IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

Not Restricted

ARBITRATION LIST
No. 2464 of 2012

BIOSCIENCES RESEARCH CENTRE PTY LTD — Plaintiff

v

PLENARY RESEARCH PTY LTD — Defendant

JUDGE:	CROFT J
WHERE HELD:	Melbourne
DATE OF HEARING:	21 May 2012
DATE OF JUDGMENT:	19 June 2012
CASE MAY BE CITED AS:	Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd
MEDIUM NEUTRAL CITATION:	[2012] VSC 249

CONTRACT – construction contract – extension of time claim – whether disputed claims to be referred to an independent expert or to arbitration for determination – interpretation and construction of the dispute resolution regime – intention of parties – nature of dispute and construction issues – appropriateness of determination by independent expert - *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 - *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646.

ARBITRATION – clause permitting resolution of extension of time dispute by arbitration – whether binding arbitration agreement - *Manningham City Council v Dura (Australia) Constructions Pty Ltd* (1999) 3 VR 13 (CA) – *Commercial Arbitration Act (Vic)* 1984, sub-s 53(1).

WORDS AND PHRASES – interpretation of the word 'may' in dispute resolution clauses - *Oakton Services Pty Ltd v Tenix Solutions IMES Pty Ltd* [2010] VSC 176.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J. Rowland QC with Ms K. Stynes	Clayton-Utz
For the Defendant	Mr C.M. Scerri QC	Allens

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HIS HONOUR:

Introduction

1 The context in which this proceeding comes before the Court is an agreement dated 30 April 2009 between Biosciences Research Centre Pty Ltd ("the plaintiff") and Plenary Research Pty Ltd ("the defendant") whereby the defendant agreed to design, construct and operate a biosciences research facility at the Bundoora Campus of Latrobe University ("the Project Agreement"). The Project Agreement was varied by an amending deed dated 16 June 2011 ("the Amending Deed").

2 By a contract dated 13 May 2009, the defendant subcontracted the design and construction of the Biosciences Research facility to Grocon Constructors (Vic) Pty Ltd ("the Builder").

3 The Project Agreement requires that:

(a) 'Technical Completion'[1] be achieved by 19 October 2011, unless adjusted under clause 26 of that Agreement; and

(b) 'Commercial Acceptance'[2] be achieved by 30 November 2011, unless adjusted under clause 26.

4 The circumstances in which the defendant may claim and be awarded an extension of time for compliance with the dates for Technical Completion and Commercial Acceptance are provided for in subclauses 26.4 to 26.9 of the Project Agreement.

5 The defendant submitted three claims for extension of time ("the EOT Claims") in October 2011, purportedly in accordance with clause 26 of the Project Agreement.[3]

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1 'Technical Completion' is defined in Clause 1.1 of the Project Agreement in the following terms:
> '**Technical Completion** means that stage of the works where all of the Technical Completion Criteria and Completion Requirements with respect to Technical Completion have been satisfied to the reasonable satisfaction of the Independent Reviewer.'

2 'Commercial Acceptance' is defined in Clause 1.1 of the Project Agreement in the following terms:
> '**Commercial Acceptance** means that stage of the Works where all of the:
> (a) Completion Requirements with respect to Commercial Acceptance; and
> (b) Commercial Acceptance Criteria,
> have been satisfied, to the reasonable satisfaction of the Independent Reviewer (where applicable) and the Project Director.'

3 The notices are contained in Project Company Notices from the defendant to the plaintiff dated: 17 October 2011 (ref: Plenary-PROJCN-001888); 17 October 2011 (ref: Plenary-RPOJCN-001889);

The three claims were, in summary:

(a) the PC3 claim[4] relating to the installation of insect mesh to the area referred to as the PC3 suite to accommodate insect research in that area;

(b) the Accreditation claim[5] relating to compliance of the facility with numerous accreditation requirements; and

(c) the Additional Testing claim[6] relating to the defendants proposed methodology and extent of testing for validating that the Facility is fit for purpose including complying with all the accreditation requirements.

6 In November 2011, the plaintiff rejected the defendant's EOT Claims.[7]

7 On 16 December 2011 the defendant served on the plaintiff a "Notice of Dispute and Submissions under clause 50.2 of the Project Agreement" disputing the rejection of its EOT claims ("the Notice of Dispute").[8]

8 In summary, the defendant claims and seeks the following outcomes by the Notice of Dispute:

(a) an extension of time of 226 calendar days to the 'Date for Technical Completion'[9] and the 'Date for Commercial Acceptance';[10]

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25 October 2011 (ref: Plenary-PROJCN-001904); 16 October 2011 (ref: Plenary-PROJCN-001886) and 24 October 2011 (ref: Plenary-PROJCN-001899).

4 Exhibit MWE1 to the affidavit of Michael William Earwaker sworn 1 May 2012.

5 Exhibit MWE2 to the affidavit of Michael William Earwaker sworn 1 May 2012.

6 Exhibit MWE3 to the affidavit of Michael William Earwaker sworn 1 May 2012.

7 The rejections are contained in the following communications from the Project Director to the defendant dated: 17 November 2011 (ref: MPV-PROJDN-000703); 14 November 2011 (ref: MPV-PROJDN-000696) and 14 November 2011 (ref: MPV-PROJDN-000694).

8 'Notice of Dispute' is defined in clause 1.1 of the Project Agreement in the following terms:

> '**Notice of Dispute** means a written notice specifying:
> (a) that the party giving the notice disputes a fact, opinion, matter or thing;
> (b) detailed particulars concerning the fact, opinion, matter or thing in dispute;
> (c) the legal basis for the dispute, whether based on the terms of this Agreement or otherwise, and if based on the terms of this Agreement, clearly identifying the relevant terms;
> (d) the facts relied upon to dispute the fact, opinion, matter or thing; and
> (e) the outcome sought (including the quantum where applicable).'

9 'Date for Technical Completion' is defined in clause 1.1 of the Project Agreement in the following terms:

(b) payment of its 'Financing Delay Costs'[11] and 'Prolongation Costs';[12]

(c) agreement that the dates for payment of incentive payments under the Project Agreement as amended by the Amending Deed are adjustable in accordance with any extensions of time to the Date for Commercial Acceptance; and

(d) on the basis of obligations in its contract with the Builder, that the Builder be allowed to participate in meetings, discussions and negotiations between the plaintiff and defendant in relation to the Notice of Dispute.

9 The plaintiff claims to have exercised its right under subclause 26.16 of the Project Agreement to refer the dispute, the subject of the Notice of Dispute, for resolution under the "Accelerated Dispute Resolution Procedures"[13] set out in clause 52 of the Project Agreement.[14]

10 The issue that has arisen between the parties as a result of the service of the Notice of Dispute is whether, under the provisions of the Project Agreement, the dispute the subject of the Notice of Dispute is to be determined by an 'Independent Expert'[15]

'**Date for Technical Completion**' means the date specified in the Technical Completion Certificate as the date on which Project Co achieves Technical Completion or as otherwise determined in accordance with this Agreement.'

10 'Date for Commercial Acceptance' is defined in clause 1.1 of the Project Agreement in the following terms:

'**Date for Commercial Acceptance**' means the date specified in the Commercial Acceptance Certificate as being the date on which Project Co achieves Commercial Acceptance or as otherwise determined in accordance with this Agreement which can be no earlier than the date which is 6 weeks after the Date of Technical Completion.'

11 'Financing Delay Costs' is defined in clause 1.1 of the Project Agreement in the following terms:

''**Financing Delay Costs** means the financing delay costs actually incurred by Project Co as part of the Project Management Plan, and as amended and updated, in accordance with the terms of this Agreement.'

12 'Prolongation Costs' is defined in clause 1.1 of the Project Agreement in the following terms:

'**Prolongation Costs** means the costs (excluding any Financing Delay Costs) properly and reasonably incurred by Project Co, directly as a consequence of a Compensable Extension Event and calculated in accordance with Clause 26.17(b)(ii) and the Change Compensation Principles.'

13 'Accelerated Dispute Resolution Procedures' is defined in clause 1.1 of the Project Agreement in the following terms:

'**Accelerated Dispute Resolution Procedures**' means the procedures established under Clause 52 to hear and resolve Disputes referred to the Independent Expert.'

14 The exercise of this entitlement is claimed to have been made by the plaintiff in its written communications with the defendant on 9 January 2012 (ref: MPV-PROJDN-000736) and 25 January 2012 (ref: MPV-PROJDN-000745).

15 'Independent Expert' is defined in clause 1.1 of the Project Agreement in the following terms:

'**Independent Expert** means a person with suitable expertise and experience required to

under the 'Accelerated Dispute Resolution Procedures' set out in clause 52 of that Agreement or whether, subject to the possibility of further agreement between the parties as to the manner of dispute resolution, the Notice of Dispute must proceed to arbitration as a result of the operation of clauses 51 and 53 of the Project Agreement.

11 By an Originating Motion between Parties dated 1 May 2012 (the "Originating Motion"), the plaintiff seeks the following relief or remedy:[16]

(a) A declaration that clause 26.16 of the Project Agreement requires that the dispute the subject of the Notice of Dispute be resolved by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures set out in clause 52 of the Project Agreement;

(b) Alternatively, a declaration that clause 26.16 of the Project Agreement entitles the Plaintiff to refer the dispute the subject of the Notice of Dispute for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures set out in clause 52 of the Project Agreement, such referral to be binding on the defendant; and

(c) An interlocutory injunction restraining the defendant from taking any steps to commence, or to continue, an arbitration in relation to the matters the subject of its Notice of Dispute served on or around 16 December 2011;

(d) An order for such further or other relief as may appear to the Court to be just;

(e) An order that the defendant pay the plaintiff's costs of and incidental to the proceeding.

12 It is common ground between the parties that the Court has jurisdiction to hear and determine the matters raised by the Originating Motion. In particular, no issue is raised by either party that under the *Commercial Arbitration Act* 2011, or on some other basis, the matters raised must be determined otherwise than by the Court.

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determine a Dispute having regard to the nature of the Dispute, appointed in accordance with Clause 52.'

