Docket: CA 159069

Date:20000823

NOVA SCOTIA COURT OF APPEAL

[Cite as: Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd., 2000 NSCA 95]

Roscoe, Flinn and Cromwell, JJ.A.

BETWEEN:

JONES POWER CO. LIMITED, a body corporate, and
J.A. JONES CONSTRUCTION COMPANY, a body corporate

Appellants

- and -

MITSUI & CO. (POINT ACONI) LTD., a body corporate

Respondent

REASONS FOR JUDGMENT

Counsel: George W. MacDonald, Q.C, Michelle C. Awad and A.H. Gaede, Jr. for the appellants
David A. Miller, Q.C., Robert G. Grant, Q.C., T. Arthur Barry and Virve Sandstrom for the respondent

Appeal Heard: March 27, 2000

Judgment Delivered: August 23, 2000

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Roscoe and Flinn, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

[1] The parties entered into a large and complicated construction contract. Disputes arose. After months of unsuccessful attempts to resolve them at lower levels, senior executives on both sides negotiated and signed a memorandum of understanding ("MOU"). The appellants then repudiated the MOU. In the ensuing litigation, they claimed not to be bound by it. They said the MOU was conditional on further agreements, incomplete and uncertain. They also claimed that the respondent was not a party to the MOU and therefore could not take advantage of its terms. These issues were severed from the main actions and tried. The trial judge held that the MOU was a binding contract and that the respondent was a party to it. The appellants argue on this appeal that both of these findings were wrong.

[2] While the questions on appeal are straightforward, the context in which they arise is intricate. It will be helpful, therefore, to set out some background concerning the relationship and the litigation between the parties before turning to detailed consideration of the issues.

(a) Overview of the Relationship of the Parties:

[3] Mitsui & Co. Ltd. ("Mitsui") is an international trading company based in Japan. J. A. Jones Construction Company ("Jones") is a U.S. Company. Its Energy Group builds power plants. Sargent & Lundy ("S & L") is an engineering firm based in Chicago specializing in the design and construction of power generating plants. Mitsui, Jones and

S & L agreed to collaborate in order to qualify, propose, negotiate and perform all activities associated with the construction of a 165 MW thermal generating plant at Point Aconi, Cape Breton, for Nova Scotia Power.

[4] In October of 1989, Mitsui's wholly owned subsidiary, Mitsui & Co. (Canada) Ltd. contracted with Nova Scotia Power to build the plant. Jones and Mitsui then contracted for Jones to perform all of the civil, mechanical and electrical work including the installation of equipment to be supplied by Mitsui. This contract (Y - 4123) was entered into in August of 1990 between Mitsui & Co. (Point Aconi) Ltd. ("MPA") and Jones Power Co. Limited ("JPC"). Both companies were single purpose, wholly owned subsidiaries which were incorporated for the Point Aconi project. S & L were the design engineers. The contract price was $101,250,000 subject to adjustment as provided for under its terms. (For ease of reference, I will generally refer to the parties as "Jones" and "Mitsui" without distinguishing among the various corporate entities. Where such distinctions are essential to the issues on appeal, my references will be exact.)

[5] As construction proceeded, disputes arose between the parties which escalated and led to a significant deterioration of their relationship. Serious and high level intervention with the objective of resolving these disputes began in the spring of 1992. Detailed "position papers" were exchanged and meetings held. On July 28, 1992, a MOU, stated to be between Mitsui and JPC, was signed. Its stated purpose was "... to eliminate current misunderstandings that exist relative to Jones' compensation ... under the existing contract."

[6] Almost immediately after signing the MOU, Jones claimed the MOU omitted several items that had been agreed upon. By September of 1992, it claimed that the MOU had "... been officially and legally retracted." Both parties, however, recognized the importance of completing the contract with Nova Scotia Power. They therefore agreed, in November of 1992, to arrangements that would assure completion of the project on schedule without waiving their legal rights acquired to that time.

[7] The project was completed, but the disputes concerning Jones' compensation were not resolved. New disputes arose concerning the financing arrangements which formed part of the November agreement. Actions by Mitsui against Jones and by Jones against Mitsui were commenced in 1994.

(b) Overview of the Litigation:

[8] In its action, Mitsui alleges, among other things, that Jones breached the contract by not completing on time and by failing in its duties to manage construction effectively. It also alleges that Jones abused the credit facility established pursuant to the November, 1992 agreement and wrongfully interfered with Mitsui's draw upon a letter of credit required by the main contract. Mitsui's position in the action is that Jones' claims outstanding as of July 28, 1992 were settled by the MOU and that the final contract price to which Jones is entitled is $125,186,783. Mitsui claims the difference between that amount and the amounts it says were advanced to Jones under the credit facility (the alleged difference is $34,040,884) plus damages and interest for a total claimed amount (as estimated by the case management judge) of $54 million.

[9] In its action, Jones sues Mitsui and S & L alleging that they failed to provide accurate and complete design information in a timely fashion and claiming for additional materials and labour required to complete the project. The basic claim is for the difference between what Jones says is the gross amount due to it under the contract ($180,519,007) and the amounts it says have been paid by Mitsui ($159,193,412) plus other damages and interest. Jones' total claim, as estimated by the case management judge, is in excess of $44 million.

[10] We are advised that the actions by Jones directly against S & L have been settled.

[11] The actions are complex and have spawned extensive oral discovery (156 days as of October, 1998), the production of large amounts of documentation (some 2500 documents as of October of 1998) and 18 volumes of experts reports. Faced with what he considered to be a "logjam" in the litigation, the case management judge, on the application of Mitsui, ordered that the issue of the validity of the MOU be tried before the trial of the other issues in the actions. (See **Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.,** N.S.S.C., Richard, J., S.H. 109629, October 7, 1998 and the judgment of this Court reported at (1999), 173 N.S.R. (2d) 159).

[12] The trial judge, Richard, J., who had been the principal case management judge, found that the MOU is a legally binding contract and, as well, dismissed Jones'

arguments that MPA was not a party to the MOU. Jones appeals.

II. Issues:

[13] Jones' position is that the MOU is not a legally binding contract and submits that the trial judge erred in both fact and law in finding otherwise. Jones says the MOU is uncertain and incomplete. It also argues that MPA was not a party to the MOU and therefore not able to take advantage of its terms.

[14] In the companion appeal, Jones also attacks the trial judge's ruling not to order production of certain documents for which Mitsui claims privilege. Jones' position is that if the privileged documents appeal is successful, the additional production may significantly affect the evidence in relation to the MOU's enforceability. As a result, it submits a new trial of the MOU issue should be ordered on that basis alone.

[15] Mitsui's position is that the MOU is both certain and complete so as to constitute a legally binding contract. It says that the MOU binds MPA and, in relation to the privileged documents issue, that no new trial of the MOU issue should be ordered regardless of the outcome of the privileged documents appeal.

[16] I will address in these reasons the legal issues relating to the enforceability of the MOU on the record before the trial judge. Reasons in the privileged document appeal authored by Roscoe, J.A. with which I agree are released concurrently.

