Supreme Court of New South Wales

Watpac Construction NSW Pty Limited v Taylor Thompson Whitting (NSW) Pty Ltd [2015] NSWSC 780 (19 June 2015)

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Case Name:	Watpac Construction NSW Pty Limited v Taylor Thompson Whitting (NSW) Pty Ltd
Medium Neutral Citation:	[2015] NSWSC 780
Hearing Date(s):	4 June 2015
Decision Date:	19 June 2015
Jurisdiction:	Common Law
Before:	Ball J
Decision:	1. The defendant execute the Expert Determination Agreement exhibited at pages 105-110 of Exhibit “WM1” to the affidavit of Warwick Meller sworn 13 April 2015 (Expert Determination Agreement), within 7 days; 2. The defendant pay the sum of $9,625 to the Security Holder (as defined in the Schedule to the Expert Determination Agreement) in accordance with the Expert Determination Agreement within 7 days; 3. The defendant provide a copy of the Expert Determination Agreement, executed in accordance with Order (1), to the plaintiff and Philip Martin within 10 days. 4. Liberty to apply on 7 days’ notice; 5. Order that the defendant pay the plaintiff’s costs.
Catchwords:	CONTRACT – Specific performance of dispute resolution clause – Where parties agreed to refer dispute to independent expert determination – Where one party refused to execute Expert Determination Agreement – Proper construction of primary agreement and Expert Determination Agreement
Cases Cited:	1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd [2009] VSCA 308 Belvino Investments No 2 Pty Limited v Australian Vintage Ltd [2014] NSWSC 978 BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 Codelfa Construction Pty Ltd v State Rail Authority of New

	South Wales [1982] HCA 24; (1982) 149 CLR 337 Fletcher Construction Australia Ltd v MPN Group Pty Ltd (Supreme Court (NSW), Rolfe J, 14 July 1997, BC9705205) McGrath v McGrath [2012] NSWSC 578 Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002] HCA 5; (2002) 240 CLR 45 Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd [1979] HCA 51; (1979) 144 CLR 596 Triarno Pty Ltd v Triden Contractors Ltd (1992) 10 BCL 305
Texts Cited:	J D Heydon, M J Leeming and P G Turner, Meagher, Gummow and Lehane's Equity Doctrines & Remedies, 5th ed, 2015, LexisNexis Butterworths)
Category:	Principal judgment
Parties:	Watpac Construction NSW Pty Limited ACN 103 211 141 (Plaintiff) Taylor Thompson Whitting (NSW) Pty Ltd ACN 113 578 377 (Defendant)
Representation:	Counsel: S Robertson (Plaintiff) D Weinberger | A Jordan Defendant) Solicitors: Colin Biggers & Paisley (Plaintiff) Gilchrist Connell (Defendant)
File Number(s):	2015/113423
Publication Restriction:	None

JUDGMENT

1. By a summons filed on 16 April 2015, the plaintiff, Watpac Constructions NSW Pty Ltd (***Watpac***), seeks orders the effect of which would be to require the defendant, Taylor Thompson Whitting (NSW) Pty Ltd (***TTW***), to submit a dispute that has arisen between them to expert determination in accordance with a dispute resolution clause in an agreement between them dated 22 December 2008. By that agreement, TTW agreed to provide consultancy services to Watpac in connection with the construction of a commercial office building, television studios and associated facilities in Eveleigh for Channel 7.

The dispute resolution clause

2. The dispute resolution clause of the 22 December 2008 agreement is relevantly in the following terms:

15.2. Resolution process
(a) Any dispute or difference between the parties arising under or in any way related to the Agreement may be referred to mediation but only after the provisions of this Clause 15 have been complied with.
(b) A party claiming that a dispute has arisen must give written notice to the other party providing details of and specifying the nature of the dispute. The parties shall confer at least once to seek to resolve the dispute in good faith within seven (7) days of receipt of the notice of dispute. At every such conference, each party shall be represented by the Chief Executive Officer or an equivalent person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.
(c) If the matter is not resolved within seven (7) working days of referral under Clause 15.2(b) the parties hereby agree that the matter shall be referred to independent expert determination.
(d) If the parties cannot agree an expert within seven (7) days, the expert will be appointed by the President (NSW Chapter) for the time being of the Institute of Arbitrators and Mediators (being a qualified Grade 111 arbitrator).
(e) In making a determination, the independent expert must:
(i) give due weight to any written submissions or representations made by a disputing party

within any reasonable time limit prescribed by the independent expert;
(ii) give written reasons for his decisions;
(iii) act as an expert and not as an arbitrator;
(iv) in the absence of any manifest error, the decision of the independent expert on disputes up to a maximum value of $50,000.00 will be final and binding upon the parties and not subject to review; and
(v) for disputes in excess of $50,000.00, and in the absence of any manifest error, the decision of the independent expert will be final and binding on the parties and not subject to review, if neither of the parties has taken any steps to enforce any right or remedy by instituting proceedings relating to the dispute within twenty-eight (28) days of the written decision of the expert; and
(vi) the cost and expense of the conference and independent expert determination will be borne equally by the parties.
(f) If the dispute or difference is not resolved by expert determination the matter may be referred to litigation subject to 15.2(e)(v).
(g) Compliance by the parties with the procedures of Clauses 15.2(a) to 15.2(h) is a condition precedent to either party being entitled to refer the matter to litigation.
(h) ...

