SUPREME COURT OF VICTORIA

CAUSES JURISDICTION

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No. 2074 of 1998

BADGIN NOMINEES PTY LTD (ACN 005 187 066) — Plaintiff

v

ONEIDA LIMITED AND ONEIDA COMMUNITY PTY LTD (ACN 082 110 101) — Defendant

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JUDGE:	Gillard J
WHERE HELD:	Melbourne
DATE OF HEARING:	14 and 15 December 1998
DATE OF JUDGMENT:	18 December 1998
CASE MAY BE CITED AS:	Badgin Nominees Pty Ltd v. Oneida Limited & Anor
MEDIA NEUTRAL CITATION:	[1998] VSC 188

DISPUTE RESOLUTION - Contract - Term - Reference to Valuer as expert - Not an Arbitration - Court proceeding - Application to stay - Principles to apply - Discretionary considerations - Stay granted

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J.D. Loewenstein	Nathan Kuperholz
For the Defendant	Mr P.J. Jopling, Q.C. with Mr D. Batt	Arthur Robinson & Hedderwicks

SC:EB

HIS HONOUR:

1 The return of a summons in the proceeding, issued by the defendants seeking an order that the proceeding be stayed pending the determination of a dispute between the parties by an expert pursuant to an agreement made between them.

Parties

2 The plaintiff, Badgin Nominees Pty Ltd, conducted the business of Stanley Rogers and Son which had been in operation for some 67 years and involved processing, importation and sale of cutlery and other products and also for the last 44 years in the business of decoration, importation and sale of crockery and other related products.

3 The managing director of the plaintiff is William Rogers whose father, Stanley Rogers, commenced the business.

4 The first defendant Oneida Limited is a company incorporated in the State of New York in the United States of America and involved in the business of wholesale crockery and cutlery in the United States of America and in other countries. The company has business interests in Australia through a joint venture with Royal Selangor in relation to retail cutlery and through an Italian company in relation to supplying catering equipment.

5 The second defendant, Oneida Community Pty Ltd, is incorporated in this country and was incorporated on the instructions of the first defendant in order to conduct part of its business in Australia.

6 Mr Gregg Denny is the managing director of the second defendant.

Basic Facts

7 The facts which led to the dispute between the parties, the institution of the proceeding by the plaintiff and the present summons can be briefly summarised. On 5 June 1998 the plaintiff sold to the first defendant the businesses respectively known as "Stanley Rogers and Sons" and "Westminster China" which were carried

on by the plaintiff at premises in Sandringham.

8 The purchase agreement was in writing and was the result of negotiations between the parties and their solicitors over a substantial period of time.

9 The base purchase price was M$8.1 but this was subject to, inter alia, valuation of stock.

10 It was agreed that the purchaser would pay M$7.8 on the completion date which was 30 June 1998 and the balance was to be paid after an exercise called completion accounts was finalised.

11 By a novation agreement made on 1 July 1998 the plaintiff agreed to the substitution of the second defendant as the purchaser in the purchase agreement. The first instalment of purchase price was paid.

12 On 24 July 1998 the plaintiff delivered the completion accounts which it had prepared in accordance with clause 3.1 of the agreement to the second defendant. The second defendant did not agree with the accounts.

13 A dispute arose between the parties with respect to the final payment, the second defendant alleging that some of the stock was incorrectly described and valued and the plaintiff denying the allegation.

14 The defendants and their solicitors requested the plaintiff to refer the dispute to a valuer pursuant to clause 4.3 of the agreement.

15 The plaintiff refused.

16 On 25 September 1998 the plaintiff issued a writ in the Commercial List seeking the balance of the purchase price in the order of $674,217. The defendants each filed a conditional appearance and issued the summons seeking that the proceeding be stayed pending the determination of the dispute by an expert pursuant to clause 4.3 of the agreement. In the alternative, it sought a stay pending a determination of the dispute by an expert pursuant to clause 3.3(b) of the agreement.