III. Facts and Findings of the Trial Judge:

[17] The trial judge observed that the technique selected for the construction of the power plant was “fast track construction” (also known as “design-build”) employing “conceptual bidding”. In essence, the design is ongoing at the same time as construction, making the overall interwoven schedule of design and construction crucial. While this approach may reduce construction time significantly, it requires considerable experience, skill and resources to achieve this potential. The designers must know ahead of time where the final design will lead and make provisions for it while construction is under way. The constructor must be able to plan the work relating to the designs as they are released and have suppliers, subcontractors and trades ready at the appropriate time.

[18] Progress payments under the contract were related to 12 target dates referred to as milestones (section 33.6) with a completion date of May 1, 1993. Any slippage or delay in attaining these milestones could place the completion date in jeopardy and expose Mitsui to a very substantial liquidated damage claim based on a daily rate of $100,000.

[19] One of the main areas of dispute between Jones and Mitsui related to “Bill of Quantity” Items, referred to by the parties as the B/Q items. The contract defines the circumstances under which an adjustment for these items (cable, steel, piping and concrete) may be made and then sets out the following adjustment clause: (Mitsui is referred to as the purchaser and Jones as the contractor)

> Adjustment Clause:
>
> Basic Philosophy
>
> The Purchaser and the Contractor desire that the final contract price adjustment (aside from NSPC initiated items) be zero.
>
> Principle 1
>
> If the Owner makes a change, the Contractor will provide a quote with its explanation to the Purchaser within a reasonable period before the Purchaser quote is due to Owner. If the change is accepted by Owner, a Change Order will be issued which will include a change in the B/Q.
>
> Principle 2 (for B/Q items)
>
> The general philosophy of contract price adjustment for B/Q items will be that if a significant change from the reference material is identified, and the Purchaser and the Contractor agree that it is a change, the price adjustment will be negotiated; and, if agreed, a change order will be issued for the portion of the B/Q change greater than ± 2.5%. The Change Order will state the change in B/Q associated with the contract price adjustment.
>
> Principle 3
>
> Final Base B/Q (including change order adjustments) will only be used as an adjustment at the end of the project, if agreement cannot be reached on a disputed item. Then, the final Base B/Q will be used for only the associated items in dispute, and the price adjustment will be made on the basis of the final actual quantity less the final Base B/Q (or quantity in dispute, whichever is smaller) less the 2.5% dead band, times the unit price for that category. The unit price used for this adjustment will be the lesser of the unit price on the B/Q list or the unit price quoted by the originating party of the dispute when the dispute arose.
>
> Other (undisputed) B/Q items will only affect the price as agreed upon under Principle 2.
>
> Principle 4
>
> (Changes from original scope of supply for non-B/Q items) If any significant change in scope of supply from the reference material is identified and the Purchaser and the Contractor agree that it is a change, the price adjustment will be negotiated.

[20] There were also disputes in relation to what Jones said were late or incomplete design drawings, late delivery of equipment and errors in equipment design. Simply put, from Jones' perspective, the scope of the work was changing and its claims for additional compensation were not being recognized. From Mitsui's perspective, the

work was not being well organized and was not proceeding on time.

[21] A working group involving representatives of Jones (usually Messrs. Adams and Codispoti) , Mitsui (usually Messrs. Akikawa and Ohara) and S & L (usually Mr. Hamachek) attempted to address the issues but without success. The parties agreed that discussions between their respective organizations at a high level might be more fruitful. Mitsui appointed Mr. Nitta to take full authority to resolve the negotiations and tackle the entire issue. Mr. Walcott, president of JPC and a senior vice president of Jones became directly involved. Mr. Doran, a senior engineer, participated on behalf of S & L.

[22] The trial judge found as a fact that "... both Nitta and Walcott had actual authority from their principals, MPA and JPC respectively to carry on ... negotiations and to enter into any settlement agreement which ... [resulted]." The trial judge outlined the steps following the decision to pursue this high level intervention up to the key meeting on July 28, 1992 at which the MOU was signed:

> Detailed and voluminous Position Papers were exchanged by MPA and JPC in which their respective arguments were documented and quantified. These papers do not appear to have resulted in any appreciable progress toward resolution. Meetings were held on 30 June 1992 and 1 July in New York at which Walcott, Adams, Doran, Hamachek, Nitta and Akikawa were present at various times, according to both Nitta and Akikawa. ... Nitta, in a memorandum following this meeting said that Walcott suggested that they convert the contract to cost plus. Doran was concerned about this and described cost plus as "an open check book" with no control and which even rewards inefficiency. Nitta said that MPA would not agree to any compensation without a cap. I am satisfied and so find that MPA had no intention of entering into any agreement, whether termed "cost plus" or "cost reimbursable" (which in the context of this case meant the same - as appears from the advice which Davidson said he gave to Walcott respecting the negotiation of this dispute). I am also satisfied that JPC was primarily interested in changing the contract to a cost plus contract. In a letter following this meeting Walcott wrote to

> Nitta stating in part “The only method that I feel would accomplish all goals that we have would be to change the total contract to cost reimbursable from inception”. ...
>
> The next major meeting was between Walcott and Doran on site at Point Aconi on 17 July. According to Walcott he felt that Doran was not fully aware of the problems at site. At this one-half day meeting Doran became aware of the specific problems such as mud mats, yardwork, painting specifications, instrumentation and insulation. He said he wanted to find some way to get out of the contentious issues. No solutions came out of this meeting although it is fair to conclude that both Walcott and Doran had a better understanding of the respective positions.
>
> There was a growing urgency to have matters resolved and get on with the completion of the Point Aconi project. This is evident from the tenor of Walcott’s letter of 24 July to Nitta which was sent to the latter’s office at Mitsui in Tokyo. The first paragraph of the letter reads;
>
> > *Having visited the Pt. Aconi site last week and meeting with Mitsui, Nova Scotia Power Company and others, I am convinced that the commercial issues between our companies must come to an immediate agreement so as to get back on track with project completion. Nova Scotia Power Company is very quickly becoming a dissatisfied customer.*
>
> Doran also prepared a 4 page letter with accompanying charts and sent this to Walcott. It appears that this letter was not vetted through any Mitsui people before it was sent although copies of the letter were sent to Akikiwa and Nitta. The letter outlined two methods of compensation which, he suggested, could be considered in reaching a settlement. In the final paragraph of the letter Doran said in part, “In conclusion, the above represents two cost components that can be considered as negotiations between Mitsui and Jones proceed.” It does not appear that this letter or the two suggested methods of compensation formed part of the negotiating package which Nitta took to the 28 July meeting.

[23] On July 28, 1992, Nitta, Walcott and Doran met in Chicago at the offices of S & L. With Nitta was Mr. Akikawa, who was assigned to MPA as project manager and was responsible on the Mitsui side for all commercial matters relating to the Point Aconi project. With Walcott from the Jones side was Mr. Adams who was a construction manager with responsibility for the Point Aconi project . Mr. Hamachek, the S & L employee responsible for the project, was also present. The actual negotiation sessions involved Walcott and Nitta with Doran present, as the trial judge put it, “...as an advisor, note taker and facilitator.” The trial judge found (although this finding is challenged on

appeal) that both Nitta and Walcott thought the purpose of the meeting was to come to a final resolution of outstanding issues respecting the project.

