IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TEC LIST

Not Restricted

S ECI 2018 00061

RW HEALTH PARTNERSHIP PTY LTD
(ACN 110 677 702) — Plaintiff

v

LENDLEASE BUILDING CONTRACTORS PTY LTD
(ACN 002 625 130) — First Defendant
- and -
AQUATHERM AUSTRALIA PTY LTD
(ACN 059 578 782) — Second Defendant

JUDGE:	RIORDAN J
WHERE HELD:	Melbourne
DATE OF HEARING:	15 February 2019 and 22 March 2019 (Written submissions)
DATE OF RULING:	29 May 2019
CASE MAY BE CITED AS:	RW Health Partnership Pty Ltd v Lendlease Building Contractors Pty Ltd
MEDIUM NEUTRAL CITATION:	[2019] VSC 353

ARBITRATION – Whether dispute resolution clause required expert determination or arbitration – Principles for the construction of dispute resolution clauses considered.
CONTRACT – Whether the parties correspondence in preparation for an arbitration constituted an *ad hoc* agreement to arbitrate.
ELECTION – Whether by its correspondence the first defendant had elected to arbitrate the relevant dispute – Whether to choose arbitration rather than expert determination was to elect between inconsistent substantive rights.
WAIVER – Principles of waiver considered – Whether by its correspondence the first defendant has unequivocally abandoned its right to expert determination.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D J Batt QC with Mr K J Naish	MolinoCahill Lawyers Pty Ltd
For the First Defendant	Mr J J Gleeson QC with Ms E Bateman	Pinsent Masons Lawyers

HIS HONOUR:

1 By summons filed 14 December 2018, the plaintiff ('Project Company') seeks the following orders:

> 1. Pursuant to s 8(1) of the *Commercial Arbitration Act* 2011 (Vic), the Plaintiff and First Defendant are referred to arbitration in respect of the Plaintiff's claims against the First Defendant made in this proceeding, and the proceeding against the First Defendant is stayed.
>
> 2. Further and in the alternative, upon the Plaintiff undertaking that within 7 days of the date of order it will discontinue the proceeding against the Second Defendant, the proceeding against the First Defendant is stayed in the inherent jurisdiction of the Court.

2 The first defendant ('Lendlease') opposes the stay of the proceeding.

The relevant facts

3 Project Company is a special purpose entity responsible for the design, construction, commissioning, managing and maintenance of the Royal Women's Hospital ('the Hospital').

4 By D&C Contract dated 5 June 2005 ('the Contract'), Project Company subcontracted its demolition, design, construction and commissioning obligations with respect to the Hospital to Lendlease. The terms of the Contract included the following dispute resolution provisions:

> **74 Dispute Resolution**
>
> **74.1 Establishment of panel**
>
> (a) Any party to a Dispute may by notice (Referral Notice) to the other party refer the Dispute to the Panel for resolution. The referral notice must specify in reasonable detail the nature of the Dispute.
>
> …
>
> (g) If the Panel does not meet, resolve the Dispute or reach unanimous agreement on any matter within the Resolution Period, the Dispute is hereby:
>
> (i) referred to expert determination under clause 74.3 [Expert determination] if this Contract expressly provides for that Dispute to be resolved in accordance with expert determination as described in this Contract;

(ii) referred to expert determination under clause 74.3 [Expert determination] in the case of Disputes in relation to Compensation; or

(iii) referred to an arbitrator under clause 74.4 [Arbitration] in the case of all other Disputes.

…

74.2 Commencement of legal proceedings

(a) A party shall not commence legal Proceedings in respect of a Dispute other than in accordance with paragraph (b).

(b) If a Dispute is referred to expert determination or to arbitration no party shall oppose an application for a stay of any legal Proceedings in respect of the Dispute pending the expert determination or the handing down of the award in an arbitration as the case may be.

74.3 Expert determination

(a) The independent expert shall:

(i) initiate such enquiries and investigations as it considers necessary or desirable for the purposes of performing its functions; and

(ii) determine and inform the parties to the Dispute of the procedure for determining the Dispute and of a time for presentation to the independent expert by the parties of their respective positions. Unless the Panel otherwise agrees the presentation must be no later than 5 Business Days after the constitution of the independent expert.

(b) The independent expert must make its determination or finding in respect of the Dispute according to law within 10 Business Days after the presentation referred to in paragraph (b). Any determination of a Dispute by the independent expert must be in writing, shall contain a statement of reasons in such a form as the independent expert considers reasonably appropriate having regard to the nature of the Dispute and shall include a determination as to the award of costs. The independent expert shall not tax the costs of a party. The fees and expenses of the expert shall be borne by the parties equally.

…

(e) Other than a determination of a Dispute in relation to clause 22.3, any determination made by the independent expert shall be final and binding on all parties unless the dispute is greater than $250,000 in value and either party notifies the other of its intention to commence court proceedings within 15 Business

Days of the determination. A determination made by the independent expert of a Dispute in relation to clause 22.3 shall be final and binding on all parties.

(f) The independent expert shall act as an expert and not an arbitrator.

…

74.4 Arbitration

If under clause 74.1(g)(iii) [Establishment of panel] a Dispute is referred to arbitration the following provisions shall apply:

(a) The arbitrator appointed under clause 74.1 [Establishment of panel] shall constitute the arbitration board.

(b) The arbitration shall be conducted in accordance with and subject to the *Commercial Arbitration Act* 1984 (Vic).

