SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2012 0140

PLENARY RESEARCH PTY LTD (ACN 132 433 080) — Appellant

v

BIOSCIENCES RESEARCH CENTRE PTY LTD (ACN 131 438 527) — Respondent

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| JUDGES | MAXWELL P, TATE JA and GARDE AJA |
| WHERE HELD | MELBOURNE |
| DATE OF HEARING | 17 May 2013 |
| DATE OF JUDGMENT | 20 August 2013 |
| MEDIUM NEUTRAL CITATION | [2013] VSCA 217 |
| JUDGMENT APPEALED FROM | *Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249 (Croft J) |

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CONTRACT – Interpretation – Project Agreement – Reference to independent expert under Accelerated Dispute Resolution Procedures – Fast track process – Reference to arbitration – Construction of Project Agreement – Principles relating to the construction of commercial contracts – *Spunwill Pty Ltd v BAB Pty Ltd* (1994) 36 NSWLR 290 – Use of maxim 'expressio unius est exclusio alterius' – *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 – Construction of the word 'may' in commercial contracts – Form of declaration varied – Appeal otherwise dismissed.

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| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Appellant | Mr C Scerri QC with Ms K Anderson | Allens |
| For the Respondent | Mr J Rowland QC with Ms K Stynes | Clayton Utz |

MAXWELL P:

1 I have had the considerable advantage of reading in draft the reasons of Garde AJA. I agree with the orders which his Honour proposes and with his reasons.

TATE JA:

2 I have had the considerable benefit of reading, in draft form, the reasons of Garde AJA. I agree that the appeal should be dismissed, for the reasons his Honour gives. I also agree that the declaration in paragraph 1 of the order of the Court dated 4 July 2012 as amended by order made on 17 July 2012 should be set aside and replaced by an order of this Court in the terms of the declaration Garde AJA proposes.

GARDE AJA:

***Introduction***

3 This is an appeal from a judgment of Croft J concerning a Project Agreement dated 30 April 2009 (the 'Project Agreement') between the appellant and the respondent whereby the appellant agreed to design, construct and operate a biosciences research facility at the Bundoora Campus of La Trobe University.[1] His Honour held that cl 26.16 of the Project Agreement required that the dispute, the subject of the notice of dispute, be resolved by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures[2] set out in cl 52 of the Project Agreement. The appellant contends that Croft J erred in the interpretation of the Project Agreement, and in particular cls 26.16 and 52.

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1 *Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249 (Croft J) ('Reasons').

2 **Accelerated Dispute Resolution Procedures** means the procedures established under Clause 52 to hear and resolve Disputes referred to the Independent Expert (cl 1.1).

*The facts*

4 The facts relevant to the determination of the appeal may be summarised shortly, and are set out in the judgment of Croft J:[3]

(a) the Project Agreement required Technical Completion[4] and Commercial Acceptance[5] to be achieved by 19 October 2011 and 30 November 2011 respectively, unless adjusted under cl 26 of the Project Agreement;[6]

(b) by a contract dated 13 May 2009, the appellant subcontracted the design and construction of the biosciences research facility to Grocon Constructors (Vic) Pty Ltd;

(c) by the Project Agreement, the appellant agreed to design, construct and operate a biosciences research facility at the Bundoora Campus of La Trobe University. The Project Agreement was varied by an amending deed dated 16 June 2011 (the 'Amending Deed');

(d) the appellant submitted three claims for extension of time (the 'EOT Claims') in October 2011, purportedly in accordance with cl 26 of the Project Agreement. In November 2011, the EOT Claims were rejected by the respondent;[7]

(e) on 16 December 2011, the appellant served on the respondent a 'Notice

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3 Reasons, [1]–[10].

4 **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 (cl 1.1).

5 **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 (cl 1.1).

6 Project Agreement, cl 1.1.

7 Reasons, [5]–[6].

of Dispute and Submissions under cl 50.2 of the Project Agreement' (the 'Notice of Dispute') disputing the rejection of its EOT claims;[8]

(f) the respondent sought to exercise its right under Cl 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' set out in cl 52 of the Project Agreement;[9] and

(g) the appellant disputes this referral and says that the Notice of Dispute must proceed to arbitration under cls 51 and 53 of the Project Agreement.

***Dispute Resolution under the Project Agreement***

5 With apparent simplicity, cl 50.1(1) of the Project Agreement provides:

> 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.

6 In reality, cls 51, 52 and 53 prescribe quite different procedures for dispute resolution. The different procedures are respectively entitled 'Senior Negotiations', 'Accelerated Dispute Resolution Procedures' and 'Arbitration' in the Project Agreement. Moreover, the different dispute resolution procedures are not separate or distinct, but are interdependent. The principal issue in this appeal is to determine which set of procedures applies. The appellant contends that the arbitration procedures apply to the dispute whilst the respondent says that the Accelerated Dispute Resolution Procedures apply.

7 Clause 50.2[10] of the Project Agreement provides in the event of a Dispute[11]

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8 Reasons, [7]; Project Agreement, cl 1.1.

9 Reasons, [9].

10 Clause 50.2 provides:

> If there is a Dispute, then a party may deliver to the other party a Notice of Dispute

for a party to deliver a Notice of Dispute to the other party together with submissions that relate to the Dispute. It also provides for the submissions to set out that party's contentions including any relevant legal basis of claim. Clause 50.2 applies to each of the three different dispute resolution procedures.

***Senior Negotiations***

8 Clause 51 is concerned with dispute resolution by a process described in the Project Agreement as Senior Negotiations. n the event that the Senior Negotiations procedure fails or does not occur, the dispute is resolved either by reference to an Independent Expert under cl 51 or Arbitration under cl 52.

9 Clause 51(a)–(c) provides:[12]

> (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 (a):
>
> (i) does not occur; or
>
> (ii) having occurred fails to resolve the Dispute or to agree on

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together with its submissions in relation to the Dispute. The submissions will set out its contentions including any relevant legal basis of claim.

11 **Dispute** has the meaning given to it in Clause 50.1 (cl 1.1).

12 In the Project Agreement, the appellant is referred to as 'Project Co', the respondent as 'BRC Co', and La Trobe University as 'LTU'.

> 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.
>
> …

10 The dispute resolution procedures in cl 51 require service of a Notice of Dispute and submissions under cl 50.2. They require a meeting between the representatives of the parties and an attempt in good faith to resolve the Dispute within five Business Days[13] of the delivery of the Notice of Dispute under cl 50.2. If this meeting does not occur or fails to resolve the Dispute, a second meeting is to occur. This meeting is between a senior representative from the appellant and two delegates representing the State of Victoria and La Trobe University. This second meeting is to occur within 10 Business Days of the delivery of the Notice of Dispute under cl 50.2.

11 In the event that the second meeting fails or does not occur within 30 Business Days of service of the Notice of Dispute, cl 51(c) provides for the dispute to go to one of two different dispute resolution mechanisms. If the Dispute is in respect of a claim for payment of an amount which is equal or less than $5 million in relation to the Works[14] or $500,000 in relation to the Services[15] (as set out in the

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13 **Business Day** means any day which is not a Saturday, Sunday or a Public Holiday (cl 1.1).

14 **Works** is defined in cl 1.1 of the Project Agreement to mean:
(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.

