IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
PRACTICE COURT

Not Restricted

No. 9599 of 2006

SIEMENS LIMITED — Plaintiff

v

VAUGHAN CONSTRUCTIONS PTY LTD — Defendant

JUDGE:	Kaye J
WHERE HELD:	Melbourne
DATE OF HEARING:	10 November 2006 (Further written submissions received 17 and 20 November 2006)
DATE OF JUDGMENT:	29 November 2006
CASE MAY BE CITED AS:	Siemens Ltd v Vaughan Constructions Pty Ltd
MEDIUM NEUTRAL CITATION:	[2006] VSC 452

BUILDING CONTRACTS – Claim for injunction to restrain enforcement of guarantee given under s.25(1)(b) of the *Building and Construction Industry Security of Payment Act* 2002 – Whether notice of dispute served on defendant commenced "other dispute resolution proceedings" under s.25(2) – Effect of notice being expressed to be "without prejudice" to rights under the contract and at law.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr T.J. Margetts	Baker & McKenzie
For the Defendant	Mr M.A. Robins	Nathan Kuperholz

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HIS HONOUR:

1 In these proceedings the plaintiff claims an injunction to restrain the defendant from enforcing a bank guarantee for the sum of $271,813.41 issued in favour of the defendant by Citigroup on behalf of the plaintiff. The matter came before me in the Practice Court on an application by the plaintiff for an interlocutory injunction. However the factual issues in the case are not in dispute. The parties therefore agreed that the matter should proceed before me by way of the trial of the action. For that purpose I heard oral submissions, and gave the parties leave to file supplementary written submissions, which they have now done.

2 By an agreement in writing dated 30 June 2004 the defendant entered into a sub-contract with the plaintiff to perform earthworks and main civil works in respect of the construction of a gas turbine power station at Laverton North. The contract price was approximately $11 million. On 30 August 2006 the defendant made progress claim No. 20 for payment of a sum of $403,820.21. The plaintiff responded by letter dated 19 September 2006 disputing that claim and stating that the scheduled amount which it proposed to pay was $94,326.51. Accordingly the defendant referred the dispute to adjudication pursuant to the provisions of the *Building and Construction Industry Security of Payment Act 2002 (Victoria)* ("the Act"). On 24 October 2006 the adjudicator, Mr S. Gunn, released his determination that the plaintiff was liable to pay the defendant $271,813.41 in respect to the progress claim No. 20, and that the date for payment of that sum was Tuesday, 31 October 2006.

3 On 31 October 2006 the plaintiff sent a letter to the defendant, copied to the defendant's solicitors, enclosing a Notice of Dispute and a bank guarantee for the adjudicated amount of $271,813.41. The letter stated:

> "Pursuant to clause 25 of the General Conditions of Contract and s.25 of the *Building and Construction Industry Security of Payment Act 2002 (Vic)* we hereby enclose:
>
> 1. Notice of Dispute; and
>
> 2. Bank guarantee for the adjudicated amount of $271,813.41.

> We advise that our authorised representatives for the Dispute Committee referred to in clause 25.2 of the General Conditions of Contract are Mike Bennett and Adam Pawsey.
>
> We confirm you [sic] authorised representatives are Matt Vaughan and Les Holland.
>
> Please advise when you are able to meet to discuss the attached Notice of Dispute."

4 The Notice of Dispute was entitled "Notice of Dispute served by Siemens Limited in accordance with clause 25 of the Commercial Contract Condition." It commenced by stating: "Pursuant to clause 25 of the Commercial Contract Conditions for Civil Works at the Laverton Gas Turbine Power Station, the Customer hereby notifies the Contractor that a Dispute exists and provides the following details of the Dispute." The notice then set out in detail the issues which it stated were in dispute. The notice concluded with the statement (in italics): "*This Notice is without prejudice to, and the Contractor reserves, all its rights under the Contract and at law.*"

5 The solicitors for the defendant responded by a letter dated 2 November 2006 in which, inter alia, the solicitors, on behalf of the defendant, threatened to enforce the bank guarantee. On 6 November the plaintiff appeared before me on an urgent application to restrain the enforcement by the defendant of the guarantee. The defendant, who was represented by its solicitors, undertook not to enforce the guarantee pending the hearing and determination of the application for an interlocutory injunction.