The Law

17 The defendants invoke the inherent jurisdiction of the court to stay a proceeding brought in breach of an agreed dispute resolution method. In addition, the defendants rely upon s.30 of the Supreme Court Act 1986 which provides -

> "Nothing in this Act affects the power of the court to stay a proceeding in the court, either of its own motion or on the application of any person, whether or not a party."

18 The defendants disavowed any reliance upon the Commercial Arbitration Act 1984 or the International Arbitration Act (Cth) 1974.

19 The relevant provisions in the purchase agreement are -

(i) "Clause 3.3(b) If any dispute arises in relation to the Completion Accounts, other than a dispute relating to Trading Stock, it must be referred to a member of an independent firm of chartered accountants of international standing nominated in writing by the auditors of the vendor and the purchaser jointly (or, in default of agreement as to the nominee, by the president for the time being of the Australian Institute of Chartered Accountants, Victorian Division) and the determination in writing of that independent account and will, in the absence of manifest error, be conclusive and binding on the parties and will be deemed to have been given as an expert and not an arbitrator. The costs of any such independent accountant will be borne equally by the parties."

AND

(ii) "4.3 If any dispute arises in relation to the quantity, quality or value of the Trading Stock it must be referred to an independent valuer nominated in writing by the Vendor and the Purchaser jointly (or, in default of agreement as to the nominee, by the President for the time being of the Australian Institute of Valuers and Land Economists, Victorian Division) and the determination in writing of that independent valuer will be conclusive and binding on the parties and will be deemed to have been given as an expert and not an arbitrator. The cost of any such independent valuer will be borne equally by the parties."

20 Both provisions require the dispute resolution to be carried out by an expert "and not an arbitrator."

21 No argument was advanced that the terms were in fact arbitration agreements - compare Ajzner v Cartonlux Pty Ltd (1972) V.R. 919.

22 Although in their written submission the defendants relied upon both sub-clauses in my opinion the dispute between the parties raised the question whether clause 4.3 applied. In my opinion clause 3.3(b) could not apply to the dispute which has arisen.

23 Surprisingly, there is no decision at Court of Appeal level in Australia concerning the approach by the court in respect of an application such as the present. Of course there are many cases concerning an application for stay where the dispute resolution procedure is by way of arbitration.

24 Nevertheless, the issue has been considered at the highest level in England.

25 Before considering the English case it is important to state a number of propositions.

26 First, the parties, both experienced in the conduct of the types of business, the subject of the sale, at arm's length and well able to look after their own interests, with the assistance of their respective solicitors negotiated the purchase agreement.

27 Secondly, in their wisdom they decided and agreed that certain disputes were to be resolved by an expert and not by an arbitrator.

28 Thirdly, their agreement expressly stated in bald terms that the dispute in question was to be decided by an expert and his "determination in writing ... will be conclusive and binding on the parties", without providing any rules concerning procedure, evidence, obtaining legal advice by the expert or complying with the rules of natural justice.

29 It is a trite proposition of law that parties may contract about anything and subject to the principles of public policy and illegality the agreement should be enforced unless there is some other vitiating factor such as mistake, misrepresentation or in capacity.

30 The parties here established a scheme concerning the resolution of a dispute in relation to the "quantity, quality or value of the Trading Stock" sold pursuant to the agreement.

31 It was their common intention that the dispute resolution procedure be applied in the event of a dispute.

32 It is their contract: and it should be enforced.

33 In Huddart Parker Ltd v. The Ship Mill Hill (1950) 81 CLR 502, Dixon, J stated the principles which should guide a court in an application to stay a court proceeding because of an arbitration agreement.

34 In my respectful opinion what his Honour said in that case applies to an application for a stay where the parties have agreed to a dispute resolution procedure involving an expert.

35 He said at p.508-509 -

> "But the courts begin with the fact that there is a special contract between the parties to refer, and therefore in the language of Lord Moulton in Bristol Corporation v. John Aird & Co, consider the circumstances of a case with a strong bias in favour of maintaining the special bargain or as Scrutton, LJ said in Metropolitan Tunnel and Public Works Ltd v. London Electric Railway Co, 'A guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it.'"