15 **Services** is defined in cl 1.1 of the Project Agreement to mean:
(a) the Building Maintenance Services;

Notice of Dispute), the Dispute is referred for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures. On the other hand, if the dispute relates to a claim of more than $5 million in relation to the Works, or more than $500,000 in relation to the Services, the dispute is referred to arbitration under cl 53. In this way, dispute resolution by the Senior Negotiations process can lead to determination by an Independent Expert under the Accelerated Dispute Resolution Procedures or to arbitration depending on the amount claimed in the Notice of Dispute.

***Accelerated Dispute Resolution Procedures***

12 Clause 52 of the Project Agreement deals with the Accelerated Dispute Resolution Procedures:

> **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

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(b) the Cleaning Services;
(c) the Grounds Maintenance Services;
(d) the Pest Control Services;
(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.

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 accidental 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.

13 The meaning of cl 52(a)(i) was heavily contested during the hearing of the appeal. I will return later to the submissions of the parties concerning the construction of this provision. However, it is apparent that the parties contemplated in the Project Agreement that there would be two classes of disputes referred for determination by the Accelerated Dispute Resolution Procedures. One class consists of disputes expressly referred for determination by an Independent Expert or by Accelerated Dispute Resolution. The second class consists of disputes agreed to be referred to an Independent Expert under cl 51(b)(iv) or under cl 51(c) in the event that the Senior Negotiations procedure did not succeed, provided in the latter case that the amount claimed in the Notice of Dispute was equal to or less than $5 million in relation to the Works or $500,000 in relation to Services.

14 Clause 52 outlines the Accelerated Dispute Resolution Procedures. Clause 52(e)(i) and (l) prescribes the procedure in the event that the Accelerated Dispute Resolution Procedures should fail. There are three ways in which a dispute under the Accelerated Dispute Resolution Procedures can nonetheless result in arbitration. First, if the Independent Expert agreed or nominated by the parties does not execute a tripartite agreement with the parties which is substantially in the form of the Independent Expert Agreement prescribed under cl 52(d), then cl 52(e)(i) refers the dispute to arbitration under cl 53.

15 Secondly, if the Independent Expert fails to make his or her determination within prescribed time limits, then under cl 52(l) either party may refer the dispute to arbitration in accordance with cl 53.

16 Thirdly, the determination of the Independent Expert will be final and binding on the parties, unless the value of the determination is greater than $15 million, and a party gives written notice to the other party within the time limit specified in cl 52(n)(ii) referring the matter to arbitration under cl 53.

17 In all other circumstances, the Accelerated Dispute Resolution Procedures

involve determination by an Independent Expert of a Dispute governed by those procedures. Clause 52(n)(i) imposes a cap of $15 million on the amount that can be determined by an Independent Expert in resolving a Dispute in a final and binding manner, albeit that the cap can be disregarded if neither party subsequently wishes to refer the Dispute to arbitration.

18 The monetary limits imposed by the parties in cls 51 and 52 point to their intentions in identifying the dispute resolution procedure to be adopted. If the amount claimed in the Notice of Dispute is equal to or under $5 million in relation to the Works, or $500,000 in relation to the Services, and in the event that the Senior Negotiations procedure fails or does not occur, cl 51(c) provides for the Dispute to be referred for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures. If the value of a determination by an Independent Expert acting in accordance with the Accelerated Dispute Resolution Procedures is greater than $15 million, one party can give notice to the other party under cl 52(n) referring the matter to arbitration under cl 53, even though the Independent Expert has published a determination, which in the absence of referral to arbitration would be final and binding.

***Arbitration***

19 The arbitration procedures are set out in cl 53. This provides:

> **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 contained 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 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 one 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.

20 Clause 53.1(b) empowers the arbitrator to grant all legal, equitable and statutory remedies and to open up, review and substitute any determination of an Independent Expert under cl 52 referred to arbitration. For example, in the case of a determination by an Independent Expert exceeding $15 million referred to arbitration under cl 52(n), the arbitrator has full power to reopen and review the issues and substitute the arbitrator's decision for any determination of the Independent Expert under cl 52.

*Clause 26.16*

21 Clause 26.16 of the Project Agreement is the pivotal clause in the current proceedings:

> 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.

22 Clause 26 of the Project Agreement is a code dealing with 'Time'. The code includes provisions as to monitoring the progress of the Works,[16] delays and

[16] Clause 26.2.

extensions of time,[17] acceleration notices,[18] and the calculation of delay costs.[19]

23 Under cl 26.9, the Project Director can extend the relevant Date for Completion by a reasonable period in accordance with the requirements of cls 26.5 and 26.12, as well as that clause itself.

24 Under cl 26.16, any dispute about an extension of time or an acceleration under cl 26, including a determination or rejection of an extension by the Project Director (or the period of time of any such extension) under cl 26.9, may be referred by either party for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures. In making such a determination, the Independent Expert must be instructed to have regard to the Change Compensation Principles.[20]

25 Clause 26.16 speaks of the resolution of extension of time and acceleration disputes by an 'Independent Expert'. Likewise, the 'Independent Expert' is to be instructed to have regard to the Change Compensation Principles. The two references to Independent Expert in cl 26.16 are clear and direct references to the Accelerated Dispute Resolution Procedures in cl 52, where the procedures to be applied by an Independent Expert are described and defined. By contrast, cl 53 which deals with arbitration does not involve an Independent Expert, and is not mentioned in cl 26.16.

26 The definition of Independent Expert contained in cl 1.1 of the Project Agreement is instructive:

> **Independent Expert** means a person with suitable expertise and experience required to determine a Dispute having regard to the nature of the Dispute, appointed in accordance with Clause 52.

27 The definition makes express reference to cl 52, which contains the

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17 Clauses 26.4 to 26.10.

18 Clauses 26.11 to 26.15.

19 Clauses 26.17 to 26.18.

20 **Change Compensation Principles** means the principles set out in Schedule 6 (cl 1.1).

Accelerated Dispute Resolution Procedures and makes it clear that the Independent Expert is to be appointed in accordance with that clause.

28 Clause 26.16 refers to the resolution of the dispute by the Independent Experts as being 'in accordance with the Accelerated Dispute Resolution Procedures'. These are contained in cl 52, and are not mentioned in cl 53.

29 Clause 1.1 of the Project Agreement contains the definitions of 'Accelerated Dispute Panel'[21] and 'Accelerated Dispute Resolution Procedures'.[22]

30 As with the definitions previously mentioned, each of these definitions refers to cl 52 and to the role of the Independent Expert in determining disputes under the Accelerated Dispute Resolution Procedures.

31 These definitions and the clauses set out above strongly point to the conclusion that disputes under cl 26.16 are intended to be resolved under the Accelerated Dispute Resolution Procedures and therefore under cl 52.

***The judge's reasons***

32 This was the conclusion reached by Croft J in the judgment under appeal. In summary, his Honour gave 11 reasons for preferring the construction of cl 26.16 advanced by the respondent:

(a) the suite of provisions found in cls 50 to 53 of the Project Agreement represented the agreed dispute resolution procedures under the Project Agreement, and covered the field. Clause 50.2 was the gateway to these dispute resolution procedures requiring, as it does, the delivery of a notice to dispute in accordance with the requirements set out;[23]

(b) the critical question was whether the provisions of cl 26.16 themselves

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21 **Accelerated Dispute Panel** means the panel described in Part B of Schedule 18 from which an Independent Expert may be appointed in accordance with Clause 52 (cl 1.1).

