Amann elected to treat the contract as at an end on account of the Commonwealth's repudiation and Amann claimed damages.

The Court held that, since the clause requiring a show cause was the agreed procedure before termination, it had to be complied with before the Commonwealth could validly terminate. In this contract, the right to terminate given by the clause was in lieu of, not in addition to, the common law right to terminate. This emphasises the importance when drafting a termination clause of stating expressly whether the procedure laid down in the clause is in addition to or in substitution for common law rights of termination.

The judges expressed views on the role of the Secretary. Davies J. at p.607 said:

> "Clause 2.24 thus empowered the Secretary to treat the contract or any specified portion thereof as cancelled in the event of a breach of any term of the contract; but it required him before doing so to give notice to the contractor to show cause in writing to the satisfaction of the Secretary. As the Secretary was not a party to the contract, he was bound to act without actual bias and not capriciously and only after giving due attention to the interests of both parties. That was the purpose of the provision for notice. The provision would be frustrated if the Secretary could act only in the interests of the Commonwealth without taking account of matters that, after notice, the contractor put forward as a reason why cancellation should not be affected... In considering cancellation, the Secretary would have regard to the ordinary principles of law as to rescission of contracts, for they reflect fair and accepted rules for regulating commercial disputes. But such principles would not be determinative, merely a guide."

Sheppard J, at pp.616 - 617, came to the conclusion that it would be 'unlawful' for the Secretary to act capriciously, arbitrarily or in bad faith, but that the Secretary was not properly to be characterised as a certifier as in *Dixon v South Australian Railways Commissioner* [1923] 34 CLR 71 and *Perini v Commonwealth* [1969] 2 NSWR 530.

Sheppard J was also of the opinion that the arbitration clause was in terms that would entitle an arbitrator to decide whether the power had been properly exercised by the Secretary.

(It will be interesting to see what the Court of Appeal in NSW has to say on the question of show cause notices under the National Public Works Conference General Conditions, in the appeal referred to in Issue #11 Australian Construction Law Newsletter at p. 48.)

On the question of damages, the contractor had incurred considerable expense in purchasing aircraft and in preparation in reliance on the contract but the contractor was unable to demonstrate that the contract would have been profitable. The contractor was therefore not entitled to recover anything for loss of profits. Nevertheless, the contractor could recover the expenses incurred, unless the Commonwealth could show that the returns from the contract would have been insufficient to recoup this expenditure.

The Commonwealth argued that the damages should be discounted to reflect the probability that, in any event the contract would have been validly terminated later on account of the contractor's breaches. The trial judge assessed as 50% the prospect that the contract would have been cancelled later and reduced the damages. The Appeal Court took the view that it was improbable that the contract would have been terminated and the Court refused to discount the damages.

The case is on appeal to the High Court.

- Philip Davenport

Trade Practices - representations in lease negotiations - effect of disclaimers - BOMA Method of Measurement

Seabridge Australia Pty Limited v JLW (New South Wales) Pty Limited, Federal Court of Australia, General Division, Beaumont J., Sydney, 12 April 1991.

1. Whether a written representation made by a Lessor or a Lessor's agent made during negotiations for Lease can be relied upon by a Lessee for the purposes of Section 52 of the Trade Practices Act.

2. Whether general disclaimers in a written statement will preclude reliance for the purposes of S52 on a specific statement made in negotiations for a Lease.

In this case Jones Lang Wootton ("JLW") as agent for Lezam Pty Limited ("Lezam"), the Lessor, made a representation to Seabridge Australia Pty Limited ("Seabridge"), the Lessee, by way of a letter that the area in metres squared which was to be the subject of the Lease was greater in area than it was later found to be in fact. The Lessee pleaded that this representation had been made, and further pleaded that it is common and usual practice for "net lettable areas" to be "calculated in accordance with standards of measurement in the guidelines adopted by the Building Owners and Managers Association ("BOMA"); and that it had relied upon this representation. The Lessee claimed further that JLW and Lezam had engaged in misleading or deceptive conduct contrary to S52 of the Trade Practices Act in that each failed to identify the area of the premises represented to the Lessee as being the "net lettable area"; and represented the "net lettable area" to be 2,229.09 square metres when in fact it was less, and by reason of

this conduct Seabridge suffered damage.