16 See Originating Motion, paragraph 21.

The Project Agreement

Provisions of the Project Agreement

13 The critical provisions of the Project Agreement are clauses 50 to 53 and subclause 26.16, which provide as follows:

> "**50. Dispute Resolution**
>
> **50.1 Disputes**
>
> If any dispute arises between the parties in respect of any fact, matter or thing arising out of, or in any way in connection with the Project, the Facility, the Designated Commercial Areas, the Site or this Agreement (**Dispute**) then the Dispute will be resolved in accordance with Clauses 50 to 53.
>
> **50.2 Notice of Dispute**
>
> If there is a Dispute, then a party may deliver to the other party a Notice of Dispute together with its submissions in relation to the Dispute. The submissions will set out its contentions including any relevant legal basis of claim.
>
> **50.3 Continuation of Obligations**
>
> Despite the existence of a Dispute between the parties or the referral of the Dispute for resolution in accordance with the Dispute Resolution Procedures:
>
> (a) Project Co will continue to execute the Works or perform the Services or perform its other obligations (as the case may be) under this Agreement; and
>
> (b) each party will otherwise comply with its obligations under this Agreement.
>
> **50.4 Urgent Relief**
>
> Nothing in Clauses 50 to 53 (each inclusive) or otherwise in this Agreement prevents a party from seeking urgent injunctive or declaratory relief from a court of competent jurisdiction.
>
> **51. Senior Negotiations**
>
> (a) Subject to this paragraph, where a Notice of Dispute and submissions have been delivered under clause 50.2, then the relevant JV Delegate and the Project Co Representative will meet and attempt in good faith to resolve the Dispute within 5 Business Days of the delivery of the Notice of Dispute under Clause 50.2.
>
> (b) If the meeting required by paragraph (a) does not occur or having occurred fails to resolve the Dispute, then:
>
> (i) a senior representative from Project Co; together with
>
> (ii) two authorised delegates from the JV Board, (representing the State and LTU, respectively),
>
> will meet and attempt in good faith, within 10 Business Days

of the delivery of the Notice of Dispute under Clause 50.2, to:

(iii) resolve the Dispute; or

(iv) agree that the Dispute be referred to either an Independent Expert under Clause 52 or to arbitration under Clause 53.

(c) If the meeting required by paragraph (b):

(i) does not occur; or

(ii) having occurred fails to resolve the Dispute or to agree on whether the Dispute should be referred to an Independent Expert or an arbitrator,

within 30 days of the delivery of the Notice of Dispute, the Dispute shall be referred to arbitration under Clause 53 save where the Dispute is in respect of a claim for payment of an amount which is equal to or less than $5 million in relation to the Works or $500,000 in relation to the Services (as set out in the Notice of Dispute) in which case the Dispute shall be referred for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures.

(d) Project Co acknowledges that any resolution of the Dispute under Clause 51(b)(iii) is subject to ratification by the JV Board and neither BRC Co nor the JV Parties will be bound by the resolution prior to any such ratification being provided by the JV Board.

52. Accelerated Dispute Resolution Procedures

(a) (**Agreement**): Subject to paragraph (b):

(i) if this Agreement expressly provides that a Dispute shall be referred for determination by an Independent Expert or by Accelerated Dispute Resolution then Clause 51 shall not apply and within 5 Business Days of the delivery of the Notice of Dispute the parties shall agree on an Independent Expert to determine the Dispute; or

(ii) if the Dispute is referred to an Independent Expert under Clause 51, then within 5 Business Days of:

A. agreement to refer the Dispute to an Independent Expert under Clause 51(b)(iv); or

B. the end of the 30 day period referred to in Clause 51(c),

the parties shall agree on an Independent Expert to determine the Dispute, either by appointing a person from the Accelerated Dispute Panel, appointing the Independent Reviewer to act as Independent Expert or by appointing some other person as agreed by the parties.

(b) (**Fail to agree on Independent Expert**): If the parties fail to agree on the Independent Expert within the time referred to in paragraph (a), then an Independent Expert will be nominated by the Minister (or the Minister's nominee) from the

appropriate discipline on the Accelerated Dispute Panel.

(c) (**Panel updates**): The parties may review and update the Accelerated Dispute Panel at any time but not more than once in every Quarter after the Date of this Agreement.

(d) (**Tripartite agreement**): The Independent Expert must execute an agreement with the parties which is substantially in the form of the Independent Expert Agreement within 10 Business Days of the agreement on the Independent Expert referred to in paragraph (a) or on appointment pursuant paragraph (b).

(e) (**Referral**): If the Independent Expert so agreed or nominated:

(i) does not execute a tripartite agreement with the parties which is substantially in the form of the Independent Expert Agreement in accordance with paragraph (d), then the Dispute will be referred to arbitration pursuant to Clause 53; or

(ii) has executed an agreement in accordance with paragraph (d), then the Dispute is referred to that Independent Expert for determination.

(f) (**Basis for determination**): The Independent Expert will make the determination based upon:

(i) the submissions provided by the party that issued the Notice of Dispute, which were delivered with that Notice of Dispute;

(ii) submissions provided by the respondent to the Notice of Dispute which, unless the Independent Expert extends the time for delivery, must be delivered within 5 Business Days of the Independent Expert signing the tripartite agreement referred to in paragraph (d); and

(iii) any further information provided by the parties in accordance with this Clause 52.

(g) (**Further information**): If the Independent Expert decides that further information is required the Independent Expert may call for further submissions, documents or information from either or both parties.

(h) (**Conference**): After the Dispute has been referred to him or her, the Independent Expert may call and conduct a conference, or any number of conferences, as the Independent Expert sees fit, between the parties but will give the parties reasonable notice of the matters to be addressed at any such conference.

(i) (**Representation**): The parties may be legally represented at any such conference.

(j) (**Privacy**): All conferences will be held in private except to the extent that representatives of the Key Subcontractors will be permitted to attend on reasonable notice, where the Dispute impacts upon the Works or the Services (as the case may be).

(k) (**Site visit**): The Independent Expert may, if he or she considers it necessary, visit the Site, the Designated

Commercial Areas or the Facility (as the case may be), and the parties will facilitate the Independent Expert's access to any of those areas.

(l) (**Timing**): The Independent Expert shall make his or her determination in relation to the Dispute:

(i) within 10 Business Days of the last of the steps set out in subparagraphs (a) to (k); or

(ii) within 30 Business Days of receipt of the respondent's submissions in accordance with paragraph (f)(ii),

whichever is the earliest. If the Independent Expert fails to make a determination within this time either party may refer the Dispute to arbitration in accordance with Clause 53.

(m) (**Not arbitrator**): The Independent Expert will act as an expert and not an arbitrator and may make a decision from his or her own knowledge and expertise.

(n) (**Final and binding**): To the extent permitted by Law, the determination of the Independent Expert will be final and binding on the parties, unless:

(i) the value of the determination is greater than $15 million; and

(ii) a party gives written notice to the other party within 15 Business Days of the determination referring the matter to arbitration under Clause 53.

(o) (**Mistake**): Where the Independent Expert's determination contains:

(i) a clerical mistake or an error arising from an accident slip or omission;

(ii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or

(iii) a defect of form,

the Independent Expert may correct the determination by written notice to the parties.

(p) (**Costs**): The cost of the Independent Expert will be borne equally by each of the parties to the Dispute unless the determination is made against the party who issued the Notice of Dispute, in which case the Independent Expert may determine that that party will bear all or a greater proportion of the Independent Expert's costs in respect of that matter.

(q) (**No liability**): The Independent Expert will not be liable to the parties arising out of, or in any way in connection with the expert determination process, except in the case of fraud.

(r) (**Change Compensation Principles**): Any dispute in relation to a matter to which the Change Compensation Principles are said to apply in this Agreement may be referred by either party for resolution by an Independent Expert and in making a determination, the Independent Expert must be instructed to

have regard to the Change Compensation Principles.

53. Arbitration

53.1 Arbitrator

(a) All Disputes referred to arbitration in accordance with Clauses 50 to 52 shall be finally determined in accordance with this Clause 53:

(i) before an arbitrator to be agreed between the parties within 5 Business Days of the Dispute being referred to arbitration; or

(ii) failing agreement within that period, an arbitrator nominated by the Australian Centre for International Commercial Arbitration (**ACICA**).

(b) The arbitrator will have power to grant all legal, equitable and statutory remedies and to open up, review and substitute any determination of an Independent Expert under Clause 52 which has been referred to arbitration.

53.2 Arbitration

(a) (**ACICA Rules**): Arbitration pursuant to this Clause 53 will be conducted in accordance with the rules of ACICA (**ACICA Rules**) current at the time of the reference to arbitration and as otherwise set out in this Clause 53.

(b) (**Seat**): The seat of the arbitration will be Melbourne in Victoria.

(c) (**Not court**): Nothing in this Clause 53 or the ACICA Rules is intended to or shall modify or vary the rights of appeal in the *Commercial Arbitration Act* 1984 (Vic).

(d) (**Conduct of arbitration**): The parties agree that:

(i) they have entered into an arbitration agreement under this Clause 53 for the purposes of achieving a just, quick and cheap resolution of any Dispute or difference;

(ii) subject to Clause 53.2(f), any arbitration conducted pursuant to this Clause 53 will not mimic court proceedings of the seat of the arbitration and the practices of those courts will not regulate the conduct of the proceedings before the arbitrator; and

(iii) in conducting the arbitration, the arbitrator must take into account the matters set out in subparagraphs (i) and (ii).

(e) (**Evidence in writing**): All evidence in chief will be in writing unless otherwise ordered by the arbitrator.

(f) (**Discovery**): Discovery will be governed by the substantive and procedural rules and practices adopted by the Federal Court of Australia at the time of arbitration.

(g) (**Oral hearing**): The oral hearing will be conducted as follows:

(i) the oral hearing will take place in Melbourne, Victoria and all outstanding issues must be addressed at the oral hearing;

(ii) the date and duration of the oral hearing will be fixed by the arbitrator at the first preliminary conference. The arbitrator must have regard to the principles set out in paragraph (d) when determining the duration of the oral hearing;

(iii) oral evidence in chief at the hearing will be permitted only with the permission of the arbitrator for a good cause;

(iv) the oral hearing will be conducted on a stop clock basis with the effect that the time available to the parties will be split equally between the parties so that each party will have the same time to conduct its case unless, in the opinion of the arbitrator, such a split would breach the rules of natural justice or is otherwise unfair to one of the parties;

(v) not less than 20 Business Days prior to the date fixed for the oral hearing, each party will give written notice of those witnesses (both factual and expert) of the other party that it wishes to attend the hearing for cross examination; and

(vi) in exceptional circumstances, the arbitrator may amend the date of hearing and extend the time for the oral hearing set under subparagraph (ii).

