

# SUPREME COURT OF QUEENSLAND

CITATION: *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160

PARTIES: **NORTHBUILD CONTRUCTIONS PTY LTD**  
ACN 011 063 764  
(applicant/appellant)  
v  
**DISCOVERY BEACH PROJECT PTY LTD**  
ACN 100 500 981  
(respondent)

FILE NO/S: Appeal No 7853 of 2007  
SC No 11269 of 2006

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 June 2008

DELIVERED AT: Brisbane

HEARING DATE: 5 March 2008

JUDGES: Muir JA, Mackenzie AJA and Atkinson J  
Separate reasons for judgment of each member of the Court,  
Muir JA and Mackenzie AJA concurring as to the order  
made, Atkinson J dissenting

ORDER: **Appeal dismissed with costs**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND  
RELATED CONTRACTS – OTHER MATTERS – where  
the appellant and respondent entered into a contract for the  
construction of a high-rise development – where disputes  
arising under the building contract were referred to experts  
for expert determination – where the contract expressly  
required the expert not to act as an arbitrator – where the  
disputes involved questions of credit of witnesses – where the  
parties approved of a procedure formulated by the experts  
which involved taking oral evidence and permitting  
cross-examination of witnesses – whether, by agreement and  
by the way in which the expert determination was conducted,  
the nature of the proceedings was changed from expert  
determination to arbitration  
  
ARBITRATION – THE SUBMISSION AND REFERENCE  
– HOW MATTERS MAY BE REFERRED – WHAT  
CONSTITUTES REFERENCE TO ARBITRATION – where

disputes arising under the building contract were referred to experts for expert determination – where the contract expressly required the expert not to act as an arbitrator – where s 4 *Commercial Arbitration Act* 1990 (Qld) requires an agreement to refer a dispute to arbitration to be in writing – where the disputes involved questions of credit of witnesses – where the parties approved of a procedure formulated by the experts which involved taking oral evidence and permitting cross-examination of witnesses – where expert determination and arbitration may have characteristics of the other – whether, by agreement and by the way in which the expert determination was conducted, the nature of the proceedings was changed from expert determination to arbitration

*Commercial Arbitration Act* 1990 (Qld), s 4

AGE Ltd v Kwik Save Stores Ltd 2001 SC 144, cited  
 Age Old Builders Pty Ltd v Swintons Pty Ltd [2003] VSC 307, considered  
 APM Group (Aust) Pty Ltd v Galwin Pty Ltd [2006] VSC 325, cited  
 Arenson v Casson Beckman Rutley & Co [1977] AC 405, applied  
 Badgin Nominees Pty Ltd v Oneida Ltd [1998] VSC 188, considered  
 Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd [1989] 1 Qd R 8, cited  
 Edmund Barton Chambers (Level 44) Co-operative Limited v The Mutual Life & Citizens' Assurance Co Ltd (1984) NSW ConvR 55-177, considered  
 Eureka Funds Management Ltd v Freehills Services Pty Ltd [2006] VSC 461, cited  
 Hammond v Wolt [1975] VR 108, cited  
 Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2004] 1 AC 715, applied  
 Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314, considered  
 M1 & Ors v L1 & Ors [2007] NSWSC 346, cited  
 Nikko Hotels (UK) Ltd v MEPC Plc [1991] 2 EGLR 103; [1991] 28 EG 86, considered  
*Palaclath Ltd v Flanagan* [1985] 2 All ER 161, considered  
*Qld Power Trading Corp v Xstrata Qld Ltd* [\[2005\] QCA 477](#), considered  
*Radaich v Smith* (1959) 101 CLR 209; [1959] HCA 45, applied  
*Re Carus v Wilson and Greene* (1887) 18 QBD 7, cited  
*Re Davis & Brown's Arbitration (No 2)* [1957] VR 127, applied  
*Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134, considered  
*Santos Ltd v Pipelines Authority of South Australia* (1996) 66 SASR 38, cited

*Sutcliffe v Thackrah* [1974] AC 727, considered  
*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR  
 165; [2004] HCA 52, applied  
*Zambia Steel & Building Supplies Ltd v James Clark & Eaton  
 Ltd* [1986] 2 Lloyd's Rep 225, applied  
*Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd  
 R 563; [\[2005\] QSC 135](#), cited

COUNSEL: R A Holt SC, with P B Scott, for the appellant  
 R M Derrington SC, with C L Douglas, for the respondent

SOLICITORS: Crouch and Lyndon for the appellant  
 Minter Ellison for the respondent

- [1] **MUIR JA:** The question for determination on this appeal is whether a process of adjudication under a building contract embarked on by persons appointed by the parties as experts under a dispute resolution clause in the Contract became one of arbitration as a result of an agreed change in the procedures required to be followed by the experts under the Contract. The critical change in the procedure which is alleged to have changed the character of the experts' role was the conferring on them of the right to hear expert evidence and to permit cross-examination.
- [2] The appellant, as head contractor, and the respondent, as principal, entered into the Contract, for the construction of a high-rise development at Marcoola, on or about 23 May 2003. A dispute arose between the parties in respect of a range of matters which came to be described as "the categories 1 to 6 disputes". They were referred by the parties for expert determination under cl 13 of the Contract.

**Clause 13 of the general conditions of contract and schedule 26**

- [3] Clause 13 of the general conditions of contract relevantly provides:

"[3] Section 13 of the general conditions of the building contract (as amended by the special conditions) outlines the process for dispute resolution and provides:

**'13.1 NOTICE OF DISPUTE**

13.1.1 If a Dispute arises then either party may give the other written notice of Dispute which adequately identifies and provides details of it. 13.1.2 Notwithstanding the existence of a Dispute, the parties must continue to perform this Agreement.

**13.2 CONFERENCE**

...

13.2.2 If a Dispute has not been resolved within 28 days of service of a notice of Dispute then **it will be referred to arbitration unless the party giving the notice of Dispute informs the other party in writing within that 28 days that it elects to have the dispute determined by expert determination.**

**13.3 ARBITRATION**

Arbitration will be effected by an arbitrator nominated by the President or Chief Executive Officer of the Organisation specified in Item 1 of Schedule 26.

**13.4 EXPERT DETERMINATION**

13.4.1 **Expert determination will be -**

**1 effected by an expert nominated by the president or Chief Executive Officer of the Organisation in Item 1 of Schedule 26  
2 in accordance with the process in Schedule 26**

13.4.2 Except to the extent that the Process in sub-clause

13.4.1 provides otherwise:

1 each party will bear its own costs and contribute one half of the expert's fee;

2 all aspects of every expert determination except the fact of occurrence will be privileged;

3 the expert must as a condition of its appointment agree to issue a written determination of the dispute within the number of days from the appointment of the expert specified in Item 3 of Schedule 26,

unless otherwise agreed between the parties;

4 **the expert will not act as an arbitrator.**” (emphasis added)

[4] Under Schedule 26 of the Contract, which contains “Rules for Expert Determination”, the Expert, to make the determination under Clause 13.4.1 of the Contract, was to be nominated by the Queensland Law Society. It nominated a solicitor, Mr Orange, and the parties approached Mr Callaghan, a quantity surveyor, to act as a joint expert. It is accepted that the terms of engagement of the experts included a term that the experts’ functions be performed pursuant to cl 13 and Schedule 26 of the Contract.

[5] The rules for expert determination in Schedule 26 make provision for a timetable for the making of written submissions and for a conference to be attended by the experts and the parties at which the parties may make oral submissions.<sup>1</sup>

[6] Rules 4, 5 and 6 provide:

**“4. Determination of Dispute**

The Expert will promptly but not later than twenty-one (21) days after the conference between the parties or such other reasonable time which, having regard to the nature and facts of the dispute is required by the Expert and agreed to by the parties, advise the parties in writing of the Expert’s determination on the dispute. The parties will be bound by the determination of the Expert.

**5. Procedural Rules**

(a) Neither party may communicate directly or indirectly with the Expert in respect of any matter relating to the dispute other than in accordance with this Process.

(b) The parties may have legal or other representation at the conference which will be held in private.

**6. Conduct of Expert**

(a) The Expert will make a determination on the dispute.

(b) The Expert must act honestly and fairly within the times prescribed and arrive at a reasonable measure or value of work, cost, quantity or time.

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<sup>1</sup> Rules 2 and 3 respectively

(c) The Expert may in the Expert's discretion obtain the advice and assistance of others in reaching the Expert's determination and in respect to any matter of law obtain the opinion of a suitably qualified lawyer.

(d) **The Expert is not bound by the Rules of Evidence and may make the Expert's determination on the basis of information received or the Expert's own expertise.**

(e) The Expert will act independently and impartially." (emphasis added)

[7] Rule 8 provides:

"Unless otherwise stated this Process may be modified only by agreement of the parties and the Expert."

**The appellant's contentions**

[8] The appellant does not claim that the giving of the notice of dispute gave rise to an agreement to arbitrate. The contention is that, although the parties originally agreed on an expert determination, they subsequently, by agreement, changed the nature of the process so that their agreement became one of arbitration not expert determination. More particularly, it is asserted that the term of the contract that experts appointed pursuant to s 13.4.2.4 would act as experts and not as arbitrators ceased to operate when the role of the experts became one of conducting a hearing in the nature of a judicial inquiry.

[9] The appellant's argument does not identify precisely the point at which and the means by which the conversion from expert determination to arbitration occurred.