5 The following definitions are relevant to the above dispute resolution provisions.

Compensation means compensation for Loss or damage suffered by a party as a result of a Default or other failure to perform by the other party payable in accordance with this Contract, as agreed between the parties or pursuant to a determination under clause 74 [Dispute Resolution].

Default means:

(a) a Major Default; or

(b) any other breach by the Builder of, or other failure by the Builder to comply with, an obligation of the Builder under this Contract or any other State Agreement to which it is a party; or

(c) a representation, warranty or statement made or given by the Builder in this Contract being false or misleading when made or given,

except to the extent caused or contributed to by an event described in paragraphs (a) or (b) of the definition of Project Company Extension Event or paragraphs (a), (b) or (d) of the definition of State Extension Event.

Dispute means a dispute between the Project Company and the Builder in connection with this Contract or the Project, including a dispute as to whether a Default is capable of cure or remedy but not:

(a) a dispute in connection with the choice of rights, remedies or powers of the Project Company arising from or in connection with a Default where the Project Company has the sole discretion;

(b) a decision made pursuant to this Contract which is final and binding; or

(c) a dispute referred to in clause 30.6(f) [Completion Activities] or a certificate issued under clause 22.3.

> **Loss** means any liability (including legal expenses) of any kind whatsoever and includes but is not limited to direct and indirect, consequential or special damage, loss of profits, loss of use, loss of revenue, anticipated revenue, interest or other such claim arising from any cause whatsoever whether or not such loss, damage or claim is based on contract, statute, warranty, tort (including negligence), indemnity or otherwise.
>
> **Resolution Period** means:
>
> (a) the period of five Business Days from the date a Referral Notice described in clause 74.1(a) [Establishment of panel] is served on the other party; and
>
> (b) where the essence of the Dispute is whether there has been a Default, two Business Days from the date a Referral Notice described in clause 74.1(a) [Establishment of panel] is served on the party.

6 On or about 20 March 2008, an occupancy permit was issued in relation to the Hospital. Section 134 of the *Building Act 1993* (Vic) provides as follows:

> Despite anything to the contrary in the *Limitation of Actions Act 1958* or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

The solicitors for Project Company and Lendlease were each aware that the 10 year period provided by s 134 of the *Building Act 1993* (Vic) would expire in relation to the Hospital on or about 20 March 2018.

7 By letter dated 6 March 2018 to Lendlease, Project Company gave a referral notice under cl 74.1(a) of the Contract ('Referral Notice') which alleged that Lendlease's design and construction of the Domestic Water System was defective ('the Dispute'). The notice described the Domestic Water System as follows:

> The Builder designed and constructed the water/hydraulic pipework system ("the Domestic Water System") for the Royal Women's Hospital ("Hospital") using a pipe product known as "Aquatherm". The Domestic Water System is comprised of pipes in the basement of the Hospital, vertical risers and a horizontal pipework system. The pipes in the basement supply, via a flow and return system, hot water to vertical risers which in turn supply water to the upper floors of the Hospital. Each floor above the basement has its own horizontal reticulation to take water to clinical and other areas of the Hospital. The Domestic Water System supplies hot water to the Hospital, at 65 Degrees Celsius, as a pressurised system.

The notice demanded that Lendlease rectify the Domestic Water System including the replacement of the Aquatherm type product. It requested that Lendlease:

(a) nominate its representative on the Panel for the purposes of cl 74.1(b)(ii) of the Contract; and

(b) confirm its attendance for a meeting of the Panel.

8 On 14 March 2018, after the Dispute did not resolve in the Resolution Period, Project Company issued a notice to Lendlease referring the Dispute to arbitration pursuant to cl 74.1(g)(iii) ('Referral to Arbitration'), or alternatively to Expert Determination. Relevantly, the notice stated as follows:

> **1 Referral of Dispute to arbitration**
>
> 1.1 As of the date of this notice, the Resolution Period in respect of the Dispute (being a period of 5 Business Days from the date of the Referral Notice, which is dated 6 March 2018) has expired.
>
> 1.2 Pursuant to clause 74.1(g)(iii) of the D&C Contract, as the Panel has not resolved the Dispute within the Resolution Period, the Dispute is now referred to an arbitrator.
>
> **2 Referral of Dispute to expert determination (in the alternative)**
>
> 2.1 Without prejudice to paragraph 1 of this notice and to the extent that the D&C Contract requires this Dispute to be referred to expert determination rather than arbitration, the Dispute is referred to expert determination in accordance with clause 74.1(g)(ii) of the D&C Contract.
>
> 2.2 The referral (whether to arbitration or expert determination) has effect from the date of this notice.

9 On 15 March 2018, Project Company filed this proceeding against Lendlease and the second defendant, Aquatherm Australia, with the following indorsement of claim:

> INDORSEMENT OF CLAIM
>
> 1. Each of the plaintiff *(**RWHP**)*, the first defendant (***Lendlease***) and the second defendant (***Aquatherm Australia***) is and was at all material times a corporation registered under the *Corporations Act 2001* (Cth).
>
> 2. On or about 11 April 2005, RWHP entered into an agreement with the State of Victoria (the ***Project Agreement***) that it would design, construct, and finance the redevelopment of the Royal Women's

Hospital (the ***Hospital***) and deliver maintenance and services at the Hospital.