3. Clause 22 of the agreement is also relevant to the operation of the dispute resolution clause. It provides:

   22. Further assurances
   The Consultant [TTW] shall do, sign and execute (and cause to be done, signed and executed) all acts, deeds, documents and things as may reasonably be required by the Builder [Watpac] so as to carry out and give effect to this Agreement or to perfect or protect the rights of the Builder including, without limitation, the giving or obtaining upon request by the Builder of confidentiality undertakings in relation to records and the subject matter of the Consultancy Services from the Consultant enforceable by, and on terms acceptable to, the Builder.

Background

4. The dispute concerns cracking in a concrete external hardstand that developed in September 2010. There were discussions between Watpac and TTW concerning how to repair the cracking and various proposals were investigated. Following those investigations, Watpac wrote to TTW on 4 April 2012 in the following terms:

   As you are aware, the matter involves the undue deterioration of the suspended slab which forms the truck hardstand area for the Channel 7, Global Studios and Pacific Magazines. This matter was first identified in September 2010, and has gradually worsened to an extent that now requires urgent rectification.
   During this time, Watpac and TTW have considered several different methods for rectification and have concluded that the current proposal shall rectify the matter to the satisfaction of all parties. This method involves the injection of a progressive process of pressure grout injection of cracks to TTW recommendations dated 08 March 2012.
   Excluding any disruption, relocation or mobilisation costs which may be incurred in connection with building tenants, Watpac estimates that the costs associated with this process including costs incurred to date will be in the order of **$850,000** and comprised of:
   Costs to date: $100,000
   Prototype $ 50,000 (covers approximately 10% of area)
   Remaining areas $500,000
   Make good, linemarking, sealant $100,000
   Watpac attendance / supervision $100,000
   Total $850,000
   As previously advised, our investigations have concluded that the deterioration arises from the design of the slab being inadequate. Accordingly, Watpac holds TTW responsible for all costs in connection with this matter. We are in the process of collating our costs to date and will invoice for these in due course. We will further continue to invoice for the remaining costs as they are realised.
   Please confirm **within seven (7) business days** that your insurer has been notified. Please also

confirm within this timeframe the identity of your insurer, the policy number and claim number for our further coordination.

5. It is not clear what happened following that letter. However, Watpac undertook the necessary repair work at a cost of $1,504,466.37 and, on 4 June 2014, it served a demand on TTW claiming that the cracking was due to TTW's faulty design work. The demand stated that Watpac remained ready and willing to confer within the next 7 days in order to resolve the dispute and that, if the matter was not resolved within that time, it would refer the matter to independent expert determination. In that event, it nominated Mr Peter Canaway as the independent expert.
6. Although it appears that the parties made some attempt to arrange a meeting, no meeting occurred. Nor was agreement reached on the appointment of Mr Canaway as the independent expert. On 5 August 2014, the solicitor for Watpac wrote to the solicitor for TTW saying that their client had taken the view that neither TTW nor its insurer was serious about trying to resolve the matter and that it appeared that neither party saw any real point in a settlement conference. In those circumstances, the letter gave notice that Watpac had written to the President (NSW chapter) of the Institute of Arbitrators and Mediators requesting the appointment of a relevant expert to determine the dispute. That request was in fact made on 4 August 2014.
7. TTW's solicitor replied by email to the letter dated 5 August 2014 on the same day. The email referred to earlier correspondence in which TTW (through its solicitor) had requested copies of concrete shrinkage test records and other information relevant to the question whether the cracking was due to poor workmanship. The email also referred to a previous request that Watpac consent to TTW having access to documents in the possession of the project manager and the architects, which Watpac is said to have refused. The email concluded:

   Our clients would prefer to avoid the additional costs and delay associated with the non binding expert determination process your client is now seeking to embark upon; but of course any meaningful discussions about settlement would have to be on an informed basis. Please advise whether your clients are prepared to allow us access to the information we have requested. We will in turn seek our clients' further instructions regarding settlement.