[10] The substance of the appellant's case is that a decision-maker who resolves disputed questions, including questions of credit, by hearing evidence, permitting cross-examination and giving the parties a right to be heard, acts judicially. In acting judicially, the decision-maker is not acting as an expert. Although the parties' description of the nature of the process has "some persuasive value", it is the nature of the process which is finally determinative of the question of whether the process is one of expert determination or arbitration. Subsequent conduct of the parties may transform an expert determination into an arbitration. The procedure in an expert determination, by way of contrast with that followed in arbitration and litigation, is inquisitorial rather than adversarial. An expert, however, may initiate his or her own lines of inquiry with or without the involvement of the parties and apply his or her own expertise.

[11] The indicia of an arbitration are:

- “(a) there is a dispute or difference between the parties which has been formulated in some way or another (the first indicator);
- (b) the dispute or difference has been remitted by the parties to the person to resolve in such manner that the person is called on to exercise a judicial function (the second indicator);
- (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute (the third indicator);

- (d) the parties have agreed to accept the decision (the fourth indicator).”<sup>2</sup>

- [12] The above indicia, formulated by Lord Wheatley in *Arenson v Casson Beckman Rutley & Co*<sup>3</sup>, were repeated in *AGE Ltd v Kwik Save Stores Ltd*<sup>4</sup>. Reliance is placed also on *Old Power Trading Corp v Xstrata Qld Ltd*<sup>5</sup> in which Williams JA observed, “The question is not whether the parties intended arbitration but whether there is a subject matter of arbitration, that is, a subject matter in the nature of judicial inquiry.”
- [13] A right to be heard, in the context of a right to call witnesses and cross-examine opposing witnesses is inconsistent with expert determination. Schedule 26 of the Contract requires a “conference” to be held. This also contrasts with a hearing or proceeding. Submissions after cross-examination necessarily involve the decision-makers determining issues of credit and analysing documents in the light of competing versions of events. Further, there will be the application of the law to a particular version of the facts.
- [14] The primary judge erred in concluding that the right of the experts under r 6(d) to “require from either party further information as the expert sees fit” or to act “on the basis of information received” accommodated the right to require cross-examination. The determination of disputed facts and issues of credit do not, in this context, amount to the receipt of knowledge. Such determinations are not matters of expertise and do not arise from decisions based on the opinion of the expert. Rule 6(d) does not accommodate “conducting what is effectively a trial. The expert process under the contract cannot be extended by agreement to become a judicial process and remain an ‘expert determination’. The matter must be considered objectively.”
- [15] That the decision-makers were no longer acting as experts was acknowledged by the experts and the parties. For example, in the determination of 30 September 2005, Mr Ryan concluded that “the expert (or experts jointly) would therefore be acting as arbitrators in all but name.” See also the determination of 30 September 2005.
- [16] The primary judge erred in giving too much weight to the parties own description of the process and insufficient weight to objectively determined criteria.
- [17] The caveat imposed by s 13.4.2.4 of the Contract, that experts appointed pursuant to it would not act as arbitrators, ceased to govern the relationship between the parties and the experts when it was agreed between the experts and the parties that the role of the experts would be “broader” than that envisaged by the Contract. The result was a judicial inquiry.
- [18] “Arbitration agreement” is defined in s 4 of the *Commercial Arbitration Act 1990* (Qld) as “an agreement in writing to refer present or future disputes to arbitration.” For an arbitration agreement to exist, there need not be a single document signed by

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<sup>2</sup> *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 at 428

<sup>3</sup> [1977] AC 405 at 428

<sup>4</sup> [2001] SC 144

<sup>5</sup> [2005] QCA 477 at [68]

the parties<sup>6</sup>. An over-formalistic approach should not be adopted. A sufficient memorandum of an agreement to arbitrators was constituted by:

“The respondent’s solicitor’s letter of 14 August 2006 to the Experts or its letter of 7 February 2006, together with the written submissions referred to in paragraph 95 of the reasons for judgment and  
 (b) the determination of the decision-makers on 3 August 2006; and  
 (c) the appellant’s letter of 14 August 2006.  
 These documents evidence that a hearing will be held at which cross-examination will occur resulting in a resolution of disputed facts.”

- [19] The primary judge erroneously found that the correspondence and directions relied on by the appellant as evidencing an agreement in writing to arbitrate, came into existence in the context of expert determination and not as part of a transformation of the process to arbitration. Alternatively, each of the written decisions of the experts requiring cross-examination is a sufficient memorandum in writing for the purposes of the Act.

**The respondent’s submissions**

- [20] In their outline of submissions counsel for the respondent summarised the respondent’s arguments as follows.
- [21] The evidence does not disclose any agreement – much less an “agreement in writing” – between the parties and the decision makers that the process of expert determination upon which the decision makers were engaged should change its fundamental character to one of arbitration.
- [22] What the evidence does show is a process by which the decision makers sought to formulate a *procedure* for the further conduct of the expert determination in a series of oral directions hearings – with the parties making submissions as to the appropriateness or otherwise of the suggested procedure.
- [23] The conclusion of the decision makers – that the process of expert determination had evolved (by agreement between the parties and the decision makers) to encompass cross-examination of witnesses by the parties – involved nothing more than a determination as to the procedure that they would adopt in performing their retainer to carry out an expert determination in relation to one group of issues (Category 1 issues). As a matter of law, this procedure was one which they were entitled to adopt in carrying out their retainer as experts.
- [24] The reliance which the learned primary judge placed upon s 13.4.2.4 of the building contract was consistent with principle. In the absence of any agreement between the parties to change the fundamental character of the process of expert determination to one of arbitration, s 13.4.2.4 operates as a statement of the parties’ contractual intention – namely, that the decision makers were not obliged to proceed in a judicial way. This is consistent with authorities that have recognised that the historic way for agreements to make it clear that an adjudicator is *not* obliged to

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<sup>6</sup> *Re Davis & Brown’s Arbitration (No 2)* [1957] VR 127 at 137; *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd’s Rep 225 at 232

proceed in a judicial way is by an express term requiring the expert *not to act as an arbitrator*.

- [25] The authority of the decision makers comes from the relevant provisions of the building contract and the decision makers are bound to carry out their functions in accordance with those provisions. To the extent that any ruling by the decision makers in relation to cross-examination is beyond their powers, it is simply ineffective. It cannot, without the clear agreement by all of the parties whose rights and obligations would be affected, transform the process of expert determination into one of arbitration.
- [26] I do not propose to further summarise the extensive written or oral submissions made by the respondent's counsel. It will suffice, I think, to mention a few of the matters emphasised in the course of those submissions.
- [27] The fundamental difference between arbitration and expert determination is the *approach* which the adjudicator is obliged to take to the proceedings. It is only if the adjudicator is *obliged by the governing agreements to act in a judicial way* that the proceedings can involve "arbitration". It is not enough that the adjudicator chooses to proceed in a particular way - the critical question is whether the governing agreements *oblige the adjudicator to proceed in that way*.
- [28] The characterisation of a particular dispute resolution process as one of expert determination or arbitration must be undertaken by reference to the intention of the parties as manifested in the governing agreements, which provide the basis for resolving all fundamental questions concerning the proceedings.
- [29] While contractual variations to the governing agreements are relevant to the characterisation of the dispute resolution process, the courts have been careful to distinguish contractual variation from mere procedural manoeuvrings during the course of the process.
- [30] Although a term of this nature is not necessarily conclusive, it has been said that it would be difficult to contend for a contrary intention in the face of such clear and unambiguous words.
- [31] The indicia which the appellant relies upon to demonstrate that the decision makers were engaged in a judicial determination are generally consistent with either expert determination or arbitration. Accordingly, the presence of some of those indicia in the present case remains consistent with an express obligation to act as an expert and not as an arbitrator.
- [32] The authorities demonstrate that the following indicia are consistent with an intention to proceed with expert determination:
- (a) the presence of a dispute;
  - (b) the fact that the subject matter is a dispute about matters of law or fact;
  - (c) the existence of a right to be heard and to adduce evidence;



- (d) a right in the parties to have the adjudicator act fairly, impartially and in accordance with the rules of natural justice.

[33] There is no suggestion in the authorities that the presence of an entitlement in the parties to cross-examine witnesses is in any way inconsistent with an expert determination. The authorities to date have explicitly treated as valid expert determinations conducted pursuant to agreements which confer:

- (a) a discretion upon the adjudicator to call for such evidence and information as is required;
- (b) an obligation upon parties to attend any interviews required by the adjudicator and respond to questions or “make available to be questioned by the Umpire any officer, employee, agent or adviser of that Party whom the Umpire may consider to be able to supply information of relevance to the determination of the issues”;
- (c) a discretion upon the adjudicator to conduct the determination in such manner as he sees fit, including by having oral hearings.

[34] None of the communications between the parties or the decision makers – whether written or oral – can be construed as an agreement to change the character of the proceedings to one of arbitration. The decision makers did not purport to “agree” with anyone about a change in their status. As between the parties, none of the documents relied upon by the appellant, even collectively, amounts to an agreement in writing to refer the matters in dispute to arbitration.

[35] The respondent’s email of 14 August 2006 merely requested a directions hearing. The respondent’s letter of 7 February 2006 merely expressed its disappointment that cross-examination was not to occur as it had envisaged. On 3 August 2006, the decision makers merely ruled that there had been agreement that there would be cross-examination. On 14 August 2006, the appellant merely indicated that it was content to proceed with the process of cross-examination.

[36] At best there was collectively a view that cross-examination could, would and should take place. That is not an agreement to arbitrate.