3. By an agreement between RWHP and Lendlease (then known as Baulderstone Hornibrook Pty Ltd) made on or about 5 June 2005 and amended on 5 June 2005, (the ***D&C Contract***), Lendlease agreed, for reward, to carry out demolition, design, construction and commissioning works to allow RWHP to fulfil its obligations under the Project Agreement in relation to the design, construction and commissioning of the Hospital.

4. The D&C Contract contained terms (among others):

   a. that required Lendlease to fulfil RWHP's obligations under the Project Agreement and for the completion of the Facility Works (as defined) diligently and in a thorough and workmanlike manner in accordance with Industry Best Practice, the D&C Contract and the Design Requirements (including Volume 4 of the Project Brief) and all applicable Laws and Quality Standard; and

   b. by which Lendlease warranted that (among other things) the Facility will be fit for the purposes and for the uses specified in the D&C Contract including use by the FPH Operator and by the Hospital Operator to perform the Hospital Functions specified in the Design Requirements for the remainder of the Contract Term provided the facility is maintained in manner at least equivalent to the manufacturers requirements and in accordance with the Project Agreement, and so as to allow the Services to be delivered in accordance with and to the standards specified in the Services Specifications.

5. As part of the Facility Works, Lendlease designed and constructed a water/hydraulic pipework system (the ***Domestic Water System***) for the Hospital using a pipe product known as "Aquatherm". It engaged Aquatherm Australia to supply the Aquatherm pipe. The Domestic Water System supplies hot water to the Hospital as a pressurised system.

6. In addition to Lendlease's contractual obligations, each of Lendlease and Aquatherm Australia owed RWHP a duty of care to undertake their respective obligations with due care and skill.

7. Lendlease has breached its contractual obligations and both Lendlease and Aquatherm Australia have breached their respective duties of care in relation to the Domestic Water System supplied for the Hospital. The Domestic Water System has suffered repeated failures and leaks in the basement, vertical risers and horizontal reticulation systems and is experiencing oxidation and cracking.

8. As a result, RWHP has suffered loss and damage.

AND THE PLAINTIFF CLAIMS AGAINST THE DEFENDANTS:

A. Damages.

B. Interest.

C. Costs.

D. Such further or other orders as the Court considers appropriate.

10 The reason for the filing of the originating process was explained by the plaintiff's solicitor in her affidavit affirmed 14 December 2018 as follows:

> By the morning of 15 March 2018, Project Co did not know the position of the Builder as to the referral to arbitration. In these circumstances, the pending expiry of the limitation period caused Project Co difficulty. If the Builder's position transpired to be that the Dispute was not referable to arbitration, and this came to be accepted, court proceedings in relation to the Dispute might end up being necessary, given clause 74.3(e), but in the meantime the limitation period under section 135 of the *Building Act* would have expired.
>
> Furthermore, if court proceedings are required and the Builder joined a third party for apportionment purposes under Part IVAA of the *Wrongs Act 1958* (Vic), Project Co could not recover any loss apportioned to the third party unless that third party was joined as a defendant by Project Co before the expiry of the limitation period.
>
> In these circumstances, as a purely precautionary measure, Project Co instructed MCL to prepare and file an originating process in respect of the Dispute, before the limitation period expired. On behalf of Project Co, MCL filed an originating process ...

11 By email of 15 March 2018 at 11:38 am to the Commercial Court registry, the solicitor for Project Company confirmed the filing of the Originating Process and stated:

> Our client does not intend to serve the Originating Process in the short term and therefore requests that the Court does not list this matter for directions at this time and also that the Court does not send any notifications to the named Defendants.

The registry replied by email at 12:02 pm stating that the registry would hold off listing the proceeding for a hearing.

12 By emailed letter of 15 March 2018, Lendlease replied to the Referral Notice and Referral to Arbitration stating:

> We refer to your correspondence dated 6 March 2018 titled 'Referral Notice' purportedly issued under clause 74.1 of the D&C Contract and to your letter dated yesterday in which you seek to refer the alleged Dispute to arbitration, alternatively expert determination.
>
> We think it would be in the interests of both the parties and the efficient conduct of the arbitration if the time set down in clause 74.1(h) of the D&C Contract for the Panel to agree an arbitrator is extended. Clause 74.1(h)

provides that the Panel must meet to agree the arbitrator within two business days of the matter being referred to arbitration. An extension would allow the parties to ensure the arbitrator who is selected has the knowledge, experience and availability to determine the matter in a manner that is both reasonable and efficient.

We are of the view it is particularly important that an appropriate arbitrator be selected in circumstances where the D&C Contract is not proscriptive as to the arbitral process once selection of the arbitrator has been confirmed. Should the nomination or selection process fail, we are also concerned to avoid – for the sake of both parties – the situation where the selection of arbitrator is left to a third party. We note that under section 74.1(j) of the D&C Contract, if nomination and selection process fails then either the Project Company or the Builder is entitled to request that the President of the Institute of Arbitrators and Mediators Australia appoint the arbitrator for determining the dispute.

Given the importance that the selection of arbitrator will have for the arbitral process going forward, we suggest the parties agree to extend the time period within which the Panel must agree an arbitrator be extended to until close of business on **Friday, 30 March 2018**.

We would be grateful if you could please let us know by no later than **5.00 pm today** if you agree to our proposed extension.