(h) (**Experts**): Unless otherwise ordered, each party may only rely upon on expert witness in respect of any recognised area of specialisation.

(i) (**Costs**): Any determinations made by the arbitrator under this Clause 53 shall include a determination relating to the costs of the reference and the award, including the fees and expenses of the arbitrator.

53.3 Proportionate Liability

Notwithstanding anything else, to the extent permissible by Law, the arbitrator appointed pursuant to this Clause 53, or the Independent Expert appointed pursuant to Clause 52 (as the case may be) will have no power to apply or to have regard to the provision of any proportional liability legislation which might, in the absence of this provision, have applied to any Dispute referred to arbitration or expert determination pursuant to this Agreement.

…

26.16 Extension of time disputes

Subject to Clause 26.10, any dispute about an extension of time claim or acceleration under this Clause 26, including a determination or rejection of an extension by the Project Director (or the period of time of any such extension) under Clause 26.9 may be referred by either

party for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures, and in making a determination, the Independent Expert must be instructed to have regard to the Change Compensation Principles and this Clause 26."

Dispute resolution regime

14 Both parties approached the proper construction of clauses 50 to 53 of the Project Agreement on the basis that this suite of provisions represents the agreed dispute resolution procedures under the Project Agreement. In other words, it is accepted these provisions "cover the field". In any event I am of the opinion that this is made clear by the provisions of the Project Agreement. Subclause 50.1 manifests this position in providing that any "dispute between the parties in respect of any fact, matter or thing arising out of, or in any way connected with the Project,[17] the Facility,[18] the Designated Commercial Areas,[19] the Site[20] or this Agreement …" will

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17 'Project' is defined in clause 1.1 of the Project Agreement in the following terms:

> '**Project** means the carrying our of the Works, the provision of the Services and the financing of both of these, including any Modifications, and Minor Works, the Final Refurbishment Works and the performance and observance of each obligation pursuant to or contemplated by any Project Document or Finance Document.'

18 'Facility' is defined in clause 1.1 of the Project Agreement in the following terms:

> '**Facility** means the facility to be designed, constructed, commissioned and maintained by Project Co in accordance with the terms of this Agreement including:
>
> (a) the entire physical infrastructure on the Site;
> (b) all Project Co Infrastructure required to be provided by Project Co in accordance with this Agreement;
> (c) the grounds and gardens within which the Facility is situated on the Site;
> (d) all Plant and Group 1 Equipment; and
> (e) any area occupied by BRC Co as a Long Term Occupation or Early Long Term Occupation,
>
> but, excluding the Designated Commercial Areas and the areas the subject of the Designated Commercial Area Works (other than, in each case, those areas referred to paragraphs (a) to (h) of the definition of Designated Commercial Areas which from part of the Facility).'

19 'Designated Commercial Areas' is defined in clause 1.1 of the Project Agreement in the following terms:

> '**Designated Commercial Areas** means the areas designated for use for the Permitted Commercial Purposes as shown on the Licence Plan, comprising the Designated Retail Area, the Designated Expansion Space and the Designated House Expansion Space, but notwithstanding this excludes from those areas:
>
> (a) all external elements including façade, roofing, balconies, external doors, windows and window screening;
> (b) all elements of the building structure and behind the wall services;
> (c) all walls or areas which are shared with or front onto the rest of the Facility or the Site or are visible from the University Campus;
> (d) External Infrastructure;
> (e) all elements (internal or external) that may impact upon the operation of the Facility or the carrying out of the BRC Functions or which need to be operational to demonstrate that the Design Requirements have been satisfied;
> (f) all amenities and general circulation space shared with the rest of the Facility or that may be used by Facility Users other than in their capacity as tenants of the

be resolved in accordance with clauses 50 to 53. Subclause 50.2 is the "gateway" to these dispute resolution provisions requiring, as it does, the delivery of a notice of dispute in accordance with the requirements set out.

15 It will be seen from the structure of clauses 50 to 53 of the Project Agreement that, in broad terms, the dispute resolution procedures set out potentially involve negotiations between senior representatives of both parties which may resolve matters in dispute and thus necessitate no further action. If, however, these negotiations are not successful, then the matters in dispute may, depending upon any agreement of the parties under clause 51 proceed either to the accelerated dispute resolution, expert determination, process provided for under clause 52 or proceed to arbitration under clause 53. An exception provided for within this suite of provisions is in respect of a claim for payment of an amount which is equal to or less than $5 million in relation to the Works[21] or $500,000 in relation to the Services,[22]

Designated Commercial Areas;
(g) all lift or escalator services; and
(h) that part of the Designated Expansion Space or Designated Glass House Expansion Space occupied by BRC Co as a Long Term Occupation or Early Long Term Occupation,
all of which items (a) to (h) form part of the Facility.

20 'Site' is defined in clause 1.1 of the Project Agreement in the following terms:
'**Site** means:
(a) for the purposes of the Design and Construction Phase, the area described and shown on the Licence Plan being the land on which the Facility and Designated Commercial Areas will be constructed; and
(b) from the Date of Commercial Acceptance, the area described and shown on the Licence Plan once reviewed and updated in accordance with Clause 7.3, being the land on which the Facility and Designated Commercial Areas are constructed and over which Project Co will require access in accordance with this Agreement.'

21 'Works' is defined in clause 1.1 of the Project Agreement in the following terms:
'**Works** means:
(a) all work necessary, whether inside or outside the Site, for the design, construction, completion and commissioning of the Facility, including the:
(i) procurement, installation and commissioning of all Group 1S Equipment, and Project Co Equipment; and
(ii) the decommissioning, transfer, installation and commissioning of all Group 2 Equipment;
(b) any BRC Co Modifications and Equipment Modifications; and
(c) any rectification of Defects,
excluding the Designated Commercial Area Works.

22 'Services' is defined in clause 1.1 of the Project Agreement in the following terms:
'**Services** means:
(a) the Building Maintenance Services;
(b) the Cleaning Services;
(c) the Grounds Maintenance Services;
(d) the Pest Control Services;

in which case the dispute "shall" be referred to resolution by an Independent Expert under the clause 52 (Accelerated Dispute Resolution Procedures) provisions.

16 The critical question that arises in the present circumstances is whether the provisions of clause 26.16 themselves trigger and mandate the application of the Accelerated Dispute Resolution Procedures under clause 52 where one a party has referred a dispute within the ambit of subclause 26.16 to an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures under the provisions of that subsection. The plaintiff argues for this position, but the defendant says, rather, that the effect of subclause 26.16 so enlivened by a party operates merely as an indication of the position of that party which may or may not form the basis of an agreement for the purposes of subclause 51(c)(ii) and thereby effect a reference to an Independent Expert under the Accelerated Dispute Resolution Procedures.

17 In broad terms, the plaintiff submits that the construction which the defendant seeks to place on these provisions would have the effect of rendering subclause 26.16 mere surplusage, with no work to do in the Project Agreement. This is, of course, at odds with a primary cannon of construction, namely that courts should prefer the construction of a document which gives work to all the provisions of that document, rather than one which, in effect, renders provisions redundant.[23] The defendant, on the other hand, submits that the detailed dispute resolution regime contained in

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(e) the Energy and Utilities Management Services;
(f) the Waste Management and Recycling Services;
(g) the Security Services;
(h) the Help Desk Services;
(i) the Administrative Services;
(j) Minor Works;
(k) Refurbishment Works; and
(l) all other activities and services required under the Services Specifications or Project Documents to be provided or undertaken by Project Co,

as modified in accordance with the terms of this Agreement.'

23 *Holdings Pty Ltd v Shiprock Holdings Pty Ltd* (2010) 15 BPR 28,199, [13] (Ball J); *Strand Music Hall Co Ltd, Re* (1865) 35 Beav 153 (Lord Romilley M.R):

'*The proper mode of construing any written instrument is, to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with other and more express clause in the same deed.*'

And see, generally, Lewison and Hughes, *The Interpretation of Contracts in Australia* (Lawbook Co., 2012) at [7.03].

clauses 50 to 53 of the Project Agreement is the exclusive regime for the resolution of disputes under that agreement and so, in the absence of a contrary agreement after a dispute has arisen under subclause 51(c)(ii) or prior to agreement as specifically required by the provisions of the Project Agreement, any dispute must be resolved by arbitration under clause 53.

18 In relation to the provisions of subclause 26.16, the defendant contends that its provisions simply identify that disputes about extensions of time under clause 26 may be referred to an Independent Expert under clause 52 if there is the necessary agreement between the parties under the clause 51 process; namely under subclause 51(c)(ii). The defendant says that the expert's jurisdiction requires the agreement of the parties and that, absent such agreement, there can be no requirement for a dispute to be submitted to expert determination. As a general proposition, this cannot, having regard to the provisions of subclause 52(b), require agreement as to the identity of the Independent Expert as provision is made for nomination of an individual if the parties are unable to agree in this respect.

19 Subclause 50.2 of the Project Agreement requires that if there is a dispute, a party may deliver to the other party a notice of dispute together with its submissions in relation to the dispute. The defendant delivered the Notice of Dispute and submissions to the plaintiff pursuant to subclause 50.2 and the parties agreed to suspend the dispute resolution processes under the Project Agreement until 9 January 2012. This is not a matter apparently in dispute.

20 The defendant submitted that where a notice of dispute and submissions have been delivered under subclause 50.2 the provisions of subclause 51(a) require that the relevant JV Delegate[24] and the Project Co Representative[25] meet and attempt in good

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24 'JV Delegate' is defined in clause 1.1 of the Project Agreement in the following terms:

> '**JV Delegate** means each of:
>
> (a) up to the last day that BRC Co is required to ensure that there is a Project Director, in accordance with Clause 5.1, the Project Director, and any person authorised to act as Project Director; and
>
> (b) as and from the date that a JV Executive Officer is appointed under Clause 5.4, the JV Executive Officer and any person authorised to act as JV Executive Officer,
>
> or, where the context requires, either one of them.'

25 'Project Co Representative' is defined in clause 1.1 of the Project Agreement in the following terms:

faith to resolve the "Dispute"[26] within five Business Days of the delivery of the Notice of Dispute. If the meeting required by subclause 51(a) does not occur or, having occurred, fails to resolve the dispute, then subclause 51(b) requires that senior representatives of each of the parties meet in an attempt, in good faith, within ten Business Days, of the delivery of the Notice of Dispute to:

(a) resolve the dispute; or

(b) agree that the dispute be referred to either an Independent Expert under clause 52 or to arbitration under clause 53 of the Project Agreement.