22 See fn 2 above.

23 Reasons, [14].

trigger and mandate the application of the Accelerated Dispute Resolution Procedures under cl 52 where one party has referred a dispute within the ambit of cl 26.16 to an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures;[24]

(c) the construction for which the appellant contends would have the effect of rendering cl 26.16 mere surplusage having no work to do in the Project Agreement;[25]

(d) if the provisions were to be interpreted as contended by the appellant, the parties would be left in a position where, if under cl 51, the Senior Negotiations procedure produced no agreement, one party might seek agreement of the other under cl 51(1)(c)(ii) to refer the dispute to an Independent Expert under cl 52 as could occur in the absence of cl 26.16 from the Project Agreement;[26]

(e) an interpretation should be adopted which gives business efficacy to the provisions of the Project Agreement;[27]

(f) the use of the word 'may' in cl 26.16 gives either party a choice as to whether or not it seeks to invoke these provisions;[28]

(g) the provisions of cl 26.16 when read with the dispute resolution provisions of cls 50 to 53 indicate with respect to extension of time and acceleration claims the subject of cl 26.16, that either party has a choice whether or not to take any dispute further, and an additional choice whether to rely on the cl 51 procedure which may or may not lead to expert determination under cl 52, or choose a 'fast track' to cl 52 by

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24 Reasons, [16].

25 Ibid [17] and [39].

26 Ibid [39].

27 Ibid [39].

28 Ibid [40].

means of cl 26.16;[29]

(h) the use of the word 'must' in cl 26.16 with respect to instructions to the Independent Expert does not detract from this position. A mandatory provision in this respect once cl 26.16 has been invoked is consistent with its invocation being permissive;[30]

(i) the proper construction of the provisions of cls 50 to 53 of the Project Agreement is that the cl 51 provisions are rendered inoperative in relation to a particular dispute in two possible circumstances. The first is where the parties have expressly agreed outside of the machinery of the Project Agreement to refer a dispute to an Independent Expert under cl 52. The second is where the trigger for the operation of cl 52 is activated by a provision such as cl 26.16 which is found to be mandatory in effect for the purposes of cl 52(a)(i) of that Agreement;[31]

(j) it makes good sense viewing the Project Agreement as a whole that in circumstances such as the present, cl 26.16 could be invoked by a party once it was clear that there was a dispute between the parties. Were the position otherwise, the respondent would be deprived of the benefit of cl 26.16 if it did not immediately invoke cl 26.16 as early as possible, and even prior to knowing whether or not there was a dispute between the parties;[32] and

(k) it could not be said that some capricious, unreasonable, inconvenient or unjust result would flow from construing the provisions of the cl 26.16 in the manner suggested by the respondent.[33]

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29 Ibid [40].

30 Ibid.

31 Ibid [51].

32 Ibid [52].

33 Ibid [55].

33 Croft J referred to *The Heart Research Institute Ltd v Psiron Ltd*,[34] where Einstein J outlined the benefits of expert determination as providing an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or of a specialised kind.[35] Expert determination was a commonplace form of alternative dispute resolution particularly in the construction industry. His Honour cited the following passage from the reasons of Einstein J:[36]

> 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 Corporation Pty Limited*, NSWSC, 19 October 1987 (unreported), Smart J stated that, in relation to Expert Determination:
>
> > '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)
>
> 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 of work and, presumably, extensions of time' (at 7) were rejected.
>
> 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.

34 As his Honour pointed out, in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd*,[37] the High Court made reference to the decision of the

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34 [2002] NSWSC 646.

35 Ibid [16]; Reasons, [56].

36 [2002] NSWSC 646, [24]–[26] (emphasis added by respondent in its trial submissions).

37 (2011) 244 CLR 305, 315 [25] (French CJ, Crennan and Kiefel JJ).

Queensland Supreme Court in *Zeke Services Pty Ltd v Traffic Technologies Ltd*:[38]

> 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.

35 Croft J observed that considerable caution must be exercised in referring to cases on the interpretation of different agreements, although some guidance at least in terms of general principles and approach might be gained from the cases interpreting dispute resolution provisions contained in other agreements.[39] His Honour referred to his own decision in *Oakton Services Pty Ltd v Tenix Solutions IMES Pty Ltd*,[40] noting that the machinery for the selection of the appropriate alternative dispute resolution process was entirely different from that found in the provisions of the Project Agreement.[41] He also referred to the decision of the Court of Appeal in *Manningham City Council v Dura (Australia) Constructions Pty Ltd*,[42] concluding that this case and two other cases, *Strzelecki Holdings Pty Ltd v Androm Pty Ltd*,[43] and *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd*,[44] served to emphasise that the position is entirely dependent upon the proper construction of the relevant agreement; in this case the Project Agreement.[45]

***The appellant's submissions***

36 Mr Scerri QC, with whom Ms Anderson appeared for the appellant, submitted that the construction of cl 26.16 and cls 50 to 53 of the Project Agreement adopted by Croft J is incorrect. They advanced a wide range of arguments as to

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38 [2005] 2 Qd R 563, 570 [27] (Chesterman J).

39 Reasons, [41].

40 [2010] VSC 176.

41 Reasons, [45].

42 [1999] 3 VR 13.

43 (2005) 38 SR (WA) 266, 271–2 [12]–[20] (Deputy Registrar Hewitt).

44 [2002] 2 Qd R 514, 535 [44]–[45] (Thomas JA).

45 Reasons, [50]–[51].

why their construction of the relevant clauses of the Project Agreement should be adopted:

(a) clauses 50 to 53 deal specifically with dispute resolution and the processes available. These express clauses should take precedence over any ambiguity or inconsistency in the language employed in cl 26.16;[46]

(b) the application of cl 52 is limited to situations where either the parties agree to refer the dispute to an Independent Expert or the Project Agreement expressly stipulates such a referral;

(c) the consequence of the use of the word 'may' in cl 26.16 is that the Project Agreement does not require that extension of time claims must be determined by an Independent Expert;

(d) where objection is taken by either party to the election of the other party to have an extension of time dispute under cl 26.16 expeditiously referred to an Independent Expert, then the election cannot be enforced;

(e) clause 26.16 of the Project Agreement does not preclude referral to arbitration;

(f) the respondent's interpretation of cl 26.16 requires the insertion of additional words to give effect to the meaning for which the respondent contends;

(g) the preferred method for resolving disputes under the Project Agreement is by arbitration, and referral to an Independent Expert at the insistence of 'either party' would cut across and render absurd the process for agreement on such a referral contained in cl 51 and the express words of cl 50.1;

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[46] The appellant referred to *Margetson v Glynn* [1892] 1 QB 337, 344 (Fry LJ) and *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016, 1022-4 (Hoffmann LJ).

(h) the words of cl 26.16 are not sufficiently clear to support the construction contended for by the respondent. It would be unfair if a dispute more complex than a simple extension of time claim could be determined by an Independent Expert in an accelerated, but necessarily limited manner;

(i) use of cl 26.16 might effect a unilateral split of the issues in dispute in order to have part of the dispute determined expeditiously, or the whole of it determined by a process unsuited to a more complex and significant dispute; and

(j) on the appellant's construction, cl 26.16 was not mere surplusage but nonetheless remained dependent on the agreement or consent of the other party. The fast track referral to an Independent Expert remained possible, on the initiative of one party, but not compulsory in the event that the other party objected, or where the preferred arbitration process had commenced.