13 By letter dated 15 March 2018 to Lendlease, Project Company agreed to the requested extension of time and stated as follows:

We refer to:

1. the D&C Contract between RW Health Partnership Pty Ltd ACN 110 677 702 (***Project Company***) and Lendlease Building Contractors Pty Ltd ACN 002 625 130 (***Builder***) dated 5 June 2005, as amended on 5 June 2005 (***D&C Contract***);

2. Project Company's Referral Notice dated 14 March 2018, by which this Dispute is referred to arbitration under clause 74.4 of the D&C Contract; and

3. your letter dated 15 March 218 (sic) wherein it is proposed that the parties agree to extend the period provided in clause 74.1(h) of the D&C Contract by which the Panel are to agree to an arbitrator. You have proposed that this period be extended to close of business on Friday, 30 March 2018.

Given the significance of the arbitral appointment, Project Company consents to the Builder's proposal that the date for appointment be extended to close of business on Friday, 30 March 2018.

As to the appointment, could you please provide by 5 pm on Tuesday, 27 March 2018 the names of three potential arbitrators which the Builder consider (sic) suitable for this appointment for Project Company's

consideration. Project Company will also put forward its recommended candidates for the parties consideration.

14 By emailed letter of 28 March 2018 to Project Company, Lendlease suggested the names of three potential arbitrators and stated as follows:

> We refer to:
>
> - your letter dated 14 March 2018 entitled "notice referring Dispute to arbitration";
> - our letter dated 15 March 2018 proposing that the time for agreement of the Panel be extended to Friday, 30 March 2018; and
> - your letter dated 15 [M]arch 2018 accepting the proposed extension and requesting a list of three potential arbitrators that the Builder considers suitable for appointment to the Panel.
>
> As to Project Company's request, the names of three potential arbitrators that Builder considers suitable, based on experience and expertise, are:
>
> 1. Mr Toby Shnookal QC
> 2. Mr Charles Scerri QC
> 3. Prof John Sharkey AM.

15 By letter dated 29 March 2018 to Lendlease, Project Company enclosed a draft letter to Professor Sharkey seeking his consent to his appointment as arbitrator and stated as follows:

> We refer to your letter dated 27 March 2018 (sic) in relation to the appointment of an arbitrator in our dispute.
>
> Project Company has reviewed the three potential candidates provided by the Builder and confirms that it considers that Prof John Sharkey AM to be (sic) suitable for appointment as arbitrator.
>
> Project Company has had its legal advisors prepare the enclosed draft letter to Prof Sharkey seeking his consent to his appointment as arbitrator. Could you please advise Project Company by 5pm on Wednesday, 4 April 2018 if the Builder requires any changes to this letter. Otherwise, Project Company will proceed to finalise the letter and arrange for it to be issued to Mr Sharkey for consideration.

16 By email of 4 April 2018 to Project Company, Lendlease requested an extension of time to review the proposed letter to Professor Sharkey and by reply of the same date Project Company agreed to the suggested extension which it presumed to be 10 April 2018.

17 On 11 April 2018, Lendlease filed an appearance in this proceeding, which it served on 12 April 2018.

18 In fact:

(a) Lendlease had been aware of this proceeding since a litigation search of the Court registry on 21 March 2018; and

(b) On 16 March 2018, Lendlease commenced separate proceedings in the Supreme Court of Victoria against the following parties:

(i) Paul & Partners Hydraulics Pty Ltd ('Paul & Partners') relating to the alleged defective water supply/hydraulics pipework at the Hospital.[1] Lendlease engaged Paul & Partners by agreement dated 9 September 2005 to carry out hydraulic consulting services for the Hospital project, including preparing design documentation for the water supply and reticulation system.

(ii) Cooke & Carrick (Vic) Pty Ltd ('Cooke & Carrick') relating to the alleged defective water supply/hydraulics pipework at the Hospital.[2] Lendlease engaged Cooke & Carrick by agreement dated 5 May 2006 to carry out hydraulic services for the Hospital project, including the design, supply and installation of pipework and fittings for the hot water service.

In an affidavit sworn 30 January 2019, the solicitor for Lendlease explained that two separate proceedings were filed because Cooke & Carrick's registration had to be reinstated for the proceeding against it to proceed. His instructions are that Lendlease would seek to join the proceedings against Paul & Partners and Cooke & Carrick to the current proceeding if the application for a stay is dismissed.

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1 S ECI 2018 00066.
2 S ECI 2018 00065.

19 The directions hearing in the current proceeding listed on 4 May 2018 was adjourned on a number of occasions to 15 February 2019 pursuant to a 'standstill' agreement between Project Company and Lendlease for the purposes of commercial discussions aimed at resolving the dispute.

The issues for determination on this application

20 The determination of this application raises the following issues.

21 Issue 1 – Is the Dispute 'the subject of an arbitration agreement' within the meaning of s 8 of the *Commercial Arbitration Act 2011* (Vic) ('the Act')?

22 Issue 2 – If no to Issue 1, did the parties' correspondence between 6 March 2018 and 4 April 2018 constitute an agreement that the Dispute be arbitrated?

23 Issue 3 – If no to Issues 1 and 2, such that there is no arbitration agreement, has Lendlease waived its right under the Contract for the dispute to be referred to expert determination, with the result that it is referred to arbitration under cl 74.1(g)(iii) of the Contract?

24 Issue 4 – If yes to Issue 1, is the Court required to refer the parties to arbitration, under s 8 of the Act, because Project Company requested the referral 'not later than when submitting [its] first statement on the substance of the dispute'?

25 Issue 5 – If yes to Issue 1 or 2 but no to Issue 4, such that there is an arbitration agreement but s 8 of the Act is not engaged:

(a) Is Lendlease prevented from opposing a stay pursuant to cl 74.2(b) of the Contract?