If there is no agreement, then the provisions of subclause 51(c)(i) require that within 30 days of the delivery of the Notice of Dispute, the dispute "shall be referred" to arbitration under clause 53, subject to the exception with respect to amounts under $5 million in relation to Works or $500,000 in relation to Services.

21 The defendant submits that the effect of the provisions of subclause 52(a)(i) is to provide an exception to the ordinary procedure to be followed under clause 51 of the Project Agreement upon the delivery of a notice of dispute. In relation to these provisions, the defendant stresses the opening words of these provisions, namely: "If this Agreement expressly provides that a dispute **shall be referred** for determination by an Independent Expert … then clause 51 shall not apply …" (emphasis added). Accordingly, it is submitted, that where a notice of dispute and submissions have been delivered under subclause 50.2, meetings in accordance with clause 51 (the "Senior Negotiations") must be conducted as required by subclause 51(a) and if the dispute is not resolved, then the remaining procedures provided for under clause 51 must be followed. This, it is said, applies generally to disputes under the Project Agreement except where the Project Agreement expressly requires that a dispute be referred to expert determination; relying for this proposition on the words of subclause 52(a)(i), which are set out and emphasised above.

'**Project Co Representative** means the person specified in Clause 5.9 or such other person as may be appointed in writing by Project Co from time to time to replace that person, with the written consent of BRC Co, in accordance with Clause 5.9.'

26 As defined in clause 50.1 of the Project Agreement, see paragraph 13.

22 Thus the defendant submits that the entitlement of either party to refer a dispute for determination by an Independent Expert arises only in four circumstances; namely, where:

(1) the Project Agreement expressly provides that a dispute "shall be" referred for determination by an independent expert;[27]

(2) the parties agree to refer the dispute to an Independent Expert following unsuccessful Senior Negotiations under clause 51;[28]

(3) the parties fail to agree whether the dispute should be referred to an Independent Expert or arbitrator following the Senior Negotiations under clause 51, and the claim is for payment of an amount which is equal to or less than $5 million in relation to Works or $500,000 in relation to Services;[29] and

(4) the meetings required by subclause 51(a) do not occur and the claim is for payment of an amount which is equal to or less than $5 million in relation to Works or $500,000 in relation to Services.[30]

23 Consequently, it is submitted by the defendant that, absent agreement between the parties, determination by an Independent Expert can only be triggered if the circumstances satisfy the requirements of subclause 52(a); and that there is no other basis upon which an Independent Expert's jurisdiction can be enlivened under the Project Agreement.

24 In the present circumstances, the defendant submits that the Independent Expert's jurisdiction is not enlivened because the Project Agreement does not expressly provide that the dispute "shall be" referred for determination by an Independent Expert. Consequently, the first circumstance to which reference is made[31] does not arise and nor, it is submitted, do the remaining three because the parties have not

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27 See Project Agreement, subclause 52(a)(i).
28 See Project Agreement, subclause 52(a)(ii)(A).
29 See Project Agreement, subclause 52(a)(ii)(B), when read with subclause 51(c).
30 See Project Agreement, subclause 52(a)(ii)(B), when read with subclause 51(c).
31 See above, paragraph 22.

agreed to refer the dispute to expert determination and because the dispute between the parties is for an amount which is greater than $5 million in relation to the Works. Further, the defendant submits that the dispute the subject of the Notice of Dispute involves more than extension of time claims – and is thus beyond the scope of subclause 26.16 in any event – and, additionally, that the entirety of the issues in dispute are not susceptible to expert determination.[32]

Construction of subclause 26.16

25 In construing a written document, the primary duty of a court is to endeavour to ascertain the intention of the parties from the words of the instrument itself.[33] As the meaning of any part of a document may be revealed or affected by other parts of the document, the instrument must be construed as a whole.[34] It follows that effect must be given, where possible, to each part of the document.[35]

26 Approaching the provisions of the Project Agreement on this basis, the defendant submits that subclause 26.16 does not mandate or oblige the referral of disputes regarding extension of time claims to an Independent Expert for determination and neither do its provisions entitle one party, namely the plaintiff in the present circumstances, to refer the dispute to an Independent Expert unilaterally.

27 In relation to the words of subclause 26.16 itself, the defendant emphasises the following provisions:[36]

> "… any dispute about an extension of time claim or acceleration under this Clause 26, including a determination or rejection of an extension by the Project Director (or the period of time of any such extension) under Clause 26.9, **may be referred by either party** for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures …"

The critical word in the emphasised words is, the defendant submits, the word

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32 See below, paragraphs 61 to 63.

33 *Australian Broadcasting Commission v Australasia Performing Right Association Ltd* (1973) 129 CLR 99, 109 (Gibbs J).

34 See *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99.

35 Lewison and Hughes, *The Interpretation of Contracts in Australia* (Lawbook Co., 2012) at [7.03].

36 *Defendant's Outline of Submissions* (17 May 2012), paragraph 62 (emphasis added in those submissions).

"may".

28 The defendant concedes that the use of the word "may" in subclause 26.16 could, when considered out of the context of the provisions of the Project Agreement, be consistent with either party having a right to refer a dispute to an Independent Expert under clause 52. However, it contends that when subclause 26.16 is read in the context of clauses 50 to 53 and, in particular, subclause 52(a) and subclause 51(c), it is apparent that there is no such unilateral right. The Project Agreement, it says, in clauses 50 to 53, provides an exclusive regime for the resolution of disputes and subclause 26.16 must be read in that context.

29 Consequently, the defendant submits that in the absence of words in subclause 26.16 such as, or to the effect of, "shall be referred" in the referring provision, the operation of the clause 52 dispute resolution procedure, the Accelerated Dispute Resolution Procedures, is not enlivened by these provisions. More particularly, the defendant's argument is that for the clause 52 provisions to be enlivened, it is necessary, having regard to the words of the triggering provisions of subclause 52(a)(i), that any other referring provision of the Project Agreement must, to have such an effect, be couched in mandatory terms. The use of the word "may" in the part of subclause 26.16 which is set out above indicates, the defendant submits, that the provisions are not to be construed as such a mandatory provision. Consequently, although, it is said, subclause 26.16 contemplates that a dispute of the type to which its provisions are directed may be referred by either party "to an Independent Expert", absent agreement between the parties to this effect under the provisions of subclause 51(c)(ii) the dispute will proceed to arbitration under clause 53 - and not to the Accelerated Dispute Resolution Procedures provided for under clause 52.

30 The defendant seeks to support its argument with respect to the proper construction of subclause 26.16 and subclause 52.1(a)(i) on the basis of the principle that:[37]

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37 *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* (1935) CLR 618, 636 (Rich, Dixon, Evatt and McTiernan JJ).

> "The contract must be interpreted like any other contract, and the natural meaning of the language used must receive its effect unless, upon a proper application of the rules of interpretation, a contrary intention is found to be contained with the instrument".

Further, it was noted that the *Oxford Dictionary* relevantly defines "may" as "used to ask for or to give permission". The defendant submits that this indicates a discretionary option or a choice; in other words that "may" is merely permissive. The defendant then seeks to contrast the use of the permissive "may" in subclause 26.16 with the use of the word "shall" in subclause 52(a)(i). In relation to "shall", it notes that the *Oxford Dictionary* relevantly defines that word as "expressing an instruction, command or obligation". This, it was said, indicates an obligation as opposed to discretion, option or choice. Further, and more generally, reference is made to the decision of the High Court in *Toll (GCT) Pty Ltd v Alphapharm Pty Ltd*[38] where it was said that in determining the ordinary and natural meaning of the words "may" and "shall", consideration should be given to "what a reasonable person would have understood [the words of a contract] to mean".[39]

31 Pursuing its argument based on the ordinary and natural meaning of words, as indicated by the *Oxford Dictionary*, and also having regard to the context in which those words appear, namely the provisions of the Project Agreement, the defendant draws attention to a number of other provisions in subclause 26.16 itself and also other provisions of the Project Agreement which it says indicate that words such as "may", "shall" and expressions such as "will be", "must be", "is to be" and "may be" are used in circumstances which indicate that the Project Agreement has been drafted with care and that these words or expressions have been selected deliberately to suit varying circumstances. In other words, it says that these words or expressions have been used with precision and, accordingly, they should bear their ordinary and natural meaning and not be construed in such a way as to eliminate differences in meaning which it should be inferred were intended by the parties to the Project Agreement. I turn now to the particular examples relied upon.

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38 (2004) 219 CLR 165.

39 (2004) 219 CLR 165, 179 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

32 In subclause 26.16 of the Project Agreement, the word "must" is employed with reference to instructions which are to be provided to the Independent Expert. The word "must" is relevantly defined in the *Oxford Dictionary* as "obliged to; should or expressing insistence". It is submitted by the defendant that this is in clear contrast to the ordinary meaning of the word "may" and that, consequently, the juxtaposition of the use of the words "may" and "must" in subclause 26.16 indicates that it was the intention of the parties that the two words should bear different meanings. Thus, it is said that there is no textual basis in the provisions of subclause 26.16 for the argument that the parties must have intended that the word "may" as used in that subclause should bear the same meaning as the word "must". Consequently, the defendant submits that the use of the word "may" in subclause 26.16 indicates that its provisions do not amount to a mandatory reference of a dispute to an Independent Expert under the Accelerated Dispute Resolution Procedures provided for in clause 52 and, consequently, the entire dispute resolution regime provided for in clauses 50 to 53 must apply. This means, it says, that, absent agreement of the parties to refer a matter to an Independent Expert under subclause 51(c)(ii), the dispute must proceed to arbitration under clause 53.

