Commercial Arbitration Act 1984 of this State.

83 This submission raised two arguments. First, is it open to parties to an agreement to exclude the application of s.7 of the Commonwealth Act and if it is, have the parties

under the present sub-contract excluded its operation?

Exclusion of International Arbitration Act

84 As a general proposition, parties to a contract can exclude the operation of the law in certain circumstances. There are a variety of principles of law which may make their attempts to do so ineffective.

85 As Fletcher-Moulton, LJ said in Perry v. National Provincial Bank of England (1910) 1 Ch. 464 at 476 -

> "If the meaning is that it is impossible to make a legal contract which would have certain legal effects we cannot accept such law. ... Moreover it would be quite meaningless. People can contract to do anything."

86 Subject to public policy and statute law, parties to a contract can agree to do anything.

87 Mr Digby, Q.C. referred me to the decision of the High Court in Lieberman v. Morris (1944) 69 C.L.R. 69.

88 That case was concerned with a testator's family maintenance application under the New South Wales Act. The court held that a person was not precluded from making an application under the Act by reason of having covenanted with the testator not to do so.

89 The legislation provided a statutory right to defined dependants to make a claim on the estate of the deceased for adequate provision out of the estate.

90 The question was whether a dependent by contract could exclude himself from claiming a right given by statute.

91 The answer to the question depended upon a consideration of the scope and policy of the Act.

92 Rich, J at p.84 stated the principles which guide a court on such an application. He

said -

> "Whenever a statute creates new rights, public policy in a broad sense is always involved, because the legislature must be assumed to have thought it desirable in the public interest that the right should be brought into existence. But it does not necessarily follow that an agreement to release or abandon rights so conferred should be regarded as opposed to public policy in general or even to the policy of the particular Act. As was pointed out in Admiralty Commissioners v. Valverda (Owners), 'The problem must be solved on a consideration of the scope and policy of the particular statute.'"

93 The High Court held after considering the provisions of the legislation, that it was the intention of Parliament that a dependant could not covenant not to make an application.

94 It is necessary to consider the scope and policy of the Act.

95 Section 7 of the Act gives the right to parties to a foreign arbitration agreement to apply to a court to stay any court proceedings.

96 Section 7 does not contain any express provision precluding a party to an arbitration agreement agreeing not to apply for a stay. The Act is silent on the issue.

97 What s.7 does is to give the right to an entity who does not reside or is not domiciled in Australia and is party to an arbitration agreement to apply for a stay of the court proceeding.

98 There is no suggestion that it would be contrary to public policy or that the general law precludes a party to such an agreement from covenanting not to make application pursuant to s.7 of the Act to stay court proceedings.

99 It follows that prima facie the parties can agree not to make an application pursuant to s.7 and a covenant to that effect should be upheld by the court. In other words, an agreement to that effect should be enforced.

100 The question is whether there is anything in the Act which shows the intention of Parliament to deny the right to the contracting parties to covenant not to apply for a

stay?

101 As has often been said, if the Parliament intended to exclude the right it would have been easy to have said so. It did not do so.

102 The Act is divided into a number of parts and each part deals with a discrete area.

103 The long title to the Act is -

> "An Act relating to the recognition and enforcement of foreign arbitrarial awards, and the conduct of international commercial arbitrations, in Australia, and for related purposes."

104 In Part II the Act gives effect to the 1958 New York Convention on the recognition and enforcement of foreign arbitrarial awards which is set out in Schedule 1 to the Act. The Act provides accession by Australia to the Convention.

105 Part II which contains s.7 is concerned with the provisions of that Convention. Australia is a Convention country.

106 Part II is concerned with enforcement of foreign arbitration agreements, recognition and enforcement of foreign arbitration awards and proof of matters relating to the Convention.

107 A perusal of Part (11) and the Convention reveals that it does not deal with any procedural matters to be applied in the arbitration.

108 Part III of the Act gives effect to the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration. Subject to Part III of the Act, the Model Law has the force of law in Australia. It is reproduced in Schedule 2. The Model Law covers a wider range of topics than the convention. Again, there is nothing in Part III or the Model Law which precludes a party to a foreign arbitration agreement from excluding the operation of the Act or the convention or the model law.

109 In my opinion there is nothing in the Act which shows an intention by the

Commonwealth Parliament to exclude the rights of parties to an arbitration agreement, to agree that the provisions of the Act, convention or model law do not apply to a foreign arbitration.

110 Indeed, Mr Shaw, Q.C. did not contend otherwise.

111 Further, a party to any foreign arbitration agreement must make application to the court in order to stay the proceedings. It must follow that if no application is made then the section would not apply.

112 It follows that in my opinion the parties to a foreign arbitration agreement within the meaning of the Act can, by agreement, exclude the operation of the Act.