36 In my opinion the court clearly has a jurisdiction to stay a court proceeding on the simple basis that "a contract is a contract" and the parties should abide by it.

37 I refer to the oft quoted dictum of Lord Tomlin that "the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains" - Hillas & Co v. Arcosi Ltd (1932) 38 Com. Cas. 23 at 29.

38 The nature of the jurisdiction was discussed by the House of Lords in Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd (1993) AC 334. In that case the construction contract contained a dispute resolution procedure which had a number of tiers. The first tier involved the resolution by a panel "acting as independent experts but not as arbitrators". The second tier involved arbitration.

39 Lord Mustill, delivered the leading speech.

40 It was recognised that the reference to the independent experts was not covered by the English Arbitration Act although it might be described as being very close to an arbitration reference.

41 Counsel for the moving party, sought to uphold the grant of a stay made by the courts below on two bases. The first submission was that the reference was in effect an arbitration and the second was described -

> "Secondly because this is an appropriate case in which to exercise the inherent power of the court to stay proceedings brought before it in breach of an agreement to decide disputes in some other way." - at p.352.

42 Lord Mustill went on to say -

> "I am satisfied however that the undoubted power of the court to stay proceedings under the general jurisdiction, where an action is brought in breach of agreement to submit disputes to the adjudication of a foreign court, provides a decisive analogy. Indeed until 1944 it was believed that the power to stay in such a case derived from the arbitration statutes."

43 His Lordship said at p.353 -

> "Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellant should go."

44 What his Lordship says accords with basic principle and I respectfully adopt and apply the principles stated by him. They accord with what Dixon, J said in the Huddart Parker Ltd case, supra.

45 Section 30 of the Supreme Court Act 1986 recognises the power in the court to stay a proceeding.

46 The next question is whether the court has a discretion to refuse a stay where the

parties have expressly and unequivocally agreed to refer a dispute to an expert in their agreement?

47 In the House of Lords case, Lord Mustill proceeds on the basis that there was a discretion to grant a stay but the interesting question that arises is on what basis could the court refuse to grant a stay in the face of an express term entered into by the parties?

48 Neither party submitted to the court that the court did not have a discretion once the court formed the opinion that the dispute in question fell within the dispute resolution term.

49 In considering a question of discretion it must be steadily borne in mind that the parties chose the path of expert valuation and expressly excluded arbitration.

50 No doubt the parties accepted that there was a difference between the two procedures.

51 It is clear that a valuation in the absence of any term in the contract means that the provisions of the Commercial Arbitration Act are not applicable. See Collins v. Collins (1858) 26 Beav. 306.

52 The distinction between arbitration and expert valuation was considered by Lord Esher MR in two cases at the end of the last century.

53 In Re Dawdy and Hartcup (1885) 15 QBD 426 at 430 his Lordship said -

> "It has been held that if a man is, on account of his skill in such matters, appointed to make a valuation, in such manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially: he is using the skill of a valuer, not of a judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators but only valuers. They have to determine the matter by using solely their own eyes and knowledge and skill."

54 In the later case his Lordship said -

> "If it appears, from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner. On the other hand there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of mere valuation. There may be cases of an intermediate kind where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence and arguments."
> (emphasis added)

55 See Re Carus v. Wilson and Greene (1886) 18 QBD 7 at 9; I refer also to Ajzner v. Cartonlux Pty Ltd (1972) VR 919 especially at pp.927-931.

56 It is noted here that the parties expressly provided that the valuation should be by an expert and not an arbitrator. Clearly the parties intended that the procedure should not be by way of arbitration.

57 The evidence shows that the terms of the contract were negotiated over a period of two months between the parties and their representatives. It is not difficult to infer that the parties appreciate the difference between arbitration and expert valuation: experience shows that arbitration conducted invariably as a trial can be costly and time consuming. The parties wished to avoid this.

58 They put in place what they intended was to be an inexpensive and speedy dispute resolution procedure conducted by an expert valuer.

59 This conclusion is supported by the requirement that each party was to pay the costs of the valuation in equal proportions.