[37] Further, none of the written directions of the decision makers can be characterised as an “agreement in writing”. The plain words of the *Commercial Arbitration Act 1990 (Qld)* require that the agreement itself be made in writing. It is not sufficient that any oral agreement to arbitrate be evidenced in writing. This can be contrasted with statutory provisions which permit oral transactions to be proved by subsequent writing.

#### **The progress of the expert determination**

[38] In the light of the parties’ contentions it is desirable to examine how the processes of the experts under cl 13.4 developed.

[39] In December 2004 Mr Ryan, a barrister, replaced Mr Orange as an expert. An agreement for Mr Ryan’s appointment, generally in terms of that in respect of Mr Orange’s appointment, was drawn up and signed by the parties, but not by

Mr Ryan. Mr Ryan, however, acted as expert in accordance with the terms of the document. By this time, a Scott schedule had been prepared for the category 1 disputes and the parties and the experts had discussed the question of whether cross-examination should occur.

[40] The issues encompassed by the category 1 disputes were whether the respondent was in breach of contract in failing to act reasonably, in good faith within a reasonable time:

1. to issue a price variation of \$450,000 in respect of future savings;
2. to assess and issue a variation for “South Tower Beach House Provision Sum adjustment”;
3. to attend to an audit so as to determine the reasonable value of any variation for “project contingency”; and
4. to issue a variation in respect of “profit contribution”.<sup>7</sup>

[41] In a letter of 10 May 2005 to the parties, the experts identified eight issues in relation to the category 1 disputes which they described as fundamental. The experts proposed that a number of steps be taken with a view to refining the issues and determining them. In relation to the making of submissions on the issues identified for determination, the experts wrote:

“... If oral evidence is taken the parties may make oral and/or written submissions at the conclusion of that evidence. Following those submissions no further submissions or correspondence with respect to the agreed issues will be accepted or suggested.”

[42] The respondent’s solicitors, by a letter dated 15 July 2005, informed the experts that they were happy to proceed on the basis outlined in the experts’ letter of 10 May 2005. In a letter to the experts dated 20 July 2005, the appellant’s solicitors contended that the process proposed by the experts in their letter of 10 May 2005 amounted to an arbitration. It was asserted also that the respondent had “agreed to the matter proceeding in the arbitration-style format proposed”. The letter suggested that if the experts accepted an appointment as arbitrator with the parties’ consent, the proceedings should be consolidated with the arbitration proceedings already on foot before an arbitrator, Mr Fischer.

[43] Correspondence took place between the parties and the experts requested that they be provided with written submissions on the competing views expressed by the parties in correspondence after 10 May 2005. That was done and the experts made a joint determination on 30 September 2005.

[44] The joint determination stated, in relation to evidentiary procedures, cross-examination and submissions:

“... ”

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<sup>7</sup> This summary has been adapted from a description in the experts’ determination of 30 September 2005

43. In these circumstances it follows, in our opinion, that the conduct of the parties described above evidenced an agreement between them –
- (a) to do away with any requirement for strict compliance with the provisions of clauses 13.1 to 13.4 of the contract as a necessary preliminary to the Category 1 disputes being referred for expert determination;
  - (b) to treat the Category 1 disputes identified in the manner mentioned above as having been referred to Messrs Orange and Callaghan for expert determination.
44. So far as the process to be followed is concerned it seems to us, judging by the notes of what occurred at the meeting of 1 September 2004, that **the parties further agreed:**
- that a Scott Schedule should be prepared with respect to the Category 1 disputes and that with that Schedule each party should provide any evidence upon which it wished to rely (including any documents, any witness statements/statutory declarations) and an submissions in support of its position;
  - **that whether any evidence should be tested by cross-examination or by the experts asking questions of a witness should be determined in accordance with the provisions of the agreement for the expert determination process (no doubt a reference to schedule 26) and that if there was no provision covering any such point then the experts should determine how it would be dealt with.**
- ...
53. As we have said, we think that the parties had by agreement set up a new structure for the referral of disputes to expert determination and that the experts had acquiesced in that and had agreed to enter upon the process of determining those disputes.
54. Further, **it seems to us that the parties by their conduct had evinced an intention to modify the process set out in the rules under schedule 26.** For example, they had agreed to make particular provisions with respect to the making of submissions and the tendering and obtaining of evidence which were not in conformity with rr. 2, 3 and (perhaps) certain parts of r. 6 under schedule 26. **We think that the parties had agreed to modify their original agreement to that extent** and that it is implicit in the notes of the meeting held on 17 September 2004 **that the parties agreed to abide by the decision of the experts with respect to what might be termed matters of ‘practice and procedure’ to be followed in the process of considering submissions and considering and testing any evidence.”**
- “57. ... Mr Ryan said that the procedure agreed upon in the contract for the appointment of an expert appeared to have been departed from so far as the legal expert was concerned and that in order to determine the legal issues arising with respect to the various items in the Scott schedule:
- (a) there would have to be decisions made with respect to

questions of fact;

- (b) that may involve judgments being made as to the credit of witnesses;
- (c) **the expert (or the experts jointly) would therefore be acting as arbitrators in all but name.**

...

**The parties through their solicitors advised Mr Ryan and Mr Callaghan that:**

- (a) **they accepted that the process now being undertaken was not in accordance with the expert determination provisions of the contract** between the parties referred to in Mr Ryan's appointment agreement;
- (b) the parties were agreed that they were proceeding on the basis that –
  - (i) **Mr Ryan and Mr Callaghan should act in a broader role than that of an expert;**
  - (ii) they should make determinations of fact or of mixed fact and law necessary to the resolution of legal and quantity surveying issues;
- (c) the parties intended that Mr Ryan and Mr Callaghan should then produce a joint decision on legal and quantum issues and that **neither party should challenge the decision by reason of any departure from the expert determination appointment and processes appearing in section 13 or schedule 26 of the Contract;**
- (d) **that nonetheless the experts in accepting their appointments to act as outlined above should so far as possible follow the procedural rules and conduct themselves as outlined in rules 5 and 6 of schedule 26 and that the other provisions of schedule 26 should apply to the above mentioned expert determination process in so far as they were not inconsistent with it.**

Those at the meeting discussed the manner in which the experts should approach the determination of questions of fact or mixed questions of fact and law necessary for the decision of legal issues and quantum issues. It was agreed by the parties that the experts should proceed as follows:

- (a) they would identify such issues of fact or of mixed fact and law which they felt unable to decide without further documents or statements from witnesses or oral evidence from relevant witnesses;
- (b) the parties should then have an opportunity to provide any further documents or statements they thought relevant to such issues;
- (c) **insofar as the experts required oral evidence with respect to such issues:**
  - (i) **the parties should make submissions as to the process to be employed; that is, whether the witness should give evidence in chief orally or whether that**

**evidence should be cross-examined by the opposing party or whether the only evidence to be taken from the witness should be in response to questions by the experts, or any combination of those methods;**

- (ii) that the experts should then advise their decision as to how the oral evidence of any such witness should be taken;**
- (iii) that the parties would accept that decision by the experts and that the evidence should be taken accordingly.**

...

**“The parties indicated to the experts that they anticipated that the experts would extract from the Scott schedule with respect to Category 1 issues and the submissions referred to above the issues to be decided by them with respect to fact, law and quantum and that the parties were content that the experts should then proceed to determine those issues as experts and accepted that any such decision should be binding on the parties.”** (emphasis added)

- [45] There is no dispute about the accuracy of the facts set out in the joint determination.
- [46] The experts wrote to the parties’ solicitors on 24 October 2005, giving directions in relation to the delivery of further witness statements and directing that each party advise by a specified time and date which witnesses it wished to cross-examine.
- [47] In their letter of 7 February 2006 to the experts, the respondent’s solicitors referred to a letter of 3 February 2006 from the experts to the parties. That letter quoted from a letter to the experts dated 25 January 2006 from the appellants, which contained the observation, “When Northbuild requested an opportunity to cross-examine witnesses, it was never intended that the process evolve further into a full trial, having all the hallmarks of an arbitration.” In the 25 January letter the respondent’s solicitors requested that the experts give the parties directions as to the process they intended to adopt. Reference was made by the experts in their 3 February 2006 letter to notes of a meeting between the parties and Mr Orange on 17 September 2004. The experts expressed the conclusion, by reference to the notes, that it did not appear “That there was any agreement concerning a process by means of which witnesses might be cross-examined. In these circumstances it is necessary to return to the documents establishing the expert determination process.”
- [48] The letter of 3 February then proceeded to discuss the rules for expert determination in schedule 26. It was concluded that there were two means by which a cross-examination of witnesses may be undertaken. The first was that the experts exercise their right under rule 2 to require further information. By that means the experts could require a witness in respect of whom there was a witness statement to attend before the experts to answer questions posed by the experts in relation to “the matters touched upon in the statement.” The second means was that the parties and the experts might agree upon a process for cross-examination of witnesses either by the experts or by the parties. The letter stated:

“In our opinion the second alternative should not be adopted. We, for our part, do not want this process to stray any greater distance than it already has (albeit by agreement) from that originally envisaged in Sch 26.

It follows that if we will not agree to a modification of the process to permit cross-examination of witnesses by opposing parties then r 2 provides the only other means by which witnesses may be tested in relation to assertions made in their statements.

We propose to proceed on that basis. That is, on the basis that we will, if we think it necessary, require a party to arrange for a witness to attend upon us in order that we may put questions in relation to assertions appearing in a witness statement.”

[49] Cross-examination by the parties’ legal representatives was thus ruled out by the experts.

