IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

No. 04583 of 2013

GLENVILL PROJECTS PTY LTD (ACN 147 526 074) First Plaintiff

and

GLENVILL PTY LTD (ACN 150 874 356) Second Plaintiff

v

NORTH NORTH MELBOURNE PTY LTD (ACN 103 762 563) First Defendant

and

WILLIAM TAYLOR Second Defendant

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	16 DECEMBER 2013
DATE OF JUDGMENT:	17 DECEMBER 2013
CASE MAY BE CITED AS:	GLENVILL PROJECTS PTY LTD & ORS v NORTH NORTH MELBOURNE PTY LTD & ORS
MEDIUM NEUTRAL CITATION:	[2013] VSC 717

BUILDING CONTRACTS - Expert determination- General principles - Dispute resolution clause in contract - Expert appointed under the contract to determine issue of escalation costs - Scope of issues under expert determination agreement - Late amendment of claim - Procedural directions given by expert - Contract construction - Incorporation of IAMA rules into expert engagement contract.

EXPERT DETERMINATION - Construction disputes - Scope of expert's jurisdiction under contract - Power to vary the scope of the determination - Expert determination differs from arbitration - Whether expert determination open to review - Whether breach of expert engagement contract - Procedural fairness - Manifest error.

REMEDIES - Whether expert determination reviewable - Applicability of administrative law remedies - Contractual remedies - Relief governed by terms of contract - Whether declaration should be granted.

APPEARANCES:	Counsel	Solicitors
For the First Plaintiff	Mr A J Laird	Kalus Kenny Intelex
For the Second Plaintiff	Mr A J Laird	
For the First Defendant	Mr T J Mullen	SBA Law
For the Second Defendant	No appearance	

HIS HONOUR:

Background

1 In this proceeding the Plaintiffs (which I shall compendiously refer to as "Glenvill") seek to challenge what is, in effect, an interlocutory procedural ruling of a contractually appointed expert the Second Defendant ("Mr Taylor"), who was appointed by the parties pursuant to the dispute resolution clauses of a construction contract entered into between Glenvill as the builder and the First Defendant ("North North Melbourne") as the principal.

2 The construction contract was entered into on 22 January 2009 for the construction by Glenvill of residential premises on each lot of a subdivision on land owned by North North Melbourne (the "Land") situated at the corners of Buncle and Sutton Streets and Buncle and Mark Streets, North Melbourne (the "Construction Contract").

3 Mr Taylor has commenced, but has not yet completed, his expert determination process (the "Expert Proceeding").

Relevant Terms of the Construction Contract

4 The Construction Contract contained the following terms of relevance:

5 It provided for the issue of a "Works Commencement Notice" in the following clause:

> 3.4 Commencement of Works and Building Permits
>
> (a) Once settlement under the Contract of Sale for each lot in a Stage has occurred and:
>
> i. The Builder has an executed copy of all Purchaser Building Contracts in respect of Lots within the Stage: or
>
> ii The Land Vendor has provided the Builder with notices pursuant to clause 3.3(a) and provided the Builder with an executed copy of each Land Vendor Building Contract in respect of those Lots within the Stage which have not settled,
>
> the Land Vendor may issue a Works Commencement Notice.

6 Clause 18 of the Construction Contract provided:

If the Works Commencement Notice in respect of any Lots is issued under this agreement after 31 July 2009, the Land Vendor must pay the Builder an amount equivalent to 0.4% per month of the price payable under the Building Contracts (excluding GST and the cost of options) for those Lots for the period after 31 August 2009 that the Works Commencement Notice for those Lots is issued.

7 Clause 9.2 of the Construction Contract provided:

The Land Vendor [North North Melbourne] warrants that:

(c) all utility services will be available at the boundary of a Lot prior to the issue of the Works Commencement Notice of that Lot.

8 Clause 16 of the Construction Contract provided:

16 Dispute Resolution

16.1 Notice of dispute

a) In the event of any dispute or difference arising between the Parties, either during the period of this Agreement or that of the termination, abandonment or breach of this Agreement, as to any matter or thing connected with this Agreement or arising under this Agreement, either Party may give to the other Party Notice of the dispute or difference.

b) The Notice

i must not be unreasonably given;

ii must state that it is a Notice under this clause; and

iii must give sufficient details of the dispute or difference to enable the Party receiving the Notice to determine the nature of the dispute or difference alleged.

16.2 Initial Period

For the period of 10 Business Days after service of a Notice under the clause 16.1 (Initial Period), the Parties must use reasonable endeavours to resolve the dispute or difference and a representative of each Party must meet within the first 5 Business Days of the Initial Period with that aim.

16.3 Appointment of Expert

a) If the dispute or difference remains unresolved at the end of the Initial Period, either Party may refer it to an expert agreed between the parties or, failing agreement, being an expert appointed by the President of the Australian Institute of Arbitrators (Expert).

b) The Expert must decide the dispute or the difference acting as an expert and not as an arbitrator. The decision of the Expert will be final and binding on each Party in the absence of manifest error.

c) Each party must use all reasonable endeavours to ensure that the Expert is able to make a decision as soon as is practical, including by providing the Expert with all information relevant to the dispute or difference, and the Expert will be required to provide such decision within 20 Business Days from the date of appointment.

d) Any information or documents disclosed by a Party under this clause must be kept confidential and must not be used except to attempt to resolve the dispute or difference.

e) Each party must bear equally the Expert's costs, unless the decision of the Expert states otherwise.