33 Additionally, the defendant refers to a variety of other provisions in the Project Agreement where different phrases are used in respect of the referral of disputes to an Independent Expert under clause 52, in contrast to the provisions of subclause 26.16:[40]

> "75. Further to the above, throughout the Project Agreement different phrases are used in respect of the referral of disputes to an Independent Expert. For example, in contrast to Clause 26.16:
>
> (a) Clause 32.8(b) provides: in respect of subcontractor tenders for Renewable Services, disputes '*will be*' referred for resolution by an Independent Expert;
>
> (b) Clause 33.9(d) provides: disputes on the calculation of any Quarterly Services Payment '*must be*' referred for resolution by an Independent Expert;
>
> (c) Clause 36.3(d) provides: disputes by Project Co in respect of

40 *Defendant's Outline of Submissions* (17 May 2012), paragraphs 75 and 76.

any matter contained in a Change Notice '*will be*' resolved in accordance with the Accelerated Dispute Resolution Procedures (being Clause 52);

(d) Clause 37.5(f) provides: a dispute as to any amounts payable during a Force Majeure Event '*is to be*' determined by an Independent Expert; and

(e) Clause 48.6(b) provides: disputes as to the payments and adjustments to be made for outstanding debts '*will be*' resolved by an Independent Expert.

76. There are 11 instances in the Project Agreement where the contract expressly provides that a dispute '*may be*' referred to an Independent Expert for determination. These are Clauses 22.2(d), 22.3(c), 23.4(e), 24.6(e), 26.3(e), 26.16, 34.2(e)(D), 34.7, 36.9(d), 46.4(d) and 49.4(b). Further, there are two instances in the Project Agreement, Clauses 29.10(b) and 38.8, which expressly provide that a dispute '*may be*' referred for resolution under Accelerated Dispute Resolution Procedures".

34 On this basis, the defendant argues that the position that the provisions of subclause 26.16 do not constitute a mandatory reference of disputes in respect to extensions of time to an Independent Expert is fortified by the provisions of the Project Agreement.[41] The defendant submits that these provisions indicate, on their plain and natural meaning, that they do mandate and require that certain disputes be referred to an Independent Expert, in contrast to the provisions of subclause 26.16. Again, in the same vein as submissions of the defendant to which reference has been made, it is said that these provisions demonstrate that the parties intended to give themselves an option with respect to the resolution of extension of time disputes in the sense of allowing and requiring an additional process of agreement if this were to occur; that is specific agreement to invoke the Independent Expert provisions of clause 52, under the provisions of subclause 51(c)(ii).

35 The plaintiff supports the general approach to the construction of the Project Agreement advocated by the defendant, emphasising that the primary object of that process is to determine the objective intention of the parties; that is the expressed intention which is to be ascertained from the words used.[42] The plaintiff emphasises, in this respect, that the meaning of the words used is to be determined in the context

41 *Defendant's Outline of Submissions* (17 May 2012), paragraph 75, and see paragraph 33 above.
42 *Goldsbrough Mort & Co Ltd v Carter* (1914) 19 CLR 429, 447 (Isaacs J).

of the whole document.[43] Further, the plaintiff submits that a commonsense approach must be taken in the process of construction and interpretation so that "… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense".[44]

36 On this basis, the plaintiff submits that subclause 26.16 is to be interpreted having regard to the whole of clause 26, a clause that provides a comprehensive code dealing, among other things, with delays in the progress of the Works. In this context, the plaintiff submits that the use of the word "may" in subclause 26.16 does no more than recognise that a party that wishes to dispute the Project Director's[45] decision has a right to an election or option to refer any dispute about an extension of time claim for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures of clause 52.

37 Thus, the plaintiff submits that the provisions of subclause 26.16 will operate in one of two ways:[46]

> "(a) each party has the choice of accepting the decision of the Project Director or pursuing the matter by referring it for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures.[47] This interpretation would mandate reference to an Independent Expert as the only form of dispute resolution; or

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43 *Bettini v Gye* (1876) 1 QBD 183, 188; *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, 641; *Spunwill Pty Ltd v BAB Pty Ltd* (1994) 36 NSWLR 290, 299 (Santow J); *Andrew Garrett Wine Resorts and Anor v National Australia Bank Ltd (No 2)* [2005] SASC 105, [41].

44 *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201 (Lord Diplock); *Di Dio Nominees Pty Ltd v Brian Mark Real Estate Pty Ltd* [1992] 2 VR 732, 740 (Marks J). See also *Andrew Garrett Wine Resorts and Anor v National Australia Bank (No 2)* [2005] SASC 105, [41] (Gray CJ) citing *Cohen & Co v Ockerby & Co Ltd* (1917) 24 CLR 288 at 300 (Isaacs J); *Mendl & Co v Ropner & Co* [1913] 1 KB 27, 32 (Bray J); *J Kitchen & Sons Pty Ltd v Stewart's Cash and Carry Stores* (1942) 66 CLR 116; *Pan Foods Co Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 170 ALR 579, 584 (Callinan J); *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at 708-9 (Kirby J); *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 198 [43] (Gleeson CJ, Gummow and Hayne JJ).

45 'Project Director' is defined in clause 1.1 of the Project Agreement in the following terms:

> '**Project Director** means the person specified in Clause 5.1, or such other person as may be appointed in writing by BRC Co from time to time to replace that person, in accordance with Clause 5.1.'

46 *Outline of Submissions for the Plaintiff* (15 May 2012), paragraph 24.

47 See *Stevens Constructions Pty Ltd v Teodor Zorko* [2002] SASC 42, [26] (Doyle CJ) and [49] (Lander J) and *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 312 (Brennan CJ, Gaudron and McHugh JJ).

(b) at the very least each party has the right to elect to have the dispute resolved by expert determination and if a party makes such an election it binds both parties.[48] This interpretation would permit arbitration but not if either party exercises its right to elect to have the dispute resolved by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures."

The plaintiff submits that either of these possibilities mean that neither party can unilaterally deprive the other of its entitlement to refer a dispute for resolution by an Independent Expert under clause 52. In any event, the plaintiff submits that both these types of possibilities have found favour with the courts.

38 The plaintiff contends that an interpretation which precludes one or other of these possibilities would ignore the language of subclause 26.16 of the Project Agreement and also flout business commonsense for the following reasons:[49]

"(a) Clause 50.1 makes it clear that any dispute arising out of the Project Agreement will be resolved in accordance with clauses 50 to 53;

(b) Clause 52 is enlivened, to the exclusion of clause 51, where the Agreement expressly provides that a Dispute shall be referred for expert determination;

(c) It is not a prerequisite of clause 52(a)(i) that the referring clause employ the words 'shall be referred for [expert determination]'. If that had been a prerequisite, it could have been clearly stated. What is important is the effect of the referring clause, specifically that, if enlivened, it makes mandatory the referral of the dispute for expert determination;

(d) The first part of clause 26.16, applying the ordinary meaning to the words used, entitles either party to refer any dispute about an EOT claim for expert determination. If such referral is not the exclusive means of resolution (as submitted in paragraph 25(a) above) then the only interpretation of the words used in the clause consistent with their ordinary meaning is that they confer on each party an entitlement to have the dispute referred to an Independent Expert. The entitlement arises in respect of '*any dispute*' and either party '*may*' refer it.

(e) If either party exercises its entitlement to refer the dispute to an Independent Expert, then the dispute must be resolved in accordance with the Accelerated Dispute Resolution Procedures. Consistent with the referral of the Dispute to an Independent Expert thereafter being mandatory, the language used in the balance of clause 26.16 (which

48 *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 324-6 (Toohey and Gummow JJ).

49 *Outline of Submissions for the Plaintiff* (15 May 2012), paragraph 25.

requires the Independent Expert to be instructed to have regard to the Change Compensation Principles) assumes that an expert determination will follow in the event that either party exercises its election to have the dispute referred to an Independent Expert. That is, the reference to the expert determination is not premised on an agreement by the other party that the dispute be so referred;

(f) Had it been intended by the parties that a dispute about an extension of time claim could only be referred to expert determination by agreement between the parties, such a requirement could easily have been expressed in clause 26.16. It was not;

(g) It would be perverse if, having provided for either party to have the option of referring the dispute for expert determination, one party could proceed under the provisions of clause 51 and thereby deprive the other of the opportunity to avail itself of the option provided under clause 26.16. '*Disputes are not readily resolved … by procedures which can be set at nought if one party elects to pursue some other course of action*.'[50] The possibility of such an outcome compels a construction of clause 26.16 which commits the parties to expert determination where at least one of them so elects".

39 In my opinion, the defendant's semantic and syntactical analysis of the provisions of the Project Agreement is, as the authorities indicate, the proper basis to commence the task of construction. I am, however, of the opinion that this process produces a result which has the effect of rendering subclause 26.16 of the Project Agreement mere surplusage and, as the plaintiff submits, in effect, simply crossing it out of the Agreement. Moreover, if its provisions were to be interpreted as contended for by the defendant, the parties would be left in a position where if, under the clause 51 procedure, senior negotiations produce no agreement, one party might seek agreement of the other under subclause 51(1)(c)(ii) to refer the dispute to an Independent Expert under clause 52, in the same way as could occur in the absence of subclause 26.16 from the Project Agreement. Apart from offending a basic rule of construction favouring the giving of work and meaning to all provisions of a document, this interpretation does not give business efficacy to the provisions of the Project Agreement and is, in any event, a result that only follows on the basis that the use of the word "may" in subclause 26.16 renders the operation of the whole of its provisions as permissive, rather than mandatory. The consequence is that the

50 *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 311 (Brennan CJ, Gaudron and McHugh JJ).

operation of clause 52 is not triggered in such a way as to avoid the application of the clause 51 provisions.

40 Additionally, on the basis of the authorities to which I now turn, I am of the opinion that the plaintiff's argument that the use of the word "may" in subclause 26.16 of the Project Agreement does not render the operation of that provision "permissive", with the consequences for which the defendant contends, correctly states the position. Rather, as is submitted by the plaintiff, it is indicative of the position, as with many dispute resolution provisions, that a party has a choice whether or not it seeks to invoke those provisions; hence the use of the word "may". A party always has the choice of accepting a position or determination with which it does not agree. In my view, the provisions of subclause 26.16, when read with the dispute resolution provisions of clauses 50 to 53, indicate that with respect to extension of time claims, and other claims the subject of subclause 26.16, either party has a choice to take any dispute further and an additional choice whether to rely on the clause 51 procedure, which may or may not lead to expert determination under clause 52, or to choose a "fast track" to clause 52 by means of subclause 26.16. The use of the word "must" in subclause 26.16 with respect to instructions to the Independent Expert does not detract from this position. A mandatory provision in this respect once subclause 26.16 has been invoked is consistent with its invocation being permissive.

Relevant case law

41 Although considerable caution must be exercised in making reference to cases on the interpretation of different agreements, some guidance, at least in terms of general principles and approach, can be gained from the cases interpreting dispute resolution provisions contained in other agreements. It is on this basis that I consider in some detail a number of the cases relied upon by the parties in this respect.