60 It is also pertinent to observe that the parties provided two different procedures to accommodate different types of disputes.

61 The expert chosen was to be an expert in the field which is under dispute.

62 The valuer gets his authority from the agreement and he is bound to carry out his function in accordance with the agreement.

63 In a recent English case, of Cott UK Ltd v. F.E. Barber Ltd (1997) 3 All ER 540 the court was concerned with a clause where a person was to act as an expert and not an arbitrator.

64 His Honour Judge Hegarty QC, sitting as a judge of the High Court, held that the court did have power under its inherent jurisdiction to stay an action where the agreement between the parties contained a clause providing for a dispute resolution by an expert but went on to hold that in the exercise of the court's discretion the proceeding should not be stayed.

65 His Lordship stated a number of reasons why in the exercise of the court's discretion he would not grant a stay. The matters he relied upon were that there were no rules concerning the dispute resolution, that the valuer had no experience in the matters in dispute, and that the agreement contained no rules or principles to guide the expert in his approach and determination of the dispute. His Lordship was concerned about the lack of any provisions concerning the powers of the expert and the procedures to be followed. In addition, reference was made to the difficulties of construing the contract, that there were questions involving breach of contract and damages. The issues raised a number of complex legal and factual matters.

66 His Honour pointed out that it was difficult to see how the determination could proceed because of the issues involved.

67 I would question some of the matters which were taken into account. However, the dispute raised something more than the mere issue of valuation.

68 There were complex legal and factual issues raised which were to be left to a layman who was not qualified to deal with them and without any guidance as to how he was to proceed.

69 Where there are a number of issues involving questions of law and fact may be the

court should not grant a stay especially if the issues are the type of issues which are not suitable for determination in an informal dispute resolution procedure.

70 But in considering the question of discretion, the fact that the parties agreed the procedure should not be overlooked.

71 In Hooper Bailie Associated Ltd and Natcon Group Pty Ltd (1992) 28 NSWLR 194 Giles, J held that an agreement to conciliate or mediate is enforceable in principle, if the conduct required of the parties for participation in the process is sufficiently certain.

72 In a more recent case of Fletcher Construction Australia Ltd v. MPN Group Pty Ltd, unreported delivered 14 July 1997, Rolfe, J of the Supreme Court of New South Wales held that a reference to an expert clause was not void as ousting the jurisdiction of the court but more importantly held that the clause was not void for uncertainty if it did not specify the procedures the expert was to follow. His Honour held that in the absence of any express term with respect to procedures then in the absence of agreement by the parties that was a matter to be decided by the expert.

73 The expert is appointed pursuant to a contractual term. He derives his authority from that term read in the context of the agreement as a whole.

74 As the cases establish the valuer has to carry out the valuation in accordance with the terms of the agreement.

75 I discussed in the decision of Commonwealth of Australia v. Wabbe Pty Ltd and Pinebark Park Pty Ltd, unreported delivered 25 September 1998, the principles relating to setting aside a valuer's decision on the ground of mistake.

76 A consideration of the cases I referred to show that in the end the valuer has to perform his task in accordance with the agreement.

77 Whether or not he has to accord what might be described as an opportunity to the

parties to make submissions or provide experts' reports is a moot point. As a general proposition an arbitrator must act judicially but an expert valuer is not obliged to act judicially. Of course questions of bias, fraud, collusion etc would be a basis for either setting aside the determination or not enforcing it. In the end it is a question of determining the common intention of the parties. This will decide whether they are entitled to be heard. In the absence of any guidelines or rules the expert will decide what procedure he will follow in order to fulfil the task entrusted to him pursuant to the contract.

78 That is what the parties agreed to: that is what they get.

Facts

79 The application spawned four affidavits by the managing director of the second defendant, Mr Gregg Denny and two affidavits from Mr William Rogers, the managing director of the plaintiff.

80 The affidavits contain allegations counter-allegations and allegations in reply.

81 One thing they clearly establish, and that is, there is a dispute between the parties with respect to the amount to be paid for the trading stock.