The Disputes Between the Parties

9 In accordance with the Construction Contract, Glenvill agreed to undertake construction work on the Land in three stages.

10 On 28 September 2009, North North Melbourne issued a Works Commencement Notice to Glenvill for stage 1.

11 In a dispute submitted by Glenvill and North North Melbourne for determination by Mr Taylor acting as Expert, Glenvill claims that this Notice was premature because, as at 28 September 2009, the utility services for stage one were not available.

12 On 7 October 2009, North North Melbourne issued a Works Commencement Notice to Glenvill for stage 2.

13 Glenvill claims that this Notice was also premature because, as at 7 October 2009, the utility services for stage 2 were not available.

14 On 7 October 2009, North North Melbourne issued a Works Commencement Notice to Glenvill for stage 3.

15 On 22 October 2012, Glenvill issued a Notice of Dispute to North pursuant to clause 16.1 of the Construction Contract.

16 On 12 November 2012, Glenvill issued a further Notice of Dispute to North North Melbourne. In the further Notice of Dispute, Glenvill contends that the Agreement contains an implied term as follows:

> The Agreement contains an implied term that for the purposes of calculating the escalation costs under clause 18, the relevant period is the period between 31 August 2009 and (in the event that the Works Commencement Notices are issued before the utility services are available) the date on which the utility services became available. The implied term goes without saying and is necessary to give business efficacy to the Agreement. (the "Implied Term")

17 Based on the Implied Term, the amount claimed in the further Notice of Dispute is $198,478.00.

18 North North Melbourne disputes the Implied Term claim in the Expert Proceeding.

19 On 15 November 2012, North North Melbourne issued a Notice of Dispute to Glenvill claiming an alleged loss of $56,564.51 as a consequence of alleged delays by Glenvill.

Appointment of Mr Taylor as Expert (the "Expert Engagement Contract")

20 In accordance with clause 16.3 of the Construction Contract, on 11 February 2013, Glenvill by its solicitors wrote to the President of the Institute of Arbitrators and Mediators Australia (the "Institute") requesting that the Institute suggest an expert to be appointed.

21 On 17 April 2013, Glenvill's solicitors received a letter from the Institute appointing Mr Taylor as the Expert (the "Expert Engagement Contract"). Thereafter Mr Taylor commenced the process of expert determination under the contract ("the Expert Determination Process").

22 On 19 April 2013, Glenvill's solicitors received a letter from Mr Taylor requesting that the parties attend a preliminary conference to deal with matters arising from his appointment.

23 On 23 April 2013, by way of telephone conference, a solicitor for Glenvill, attended a Preliminary Conference with Mr Taylor and a solicitor for North North Melbourne. The parties agreed that the matters to be determined were:

> 1. The Claimants' [Glenvill's] claim for escalation costs under clause 18 of the contract and the question of the construction of clause 18. Refer to Claimants' notice of dispute dated 12 November 2012.

2. The Respondent's [North North Melbourne's] defence of the Claimants' claim and the Respondent's cross claim (approximately $58,000.00) related to delays in release of Councils bonds. Refer Tan Partners letter dated 31st October 2012 and SBA Law letter of 13th November 2012 (sic).

24 On 17 May 2013, the solicitors for the parties exchanged letters agreeing that neither party would challenge the jurisdiction of the expert, save for manifest error.

25 On 12 June 2013, Glenvill's solicitors emailed a letter to the solicitors for North North Melbourne (with a copy to Mr Taylor), seeking to include a claim for damages for the breach of warranty contained in clause 9.2(c) of the Agreement.

26 On 4 July 2013, Glenvill's solicitors received a letter from the solicitors of North North Melbourne (copied to Mr Taylor) stating in substance that North North Melbourne consented to the inclusion of the further claim.

27 Glenvill and North North Melbourne also consented to several extensions of time for delivery of documents required for Mr Taylor.

28 On 12 August 2013, Glenvill's solicitors received a letter from the solicitors for North North Melbourne (copied to Mr Taylor) stating that North North Melbourne agreed to the extension of the timetable. The solicitors for North North Melbourne further stated that it would object to any further delays or further applications to amend the Submissions.