[50] The respondent’s solicitors, in their letter of 7 February, expressed their client’s disappointment at the suggestion that the cross-examination might be abandoned. The letter stated:

“We understood that there had been an agreement at the request of Northbuild, to modify the rules for expert determination to allow for the cross examination of witnesses. This agreement is reflected in the directions made by you in your letter of 24 October 2005 and the way the parties conducted themselves after that date ...

Since 24 October 2005 DBP has proceeded on the basis that it would have the opportunity to cross examine Northbuild’s witnesses.

...

If the cross-examination is abandoned months will have been wasted. If there was no agreement that there be cross-examination why was Northbuild allowed to deliver more statements ...

Having secured DBP’s agreement to the amendment of the process it seems unfair that Northbuild be allowed to resile from the position agreed last October . . . DBP respectively asks that you reconsider the course you propose in your letter of 3 February 2006 ...

We respectfully request that either:

- You confirm that the rules have been varied to allow for cross-examination and that you fix dates for the cross-examination to occur. In that regard we note that DBP’s senior counsel, Mr Morrison is not available from 16 to 31 March 2006, or
- You fix a conference date at which you might hear from the parties’ legal representatives and make directions about how the determination is to proceed as quickly as possible.”

[51] The debate about cross-examination continued. In an email sent on 10 February 2006 by the appellant’s solicitors to the experts, it was stated “that the appellant did not consider there to be any need for a further conference. Your final decision as to the process is clear.” It was then asserted that it was “apparent that there is no

agreement as to how any cross-examination process would proceed, confirming the determination made in your letter of 6 February.” The reference to the 6 February letter appears to be a reference to an email which attached the experts’ 3 February letter.

- [52] There was a lull in relevant dealings between the parties between February and June 2006. The solicitors for the appellant in June 2006 foreshadowed an application to the court with a view to obtaining a declaration that the matter before the experts was an arbitration. The foreshadowed application did not eventuate and in an email dated 10 July 2006 to the experts, the appellant’s solicitors requested that they convene a directions hearing to clarify matters including: the parties’ right to attend before the experts to make oral representations; how disputed questions of credit and fact were to be resolved by the experts and the relief which the experts considered themselves entitled to deliver.
- [53] The experts wrote to the parties’ solicitors on 3 August 2006. Referring to their letter to the solicitors for the parties dated 3 February 2006, they stated:

“It now seems to us that in taking that approach we overlooked the conclusions which we had reached and expressed in our determination dated 30 September 2005 after a close examination of the evidence ...

44. So far as the process to be followed is concerned it seems to us, judging by the notes of what occurred at the meeting of 17 September 2004, that the parties further agreed:

...

- **that whether any evidence should be tested by cross-examination or by the experts asking questions of a witness should be determined in accordance with the provisions of the agreement for the expert determination process (no doubt a reference to schedule 26) and that if there was no provision covering any such point then the experts should determine how it would be dealt with.**

...

53. As we have said, we think that the parties had by agreement set up a new structure for the referral of disputes to expert determination and that the experts had acquiesced in that and had agreed to enter upon the process of determining those disputes.

54. Further, **it seems to us that the parties by their conduct had evinced an intention to modify the process set out in the rules under schedule 26.** For example, they had agreed to make particular provisions with respect to the making of submissions and the tendering and obtaining of evidence which were not in conformity with rr. 2, 3 and (perhaps) certain parts of r. 6 under schedule 26. **We think**

**that the parties had agreed to modify their original agreement to that extent** and that it is implicit in the notes of the meeting held on 17 September 2004 that the **parties agreed to abide by the decision of the experts with respect to what might be termed matters of ‘practice and procedure’ to be followed in the process of considering submissions and considering and testing any evidence.**

... (emphasis added)

In making the statements which we did in our letter dated 3 February 2006 we had also overlooked the statements made by the parties during a hearing before us on October 2005 ... it is clear that Northbuild proposed cross-examination of the witnesses by the opposing party and that Discovery Beach agreed to go along with that proposal. Accordingly, that letter dated 21 October 2005 contained a direction that each party advise by a certain date the witnesses which it wished to cross-examine.

Having considered the submissions made by counsel for both parties on 19 July 2006 and the abovementioned development of the agreement between the parties we have decided that we should make arrangements for the cross-examination of witnesses and the taking of submissions from the parties before reaching a determination on the Category 1 issues.

Mr Holt SC and Mr Burnett of counsel for the plaintiff submitted that any process which requires examination or cross-examination of witnesses and a determination of a dispute based upon the process is an inquiry in the nature of a judicial enquiry and is one where the parties should be heard and permitted to put their cases. They also submitted that these circumstances are beyond the ambit of an expert determination as contemplated by the contract.

In our opinion the agreement between the parties has evolved along the lines referred to earlier and the circumstances mentioned are within the ambit of the agreement as it presently stands between the parties. We accept that the parties should be heard and be permitted to put their cases and we shall conduct the process accordingly.”

- [54] In their letter of 14 August 2006 to the experts, the appellant’s solicitors referred to the experts’ decision dated 3 August 2006 and stated:

“...You decided that there existed an agreement between the parties that there would be cross examination of witnesses and that the parties would be heard and be permitted to put their cases. You indicated that you would conduct the process accordingly.

Our client is content to proceed in this way. We understand from its submissions made to you on 19 July 2006 that DBP is also content to so proceed ...”

- [55] The appellant’s solicitors advised Mr Fischer in a letter dated 21 August 2006 that they had requested the experts to make a provisional order, in accordance with s 26 of the Act, that the arbitration before them be consolidated with the arbitration



before Mr Fischer and that Mr Fischer determine the consolidated arbitration. The parties made written submissions to the experts and in a determination delivered on 8 November 2006, the experts rejected the submission that there was an agreement between the parties to refer to arbitration the disputes before the experts.

**The documents alleged to constitute an agreement in writing**

- [56] It is convenient now to analyse the documents alleged by the appellants to constitute a sufficient memorandum of an agreement to arbitrate. Perhaps the most obvious feature of these documents is that, on their face, they do not constitute the parties' entire agreement about the subject dispute resolution process. At best, they record a departure from or variation of the terms of clause 13 and schedule 26.
- [57] The respondent's solicitors' letter of 9 February 2006 relevantly contains an assertion that the experts have made a determination "as to how the process will proceed." It states that the respondent will be proceeding on the basis of "the Experts' decision communicated by your email of 6 February 2005". The letter also sought directions about the category 2 to 6 disputes.
- [58] The appellant's solicitors' letter of 14 August 2006 relevantly concerns a procedural matter, namely, an assertion that the experts had decided that there was an agreement between the parties that there would be cross-examination and submissions by the parties and that the matter would proceed accordingly. The letter stated that the appellant would be "content to proceed in this way". The appellant, nevertheless, suggested in the letter that consolidation of disputes 1 to 6 with the Fischer arbitration be considered before the experts proceeded further.
- [59] Neither of these letters refers to or even suggests the existence of an agreement varying clause 13 or schedule 26. Both letters referred to and accepted a determination by the experts concerning procedural matters.
- [60] In their letter to the experts of 7 February 2006, the respondent's solicitors stated their understanding that there had been an agreement "to modify the rules for expert determination to allow for the cross-examination of witnesses". It was said that the agreement was "reflected in the directions" in the experts' letter of 24 October 2005 and in the subsequent conduct of the parties. There was a complaint that if "cross-examination is abandoned months will have been wasted". The letter concluded with the request that the experts either confirm that the rules have been varied to permit cross-examination or that the experts fix a conference date on which to hear from the parties' legal representatives and make directions about how the matter was to proceed.
- [61] Although that letter asserted the existence of an "agreement" in relation to cross-examination, the respondent's solicitors did not appear to be alleging the existence of a legally binding agreement from which the parties and the experts were not at liberty to depart. Nor did the letter suggest that any such agreement went beyond a "modification of the rules for expert determination to allow for the cross-examination of witnesses."
- [62] The determination of 3 August 2006 also was concerned primarily with the procedure the experts should follow. In relation to cross-examination, the experts referred to their 30 September 2005 determination in which they had concluded that "the parties had by agreement set out a new structure for the referral of disputes to

expert determination and that the experts had acquiesced in this ...”. The passage quoted by the experts from their 30 September 2005 determination spoke of the parties “by their conduct” evincing “an intention to **modify the process** set out in the rules under schedule 26.” The conclusion was expressed that “**the parties had agreed to modify their original agreement to that extent**”. It was stated also that it was implicit “that the parties agreed to abide by the decision with respect to matters of ‘practice and procedure.’” (emphasis added)

[63] Included in the quotations from the 30 September 2005 determination was the following:

“We have already noted the issues of fact and law which will have to be determined if we proceed and we accept that those features of the disputes are not readily amenable to expert determination; they require an adjudication between opposing contentions.

However –

- The parties reached the agreement described in the earlier directive
- They reached that agreement in the manner and in the circumstances described
- They have chosen a person or persons qualified on the face of it to determine the issues between them

And accordingly, we think that the determination of those issues by us is not inappropriate and that we are obliged to proceed to such a determination.”

[64] Reference was made to the submissions on behalf of the appellants that the process, as it had developed, was “beyond the ambit of an expert determination as contemplated by the contract.” That submission was implicitly rejected.

[65] The 3 August and 30 September determinations are opaque and lacking in consistency in some respects. The 30 September document, although labelled a determination, is an exploration of the serpentine progress of the dispute resolution process. It contains expressions of opinion by the experts as to whether cl 13 and schedule 26 have been varied by the parties and whether any such variations have been accepted by the experts. One opinion expressed is that there are agreements between the parties under which the role of the experts has changed such that it is “not within the commonly understood meaning of an ‘expert determination’.” The experts then canvassed problems which may arise from this asserted change. They concluded by expressing the view that determination of the issues by the experts was “not inappropriate”, and that the experts were obliged to proceed to determine the dispute. They then invited further submissions from the parties.