82 It is necessary to consider the scheme of the purchase agreement with respect to the purchase price.

83 Clause 3 is concerned with the purchase price but it is clear that it was a common intention of the parties that the price was to be adjusted in certain circumstances.

84 The first step in the ascertainment of the price was what one might describe as the base price of M$8.1 which was to be finally determined taking into account the price for plant and equipment, the price for good will which was agreed at M$3.1 and finally -

> "(c) the price for the trading stock will be calculated in accordance with clause 4."

85 The price was subject to adjustment in accordance with clause 3.5.

86 The second defendant was obliged to pay the purchase price by payment of M$7.8 on 30 June 1998 (being the completion date) and by the payment of the balance, if any, on the third business day after the completion of the "Completion Accounts" in accordance with clause 3.3.

87 The completion accounts were to be prepared in accordance with the number of clauses including clause 3.1(c) of the agreement and this in turn required the price for the trading stock to be calculated in accordance with clause 4.

88 Going to clause 4, the agreement provided a procedure to determine the value of the trading stock. In my opinion the procedure set out required agreement by the parties. Absent such an agreement and the trading stock figure was not calculated. This is made clear by clause 4.

89 It is common ground that the parties never agreed on the value of the trading stock.

90 Clause 4 set out a step by step procedure which is as follows -

(i) On 30 June 1998 the plaintiff as vendor was obliged to carry out a stock take of the trading stock at which the second defendant was entitled to have present a representative.

(ii) Once the stock was ascertained and quantified then it was to be valued on the bases which involved considering silver, current stock, discontinued stock, work in progress and packaging and packaging material.

91 The dispute which has arisen between the parties concerns the value of the "Current Stock" and "Discontinued Stock". The current stock was to be valued "at the lower of the average landed cost of replacement value as shown in the business records" and "discontinued stock" at "the lower of 50% of the average landed cost or the amount that appears in the Business Records".

92 It is necessary to go back to the definition of these two terms. Clause 1.1 provides -

> "The following definitions apply unless the context requires otherwise -
> 'Current Stock' means stock which is in the vendor's day to day Price Lists as at the completion date and which is saleable in the ordinary course of business, unless otherwise agreed by the parties.
> ...
> 'Discontinued Stock' means stock which is not Current Stock."
> (emphasis added.)

93 The dispute which has arisen between the parties is whether certain stock falls within the definition of current stock or whether it is discontinued stock. By referring back to clause 4.2 it is clear that the valuation of the two categories is substantially different.

94 The real dispute comes down to whether the stock falls into one of the two categories, "Current Stock" or "Discontinued Stock". Once that decision is made the value is readily ascertained by reference to the business records and application of the formula.

95 Clause 4.3, sets out the dispute resolution procedure.

96 The independent valuer has authority to resolve any dispute in relation to the "quantity, quality or value of the trading stock" and I am quite satisfied that there is a dispute with respect to both the quality and value of the trading stock.

97 The evidence establishes that on 24 July 1998 the second defendant's solicitors received from the plaintiff's solicitors a copy of the purported completion accounts. By 28 July 1998, some four days later, the solicitors acting for the plaintiff had been made aware that there was some concern about the age of certain stock. By letter dated 28 July 1998 the second defendant's solicitors raised the question of a possible dispute and on the same day Mr Denny on behalf of the second defendant sent a facsimile to Mr Rogers of the plaintiff informing him that a substantial portion of the stock was discontinued stock and that there should be an adjustment in the completion accounts and concluding by suggesting an independent valuer be nominated pursuant to paragraph 4.3 of the agreement.

98 I am satisfied by that moment in time which is a mere four days after the completion

accounts were sent to the second defendant as purchaser, that there was a dispute between the parties.

99 I am equally satisfied that in accordance with the terms of the purchase agreement the completion accounts had to be agreed to by the parties and once that was done the purchase price would be adjusted accordingly, if there was the need for adjustment. But the final purchase price had to be determined after the trading stock had been valued and as at 28 July 1998 there was a dispute between the parties which the second defendant wished to refer to an independent valuer.