8. On 27 August 2014, the Institute gave notice that it had nominated Mr Phillip Martin to be the expert.
9. On 3 September 2014, the expert circulated an Expert Determination Agreement that he required the parties to execute and asked the parties to pay a security deposit in accordance with the agreement. The original draft circulated by the expert specified a security deposit of $22,000, but that was later reduced to $19,250.
10. On 25 September 2014, the solicitors for Watpac wrote to the expert asking him to remove cls 13, 14, 15 and 26 from the Expert Determination Agreement on the ground that they were inconsistent with the dispute resolution clause. Those clauses were in the following terms:

    13. The parties agree to implement the Expert's determination within 30 days of receiving the written determination or otherwise as agreed between the parties.
    ...
    14. The parties will not challenge the determination in any legal proceedings or otherwise.
    15. After expiry of the period referred to in clause 13, a party may enforce the determination by judicial proceedings. In any such proceedings, the Expert's determination and any written reasons shall be final and conclusive evidence of the terms of the determination.
    ...
    26. The parties shall be jointly and severally liable to each of the Expert and the security holder for their respective fees and for the Expert's reasonable cost [sic] and expenses.

The letter also questioned the amount of the security deposit on the basis that it was more than the expert's estimated fees.

11. On 13 October 2014, the expert responded to the letter dated 25 September 2014. In that response, he said that he had amended cls 13, 14 and 15, but that he had not amended cl 26 "as this clause is necessary in the event of a default in regard to the fee for the expert determination by either party". The amended clauses were in the following terms:

    13. The parties agree to implement the Expert's determination within 28 days of receiving the written determination subject to either party instituting proceedings within this period *in*

> *accordance with the formal instrument agreement between* the parties dated 22 December 2008.
> ...
> 14. The parties will not challenge the determination in any legal proceedings or otherwise after the expiry of the period referred to in clause 13.
> 15. After expiry of the period referred to in clause 13, a party may enforce the determination by judicial proceedings. In any such proceedings, the Expert's determination and any written reasons shall be final and conclusive evidence of the terms of the determination.

12. On 12 November 2014, the solicitors for TTW wrote to the expert. They suggested that cl 12 be amended so that it read:

> The Expert's Determination will be binding on the parties provided that neither party commence proceedings within 28 days of the date the Determination is published to the parties. If either party commences Court proceedings within 28 days the Determination will not be binding on the parties.

The solicitors also said they were content with the amendments to cls 13 and 14 and that no amendment appeared to have been made to cl 15. In addition, they expressed concern that the agreement as currently framed did not include a power to compel either party to provide relevant documents. They suggested that cl 6 be amended so that it read:

> The parties will use their best endeavours to comply with the Expert's reasonable requests and directions for the efficient conduct of the determination <u>including any direction by the expert to produce to the expert and the opposite party any documents relevant to the Dispute requested by a party and/or to provide consent for the opposite party to obtain access to documents in the possession of a third party.</u>

The words underlined were the words that it was suggested should be added to cl 6.

13. The solicitors for Watpac replied to that letter on 13 November 2014. They suggested that cl 12 be amended so that it read as follows:

> The Expert's Determination will be binding on the parties in accordance with clause 15.2 of the contract dated 22 December 2008 (**Dispute Clause**) provided that neither party commences court proceedings pursuant to the Dispute Clause. If either party commences court proceedings pursuant to the Dispute Clause the Determination will not be binding on the parties.

The letter also indicated that Watpac did not agree to the proposed amendment to cl 6.

14. The expert replied to that letter on 1 December 2014. He indicated that he had amended cl 12 in the way suggested by Watpac's solicitors (although in fact he made some further amendments to the clause). In relation to cl 6, he said the following:

> I have not amended clause 6 as it is not appropriate to add the direction suggested by Gilchrist Connell in an Expert Determination. The contract in clause 15.2(e)(i) sets out the requirements for the expert in making the determination. I am to rely on the submissions or representations provided by the parties.

15. A copy of the amended agreement was enclosed with the expert's letter. The final version of cls 12 to 15 were in the following terms:

> **Effect of the expert determination**
> 12. The Expert's determination is final and binding on the parties provided that neither party commences proceedings within 28 days of the date of the written decision of the expert in accordance with clause 15.2 of the contract dated 22 December 2008. If either party commences Court proceedings within the 28 days pursuant to clause 15.2 of the contract, the determination will not be binding on the parties.
> 13. The parties agree to implement the Expert's determination within 28 days of receiving the written determination subject to either party instituting proceedings within this period in accordance with the formal instrument of agreement between the parties dated 22 December 2008.

Subsequent proceedings

14. The parties will not challenge the determination in any legal proceedings or otherwise after the expiry of the period referred to in clause 13.
15. After expiry of the period referred to in clause 13, a party may enforce the determination by judicial proceedings. In any such proceedings, the Expert's determination and any written reasons shall be final and conclusive evidence of the terms of the determination.