113 The conclusion I have reached does not defeat the object of the Act.

Have the parties excluded the operation of the Commonwealth Act?

114 The plaintiff submits that the parties have by their agreement excluded the operation of the Commonwealth International Arbitration Act 1974.

115 The general conditions of sub-contract which the plaintiff has pleaded form part of the sub-contract between the parties sets out in some detail, provisions concerning dispute resolution.

116 Clause 13 sets out a procedure that is to be followed in relation to a dispute under the sub-contract. The procedure goes through negotiation, followed by mediation, and then clause 13.5(a) provides -

> "(a) Any dispute not resolved by mediation or expert determination, other than a dispute under or in respect of any of the matters the subject of any of clauses 12.1 to 12.9 inclusive, must be resolved by arbitration."

117 The plaintiff relies upon clause 13.5(d) which provides -

> "(d) The arbitration must conducted in accordance with the following rules and procedures:
>
> (i) the place of arbitration must be in Melbourne, Victoria;

(ii) the parties to the arbitration are entitled to legal representation;

(iii) the arbitrator must hand down his award within one month after the conclusion of the hearing unless the parties agree to extend the time for one further period of a maximum of one month;

(iv) the cost of the reference to arbitration and award are at the discretion of the arbitrator, but the arbitrator does not have the power to tax any award of costs made under Section 34 of the Commercial Arbitration Act of Victoria;

(v) the rules of evidence apply to the proceedings; and

(vi) the Commercial Arbitration Act of Victoria applies to the arbitration except to the extent it is inconsistent with the preceding provisions of this clause."

118 Mr Digby, Q.C. submitted that the paragraph excluded the provisions of s.7 of the Act. He drew attention to paragraph (iv) and paragraph (vi) and submitted that the reference to the Commercial Arbitration Act of Victoria made it clear that the International Arbitration Act 1974 of the Commonwealth had been excluded and the applicable Act was the Commercial Arbitration Act of Victoria.

119 It is noted that the paragraph is concerned with the conduct of the arbitration. This is made clear by the opening words of the paragraph.

120 In my opinion the paragraph does not exclude s.7 of the Commonwealth Act and there is nothing in the clause which is inconsistent with that conclusion. In my opinion, s.7 does apply but that is not to say that the procedures set out in the Commercial Arbitration Act of Victoria do not apply to the conduct of the arbitration.

121 In addition, Mr Digby, Q.C. relied upon clause 17.2(a) which provides -

"(a) The proper law of the sub-contract and of the dispute resolution procedures is the law of Victoria."

122 In my opinion this sub-clause does not exclude the operation of the Commonwealth

Act. The Commonwealth Act is part of the law of Victoria. Further, the sub-clause does not address the question of whether or not a court can stay the court proceeding pursuant to s.7. The law of Victoria concerning dispute resolution procedures applies but this does not exclude the right of a party to apply for a stay.

123 I therefore find that the parties have not excluded the operation of s.7 of the Act.

Is TOJV entitled to a stay?

124 TOJV, having established the various elements required by s.7(1) and (2) of the Act, is entitled to a stay of the court proceedings.

125 There was no dispute between the parties that the plaintiff's court proceeding involves the determination of a matter that is capable of settlement by the arbitration agreement between the parties.

126 Clause 1 of the sub-contract defines dispute as "a dispute difference claim or any unresolved issue arising between the parties relating to the interpretation of the sub-contract or any matter arising under, or relating to, the sub-contract or the sub-contract works."

127 The definition is indeed extremely wide and clause 13.5 provides that any dispute must be resolved by arbitration.

128 Section 7(2) empowers the court to stay so much of the proceeding as involves the determination of a matter that is capable of settlement by arbitration.

129 Clearly the wide definition of "dispute" covers all the claims made by the plaintiff against the TOJV defendants which concern the pre-contract negotiations and the alleged breaches of sub-contract. The claims made pursuant to the Trade Practices Act would also be included - see Francis Travel Marketing Pty Ltd v. Virgin Atlantic Airways (1996) 39 N.S.W.L.R. 160. The only question in whether the quantum meruit claims found in paragraphs 102 and 124 are covered.

130 The question is not without controversy. In two recent decisions in New South

Wales, single judges have held that a quantum meruit claim fell within the dispute clause in the agreement in question. In both cases the dispute clause was extremely wide and covered a dispute concerning the contract "or in connection therewith". That phrase is not found in the dispute definition in the present sub-contract.

131 The New South Wales decisions are O'Connor v. Leaw Pty Ltd (1997) 42 N.S.W.L.R. 285 and Elkateb v. Lawindi (1997) 42 N.S.W.L.R. 396.