42 In *Oakton Services Pty Ltd v Tenix Solutions Pty Ltd*,[51] I considered the meaning of the word "may" in dispute resolution provisions contained in a subcontract which

51 [2010] VSC 176.

provided for the possibility of review by the Chief Executive Officers of the parties with a provision in default of agreement as a result of that review for expert determination or arbitration, in the following terms:

> "**73.3 Chief Executive Officer review**
>
> (a) If a dispute is referred to the Chief Executive Officers under clause 73.2(e) the Chief Executive Officers are required to meet within 5 Business Days of the dispute being referred to them to attempt to resolve the dispute in good faith.
>
> …
>
> (c) If:
>
> (i) the Chief Executive Officers are unable to resolve the dispute within 5 Business Days of first convening to resolve the dispute under clause 73.3(a); or
>
> (ii) the Chief Executive Officers do not convene within 5 Business Days following referral of the dispute to them under clause 73.1(a).
>
> then the parties may agree that the dispute will be referred to an Expert for determination in accordance with clause 73.4. Failing such agreement within 10 Business Days following referral of the dispute to the Chief Executive Officers, either party may immediately refer the dispute to arbitration pursuant to clause 73.5."

43 I concluded that in spite of the use of the word "may" in these provisions, their effect was that in the absence of agreement to refer the dispute to expert determination, the dispute must proceed to arbitration; assuming, of course, that a party wished to pursue resolution of the dispute, rather than simply leave the status quo unchanged, however much that party may have disliked this position. The critical reasoning in this respect appears in the following paragraphs of the judgment in *Oakton Services*:[52]

> "[23] The first is in light of the intention of commercial parties. The clear references to a broad range of disputes and alternative dispute resolution procedures, including arbitration under the provisions of clause 73.1 of the Subcontract, suggest that an interpretation of clause 73.3 giving decisive effect to the use of the word 'may', and thereby depriving the arbitration provisions of clauses 73.5 and 73.6 of efficacy, cannot be regarded as being in accordance with the intention of commercial parties (as already clearly expressed in provisions such as paragraph 73.1(a), (b), (c) and (e)).[53] On this

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52 [2010] VSC 176, [23] and [24].

53 See *Upper Hunter County District Council v Australian Chilling and Freezing Company Ltd* (1968) 118 CLR

> basis, the provisions of paragraph 73.3(c) of the head contract should be taken as confirmation of a contrary intention, suggesting that the use of the word 'may' in paragraph 73.3(c) of the Subcontract is either an error or a provision which should be read in a mandatory sense having regard to the context of clause 73 of the Subcontract.
>
> [24] Secondly, I am of the opinion that the use of the word 'may', even if it were to be treated as permissive, would not produce a position as argued for by Oakton which, in effect, opens a gap in the operation of clause 73. This would allow a dispute within the ambit of clause 73.1 to be litigated before a court, prior to a party 'electing' to refer a dispute to arbitration pursuant to clause 73.5. The basis submitted in support of this position is the lack of any arbitration agreement, prior to that election, for the purposes of the definition of 'arbitration agreement' under subsection 4(1) of the Act, and as required for the operation of subsection 53(1) of the Act as a result of the words of its chapeau."

44 It was clear that the dispute resolution provisions considered in *Oakton Services* were intended to cover the field in terms of dispute resolution between the parties under the subcontract.[54] I was also of the opinion that the purpose of the reference to expert determination in subclause 73.5 in the subcontract was to enable the Chief Executive Officers, during or subsequent to their review, to consider whether expert determination would be the appropriate means of dispute resolution in the particular circumstances and if they both agreed that this was the position, then the dispute could be referred to expert determination (in accordance with subclause 73.4 of the subcontract), rather than proceeding to arbitration (under subclause 73.5 of the subcontract).

45 In my opinion, this is a completely different type of machinery for the selection of the appropriate alternative dispute resolution process from that found in the provisions of the Project Agreement in this case, in spite of the submission by the defendant that these provisions are analogous with those considered in *Oakton Services*. It is true that there is an analogy in the event that the provisions of subclause 51(b) and (c) of the Project Agreement applies in the sense that the parties engaged in senior negotiations can, in the course of those negotiations, decide that determination by an Independent Expert under clause 52 would be an appropriate mechanism in spite of the fact that subclause 26.16 had not been enlivened

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429.

54 See [2010] VSC 176, [23].

previously. The extent of the analogy is not, however, significant in the present circumstances in terms of the defendant's case.

46 In my view, the decision in *Oakton Services* supports the plaintiff's case because subclause 73.3 was construed as a mandatory reference to arbitration, an arbitration agreement, in the event that the Chief Executive Officer review yielded no resolution by agreement and the parties did not agree to expert determination within the time limited by those provisions. The use of the word "may" did not detract from the effect of these provisions as an arbitration agreement because, for reasons already discussed, its effect was to require dispute resolution by arbitration in the event that dispute resolution was necessary. It was a matter for the parties to decide whether dispute resolution was necessary, as indicated previously, and hence the word "may" is quite appropriate. In the circumstances of such a subcontract, it would, naturally, be inappropriate to include a mandatory provision requiring arbitration, regardless of whether one or other of the parties required the dispute resolution process to proceed. In general terms, the same reasoning applies, in my view, to the use of the word "may" in subclause 26.16 of the Project Agreement. As in *Oakton Services*, no other dispute resolution machinery was contemplated by the parties beyond that provided for in their written agreement; in *Oakton Services*, the subcontract, and in this case, the Project Agreement.

47 Reference was also made in argument to a number of other cases which dealt with agreements containing arbitration clauses which raised arguments as to whether they could be regarded as arbitration agreements or provisions which allowed for agreement or election to refer a matter to arbitration, in which case an arbitration agreement would arise and the provisions of sub-s 53(1) of the *Commercial Arbitration Act* 1984 enlivened. These provisions and these cases were also considered in *Oakton Services*, as follows:[55]

> "[25] In this context, Oakton referred to the chapeau to s 53(1) of the Act as follows:
>
> '(i) If a party to an arbitration agreement commences proceedings

55 [2010] VSC 176, [25]-[31].

> in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings …". [Emphasis added.]

[26] Oakton submitted that the emphasised passage contained in the chapeau to s 53(1) does not encompass a situation where a party to an arbitration agreement might, if it elected to do so, refer a dispute to arbitration but has yet to do so. In this respect, reference was made to *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service*,[56] *Stevens Construction Pty Ltd v Zorko*,[57] and *Equuscorp Pty Ltd v Wilmoth Field Warne (a firm)*.[58]

[27] In *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service*,[59] Brennan CJ, Gaudron and McHugh JJ said at 309:

> '"a matter agreed to be referred to arbitration"', [is] an expression which is apt to describe the situation that occurs when a right of election has been exercised or other preconditions satisfied and which is syntactically and conceptually quite different from that found in the definition of "arbitration agreement" which merely requires that the parties have agreed "to refer present or future disputes to arbitration".'

[28] In *Stevens Construction Pty Ltd v Zorko*,[60] Doyle CJ, after setting out the above passage, said:[61]

> 'I take their Honours to mean that if the relevant arbitration clause allows a right of election or choice as between litigation and arbitration, the matter of dispute in question will be a matter "agreed to be referred to arbitration" if, but only if, the election or choice for arbitration has been exercised.'

The Chief Justice also said:

> 'The language of s 53(1) suggests quite strongly that the time at which the nature of the proceedings must be considered is the time when the proceedings are commenced.'

[29] The decision of the South Australian Full Court in *Stevens Construction* was followed by Byrne J in *Equuscorp Pty Ltd v Wilmoth Field Warne (a firm)*.[62] Byrne J expressly agreed with the Full Court's reasoning and said:[63]

> 'The text of s 53(1) shows this to be correct. Moreover, until a party has enlivened the arbitration agreement by electing to arbitrate, it is difficult to see how the Court should under s 53 act to give effect to a

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56 (1995) 184 CLR 301.
57 (2002) 81 SASR 316 (FC).
58 [2003] VSC 279.
59 (1995) 184 CLR 301.
60 (2002) 81 SASR 316.
61 (2002) 81 SASR 316 at paragraph 19.
62 [2003] VSC 279.
63 [2003] VSC 279 at paragraph 23.

course which no party has set in train.'

> [30] On the basis of these authorities, Oakton re-affirmed its submission that the effect of clause 73.3 of the Subcontract was to provide a party with a right to elect to arbitrate. In the particular circumstances of this matter, the election had not occurred prior to the commencement of these proceedings, with the result that it could not be said that there was 'a matter agreed to be referred to arbitration' for the purposes of s 53(1) of the Act.
>
> {31} In my opinion, the difficulty with Oakton's submission with respect to 'election' is that it fails to have proper regard to the effect of the provisions of clause 73 as a whole, which, as indicated previously, provide a comprehensive regime of dispute resolution procedures. This is underpinned by the clear agreement of the parties that, save for urgent interlocutory relief (including interim injunctions), each party may not commence court proceedings relating to the Subcontract before it has complied with the Dispute Resolution Procedures.[64]"

48 In my view, these cases do not significantly advance the arguments with respect to the construction of the Project Agreement, save to emphasise that if one were considering whether or not an arbitration agreement had come into being under its provisions it would be necessary to consider whether the preconditions or preliminary steps provided for in clause 51, if applicable, and clause 52, if applicable, had been complied with and completed before it could be said that clause 53 had been enlivened. This does serve to emphasise, in my view, that the provisions of the Project Agreement must be viewed as a whole and read together; a matter of some importance when it comes to the argument advanced by the defendant that it is in any event entitled to proceed to arbitration under clause 53 on the basis that no agreement to refer the matter to an Independent Expert under subclause 51(c)(ii) of the Project Agreement has been reached. In my view, this argument simply begs the question in terms of the proper construction of clauses 50 to 53 having regard to the provisions of subclause 26.16 and is not a position which is enhanced in any respect by the authorities to which reference has been made. In particular, it is no answer, in my view, that there is nothing in the Project Agreement which acts to preclude a defendant from giving its own notice to refer the same dispute to arbitration if it is found that the plaintiff exercised its claimed entitlement under subclause 26.16 before clause 51 was activated.

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64 Referring to paragraphs 15 to 17 of that judgment.