16. Watpac signed that agreement and returned it to the expert on 17 December 2014 and at about the same time paid 50 percent of the security deposit. TTW, on the other hand, refused to sign the agreement in the form proffered by the expert. That refusal led to these proceedings.

The issues

17. TTW advances a number of reasons for why it should not be required to sign the Expert Determination Agreement (or pay the security deposit).
18. First, TTW submits that Watpac's letter dated 4 April 2012 constituted the notice of dispute. TTW contends that no meeting occurred following that letter and the parties did not take any other steps contemplated by the dispute resolution clause. As a consequence, they must be taken to have abandoned the whole dispute resolution procedure.
19. Second, TTW submits that the parties have not met and a meeting is a necessary precondition to the expert determination procedure.
20. Third, TTW submits that the expert has wrongly concluded that he is prohibited from requiring one party to produce documents to the other and in doing so he has made a jurisdictional error because there is nothing in the dispute resolution clause that would prevent the expert from requiring one party to make documents available to the other.
21. Fourth, TTW submits that a number of clauses of the Expert Determination Agreement are inconsistent with the dispute resolution clause or at least are not required by that clause. The relevant clauses are cls 13, 14, 15, 16, 18 and 26.
22. TTW contends that cls 13 to 15 are inconsistent with the dispute resolution clause because they purport to make the expert's determination binding if neither party commenced proceedings within the 28 day period whereas cl 15.2(e)(v) of the dispute resolution clause provides that in the case of disputes in excess of $50,000 the decision is only binding "in the absence of any manifest error".
23. Clause 16 of the Expert Determination Agreement provides:

    The parties and each of them agree and undertake to the Expert not to subpoena the Expert to give evidence or to deliver up documents in any proceedings. The parties shall not join the Expert in any legal proceedings brought by third parties.

TTW submits that there is nothing in the dispute resolution clause which would require the parties to agree to such a term.

24. Clause 17 of the Expert Determination Agreement contains an extensive joint and several release and indemnity in favour of the expert except in the case of fraud. The release and indemnity applies to all types of claim whatever their legal basis "arising out of or in connection with the expert determination". Clause 18 provides:

    The parties' joint and several releases and indemnities to the Expert include without limitation claims by third parties upon any basis set out herein (or otherwise):
    (A) against the parties, or any of them; and
    (B) against the Expert arising out of, or in conjunction with, the expert determination.

Again, TTW submits that it is one thing to require the parties to provide a release. However, there is nothing in the expert determination clause that would require them to give an indemnity to the expert in respect of claims by third parties.

25. Lastly, cl 26 of the Expert Determination Agreement provides that the parties should be jointly and severally liable to each of the expert and the security holder for their respective fees and for the expert's reasonable costs and expenses. TTW submits that that requirement is inconsistent with cl 15.2(e)(vi) of the dispute resolution clause, which provides that "the costs and expenses of the conference and independent expert determination will be borne equally by the parties".

26. Fifth, TTW submits that the relief sought by Watpac should be refused on discretionary grounds.

Did the parties abandon the dispute resolution procedure?

27. The contention that the parties abandoned the dispute resolution procedure depends on the contention that Watpac's letter dated 4 April 2012 was a notice satisfying the requirements of cl 15.2(b) of the dispute resolution clause. In my opinion, it was not.
28. In order to satisfy the requirements of cl 15.2(b), a notice must be in writing and must provide details of and specify the nature of the dispute. The letter dated 4 April 2012 did not do that. It identified a problem with the hardstand. It indicated that Watpac held TTW responsible for that problem and stated that Watpac would invoice TTW for the costs of repair in due course. The letter also asked TTW to confirm that it had notified its insurers of the demand. However, the letter gave no indication that there was a dispute concerning those matters that required resolution. Whether or not there was a dispute depended on whether TTW accepted Watpac's assertions; and the nature of the dispute depended on the extent to which it did so. For example, the letter gave no indication whether or not TTW accepted all or some of the responsibility for the cracks and whether it took issue with the estimated costs of repair. What, in fact, seems to have happened is that TTW neither accepted nor denied liability. Watpac undertook the repairs and then claimed the amount of the repairs from TTW. It was at that point that Watpac denied liability for the amount claimed and a dispute arose, which became the subject of Watpac's letter dated 4 June 2014. That letter was the written notice of the dispute.

Was a meeting a pre-condition to the expert determination procedure?