Glenvill Seeks to Amend its Claim and Submissions Before Expert

29 On 16 August 2013, Glenvill's solicitors sent a letter to Mr Taylor (copied to the solicitors for North North Melbourne) seeking leave to amend Glenvill's case as it had then been presented in its claim and submissions and delivered North North Melbourne and to Mr Taylor. The letter said in material respects:

> **Leave to amend claim and submissions**
>
> We have been instructed by our clients that they have located relevant emails from the respondent which evidence that the claimants were not able to commence the works until well after the delivery of the works Commencement Notices as a result of the respondents' failure to provide the Geotechnical

> Reports until 19 October 2013 (for stage 1 and part of stage 2) and 30 November 2009 (for stage 3 and the remaining part of stage 2).
>
> We have attached an email dated 16 October 2009 from Mr Moreira relating to this issue. This contradicts Mr Moreira's sworn evidence at paragraphs 5 and 6 of his affidavit, and contains an admission that the respondent is incurring liquidated damages to our client because of this delay.
>
> Because that evidence has now come to light, our clients also seek to leave to amend their claim and submissions to include the additional delay and the liquidated damages that Mr Moreira is alluding to, that is, based on the failure of the respondent to provide the geotechnical report in a timely manner.
>
> Our client also instructs us that the stage 3 works were delayed until 1 February 2010 because of the civil works contractor engaged by the respondent. Our clients propose to allege an implied term similar to that in the submissions dated 14 June 2013, and we do not anticipate that the submissions will be greatly changed because the basis of the claim and submissions will still be escalation costs under clause 18 based on an implied term; however, the reasons for the delay will differ.
>
> We also submit that the claim is within the scope of the dispute, as the scope of the dispute has been identified in schedule A of the IAMA agreement as:
>
> 'The Claimant Claim [sic] for escalation costs under clause 18 of the contract and the question of the construction of clause 18'.
>
> Failing leave being given to amend the claim an submissions, we are instructed to issue a Notice of Dispute in relation to the additional delay, or alternatively, issue a new process for a determination based on the additional day.

30 The letter also sought one week's extension from the Expert (to 23 August 2013) to provide responding affidavits and submissions and a similar extension to amend Glenvill's claim and submissions.

31 North North Melbourne did not agree to the proposed amendments or to the extensions of time sought by Glenvill.

32 On 21 August 2013, Glenvill's solicitors received a letter from Mr Taylor (copying the solicitors for North North Melbourne) in which Mr Taylor ruled that the proposed change was not within the scope of the expert determination process and without the consent of North North Melbourne, no leave would be given to serve the proposed amended submissions. The letter also pointed out that Glenvill's responding submissions were due to be served by 23 August 2013 and North North Melbourne's response and counterclaim was due by 6 September 2013.

33 Mr Taylor provided the following reasons in his letter to the parties of 21 August 2013:

> The scope of the expert determination is set out in the Claimant's notice of dispute dated 12th November 2012 and Schedule A of the "*Expert Determination Rules and Agreement*" dated 23rd April 2013.
>
> In summary the Claimant's claim as it relates to this expert determination is a claim for escalation costs firstly arising from an express entitlement under clause 18 in respect of late issuance of "Works Commencement Notices" ("Part A of the Claim") and secondly arising from an implied term to the effect that the rise and fall provisions should also apply in respect of late provisions of utility services to the site ("Part B of the Claim"). The Part A and B claims are in relation to Stages 1, 2 and 3 of the contract.
>
> In June 2013 the Claimant sought to have the scope of the expert determination expanded to include an alternative basis under clause 9.2(c) of the contract for its Part B claim. This amendment was consented to by the Respondent as confirmed in its letter dated 12th August 2013. I will refer to this as the "Part C Claim").
>
> The Claimant now seeks to amend its claim and submissions so as to include:
>
> 1. A claim for "*additional delay and liquidated damages*" due to the Respondent's failure to provided Geotechnical Reports and:
>
> a. Stage 1 until 19th October 2009
>
> b. Stage 2 (part) until 19th October 2009
>
> c. Stage 2 (part) and Stage 3 until 30th November 2009.
>
> I refer to this as the "*Part D Claim*".
>
> 1. A claim that Stage 3 of the work was delayed until 1st February 2010 by the civil works contractor engaged by the Respondent. The Claimant indicates that its claim will be based upon "*escalation costs under clause 18 based on an implied term*".
>
> I refer to this as the "*Part E Claim*".
>
> I note there appears to be concurrent delays in respect of all the claims.
>
> I also note that in respect of the Claim D and E, there is no alternative basis under the clause 9.2(c) claimed.
>
> In its letter of 19th August 2013 the Respondents indicates that it "*strongly opposes*" the Claimant's proposed amendments.
>
> As I see it there are two issues. Firstly, whether the Claimant's amended claim falls within the scope of the agreement and secondly, if this is the case, whether I can allow (in the face of the Respondents objections) the Claimant to amend its claim at this late stage.
>
> It should not be controversial that expert determination is a contractual process. The expert has limited powers and under the current agreement no

> powers to vary the scope of the determination in the absence of the agreement of the parties.
>
> As far as I can see the causes of the delay now alleged by the Claimant under part D and Part E of its proposed amendments (i.e. late provision of the Geotechnical Reports and late civil works) are entirely different to the causes notified in its Notice of Dispute (i.e. the late provision of the Works Commencement Notices and delay in the availability of the utility services). I do not see that the generality of the first sentence of Schedule A Item (1) of the "Expert Determination Rules and Agreement" should be read to broaden the particularity of the Claimant's notice of Dispute.
>
> In my view, a notification of one cause of delay is unlikely to constitute a notification of another cause. The facts and circumstances that give rise to one cause of delay are unlikely to be the same facts and circumstances that give rise to a second cause of delay (regardless of any concurrency in the delays).
>
> In my view, and the Respondent submits, an amendment to include the Claimant's Part D and E Claims will require a new timetable involving the restarting of the submissions process.
>
> It follows in my view that the proposed amendments are outside the scope of my determination. Further and in any case there is in my mind a real question as to whether I have the power under the agreement (see Item 8 of Schedule B), in the absence of the parties' agreement, in the circumstances, to vary the timetable such as to allow the Claimant's new claims at this late stage.