(b) Should the Court nonetheless exercise its discretion to refuse the stay?

26 It is common ground that if Issues 1 to 3 are answered in the negative, Issues 4 and 5 do not arise.

Issue 1 – Is the Dispute 'the subject of an arbitration agreement' within the meaning of s 8 of the Act?

27 Section 8(1) of the Act provides:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

It is agreed that if the Dispute is required by the Contract to be referred to arbitration (and Project Company's request was within time), the Court must order this proceeding against Lendlease to be stayed.

28 It is common ground that the Panel did not meet, resolve the Dispute or reach unanimous agreement on any matter within the Resolution Period. Because cl 74.1(g)(i) does not apply, the Dispute should either be:

(a) referred to expert determination under cl 74.3 in the case of Disputes in relation to Compensation (cl 74.1(g)(ii)); or

(b) referred to an arbitrator under cl 74.4 in the case of all other Disputes (cl 74.1(g)(iii)).

29 Accordingly, Issue 1 turns on whether the Dispute is 'in relation to Compensation'. If answered in the positive, the Dispute should be referred to expert determination, and is therefore not 'the subject of an arbitration agreement' within the meaning of s 8 of the Act.

Project Company's submissions

30 Project Company contended that the Dispute was not in relation to compensation, and therefore fell in the category of 'all other disputes', because the expression 'Disputes in relation to Compensation' should be interpreted narrowly to mean disputes about the *amount* of Loss or damage ('the narrow construction'). It was submitted as follows:

(a) Clause 74.1(g)(ii) should not be construed so as to encompass all disputes in which a breach of the Contract is alleged and loss or damage is claimed ('the broader construction'). Such a reading would be unduly wide, and would leave little room for the operation of cl 74.1(g)(iii), in circumstances where the wording and structure of cl 74.1(g) conveys that arbitration is intended to be the principal means of dispute resolution.

(b) The definition of Compensation in the Contract is:

> ... compensation for Loss or damage suffered by a party as a result of a Default or other failure to perform by the other party payable in accordance with this Contract, as agreed between the parties or pursuant to a determination under clause 74 [Dispute Resolution].

This definition supports the narrow construction because in its terms 'Compensation' is for loss or damage, and the question of liability is not in issue in disputes in relation to 'Compensation'. The words used in the definition 'embed the position that the default or failure to perform has been established. It's a given. It's either agreed or previously determined.' Accordingly, the reference in cl 74.1(g)(ii) to expert determination for 'Disputes in relation to Compensation' 'arises where the contract provides for something to be paid, e.g. liquidated damages or progress payments, and because of the failure to perform or other default, there's an issue about how much is to be paid'.

(c) The broader construction would be uncommercial, unworkable and unjust. The informal, summary procedure for expert determinations set out in cl 74.3 is inappropriate for the resolution of disputes regarding defaults and breaches. This includes the provision of short time frames, and the lack of provision for legal representation or the calling of evidence.

(d) Conversely, the arbitration procedure provisions set out in cl 74.4 are appropriate for, and objectively intended for, determination of disputes regarding defaults and breaches.

(e) Lendlease's broader construction renders the arbitration provision with no work to do.

(f) The fact that cl 74.3:

(i) contemplates that the parties are to give a presentation to the independent expert within 5 days of its constitution; and

(ii) requires the expert to make its determination within 10 business days;

is not consistent with it being intended to be the mechanism for the resolution of complex liability disputes.

Lendlease's submissions

31 Lendlease contended that the Dispute was 'in relation to Compensation' within the meaning of cl 74.1(g)(ii) of the Contract, and should be referred to expert determination under that clause, not arbitration under cl 74.1(g)(iii). It was submitted as follows:

(a) Clause 74.1(g) of the Contract is a split regime, which mandates that certain disputes are to be referred to expert determination, and the remainder to arbitration. Arbitration ought not to be assumed to be the default dispute resolution mechanism — rather, the default position is to refer to expert determination. This is a commercially efficient regime, whereby small disputes (being less than $250,000) are referred to an expert, with a right to commence court proceedings should the result be challenged.

(b) In this context, the phrase 'in relation to' in cl 74.1(g)(ii) should be given wide meaning, and it would be wrong for the Court to read it down or substitute the phrase with alternative words (e.g. 'disputes *about* Compensation' or '*restricted to* Compensation').

(c) The terms of the Contract demonstrate that the meaning of 'Compensation', which is defined in cl 1.1 of the Contract, is broad and goes beyond what might traditionally be thought of as matters of quantum.

(d) Disputes under the following clauses, which have nothing to do with quantum, are expressly referred to expert determination:

(i) Clause 12.5 with respect to determinations of the Independent Certifier (relating to matter such as an extension of time under cl 50.4), if the dispute exceeds $250,000;

(ii) Clause 28 with respect to completion;

(iii) Clause 30.5 with respect to a Certificate of Final Completion;

(iv) Clause 56(f) with respect to the refusal to grant an extension to an Applicable Cure Period; and

(v) Clause 22.3 (which cl 74.3(e) expressly refers to 'final and binding' expert determination regardless of quantum) with respect to the project financier's right to review Lendlease's performance of Lendlease's design and construction and completion obligations.