37 At the hearing of the appeal, Mr Scerri QC elaborated on his principal arguments. He contended:

(a) clause 26.16 was not capable of being invoked after the arbitration process has been invoked, which is what happened here;

(b) two alternative constructions of cl 26.16 were put forward by the respondent, neither of which matched the declaration by the Court;[47]

(c) clause 26.16 is concerned (in part) with 'any dispute about an extension of time claim'. The class of disputes with which cl 26.16 was concerned is not co-extensive with the definition of Dispute as found in cls 50.1 and 52. Clause 26.16 should not be read so as to take this dispute

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47 Order of the Honourable Justice Croft made 4 July 2012 as amended by the Order of the Honourable Justice Habersberger made on 17 July 2012.

outside the scope of the provisions that deal with dispute resolution;

(d) the provisions which engage cl 52(a)(i) are provisions which expressly require or mandate determination under the Accelerated Dispute Resolution Procedures,[48] rather than provisions such as cl 26.16 which merely provide that a dispute of the requisite character may be referred for resolution under cl 52;

(e) clause 50.1 provided that 'the Dispute will be resolved in accordance with cls 50 to 53'. This applied to all disputes. The language in cl 26.16 was much more vague than cl 50. Clauses 50 to 53 should be read as a code, and should, if necessary, override cl 26.16. Clauses 50 to 53 were not expressed to be 'subject to cl 26';

(f) if cl 26.16 were to lead directly to cl 52, it would bypass and render nugatory the Senior Negotiations procedure specified in cl 51;

(g) clause 51(c) expressly referred a Dispute to arbitration under cl 52 in the event that the meeting required under cl 51(b) did not occur or was unsuccessful. Here, the Notice of Dispute was served in December 2011, and the arbitration procedures had been invoked by the appellant. Clause 26.16 could not work with the dispute resolution provisions, and could not override them. Once the cl 50 and 51 procedures had been invoked, the contractual procedures with respect to a dispute had been crystallised;

(h) whilst 'may' can mean 'must', that did not mean that one party could proceed unilaterally against the opposition of the other party to impose the Accelerated Dispute Resolution Procedures on the other contracting party;

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[48] Examples of such provisions given by Mr Scerri QC were cls 32.8(b), 33.9(d), 36.3(d), 37.5(f), and 48.6(b).

(i) as to commercial efficacy, these were large disputes, over the $15 million limit, and there was no obvious rationale for a separate fast track because of the character of the dispute. he appellant's position was more consistent with commercial commonsense; and

(j) the effect of the order made by the trial judge was that all disputes were required to be decided by expert determination. The order was not in its effect confined to disputes involving an extension of time.

***The respondent's submissions***

38 Mr Rowland QC who appeared with Ms Stynes for the respondent submitted:

(a) clause 26.16 is to be interpreted having regard to the whole of cl 26. The clause provided a comprehensive code dealing with delays in the progress of the Works;

(b) clause 26.16 provided a right of election or an option for either party to refer any dispute about an extension of time claim for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures. There were two interpretations that might be adopted:

(i) each party had the choice of accepting the decision of the Project Director or pursuing the matter for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures. Those procedures would then be the only form of dispute resolution; or

(ii) each party had the right to elect to have the dispute resolved by expert determination, and if a party made such an election it binds both parties. This interpretation would permit arbitration but not if either party exercised its right to have the dispute resolved by an

Independent Expert in accordance with the Accelerated Dispute Resolution Procedures;

(c) whilst not critical to the respondent's argument, the better interpretation was the first interpretation;

(d) where the Agreement provides that a Dispute shall be referred for expert determination, cl 52 was enlivened. What was important for cl 52(a)(i) was that the referring clause, if enlivened, made mandatory the referral of the dispute for expert determination;

(e) clause 26.16 entitled either party to refer any dispute about an extension of time claim for expert determination. This entitlement arose in respect of 'any dispute' and either party 'may' refer it;

(f) all parts of the Project Agreement must be given effect where possible. The appellant's submission would require the Court to ignore the phrase 'may be referred by either party' found in cl 26.16;

(g) the balance of cl 26.16 required the Independent Expert to be instructed to have regard to the Change Compensation Principles and assumed that an expert determination will follow in the event that either party exercised its election to have the dispute referred to an Independent Expert;

(h) there was no requirement expressed in cl 26.16 that a dispute about an extension of time claim could only be referred to expert determination by agreement. This could easily have been expressed in cl 26.16. It was not;

(i) it is not a defence to the construction of cl 26.16 as entitling the respondent to refer the whole or part of the dispute described in the Notice of Dispute for resolution by an Independent Expert that there may be other matters in dispute between the parties which fall outside

the Expert's jurisdiction;

(j) the parties have by agreement provided for a number of mechanisms: Senior Negotiations; Accelerated Dispute Resolution Procedures; Arbitration. None of these mechanisms are identified as the preferred method;

(k) it is not unfair to require the Dispute to be determined by an Independent Expert as, amongst other things:

(i) the parties were at arms length and able to look after their own interests with the assistance of their respective solicitors;

(ii) the terms of the contract should be enforced;

(iii) expert determinations provide an informal, speedy and effective way of resolving disputes, and are commonplace in the construction industry;

(iv) the courts have taken a positive and expansive approach to expert determination and the construction of dispute resolution clauses; and

(v) the court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.

39 At the hearing of the appeal, Mr Rowland QC made a number of additional points:

(a) in the context of cl 26.16, 'may' means that if either party wished to pursue a dispute, then either party may refer it for expert determination. The use of the word 'may' in cl 26.16 was similar to the way it was used in cl 50.2. If a party wished to pursue a Dispute, then delivery of a Notice of Dispute together with submissions was the

gateway to it;

(b) clause 51 did not apply to disputes referred for expert determination because cl 52(a)(i) expressly said so. Service of a Notice of Dispute under cl 50.2 was required, and was referred to in cl 52. Clause 52 disapplied cl 51;

(c) the appellant's interpretation of cl 26.16 would leave the provision as having little contractual value. Effectively, the appellant's construction would mean that neither party could refer the dispute for expert determination unless both parties agree;

(d) there were numerous instances where the Project Agreement contained provisions whereby a dispute may be referred by either party for determination by an Independent Expert under or in accordance with the Accelerated Dispute Resolution Procedures.[49] In each instance there had been a prior determination made by a third party, like the Independent Reviewer or the Project Director. The use of the word 'may' highlighted that either party might serve a Notice of Dispute, and proceed to the Accelerated Dispute Resolution Process. If a party wished to challenge the decision of the Independent Reviewer, or the Project Director, this could be done, but only by the Accelerated Dispute Resolution Procedures as each of the enabling clauses made clear was the process to be adopted;

(e) the intention derived from cl 26.16 was that cl 52 should operate as far as possible in relation to disputes governed by cl 26.16 and other similar provisions. The words 'in accordance with' would accommodate something less than slavish compliance. Even if there were an inconsistency between cl 52(a)(i) and cl 26.16, it should be

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[49] Clauses 22.2(d), 22.3(c), 23.4(e), 24.6(e), 26.3(e), 29.10(b), 34.2(e)(ii)(D), 34.7, 36.9(d), 38.8, 46.4(d), and 49.4(b) of the Project Agreement. Cf cls 32.8(b), 33.9(d), 36.3(d), 37.5(f) and 48.6(b) of the Project Agreement.

resolved in favour of what the parties say in cl 26.16, that the parties may refer the dispute to the accelerated procedure;

(f) the preferred construction of cl 26.16 is that it offered either party the opportunity of accepting the status quo, and a party which did not accept it could go to the Accelerated Dispute Resolution Procedures. The word 'may' as used in cl 26.16 should be treated as a choice between dispute and no dispute. Primarily, he submitted that there was only one dispute resolution method available for a dispute of the kind that fell within cl 26.16; and

(g) finally, he drew attention to a letter from the Project Director sent on the same day and shortly after the delivery of the Notice of Dispute on 16 December 2011, asking why it was that cl 51(a) of the Project Agreement was activated. It should not be a matter of which party got in first with their preferred procedure.