[24] Negotiations went on through the morning. The trial judge summarized them as follows:

> Nitta had with him a paper prepared by Akikawa which indicated the Mitsui bargaining range as between $109.7 and $121.6 million. To this was added a calculation of JPC range of $119 to $126 million. It appears that Nitta, during the course of the discussions used this paper to prepare his own notes from which he would make suggestions and proposals. My general impression is the [sic] Nitta is a very experienced and shrewd negotiator.
>
> Walcott had a cost chart prepared by Codispoti. This chart showed a final contract total of $135.5 million. The compilation of this chart was the subject of vigorous cross-examination of Codispoti. He included in the chart which he provided to Walcott certain estimates which he variously described as “rough approximation”, “just a feeling”, “ballpark figures generated by me”, “a gut feeling”, “a guesstimate” or “pulled out of the air”. On the basis of Codispoti’s evidence I conclude that this chart was a speculative and largely inaccurate estimation of JPC’s project costs. Codispoti was critical of the performance of several of the JPC sub-contractors which, in his view added to delays and increased costs. The performance of the sub-contractors was, of course, the sole responsibility of JPC under the terms of the head contract but this consideration was not factored into the Codispoti chart.
>
> Walcott said that his concern at this time was to find some method of payment so we could complete the work. He envisioned a “gentlemen’s” agreement as a result of this meeting. He also said that Nitta was very concerned with the project schedule and the looming spectre of the NSP claim for liquidated damages. Walcott raised the issue of changing the contract to cost plus but Nitta said that this was of no interest to Mitsui. Nor was Nitta interested in any review or audit of JPC actual project costs which would be of no concern to Mitsui in the context of a fixed price contract such as Y-4123. Walcott expressed concern about the outstanding claims and EWO’s of the sub-contractors and Doran undertook, on behalf of SL to assist JPC in setting these claims in a manner which would benefit JPC. Doran said that the discussions gradually narrowed to a final figure and a change in the completion date to allow for slippage already experienced. He said that they talked about range and “bartered” and finally moved slowly toward the $118 million figure. A revised completion date was also agreed upon. According to Nitta, terms of payment were discussed and that failing the special request of JPC the contract would rule.

[25] By lunch time, the negotiations were concluded and Doran was asked to prepare an agreement. Doran completed the document and gave copies of it to Nitta and

Walcott. The trial judge found that both read the draft MOU, that Walcott signed it and passed it to Nitta requesting that he sign it. Nitta indicated that he would prefer to await the final draft before signing. Both Walcott and Nitta suggested minor changes to the draft which, after some discussion, were agreed upon and incorporated into the final document. Doran made the necessary changes and returned with the revised document. Both reviewed it. Walcott signed it and pushed it across the table for Nitta to sign. Nitta expressed the wish to take the MOU to Tokyo for review. Walcott objected to the delay. Mr. Akikawa asked Nitta to sign. Nitta did so.

[26] The trial judge found as a fact that both Nitta and Walcott were firmly of the opinion that, with the signing of the MOU, they had resolved the outstanding disputes between their companies relating to the Point Aconi project.

[27] Following the meeting, Walcott and Adams took a taxi to the airport. En route, Adams asked what had happened and Walcott replied that they had reached an agreement . When Adams learned of the terms of the MOU, he disagreed strenuously and apparently persuaded Walcott that these terms were not consistent with Jones' objectives.

[28] Walcott drafted a letter which was faxed to Nitta the next day (July 29). The letter asserted that "... several items were not attached or included that were agreed upon..." , that he (Walcott) "... may have left too early to see the inclusions..." and proposed that he and Nitta meet again immediately. The trial judge found that this letter

was "... simply a bald attempt to disclaim the MOU and to place an interpretation on it, and on the negotiations, that the established facts cannot support." He found that Walcott's suggestion in the letter that there were several items not attached or included that were agreed upon was "... simply a fabrication."

[29] The trial judge described the events after this July 29 letter as "largely anti-climactic". Walcott and Nitta met again in Chicago July 29. The trial judge did not make any specific findings with respect to this meeting, but it appears from the record that Jones denied and Mitsui asserted the legal effect of the MOU. It was, apparently, agreed that Adams, Akikawa and Hamachek would make up a working level committee to try to sort things out. It was clearly understood that this attempt did not derogate from the position of the parties in relation to the binding effect of the MOU. For example, Mr. Adams agreed in his testimony that it was his understanding that if the working level committee (of which he was a member on Jones' behalf) could not come up with a recommendation, the parties were back to where they were, maintaining their original positions.

[30] In relation to the post July 29 events, the trial judge made the following findings:

> ..... The working committee was re-instituted. Akikawa felt that the committee may be able to make the MOU acceptable to JPC but the futility of this soon became apparent. Following a committee meeting on 18 August 1992 Adams sent a memorandum to Walcott and Jim Walker (another Jones executive) in which the following appeared:

> 5. *Dave stated that he had instructed his contracts department to issue a change order incorporating MOU signed by Del Walcott.*
>
> *Mike Adams responded that it was a total waste of time, that we would never sign, and did not consider MOU valid. It had been withdrawn the day after signing.*
>
> *Ken stated Mitsui Japan considered it very valid as did their lawyers!*

> This signalled the end of any meaningful attempt to give life to the MOU. A later letter from JPC dated 4 September 1992 stated that the MOU "has been officially and legally retracted." ...

[31] An agreement was reached between the parties on November 5, 1992 under which Mitsui made payments to assure completion of the project on schedule and pursuant to which neither party waived its legal rights acquired to that time.

[32] Before turning to the judge's findings concerning Jones' attack on the legal validity of the MOU, it will be helpful to set out the terms of the MOU itself. The document states that its purpose is "... to eliminate current misunderstandings that exist relative to Jones' compensation (i.e., fixed price and bill of quantity components) under the existing contract." It increases Jones' compensation for the project to $118 million and sets out terms relative to future adjustments. It states that the MOU does not change any of the remaining provisions of the existing contract or change orders that have been agreed to prior to July 28. Jones agrees to void all of the claim letters issued to date to Mitsui. It provides that change orders will be dealt with according to three principles which are set out in the MOU. It concludes by both parties agreeing to do their best to develop a suitable change order to accomplish this memorandum of understanding in a

timely fashion. The text of the MOU follows:

July 28, 1992

Memorandum of Understanding

This Memorandum of Understanding has been initiated by Mitsui & Company, Ltd. (Mitsui) and Jones Power Company, Ltd. (Jones) for the Pt. Aconi - Unit 1 project. The purpose of the document is to eliminate current misunderstandings that exist relative to Jones' compensation (i.e., fixed price and bill of quantity components) under the existing contract. Jones compensation for the project is hereby increased to C$118 Million based on the following agreement relative to future adjustments:

- Jones will proceed so that the plant completion date is between July 1 and 15, 1993. This does not change the original date at which liquidation damages penalties become effective. They will remain as previously identified in the existing contract.

- This document does not change any of the remaining provisions of the existing contract or change orders that have been agreed to prior to this date. Included in this change order are pending change orders number 11 and 12, and the pending change order covering necessary boiler instrumentation installation work.