34 It is these circumstances which give rise to the present proceeding. Glenvill is concerned that if the Expert Proceeding was to proceed with its claims unamended by Mr Taylor, it would be compelled to commence a new process, either before an expert, the Victorian Civil and Administrative Tribunal or a Court in order to seek relief based on the new claims. This would not only be inefficient, but there is a considerable risk of inconsistent findings between the two proceedings and an issue estoppel may arise to prevent it from bringing the alternative claims based on the new claims at all.

Expert Engagement Contract

35 I accept that the parties engaged Mt Taylor as the Expert pursuant to the Expert Engagement Contract.

36 The Expert Engagement Contract was wholly in writing and I find was constituted by the following documents:

(a) the Preliminary Conference Agenda executed by Mr Taylor and the solicitors acting for the parties; and

(b) the IAMA Expert Determination Rules which were incorporated into the Preliminary Conference Agenda.

37 Together, these documents, which included clause 18 of the Construction Contract and Glenvill's Notice of Dispute dated 12 November 2012 and North North Melbourne's Notice of Dispute dated 13 November 2012, defined the scope of the dispute referred to the Expert.

Plaintiff's Submissions

38 Glenvill accepted that the process of expert determination differs from arbitration and that the Courts do not readily or lightly interfere with the conduct of a reference by a contractually appointed expert.

39 However, Glenvill submits in summary that the Expert appointed in this case has made manifest errors by ruling incorrectly that:

(a) the amendment proposed by Glenvill was not within the scope of the reference already before him (the 'Scope' case); and

(b) by his ruling the Expert failed to allow Glenvill a proper opportunity to deal with the case of North North Melbourne and put its own case (the 'Procedural Fairness' case).

40 Glenvill submitted as to its 'Scope' case that no narrow approach ought to be taken to the scope of the issues referred to the Expert on a proper construction of the Expert Engagement Contract, if the commercial purpose of that contract is to be fulfilled.

41 In this case it submitted that the Expert has made a manifest error in artificially quarantining Glenvill's claims from each other by adopting an all too narrow view of the scope of the issues referred to him.

42 As to the Procedural Fairness case, Glenvill submits that in circumstances where North North Melbourne itself considered it relevant to put on material asserting that Glenvill could have commenced the works at an earlier time, then Glenvill, it was submitted, is plainly entitled to a reasonable opportunity to deal with the case made against it and to advance its own case.

43 In this sense, Glenvill submits that it has been denied procedural fairness.

Legal Analysis as to the Role of a Contractually Appointed Expert

44 It is well accepted that the process of expert determination differs from arbitration and that the Courts do not readily or lightly interfere with the conduct of a reference by a contractually appointed expert.

45 In *500 Burwood Highway v Australian Unity & Ors*[1] this Court analysed the role of a contractually appointed expert. The Court pointed to the distinction between the position of an arbitrator and an expert appointed under a contract by reference to the authorities, in the following passages:[2]

> An expert appointed under a contract is in a different position to an arbitrator and has a distinctly different range of duties. *In Beevers v Port Philip Sea Pilots Pty Ltd*[3] ("*Beevers*"), Dodds-Streeton J described the differences in the following terms: [4]
>
> A valuer acting as an expert unlike an arbitrator is generally not obliged to receive submissions from the parties.
>
> An arbitration is characteristically quasi-judicial and the parties intend that they should have the right to be heard if they so desire.
>
> It is clear that, whereas a primary function of an arbitrator is to hear and resolve opposing contentions, in contrast, an expert is appointed to appraise value of loss or damage 'by use of some special knowledge or skill ... without being required to hear the parties.
>
> It has been held that, due to the distinction between the arbitral and expert functions, a report by an expert will not be vitiated by the appearance alone of partiality.

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1 [2012] VSC 596 ('*500 Burwood Highway*').
2 *500 Burwood Highway* [2012] VSC 596 [164]-[165].
3 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556.
4 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556 [263]–[266].

In *Beevers* Dodds-Streeton J referred to *Macro v Thompson (No. 3)*[5] ("*Macro*") with approval. *Macro* involved a valuation of shares in family companies was, under a pre-emption clause in the articles, committed to the companies' auditor acting as an expert, rather than an arbitrator. Robert Walker J stated that

> [a]n expert entrusted with the duty of issuing certificates under contractual arrangements between two other parties is under a duty to act fairly and impartially, and the other parties implicitly contract on that basis.