49 In this context, the defendant made reference to the decision of the Court of Appeal in *Manningham City Council v Dura (Australia) Constructions Pty Ltd*.[65] The Court of Appeal in that case considered whether provisions in a building contract which conferred a right on "either party" to refer a dispute "to arbitration or litigation". Considering these provisions, Winneke P said:[66]

> "**[2]** … The fact that [cl] 13 contemplates that the disputes of the parties might be resolved by means other than arbitration does not, in my opinion, lead to the conclusion that their agreement was not 'an arbitration agreement' within the meaning of the Act; nor to the conclusion that the Court's discretion to stay proceedings pursuant to s 53(1) of the Act is ousted.
>
> **[3]** Clauses 13.03 and 13.04, when read with each other, and in the context of the agreement, suggest to me that arbitration of disputes was the parties' preferred method of dispute resolution and the one which they intended would be adopted in the event that either party elected to refer a dispute to arbitration in compliance with those clauses. In my view, it was the parties' intention that a dispute would only be resolved by litigation if both parties were in agreement that such was the method to be adopted with respect to a particular dispute. Such an agreement would, no doubt, be inferred where one party, following negotiations, gave notice referring the dispute to litigation and the other party thereafter accepted that as the preferred method of resolution.
>
> **[4]** It was the appellant's contention in this Court that the agreement was not an 'arbitration agreement' because cl 13.03 disclosed an intention that disputes were to be resolved, at the option of the parties, either by arbitration or litigation and there was no intention therefore to 'refer disputes to arbitration'. This contention rests on the proposition that cl 13.03 means that, once one party has given a notice referring a dispute to litigation, the other party loses whatever right he might have had to refer the matter to arbitration. I do not agree with this contention. There is nothing in the clause which suggests, in terms, that the right of the other party to refer the dispute to arbitration is lost. Rather, it seems to me that the clause re-affirms the right of the parties to litigate their dispute before the Court, if that is what they wish. However, the combined effect of cll 13.03 and 13.04 is, in my view, to give primacy to arbitration as the preferred method of dispute resolution agreed between the parties. This is because, whether or not one party has given notice of an intention to refer the dispute to litigation, there is nothing in the clause which prevents the other party from giving his own notice to refer the same dispute to arbitration and, if he does so, and complies with the provisions of cl 13.04, the consequence is, demonstrably, that from the time of the giving of the notice, the dispute (if not settled) is 'referred to arbitration'. I can see no reason to read into cl 13.03 the implication contended for by the appellant. Such a construction only promotes the unseemly 'jostling for position' which occurred in this

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65 [1999] 3 VR 13 (CA).

66 [1999] 3 VR 13 at 15, [2]-[5].

case.

> **[5]** Nor do I agree with the contention made by the appellant that, if its construction of cl 13.03 is not accepted, then the clause has 'no work to do'. In the first place, it enables the party giving the notice to signal to the other party that the 'negotiation phase' of the dispute provided for in cl 13.02 is at an end; and secondly, if the party giving the notice elects for 'litigation', it provides the other party with the opportunity to consider whether that method of resolution is to be preferred to arbitration. If, upon the receipt of the notice, he accepts it and joins in the subsequent curial proceedings, he will have (as I have noted) signalled his assent to that method of resolution and prejudiced his right to apply for a stay of those proceedings (s 53(2) *Commercial Arbitration Act*). Otherwise, as I see it, the contract contemplates that he may elect, in compliance with cll 13.03 and 13.04, to refer the matter to arbitration and, if he does so, the Court's powers under s 53(1) of the Act are enlivened. ..."

Similarly, Phillips JA said:[67]

> "**[13]** The second issue is whether under the particular terms of s 13 of this contract, the right to elect to proceed to litigate or to arbitrate is exhausted once one party or the other has given notice of election. Mr Justice Buchanan is of opinion that it is not, and again I agree. The notice which is required by cl 13.03, and which is expressly made a pre-condition to litigation or arbitration, is not required so that whoever leaps first, wins. The provision for notice has been inserted so that the party to whom the notice is given is alerted to the fact that the other party regards the period of negotiation as at an end. One purpose of s13 is plainly to require negotiation before either litigation or arbitration is commenced: something must mark the end of that period and hence the requirement for this notice under cl 13.03. It would be altogether counter-productive, in such a scheme, to reward the first to become impatient with negotiation with the right to choose once and for all between litigation and arbitration. Notice by one party does not preclude notice by the other."

50 The defendant submits that the *Manningham City Council* case supports the view that the party "first in" with its notice does not win if there is a valid arbitration clause and that this approach has been followed by the courts in other cases, referring to *Strezlecki Holdings Pty Ltd v Androm Pty Ltd*[68] and *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd*.[69]

51 In my opinion, these cases do not advance the defendant's argument but, rather, serve to emphasise that the position is entirely dependent upon the proper construction of the relevant agreement; in this case the Project Agreement. This is

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67 (1999) 3 VR 13, 17-18, [13].

68 [2005] WADC 33, [12] - [20] (Deputy Registrar Hewitt).

69 [2001] QCA 471, [44] - [45] (Thomas JA).

made very clear in that part of the judgment of Winneke P in the *Manningham City Council* case which is set out above.[70] For the reasons already indicated, I am of the opinion that the proper construction of the provisions of clauses 50 to 53 of the Project Agreement is that the clause 51 provisions are rendered inoperative in relation to a particular dispute in two possible circumstances. The first is where the parties have expressly agreed (entirely outside the machinery of the Project Agreement) to refer a dispute to an Independent Expert under clause 52. The second is where the trigger for the operation of clause 52, rather than clause 51 in response to a notice of dispute under clause 50, is activated by a provision of the Project Agreement which is found to be mandatory in effect for the purposes of subclause 52(a)(i) of that Agreement. For the reasons indicated, I am of the opinion that subclause 26.16 is just such a provision.

52 Further, there is nothing in the Project Agreement which supports the position that the operation of subclause 26.16 could be defeated by the giving of a notice of dispute before its provisions were invoked. In any event, in my view it makes good sense on a view of the provisions of the Project Agreement as a whole that in circumstances such as the present clause 26.16 could be invoked by a party once it is clear from the fact that the other party has given a notice of dispute that there is a dispute between them. Were the position 'otherwise' the plaintiff in the present circumstances would, in effect, be deprived of the benefit of subclause 26.16 if having rejected the extension of time claim it did not immediately invoke subclause 26.16 prior to the giving of a notice of dispute by the defendant – and so prior to knowing whether or not there was a dispute between them. This is an absurd interpretation and one which both involves an unnecessary decision to invoke subclause 26.16 on the plaintiff's part and a step which may only serve to provide a dispute in circumstances where the parties may have been content to "let sleeping dogs lie".

Nature of the dispute

Effect in relation to construction issues

70 See above, paragraph 49.

53 The defendant submits that the Accelerated Dispute Resolution Procedures provided for in clause 52 of the Project Agreement are not appropriate for the determination of the dispute and that this is a factor that should be considered in the interpretation of the provisions of the Project Agreement. This submission relies primarily on the statement by Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*:[71]

> "… if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically correct'".

Hence, it submitted that in circumstances where the Court considers the construction of subclause 26.16 of the Project Agreement to be ambiguous, it is open to the Court to give consideration to what is just, reasonable and convenient in determining whether the dispute ought to be referred for resolution by an Independent Expert or by arbitration. The defendant submits that guidance for the Court in this regard may be found in a number of cases regarding applications to stay proceedings.

54 Pursuing this line of argument, the defendant submits that in *Badgin Nominees Pty Ltd v Oneida Ltd*,[72] Gillard J acknowledged that issues concerning a number of legal questions, whether there was a breach of any of the terms of the agreement and whether there was an entitlement to damages, "are not suitable for determination in an informal dispute resolution procedure".[73] Gillard J also said that the same considerations would be relevant in the event that the Court was exercising its discretion in relation to whether the dispute would be better suited to arbitration, as opposed to expert determination, despite what the words of the agreement provided.[74] These statements must, however, be viewed in the context of his Honour's reasons for decision, which include discussion of possible deficiencies

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71 (1973) 129 CLR 99, 109 (a passage which was cited with approval in the dissenting judgment of McColl JA in *Peppers Hotel Management Pty Ltd v Hotel Capital Partners Limited* [2004] NSWCA 114, [68].

72 [1998] VSC 188.

73 [1998] VSC 188, [69].

74 [1998] VSC 188, [138].

which may be associated with an expert determination process:[75]

> "**[129]** That is the question the parties have left to an independent valuer. In my opinion a valuer having some experience in the area of cutlery and crockery would have very little difficulty in making up his mind based upon his experience, skill and knowledge and after gathering what evidence he thought appropriate to determine whether the particular stock was 'saleable in the ordinary course of the business' as at 30 June 1998.
>
> **[130]** I have carefully weighed up the criticisms made by Mr Loewenstein on behalf of the plaintiff and the difficulties that he submits will face the valuer but in my opinion the parties intended that the valuation should be carried out by a valuer in the circumstances provided for in the agreement and I do not accept that the task is too complex for a valuer to perform.
>
> **[131]** In this regard I refer to what Lawton, LJ said in *Baber v Kenwood Manufacturing Co Ltd & Anor* (1978) 1 Ll R 179 at p181 -
>
> > 'They (the auditors) were to be experts. Now experts can be wrong; they can be muddle headed; and, unfortunately, on occasions they can give their opinions negligently. Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening. What is now acceptable is the risk of the expert being dishonest or corrupt.'
>
> **[132]** I refer to what I said in the Commonwealth of Australia case, supra at p 5 as to what the parties should accept on a reference to an expert. I said -
>
> > 'The parties to a contract agree that the value is to be determined by an expert acting as such using his own skill, judgment and experience. He is not a lawyer. His authority derives from the contract. The terms of the contract are to be considered by him. It would be contrary to the parties common intention to expect the valuer to construe the contract and apply it as a court would. The parties have entrusted the task to an expert valuer, not a lawyer. They must be taken to accept the determination "warts and all" and subject to such deficiencies as one would expect in the circumstances. The parties put in place a procedure, they must accept the result unless it would be contrary to their common intention.'
>
> **[133]** In my opinion the matters raised by Mr Loewenstein are matters which the parties contemplated. They put in place the procedure and if it involves a question of law as to construction of the agreement, the gathering of evidence without regard to rules or procedures, a determination in which the expert may rely upon his own experience and knowledge and without hearing the parties or any valuation experts on their behalf, the parties are bound by it.
>
> **[134]** They put it in place, it binds them.
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> **[135]** In regard to the question of the discretion I have not overlooked the observations made in the recent English case of *Cott UK Ltd v F E Barber Ltd*,

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75 [1998] VSC 188, [129]-[139].