- Jones agrees to void all of the claim letters issued to date to Mitsui and the request for extension of time dated July 15, 1992.

- Future adjustments to compensation are not excluded by this agreement. Change orders can only be caused by the principals (sic; hereafter principles) listed below or by mutual agreement:

Principal 1 (sic, hereafter Principle)

Nova Scotia Power Corporation (NSPC) may agree to pay for additional or decreased work to be performed by Jones. All parties agree that this work will not be performed until a change order is initiated by NSPC in the amount required. Upon agreement, Mitsui will issue a corresponding change order to Jones.

Mitsui can request that work be performed at their own cost. This would result in a change order from Mitsui to Jones.

Principle 2

The work identified by the existing contract is based on the design documents which have been generated and issued by the engineer on or before June 1, 1992 and/or those currently being discussed with Jones. Design documents which produce a change to this design basis will be treated as a change order. Work will not be started on these changes until a change order has been issued by Mitsui to Jones. Jones is obligated to advise Mitsui of changes that are covered by this principle before the changes become critical to the schedule.

Principle 3

> If from time to time work is required because a manufacturer has supplied equipment that is not in conformance with the design requirements, any re-work or warrantee work associated with this type of change will be performed by Jones and compensated for by Mitsui. However, compensation of this work depends on Jones providing adequate documentation (i.e., pictures or sketches of fault conditions, signed time tickets, etc.) that the work is required and that the cost of re-work or warrantee work is reasonable. Jones understands that Mitsui will seek reimbursement from the original manufacturer.
>
> Relative to this Principle 3, any re-work required due to faulty performance by Jones' sub-contractor in installing the original work is excluded. Jones agrees that this work is at their cost.
>
> The above outlined principles will be used to modify and determine the final compensation for work performed on the Pt. Aconi - Unit 1 project. Change orders developed hence forth will include a value for overhead. This value will be calculated as 4.82% of the Jones' direct cost. Both parties agreed to modify the contract accordingly so that these principles can be complied with.
>
> No time has been set for the completion of the necessary contract review and preparation of the change order to accomplish this memorandum of understanding. However, both parties agreed to do their best to develop a suitable change order in a timely fashion.
>
> As agreed to on this date of July 28, 1992 by:
>
> _____ _____
> Koichi Nitta, D. L. Walcott,
> General Manager, Plant Team President,
> Mitsui & Co., Ltd. Jones Power Company, Ltd.

[33] The trial judge held that the MOU is a legal contract which the parties intended to enter into at the time so as to resolve their outstanding differences. He concluded that it was negotiated by senior executives of the respective parties who struck a deal and, as appeared to be the practice in such situations, left it to the working group to work out the details which would be reflected in the final change order.

[34] Jones argued at trial that the MOU lacked essential terms, specifically payment conditions. The trial judge did not accept this submission. He noted that the

MOU affirmed the other provisions of the existing contract which included a payment schedule and that it was the practice of the parties to apply this schedule to any extra payments resulting from changes or additions to the work. He concluded that it would be a “simple clerical matter” to adjust those payment provisions to accommodate the MOU.

[35] Jones also argued at trial that the terms of the agreement were uncertain because the provision concerning voiding claim letters could not be understood. Dismissing this as “one of the more improbable arguments”, the trial judge found that it would be a simple clerical matter to determine all claims supported by claim letters which were issued prior to July 28 in order to apply this provision of the MOU.

[36] Jones submitted at trial that the contract could only be amended by a change order. The trial judge found that while the change order appears to be the accepted method of documenting changes to the head contract, he was unable to conclude that it is the only method available to the parties. He also found that change orders were merely an administrative confirmation of the actual change which had already been agreed upon. He rejected Jones’ contention that there was no binding agreement because the MOU did not set a time for the completion of the necessary contract review referred to in it. He held that this provision could reasonably be interpreted as meaning that since the parties had reached an agreement there is no urgency in getting all of the details completed.

IV. Analysis:

IV.1: Completeness and Certainty:

(a) Factual Issues:

[37] Jones raises several factual issues, most of which concern alleged failures of the judge to advert to relevant evidence. Specifically, it is argued that the judge omitted and ignored evidence: supporting Jones' position that the MOU is neither valid nor legally binding; that the parties had to agree on the terms of payment of the increased contract remuneration; that the "scope of work" to be performed by Jones for the increased remuneration had to be defined by the parties; that the modifications to the contract required as a result of the MOU had to be negotiated and agreed to by the parties; that Jones and Mitsui had agreed to secure S & L's assistance for Jones in dealing with the claims of subcontractors; and, that the parties were required to negotiate and agree upon the change order necessary to give contractual effect to the MOU. Jones also submits that certain of the judge's findings are not supported by the evidence.

[38] Before considering these factual arguments, it will be helpful to set out the principles governing this Court's review of findings of fact at trial.

[39] Appellate courts must treat a trial judge's findings of fact with great deference: **Schwartz v. Canada**, [1996] 1 S.C.R. 254 at 278. Appellate intervention with regard to findings of fact may be justified only if there is a palpable or overriding error: **Toneguzzo-Norvell (Guardian *ad Litem* of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at 121. The trial judge's failure to advert to conclusive or relevant evidence may justify appellate

review (**Toneguzzo** at 121). However, and this is important for this case, appellate review of findings of fact at trial is not justified simply because a trial judge has omitted reference to some of the relevant evidence in the reasons for judgment. Before the judge's findings should be interfered with, "... an appellate court must come to the conclusion that the evidence in question and the error by the trial judge in disregarding the evidence were overriding and determinative in the assessment of the balance of probabilities with respect to the factual issue.": **MacPhail v. Desrosiers** (1998), 170 N.S.R. (2d) 145 (N.S.C.A.) at § 23 (emphasis added).

[40] For reasons which I will set out at length, none of the factual arguments raised by Jones on appeal meets the standard for appellate interference with the trial judge's findings of fact.

[41] The trial judge found that both Nitta and Walcott were firmly of the opinion that with the signing of the MOU, they had resolved the outstanding disputes between MPA and JPC. This was exactly contrary to Jones' fundamental position at trial. Jones asserted that the MOU was simply a step along the way to the resolution of the disputes between the parties -- that it was at most an agreement to agree. It is important not to lose sight of the fact that the trial judge unequivocally found against Jones on this point and, in doing so, made adverse findings with respect to the credibility of key witnesses called by Jones.

[42] A case in point is the evidence of Jones' witness, Mr. Walcott, who was president of JPC at the relevant times. The trial judge found Mr. Walcott's recollections of the events leading up to the MOU meeting and the meeting itself somewhat vague and often slanted toward enhancing the position of JPC rather than being historically accurate. The trial judge rejected Mr. Walcott's stated belief that with the signing of the MOU he felt simply that "... we reached an agreement for some method to get on with the work - and how the matters would be resolved". Contrary to this view of events, the evidence of Mitsui's witnesses Doran and Nitta was accepted by the trial judge. They affirmed their understanding and belief that when the MOU was signed, negotiations were completed and an agreement had been reached. The judge rejected Walcott's evidence that he had left the meeting too early or that he should have stayed on to get all the matters "tied down". As the trial judge put it, "[o]ther, more credible evidence clearly points to the conclusion that Walcott, in the company of Adams, left the meeting because his task was completed and the dispute had been settled."