100 The evidence shows that steps were taken by the second defendant to nominate a valuer. The plaintiff did not agree to the appointment. It ignored the steps taken.

101 Mr Loewenstein of counsel who appeared for the plaintiff drew the court's attention to the fact that there was some change in position by the second defendant with respect to some stock, that it had taken steps to sell some of the old stock, that there were errors made by Mr Denny in relation to the matters deposed to in earlier affidavits and submitted that there was not a dispute between the parties within the meaning of clause 4.3.

102 He submitted that on a proper analysis of the assertions made by the parties, the real complaint concerned categorisation of the stock as at 30 June 1998. That is whether it was current stock or discontinued stock.

103 He submitted that this was not a dispute concerning the "quantity, quality or value of the Trading Stock".

104 The opening words of clause 4.3 are - "if any dispute arises in relation to". The phrase "in relation to" are words of wide import and should be construed as such. It is a question of determining the common intention of the parties and in my opinion the word "quality" covers the situation of making an assessment as to the type of stock concerned. In any event the determination of the value assumes the first step in the appraisal, namely, the categorisation of stock because it is that step

which sets in train the ultimate value.

105 In my opinion clearly there is a dispute falling within clause 4.3 and the court does have jurisdiction to grant a stay.

Discretionary Considerations

106 Mr Loewenstein on behalf of the plaintiff submitted that the court in the exercise of its discretion should not grant a stay. He contended it was more appropriate in the circumstances that the court should hear the proceeding. It was the just and convenient route to follow.

107 In a nutshell he submitted the absence of any guidelines in the agreement as to procedure to be followed, the way the dispute has evolved and in particular the way the second defendant has shifted ground with respect to its complaints, and the difficulties involved in the interpretation of the agreement have made the exercise too complicated for a valuer to deal with.

108 In support he drew attention to the following matters:

(i) That because the way the dispute has evolved it is difficult to define what the dispute is between the parties and he emphasised the changes in the second defendants arguments with respect to valuation, that the second defendant was selling the stock and the disputed evidence that the second defendant had changed the nature of the business.

(ii) That there were no rules, principles or procedures to apply to the valuation and therefore the valuer was left to do his best in uncharted seas.

(iii) That there were a number of difficult issues facing a valuer which involved questions of law and he itemised those as the interpretation of the agreement, what is meant by "Trading Stock" in clause 4.2, what were the parameters for the determination of the important question of what is "saleable in the ordinary course of business", and precisely what the valuer was being asked

to value. Again he emphasised the change in complaint put by Mr Denny, and the fact that it was arguable that the purchaser had changed the nature of the business, and whether that had any effect upon the valuation at the completion date?

109 He also emphasised that there was some factual questions that had to be resolved concerning the change in the nature of the business sold, whether there was obsolete stock and what the vendors ex-employees had told the purchaser.

110 He also raised the question of the bona fides of the purchase which he said were in question because of their changing attitude to the dispute and taking into account that they had exercised a due diligence procedure prior to the completion date which involved looking at the stock.

111 Mr Loewenstein contrasted all those problems with the proceeding remaining in the court and the value of the trading stock being determined by a special referee pursuant to Order 50 of the Rules of Court. He pointed out that before that step was taken, the parties by their pleadings would define the issues, that the court would decide what questions were to be decided by the referee and would give directions with respect to procedure, evidence and the question of granting a hearing to the parties.

112 He submitted that a court controlled reference would overcome all the matters of concern which he had outlined.

113 In this regard he also relied upon the power in the court to appoint a special referee with the necessary qualifications to deal with the particular dispute.

114 Often in the course of his submissions, Mr Loewenstein made observations which would have the effect of turning what was meant to be an inexpensive and expeditious dispute resolution procedure into a full adversarial contest between the parties.

115 I am satisfied that that is not what the parties agreed to. Indeed the suggestion of

keeping the proceeding in the court and going down the path of a reference out of court pursuant to Order 50 would result in a more expensive dispute resolution method which the parties clearly wished to avoid.