Robert Walker J accepted that

> [o]n the authorities as a whole I accept the submission made by Mr Rhys that when the court is considering a decision reached by an expert valuer who is not an arbitrator performing a quasi-judicial function, it is actual partiality, rather than the appearance of partiality, that is the crucial test.

His Honour adopted that view because –

> [t]o hold otherwise would mean that auditors who have had a longstanding professional relationship with an association with one party to the contract might be unduly inhibited in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of partiality.

In *Macro*, as noted by Dodds-Streeton J in *Beevers*,[6] Robert Walker J found that the auditor (while not guilty of fraud or collusion or any conscious and positive cooperation in forwarding the interests of one party) was extremely imprudent in seeking advice and information from the purchaser's solicitor, with whom he discussed figures. The auditor allowed the solicitor 'to obtain a position of psychological ascendancy over him' which the solicitor seemed to exploit.[7]

46 In *500 Burwood Highway* the Court also made observations as to the basis upon which an expert determination, as opposed to an award made by an arbitrator, may be invalidated following judicial intervention, which appear in the following passages:[8]

> In the recent case of *McGrath v McGrath* ("*McGrath*")[9] Pembroke J cited with approval the observations of the English Court of Appeal in *Barclays Bank v Nylon Capital*[10] which are to similar effect:
>
> As I have said, there is no procedural code for expert determination, in contradistinction to arbitration. The activities of an expert are subject to little control by the court, save as to jurisdiction or departure from the mandate

5 *Macro v Thompson (No. 3)* [1997] 2 BCLC 36.
6 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556 [268]-[270].
7 *Macro v Thompson (No. 3)* [1997] 2 BCLC 36 [64].
8 *500 Burwood Highway v Australian Unity & Ors.* [2012] VSC 596 [167]-[173].
9 *McGrath v McGrath* [2012] NSWSC 578.
10 *Barclays Bank v Nylon Capital* [2011] EWCA Vic 826; [2012] Bus LR 542.

given. Unless the parties specify the procedure, the expert determines how he will proceed; it is rare for what might be perceived as procedural unfairness in an arbitration to give rise to a ground for challenge to the procedure adopted by an expert: see *Kendall, Freedman & Farrell, Expert Determination*, 4th ed (2008), ch 16.[11]

For these reasons, unless required by the contract in question, the parties have no entitlement to insist that the expert adopt any particular procedure; or that the appointed expert seek their approval to the proposed determination; or that they are given any hearing or facility to provide input into the process. An expert is not obliged to afford to the parties procedural fairness in the manner required of a court or arbitration in a curial context.[12] A certifying expert is not under an obligation to provide procedural fairness or natural justice in the absence of an express contractual provision, and there is none in the present case: *Hounslow London Borough Council v Twickenham Garden Developments Ltd*.[13] How the task is undertaken is in the hands of the expert, subject to anything to the contrary in the contract pursuant to which the appointment was made.

This result is in part the product of the contract and what is to be gleaned from it as to the intention of the parties. When the parties appoint an expert, they usually do so because they agree to place reliance on the expert's skill and judgment. They implicitly agree to accept and be bound by the determination. In the usual case, provided the decision is arrived at honestly and in good faith, the parties will not be able to re-open it and will be bound by the result.

It is also in part the product of a particular body of expert experience, learning, skill and judgment which the parties wish to apply to the problem to be dealt with. This is to be applied in a manner which is untrammelled by procedural considerations, so that the specialist skills and insights of the expert can be freely applied to the issue.

Finally, considerations of commercial utility are likely to be relevant factors. Efficiency, the production of a speedy and authoritative outcome and the elimination of the expense of a more elaborate procedure, undoubtedly play a part in parties selecting the contractual process of expert determination.

Mistake or error in the process of the determination of the appointed expert will not invalidate a decision.[14] However, if the expert asks the wrong question or misconceives the function of the appointment, the task required to be performed by the contract will not have been fulfilled.[15] In this event, the determination will be exposed to being set aside.

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11 *McGrath v McGrath* [2012] NSWSC 578 [7].

12 *Lahoud v Lahoud* [2010] NSWSC 1297 [59]; *Barclays Bank v Nylon Capital* [2011] EWCA Cic 826; [2012] Bus LR 542 [37].

13 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, 258-60; *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8; Cf *Fletcher Construction Australia Pty Ltd v MPN Group Pty Ltd* (unreported) Supreme Court, NSW, 14 July 1997 p.20.

14 *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 334-336 (McHugh JA).

15 *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4 [23] (Brereton J); *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 [51].

> Parties to a contract who, by the terms of that contract, agree to submit a question to an independent expert, are bound by the determination of that expert acting honestly and in good faith.[16]

47 In the present case, counsel for Glenvill sought to draw a distinction between the position of an expert who has been appointed to provide an expert determination of an issue akin to a 'mechanical' exercise, as for example in the case of *500 Burwood Highway* where the expert was engaged as a quantity surveyor to determine the cost to complete outstanding works on a project, and the position of an expert whose primary function is akin to that of an arbitrator in hearing and resolving opposing contentions. It was submitted that in the present case, the appointed expert was engaged to undertake an exercise approaching that of an arbitrator. It followed, so it was put, that the expert in this case was required to conduct himself under his contract of engagement, much as if he was an arbitrator, and that so much was the objective intention of the parties as reflected in the text of their Expert Engagement Contract.