[43] As a further example of the trial judge's firm rejection of Jones' position, I refer to the evidence relating to Mr. Walcott's letter written and faxed the day after the MOU was signed. Jones, in its factum, characterizes Walcott's July 29, 1992 letter to Nitta as a letter "... expressing some concern about the MOU." This is hardly an apt description of the letter in light of the trial judge's findings. He found Walcott's letter of 29 July to be a "bald attempt to disclaim the MOU and to place an interpretation on it, and on the negotiations, that the established facts cannot support". He characterized the suggestion made by Walcott in that letter that there were several items not attached or included in

the MOU which had in fact been agreed upon as ".. simply a fabrication."

[44] Jones does not challenge the trial judge's finding that, going into the July 28 meeting, both parties intended to reach a binding agreement. Nor does it directly attack the finding that, with the signing of the MOU, they thought they had done so. However, Jones places great stress on actions by S & L and Mitsui after the signing of the MOU, which, it submits, show either that further agreements were essential or that the terms of the MOU were so uncertain as to be unworkable. In my view, these submissions are not supported in either law or fact.

[45] I will address the applicable legal principles in more detail later in my reasons. There are two legal principles, however, that must be borne in mind in evaluating Jones' factual arguments and so I will refer to them briefly now.

[46] The first relates to Jones' submission that the MOU was conditional on the signing of a change order. As Trietel puts it, an agreement is not necessarily incomplete simply because it provides for the execution of a further formal document: see G. H. Trietel, **The Law of Contract** (10th, 1999) at 51 - 52. Here, the parties agreed in the MOU to prepare a change order. It is not particularly telling, therefore, that Mitsui, which took the position that the MOU was effective, attempted to do so. The fact that the MOU contemplated further documentation does not mean that its legal effectiveness was conditional on it. The relevant question is not whether the MOU contemplates that a change order would be signed; it is whether the legal effectiveness of the MOU was

conditional on the signing of a change order or whether it was simply a step in carrying out an already enforceable agreement: see, for example, S. M. Waddams, **The Law of Contract** (4th ed. 1999) at para. 52.

[47] Jones stressed in its factum and oral submissions that, after Jones had repudiated the MOU, Mitsui attempted to develop an appropriate change order. This, it says, shows that agreement on additional points and execution of a change order were essential. However, I am not persuaded that the trial judge erred in failing to draw this inference.

[48] The trial judge found that what happened as regards the MOU after the July meeting was “largely anti-climactic”. The “working committee” was re-instituted. Mr. Akikawa felt that the committee might be able to make the MOU acceptable to Jones, but efforts to do so soon proved futile. In short, the trial judge found that, faced with Jones’ repudiation of the MOU and the urgent need to get the project on track, Mitsui attempted to meet Jones’ concerns. He obviously did not take these efforts as admissions by Mitsui that the change order was a condition of the agreement.

[49] The trial judge also made a clear finding in relation to the practice of the parties with respect to change orders. He refers to the fact that many of the executed change orders were not issued and signed until long after the subject changes had been completed. He mentions as an example change order 2 which was dated 23 October,

1990 but which was not actually executed on behalf of JPC until 27 March, 1991. He concluded that " [t]he change orders seemed to be merely an administrative confirmation of the actual change which had already been agreed upon".

[50] Jones, in effect, challenges this finding when it asserts in its factum that "[p]rior to November 1992, the only procedure used by the parties to amend the contract was a formal written change order". This statement by Jones may be contrasted with the trial judge's finding that change orders were "merely an administrative confirmation of the actual change which had already been agreed upon." There was a formidable volume of evidence supporting the trial judge's conclusion. For example, Jones' witness Codispoti, who was "Jones' main man on site for the duration of project" and whose evidence the trial judge found to be forthright and given without embellishment, agreed that it was a fairly frequent occurrence that items were determined and agreed and then the change order was issued subsequently as a formality. There is no basis to interfere with the judge's finding in this regard.

[51] There is ample evidence to support the conclusion that as early as July 29, Jones had repudiated the MOU for reasons which the trial judge characterized as "simply a fabrication", that Mitsui agreed to a meeting of the "committee" but on condition that Mitsui was not recognizing in any way that the MOU was invalid and that these efforts were directed to reaching some new accommodation with Jones. Given that these efforts were expressly subject to Mitsui's position as to the validity of the MOU, there was no error in failing to treat participation in these efforts as some sort of admission that the

MOU was uncertain or incomplete.

[52] I will briefly mention a second legal principle. It relates to Jones' submission that the efforts after the MOU to make its meaning more precise tend to show that it fails for uncertainty. However, an agreement does not fail for uncertainty simply because it may be difficult to interpret. To paraphrase Lord Wright, an agreement is unenforceable because of uncertainty only in those infrequent cases in which the words used by the parties, considered broadly and untechnically and with due regard to all the just implications, do not evince any definite meaning on which the court can safely act: see **G. Scammell and Nephew, Ltd. v. Ouston (H.C. and J.G.)**, [1941] A.C. 251 (H. L.(E.)) at 268. It is important not to equate difficulties of interpretation with uncertainty in law.

[53] Jones argues that Mitsui prepared a draft change order that spelled out a schedule of payments of the increased contract price and that this "..evinces an intention to make specific payment terms a part of the change order which was necessary to give effect to the MOU." This argument is neither factually nor logically correct. The trial judge found that Mitsui was open to negotiating an accelerated payment schedule but that in the absence of agreement, the payment provisions of the contract would govern. That finding is supported by the evidence and is, as the judge pointed out, consistent with the wording of the MOU. Moreover, given that finding, Mitsui's willingness to address the possibility of accelerated payment does not support the inference that such an accelerated payment was an essential term of the MOU.

[54] Jones takes exception to what it characterizes as a finding by the judge that terms of payment were discussed before the MOU was signed and says that the evidence was clear that the discussion was in fact after the signing. Even if that is the correct implication to draw from the trial judge's reasons, this imprecision in the chronology does not at all put in doubt the basic finding that, absent some other agreement, the terms of the main contract would govern. It is consistent with the terms of the MOU itself which, as noted, preserves the terms of the main contract. It is fully supported by the evidence of witnesses whom the trial judge believed and consistent with the behaviour of witnesses he found less credible. For example, the timing of this payment was not referred to by Mr. Walcott in his July 29 letter or in the letter of September 4, drafted by in-house counsel with Walcott's approval, which purported to "officially and legally" retract the MOU. In essence, the trial judge found that Mitsui said it would look into the possibility of expediting payment but that the MOU was not in any way conditional on the accelerated payment being made. There is no error justifying appellate intervention with respect to that finding.

[55] Jones makes similar arguments with respect to the preparation of draft changes to Principles 2 and 3 of the MOU. Jones' main arguments on this point are first, that Mitsui's witness Akikawa admitted that Principle 2 required modification and second, that the preparation by S & L about two weeks after the execution of the MOU of some draft wording for possible amendment of the wording of Principle 2 constituted an admission that Principle 2 was uncertain.