***Relevant principles in the construction of commercial contracts***

40 In *Antaios Compania Naviera SA v Salen Rederierna AB*,[50] Lord Diplock said 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.

41 To like effect, Marks J said in *Di Dio Nominees Pty Ltd v Brian Mark Real Estate Pty Ltd*:[51]

> In recent times, the courts have with increasing frequency and emphasis interpreted commercial contracts so that they accord with commercial reality and where necessary imply such words for that purpose as appear necessary. See *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VR 834 per McGarvie J, at pp 840 and 845, and the authorities there mentioned. See also *David Leahey*, at p 387, per Murphy J and *Doyle v Mount Kidston Mining and Exploration Pty Ltd* [1984] 2 Qd R 386 per MacPherson J, at

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50 [1985] AC 191, 201.

51 [1992] 2 VR 732, 740 (Marks J, with whom Hedigan J agreed).

p 392.

42 However, in *Maggbury Pty Ltd v Hafele Australia Pty Ltd*,[52] Gleeson CJ, Gummow and Hayne JJ identified the potential difficulty in identifying what in respect of any particular contract, comprised 'business commonsense':

> Upon the proper construction of the agreements, did the restraints upon use continue to operate after the public disclosure and the collapse of negotiations? It was said by Lord Diplock 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.'
>
> Of course, what in respect of a particular contract comprises 'business commonsense', as an apparently objectively ascertained matter, may itself be a topic upon which minds may differ and in respect of which an imputed consensus is impossible. Here the difficulty arises not from the need for detailed semantic and syntactical analysis of the language used in the agreements, but from the use therein of simple terms such as 'at any time hereafter' and 'forever'. Is this a case where 'something must have gone wrong with the language'?

43 In *Spunwill Pty Ltd v BAB Pty Ltd*,[53] Santow J helpfully listed a number of settled principles for the construction of a written document. I will set out those of greater significance in the construction of the Project Agreement:

> 2. A presumption that the parties intended a written document to be the sole and exclusive repository of their agreement arises where the document is clear on its face, contains all terms appropriate to the transaction and is signed by the parties as the record of their agreement: *LG Thorne & Co Pty Ltd v Thomas Borthwick & Sons (Australasia) Ltd*. Extrinsic evidence is available to show that a document, ostensibly the entire and final contract, does not contain all the terms of the agreement but may for example be partly oral and partly written, or in more than one document: *State Rail Authority of New South Wales v Health Outdoor Pty Ltd*. However, where it is determined that the terms of the agreement are wholly contained in writing and are unambiguous or of a plain meaning, extrinsic evidence cannot be admitted to subtract from, add to, vary or contradict the language of the written agreement: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*.
>
> 3. In construing a written document, the object is to discover and give effect to the contractual obligations that reasonable persons in the position of the parties would objectively have intended the document's language to create. The emphasis is thus on giving effect to the apparent intention of the parties,

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52 (2001) 210 CLR 181, 198 [43] (citations omitted).

53 (1994) 36 NSWLR 290, 298-300 (citations omitted).

and direct evidence of the parties' actual subjective intentions and expectations is inadmissible for purposes of construction: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*; *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd*.

4. The language of a term is generally assigned its natural and ordinary meaning, read in the light of the contract as a whole but where it is ambiguous surrounding circumstances may be taken into account in assigning the presumed meaning. The surrounding circumstances include the matrix of mutually known facts, and the background, object, context and commercial purpose of the transaction, in the objective sense of what reasonable persons in the position of the parties would have had in mind: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*; *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd*; *Manufacturers' Mutual Insurance Ltd v Withers*.

5. The consequences of alternative interpretations are not immaterial, and where the meaning of language in a contract is ambiguous, that interpretation will be preferred which avoids consequences which are in the circumstances capricious, unreasonable, unjust or not consonant with business efficacy: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*; *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland*; *Stillwell Trucks Pty Ltd v Nectar Brook Investments Pty Ltd*.

6. Every passage of a document must be read as part of the whole instrument. This may justify departing from what had seemed the plain meaning of a clause considered in isolation: *The Metropolitan Gas Co v Federated Gas Employees' Industrial Union*.

7. Where a court can discern the intent of the parties from an examination of the document as a whole, words may be supplied, omitted or corrected in the instrument, where it is clearly necessary in order to avoid absurdity or inconsistency: *Fitzgerald v Masters*. In such cases rectification of the document is not required: *Re United Pacific Transport Pty Ltd*; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*.

8. 'If, by any reasonable construction, the intention of the parties can clearly be arrived at from the document itself, then the court will give effect to that intention even though this involves departing from or qualifying particular words used. So the court will be prepared to restrict, transpose, modify, supply or reject words or terms in the documents, provided the intention of the parties is plain in spite of the words': *Chitty on Contracts*; *Tropwood AG of Zug v Jade Enterprises Ltd (The Tropwind)*.

44 In argument, both parties sought to rely on the well known Latin maxim *expressio unius est exclusio alterius*.[54] This canon of construction was conventionally

[54] The expression of one thing is the exclusion of the other. See, generally, Lewison and Hughes (Thomson Reuters) *The Interpretation of Contracts in Australia* (2012), pp 298-302.

stated by Wiles J in *North Stafford Steel Iron & Coal Co (Burslem) Ltd v Ward*:[55]

> But the ordinary rule, that if authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act under other circumstances than those so defined: '*unius est exclusio alterius*'.

45 The principle was expressed by Fry LJ in *Margetson v Glynn* in similar terms:[56]

> Our decision depends, as it appears to me, upon an ancient and well-established principle of construction, of which *Ledue v. Ward* is one of the most recent illustrations. I think that principle of construction is not confined to this class of documents, but is applicable to all documents. This principle is applicable wherever specific words are used to express the main object and intent of the instrument, and in some other parts general words are used which in their utmost generality would be inconsistent with and destructive of the main object of the contract. When the Court in dealing with a contract or document of any kind finds that difficulty, it always, so far as I know, follows this principle, that the general words must be limited so that they shall be consistent with and shall not defeat the main object of the contracting parties.

And in *William Sindall Plc v Cambridgeshire County Council* by Hoffmann LJ:[57]

> It is of course a principle of construction that words capable of bearing a very wide meaning may have to be given a narrow construction to reconcile them with other parts of the document. This rule is particularly apposite if the effect of general words would otherwise be to nullify what the parties appear to have contemplated as an important element in the transaction.

46 In *ABB Power Plants Ltd v Electricity Commission of New South Wales*, Handley JA said:[58]

> It has long been established that contractual or statutory provisions prescribing in positive terms a procedure to be followed necessarily imply that the same matter will not be dealt with under a different procedure.