6 The claim by the plaintiff is based on the proposition that, by seeking to enforce the bank guarantee, the defendant is acting unlawfully and contrary to s.25(5) of the Act. The plaintiff submits that it has commenced "dispute resolution proceedings" under s.25(2) of the Act, and that, accordingly, s.25(5) renders it unlawful for the defendant to enforce the bank guarantee until those proceedings have been finally determined.

The *Building and Construction Industry Security Payment Act 2002*

7 Section 3(1) of the Act states that the object of the Act is to ensure that any person who carries out construction work, or who supplies goods or services, under a

construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of that work and the supply of those goods and services. Section 9 provides that any person who has undertaken construction work or who has supplied related goods and services under a construction contract is entitled to progress payments. Section 14(1) permits such a person to claim for a progress payment to which that person is entitled. Section 15 provides that the person on whom the payment claim is served ("the respondent") may reply to the claim by providing a payment schedule to the claimant. Under s.18, if the scheduled amount indicated in the payment schedule is less than the amount claimed in the payment claim, the claimant is entitled to apply for adjudication of the progress payment. Section 20 provides for the appointment of an adjudicator. Section 23 provides that the adjudicator is to determine the amount of the progress payment and the date on which the amount becomes payable. Section 25 sets out the respondent's obligations following the adjudicator's determination. Sections 25(1), (2), (5) and (6) are relevant to this case. They provide:

> "(1) If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent –
>
> (a) must pay that amount to the claimant; or
>
> (b) must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them.
>
> (2) The respondent may only give security under sub-s.(1)(b) if the respondent has *commenced proceedings* (including arbitration proceedings or other dispute resolution proceedings) against the claimant in relation to a dispute under the construction contract.
>
> …
>
> (5) Except with the consent of the parties, it is unlawful for the claimant to enforce any security given under this section until at least two business days after any matters in dispute between them in connection with a progress payment to which this security relates have been finally determined.

(6) For the purposes of sub-s.(5), a determination becomes final –

(a) in the case of a determination from which there is no right of appeal or review, when the determination is made; or

(b) in the case of a determination from which there is a right of appeal or review –

(i) when the right of appeal or review expires; or

(ii) if the determination becomes subject to appeal or review proceedings, when those proceedings have been finally disposed of." (Emphasis added)

8 The plaintiff contends that the Notice of Dispute, contained in its letter to the defendant dated 31 October, commenced "other dispute resolution proceedings" under s.25(2), which have not been finally determined. The plaintiff submits that the notice of dispute has commenced such proceedings under clause 25 of the contract. Accordingly the plaintiff submits that it is unlawful for the defendant to enforce the bank guarantee until the final determination of those proceedings.

Clause 25 of the Contract: Dispute Resolution

9 Clause 25 of the contract is entitled "Dispute Resolution". Clauses 25.2, 25.3, 25.6 and 25.9 are relevant. They state:

"25.2 Prior to the commencement of the Works, both parties to the Contract shall nominate representatives authorised to make binding decisions on matters of difference or dispute arising in connection with the Contract. The number of such authorised representatives shall be agreed between the parties but shall not exceed two per party and shall be collectively referred to as 'the Dispute Committee'. The parties shall refer all disputes to the Dispute Committee who shall meet at intervals to be agreed and as necessary to progress resolution, and shall undertake to resolve and agree matters of difference or dispute which have been referred to it by the parties' respective site and/or project management. The Dispute Committee may issue instructions to the referring party/ies in respect of further actions or provision of further information by the party/ies in such cases where the Dispute Committee is of the opinion that the parties have not made every effort to resolve the dispute or have not provided full and/or appropriate details or documentation. Any mutual decision confirmed by the Dispute Committee in connection with respective matters of difference or dispute shall be considered final and binding upon the parties and shall not

prejudice or otherwise influence decisions made, or to be made, in other cases of differences or dispute.

25.3 In the event that the Dispute Committee is unable to resolve and agree upon a matter of difference or dispute, either party to the contract may give notice of intent to refer such matter to adjudication. Within 28 days following the issue of such notice, the parties shall agree on the appointment of an Adjudicator who shall be mutually acceptable to the parties and shall be demonstrably impartial. If the parties are unable to agree upon nomination and appointments of an Adjudicator … the Adjudicator shall be appointed by the President of the Zurich Chamber of Commerce … .