29. In my opinion, a meeting was not a pre-condition to the expert determination procedure.
30. The agreement to submit the dispute to expert determination is contained in cl 15.2(c) of the dispute resolution clause. The only condition expressed in that clause is that if the matter not be resolved within seven working days of "referral under Clause 15.2(b)". Although the drafting of the clause is not clear, the reference to a "referral under Clause 15.2(b)" must be read as a reference to the referral of the dispute in accordance with the dispute resolution procedure set out in cl 15.2, which occurred when one party or the other gave a notice under cl 15.2(b). Read in that way, cl 15.2(c) says that if the dispute is not resolved within seven days after a notice is given, then the parties agree that the matter shall be referred to expert determination. The dispute may not be resolved because the parties do not meet, or refuse to meet or despite their best endeavours over a number of meetings fail to reach a resolution.
31. The interpretation I favour is consistent with the words of the clause. It also makes commercial sense. If TTW is correct, one party or the other could defeat the expert determination procedure by refusing to meet. The refusal to meet may in that event be a breach of an express or implied term of the agreement. But what then? Unless the party not in breach could obtain an order for specific performance of the obligation to meet, the dispute resolution mechanism would still be defeated. The parties could not have intended that.
32. Clause 15.2(d) states that if the parties cannot agree on an expert within seven days, the expert will be appointed by the President (NSW Chapter) of the Institute of Arbitrators and Mediators. The clause begs the question: seven days from what? TTW suggests that the answer must be seven days from the meeting contemplated by cl 15.2(b), which suggests that a meeting must be a precondition to the operation of cl 15.2(c).
33. I do not accept that submission. There is clearly an ambiguity in cl 15.2(d). But I do not think that ambiguity can be cured in the way that TTW suggests. If TTW is correct, then cl 15.2(d) cannot operate at all if the parties do not meet. That cannot have been their (objective) intention. In my opinion, clause 15.2(d) must be interpreted as stating that, if the parties cannot agree on an expert with seven days of the notice of dispute, then the expert is to be appointed in accordance with cl 15.2(d). Read in that way, the agreement on an expert is to be reached in the same seven days as any attempt to resolve the dispute through a meeting. If the parties do not resolve the dispute and do not agree on an expert within those seven days for whatever reason, then cls 15.2(c) and (d) say that the dispute must be referred to expert determination by an expert chosen by the President of the Institute. Interpreted in that way, cl 15.2(d) has a sensible commercial operation.

Has the expert made a jurisdictional error?

34. This question raises two issues. The first is what is required by cl 15.2. The second is whether the

expert has made an error concerning what is required that goes to his jurisdiction.

35. Clause 15.2 does not specify how the expert determination is to be conducted except to say in cl 15.2(e)(i) that the expert must give due weight to any written submission or representations made by a disputing party within any reasonable time limit prescribed by the expert.
36. In the absence of express terms in the agreement, it is a matter for the expert to determine what procedure he should follow. As Cole J explained in *Triarno Pty Ltd v Triden Contractors Ltd* (1992) 10 BCL 305 at 307:

> If the parties have not by their deed agreed the procedures to be followed upon an expert determination, that is not a void the court can fill. There is no reason to imply a term that the court will determine procedures. It is a matter for either agreement between the parties, or determination by the independent experts as to the procedures to be followed.

See also *Fletcher Construction Australia Ltd v MPN Group Pty Ltd* (Supreme Court (NSW), Rolfe J, 14 July 1997, BC9705205); *McGrath v McGrath* [2012] NSWSC 578 at [7] per Pembroke J.

37. Consequently, cl 15.2 leaves it to the expert to decide whether to require the parties to produce documents or give access to documents.
38. In my opinion, cl 6 of the proposed Expert Determination Agreement in its current form permits the expert to request the parties to make available documents provided the request is reasonable. If the expert makes such a request, the parties must use their best endeavours to comply with it.
39. TTW's complaint is that the expert, by refusing to amend cl 6 and by his explanation for that refusal, has already indicated that he is not willing to require either party to produce documents. That is said to be an error going to his jurisdiction.
40. I do not accept that submission.
41. The effect of the additional words sought by TTW to be included in cl 6 would be to give the expert power to direct the production of any document relevant to the dispute requested by a party or to direct that one party provide its consent to access by the other party to documents held by a third party. The additional words appear to contemplate a procedure by which one party would request documents from another and, if there was a dispute about production, the expert would rule on that dispute. The expert concluded that those words should not be added because "[t]he contract at clause 15.2(e)(i) sets out the requirements for the expert in making the determination", which are for the expert "to rely on the submissions or representations provided by the parties".
42. Several points should be made about the amendment sought and the expert's response.
43. First, as I have said, the amendment appears to contemplate a procedure by which each party will request documents from the other. There is no reason why the expert should be required to agree to such a procedure.
44. Second, it is not entirely clear whether the expert is saying that he is prohibited by the dispute resolution clause from requesting the production of documents or whether he is saying that he is to rely on the submissions of the parties, leaving it open that he may be persuaded by a party that he needs to see particular documents before he can give his determination. I prefer the latter interpretation. The expert recognises that he is to rely on the submissions or representations provided by the parties. It is open to either party to seek to persuade the expert that he needs particular information that is not within that party's possession in order to reach a conclusion and that the expert therefore needs to request that information. I do not read the expert's response as precluding that possibility.
45. Third, it is apparent that the expert has concluded that he should not adopt a procedure that involves the production of documents by each party and requests for access to documents held by third parties. However, it is not clear whether the expert has rejected that procedure because it is not permitted by the dispute resolution clause or because he has concluded that it is not appropriate having regard to the terms of that clause. I prefer the latter interpretation. The expert says that "it is not appropriate" to add the direction sought by TTW. He does not say that it is not permitted. He was entitled to reach the conclusion he did.
46. Fourth, even if the expert has formed the view that he is prevented by the terms of cl 15.2(e)(i) from seeking the production of documents, I do not accept that that is a jurisdictional error. Clause 15.2 does not require the production of documents. The expert was entitled to determine whether documents should be produced or not. The fact that he has chosen not to require the production of documents for a reason that involves an error concerning the interpretation of cl 15.2 does not make the error a jurisdictional one.