[66] The 3 August document referred to a hearing on 10 October 2005 in which it was said that the appellant proposed cross-examination of witnesses by the opposing party “and that the respondent agreed to go along with that proposal”. Counsel for the respondent in fact said in the hearing that his client would not object if the experts “wish to do it that way”<sup>8</sup>. The experts concluded, as they had decided back in September 2005, that cross-examination would be permitted. The document also

communicated the experts' decision in that respect and sought advice from the parties as to whether "any definition of issues should be undertaken", failing which another directions hearing was to be convened.

- [67] The respondent's solicitor's letter of 7 February 2006 states the respondent's understanding that the rules had been modified to allow for cross-examination but does not attempt to set out the extent of the alleged agreement. The letter does not refer to any other modification of the rules. It pre-dated the 3 August 2006 determination and refers to a letter from the experts of 24 October 2005 in which directions were given as to cross-examination. The appellant's solicitor's letter of 14 August 2006, although concerned primarily with cross-examination also refers to the making of submissions. The letter does refer to the 3 August 2006 decision and says of it that the experts decided that there was an agreement between the parties that there would be cross-examination and submissions. The letter does not assert the existence of any agreement, attempt to define the content of any agreement, or even endorse the decision or opinion of the experts as to the existence of an agreement. It merely states that the appellant "is content to proceed in this way".<sup>9</sup>
- [68] The reference to a letter from the respondent's solicitors dated 14 August 2006 in the appellant's counsel's outline of submissions is to an email from the respondent's solicitors to the experts dated 14 August 2006, which stated merely:

"In your letter of 3 August you indicated that if a joint advice was not provided by 4pm on 10 August you would convene another directions hearing.

That date has passed. A joint position has not been reached. Could you please convene another directions hearing."

- [69] It was said of that email by senior counsel for the appellant that it "effectively accepts the process ... directed in [the] letter of 3 August."
- [70] The only part of the 3 August determination adopted in the email is the intimation by the experts that a directions hearing would be called in the event that the parties did not provide the experts with a joint advice.
- [71] It therefore does not seem to me that the documents relied on by the appellant constitute a written agreement to arbitrate. However, in view of the conclusions expressed below, it is unnecessary to express a concluded view on this question.

**Was there a change from an agreement for expert determination to an arbitration agreement?**

- [72] The primary judge found:

"[46] I do not consider that the experts could rely on the conclusion that they reached in their determination of 30 September 2005 to support the existence of an agreement between the parties (and the experts) that there would be cross-examination of witnesses by the parties, to the extent that the conclusion in the determination of 30 September 2005 was based on the experts' interpretation that the

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<sup>9</sup> As discussed earlier, the parties' contractual intention must be ascertained from the words of their agreement, not from their subsequent conduct.

parties at the meeting on 17 September 2004 had agreed that the question of cross-examination of witnesses was a matter to be decided by the experts. This is because the experts incorrectly interpreted the notes made by Mr Orange of the meeting on 17 September 2004. **The agreement between the parties and the experts on the taking of oral evidence made at the meeting on 1 April 2005 and also the statements made on behalf of the parties about cross-examination of witnesses at the meeting on 10 October 2005 which were accepted and acted upon by the experts in their directions given on 24 October 2005 are sufficient to support the existence of an oral agreement between the parties and the experts that cross-examination of the witnesses by the parties should take place if directed by the experts. The conclusion by the experts in their determination of 3 August 2006 that the process of expert determination had evolved (by agreement between the parties and the experts) to encompass cross-examination of witnesses by the parties was justified.**” (emphasis added)

[73] Later in her reasons<sup>10</sup> Her Honour said:

“Although I do not agree with the Experts’ reliance on an agreement having been made on 17 September 2004 about the Experts to decide whether there should be cross-examination, as I have indicated above, there was otherwise justification for the Experts’ conclusion that the parties had agreed that they could decide whether there should be cross-examination.”

[74] On the hearing of the appeal neither party sought to challenge these findings. On one view of the evidence the consensus between the parties and the experts concerning cross-examination was not intended to give rise to a legally binding agreement. It is possible also that the consensus was merely an arrangement as to the mode of performing the Contract.<sup>11</sup> Another possibility was that there was a legally binding agreement which, in practical terms at least, varied cl 13.4 and the Second Schedule Rules by adding a provision to the effect that the experts could, at their discretion, permit cross-examination. That seems to be what the primary judge found.

[75] The primary judge implicitly held that any such agreement (“the Agreement”) did not vary the Contract by excluding the operation of provisions of the Contract, such as cl 13.4.2.4 (“the Expert will not act as arbitrator”) and r 6(d) (“the Expert is not bound by the *Rules of Evidence* and may make the Expert’s determination on the basis of information received or the Expert’s own expertise”). That finding is consistent with the appellant’s case which incorporates the 3 August determination in its alleged agreement in writing. The 3 August determination evidences only a limited modification of schedule 26 to the extent necessary to enable the experts to permit cross-examination.

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<sup>10</sup> Reasons paragraph [59]

<sup>11</sup> See eg. *Phillips v Ellinson Brothers Pty Ltd* (1941) 65 CLR 221 at 243 - 245

- [76] The Agreement could have varied the Contract by effectively excluding cl 13.4.2.4 and r 6(d) only if those provisions and the Agreement were incapable of operating together and if the parties' intention was to bring about that result. That intention must be ascertained in the manner set out below. And there are powerful considerations which weigh against the existence of any such intention.
- [77] The parties, by the direction in cl 13.4.2.4, chose a traditional way of identifying the task of the experts as one which does not have the trappings and incidents of the judicial process and of making it plain that the experts were not obliged to proceed in a judicial way.<sup>12</sup>
- [78] In an address to the Chartered Institute of Arbitrators (Australia) Limited on 30 April 2007, the Hon. Michael McHugh AC, referring to the proposition that an express contractual provision to the effect that the expert is not an arbitrator and is not acting in an arbitral capacity is not conclusive,<sup>13</sup> observed:

“The fact that the parties have expressly agreed that the decider is acting as an expert and not as an arbitrator seems almost conclusive evidence that the person was not conducting a judicial or quasi judicial inquiry.”

- [79] When a judge of the New South Wales Court of Appeal, McHugh JA said<sup>14</sup>:

“It is true that the valuer is ‘acting as an expert and not as an arbitrator’. But those words which have been commonly used in agreements since the *Common Law Procedure Act* 1854 serve the purpose of excluding the provisions of the *Arbitration Act* 1902. They avoid the necessity for the valuer to hear evidence and the parties and to determine judicially between them. They enable him to rely on his own investigations, skill and judgment: *Re Dawdy* (1885) 15 QBD 426 at 429, 430. Indeed they reinforce the view that the parties, as between themselves, rely on the honest and impartial skill and judgment of the valuer.”

- [80] There is a marked difference between a provision which enjoins an adjudicator from acting as an arbitrator and one which describes the adjudicator as an expert. The former has an operative effect. It stipulates how the adjudicator is required to act. The latter merely provides evidence of the parties' intentions in relation to the adjudicator's role.
- [81] In *Palacath Ltd v Flanagan*<sup>15</sup> Mars-Jones J said in respect of such a provision:

“The parties expressly stipulated in cl 8 of the second schedule that the surveyor appointed 'will act as an expert and not as an arbitrator'.

<sup>12</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 366; *Eureka Funds Management Ltd v Freehills Services Pty Ltd* [2006] VSC 461 at [4]; *APM Group (Aust) Pty Ltd v Galwin Pty Ltd* [2006] VSC 325 at [37]; *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 at paragraph [56] and *Palacath Ltd v Flanagan* [1985] 2 All ER 161 at 165

<sup>13</sup> *Ajzner v Carton Lux Pty Ltd* [1972] VR 919; and *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307; *The Law and Practice of Commercial Arbitration in England* p 51; *Taylor v Yielding* (1912) 56 SJ 353

<sup>14</sup> *Legal & General Life Of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336

<sup>15</sup> [1985] 2 All ER 16 at 165

Counsel for the plaintiff submitted that those words demonstrated (1) that the parties were aware of the difference between an arbitrator and an expert, (2) that they did not want to appoint an arbitrator and (3) that they did want him to act as an expert. I must confess that I, too, consider it would be fanciful to imagine the parties intended the surveyor to act as an arbitrator or quasi-arbitrator despite such a clear and unambiguous stipulation to the contrary.”