The letter in which JLW made the representation to Seabridge contained certain disclaimers. First of these was that the letter was "subject to Lease" and the second was that it was "subject to survey" and at the bottom of the page in small almost illegible print the following three disclaimers appeared:

1. The particulars are set out as a general outline are only for the guidance of lessees ... and do not constitute an offer or contract;
2. All descriptions ... are given in good faith and are believed to be correct but any intending tenants ... should not rely on them as statement or representations of fact; and
3. No person in the employment of JLW has any authority to make or give any representation or warranty whatsoever in relation to this property.

The letter contained an "itemised lease schedule" which stated that the area of the premises was 2,229.09 square metres which in fact was greater than the "net lettable area".

The Lease was later executed by Seabridge. No area or dimensions of the premises were stated in the Lease. No survey was produced to Seabridge at this time and that matter was not raised again.

Seabridge became aware that the total "net lettable area" of the premises was less than that mentioned in the "itemised Lease Schedule" referred to in the JLW's letter during a contractual review of the rent payable under the Lease two years after the date of the original letter.

In his judgment, Mr Justice Beaumont considered first the oral statements made by the Lessee's agent, JLW, stating "the courts should exercise caution in invoking provisions such as S52 based upon things said, or not said in oral discussion in the course of negotiations which lead to a formal document or agreement being drawn up." His Honour went onto say "the courts, in my view, should ordinarily be reluctant to interfere by setting aside or altering the formal instrument or contract in the absence of proceedings for rectification of the written instrument purporting to evidence the real agreement. Where, however, an oral statement bears upon a subject not dealt with in the form of contract, the position may be different."

In the present case His Honour stated that the parties intended the oral discussions with respect tot eh area to be leased to be definitively stated in the letter, to the exclusion of what might have passed between them informally earlier. His Honour stated "it follows, in my view, that these discussions cannot be relied upon by Seabridge for present purposes."

His Honour then went on to consider the letter. The letter was expressed to be "subject to lease". The court accepted as a matter of contract that this provision was to ensure that no binding commitment to grant a lease was to arise unless and until a formal instrument by was of Lease was executed. His Honour went on to consider the question of whether a collateral statement made in a letter could be relied upon for the purposes of S52 saying:

> "In my opinion, the use of the phrase "subject to lease" in the letter does no preclude possible reliance by Seabridge, for the purposes of S52, on statements made in the "itemised lease schedule" by way of description of premises."
>
> The letter also was expressed to be "subject to survey". Since no survey was produced however Beaumont J felt that the respondents could not rely on the rider "subject to survey".

The court considered the three disclaimers stated in the letter. In relation to the first of these His Honour felt that the statement of area in the "itemised lease schedule" was specific, and therefore that it was not relevant to consider whether the letter had any contractual force. In relation to the second disclaimer His Honour stated that the exemption clause was expressed in general terms only and accordingly should be read down in the case of a specific statement as to area. The third disclaimer was found to be of no material operation also as His Honour stated "again, this is a general provision and not, I think intended to supercede the specific statement made with respect to the areas of the floors." Beaumont J concluded that "the statements made in the "itemised lease schedule" with respect to the areas of the floors, could, if false, constitute misleading conduct for the purposes of S52.

His Honour focussed his attention next on the question of the liability of the respondents finding that the details of the "itemised lease schedule" were provided by JLW to Seabridge with the knowledge and approval of the controllers of Lezam. The conclusion His Honour reached was that the representation alleged was made by JLW with the authority of Lezam.

Expert evidence was admitted in relation to the standard called BOMA ("Building Owners and Managers Association of Australia Limited") Method for the Measurement of Buildings. In this expert evidence it was observed that measurements of area for commercial office buildings are calculated on the basis of "net rentable area" or "net lettable area", in accordance with the BOMA standard. Beaumont J found that it was reasonable to infer that the parties must have intended that an appropriate BOMA standard of measurement would apply.

His Honour went on to find that the "net rentable area" was in fact 1,969.42 square metres.

Seabridge sought an order varying the amount of rental payable under the lease together with an order that the respondents pay it the sum of $89,887.15 being the difference in the amount of rent payable on the "gross" area basis on the one hand, and a rental per square metre calculated by reference to a "net rentable area" on the other.,

Beaumont J found that Seabridge had "suffered loss or damage by paying a greater amount than it would have done had it known the true position". His Honour further found that since JLW had an active role in the negotiations generally the respondents were jointly liable and each respondent was liable for one-half of the amount ordered to be paid to the applicant. His Honour ordered that the lease be varied, and relief be granted under S 87(1A) of the Trade Practices Act.

- **Andrew Truswell, Solicitor,**
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