47 However, in *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service*,[59] Toohey and Gummow JJ said that:

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55 (1868) LR 3 Ex 172, 177, followed in *R v Wallis* (1949) 78 CLR 529, 550 (Dixon J).

56 [1892] 1 QB 337, 344 (citation omitted).

57 [1994] 1 WLR 1016, 1024.

58 (1995) 35 NSWLR 596, 599.

59 (1995) 184 CLR 301, 320.

> the maxim must always be applied with care, for it is not of universal application and applies only where the intention it expresses is discoverable on the face of the instrument.

And Nettle JA of this Court said in *Australia Pacific Airports (Melbourne) Pty Ltd v The Nuance Group (Australia) Pty Ltd*:[60]

> *Expressio unius est exclusio alterius* and kindred syntactical presumptions are problematic at the best of times, and particularly when construing commercial agreements.

***Construction of cl 26.16 and cls 50 to 53***

48 Despite the arguments of the appellant, I am of the opinion that the construction of cl 26.16 adopted by the trial judge is correct.

49 As to the construction of cl 26.16, I note:

(a) the Project Agreement is the sole and exclusive repository of the agreement between the parties;

(b) the object is to discover and give effect to the contractual obligations that reasonable persons in the position of the parties would objectively have intended the language of the Project Agreement to create. The language of cl 26.16 and of cls 51 to 53 should be given its natural and ordinary meaning in the light of the Project Agreement as a whole;

(c) clause 26.16 is expressed to apply to '<u>any</u> dispute about an extension of time claim'[61] or 'acceleration under this cl 26'. The use of the word 'any' suggests a comprehensive approach to the class of disputes identified in the provision;

(d) clause 26.16 stands to be read as part of cl 26, and as part of the whole Project Agreement. Clause 26 is a code dealing with 'Time'. Clause 26.16 is the provision in that code which describes how extension of

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60 [2005] VSCA 133, [31] (citations omitted).

61 Emphasis added.

time disputes are to be resolved. Parts of that code involved the submission of Change Notices,[62] the grant of extensions of time by the Project Director,[63] and the unilateral extension of time by the respondent in its absolute discretion when it considers that any act or omission by it or certain other parties will, or is likely to, delay the appellant;[64]

(e) clause 26.16 refers to any dispute about any extension of time or acceleration under cl 26.6 expressly including determinations or rejections by the Project Director under cl 26.9. Decisions of the Project Director under cl 26.9 are well suited for 'fast track' determination by an Independent Expert;

(f) the matrix of facts mutually known to the parties includes the background, object, context and commercial purpose of the Project Agreement, including the nature of claims and disputes as to extensions of time and acceleration, the significance of cl 26 and its provisions relating to time, and the role of the Project Director in seeking to resolve extension of time and acceleration disputes;

(g) the right to refer a dispute under cl 26.16 is conferred on either party. As the word 'may' indicates, it is not obligatory for either party to refer a dispute but if neither party does so, the status quo will remain. Typically, although not invariably, the status quo will be the decision made by the Project Director under cl 26.9. The use of the word 'may' in cl 26.16 gives either party a choice as to whether or not it seeks to invoke these provisions. Such a construction is reasonable, and consistent with business efficacy;

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62 Clauses 26.6 and 26.7.

63 Clause 26.9.

64 Clause 26.10.

(h) the use of the word 'may' attracts a prima facie presumption that the word is to be understood in its natural meaning, that sense being permissive or facultative only.[65] This is also the ordinary meaning of the word 'may' read in the light of the Project Agreement as a whole;

(i) whilst the appellant contends that the exercise of cl 26.16 by one party requires the consent of the other party before the dispute is referred to the Independent Expert under cl 52, there is nothing in cl 26.16 which supports such a limitation on the operation of the right of each party to have the dispute determined under the Accelerated Dispute Resolution Procedures. The exercise of the right conferred by cl 26.16 is open to 'either party';

(j) if one party does refer a dispute for resolution under cl 26.16, there are a number of important consequences:

(i) first, the dispute is referred for resolution by an Independent Expert. There is no reference to the Senior Negotiations procedure or to arbitration in cl 26.16;

(ii) secondly, cl 26.16 states that the dispute is to be resolved 'in accordance with the Accelerated Disputes Resolution Procedures'. This is a clear and unequivocal reference to cl 52;

(iii) thirdly, cl 26.16 contemplates only the application of the Accelerated Dispute Resolution Procedures. It directs that an Independent Expert must be instructed, and that those instructions must have regard to the Change Compensation Principles;

(k) clause 26.16 requires the Independent Expert to act in accordance with

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[65] *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 63 (Mason CJ); *Ward v Williams* (1955) 92 CLR 496, 505 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ).

the Accelerated Dispute Resolution Procedures;

(l) the definitions in the Project Agreement support such a construction of the Project Agreement:

(i) the definition of 'Accelerated Dispute Resolution Procedures' makes express reference to cl 52, and not to cls 51 or 53;

(ii) likewise the definition of 'Accelerated Dispute Panel' makes express reference to cl 52 and not to cls 51 or 53;

(iii) again, the definition of 'Independent Expert' makes express reference to appointment in accordance with cl 52, and does not refer to cls 51 or 53; and

(iv) clause 26.16 contemplates and proceeds on the basis of an Independent Expert determination under cl 52;

(m) the construction adopted by his Honour gives cl 26.16 important work to do. Clause 26.16 is intended as the gateway by which the code agreed by the parties as to 'Time' in cl 26 interacts with the dispute resolution process contained in cls 50 to 53. By contrast, the appellant's construction of cl 26.16 would give that provision very little work to do. It is unlikely that this is what the parties intended when they agreed on cl 26.16 in the context of cl 26 which deals with the very important topic of time in a large building contract;

(n) it is commercially efficacious for the parties to agree on dispute resolution procedures so that disputes as to the decisions of the Project Director concerning extensions of time directly engage the Accelerated Dispute Resolution Procedures. Before making an extension of time decision under cl 26.9(a), the Project Director will already have taken

into account all relevant evidence presented by the parties.[66] Extension of time claims are notorious in building disputes and it is reasonable and sensible for them to be resolved using a 'fast track' process;

(o) the range of disputes which can be referred under cl 26.16 is limited, and not co-extensive with the disputes that fall under cl 50.1. Consistently with its role as part of a code of provisions dealing with time, cl 26.16 applies to disputes about extensions of time or acceleration under cl 26; and

(p) the selection by the parties of Accelerated Dispute Resolution Procedures for the resolution of specified types of disputes necessarily means that other types of disputes will be resolved by a different process. The parties in the Project Agreement provided for different types of disputes to be dealt with by different types of dispute resolution mechanisms. This result is not capricious, unreasonable, inconvenient or unjust. To the contrary, the reference to the Accelerated Dispute Resolution Procedures in cl 26.16 shows that the parties intended to bypass the Senior Negotiations process contained in cl 51. They also decided not to directly engage the Arbitration procedures in cl 53. Neither consequence is in any way unlikely or unreasonable, particularly given that in the typical extension of time case the Project Director will, and is required under cl 26.09(b) to, have taken into account all relevant evidence presented by the parties. The result achieved by this construction is consistent with business efficacy.