- [82] Even the parties’ description of the nature of the dispute resolution process established by their agreement, where the agreement does not contain a provision such as cl 13.4.2.4, may be an important factor. In *Edmund Barton Chambers (Level 44) Co-operative Limited v The Mutual Life & Citizens’ Assurance Co. Ltd*<sup>16</sup> Moffatt P with whose reasons Samuels JA agreed, in the course of a discussion concerning the differing functions of a valuer and an arbitrator in the context of a rent review provision in a lease, observed:

“The present case does not involve considerations so finely balanced as to call for a review of the authorities. It is convenient however to adopt the general rule of construction applied to the subject question by Williams J in *re Hammond and Waterton* (1890) 62 LT (808 at 809). “The view which I take is this, that in every case it is necessary to look, not only at the exact words of the agreement, but also at the subject matter with which the agreement deals. Then it can be ascertained whether the parties intended that a mere valuation should take place or an arbitration.” I add that, **a description of the person in question as an arbitrator will be of substantial even critical importance in favour of there being an intention that he shall so act but may not be conclusive.**” (emphasis added)

- [83] The importance of the description of the adjudicator’s role in determining the parties’ contractual intention was stressed in *Badgin Nominees Pty Ltd v Oneida Ltd*.<sup>17</sup> In *Age Old Builders Pty Ltd v Swintons Pty Ltd*<sup>18</sup> Osborn J observed that such a provision, although not “conclusive of the characterisation of the referral ... must be regarded as significantly indicative of the intention of the parties ...”.
- [84] The object of contractual construction, of course, is to “ascertain and give effect to the intentions of the contracting parties.”<sup>19</sup> Such intentions, to be determined objectively, are “what a reasonable person would have understood [the words of a [contract] to mean.”<sup>20</sup> And care should be taken not to confuse “procedural manoeuvrings during the course of the process”<sup>21</sup> or the parties’ acquiescence in procedural arrangements with contractual variation. Moreover, sight should not be lost of the fact that the parties are free to include in their contract whatever terms they see fit.<sup>22</sup> It is the meaning of those terms which must be ascertained, not the

<sup>16</sup> (1984) NSW ConvR 55-177

<sup>17</sup> [1998] VSC 188 and *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307

<sup>18</sup> [2003] VSC 307

<sup>19</sup> *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at 737

<sup>20</sup> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179

<sup>21</sup> *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 2 EGLR 103

<sup>22</sup> See eg. *Sutcliffe v Thackrah* [1974] AC 727 at 745; *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 2 EGLR 103

terms of a more harmonious or workable arrangement they may have made with the advantage of greater thought and judgment.

- [85] It is apparent that the original words of cl 13.4.2.4 and the rules in schedule 26 disclose an intention that the experts were to act as experts and not as arbitrators. It was provided expressly that they were not to conduct themselves as arbitrators. Can a change in that clearly expressed intention be detected in the Agreement even though the parties did not expressly vary cl 13.4.2.4 and the rules in schedule 2 by deleting any of them?
- [86] The appellant argues that the effect of the Agreement is to turn the Contract into an arbitration agreement whether the parties intended that result or not. That may be so if the conferring on an expert of a right to decide whether or not to permit cross-examination is so antithetical to the role of an expert that the giving of such a right must change the character of the process from expert determination to arbitration. Alternatively, the contention may be correct if the necessary consequence of the variation is to delete or rescind cl 13.4.2.4 and r 6(d).
- [87] In order to assess the merits of the appellant's claims, it is desirable to consider in some detail the nature of the two dispute resolution processes under consideration.
- [88] The differences between an expert determination and an arbitration are succinctly explained in the following passage from *Hudson's Building and Engineering Contracts*:<sup>23</sup>

“If a person is appointed, owing to his skill and knowledge of the particular subject, to decide any questions, whether of fact or of value, by the use of his skill and knowledge and without taking any evidence or hearing the parties, he is not, *prima facie*, an arbitrator.

‘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.’

If, on the other hand, a person is appointed with the intention that he should hear the parties and their evidence and decide in a judicial manner, then he is an arbitrator, although mere absence of a hearing, provided it does not result in any unfairness to the parties, will not necessarily invalidate an award. Obviously this must depend on the subject-matter of the dispute and the terms of any written pleadings or submissions to the arbitrator.”

- [89] A generally similar formulation appears in *Russell on the Law of Arbitration*<sup>24</sup>.

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<sup>23</sup> 11<sup>th</sup> Ed Vol 2

<sup>24</sup> 20<sup>th</sup> Ed pp 53, 54

[90] Judicial definitions of “arbitration” normally place emphasis on the judicial nature of the arbitrator’s role. In *Old Power Trading Corp v Xstrata Qld Ltd*<sup>25</sup> Williams JA, with whose reasons the other members of the Court agreed, said:

“[9] As long ago as 1886 Lord Esher MR provided a definition of an arbitration and it has stood the test of time. He said in *Re Carus-Wilson and Greene* (1886) 18 QBD 8 at 9:

‘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 inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration.’

[10] That definition has been applied in New South Wales *Re Fenwick v Port Jackson Co-operative Steamship Co* (1898) 14 WN (NSW) 85 at 87 and *Norths Ltd v McCaughan Dyson Capel Cure Ltd* (1988) 12 ACLR 739 at 747-8. To similar effect was the approach of DeBelle J, with whom Cox and Prior JJ agreed, in *Santos Ltd v Pipelines Authority of South Australia* (1996) 66 SASR 38 at 48 where he said: “. . .the question is not whether the parties intended arbitration but whether there is a subject matter of arbitration, that is, a subject matter in the nature of judicial inquiry.” In his view that factor was satisfied where the contract “provides the criteria by which the price will be determined.” That was also the approach of the Full Court of Western Australia in *Apache Northwest Pty Ltd v Western Power Corporation* (1998) 19 WAR 350. There the court (Kennedy, Pidgeon and Franklyn JJ) after saying that the term arbitration should not be “narrowly defined” concluded at 368 that in that case “the inquiry upon which the arbitrator is required to embark is, in our view, in the nature of a judicial inquiry.”

[91] *Halsbury*<sup>26</sup> defines arbitration in these terms:

“Arbitration is the process by which a dispute or a difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the Arbitral Tribunal) instead of by a court of law.”

[92] Although the basic differences between the two processes are readily stated, either one may have characteristics of the other.

[93] The fact that a tribunal has a duty to act impartially whilst a necessary characteristic of an arbitration agreement, is not sufficient in itself to prevent the tribunal from

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<sup>25</sup> [2005] QCA 477

<sup>26</sup> *Halsbury’s Laws of England* 4<sup>th</sup> Ed (reissued) paragraph 601



acting as an expert. Valuers and other experts may, and normally will, have such a duty<sup>27</sup>.

- [94] There are cases in which an expert will require or have the right to the benefit of evidence and/or submissions. In that regard the learned authors of *Russell on the Law of Arbitration*<sup>28</sup> observed:

“As to the highly important matter of hearing evidence and submissions, it would seem that a valuer would always be entitled to hear such matters. It is a moot point whether by so doing he would upgrade himself into an arbitrator; it may be that if the parties expressly consented to his so doing that he would; but it would not seem that the parties’ consent would be necessary to his so doing.”

- [95] There are also arbitrations which lack features of this kind.<sup>29</sup>
- [96] Reference to the authorities provides examples of expert determination clauses which provide for the making of submissions and the giving of evidence.<sup>30</sup>
- [97] In order to ascertain the true character of the process contemplated by an agreement it is necessary to consider all relevant terms of the agreement. It is impermissible to focus on the experts’ ability to permit cross-examination to the exclusion of all else. Here, as the respondent’s counsel was at pains to point out, the experts were not obliged by the terms of the Agreement or of the Contract, as varied, to permit cross-examination.
- [98] Reliance was placed by the respondent’s counsel on the following passage from the reasons of Mars-Jones J in *Palacath v Flanagan*<sup>31</sup>:

“In the instant case the defendant was specifically enjoined in cl 8 of the second schedule to act as an expert, and was not to be limited or fettered in any way by the statement of reasons or valuations submitted by the parties, but was entitled to rely on his own judgment and opinion. In the light of those express provisions it is impossible for me to hold that the parties intended that the defendant should act as an arbitrator or quasi-arbitrator in determining the revised rent. I am satisfied that the provisions of cl 8 were not intended to set up a judicial or quasi-judicial machinery for the resolution of this dispute or difference about the amount of the revised rent. Its object was to enable the defendant to inform himself of the matters which the parties considered were relevant to the issue. He was not obliged to make any finding or findings accepting or rejecting the opposing contentions. Nor, indeed, as I see it was he obliged to accept as valid and binding on him matters on which the parties were agreed. He was not appointed to adjudicate on the cases

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<sup>27</sup> *Baber v Kenwood Manufacturing Co. Ltd and Whinney Murray & Co* [1978] 1 Ll Rep 175 at 181; *Sutcliffe v Thackrah* [1974] A.C. 727 at 753 and 758

<sup>28</sup> 20<sup>th</sup> Ed at p 55

<sup>29</sup> *The Law and Practice of Commercial Arbitration in England* by Mustill and Boyd at p 50

<sup>30</sup> *Eureka Funds Management Ltd v Freehills Services Pty Ltd* [2006] VSC 461; *Straits Exploration (Australia) Pty Ltd v Murchison United NL* (2005) 31 WAR 187 (CA)

<sup>31</sup> *Palacath Ltd v Flanagan* [1985] All ER 161 at 166

put forward on behalf of the landlord and the tenant. He was appointed to give his own independent judgment as an expert, after reading the representations and valuations of the parties (if any) and giving them such weight as he thought proper (if any).”