Construction of the Expert Engagement Contract

48 However, in my opinion, there are some important distinctions to be made between the roles of arbitrator, on the one hand, and expert on the other, as regards the source of the authority and the rules which govern the decision-making process that each undertakes. These distinctions apply to the present case.

49 An expert is appointed by contract to make an expert determination in respect of specific matters which may arise during the course of a commercial relationship. An expert, in making a determination, is not obligated to abide by the rules of procedural fairness in the manner required of a court or an arbitration in a curial context.[17] The expert's obligations with regard to procedural fairness, or natural justice as it was

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16 See *Campbell v Edwards* [1976] 1 WLR 403, 407 (Lord Denning MR); followed in *Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co* [1978] 1 Lloyds Rep 175 (Court of Appeal); *Jones & Others v Sherwood Computer Services PLC* [1992] 1 WLR 277; applied in Australia in *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314 by McHugh JA. The critical distinction is between a mistake in a process of the valuation or assessment where in the absence of dishonesty or partiality, the courts will not generally interfere, in contrast to a valuation or assessment which actually departs from the contract, where the courts may well intervene.

17 *Lahoud v Lahoud* [2010] NSWSC 1297 [59]; *Barclays Bank v Nylon Capital* [2012] Bus LR 542 [37].

described by counsel for Glenvill, are defined by the content of the express contractual agreement between the parties comprised in the Expert Engagement Contract,[18] which in this case includes the terms of the IAMA Rules.

50 The manner in which the task of making the determination in question is undertaken is in the hands of the expert, subject to anything to the contrary in the contract which governs the appointment of the expert and in the IAMA Rules.

51 The result which is arrived at by the expert – the determination, in this case - is thus ultimately the product of the contract in the full sense of the word, as properly construed in accordance with the usual approach to the construction of commercial contracts.

52 The approach was recently considered in *ICM Investments Pty Ltd v San Miguel Corporation & Ors [No 2]*).[19] Where it was observed that the applicable principle is often stated in terms of a necessity to construe commercial agreements so as to accord with 'business commonsense' or 'commercial reality'.[20]

53 As Santow J said in *Spunwill Pty Ltd v BAB Pty Ltd*,[21] 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.

54 Further, the language used in the contract is generally assigned its natural and ordinary meaning, read in the light of the contract as a whole. Where it is ambiguous, surrounding circumstances may be taken into account in assigning the constructed meaning. The surrounding circumstances include the matrix of mutually known facts, and the background, object, context and commercial purpose of the transaction, in the

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18 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, 258-60; *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8; cf *Fletcher Construction Australia Pty Ltd v MPN Group Pty Ltd* (unreported Supreme Court of NSW, 14 July 1997) 20.

19 [2013] VSC 528 [69]-[77].

20 *ICM Investments Pty Ltd v San Miguel Corporation & Ors [No 2]*) [2013] VSC 528 [71].

21 (1994) 36 NSWLR 290; approved by the Victorian Court of Appeal in *Plenary Research Pty Ltd v Biosciences Research Centre Pty Ltd* [2013] VSCA 217 [43].

objective sense of what reasonable persons in the position of the parties would have had in mind.[22]

55 As Gleeson CJ summarised the position in *International Air Transport Association v Ansett Australia Holdings Limited*:[23]

> In giving a commercial contract a businesslike interpretation, it is necessary to consider the language used by the parties, the circumstances addressed by the contract, and the objects which it is intended to secure. An appreciation of the commercial purpose of a contract calls for an understanding of the genesis of the transaction, the background, and the market.

56 The commercial context in which a reference of disputes to an expert in a commercial contract is thus most relevant. The decision to refer disputes for determination by a contractually appointed expert will usually arise because the parties desire a particular body of expert experience, learning, skill and judgment to be applied to the resolution of defined issues which may arise in the course of the relationship and need to be dealt with. This problem-solving role is usually intended to be applied in a manner which is untrammelled by overly restrictive procedural considerations, so that the specialist skills and insights of the expert can be fully applied to the issues for resolution, in an expeditious and cost effective manner which is attended with an appropriate measure of 'finality'.

57 This may give rise to the parties agreeing that they will abide by a decision which in hindsight appears to be 'wrong'. In such circumstances, mistake or error in the process of the determination of the appointed expert will not invalidate a decision,[24] as long as it is made in accordance with the terms of the agreement.

58 This is not to say that there are no parameters of fairness or that the determination will be unreviewable. For example, if the expert asks the wrong question or misconceives the function of the appointment, the task required to be performed by the contract will not have been fulfilled.[25]

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22 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

23 *International Air Transport Association v Ansett Australia Holdings Limited* (2008) 234 CLR 151 [8].

24 *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 334-336 (McHugh JA).