The appointed Adjudicator shall ensure that the adjudication procedure is fair and that the parties to the contract are given due and reasonable opportunity to be heard throughout the adjudication procedure. … Where the amount involved in a single dispute exceeds $10,000,000 … , either party to the Contract shall be entitled to initiate arbitration proceedings pursuant to clause 25.9 without first referring the dispute to adjudication.

…

25.6 In the event of the rejection by either party of a respective Adjudicator's decision, the rejecting party shall be entitled to refer such matter to arbitration in accordance with clause 25.9 below.

…

25.9 In cases of single dispute where the amount in dispute is in excess of $10,000,000 or if an adjudicator's decision has been sought and rejected by either party and referred by that party to arbitration subject to the provisions of clause 25.6 above in respect of notice to refer a dispute to arbitration, the dispute shall be finally settled in accordance with the Rules of Arbitration of the International Chamber of Commerce in Paris by three arbitrators appointed in accordance with these rules."

Submissions

10 The plaintiff's claim is based on the propositions, first, that the Notice of Dispute constitutes a reference to a Dispute Committee under clause 25.2 of the contract, and, secondly, that such a reference of a dispute to a Dispute Committee constitutes the commencement by the plaintiff of "other dispute resolution proceedings" pursuant to s.25(2) of the Act. Mr Margetts submitted that the Act is not intended to displace

the rights of parties under a contract, inter alia, to resolve disputes under specific provisions of the contract between them. He submitted that the purpose of the Act is to ensure either the payment of progress claims, or the setting aside of security for them, as determined by the adjudicator under the Act. Thus, he submitted, the structure of s.25 is such that, if a respondent to a statutory adjudication seeks to resort to the dispute resolution provisions of a contract, and provides appropriate security for payment of the amount found due by the statutory adjudication, that security could not be enforced until the final determination of the contractual dispute resolution processes. Mr Margetts further submitted that the phrase "or other dispute resolution proceedings" in s.25(2) of the Act should be given a broad construction. The Act must be construed in the setting of the practices of the building industry. The existence of "prior reference" provisions such as clause 25.2 of the contract are common in building contracts.[1] Mr Margetts submitted that a Dispute Committee constitutes a mechanism, separate from the parties, which, under clause 25.2, is empowered to make a decision which is "final and binding" upon the parties. The parties are not entitled to proceed to adjudication (under clause 25.3) or arbitration (under clause 25.6) unless and until the dispute has first been considered by the Dispute Committee. Thus Mr Margetts submitted that the processes of a Dispute Committee are "other dispute resolution proceedings" under s.25(2) of the Act.

11 In response, Mr Robins' primary submission was that the phrase "other dispute resolution proceedings" in s.25(2) of the Act connotes curial or quasi-curial proceedings. Mr Robins submitted that the Dispute Committee is a conciliatory body lacking curial or quasi-curial processes. Mr Robins also submitted that, if the processes of a Dispute Committee could be characterised as "other dispute resolution proceedings", the notice of dispute served on 31 October did not constitute the commencement of such proceedings in any event. In support of that argument he relied on the lack of any identification, in the notice of the dispute, of which "tier" of dispute resolution under clause 25 of the contract was being invoked

1 See *Hudson's Building and Engineering Contracts* (11th edition) pp.1591-2.

by the plaintiff. Mr Robins also submitted that because the notice was expressed to be "without prejudice" to the rights of the Contractor under the contract, notice of dispute could not operate as a commencement of any proceedings under clause 25.2 of the contract.

12 There are thus two questions which I must determine. The first question is whether the notice of dispute dated 31 October 2006 constituted a reference by the plaintiff of the dispute to the Dispute Committee. The second question is, if it did, was such a reference of the dispute to the Dispute Committee constitute the commencement by the plaintiff of "other dispute resolution proceedings" under s.25(2) of the Act.

The Notice of Dispute

13 Turning to the first question, the notice of dispute itself does not, on its face, identify what process of dispute resolution was intended to be invoked by the plaintiff. However, the letter which accompanied the dispute notice made it plain that the plaintiff intended to invoke the procedures of the Dispute Committee and requested the defendant to confirm the names of its authorised representatives. The dispute notice itself, both in its title, and in clause 2, indicated that the plaintiff was intending to invoke the processes of clause 25 of the general conditions of the contract. Under clause 25, the parties could not proceed to adjudication or to arbitration unless they first referred the dispute to a Dispute Committee. In those circumstances, I accept that the notice of dispute intended to, and did, refer the relevant dispute to a Dispute Committee under clause 25 of the contract.