50 The arguments advanced on behalf of the appellant as to cls 51 to 53 should not be accepted as:

(a) clause 50.1 says that Disputes will be resolved in accordance with cls 50 to 53. Clauses 51, 52 and 53 contain three different types of dispute

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66 Clause 26.9(b).

resolution mechanisms. Clause 50.1 does not give any guide as to which dispute resolution mechanism will be applied in any given circumstances. It does not assist where the dispute is as to the dispute resolution mechanism is to be engaged; and

(b) clause 50.2 provides that a party to a Dispute 'may' deliver to the other party a Notice of Dispute together with its submissions in relation to the Dispute. Again, this provision applies to each of the three dispute resolution mechanisms. The use of the word 'may' is permissive and facultative here as in cl 26.16.[67] If nothing is done, and no Notice of Dispute and submissions are given, the status quo will remain.

51 As to the construction of cl 52:

(a) there is no provision in which the parties indicate that the Senior Negotiations procedure, Accelerated Dispute Resolution Procedures or Arbitration is the preferred mechanism for resolving disputes. Rather, all three are available under the provisions of the Project Agreement, and are engaged in the circumstances respectively set out in the provisions of the Project Agreement;

(b) it is cl 52 which expressly disengages cl 51. Clause 52 says that the express referral of a dispute for resolution by an Independent Expert or by Accelerated Dispute Resolution disengages the Senior Negotiations procedure;

(c) clause 52(a)(i) applies whenever the Project Agreement expressly provides that a Dispute shall be referred for determination by an Independent Expert or by Accelerated Dispute Resolution;

(d) clause 26.16 expressly provides for resolution of disputes falling within the scope of that clause by an Independent Expert, and by the

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67 See [49(h)] above.

Accelerated Dispute Resolution Procedures. It is clear that the parties sought in cl 26.16 to engage cl 52;

(e) the respondent's argument gains additional force from the 'expressio unius' principle. The use of affirmative words in cl 26.16, to the effect that the Accelerated Dispute Resolution Procedures would be engaged in the defined conditions described in that clause may be taken as excluding the alternative procedures of 'Senior Negotiation' and 'Arbitration' contended for by the appellant. Clause 26.16 prescribes in positive terms the procedure to be followed. This necessarily implies that the same matter will not be dealt with in an inconsistent manner under a different procedure;[68]

(f) whilst there is a difference in language between the use of the word 'may' in cl 26.16, and the use of the word 'shall' in cl 52(a)(i), four points stand to be made:

(i) first, if a power to refer such as that found in cl 26.16 is exercised by either party the reference to an Independent Expert under cl 52 is imperative. Upon a party exercising the election contained in cl 26.16, the application of cl 52 and the Accelerated Dispute Resolution Procedures is compelled, and cannot be resisted by the other party. For this reason, the dispute falls within the language of cl 52(a)(i);

(ii) secondly, even if this were not so, cl 26.16 provides for the dispute to be resolved by the Independent Expert 'in accordance with the Accelerated Dispute Resolution Procedures'. Thus, even if a dispute arising under cl 26.16 could not strictly be regarded as falling within cl 52(a)(i), this does not debar the operation of cl 26.16, as it nonetheless requires the dispute to be resolved by

[68] See *Saraswati v R* (1991) 172 CLR 1, 23–4 and the cases there cited.

the Independent Expert 'in accordance with' the Accelerated Dispute Resolution Procedures;

(iii) the words 'in accordance with' mean 'in conformity with' or 'consistently with'[69] or 'not inconsistently with'.[70] The expression connotes a substantial measure of consistency.[71] However, the words do permit a level of tolerance as to the application of the Accelerated Dispute Resolution Procedures;

(iv) if it were necessary to do so, the court can restrict, transpose, modify, supply or reject words or terms in the Project Agreement, provided that the intention of the parties is plain, which in my view it is;

(g) clause 52(a)(ii) has a different purpose and character to cl 52(a)(i). Clause 51(c) contains the gateway from the Senior Negotiations procedure into the Accelerated Dispute Resolution Procedures. As I have said, this is available where the Senior Negotiations procedure has failed, and 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. Clause 52(a)(ii) has no relevance to the dispute currently before the Court;

(h) the Accelerated Dispute Resolution Procedures do not solely involve determination of a Dispute by an Independent Expert. There are three different ways in which Disputes engaged by the Accelerated Dispute

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69 *Walker v Wilson* (1991) 172 CLR 195, 207–8 (Deane, Dawson, Toohey and McHugh JJ)

70 Ibid 200 (Brennan J).

71 *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1993) 41 FCR 536, 542–3 (Black CJ, Burchett and Lee JJ). See also *Re Barber; Ex parte Stanford* (1886) 17 QBD 259, 264 (Lord Esher MR), 265 (Lopes LJ), 270–1 (Bowen LJ); *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* (2000) 158 FLR 121, 129-30 [31] (Austin J); *Permanent Mortgages Pty Ltd v Cook* [2006] NSWSC 1104, [57]–[60] (Patten AJ); *City Pacific Ltd v Bacon (No 2)* (2009) 178 FCR 81, 91-3 [34]–[41] (Dowsett J).

Resolution Procedures may nevertheless ultimately be resolved by arbitration;[72] and

(i) the interdependent nature of the three dispute resolution mechanisms viz the Senior Negotiations procedure, Accelerated Dispute Resolution Procedures and Arbitration points to the lack of substance in the appellant's argument that arbitration is the 'preferred' method of dispute resolution contained in the Project Agreement, and that cl 51 should not be overridden by cl 52.

***What is the correct procedure for disputes within cl 26.16?***

52 The judge's construction of cl 26.16 and cls 51 and 52 of the Project Agreement gains some force from the judgment of Brennan CJ, Gaudron and McHugh JJ in *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* where it was said:[73]

> Disputes are not readily resolved … by procedures which can be set at nought if one party elects to pursue some other course of action.

53 Likewise, it is said here that the Project Agreement should not be construed so as to permit parallel or alternative procedures which might conflict or lead to different outcomes.

54 Further, although the High Court was concerned with a different agreement, the use of the word 'may' in the provision by which the dispute resolution procedure was engaged did not lead to the conclusion that the provisions were other than an exclusive regime for the resolution of disputes:[74]

> The change in language from 'shall' in cl 45(a) to 'may' in cl 45(b) and the paragraph following provides no reason for thinking that cl 45 does not provide an exclusive regime for the resolution of disputes. Rather, the provisions, if read in their entirety, confirm the view that disputes are to be determined in accordance with and only in accordance with the procedures:

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72 See [14]–[18] above.

73 (1995) 184 CLR 301, 311 (Brennan CJ, Gaudron and McHugh JJ).

74 Ibid 312 (Brennan CJ, Gaudron and McHugh JJ).

> if the Contractor wishes to raise a dispute he must – 'shall' - give notice to the Superintendent who has power to decide the matter; however, once the Superintendent has decided the matter, the Contractor may accept the decision or, if dissatisfied, 'may ... submit the matter at issue ... to the Principal for decision'; so, too, the Contractor may accept the decision of the Principal or, if dissatisfied, 'may ... give notice ... requiring that the matter at issue be referred to arbitration'.