25 *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4 [23] (Brereton J); *AGL Victoria Pty Ltd*

59 In this case, the procedures to be followed by the Expert are essentially governed by the IAMA Rules, which are incorporated into the Expert Engagement Contract.

60 The IAMA Rules defined the process pursuant to which the Expert was to proceed to determine the dispute referred to him.

61 Relevant clauses of the IAMA Rules provided by the Institute of Arbitrators and Mediators Australia[26] are as follows:

> **RULE 5 Role of the Expert**
>
> 1. The Expert shall determine the Dispute as an expert in accordance with these Rules and according to law.
>
> 2. The parties agree that:
>
> a. the Expert is not an arbitrator of the matters in dispute and is deemed not to be acting in an arbitral capacity;
>
> b. the Process is not an arbitration within the meaning of any statute.
>
> 3. The Expert shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious cost-effective and fair means of determining the Dispute.
>
> 4. The Expert shall be independent of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of any opposing party, and a reasonable opportunity to make submissions on the conduct of the Process.
>
> 5. Any dispute arising between the parties in respect of any matter concerning these Rules or the Process, (including the Expert's jurisdiction) shall be submitted to and determined by the Expert.
>
> **RULE 6 General Duty of Parties**
>
> The parties shall do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the Process.
>
> 2. Without limiting the generality of the foregoing, the parties shall:
>
> a. be represented at any Preliminary Conference or meeting convened by the Expert by a person or persons with authority to agree on procedural matters;

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v SPI Networks (Gas) Pty Ltd [2006] VSCA 173 [51].

26 *Expert Determination Rules*, Institute of Arbitrators & Mediators Australia, 2010 Edition (October 2010).

b. comply without delay with any direction or ruling by the Expert as to procedural or evidentiary matters; and

c. where appropriate, take without delay any necessary steps to obtain a decision of a Court on a preliminary question of jurisdiction or law

RULE 8 PRELIMINARY CONFERENCE

1. Unless otherwise agreed by the parties, the Expert shall convene a Preliminary Conference with the parties, in person or by teleconference, to be held as soon as practicable after reference of the Dispute to the Process.

2. The purpose of the Preliminary Conference is to:

a. discuss and agree on the issues in dispute, or formulate a procedure by which those issues can be clarified and agreed;

b. plan and agree on how the Process should proceed, including a timetable for provision of submissions, documents and any other evidentiary material;

c. make arrangements for Confidentiality Agreements to be signed by all persons taking part in the Process, in accordance with Rule 7;

d. make such other planning and administrative arrangements as may be required in relation to the Process, including in respect of the terms of appointment of the Expert.

RULE 9 Conduct of the Process

1. Subject to any rule of law or equity or written agreement of the parties to the contrary, and the requirements of Rule 5, the Expert shall make such directions or rulings in relation to the Process as he or she sees fit.

2. Subject to any written agreement of the parties to the contrary, and without limiting the generality of paragraph I of this Rule, the directions and rulings made by the Expert may include directions or rulings in relation to:

a. identifying or clarifying the issues in dispute, by preparation of a joint statement of issues or otherwise;

b. provision of submissions, documents and any other evidentiary material relied upon by the parties;

c. provision of any further submissions and evidentiary material which the Expert considers appropriate;

d. meetings between the parties, their representatives and/or experts engaged by the parties, whether or not such meetings are attended by the Expert.

62 The following key points of relevance to the present proceeding emerge from the IAMA Rules:

(a) the Expert was not appointed as an arbitrator of the matters in dispute and is deemed not to be acting in an arbitral capacity [Rule 5(2)(a)];

(b) The Expert is to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious cost-effective and fair means of determining the dispute [Rule 5(3)];

(c) Any dispute arising between the parties in respect of any matter concerning these Rules or the Process, (including the Expert's jurisdiction) is to be submitted to and determined by the Expert [Rule 5(5)];

(d) The parties agreed to be represented at any Preliminary Conference or meeting convened by the Expert by a person or persons with authority to agree on procedural matters [Rule 6(2)(a)];

(e) The Expert was to convene a Preliminary Conference with the parties, in person or by teleconference, the purpose being (inter alia) to discuss and agree on the issues in dispute [Rule 8 (1 & 2)];

(f) Subject to any rule of law or equity or written agreement of the parties to the contrary, and the requirements of Rule 5, the Expert shall make such directions or rulings in relation to the Process as he or she sees fit [Rule 9(1)]; and

(g) The directions and rulings made by the Expert may include directions or rulings in relation to identifying or clarifying the issues in dispute [Rule 9(2)(a)].

63 In my opinion, the parties by their Expert Engagement Contract intended to confer at least two important procedural processes to be determined by the appointed expert, being:

(a) definition of the issues in dispute; and

(b) the appropriate procedures for the determination of those issues.

64 Of particular importance in this context was Rule 5(5) which provided that any dispute arising between the parties in respect of any matter concerning the IAMA Rules or the Process (defined by Rule 1 to mean the'expert determination of the Dispute in accordance with these Rules') is to be submitted to and determined by the Expert.