[56] The trial judge did not err in failing to treat certain portions of the evidence of Mr. Akikawa as any sort of admission that Principle 2 was uncertain. The passages relied on by Jones tend to show there could be disputes about the interpretation and application of Principle 2. The submission in Jones' factum that "Akikawa testified that the wording of the MOU would have to be amended to enable anyone to define the scope of work.." or that his evidence shows that "... Principle 2 of the MOU was a completely unworkable way of defining the scope [of the work] ..." is simply not a fair reading of his testimony on this point. There is no error on the part of the trial judge in failing to accept it as such. In any event, evidence of difficulty of interpretation or application falls far short of showing legal uncertainty. An agreement is not unenforceable for uncertainty because its meaning is not self evident or there is a dispute about how it applies to particular facts.

[57] Jones also argues that the attempts by S & L to draft clarifications of the Principles 2 and 3 is, "proof positive" that Mitsui and S & L acknowledged that the definition of the scope of the work in the MOU was uncertain. I do not agree. The trial judge found that there were attempts after Jones' repudiation of the MOU to make it acceptable to them. There was clear evidence, including from at least one of Jones' witnesses, that these efforts were expressly subject to Mitsui's position that the MOU was binding. The trial judge did not err in failing to treat these attempts to clarify or change the MOU in those circumstances as any sort of admission of uncertainty or incompleteness.

[58] It is suggested in various places in Jones' factum that there was an undertaking to assist Jones with claims by the subcontractors. It is not argued that this was a condition of the validity of the MOU and the point was not pursued either in the written or oral submissions and I will, therefore, say nothing further about it.

[59] The express findings of the trial judge which are challenged on appeal are fully supported by the evidence. None of the evidence to which we have been referred that the trial judge did not expressly review in his reasons is, in my opinion, overriding and determinative in the assessment of the balance of probabilities with respect to these factual issues. Accordingly, I would not disturb any of the trial judge's factual findings which have been challenged by Jones on appeal.

(b) Legal Issues:

[60] There are two legal issues to be resolved on appeal: first, whether the trial judge erred in finding that the MOU was a valid and legally binding contract and second, whether the trial judge erred in finding that MPA was a party to the MOU. I turn first to the question of whether the MOU was a legally binding contract.

(i) The intention to contract:

[61] The trial judge found that Nitta (for Mitsui) and Walcott (for Jones) intended, by signing the MOU, to enter into a legal contract and that they were firmly of the opinion the signing of the MOU resolved all outstanding disputes in relation to the project. I have concluded that these findings should not be disturbed on appeal.

[62] These findings are highly relevant to the evaluation of Jones' arguments that the MOU is not a binding contract. Jones argues, for example, that the effectiveness of the MOU was conditional on further agreements and the execution of a change order. Whether the MOU is conditional on further agreement is a question of construction (see G. H. Trietel, **supra** at 53 - 54; **Sydney Steel Corporation v. Mannesmann Pipe and Steel Corporation** (1986), 75 N.S.R. (2d) 211 (S.C.T.D.) at 229). As Burchell, J. pointed out in **Mannesmann**, where the parties intended to be bound, courts will favour a construction that the agreement is not conditional: at § 55.

[63] The parties' intention to create legal obligations is also relevant to the question of certainty. As stated by Lord Wright in **Scammell v. Ouston**, **supra**, the court, if satisfied that the intention to contract existed, will do its best to give effect to that intention.

[64] The same principle applies to the issue of completeness. To be enforceable, an agreement must contain all essential terms. The determination of what terms are essential, however, varies with the nature of the transaction and the context in which the agreement is made. As Morden, J.A. said in **Canada Square Corp. et al. v. VS Services Ltd. et al.** (1981), 34 O.R. (2d) 250 (C.A.) at 262, where the parties intended to create a binding relationship and were represented by experienced businessmen, ".. a court should not be too astute to hold that there is not that degree of certainty in any of its essential terms which is the requirement of a binding contract."

[65] Therefore, with respect to all of Jones' arguments concerning certainty and completeness, the fact that the parties to the MOU intended it to be a binding contract is highly relevant. All of the submissions by Jones relating to completeness and certainty must, therefore, be considered in light of the fundamental factual finding that the parties intended to conclude a binding agreement and, with the signing of the MOU, thought that they had done so.

(ii) Agreement to agree:

[66] Jones submits that the MOU is not a contract because its terms require the parties to reach agreement in three areas: suitable modifications of the contract to make the new principles set out in the MOU a part of the contract; review and revision of the contract to take account of the MOU generally and the development and signing of a suitable change order. In essence, the submission is that the operation of the MOU is conditional on agreement being reached on contract modifications to reflect the MOU and embodiment of those modifications in a change order.

[67] An agreement is not incomplete simply because it calls for some further agreement between the parties (H. G. Beale et al, **Chitty on Contracts** (28th ed.1999) at 2-119) or because it provides for the execution of a further formal document (G. H. Trietel, **The Law of Contract**, **supra** at 51 - 2). The question is whether the further agreement or documentation is a condition of the bargain, or whether it is simply an indication of the manner in which the contract already made will be implemented. This is

a matter of the proper construction of the agreement: see **Calvan Consolidated Oil & Gas Co. Ltd. v. Manning**, [1959] S.C.R. 253 at 261 citing with approval **Von Hatzfeldt-Wildenburg v. Alexander**, [1912] 1 Ch. 284 at 288 - 9; see also G. H. Trietel, **supra**, at 52. This exercise of interpretation must take account of the document as a whole as well as of the 'genesis and aim of the transaction' of which it forms part: see, for example, **Hillas & Co. Ltd. v. Arcos Ltd.** (1932), 43 Lloyd's L. Rep. 359 (H.L.) per Lord Wright at 368 and I. N. Duncan Wallace, **Hudson's Building and Engineering Contracts** (11th ed. 1995) at 114. As noted earlier, where, as here, the parties intended to be bound, the courts will tend to favour a construction that the agreement is not conditional.

[68] The submission that the MOU was conditional on future agreements and a change order, in my view, finds no support in the text of the MOU. None of the traditional language (such as "subject to contract", or "subject to the parties reaching further agreement") was used to show the intent that the MOU was not to be binding pending the signing of further documentation.

[69] The purpose of the MOU was "... to eliminate current misunderstandings that exist relative to Jones' compensation... under the existing contract." It states that Jones' compensation "... is hereby increased to C$118 Million based on the following agreement relative to future adjustments." (emphasis added) The completion date is revised by the MOU. It states that Jones will proceed so that the plant completion date is between July 1 and July 15, 1993 and specifically adds that this does not change the original date at

which liquidated damages penalties become effective. The MOU makes clear it "...does not change any of the remaining provisions of the existing contract..." and sets out three Principles relating to change orders. It provides that "Jones agrees to void all of the claim letters issued to date to Mitsui and the request for extension of time dated July 15, 1992." It provides that "[f]uture adjustments to compensation are not excluded by this agreement". The three Principles use mandatory language consistent with contractual intent. The MOU then provides that: "Both parties agreed to modify the contract accordingly so that these principles can be complied with." With respect to the change order issue, the MOU provides that "... [n]o time has been set for the completion of the necessary contract review and preparation of the change order to accomplish this memorandum of understanding. However, both parties agreed to do their best to develop a suitable change order in a timely fashion."