14 The concluding sentence of the notice, that the notice is "without prejudice to" the rights of the contractor under the contract and at law, is curious. Its intended meaning is difficult to divine. Possibly, it meant that service of the Notice was not intended to derogate from any other rights of the Contractor. If that is correct, then such a reservation of rights did not prevent the Notice being effective under clause 25.2. Alternatively, the "without prejudice" notation might have been intended, somehow, to perform the same function as it does to cloak negotiations, antecedent to or in the course of litigation, with legal privilege. If that is so, then the inclusion of

that phrase on the foot of the Notice of Dispute was misconceived and thus of no effect. Whatever the "without prejudice" phrase means, it does not, in my view, negate the effect of the letter accompanying the notice, together with the references in the notice to clause 25 of the conditions of the contract, as constituting the notice an efficacious reference of the dispute to a Dispute Committee under clause 25 of the general conditions of the contract.

"Other Dispute Resolution Proceedings" – s.25(2) of the Act

15 The second question is whether the reference of the dispute to the Dispute Committee, under clause 25.2, constitutes the commencement of "other dispute resolution proceedings" by the plaintiff under s.25(2) of the Act. In support of the submission that the notice of dispute constituted the commencement of such proceedings, Mr Margetts relied on two principal features of clause 25.2 of the contract. First, he pointed out that it was mandatory for the parties to refer a dispute to the Dispute Committee, before they are entitled to obtain an adjudication (under clause 25.3) or to proceed to arbitration (under clause 25.6). Essentially, Mr Margetts submitted that clause 25.2 is the gateway to "other dispute resolution proceedings" provided for in the contract. Secondly, Mr Margetts relied on the last sentence of clause 25.2, which provides that any "mutual decision confirmed by the dispute committee" in respect of a dispute "shall be considered final and binding upon the parties". Mr Margetts submitted that those two characteristics of the Dispute Committee lead to the conclusion that the reference of a dispute to the Dispute Committee constituted the commencement of "other dispute resolution proceedings" under s.25(2) of the Act.

16 In determining this question, three preliminary observations may be made. They are each obvious but they are worth stating. First, as the parties have correctly pointed out, the Act did not intend to supplant contractual provisions for the resolution of disputes between parties. That is made plain by s.18(6) and s.47 of the Act. Accordingly, s.25(2) recognises that, notwithstanding the conclusion of an adjudication under Part 3, Division 2 of the Act (to which I shall refer as a "statutory

adjudication") the parties may resolve a dispute which has already been subject to an adjudication, by the commencement of proceedings, including "arbitration proceedings or other dispute resolution proceedings".

17 Secondly, the intention of the Act is to provide a process for the speedy and efficient making and determination of progress claims. That process is designed to serve the express purpose of the Act, namely, to protect the entitlement of a contractor to recover progress payments. (Section 3(1)). In order to achieve that objective, the Act expressly provides that its intention is to ensure the payment, or setting aside of money as security for payment, of amounts determined by a statutory adjudication.[2]

18 Thirdly, and consistent with those objectives, s.25(2) only allows a respondent to a progress claim to withhold payment of an adjudicated amount, and instead to give security for payment of that amount, where the respondent has commenced "proceedings" in relation to a dispute under the contract. The existence of a dispute, and even the articulation of that dispute between the parties, would not be sufficient to entitle a respondent to defer payment and to provide security in lieu. Section 25(2) expressly requires that the respondent must have commenced "proceedings" in order to be entitled to defer payment and to provide security instead.

19 Thus the principal issue in this case concerns the construction of the phrase "other dispute resolution proceedings" in s.25(2). As a starting point, it is of course relevant that the sub-section uses the noun "proceedings", and not some other noun such as "processes". The phrase "other dispute resolution proceedings" is used in the context of the requirement that the respondent has commenced "proceedings (including arbitration proceedings or other dispute resolution proceedings)". Ordinary canons of statutory construction, and the context, favour the construction of the phrase "other dispute resolution proceedings" eiusdem generis. In other words, orthodox principles of interpretation favour the conclusion that "other dispute resolution proceedings" consist of processes of a similar nature to arbitration

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2 Section 3(3), 3(4)(b)(i).

proceedings. In ordinary usage, the terms "proceedings" and "arbitration proceedings" contemplate curial, or quasi-curial, processes involving the independent adjudication or determination of a dispute between two or more parties. While the phrase "other dispute resolution proceedings" is no doubt intended to encompass a broader category of proceedings than arbitration proceedings, nonetheless the context of that phrase, in my view, clearly envisages that such other dispute resolution proceedings shall involve the independent determination or adjudication of the relevant dispute between the parties.