65 To this I would add the agreement of the parties as to the scope of the matters to be determined achieved at the Preliminary Conference. The agenda evidencing this agreement was signed by the solicitors acting for the parties. This provided evidence of the agreement as to the scope of the issues for determination by the Expert pursuant to Rule 8 (1 & 2) of the IAMA Rules.

66 I construe this to mean that the appointed Expert was clothed with ample power to make final and binding decisions as to the two procedural processes which I have described.

Whether Decision of the Expert a Product of 'Manifest Error'

67 It will be recalled that on 17 May 2013, the solicitors for the parties exchanged letters agreeing that neither party would challenge the jurisdiction of the expert, save for manifest error. Although this particular position was asserted only in the letter from the solicitors for North North Melbourne dated 17 May 2013, it was accepted as being the agreement achieved in the affidavit filed in this proceeding on behalf of Glenvill.[27] Indeed the term was pleaded as such in Glenvill's statement of claim.[28] Accordingly, I find that this was in fact agreed to be the parties.

68 On review of the reasons provided by Mr Taylor for refusing Glenvill's proposed amendment and its request for extensions of time, as reflected in his letter dated 21

27 Affidavit of Michael Jonathan Kenny dated 3 September 2013, para 30.

28 Statement of Claim, para 7(i).

August 2013, I find that there was no manifest error in the accepted sense of any error being apparent on the face of the determination. The High Court in *Westport Insurance Corporation v Gordian Runoff Limited,*[29] in the course of considering the limited circumstances in which judicial review of arbitral awards may be permitted, said of the phrase a 'manifest error of law on the face of the award', as that expression appears in paragraph (b)(i) of s 38(5) of the *Commercial Arbitration Act 1984*:[30]

> Paragraph (b)(i) of s 38(5) may be awkwardly expressed, but the words "a manifest error of law on the face of the award" comprise a phrase which is to be read and understood as expressing the one idea. An error of law either exists or does not exist; there is no twilight zone between the two possibilities. But what is required here is that the existence of error be manifest on the face of the award, including the reasons given by the arbitrator, in the sense of apparent to that understanding by the reader of the award. If that error is manifest and its determination could substantially affect the rights of at least one of the parties, as specified in par (a) of s 38(5), then the Supreme Court may go on to decide to grant or refuse leave in the exercise of the power conferred by s 38(4)(b).[31]

69 Even if one was to travel beyond the face of the determination made in this case, I would find no error which would be capable of review by this Court. The question of any relief is governed entirely by the powers conferred on the Expert by the terms of the Expert Engagement Contract.

Procedural Fairness

70 I am not satisfied that Mr Taylor denied procedural fairness to Glenvill.

71 Mr Taylor duly considered Glenvill's application to amend its claim and submissions, and its consequent application for an extension of time to enable this to occur. Mr Taylor determined that Glenvill's application should be

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29 [2011] HCA 37 [42] (French CJ, Gummow, Crennan and Bell JJ).

30 Section 38(5) of the *Commercial Arbitration Act 1984* provides that: The Supreme Court shall not grant leave [under subsection (4) (b)] unless it considers that:
(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement, and
(b) there is:
(i) a manifest error of law on the face of the award, or
(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

31 *Westport Insurance Corporation v Gordian Runoff Limited* [2011] HCA 37 [42].

rejected. It was within his power to do so, bearing in mind the various factors which were before him, including the fact that consent from North North Melbourne was not forthcoming and the relevant time considerations.

72 The fact that the outcome of this interlocutory application was not to Glenvill's procedural advantage, or indeed was to its disadvantage, and could give rise to an inconvenient course which may indeed have caused prejudice to it, does not constitute a denial of procedural fairness.

Relief

73 On the assumption that the Expert had failed in his duty and Glenvill would be entitled to relief, it would only be entitled to contractual remedies arising from a breach of the Expert Engagement Contract. Further, that relief would be likely to be limited to discretionary declaratory relief.

74 Specific performance has not been claimed, and in any event would not have been appropriate, given that the contract in question provides for no specific obligation to be fulfilled by the appointed Expert as to how he is to conduct the process assigned to him. Rather, the process to be followed is left to the discretion of the Expert, to be exercised within the very broad parameters provided for.

75 A contractually appointed expert, being a privately appointed person, is not amenable to administrative law remedies. Even though such expert may have contractual authority to determine questions affecting the rights or obligations of individuals and a duty *to* act in a fair manner, being a purely private appointment, certiorari and prohibition, for example, will not lie. It is well accepted that an arbitrator's award, resulting from the appointment of a private arbitrator, is not amenable to prerogative writ.[32]

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32 *R v Northumberland Compensation Appeal Tribunal, Ex Parte Shaw* [1952] 1 KB 338, 351 (Lord Denning). See also *Grocon Constructors v Planit Cocciardi Joint Venture [No. 2]* [2009] VSC 426 [54]-[56].

76 I am satisfied that the Expert engaged, Mr Taylor, acted entirely within the terms of his engagement defined by the contract in making the procedural determination he did.

77 It follows that the Plaintiff's application for declaratory relief must fail and its proceeding be dismissed.