- [99] Any cross-examination the experts permitted would not have been, necessarily, of the nature of a cross-examination in a judicial proceeding. The experts were not bound by the rules of evidence and their only obligation in deciding on the processes they were to follow was to act “honestly and fairly” as well as “independently and impartially”. They were entitled to obtain information on the matters to be decided from any source. Cross-examination, should they permit it, was but another means of obtaining information, albeit one not normally contemplated in an expert determination but not unprecedented either.<sup>32</sup>
- [100] The ability of the experts to make their “determination on the basis of information received” is not inconsistent with the existence of a right to permit cross-examination. Information may be received by oral or written evidence. Cross-examination may clarify such evidence. It may also impart further information. The right to permit cross-examination is no more inconsistent with the experts’ right to make the determination on the basis of “The Experts’ own expertise” and as experts not arbitrators than is the obligation of the experts under r 2 to entertain written submissions from the parties. These considerations suggest that the terms of the Agreement are not incompatible with cl 13.4.2.4 and r 6(d).
- [101] It would be a surprising result if, by discussing with the experts a question of practice and procedure concerning the dispute resolution process and arriving at a consensus in relation to cross-examination, the parties’ solicitors changed the terms of the Contract entered into by their respective clients. It was not argued that the solicitors had no authority to contract but the fact that the Agreement resulted from discussions about procedural matters, is highly relevant to the question of what a reasonable person would have understood its words to mean. Also highly relevant is the fact that arbitration was something which the parties expressly decided against in the Contract.
- [102] The fact that there was no discussion of the exclusion or alteration of any part of cl 13 and schedule 26 in connection with the permitting of cross-examination is, to my mind, quite significant. Not only did the parties need to reach consensus in order to vary the experts’ role and the procedures to be followed by the experts, the parties had to reach agreement with the experts. It is unlikely that the intention of the parties and the experts, objectively ascertained, was that the powers of the experts be reduced and their role fundamentally changed without that matter being expressly raised and debated.
- [103] The judicial process, normally, if not invariably, requires the adjudicator to determine the dispute on the basis of evidence placed before the adjudicator by the parties. The judicial process does not contemplate a right on the part of the adjudicator to make his own independent investigations.<sup>33</sup> A process under which the adjudicator “could undertake his own investigations without disclosing them to

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<sup>32</sup> *M1 & Ors v L1 & Ors* [2007] NSWSC 346

<sup>33</sup> *Sutcliffe v Thackrah* [1974] AC 727 at 735 per Lord Reid; *AGE Limited v Kwik Save Stores Limited* 2001 SC 144 per Lord Hardie

the parties and generally could determine (the matter) according to his own experience without being constrained by the contentions of the competing parties”<sup>34</sup> is more distant again from a judicial process.

[104] For the above reasons I agree with the primary judge’s conclusion that there was no change in the Contract and no agreement was entered into between the parties whereby the parties’ agreement to have their dispute determined by experts became an agreement to arbitrate.

[105] I would dismiss the appeal with costs.

[106] **MACKENZIE J:** The facts and the principles relating to the respective roles of experts and arbitrators are fully discussed in the reasons of Muir JA and Atkinson J. It is a matter of judgment and impression whether the persons initially appointed as experts under the relevant contract have, in the circumstances of this particular case, crossed the line between performing the function of experts and becoming arbitrators.

[107] I had come to the conclusion that Muir JA’s analysis of the question was compelling. Since reaching that conclusion, I have had the opportunity to read Atkinson J’s reasons, but remain of the opinion that the appeal should be dismissed for the reasons given by Muir JA. I agree with the orders proposed by him.

[108] **ATKINSON J:** The factual circumstances of the dispute which led to this appeal and the competing contentions of the parties have been comprehensively set out by Muir JA so there is no need for repetition of them in this judgment.

[109] The appellant sought the following declarations and orders at first instance in an amended originating application:

- “1. A declaration that Mr Daniel Ryan and Mr Stephen Callaghan, initially appointed by the parties as experts to determine certain disputes known as Category 1 to 6 issues arising from a contract dated 23<sup>rd</sup> May 2003 between the Applicant and the Respondent (“the Contract”) are, in requiring that witnesses attend before them for the purpose of giving evidence to resolve contentious issues of fact, acting as arbitrators of the disputes and no longer as experts;
2. Further or in the alternative to order 1, a declaration that Mr Daniel Ryan and Mr Stephen Callaghan, would, in receiving evidence from witnesses attending before them for the purpose of resolving contentious issues of fact, be acting as arbitrators of the disputes and no longer as experts;
3. A declaration that Mr Daniel Ryan and Mr Stephen Callaghan have been appointed pursuant to an arbitration agreement between the Applicant and the Respondent within the meaning of the *Commercial Arbitration Act 1990* (“the Act”);

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<sup>34</sup> *AGE Limited v Kwik Save Stores Limited* 2001 SC 144. See also *Bernhard Schulte G.M.B.H. & Co. K.G. and Ors v Nile Holdings Ltd* [2004] Lloyd’s Rep 352 at 372

4. Further or in the alternative to orders 1, 2 and 3, a declaration that a consequence of the requirement by Mr Daniel Ryan and Mr Stephen Callaghan that witnesses attend before them for the purpose of giving evidence to resolve contentious issues of fact, is that the process of expert determination of the disputes has come to an end.
5. An order that, pursuant to s 26(2) of the Act, the arbitration proceedings before Mr Daniel Ryan and Mr Stephen Callaghan be consolidated with arbitration proceedings in relation to disputes arising from the Contract presently before Mr Warren Fischer as arbitrator in accordance with the terms of the provisional order issued by Mr Fischer on 19 December, 2006 pursuant to s 26(2)(a) of the Act.”

[110] The learned judge at first instance dismissed the application, refusing to make any of the declarations or grant the order sought.

[111] To determine whether or not the appellant was entitled to any of the declarations or orders it is necessary to examine the facts in light of the contractual arrangements between the parties and the applicable statutory regime, in particular the provisions of the *Commercial Arbitration Act 1990* (“the Act”).

### **Dispute resolution**

[112] The contract between the parties dated 23 May 2003 provided in cl 13 for the means of dispute resolution between the parties. The relevant parts of cl 13 are set out in the judgment of Muir JA. Under cl 13.1, either party could give the other a written notice of dispute. Clause 13.2 provides for a conference to occur in order to endeavour to resolve the dispute or to agree upon methods for doing so; but failing the success of any such conference then the parties agreed that the matter should be referred to arbitration, unless the party giving notice of the dispute elected to have the dispute determined by expert determination.

[113] Clause 13.3 deals with arbitration and cl 13.4 with expert determination. The subclauses of most importance to the present matter include cl 13.4.1.2 which provides that expert determination will be in accordance with the rules in item 2 of Schedule 26 and cl 13.4.2 which provides that except to the extent that those rules provide otherwise, “the expert will not act as arbitrator”.

[114] Clause 13.4.2.4 acts as a limit on the powers of an expert. Without that limit there would be no contractual reason why the appointed expert could not act in the way in which an arbitrator does. Because it prohibits the experts from acting as arbitrators, it has the effect of excluding the operation of the Act which is premised on there being an arbitration agreement, defined in s 4 of the Act as an agreement to refer present or future disputes to arbitration. The caveat to that proposition is that it does not exclude the operation of the Act if the expert appointed under the written agreement between the parties in fact acts not as an expert but as an arbitrator. Hence the contractual provision precluding the expert from acting as arbitrator.

- [115] The relevant rules for expert determination found in Schedule 26 are set out in the judgment of Muir JA at [6]. These rules are in very broad terms but are limited by the provision in the contract that the expert will not act as an arbitrator.
- [116] The question for determination is then what does “will not act as an arbitrator” mean. In my view it must mean that the experts will not act as if they were arbitrators. Since the terms of their appointment were governed by cl 13 and Schedule 26 of the contract, they would be in breach of their terms of engagement if they commenced to act as arbitrators. Furthermore, it would be illogical for the experts to act as if they were arbitrators because then the commonly understood distinction between the determination by an expert and a determination by an arbitrator would be illusory and the contractual limitation on the expert’s powers and role of no effect.
- [117] The distinction between those two roles was recently conveniently set out by Einstein J in *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134 at [20] where his Honour examined the meaning of a clause in a contract referring a dispute to an expert for determination by reference to the leading authorities, particularly the judgments of Lord Esher MR:

“I ... accept as correct the proposition that the nature of the clause as an ‘expert determination clause’, bears upon its proper construction: *Badgin Nominees Pty Limited v Oneida Limited* [1998] VSC 188, *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540. In the former case, Gillard J [52-54] said:

‘The distinction between arbitration and expert valuation was considered by Lord Esher MR in two cases at the end of the last century. In *Re Dawdy and Hartcup* (1885) 15 QBD 426 at 430 his Lordship said –

‘It has been held that if a man<sup>35</sup> is, on account of his skill in such matters, appointed to make a valuation, in such a 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.’

In the later case<sup>36</sup> 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 inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then

<sup>35</sup> More than a century later, it may be assumed that experts and arbitrators are not necessarily male

<sup>36</sup> *Re Carus v Wilson and Greene* (1887) 18 QBD 7 at 9

the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry 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 a 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 or arguments’.”<sup>37</sup>

[118] The different qualities of an arbitration and which distinguish it from an expert determination may be summarised as follows:

### Characteristics of an arbitration

- It is an inquiry in the nature of a judicial inquiry: *Re Carus-Wilson & Greene* at 9; *Re an Arbitration between John Fenwick and Port Jackson Co-operative Steamship Co* (1898) 14 WN (NSW) 85 at 87; *Norths Ltd v McCaughan Dyson Capel Cure Ltd* (1988) 12 ACLR 739 at 747-748; *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8 at 15, 28; *Santos Ltd v Pipelines Authority of SA* (1996) 66 SASR 38 at 48; *AGE Ltd v Kwik Save Stores Ltd* 2001 SC 144 at 150-151; *JFA P/L v Touringcar Entrants Group Aus P/L* [2005] QSC 087 at [9]-[10]; *Qld Power Trading Corp v Xstrata Qld Ltd* at [9].
- The parties have the right to be heard if they so desire: *Hammond v Wolt* [1975] VR 108 at 112; *Capricorn Inks v Lawter International* at 16, 19; *Santos v Pipelines Authority of SA* at 47.
- Evidence is taken only in the presence of the parties: *Royal Commission on Sugar Supply v Trading Society Kwik Hoo Tong* (1922) 11 Ll L Rep 163; *London Export Corporation Ltd v Jubilee Coffee Roasting Co* [1958] 1 WLR 271 at 280; *Eastcheap Dried Fruit Company v NV Gebroeders Catz' Handelsvereniging* [1962] 1 Lloyd's Rep 283 at 284; *Capricorn Inks v Lawter International* at 16.
- The parties have the right to give evidence: *Santos v Pipelines Authority of SA* at 47.
- Each party is entitled to test by cross-examination or by other appropriate means the opposing case and to answer the opposing case: *Santos v Pipelines Authority of SA* at 47.
- The process must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both sides: *JFA v Touringcar Entrants Group* at [10] citing Mustill and Boyd “The Law and Practice of Commercial Arbitration in England” 2<sup>nd</sup> ed, Butterworths, 1989.