[70] The parties used clear language in the Principles when they intended that a change order would be a condition. For example, Principle 2 (relating to future design changes) stipulates that "work will not be started on [such] changes until a change order has been issued by Mitsui to Jones." As the trial judge noted, this provision represents a "tightening up" of wording in the main contract. This language in Principle 2 may be contrasted with that used in relation to the change order to accomplish the MOU. No language suggesting or even consistent with the signing of a change order being a condition of the effectiveness of the MOU was used. The parties agreed "to develop" a "suitable" change order "to accomplish" the MOU.

[71] The prior practice between the parties shows that the signing of a change order was not intended as a condition precedent to the effectiveness of the MOU. As Jones' witness Codispoti testified and the trial judge found, the practice between these parties leading up to the MOU was that the signing of a change order was a formality that evidenced a previously concluded agreement. It follows that not only are the words used by the parties in the MOU inconsistent with a change order being a precondition to the operation of the MOU, but the practice of the parties is also inconsistent with it being so.

[72] The contrary view makes no commercial sense in the context of the dealing between the parties leading to the execution of the MOU. The MOU was signed to resolve a pressing and significant problem. Time was of the essence; Walcott himself objected to any delay in signing it. In view of that, the fact that the MOU provides that no time was set for completion of the necessary contract review and preparation of the change order supports the view that the parties did not intend the effectiveness of the agreement recorded in the MOU to be conditional on those steps. Moreover, the MOU was negotiated personally by senior executives after attempts to resolve the dispute at the working level had failed. The argument that the MOU was conditional on agreement being reached on other matters at the working level is improbable in light of the background and purpose of the MOU. That proposition amounts to saying that these senior executives, faced with a major and pressing problem, thought they had solved the problem by signing a document which, in effect, simply referred important issues back to the working level which had failed to resolve them over months of negotiation.

[73] For these reasons, I reject Jones' argument that the trial judge erred in either law or fact in concluding that the legal effectiveness of the MOU is not conditional on the contract review or the signing of a change order.

(iii) Certainty and completeness:

[74] A contract must contain all essential terms. If any are absent, there is no completed, binding agreement. The terms of a contract must also be sufficiently certain. The question of whether terms are certain asks whether the court can give reasonably definite meaning to what the parties have said.

[75] Jones' arguments about completeness overlap to some extent with its submissions just discussed. They are distinct arguments, however, in this sense: the submission that the MOU is at most an "agreement to agree" is that the effectiveness of the MOU was conditional on further agreement being reached. The submission about completeness is that, absent agreement on certain points, there was no contract because these missing terms were essential to its legal validity.

[76] In relation to completeness, Jones argues that the MOU lacks payment terms, that such terms are essential and therefore failure to include them makes the MOU unenforceable. As noted, where, as here, experienced business people intended to create a binding agreement, the court should not be astute to find essential terms lacking.

[77] On this point, the trial judge held that the MOU specifically preserved the terms of the main contract except where altered by the MOU, that Table 33 of the main contract set out the payment schedule and that it was the practice of the parties to apply this schedule to any extra payments which resulted from changes or additions to the work. He also noted, and appears to have accepted, the evidence adduced by Mitsui that, while Mitsui was willing to attempt to work out an accelerated payment for the increased contract price specified in the MOU (and in fact made a specific offer in this regard), in the absence of such agreement, the contract terms of payment would apply. The trial judge held that "[i]t would be a simple clerical matter [to] adjust [the table in the contract setting out payment terms] to comply with the revised plant completion date as set out in the MOU."

[78] I understand the judge's conclusion to be that terms of payment were not lacking because they could be implied from the terms of the main contract and the practice of the parties. In other words, assuming that detailed terms of payment were essential to the validity of the MOU, such terms could fairly be implied on the basis of the terms of payment under the main contract (which were preserved in the MOU) and the practice of parties in relation to increased payments resulting from change orders.

[79] Jones' attack on this conclusion is primarily factual. First, it is argued that there was in fact no agreement on amended payment terms at the time the MOU was signed. This, of course, is not significant if, as the trial judge held, it was reasonable to imply that the main contract and the practice of the parties in relation to terms of payment governed

in absence of agreement to some other approach.

[80] Jones also argues that the terms of payment are uncertain because it is unclear how and when the increased payments would be paid and how and when the remaining original contract amount would be paid given the extension in the MOU of the time for completion. At this point, the argument relating to completeness slips into an argument about certainty. In effect, the submission here is not that terms of payment are entirely lacking, but that the terms of the main contract cannot be applied with sufficient certainty to the changes in price and completion date effected by the MOU.

[81] Where parties reach agreement, courts are reluctant to find that it cannot be given meaning. From early times, the common law has accepted the principle that, where possible, words should be understood so as to give effect to the agreement rather than to destroy it: *verba ita sunt intelligenda ut res magis valeat quam pereat*. This principle was stated by Lord Wright in **Scammell v. Ouston**, **supra** at 268:

> ... the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation.

[82] The question of certainty does not relate to the correct meaning of the words, but rather to whether the words are capable of being given a reasonably certain meaning by the court: see **Marquest Industries Ltd. v. Wilsons Poultry Farms Ltd.** (1968), 1 D.L.R. (3d) 513 (B.C.C.A.) at 517 and **American Law Institute, Restatement of the Law (Second) Contracts** (2d), (1981), Vol. 1, Chapter 3, s. 33.

[83] To place Jones' submission in perspective, I note that the increase in price effected by the MOU was roughly $1.8 million above a total contract price (taking into account change orders previously agreed to by that time) of at least $116 million. As for the timing, the extension for completion set out in the MOU changes the time for completion from May 1, 1993 to between July 1 and July 15, 1993, a period of 2 to 2½ months. The length of construction under the main contract was from October 30, 1989 to May of 1993 and contemplated that 43 monthly payments would be made over that period. The contract also makes provision for delay in payments if the contract milestones are not met.

[84] The trial judge heard evidence that significantly larger increases to the contract price had been made without discussion or reference to terms of payment. He also heard evidence from Codispoti, Jones' project manager, that there was no difficulty in applying the payment terms of the main contract to these increased payments and as well considerable evidence about the practice of the parties regarding payment for increased amounts resulting from change orders.

[85] In light of this evidence, and in the context of this $116 million contract, the submission that the MOU should be found ineffective because it did not specifically set out revised terms of payment for $1.8 million is simply unreal. Similarly, in the context of this contract, the submission that the MOU should fail for uncertainty because it does not expressly stipulate how payments will be spread over the two month extension to a 43 month contract seems to me to be contrary to commercial reality. Jones says that the

holding of the trial judge is “incredible” and ignores “reality and the evidence.” With respect, this language more aptly characterizes Jones’ submission than the trial judge’s holding.

[86] What the law requires is reasonable certainty. Where, as here, the argument is that the agreement is so uncertain that it fails, our task is not to provide a definitive interpretation of the MOU but to determine whether it is capable of being given a reasonably certain interpretation. In my view, the terms of the MOU, read in the context of the main contract and the practice of the parties, permit the court to determine the intention of the parties with reasonable certainty. Settling that interpretation, if a dispute arises about when payments were to have been made, will be for the trial judge in the next phase of this litigation.