132 The question is whether the phrase "or relating to the sub-contract or the sub-contract works" is wide enough to cover a true quantum meruit claim.

133 The parties did not make submissions in relation to this question and accordingly I am not prepared to conclude as presently advised that the quantum meruit claims in paragraphs 102 and 124 are covered by the arbitration agreement.

134 However, nothing would be gained from a practical point to stay all the causes of action between the plaintiff and the first and second defendants and leave the quantum meruit claims to proceed in the court.

135 I encourage the parties to enter into an agreement to ensure that the quantum meruit claims can also be heard in the arbitration.

Commercial Arbitration Act 1984 (Victoria)

136 If s.7 of the Commonwealth Act does not apply, then TOJV rely upon s.53 of the Victorian Commercial Arbitration Act 1984.

137 Unlike the Commonwealth Act, an application under s.53 involves the exercise of a discretion by the court. In other words, it is a matter of discretion whether the court will stay the proceeding.

138 The authorities establish a general practice in favour of staying court proceedings where parties have agreed to refer their disputes to arbitration.

139 It was submitted on behalf of the plaintiff that the court should not stay the court

proceeding because the plaintiff has brought proceedings against six other defendants.

140 I accept as a general proposition that its desirable that all issues in dispute between parties be determined in the one proceeding by the same tribunal.

141 Whilst that is a general rule and one of the rationales for it is the avoidance of multiplicity of proceedings and possible inconsistent findings, nevertheless, there may be circumstances where it is clear that the risk of such results is small.

142 Before considering the submissions it is necessary to set out the history of the dispute between the parties.

143 After disagreement arose during the works, the plaintiff served upon TOJV a Notice of Dispute dated 24 November 1997. The notice stated that it was given "pursuant to clause 13.2 of the sub-contract."

144 The parties agreed to certain steps required by clause 13 to be waived or varied but in the main the clause 13 dispute resolution procedure was complied with, leading up to the appointment of Mr M Phipps, Q.C. as arbitrator on or about 11 May 1998. Shortly thereafter, TOJV issued a Notice of Dispute against the plaintiff on or about 25 May 1998. On 10 June 1998 the plaintiff, by letter to TOJV and the arbitrator withdrew its notice of dispute.

145 Notwithstanding the withdrawal, the parties attended before Mr Phipps, Q.C. and TOJV sought an order from the arbitrator pursuant to s.29 of the Commercial Arbitration Act that the arbitration be extended to include the issues raised by the TOJV notice. Submissions were made and the arbitrator adjourned the hearing of the application to a date to be fixed.

146 Since the TOJV notice was given the parties have progressed the dispute resolution procedure under clause 13 of the sub-contract.

147 The plaintiff's writ was issued on 24 July 1998, the TOJV defendants filed their

appearance on 3 August 1998 and shortly thereafter issued the summons to stay the proceeding.

148 As a general rule, a court does stay a proceeding where there is an agreement to arbitrate. The reason is obvious. The parties have made an agreement to that effect and the court should enforce it. The general rule should only be departed from if there is good cause. See Huddart Parker Ltd v. The Ship 'Mill Hill' (1950) 81 C.L.R. 502 at p.508.

149 TOJV makes a strong point that the plaintiff and it have already agreed to arbitration by Mr Phipps and it should continue.

150 The plaintiff for its part submits that a stay should not be granted because the dispute is not only between it and TOJV but involves other parties, that the disputes are intertwined, that some of the relief sought by the plaintiff cannot be the subject of the arbitration, and it is not practical and a waste of money to litigate similar disputes in two forums with the real risk of inconsistent findings and results.

151 I accept that the matters raised by the plaintiff are of substance. It does reflect on the administration of justice if there are two sets of proceedings canvassing much the same issues with the risk of inconsistent results. The spectre of inconsistent results is a sound reason for not staying a court proceeding. See the recent House of Lords decision of Beaufort Ltd v. Gilbert-Ash Ltd (1998) 2 All E.R. 778.

152 Section 53(2) of the Commercial Arbitration Act 1984 provides that a court may stay a proceeding, if satisfied, inter alia, "that there is no sufficient reason why the matter should not be referred to arbitration".

153 The question is, is there a sufficient reason why the matter should not be referred to arbitration?

154 The plaintiff submitted that the claim under the Trade Practices Act against TOJV is outside the scope of the arbitration agreement.