20 Indeed, it is clear that the Act specifically contemplates that the processes involved in "other dispute resolution proceedings" conclude in a "determination" of those proceedings. Section 25(5) and (6), which I have set out above, are each premised on the conclusion of such proceedings with a "determination". So too does s.47(4) of the Act which provides:

> "In any arbitration proceedings or other dispute resolution proceedings under the contract, the person determining the arbitration or dispute must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or determination or award the person makes in those proceedings." (Emphasis added)

21 It is, I consider also instructive that the Act uses the term "proceedings" to describe the processes of a statutory adjudication. Thus s.22(5) provides that, "for the purposes of any proceedings conducted to determine an adjudication application" (emphasis added), the adjudicator may request written submissions, set deadlines for submissions, call a conference of the parties or carry out an inspection. Part 3, Division 2 of the Act contains provisions relating to the conduct of a statutory adjudication. The adjudicator must be independent of the parties.[3] The adjudication process involves the making of a claim,[4] the response by the respondent to that claim,[5] and the provision of that response to the claimant.[6] It is clear that the processes required to be undertaken by the adjudicator contain the basic elements of

3 s.19(2).
4 s.18(2).
5 s.21.
6 s.22(2).

the requirements of natural justice. The description of those processes as "proceedings" in s.22(5) thus supports a construction of the term "proceedings" in Part 3, Division 2 which involves the adjudication or determination of a dispute by an independent person conforming with the basic requirements of procedural fairness.

22 In the course of his submissions Mr Robins referred me to a number of authorities in which the term "proceedings" has been construed in a number of different statutory contexts.[7] Those authorities are of limited assistance as they relate to the construction of the term "proceedings" in quite different statutory contexts. However they do support the construction of that term, in whatever context, as a term bearing its ordinary English meaning, namely, a process involving the determination of a dispute by an independent person complying with the basic dictates of procedural fairness.

23 Mr Margetts has correctly pointed out that in the building industry parties to a contract often provide for quite informal mechanisms of resolving disputes. I accept that that is so, and that it may be that a number of those processes may constitute "other dispute resolution proceedings", notwithstanding that they lack the trappings and procedures which one would otherwise normally expect. Nonetheless in order to conform with the term "proceeding" under s.25(2) of the Act it is, in my view, essential that, whatever process is adopted, that process must involve the determination or adjudication of a dispute by an independent person or persons adhering to the fundamental tenets of procedural fairness. In other words, there must be a process the purpose of which is that some person or persons, independent to the parties to the dispute, decides that dispute by an impartial consideration of the competing merits of both sides of the dispute.

24 The question, then, is whether the processes of the Dispute Committee, under clause 25.2, constitute "proceedings" as I have construed that term, in s.25(2) of the Act. As

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7 See for example *Herbert Berry Associates Limited v Inland Revenue Commissioners* [1977] 1 WLR 1437 at 1446 (per Lord Simon of Glaisdale); *Cheney v Spooner* (1929) 41 CLR 532 at 538-9 (Starke J); *Forest v Kelly* (1991) 105 ALR 397 at 408-9 (O'Loughlin J).

I have stated, Mr Margetts has contended that the Dispute Committee has two principal characteristics which, together, render the processes of such a Committee a proceeding. First, he relied on the fact that it is mandatory for the parties to refer a dispute to a Dispute Committee, before the parties are entitled to access the adjudicative or arbitration provisions of clause 25. He submitted that, accordingly, a reference of a dispute to a Dispute Committee is the first essential step to accessing the adjudicative processes under clause 25.3 of the contract. However, in my view, that circumstance, while relevant, could not be determinative of the question whether the initiation of the processes of a Dispute Committee amounts to the commencement of a proceeding. Logically, a step may be a prerequisite to the initiation of proceedings, without itself constituting, or being a part of, the commencement of proceedings. For example, a provision in a contract that before a party is entitled to institute arbitration proceedings, the party must participate in conciliation procedures, would not render those conciliation procedures "proceedings" under s.25(2). Rather, in such a case, the conciliation procedures would be no more than a precursor to the commencement of proceedings. Likewise, in this case, the requirement that the parties first refer a dispute to a Dispute Committee would not, of itself, have the result that such a step forms or is part of the commencement of proceedings.