<sup>37</sup> See also *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135 at [23]-[35] per Chesterman J; *Qld Power Trading Corp v Xstrata Qld Ltd* [2005] QCA 477 at [9]-[10]

- The proceedings are adversarial not inquisitorial: *Capricorn Inks v Lawter International* at 19.
- The appointment to resolve a dispute is given to specific individuals rather than a firm: *Capricorn Inks v Lawter International* at 19.
- The primary function is to hear and resolve opposing contentions: *Capricorn Inks v Lawter International* at 28.
- Arbitrators are expected to be trained fact finders who can adjudicate disputed facts: *Zeke Services v Traffic Technologies* at [31]-[35].
- Arbitrators are generally immune from suit: *Palacath Ltd v Flanagan* [1985] 2 All ER 161; *Sutcliffe v Thackrah* [1974] AC 727 at 754; *AGE Ltd v Kwik Save Stores Ltd* at 149.
- An arbitrator is obliged to act wholly or in part on the evidence and submissions made by the parties: *Palacath Ltd v Flanagan* at 166.

### **Characteristics of expert determination**

- Whilst there may be a dispute in existence rather than just a determination to avoid a dispute, there but will ordinarily be a dispute of a kind which can be determined in an informal way by reference to the specific technical knowledge or learning of the expert: *Capricorn Inks v Lawter International* at 15, 28; *Zeke Services v Traffic Technologies* at [24].
- Experts are not required to take evidence in the presence of the parties: *Capricorn Inks v Lawter International* at 16.
- The determination is inquisitorial not adversarial: *Capricorn Inks v Lawter International* at 19; *JFA v Touringcar Entrants Group* at [12].
- The manner in which the experts may elicit information inconsistent with any assumption that evidence is to be taken on oath: *Capricorn Inks v Lawter International* at 19.
- The appointee is directed to make an appraisal in money terms of property value or loss or damage or the like by the use of some special knowledge or skill possessed by him or her: *In Re an Arbitration Between Dawdy and Hartcup* (1885) 15 QBD 426 at 430; *Capricorn Inks v Lawter International* at 28.
- An expert is not required to hear the parties: *Capricorn Inks* at 28; *Zeke Services v Traffic Technologies* at [35].
- It has the advantage of being expeditious and economical. This is so because an expert determination is informal and experts apply their own store of knowledge and expertise to their observation of the facts, which are of a kind with which they are familiar: *Zeke Services v Traffic Technologies* at [27]; *Straits Exploration v Murchison United* (2005) 31 WAR 187 at 192.

- Unless expressly obliged to do so, they do not have to comply with requirements of procedural fairness and natural justice: *Zeke Services v Traffic Technologies* at [32].
- Experts, unlike arbitrators, can undertake their own investigations, without disclosing them to the parties and generally can determine the question before them according to their own experience without being constrained by the contentions of competing parties: *AGE Ltd v Kwik Save Stores Ltd* at 148,151.
- Experts are entitled to act solely on their own expert opinion: *Palacath Ltd v Flanagan* at 166.

[119] There is an overlap between the role that may be undertaken by an expert and the role that may be undertaken by an arbitrator. What is significant in this case is the limits which the parties have set on the experts by their contract: that the experts may not act as arbitrators. If they do, then they are acting beyond the powers that the parties have contractually agreed should be conferred on them.<sup>38</sup> It does not matter that it is called an expert determination if it has in fact become an arbitration: cf *Old Power Trading v Xstrata Old* at [10] citing *Santos Ltd v Pipelines Authority of SA* at 48 which in turn cited *AMP Society v Overseas Telecommunications Commission (Australia)*<sup>39</sup> at 814 per Jacobs P: "... the problem in such a case as the present one is not whether the parties intended arbitration or valuation, but whether there is a subject matter of arbitration, that is, a subject matter in the nature of a judicial inquiry." Similarly, in this case it can be said the problem is not whether the parties intended expert determination. It is clear that they did. The question is whether what that has become can any longer be described as an expert determination. If it no longer can be so described, the "expert determination" would be ultra vires and liable to be set aside.<sup>40</sup> It would, in short, be unenforceable.<sup>41</sup>

[120] It is clear in this case that the parties did not intend the experts to act as arbitrators. They had deliberately inserted a provision to that effect in the contract. There could be no argument that they were appointed to be anything other than experts. As Muir JA has held there has been no agreement varying cl 12 or schedule 26.

[121] In this case the parties agreed that any experts appointed were not to act as arbitrators. The effect of such a clause was considered by McHugh JA in *Legal & General Life of Aust Ltd v A Hudson P/L* (1985) 1 NSWLR 314 at 336:

"It is true that the valuer is 'acting as an expert and not as an arbitrator'. But those words which have been commonly used in agreements since the *Common Law Procedure Act* 1854 serve the purpose of excluding the provisions of the *Arbitration Act* 1902. They avoid the necessity for the valuer to hear evidence and the parties and to determine judicially between them. They enable him to rely on his own investigations, skill and judgment: *Re Dawdy* (1885) 15 QBD 426 at 429, 430. Indeed they reinforce the view that

<sup>38</sup> *AGE Limited v Kwik Save Stores Limited* at 150

<sup>39</sup> [1972] 2 NSWLR 806

<sup>40</sup> *Capricorn Inks Pty Ltd v Lawter International* at 21; *Straits Exploration (Australia) Pty Ltd v Murchison United NL* (2005) 31 WAR 187 at 193

<sup>41</sup> cf *APM Group (Aust) Pty Ltd v Galwin Pty Ltd* [2006] VSC 325 at [55]



the parties, as between themselves, rely on the honest and impartial skill and judgment of the valuer.”

[122] Where the experts have committed themselves to acting judicially then they are acting as arbitrators quintessentially act. If they adjudicate on the case put forward by the parties rather than acting as independent experts relying on their own skill and judgment then it appears likely that they have crossed the impermissible line and strayed outside their contractual limits. Calling someone an expert who is in fact acting as an arbitrator does not avoid the operation of the Act. It is not what the decision maker is called but rather the nature of the process and the way the decision makers have bound themselves to act that is finally determinative of the issue.<sup>42</sup>

[123] In this case, the “experts” decided that they would reach their decision after hearing evidence, permitting cross-examination of witnesses and deciding questions of credit. They had effectively abandoned any right to informal determination, to take evidence in the absence of the parties or decide the matter without giving parties the opportunity to make submissions, to undertake their own investigations and rely solely on their own expert opinion. They had committed themselves to hear the respective cases of the parties and decided on evidence heard in the presence of the parties which would be subject to cross-examination. In doing so, they had bound themselves to conducting, to use the words of Lord Esher, “an inquiry in the nature of a judicial inquiry”.<sup>43</sup> They were therefore in breach of the terms of engagement requiring them not to act as arbitrators. In my view the appellants were therefore entitled to the declarations sought in paragraphs 1 and 4 of the amended originating application.

### Orders

[124] The orders should be:

1. Appeal allowed.
2. A declaration that Mr Daniel Ryan and Mr Stephen Callaghan, initially appointed by the parties as experts to determine certain disputes known as Category 1 to 6 issues arising from a contract dated 23<sup>rd</sup> May 2003 between the Applicant and the Respondent (“the Contract”) are, in requiring that witnesses attend before them for the purpose of giving evidence to resolve contentious issues of fact, acting as arbitrators of the disputes and no longer as experts.
3. A declaration that a consequence of the requirement by Mr Daniel Ryan and Mr Stephen Callaghan that witnesses attend before them for the purpose of giving evidence to resolve contentious issues of fact, is that the process of expert determination of the disputes has come to an end.
4. The respondent pay the appellant’s costs.

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<sup>42</sup> *Radaich v Smith* (1959) 101 CLR 209 at 214; Hunt, R, *The Law Relating to Expert Determination* (2002) 18 BCL 2 at 11-13; *Edmund Barton Chambers (Level 44) Co-operative Ltd v The Mutual Life & Citizen’s Assurance Co Ltd* [1984] NSW Conv R 55-177 (BC 8400354 at p 3); *A. Raptis & Sons Holdings Pty Ltd v Commissioner of Stamp Duties (No 2)* [1999] 1 Qd R 462 at 465; *Campbells Hardware & Timber Pty Ltd v Commissioner of Stamp Duties* [1998] QCA 16 at p16 per Fitzgerald P, p 24 per Davies JA; *Nashvying P/L v Giacomi* [2007] QCA 454 at [21]

<sup>43</sup> *Re Carus-Wilson and Green* at 9, per Lord Esher MR