The terms of the Expert Determination Agreement

47. The complaints in relation to the Expert Determination Agreement fall into two categories. First, it is said that cls 13 to 15 (taken together) and cl 26 are inconsistent with the dispute resolution clause. Second, it is said that cls 16, 17 and 18 go beyond what is reasonable to require the parties to agree to.
48. In my opinion, cl 26 is not inconsistent with the dispute resolution clause. Both parties have agreed to appoint the expert to determine their dispute. There is no reason why, as between them and the expert, they should not be jointly and severally liable for the expert's fees. The expert determination is for the benefit of both of them. It is reasonable in those circumstances that they be jointly and severally liable for the expert's fees. That is what cl 26 provides. On the other hand, cl 15.2(e)(vi) provides that the costs of the independent expert determination as between the parties will be borne equally by them. The fact that they have agreed between themselves that the costs will be borne equally is not inconsistent with an agreement with the expert that they will be jointly and severally liable for his costs.
49. The position in relation to cls 13 to 15 is more difficult.
50. TTW points out that that under the terms of the dispute resolution clause, the expert's determination is not binding if it is infected by "manifest error". It is open to either party to challenge the determination on that ground at any time. On the other hand, cl 14 of the Expert Determination Agreement states that "[t]he parties will not challenge the determination in any legal proceedings or otherwise after the expiry of the period referred to in clause 13". The "period referred to in clause 13" must be a reference to the period "within 28 days of receiving the written determination". That is reinforced by cl 15 which states that after the expiration of the period referred to in cl 13 "a party may enforce the determination by judicial proceedings". As a result, TTW submits that the dispute resolution clause permits a challenge at any time to the determination for manifest error whereas cl 14 prevents any challenge after the expiration of the 28 day period. That is a clear inconsistency.
51. There is considerable force in TTW's submission if cls 14 and 15 of the Expert Determination Agreement are read in isolation. However, read in context, I do not think that they can have that meaning.
52. Clauses 12 and 13 set out the effect of the expert determination. It is apparent when cls 12 to 15 are read together that cls 14 and 15 are consequential in that they set out the consequences of cls 12 and 13 for subsequent court proceedings involving the determination.
53. Clauses 12 and 13 are poorly drafted. It is not clear what the words in cl 12 "in accordance with cl 15.2 of the contract dated 22 December 2008" and the similar words in cl 13 "in accordance with the formal instrument of agreement between the parties dated 22 December 2008" are intended to qualify. So, for example, in cl 12 it is not clear whether the words are saying that the determination must be final and binding in accordance with cl 15.2, or that the commencement of the court proceedings must be in accordance with cl 15.2 or that the written decision of the expert must be in accordance with cl 15.2. Similarly, in cl 13 it is not clear whether the words are saying that the written determination must be in accordance with cl 15.2 or whether the instituting of the court proceedings must be in accordance with cl 15.2.
54. Given the relationship between cls 12 and 13, it would be natural to read the qualification in each clause as qualifying the same thing. In my opinion, that thing must be the decision of the expert. That is a natural reading of cl 12, where the qualifying words come immediately after the words "written decision of the expert". It is perhaps a less natural reading grammatically of cl 13, where the qualifying words come immediately after the words "instituting proceedings within this period". However, it is difficult to know what the qualification was intended to achieve if it was intended to be a qualification on the institution of proceedings, since the only thing that "the formal instrument of agreement" says about the instituting of proceedings is that they must be instituted within 28 days (absent manifest error) and cl 13 already refers to that 28 day period. For that reason, it seems to me to be preferable to read both cls 12 and 13 as saying that the expert's determination is final and binding and the parties agree to implement the determination in accordance with cl 15.2 of the agreement dated 22 December 2008. Clause 12 says, in addition, that the determination is final and binding in accordance with cl 15.2 if neither party has commenced proceedings within the 28 day period. Clause 13 says, in addition, that both parties agree to implement the determination in accordance with cl 15.2 subject to either party commencing proceedings within the 28 day period. Both those additions are consistent with cl 15.2.
55. When cls 14 and 15 refer to the "determination" they must be referring to a determination that satisfies the requirements of cls 12 and 13 – in other words, a determination that has become final and binding and which the parties agree to implement. Clauses 14 and 15 cannot be read as preventing the

commencement of court proceedings to challenge a determination or permitting the commencement of court proceedings to enforce a determination that is not final and binding in accordance with cl 12.