55 In *Stevens Constructions Pty Ltd v Zorko*,[75] the Full Court of the Supreme Court of South Australia again held that there should only be one means of review:[76]

> I accept as my starting point the proposition that a court will not treat a contract as preventing parties from pursuing their remedies in the courts unless it is clear that that is what was agreed: *PMT Partners* (at 311): Brennan CJ, Gaudron and McHugh JJ. But I also bear in mind what those Judges went on to say (at 311) about the fact that clauses like cl 44(b) are concerned with dispute resolution:
>
> > 'Disputes are not readily resolved if there are parallel proceedings permitting of different outcomes. Nor are they readily resolved by procedures which can be set at nought if one party elects to pursue some other course of action.'
>
> In my opinion it is not surprising that the parties should provide for only one means of dispute resolution. As well, it is not difficult to explain the presence of the word 'may' in the provision in cl 44(b) that 'either party may give to the other notice in writing of such dispute or difference ...' The explanation is that the clause reflects the fact that if there is a dispute each party has the option of acquiescing in the view of the other party, or giving notice with a view to arbitration.

56 In *Oakton Services Pty Ltd v Tenix Solutions IMES Pty Ltd*,[77] Croft J took a similar view of the meaning of the word 'may' in a dispute resolution provision contained in a subcontract which provided for a review mechanism with a provision in default of agreement for expert determination or arbitration. His Honour construed the word 'may' as follows:[78]

> 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

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75 (2002) 81 SASR 316 (Doyle CJ, Lander and Wicks JJ).

76 Ibid 321 [26].

77 [2010] VSC 176.

78 Ibid [23]–[24].

> 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)).[11] On this 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.
>
> 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.

57 Having regard to the ongoing dispute between the parties, it is desirable to finally determine the procedure applicable to cl 26.16 disputes. In my view, cl 26.16 (once engaged by either party) mandates reference to the Accelerated Dispute Resolution Procedures as the only and exclusive form of dispute resolution for disputes within the scope of cl 26.16. Reference to arbitration is not a default form of dispute resolution in the event that neither party were to elect under cl 26.16 to refer the dispute for resolution in accordance with the Accelerated Dispute Resolution Procedures. I have come to these conclusions for the following reasons:

(a) there is only one form of dispute resolution procedure referred to in cl 26.16 – that is, resolution by an Independent Expert under the Accelerated Dispute Resolution Procedures. There is no reference in cl 26.16 to arbitration, or to arbitration as the default form of dispute resolution; nor is there any provision elsewhere in the Project Agreement to that effect;

(b) there is no reason why arbitration should be regarded as the default or underlying system of dispute resolution any more than the other alternative mechanisms agreed by the parties in the Project Agreement;

(c) clause 26.16 contemplates that a dispute about an extension of time or

acceleration under cl 26 will be dealt with by an Independent Expert acting on instructions, including instructions to have regard to the Change Compensation Principles;

(d) clause 52(r) deals with the Change Compensation Principles, and contemplates that disputes as to the Change Compensation Principles may be referred by either party for resolution by an Independent Expert;

(e) it is important that there be certainty as to the available decision making processes, and not options or alternatives;[79]

(f) there is no clear demarcation between the different dispute resolution procedures set out in cls 51 to 53. Dispute resolution commenced under the Senior Negotiations procedure can result in dispute resolution under the Accelerated Dispute Resolution Procedures or in arbitration, depending on what was described in argument as 'a cascading series of eventualities'. Likewise, the Accelerated Dispute Resolution Procedures can end in arbitration if the Independent Expert process fails, or if the value of the determination is greater than $15 million and the other party gives notice to the other party referring the matter to arbitration in accordance with cl 52(n)(ii) of the Project Agreement;

(g) in the event that the Senior Negotiations procedure fails, cl 51(c) provides for the dispute to be referred to arbitration if the amount claimed in the Notice of Dispute is equal to or less than $5 million in relation to the Works, or $500,000 in relation to the Services. However, if the amounts claimed are less than these amounts, the Dispute is referred for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures. Both processes are

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[79] See [52]–[56] above.

contemplated by cl 51 depending on the amount claimed;

(h) clause 51 is excluded by cl 52 if the Project Agreement expressly provides that a Dispute is referred for determination by an Independent Expert or by Accelerated Dispute Resolution. This is the case with cl 26.16. The effect is that the agreed form of dispute resolution in the event that either party wishes to challenge the status quo under cl 26.16 by delivering a Notice of Dispute under cl 50.2 is the Accelerated Dispute Resolution Procedures; and

(i) it is important for provisions such as cl 26.16 to be reasonably and meaningfully construed so as to give the parties a real opportunity of avoiding prolonged and expensive litigation or arbitration proceedings which they have in their agreement sought to avoid through access to accelerated dispute resolution.

58 The construction preferred by his Honour will facilitate the expeditious resolution by the parties of the EOT Claims through the Accelerated Dispute Resolution Procedures.

***Conclusion***

59 For the reasons that I have given, I consider that the construction of cl 26.16 and cls 50-53 adopted by his Honour is correct. The appeal should be dismissed, subject to one matter concerning the form of the declaration raised by Mr Scerri QC.

***Form of Declaration***

60 In his submissions, Mr Scerri QC contended that the form of declaration made following the trial was in error.

61 He contended that the effect of the order was that all of the disputes the subject of the Notice of Dispute were referred for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures set out in

cl 52. The Notice of Dispute contains four claims. The appellant contends that one of these claims is not an extension of time claim capable of being dealt with under cl 26.16.

62 In a letter dated 22 December 2011, sent on behalf of the appellant following service of the Notice of Dispute, this issue was raised:

> Thirdly, Project Co's Dispute Notice also includes a significant issue which is not an extension of time claim, that is, the issue of whether the payment date for Incentive Payments under the Project Agreement (as amended by the Project Agreement Amending Deed) should be adjusted in accordance with any extensions of time to the Date for Commercial Acceptance granted under the Project Agreement.

63 The issue disputed in the letter has not been argued in these proceedings, and should remain open for the appellant to raise before the Independent Expert under the Accelerated Dispute Resolution Procedures.

64 The declaration the subject matter of this appeal should be varied by changing the word 'dispute' to the plural 'disputes', by addition of the words 'insofar as they are disputes as to claims within the scope of cl 26.16' and by deletion of the words 'by an Independent Expert' from the declaration.

65 The first two changes are intended to make it clear that only those disputes set out in the Notice of Dispute which fall within the scope of cl 26.16 are referred for resolution under the Accelerated Dispute Resolution Procedures. The third change viz the deletion of the words 'by an Independent Expert' makes it clear that the resolution of the dispute under the Accelerated Dispute Resolution Procedures may not ultimately be by the Independent Expert. Whilst the dispute is initially referred to an Independent Expert under the Accelerated Dispute Resolution Procedures, it may nonetheless be finally determined by arbitration in any of the three eventualities that I have referred to.[80]

66 For these reasons, I would order that:

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[80] See [14]–[18] above.

(a) the appeal be allowed only insofar as necessary to make an order that in lieu of the declaration in paragraph 1 of the order of the Court dated 4 July 2012 as amended by order made on 17 July 2012:

> It be declared that clause 26.16 of the Project Agreement (being exhibit MWE1 to the affidavit of Michael Earwaker dated 1 May 2012) requires that the disputes the subject of the Notice of Dispute (comprising exhibit MWE11 to the affidavit of Michael Earwaker dated 1 May 2012 and exhibit NCSR1 to the affidavit of Nicholas Rudge dated 11 May 2012) insofar as they are disputes as to claims within the scope of clause 26.16 be resolved in accordance with the Accelerated Dispute Resolution Procedures set out in clause 52 of the Project Agreement.

(b) the appeal be otherwise dismissed; and

(c) the appellant pay the respondent's costs of the appeal.

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