25 The second matter relied on by Mr Margetts is the stipulation in clause 25(2) that any mutual decision confirmed by the Dispute Committee shall be considered "final and binding upon the parties". Again, that factor, while relevant, could not be determinative of the question whether the processes of a Dispute Committee are a "proceeding". It is true that finality is, generally, a necessary component of an adjudicative process (subject, of course, to appeal). However, finality is also characteristic of processes which could not be described as "proceedings" in their ordinary sense. Thus, the successful conclusion of a conciliation, culminating in a binding agreement between parties, would be equally final and binding on the parties.

26 Essentially, the answer to the question I must decide lies in the plain language of clause 25.2, and in a consideration of the nature, composition and role of a Dispute Committee. In my view, as a matter of plain construction, the reference by a party of a dispute to a Dispute Committee under clause 25.2 does not constitute the commencement of "other dispute resolution proceedings" under s.25(2) of the Act. By its terms clause 25.2 clearly contemplates a dispute resolution process by means of conciliation between representatives of the two disputing parties, rather than by adjudication of the dispute by an independent person. Clause 25.2 requires both parties to nominate representatives who are "authorised" to make binding decisions on matters of difference or dispute. There would be no need for those representatives to be so "authorised", if they were nominated to participate in an adjudicative process, as distinct from a process designed to achieve agreement between the two disputing parties. The second sentence of clause 25.2 requires the members of the Dispute Committee to "undertake to resolve and agree matters of difference or dispute which may have been referred to it … ". (Emphasis added) Clearly, the role of the committee is to reach a consensus in relation to the dispute, rather than to determine it. This is reinforced by clause 25.3 which commences by stating that "in the event that the Dispute Committee is unable to resolve and agree" upon a dispute, then either party may give notice of intent to refer the matter to "adjudication".

27 Furthermore, the adjudicative processes of clause 25.3 are to be contrasted with the conciliation processes of clause 25.2. That contrast is highlighted by the clear distinction between the persons who, on the one hand, comprise the Dispute Committee, and, on the other hand, the person who is to be the adjudicator. Under clause 25.2, the members of the committee are required to be representatives of each of the disputing parties. That stipulation is in stark contradistinction to clause 25.3, which expressly requires that the adjudicator is to be "demonstrably impartial". In no sense could the members of the Dispute Committee be characterised as independent of the disputing parties. Indeed the clear intent of clause 25.2 is that they are not. The whole context of clause 25.2 would make it unimaginable that the

Dispute Committee should be required to conform with the basic dictates of procedural fairness. Indeed such a requirement would undermine the utility of the process catered for by clause 25.2, namely a process designed to achieve conciliation and consensus between the parties before they embark on the adjudicative process. Again, by contrast, the adjudicator is required to conform with the basic dictates of procedural fairness. Clause 25.3 specifically requires the adjudicator to "ensure that the adjudication procedure is fair and that the parties to the contract are given due and reasonable opportunity to be heard during the adjudication procedure". Finally, there is expressly no right of review or "appeal" from the processes of the Dispute Committee under clause 25.2. They are "final and binding" because, if successful, they result in a concluded agreement. By contrast, a party is entitled to reject an adjudicator's decision, and to then proceed to arbitration under clause 25.6.

28 The foregoing analysis of clause 25 of the contract makes it clear, in my view, that the processes of a Dispute Committee under clause 25.2 do not constitute "other dispute resolution proceedings" under s.25(2) of the Act. It therefore follows that the notice of dispute served by the plaintiff on 31 December did not operate to commence any such "proceedings" under s.25(2).

Conclusion

29 Section 25(1) of the Act required the plaintiff to pay the amount found due under the statutory adjudication. Instead the plaintiff has provided security for such a payment, purporting to do so under s.25(1)(b). As the plaintiff has not commenced "other dispute resolution proceedings" under s.25(2), it follows that the defendant is entitled to enforce the security and obtain payment to it of the amount due to it under the statutory adjudication.

30 It therefore follows that the plaintiff must fail in its claim for an injunction, and that the originating motion should be dismissed.