(e) On the broader construction, the referral to arbitration under cl 74.1(g)(iii) still has significant work to do under the Contract including the following clauses:

(i) Clause 2.4 with respect to determinations where Lendlease's entitlements are linked to the State Linked Entitlement;

(ii) Clause 2.5 with respect to Project Company's obligations not to amend the Project Agreement so as to affect Lendlease's rights;

(iii) Clause 9.2 with respect to sub-contractors;

(iv) Clause 23 with respect to Lendlease's obligation to design and develop;

(v) Clause 24 with respect to Project Company's right to inspect and test; and

(vi) Clause 70.6 with respect to the format of manuals, plans and reports.

(f) The narrow construction leads to unworkable consequences because, after the arbitrator determines liability, cl 74.1(g)(ii) would require that the assessment of quantum be referred to expert determination.

(g) It is inherently unlikely that Lendlease would have accepted unlimited claims being subjected to an arbitration clause in circumstances where such a clause would preclude it from joining its responsible subcontractors, which it always proposed to engage.

Principles of construction

32 Dispute resolution clauses are construed using the same principles that apply to other commercial contracts.[3] To determine the meaning of the terms of a commercial contract, the Court will ask the question: 'What would a reasonable business person have understood those terms to mean?'[4] For the purpose of answering that question, 'the reasonable businessperson [is] placed in the position of the parties',[5] and the Court applies the following principles:

(a) The terms are construed objectively and the subjective intentions of the parties are irrelevant.[6] A court 'cannot receive … evidence from one party as to its intentions and construe the contract by reference to those intentions'.[7]

(b) The Court will consider not only the text and the ordinary meaning but also:

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3 *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, [112]-[136] (Austin J) ('*Tridon*'); *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [44] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

4 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-7 [35] (French CJ, Hayne, Crennan, and Kiefel JJ) ('*Electricity Generation*'); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [47] (French CJ, Nettle and Gordon JJ).

5 *Ecosse Property Holdings Pty td v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 551 [16] (Kiefel, Bell and Gordon JJ) ('*Ecosse*').

6 Ibid.

7 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, 429 (Stephen, Mason and Jacobs JJ).

(i) the context, being the entire text of the contract including matters referred to in the text of the contract; and

(ii) the commercial purpose and object of the contract.[8]

33 The identification of the commercial purpose and object of a contract 'presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating'.[9] For this purpose, the Court may have regard to the surrounding circumstances known to the parties.[10] It is also entitled to assume 'that the parties intended to produce a commercial result';[11] and will avoid a construction that renders it 'commercial nonsense or working commercial inconvenience'.[12]

Determination of Issue 1

34 In my opinion, the expression 'Disputes in relation to Compensation' in cl 74.1(g) should be read as including disputes with respect to liability for compensation and should not be limited to disputes with respect to the assessment of compensation. Accordingly, I find that the Dispute is 'in relation to Compensation' within the meaning of the Contract, and is therefore not 'the subject of an arbitration agreement' within the meaning of s 8 of the Act. My reasons for this conclusion are as follows.

35 On a plain reading of the ordinary English words, in my opinion, a reasonable business person in the position of the parties would understand 'a Dispute in relation to Compensation' as unambiguously including a dispute as to the liability to

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8 *Eureka Operations Pty Ltd v Viva Energy Australia Ltd* [2016] VSCA 95, [45]–[47] (Santamaria, Ferguson and McLeish JJA).

9 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 995–6 (Lord Wilberforce) cited with approval by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 350 which in turn was cited in *Royal Botanical Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 52–3 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) and *Electricity Generation* (2014) 251 CLR 640, 656-7 [35] (French CJ, Hayne, Crennan, and Kiefel JJ).

10 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40].

11 *Ecosse* (2017) 261 CLR 544, 551 [17] (Keifel, Bell and Gordon JJ).

12 *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530, 559 [82] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ); cited with approval in *Electricity Generation* (2014) 251 CLR 640, 656-657 [35] (French CJ, Hayne , Crennan and Kiefel JJ); and *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85, 111 [78] (Gageler, Nettle and Gordon JJ).

pay compensation particularly in the context of a dispute in relation to compensation arising out of a building contract. To read the expression as 'a dispute in relation to the assessment of Compensation' requires the insertion of the underlined words, which is not justified in the context of the terms of the Contract; and could easily have been added by the parties if it was intended. The phrase 'in relation to' is wide in its connotation;[13] and does not warrant reading words of limitation into the expression.

36 Further to the above conclusion on the basis of ordinary English words, the words 'Dispute' and 'Compensation' are both defined, and those definitions refer to other words defined in the Contract. The relevant definitions are set out in paragraph 5 and in particular:

(a) Compensation is defined as 'compensation for Loss or damage suffered by a party as a result of a Default';

(b) Default is defined broadly and includes breaches by Lendlease under the Contract;

(c) Dispute is defined as 'a dispute between the Project Company and [Lendlease] in connection with the Contract', with some further specific exclusions; and

(d) Loss is defined to mean 'any liability … of any kind whatsoever'.

Accordingly, as defined, the independent expert is required to determine the relevant dispute in relation to compensation for 'liability … of any kind whatsoever' or damage suffered by a party as a result of breaches of the Contract. In my opinion, a reasonable business person in the position of the parties would consider that such disputes would require the determination of:

(e) whether a party was liable or in breach of the Contract; and

13 *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356.

(f) the extent to which loss or damage was caused by the breach of contract or other basis of liability.