155 The dispute which is referred to the arbitrator is a "dispute difference claim or any unresolved issue arising between the parties relating to the interpretation of the sub-contract or any matter arising under, or relating to, the sub-contract or the sub-contract works." [My emphasis]

156 In my opinion the words emphasised show the intention of the parties to invest the arbitrator with a wide authority to decide disputes between them and in my opinion, the authority is wide enough to embrace a claim under s.52 of the Trade Practices Act. Further, contrary to the submission put by the plaintiff, in my opinion the arbitrator would be clothed with the power to grant remedies pursuant to that Act. See Francis Travel Marketing Pty Ltd v. Virgin Atlantic Airways (1996) 39 N.S.W.L.R. 160 at p.167.

157 The plaintiff also submits that it is not open to the arbitrator to consider the cause of action pleaded based on a breach of a collateral warranty. In my opinion, for the same reasons, the arbitrator does have authority to determine that dispute.

158 In my view, the real issue comes down to whether the causes of action involving the plaintiff and eight defendants are so intertwined that there is a real prospect of multiplicity of proceedings, with increase in legal costs and the prospect of inconsistent findings and maybe results.

159 Any stay that is granted is only in relation to the causes of action against the first and second defendants, TOJV. The proceeding will continue against the other defendants.

160 At this stage it is necessary to examine the various causes of action.

161 At the outset, one can put to one side the claims brought against the sixth, seventh and eighth defendants. They are joined in case they obtain some benefit to which the plaintiff is entitled.

162 The real dispute involves four separate parties in respect of the pre-contract events.

163 The four parties are -

(i) the plaintiff as builder;

(ii) TOJV as the proprietor;

(iii) the design consultants;

(iv) the geotechnical consultants.

164 Prior to the sub-contract, certain investigation works were performed by the design consultants and the geotechnical consultants which ultimately led to the preparation of a number of designs in relation to a number of works. In a nutshell, the complaint is that the two consultants negligently performed their works with the consequences that their results were wrong, their designs were defective and could not be relied upon. It is asserted that TOJV knew that the designs created by the two consultants were erroneous, incorrect and defective but nevertheless incorporated them in the works to be performed pursuant to the sub-contract.

165 The plaintiff states that TOJV and both consultants each owed a duty of care to the plaintiff as a future tenderer. It is stated that the three entities made misrepresentations to the plaintiff in the tender stage. The plaintiff pleads that it entered into the sub-contract in reliance of the representations that were made and the designs prepared. As a result it pleads the following causes of action against TOJV, the design consultants and the geotechnical consultants -

(i) common law negligence;

(ii) negligent pre-contract misrepresentations;

(iii) breach of s.52 of the Trade Practices Act.

166 In addition, the plaintiff asserts a breach of a collateral warranty against TOJV arising out of the same circumstances.

167 I have considered the statement of claim. In my opinion the issues concerning the

four parties are inextricably bound up. The result would be that there would be two pieces of litigation being conducted involving much the same issues with parties present before the particular forum seeking to blame parties who may not be present.

168 There is the ever present risk of inconsistent findings and/or results. This would reflect upon the administration of justice. Further, there will be a substantial increase in the overall legal costs involved.

169 It is clear that the one tribunal should hear causes of action based on the pre-contract events.

170 In addition, if the court stayed the court proceeding against the first and second defendant and the plaintiff exercised its right to continue against the other defendants, the other defendants would seek contribution from TOJV. This would involve TOJV in the court proceeding at a time when the claims brought against it by the plaintiff are stayed.

171 All these factors lead to the conclusion that the one forum should hear all the plaintiff's claims against the defendants named in the proceeding.

172 I am not satisfied that there is no sufficient reason why the matter should not be referred to arbitration and accordingly, if the application had to be decided under s.53 of the Commercial Arbitration Act 1984, I would not stay the court proceeding.

Practical course

173 Although I have found that the court is bound to stay the court proceeding by the plaintiff against the first and second defendants under the International Arbitration Act 1974 (Commonwealth) I think the result is unpractical, is likely to lead to multiplicity of proceedings with attendant increases in legal costs and the real risk of inconsistent findings. Further, there is the possibility that the plaintiff and TOJV will be fighting two cases at the same time if some defendants file notices of contribution against the TOJV defendants.

174 I think that the parties should give thought to not proceeding with the arbitration but leave the disputes to be litigated in the court proceeding.

175 There is another practical solution and that is that the court proceeding be referred to arbitration pursuant to Rule 50.08(1) of the Rules of Court. It is noted that all parties to the litigation would have to consent to that course.

176 It is said that one of the advantages of going to arbitration is that the matters in dispute can be resolved earlier than a court proceeding.

177 One of the objects of the Building List is to court manage cases and I have no doubt the court can mould suitable directions which would ensure that the court proceeding would be ready for trial within a short period. I accept that the court could not hear the proceeding earlier than if it was arbitrated, but the cost would be substantially less. In the end, it is a matter for the parties. I encourage the parties to consider the comments I have made. I will hear the parties on the form of orders.