> supra. The learned judge relied upon a number of factors which resulted in the exercise of his discretion refusing the stay.
>
> **[136]** I would beg to differ with respect to some of the matters which the learned judge took into account. The matters in question concern the fact that there were no rules governing the form of dispute resolution, that the valuer had no experience with respect to the issues raised and that there were no rules or principles laid down pursuant to which the expert was to approach or determine the dispute.
>
> **[137]** However, I do respectfully agree that the fact that there were issues concerning a number of legal questions, whether there was a breach of any of the terms of the agreement and whether there was an entitlement to damages are matters which may be of some importance in deciding against the grant of a stay on the basis that it could not have been the common intention of the parties to refer disputes of mixed facts and law to an untrained and inexperienced person. These are questions which are more appropriate to a court proceeding. But in the end it is a question of what the term of the contract provides and the nature of the dispute.
>
> **[138]** These latter considerations may be relevant to an issue whether the parties intended the dispute to be resolved by arbitration rather than by an expert despite what the words of the agreement provided.
>
> **[139]** Here it is a straightforward valuation exercise following on from a stock take in which the parties disagree as to the value and quality of certain stock."

55 In my opinion, these passages from the judgment of Gillard J serve to emphasise that the question is one to be determined on the basis of the proper construction of the contract, in this case, the Project Agreement. Additionally, having regard to the position that the parties to the Project Agreement clearly contemplated, as is evident by the provisions of subclause 26.16, that disputes with respect to extension of time claims (and other claims within the ambit of those provisions) might be the subject of resolution by an Independent Expert (and subject to all the positive and negative features which might be contemplated to apply with respect to that form of dispute resolution) it cannot, in my view, be suggested with any force that some "capricious, unreasonable, inconvenient or unjust" result would flow from construing the provisions of this subclause as requiring such determination under clause 52 of the Project Agreement. Neither, in my opinion, and for the same reasons, is this position advanced by the defendant's reference to the decision of the New South Wales Supreme Court in *The Heart Research Institute Ltd v Psiron Ltd*,[76] enunciating the

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76 [2002] NSWSC 646.

difference between arbitration and expert determination, stating that, unlike arbitration, expert determination is not governed by legislation and so its adoption is a consensual process, based in contract, by which the parties agree to take defined steps in resolving certain disputes and where the relevant contractual provisions establish the scope of the expert's authority.[77]

Appropriateness of expert determination

56 In *The Heart Research Institute Ltd v Psiron Ltd*,[78] the Court considered whether a clause referring a dispute to expert determination was mandatory and, if so, whether it was void against public policy or, if not, unenforceable by reason of uncertainty. In that context, Einstein J made a number of comments in relation to the breadth and advantages of expert determination as a form of alternative dispute resolution. His Honour said that expert determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or of a specialised kind.[79] Further, it was recognised that expert determination has become a commonplace form of alternative dispute resolution, particularly in the construction industry.[80] More particularly, Einstein J said:[81]

> "**[24]** Clearly the New South Wales Courts have responded positively to the benefits which Expert Determination can entail. In *Public Authorities Superannuation Board v Southern International Developments Corp Pty Ltd*, NSWSC, 19 October 1987 (unreported), Smart J stated that, in relation to Expert Determination:
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> > 'There are many reasons why they may take such a course. They may prefer to have a relatively informal process which they may think is likely to be cheaper and quicker and the decision of an independent consultant who is likely to be familiar with the problems...It is not for the Court to re-write their contract.' (at 10)
>
> **[25]** His Honour was prepared to extend the matters which may be considered by Expert Determination to issues of liability and quantum. The arguments that the role of an Expert under such agreements should be limited to those 'usually dealt with by experts, for example, questions of value, questions of the work to be done prior to practical completion, quality

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77 [2002] NSWSC 646, [17] - [18] (Einstein J), cited in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 281 ALR 635. And see Jones, *Commercial Arbitration in Australia* (2011), [1.420].

78 [2002] NSWSC 646.

79 [2002] NSWSC 646, [16].

80 [2002] NSWSC 646, [17].

81 [2002] NSWSC 646, [24]-[26].

of work and, presumably, extensions of time' (at 7) were rejected.

> **[26]** A positive approach to Expert Determination can also be implied from the decisions in *Government Insurance Office of NSW v Atkinson-Leighton Joint Venture* (1979) 146 CLR 206 and *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, both cases dealing with the construction of arbitration clauses. Each of these cases indicates an acknowledgement of the commercial utility of alternate dispute resolution processes and a willingness on the part of courts to construe dispute resolution clauses in an expansive manner. In *Government Insurance* the High Court held that, even though an arbitration clause contained no express reference to the awarding of interest, the scope of the power was sufficient to imply a power in the arbitrator to award interest in accordance with the relevant Supreme Court Act." [emphasis added in the Plaintiff's Reply to the Defendant's Submissions]

57 Einstein J also made reference to the decision of Rolfe J in *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*,[82] in which it was said that: "There is nothing unusual about such a provision [for expert determination] and the parties are held to their bargain if they agreed to such a clause".[83] Similarly, in referring with approval to the decision of Gillard J in *Badgin*, including the conclusion that where the parties intended the dispute resolution procedure be applied in the event of a dispute, Einstein J said that: "It is their contract; and it should be enforced".[84]

58 Additionally, the High Court in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd*[85] made some positive comments in relation to the utility of expert determination as a means of dispute resolution. This was in the context of an expert determination which included variations and payment for additional works, extension of time claims in relation to those works and contractual compensation in respect of the extended time extension of time claims (for *Firedam*) and an entitlement under the contract for direct costs incurred due to delayed completion (for *Shoalhaven*).[86] The issue in that case was not a question of the construction of the referring clause but, rather, whether the reasons given by the expert for his determination were adequate.

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82 NSWSC 14 July 1997 (unreported).
83 Cited in [2002] NSWSC 646, [19].
84 [2002] NSWSC 646, [21].
85 [2011] 244 CLR 305.
86 [2011] 244 CLR 305, 310 [9] (French CJ, Crennan and Kiefel JJ).

59 In this context, the High Court made reference to the decision of the Queensland Supreme Court in *Zeke Services Pty Ltd v Traffic Technologies Ltd*,[87] and said:[88]

> "**[27]** The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditious because they are informal and because the expert applies his own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar."

Additionally, the High Court went on to note that the Queensland Court of Appeal had remarked that the expert had determined, as required by the contract, the issues identified by the parties:[89] "He answered 'meticulously', as Campbell JA put it, each of the questions identified in the expert determination procedure set out in Sch 6 of the general conditions".

60 On the basis of these authorities, I accept the plaintiff's submission that it is appropriate that this Court should similarly take a positive and expansive approach to expert determination as a form of alternative dispute resolution and, in the circumstances of this case, in the construction of the referring clause of the Project Agreement, subclause 26.16.

61 In relation to the issues which the defendant identifies as indicia of the unsuitability of utilisation of a Independent Expert to deal with the matters the subject of the Notice of Dispute in this case, I am of the opinion that the issues identified are those that commonly arise in connection with extension of time claims and must have been within the contemplation of the parties when they were negotiating the terms of subclause 26.16. The matters referred to are matters contemplated by the provisions of clause 26 of the Project Agreement and precisely the basis upon which extension of time claims must be determined, being:

(a) programming obligations;

(b) whether the conduct alleged to have caused the delay can, under the Project

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87 [2005] 2 Qd R 563, 570 [27] (Chesterman J).
88 [2011] 244 CLR 305, 315 [25] (French CJ, Crennan and Kiefel JJ).
89 [2011] 244 CLR 305, 315 [26] (French CJ, Crennan and Kiefel JJ).

Agreement, be relied upon to support an EOT claim; and

(c) the flow of costs of compensation following the determination of an EOT claim.

62 Consequently, I do not accept the defendant's submission that an Independent Expert does not have authority under the provisions of the Project Agreement to consider and resolve substantive issues which may, by implication,[90] arise in the course of the consideration and determination of an extension of time claim. If this position were correct it would impinge upon and impair the operation of sub clause 26.16 to an extent which, in my opinion, could not be thought to have been contemplated by the parties. This would be the position whether sub clause 26.16 were to be treated as a trigger for the operation of the Accelerated Dispute Resolution Procedures under clause 52 or as the basis for agreement under sub clause 51(1)(c)(ii). In either circumstance, on the defendant's argument, the subclause 26.16 provisions would be deficient and need to be supplemented by further agreement between the parties to refer additional powers to the Independent Expert. This is hardly a result that could be said to be indicative of the likely intention of the parties to the Project Agreement or a result which would be thought to be one flowing from giving business efficacy to its provisions.

63 Subject to this position, I accept the submission of the plaintiff that the issue before this Court is the construction of subclause 26.16 and that if the construction adopted by the Court is to entitle the plaintiff to refer the whole or part of the dispute, in the subject of the Notice of Dispute, for resolution by an Independent Expert, it is no argument against that construction that there may be other matters in dispute between the parties which fall outside the Independent Expert's jurisdiction. This position, if it exists, would not prevent matters properly within the Independent Expert's jurisdiction being referred to the Independent Expert for resolution in accordance with the provisions of clause 52.

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90 See, for example, *Defendant's Outline of Submissions* (17 May 2012), paragraphs 122 to 144.

Summary and conclusions

64 For the preceding reasons, I will declare that subclause 26.16 of the Project Agreement requires that the dispute the subject of the Notice of Dispute be resolved by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures set out in clause 52 of the Project Agreement. This position is, nevertheless, subject to the extent of jurisdiction of the Independent Expert under these provisions, as discussed in these reasons.

65 I will hear the parties in relation to such further or other relief which may be sought on the basis of these reasons and the form of orders to be made to give effect to these reasons.

66 The question of costs is reserved to enable the parties to make submissions on this issue in light of these reasons.

CERTIFICATE

I certify that this and the 42 preceding pages are a true copy of the reasons for Judgment of Croft J of the Supreme Court of Victoria delivered on 19 June 2012.

DATED this nineteenth day of June 2012.

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Associate