37 This broader construction produces a commercially sensible result. Reasonable business persons in the position of the parties would be well aware of the difficulties of achieving cost efficient resolution of building construction disputes. The reference of such compensation claims to expert determination within very tight timeframes has been adopted to resolve other disputes in the building industry.[14] Clause 74.3(e) contemplates that the parties are bound to accept the independent expert determination for claims of less than $250,000, but allows the parties to litigate greater claims in Court. This provides the opportunity in larger claims for other allegedly responsible parties to be joined in the dispute.

38 On a plain reading of the narrow construction, only the question of liability would be submitted to arbitration; but the assessment of compensation would be required to be determined by expert determination. Such an interpretation would result in an inefficient bifurcation of dispute resolution and appear to work a commercial nonsense.

39 If cl 74.1(g) was construed so that disputes involving both liability and quantum were wholly referred to an arbitrator (to avoid the bifurcation referred to in the previous paragraph), then the reference for expert determination under cl 74.1(g)(ii) would be limited to circumstances where a party had admitted liability. Given the nature of building disputes, the clause would likely have a very limited application if construed this way.

40 I accept Lendlease's submissions that the broader interpretation still leaves the reference to an arbitrator under cl 74.1(g)(iii) significant work to do with respect to disputes under the Contract, including the clauses referred to by counsel for Lendlease.

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14 For example, the *Building and Construction Industry Security of Payment Act 2002* (Vic).

Issue 2 – If no to Issue 1, did the parties' correspondence constitute an agreement that the Dispute be arbitrated?

Project Company's submissions

41 Project Company contended that if the Contract did not provide for the Dispute to be referred to arbitration, the parties entered into an ad hoc agreement to arbitrate the Dispute. It was submitted that the agreement should be inferred from the following correspondence between 6 March 2018 and 4 April 2018 referred to in paragraphs [7], [8] and [12] to [16] above ('the Relevant Correspondence'):

(a) After Project Company served the Referral Notice on 6 March 2018 and Referral to Arbitration on 14 March 2019, Lendlease responded by email of 15 March 2018 making it absolutely clear that it agreed that the matter was to be arbitrated. The letter referred to a number of matters with respect to the arbitration and, in particular it stated:

> We think it would be in the interests of both the parties and the efficient conduct of the arbitration if the time set down in clause 74.1(h) of the D&C Contract for the Panel to agree an arbitrator is extended.

(b) By letter dated 15 March 2018 to Lendlease, Project Company agreed to the requested extension of time and requested the names of three arbitrators.

(c) By emailed letter of 28 March 2018, Lendlease gave the name of three arbitrators; and by letter of 29 March 2018 Project Company advised that Professor Sharkey was suitable, enclosed a draft letter seeking his consent to appointment, and requested a response to the proposed letter by 4 April 2018.

(d) By email of 4 April 2018 to Project Company, Lendlease requested an extension of time to review the proposed letter to Professor Sharkey and by reply of the same date Project Company agreed to the suggested extension which it presumed to be 10 April 2018.

42 Counsel for Project Company did not contend, in my opinion properly, that the circumstances gave rise to an estoppel against Lendlease.

Lendlease's submissions

43 Lendlease submitted that the Relevant Correspondence did not constitute an agreement to submit to arbitration for the following reasons:

(a) It is common ground that, assuming the Dispute is in relation to Compensation, the effect of cl 74.1(g)(ii) was that the Dispute was automatically referred to expert determination after the specified events did not occur within the Resolution Period. Accordingly, by 15 March 2018, the Dispute was referred to expert determination.

(b) No arbitrator was appointed and no steps were taken in the arbitration.

(c) An ad hoc agreement would constitute an amendment to the Contract, however, cl 76.2 states:

> No amendment or variation of this Contract is valid or binding on a party unless made in writing executed by both parties, provided that amendments to the Services Specifications can be made by agreement in writing executed by the Project Director …

(d) There was no document executed by the parties to evidence this agreement (while this is not a legal requirement, its absence points against the formation of an agreement).

(e) Under the terms of the Contract, a dispute is not referred to arbitration because a party gives a notice saying the dispute is to go to arbitration. Under the terms of the Contract, there is no such thing as a 'notice of arbitration' or a 'Referral to Arbitration' – these are simply terms which Project Company assigned to its communication dated 14 March 2018.

(f) The Relevant Correspondence rose no higher than an effort to discuss arrangements for a potential arbitration in accordance with the terms of the Contract, and 'all the parties [were] doing is acting consistently with what … is an erroneous construction of the Contract; that is, that they had to arbitrate. … If anything, it's an agreement that has as its genesis a mistake'.

(g) Any purported new agreement suffered from a lack of certainty of terms and/or a clear offer and acceptance of those terms.

Determination of Issue 2

44 Pursuant to the Contract, it is common ground, given my finding that the Dispute is in relation to Compensation, that the effect of cl 74.1(g) is that the Dispute was automatically referred to expert determination on the expiration of the Resolution Period on 11 March 2018, being 5 days after the Referral Notice under cl 74.1(a) was served on Lendlease on 6 March 2018.

45 Accordingly, Issue 2 turns on whether the parties contracted to terminate the expert determination mechanism under the Contract and submit the Dispute to arbitration.