56. The interpretation I prefer of cls 12 to 15 is consistent with their history. It is accepted that evidence of pre-contractual negotiations is admissible as evidence of relevant surrounding circumstances and, significantly for this case, as evidence that the parties were united in rejecting a possible construction: see *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 352-3 per Mason J.
57. Originally, Watpac objected to cls 13 to 15 on the basis that they were inconsistent with the dispute resolution clause. The expert inserted the qualification in cl 13 referring to the formal instrument of agreement in response to that criticism. TTW agreed to that change and the parties made a similar change to cl 12. It is clear that their intention by making the changes was to ensure that cls 12 to 15 were consistent with the dispute resolution clause. Consistently with that intention, those clauses should be given an interpretation that has that result.
58. The issue in relation to cls 16, 17 and 18 is different. Watpac and TTW did not set out in their agreement the terms on which the expert would be appointed. There is a question, then, whether they are bound to appoint the expert on any particular terms and, if so, what terms.
59. It is now accepted that where parties have agreed to appoint an expert but have not agreed on the terms of appointment, they should be taken to have agreed to appoint the expert on the terms that are reasonable: *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd* [2009] VSCA 308 at [29]. Sometimes, that agreement can be found in an express obligation in the contract, such as a further assurances clause like cl 26 of the 22 December 2008 agreement. In other cases, the obligation has been explained as part of the implied obligation on each party to do all that is necessary to be done on the party's part to give effect to what has been agreed to be done: *Belvino Investments No 2 Pty Limited v Australian Vintage Ltd* [2014] NSWSC 978 at [59] ff per White J; *1144 Nepean Highway* at [36]-[37]. It has also been suggested that the obligation will be implied in accordance with the normal principles for the implication of terms identified by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283 and adopted by Mason J in *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596 at 605: see *1144 Nepean Highway* at [29]. An alternative and perhaps preferable way of putting the point is to say that, in the absence of agreement, the parties have agreed to appoint the expert on the terms proposed by the expert, except possibly to the extent that those terms are unreasonable. That appears to have been the approach taken by White J in *Belvino* at [65]. Where the parties have agreed to the appointment of a particular expert, they must be taken to have accepted that the expert will impose terms on his or her appointment. If they have not agreed between them what terms would be acceptable, then, in order to give effect to their agreement, each must have agreed to the terms proposed by the appointee, except possibly where the terms are unreasonable.
60. There is also much to be said for the view that where the parties have agreed that the expert will, in the absence of agreement between them, be appointed by an appointing authority, such as the Institute of Arbitrators and Mediators, they must have impliedly agreed absent any other terms that the appointment would be on terms identified by the appointing authority. It is common for appointing authorities such as the Institute of Arbitrators and Mediators to publish rules setting out the terms on which experts appointed by them are to be appointed absent any other agreement. It is to be expected that the parties would be aware of that fact. Where the parties have chosen an appointing authority but do not set out the terms of appointment, it seems logical to imply a term that they have agreed to the appointment on the terms adopted by the appointing authority. Such a term seems to meet the requirements set out in *BP Refinery.* It is reasonable and equitable that the parties should agree to the terms of the appointing authority. The identification of terms of appointment is necessary to give business efficacy to their agreement to submit their dispute to expert determination. The parties must be taken to agree to some terms. The obvious ones are those adopted by the appointing authority. Those terms are capable of clear expression. By hypothesis, they do not contradict the terms of their agreement.
61. It is not necessary in this case to resolve the precise form in which the obligation should be expressed or its precise legal basis. It is sufficient to ask the question whether the terms to which TTW takes objection were reasonable. In my opinion, they were.
62. TTW contends that cl 16 of the Expert Determination Agreement is unreasonable insofar as it prevents the parties from subpoenaing the expert or documents from the expert. However, it is unclear why that term is unreasonable. It is taken from the expert determination rules of the Institute of Arbitrators and Mediators. Not all rules published by appointing authorities contain similar rules. However, in my

opinion, an expert is entitled as a condition of his or her appointment to seek to protect himself or herself in relation to possible court proceedings arising out of his determination and a term preventing the parties from subpoenaing the expert is one means of doing that.