116 Turning to the alleged complexity of the valuation it is my opinion that the dispute is not complex and involves very few issues.

117 Clause 4 is concerned with valuing trading stock. It proceeds on the basis that the vendor will carry out a stock take and in the end the purchaser will agree to the value. Not surprisingly the parties have provided a dispute resolution procedure in the event they cannot agree. The fact is they cannot agree.

118 In my opinion the only issue that confronts the valuer is to determine what categories of stock, which are in dispute, fall into "current stock" and "discontinued stock".

119 In my opinion a valuer would have no difficulty in performing that task based upon his experience, skill and knowledge. He will devise his own procedures to follow and no doubt initially will seek to ascertain from the parties the nature of the dispute. What he does thereafter in order to fulfil the task given to him is a matter for his own judgment and common sense.

120 But in any event the mere fact that there is a degree of complexity involved does not mean that the chosen procedure should be abandoned.

121 In Karen Lee Nominees v. Gollin & Co (1983) 1 VR 657 at 669 the Full Court said-

> "In cases of this kind it is important to bear in mind that the parties have contracted that their rights are to be determined by one or more valuations.
> The valuation of land and building involves matters of judgment. Opinions notoriously vary on this subject matter - it would be surprising to find two valuers who agreed on the valuation to be given to land and buildings of the nature of the subject premises. There is no scientific exactitude in the valuations of land and buildings. They are as hypothetical as is the hypothetical purchaser whom they assume. Nonetheless the present parties wish to make a contract which would not be void for uncertainty."

122 In the later case of Email Limited v. Robert Bray (Langwarren) Pty Ltd (1984) VR 16 at p.23 the Full Court said -

> "Mr Gillard advanced an argument that it would be an impossible task for a valuer to determine what was relevant and give effect thereto. He drew attention to some remarks of Megarry, J in Cuff v. J. & F. Stone Property Co Ltd (1979) AC 87, as to the difficulties likely to be encountered by a valuer in determining a 'reasonable rent'.
> In this case, the task of the valuer may be difficult but we cannot accept that it is impossible. In any event, the task was expressly given to him by the parties. " (Emphasis added)

123 As I have stated in my view the issue is not complicated and in any event the parties entrusted this particular valuation issue to a particular type of valuer.

124 I have already made my observations with respect to the criticisms of no rules principles or procedure and confirm that in my opinion that is a matter for the valuer.

125 I do not believe that the interpretation of the agreement is a difficult one. The valuer will have to determine what in his opinion is meant by the phrase "which is saleable in the ordinary course of business" as at 30 June 1998. He will evaluate the facts as he ascertains them with respect to the business at the relevant date. He will then determine what he thinks is stock which was saleable in the ordinary course of business at that date.

126 The fact that the purchaser may have changed the nature of the business since the commencement date, the fact that the purchaser may have changed its views with respect to obsolete stock and its arguments and what the vendor's ex-employees may have said about the purchase in my opinion are irrelevant to the question that the valuer has to decide. But if in his wisdom he considers that they are relevant in any way to the procedure which he adopts in order to properly carry out his function, then they are matters of which he, no doubt can make his own assessment and decision. I do not believe that even if they were considered relevant by the valuer that he would have any difficulty in deciding what the facts are and what weight he should attach to them.

127 The question whether the purchaser may lack bona fides in relation to its attitude to valuing the stock again does not seem to me to be of any great moment. Either there is a dispute or there is not a dispute. The valuer will determine that. Whether or not the purchaser is bona fide in its attitude to the dispute is of little moment in the determination of the ultimate question as to the value of the trading stock at 30 June 1998.

128 One might criticise their attitude bearing in mind the opportunities they had to consider the stock prior to taking possession of the business, and one may even argue that they are being obstructive but in the end result it is of little moment to a valuation process. Either stock is current stock or discontinued stock? That is the question.

129 That is the question the parties have left to an independent valuer. In my opinion a valuer having some experience in the area of cutlery and crockery would have very little difficulty in making up his mind based upon his experience, skill and knowledge and after gathering what evidence he thought appropriate to determine whether the particular stock was "saleable in the ordinary course of the business" as at 30 June 1998.

