Peninsula Balmain P/L v Abigroup Contractors P/L [2002] Adj.L.R. 08/19

Supplementary Judgment in Court of Appeal, Supreme Court of New South Wales, before Mason P ; Stein JA ; Hodgson JA : 19th August 2002

1 **MASON P:** I agree with Hodgson JA as set out below.

2 **STEIN JA:** I also agree with Hodgson JA.

3 **HODGSON JA:** Pursuant to leave granted in Order 6 made on 3 July 2002, Abigroup provided written submissions applying for reconsideration of Orders 3(b) and 5. Peninsula then provided written submissions, Abigroup responded with further written submissions, and Peninsula again responded.

4 In relation to Order 3(b), Abigroup accepted that the version of cl.36 applied by the primary judge had been displaced by the version set out in par.[10] of this Court's judgment, but submitted that this version too was inconsistent with the quantification of delay costs in the tender and therefore displaced that quantification. Abigroup also submitted that this quantification was displaced by cl.40.5 of the contract dealing with valuation of variations, providing that "*reasonable rates or prices shall be used in any valuation of a variation*" and also:

(f) If the valuation relates to extra costs incurred by the Contractor for delay or disruption, the valuation shall include a reasonable amount of overheads but shall not include profit or loss of profit.

5 In order to deal with this submission, it is necessary to consider the effect of par.3 of the formal instrument of agreement, which was as follows:

3. The Contract means:

a) This Formal Instrument of Agreement;
b) AS2124-1992 General Conditions of Contract and Annexure, Part A & Part B
c) The Special Conditions of Contract for AS2124-1992 for Guaranteed Maximum Price;
d) Schedule of Contract of Documents dated 9th March 1998. Ref: RM/NJ/0298106, 11 pages.
e) Letter of acceptance dated 30th January 1998;
f) Tender dated 11th December 1997.

Note: Should the documents noted above contain any discrepancy or inconsistency then the noted order of precedence shall apply to resolve the same.

6 One curious feature of this provision is that it appears to give the General Conditions of Contract precedence over the Special Conditions; yet the Special Conditions themselves provide that the General Conditions "shall be read subject to these Special Conditions", and proceed to provide for deletions, additions, and substitutions for various clauses of the General Conditions. Both parties have accepted that these provisions are efficacious, so that to that extent the Special Conditions take precedence over the General Conditions. I think the explanation must be that General Conditions are no more than standard clauses, and may be expected to be modified by Special Conditions negotiated for a particular contract; and accordingly there is no true "discrepancy or inconsistency" which would cause the General Conditions to prevail. This is confirmed by the circumstance that the "Annexure, Part A and Part B" in the form of the General Conditions has been left blank, but has been duplicated and filled out, so as to record choices and modifications to the General Conditions, as part of the Special Conditions.

7 The terms of the Tender are in a somewhat different position. The Tender represents an earlier stage of the negotiation of the contract, and does not by its form or content suggest that its provisions should modify either the General Conditions or Special Conditions. However, its terms are to be given effect to the extent provided by par.3 of the formal instrument of agreement.

8 The version of clause 36 which takes effect as a result of the Special Conditions says nothing about the costing or valuation of delay costs, merely that no such costs can be claimed except in relation to a matter "which affects the critical path program". This is plainly not inconsistent with the quantification provided by the tender.

9 As regards clause 40.5, these questions have been raised:

(a) whether Abigroup can rely on it;
(b) whether it is applicable;
(c) whether it is inconsistent with, and prevails over, the tender.

10 As regards (a), Peninsula submitted that Abigroup's case was pleaded as one involving entitlement to delay costs under clause 36, not variations under clause 40.5. However, I do not think this is inconsistent with reliance on clause 40.5 for the purpose of quantifying the costs of delay caused by variations, when the conditions of the substituted clause 36 are satisfied.

11 As regards (b), in my opinion clause 40.5 would apply to the quantification of costs of delay caused by variations and satisfying the requirements of the substituted clause 36; and it appears that the Referee treated the delays as being caused by variations.

12 As regards (c), clause 40.5 provides that reasonable rates or prices be used and clause 40.5(f) specifically deals with how this applies to delay costs. I think this is inconsistent with the quantification provided by the tender, and by virtue of par.3 of the formal instrument of agreement prevails over it.

13 Accordingly, having regard to the additional submissions, Ground 13 of the Appeal is not made out, and I propose that Order 3(b) made on 3 July 2002 be deleted.

14 In relation to Order 5, Abigroup submitted that, having regard to Peninsula's failure on various issues, it should have no more than 60 percent of its costs, referring to ***Fexuto Pty. Limited v. Bosnjak Holdings Pty. Ltd.*** (2001) 19 ACLC 856 at 885.

15 The only matter which could, in my opinion, justify depriving Peninsula of some of its costs is its failure on issues concerning extension of time and variations. However, I think those matters were not unreasonably included in the appeal and did not add greatly to the costs; and I do not think it appropriate either to separate out issues for special costs orders or to deprive Peninsula of some of the costs of its successful appeal.

16 Accordingly, I would not alter Order 5.

17 I propose the following order: Order 3(b) made on 3 July 2002 deleted.

Mr. F.M. Douglas QC with Mr. M.G. Rudge SC and Mr. M. Christie for appellant instructed by Deacons Lawyers, Sydney
Mr. B.W. Walker with Mr. I. Faulkner for respondent instructed by Clayton Utz Lawyers, Sydney