63. TTW did not point to any unreasonable practical consequences that cl 16 would have on its ability to protect its own interests. The expert determination only becomes binding on the parties if court proceedings are not commenced within 28 days of the determination. Consequently, it is always open to TTW to seek to resolve the dispute through court proceedings. It is difficult to see how anything the expert has done could be relevant to those court proceedings. In addition, the expert determination is not binding on the parties in the case of manifest error. The expert is required to give reasons for his decision. Whether there has been manifest error or not will be apparent from those reasons. Consequently, it is difficult to see why it would be necessary to subpoena the expert in the unlikely event that there is a question whether his determination contains a manifest error.
64. Clause 17 of the Expert Determination Agreement provides that except in the case of fraud, the parties jointly and severally release and indemnify the expert against all claims of whatever nature arising out of or in connection with the expert determination. Clause 18 states that the releases and indemnities include claims by third parties against the parties (that is, Watpac or TTW) or against the expert arising out of or in conjunction with the expert determination. TTW contends that these clauses are unreasonable insofar as they provide that the parties jointly and severally indemnify the expert. Again, however, the term is taken from the rules of the Institute of Arbitrators and Mediators. Again, also, it seems to me that it is reasonable for the expert to protect himself against possible claims by third parties. The expert is required to agree to make a determination as part of a dispute resolution procedure. He is proposing to charge a relatively modest fee estimated to be $17,500 for providing that service. It does not seem to me to be unreasonable for the expert to impose as a condition of doing so that the parties indemnify him in the event that his determination somehow or another gives rise to a third party claim. The indemnity does not apply in the case of fraud. In those circumstances, it does not seem to me to be unreasonable for the expert to place the risk of any third party action arising from his determination on the parties who seek the determination. Moreover, once again, TTW does not point to any practical circumstances where it could be said that the indemnity would operate unreasonably. The true position is that the prospects of any third party claim are remote.

Discretionary grounds

65. TTW submits that the court should refuse equitable relief for three reasons. First, Watpac delayed in issuing the notice of dispute. Second, the determination is likely to be impugned because the expert has made a jurisdictional error in refusing to consider giving a direction requiring the production of documents. Third, Watpac has failed to co-operate to make documents available.
66. In my opinion, none of these matters provide a basis for refusing equitable relief.
67. Delay of itself is not a ground for refusing equitable relief. Rather, laches is necessary. Laches involves delay with prejudice: see J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity Doctrines & Remedies,* 5th ed, 2015, LexisNexis Butterworths at [38-010]ff. TTW has not pointed to any actual prejudice it has suffered as a consequence of the delay. In any event, in my opinion, Watpac has not been guilty of delay. TTW points to the fact that the cracking arose in 2010 but Watpac did not, on its case, serve a notice of dispute until 2014. Although the cracking arose in 2010, it was not repaired until sometime after April 2012. Watpac put TTW on notice that it held TTW responsible for the cracking. However, it was reasonable for it to wait to see how much the repairs cost before serving a notice of dispute. It was not until that point that it could be certain that there was a dispute and, if there was, its scope. It is not clear when the cracking was finally repaired. However, TTW has not established that there was a substantial delay between that time and the time when Watpac served the dispute notice.
68. I have already dealt with the contention that the expert has made a jurisdictional error.
69. The fact that Watpac has refused to make documents available is not a ground for refusing relief. It is not clear why Watpac has refused to make documents available; and it might have been thought that the best way of ensuring that the dispute resolution procedure was productive was to give TTW access to the documents it seeks. However, TTW does not point to any basis on which it could be said Watpac was obliged to provide TTW with access to documents. That is a matter that could have been dealt with in the dispute resolution clause, but it was not. In the absence of an obligation to make documents available, I cannot see how the failure to make them available provides a discretionary basis for refusing relief.
70. It follows that Watpac should be entitled to the orders it seeks in the summons. It has been successful

in the proceedings. Consequently, TTW should pay its costs.

Orders

71. The orders of the court are:
    (1) The defendant execute the Expert Determination Agreement exhibited at pages 105 to 110 of Exhibit “WM1” to the affidavit of Warwick Meller sworn 13 April 2015 (Expert Determination Agreement), within 7 days;
    (2) The defendant pay the sum of $9,625 to the Security Holder (as defined in the Schedule to the Expert Determination Agreement) in accordance with the Expert Determination Agreement within 7 days;
    (3) The defendant provide a copy of the Expert Determination Agreement, executed in accordance with Order (1), to the plaintiff and Mr Philip Martin within 10 days.
    (4) Liberty to apply on 7 days’ notice;
    (5) Order that the defendant pay the plaintiff’s costs.

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Amendments

19 June 2015 - Typographical error on coversheet - A Jacobs corrected to A Jordan

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