130 I have carefully weighed up the criticisms made by Mr Loewenstein on behalf of the plaintiff and the difficulties that he submits will face the valuer but in my opinion the parties intended that the valuation should be carried out by a valuer in the circumstances provided for in the agreement and I do not accept that the task is too complex for a valuer to perform..

131 In this regard I refer to what Lawton, LJ said in Baber v. Kenwood Manufacturing Co Ltd & Anor (1978) 1 Ll. R 179 at p.181 -

> "They (the auditors) were to be experts. Now experts can be wrong; they can be muddle headed; and, unfortunately, on occasions they can give their opinions negligently. Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening. What is now acceptable is the risk of the expert being dishonest or corrupt."

132 I refer to what I said in the Commonwealth of Australia case, supra at p.5 as to what the parties should accept on a reference to an expert. I said -

> "The parties to a contract agree that the value is to be determined by an expert acting as such using his own skill, judgment and experience. He is not a lawyer. His authority derives from the contract. The terms of the contract are to be considered by him. It would be contrary to the parties common intention to expect the valuer to construe the contract and apply it as a court would. The parties have entrusted the task to an expert valuer, not a lawyer. They must be taken to accept the determination 'warts and all' and subject to such deficiencies as one would expect in the circumstances. The parties put in place a procedure, they must accept the result unless it would be contrary to their common intention."

133 In my opinion the matters raised by Mr Loewenstein are matters which the parties contemplated. They put in place the procedure and if it involves a question of law as to construction of the agreement, the gathering of evidence without regard to rules or procedures, a determination in which the expert may rely upon his own experience and knowledge and without hearing the parties or any valuation experts on their behalf, the parties are bound by it.

134 They put it in place, it binds them.

135 In regard to the question of the discretion I have not overlooked the observations made in the recent English case of Cott UK Ltd v. F.E. Barber Ltd, supra. The learned judge relied upon a number of factors which resulted in the exercise of his discretion refusing the stay.

136 I would beg to differ with respect to some of the matters which the learned judge took into account. The matters in question concern the fact that there were no rules governing the form of dispute resolution, that the valuer had no experience with respect to the issues raised and that there were no rules or principles laid down pursuant to which the expert was to approach or determine the dispute.

137 However, I do respectfully agree that the fact that there were issues concerning a number of legal questions, whether there was a breach of any of the terms of the

agreement and whether there was an entitlement to damages are matters which may be of some importance in deciding against the grant of a stay on the basis that it could not have been the common intention of the parties to refer disputes of mixed facts and law to an untrained and inexperienced person. These are questions which are more appropriate to a court proceeding. But in the end it is a question of what the term of the contract provides and the nature of the dispute.

138 These latter considerations may be relevant to an issue whether the parties intended the dispute to be resolved by arbitration rather than by an expert despite what the words of the agreement provided.

139 Here it is a straightforward valuation exercise following on from a stock take in which the parties disagree as to the value and quality of certain stock.

140 In my opinion the defendants are entitled to a stay of the proceeding pending the resolution of the dispute concerning the value of trading stock pursuant to clause 4.3 of the purchase agreement.

141 Subject to the submissions of counsel I propose to make the following orders -

(i) That the proceeding be stayed pending the determination by a valuer in writing of the dispute between the parties concerning the valuation of the trading stock pursuant to clause 4.3 of the agreement made between the plaintiff and the first defendant dated 5 June 1998 and the subsequent agreement made dated 1 July 1998 between the plaintiff and the second defendant with respect to the same subject matter.

(ii) That there be liberty to apply generally upon seven day's written notice to the other side.

(iii) That the plaintiff pay the defendants' costs of their summons filed 7 October 1998.

BADGIN NOMINEES PTY LTD
(ACN 005 187 066) Plaintiff

v

ONEIDA LIMITED AND ONEIDA
COMMUNITY PTY LTD
(ACN 082 110 101) Defendant