[87] That brings me to Jones’ main argument relating to certainty. The submission is remarkably narrow. Its focus is the last eight (8) words of Principle 2 in the MOU. Jones says that the MOU relates to the work as described in (to quote the MOU, Principle 2) “... design documents which have been generated and issued by the engineer on or before June 1, 1992 and/or those currently being discussed with Jones”. The submission is that the concluding words (“and/or those currently being discussed with Jones”) are so uncertain that the MOU must fail.

[88] In my view, this submission confuses difficulties of interpretation or proof with the sort of uncertainty that will result in an agreement being unenforceable. While it may

be less than obvious what the words “those currently being discussed with Jones” were intended to refer to, they are simple words capable of being given a sensible and reasonably definite meaning. That an interpretation is difficult or controversial does not mean the agreement fails for uncertainty. Similarly, the application of those words to the dealings between the parties may not be straightforward; there may be factual disputes about what was and what was not being discussed with Jones at the relevant time. That, however, is a problem of fact finding, not of legal uncertainty.

[89] I conclude, therefore, that the trial judge did not err in rejecting Jones’ arguments that the MOU failed because it was conditional on further agreements or because it was incomplete or uncertain.

[90] Jones stressed that there is additional documentation relating to the post July 29 period in relation to which privilege is claimed and that, should it succeed in its attack on the trial judge’s finding of privilege in relation to these documents, a new trial should be ordered on the MOU issue.

[91] I agree with the disposition of the privileged document appeal proposed by Roscoe, J.A. and, therefore, the question arises of whether the additional production ordered entitles Jones to a new trial on the MOU issue.

[92] Neither Jones nor Mitsui insisted on their rights under the Civil Procedure Rules to require the other to provide a list of documents specifying the documents for

which privilege was claimed. By the opening of the trial, Jones knew the nature of the documentation which is the subject of the privileged document appeal and had the trial judge's ruling with respect to it. No adjournment was sought. No appeal was filed until the 13th day of the trial, and a new trial was not sought in that notice of appeal.

[93] In my view, given that Jones did not insist on its rights under the Rules or attempt to have the judge's ruling on the documents reviewed before completion of the trial, a new trial should be ordered only if our review of the additional production indicates that there is a serious risk of substantial injustice if a new trial is not ordered. Having reviewed the documents ordered to be produced in the privileged documents appeal, in light of the evidence and arguments and trial, there is, in my view, no serious risk of substantial injustice if a new trial is not ordered on the MOU issue. I would, therefore, not order a new trial of the MOU issue on account of the additional production ordered in the privileged documents appeal.

IV.2 Is the MOU binding on Mitsui?

(a) Findings of the trial judge:

[94] On its face, the MOU is between Mitsui & Co. and Jones Power; it contains no explicit reference to Mitsui (Point Aconi). The main contract was between Mitsui (Point Aconi) and Jones Power. The trial judge found that nothing turned on this difference and that at all times germane to this matter, Mitsui Point Aconi was functioning as an operating adjunct or agent of its parent company. He further found that both Mitsui Point

Aconi and Jones Power were simply “single purpose” companies incorporated for ease of administration and taxation considerations. Mr. Toda of Mitsui and Co. Ltd., he found, had full responsibility for MPA and appointed whatever on site staff was required. The trial judge also found that Mr. Nitta had actual authority from his principal, MPA, to carry on the negotiations and to enter into any settlement agreement which derived from them.

(b) Positions of the parties:

[95] Jones asserts that MPA is not a party to the MOU and therefore cannot take advantage of its terms unless it shows that Mitsui and Co. was acting as its agent or its trustee in entering into the MOU. The submission with respect to agency is that the trial judge’s finding that MPA was an operating adjunct or agent of Mitsui & Co. does not assist Mitsui; the key point, in Jones’ submission, is that there is no evidence to support the finding that Nitta signed as agent for MPA.

[96] Jones says that the trial judge found that Nitta received authority to act as agent for MPA from Toda, but there is no evidence that Toda himself had the authority to do so. Jones notes that in August of 1992 (i.e. after the signing of the MOU), a power of attorney, backdated to March 27, 1992, was issued to Nitta to act for MPA and this shows that “... MPA was concerned about Nitta’s authority for the July 28, 1992 meeting.... and was attempting to vest him with the necessary authority after the fact.” Moreover, the trial judge erred, it is submitted, when he said that the Power of Attorney was issued to Nitta by Toda when it in fact was issued by Ohara as president of MPA. It

follows, says Jones, that, contrary to the judge's holding, the power of attorney could not be confirmatory of earlier authority conferred by Toda. Jones says that the trial judge "... ignored the law and the facts and committed obvious errors in his simplistic effort to find that Nitta..." was authorized to act as agent for MPA.

[97] Briefly stated, Mitsui's response is that the trial judge's finding that Nitta had actual authority is fully supported by the evidence.

[98] I do not think that any issue of privity of contract, trusteeship or piercing the corporate veil arises in this case. The question is whether the trial judge erred in finding that Nitta had authority from MPA to sign the MOU on its behalf. The linchpin of Jones' argument is that the trial judge's finding of Nitta's authority is premised on Toda having authority to confer on him and that Toda was not shown to have such authority.

[99] Jones submits that the parties deliberately named the corporate entities they did although no plausible explanation is offered as to why that choice would be made deliberately. To accept this proposition would have the effect of holding that the parties deliberately chose these corporate entities, for no apparent reason, even though that choice thwarted their intention to enter into a binding settlement of their disputes. The proposition need only be stated to be dismissed. But there is more. Contrary to Jones' submission that the parties were careful throughout the project to preserve the separate corporate identities of MPA and Jones Power, the record is replete with examples of instances in which the parties' dealings did not pay careful attention to the distinctions

between the various Mitsui and Jones entities. The description of the parties in the MOU was taken by an engineer (Mr. Doran) from the business cards of Messrs. Walcott and Nitta. I cannot accept the proposition that the choice of named parties to the MOU was deliberate.

[100] I do not read the judge's reasons as having based the finding of Nitta's authority solely on the appointment of him to deal with the issue by Toda. The trial judge simply found that Nitta had actual authority from his principal, MPA, to carry out the negotiations and to enter into an agreement which might result from them. There was considerable other evidence beyond that in relation to Nitta's appointment by Toda which supports the finding of Nitta's authority. For example, that evidence shows that Nitta worked throughout the negotiations with Akikawa. Akikawa was MPA's project manager with responsibility for commercial matters in relation to the project. Nitta signed the MOU, not only in the presence, but at the urging of Mr. Akikawa. Even if, as Jones submits and contrary to the whole course of dealing with respect to this contract, Mr. Toda lacked authority to confer on Nitta, I see no answer to the argument that Akikawa could confer such authority and did so by his presence and request to Nitta to proceed at the time of the signing of the MOU. Accordingly, I reject Jones' submission that MPA is not bound by the MOU.

V. Disposition:

[101] I would dismiss the appeal with costs.

Cromwell J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.