46 It is trite law that the major elements necessary for the formation of a contract are:

(a) offer and acceptance;

(b) consideration;

(c) intention to create legal relations; and

(d) certainty of terms.[15]

47 Although a contract may be inferred without proof of offer and acceptance, the circumstances in which a contract will be inferred were explained by Sundberg J in *Adnunat Pty Ltd v ITW Construction Systems Australia Pty Ltd* as follows:

> A contract may in certain circumstances be inferred from conduct, even where no offer and acceptance can be identified. However the existence or otherwise of an enforceable agreement depends ultimately on the manifest intention of the parties, objectively ascertained. Where mutual promises are sought to be inferred, the conduct relied upon must, on an objective assessment, evince a tacit agreement with sufficiently clear terms. It is not enough that the conduct is *consistent* with what are alleged to be the terms of a binding agreement. The evidence must positively indicate that both parties considered themselves bound by that agreement.[16]

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15 N C Seddon and R A Bigwood, *Cheshire & Fifoot Law of Contract* (LexisNexis Butterworths, 11th Aust ed, 2017) 10 [1.16].

16 [2009] FCA 499, [39] (citations omitted); quoted with approval by the Court of Appeal in *P'Auer AG v*

48 In *Woolcorp Pty Ltd v Rodger Constructions Pty Ltd*, the Court of Appeal identified the following considerations to be 'kept in mind' in considering whether the facts allow a contract to be inferred:

> (1) Circumstances in which a contract will be inferred are rare.
>
> (2) Before the inference may be drawn, a party must establish that the conduct positively indicated that both parties considered themselves bound by the contract. It is not enough to establish that conduct was merely consistent with the alleged terms of the contract.
>
> (3) In the absence of an offeree's express consent, acceptance of an offer may be inferred if an objective bystander would conclude from the offeree's conduct, including its silence, that the offeree has accepted the offer and has signalled that acceptance to the offeror.[17]

49 I do not consider that a contract to submit to arbitration can be inferred from the Relevant Correspondence for the following reasons:

(a) The Relevant Correspondence and in particular the Referral to Arbitration of 14 March 2018 and the response from Lendlease of 15 March 2018 specifically purport to be steps in accordance with the Contract. The Relevant Correspondence is not consistent with, and does not demonstrate any intention, to vary the Contract. Similar issues arose in *Hi-Fert Pty Ltd v United Shipping Adriatic Inc*,[18] where Emmett J found on the facts before him that Hi-Fert's participation in an arbitration, including the nomination of its own arbitrator, was conducted on the mistaken basis that there was an existing arbitration clause incorporated in the bill of lading. He found that the correspondence between the parties, with respect to the arbitration, did not demonstrate an intention to enter into a separate arbitration agreement. He explained:

> I do not consider that, objectively considered, the communications … evidence any intention to submit to arbitration an issue which was not otherwise the subject of an enforceable arbitration clause. I would not put that conclusion on the basis of a vitiating mistake but that, on the true construction and interpretation of the correspondence, there was

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Polybuild Technologies International Pty Ltd [2015] VSCA 42, [11] (Whelan JA, with whom Ferguson and Kaye JJA agreed).

17 [2017] VSCA 21, [9] (Santamaria, Kyrou JJA and Elliott AJA).

18 (1998) 89 FCR 166.

no intention to submit to arbitration a matter which was not already the subject of arbitration.[19]

(b) I accept the submission of Lendlease that objectively there is nothing that can be inferred from the Relevant Correspondence, other than that the parties were preparing to put steps in place for an arbitration under the mistaken apprehension that arbitration was the appropriate mechanism provided for under the Contract for their Dispute.

(c) The inference that the parties had entered into a variation agreement is not supported by the fact that:

(i) the preparatory steps for an arbitration were at an early stage – an arbitrator had not been appointed and the terms of appointment for the proposed arbitrator had not yet been agreed; and

(ii) the Contract specifically provided, in cl 76.2, that the Contract can only be amended or varied in writing.[20]

(d) Although the existence of a contract to submit a dispute to arbitration must be determined on the particular facts of each individual case, I was not referred to any case where such a contract to submit to arbitration had been inferred prior to the appointment of the arbitrator.

(e) In *Balfour Beatty Power Construction Australia Pty Ltd v Kidston Gold Mines Ltd*,[21] Dowsett J considered the refusal by an arbitrator, after two weeks of hearing, to permit the amendment of points of defence to plead that a particular issue was beyond the scope of the agreement to arbitrate. Dowsett J noted the different considerations to be applied in determining whether a party has

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19 Ibid 195. Emmett J also found that Hi-Fert had expressly reserved its rights: at 192-3; but he separately decided that there was no intention to enter a contract to submit to arbitration.

20 The 'no oral modification' provision in cl 76.2 does not prevent an oral contract, if made, being effective. However, it is relevant to the question of whether a variation was in fact agreed: *Liebe v Molloy* (1906) 4 CLR 347, 353-5; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 63 [222], 76 [289] (Finn J).

21 [1989] 2 Qd R 105 ('*Balfour*').

submitted to the jurisdiction of an arbitrator as opposed to the jurisdiction of a court. He said:

> Submission to jurisdiction in the curial sense involves only an answer to the question namely, "Has there been a submission?" However, submission to the jurisdiction of an arbitrator depends upon the answer to the question "Has there been an agreement to arbitrate?" The law of contract applies to answer that question, not the law relating to submission to the jurisdiction of a court.[22]

His Honour found that the arbitrator was not bound to refuse the application for the amendment. In doing so, he distinguished cases where it had been found that allowing the arbitration to proceed to the point of an award constituted an ad hoc agreement to arbitrate. He did not accept that even participation in an arbitration by filing points of claim or defence would necessarily be a sufficient basis to infer a contract to submit a dispute to arbitration.[23]

Issue 3 – If no to Issues 1 and 2, such that there is no arbitration agreement, has Lendlease waived its right under the Contract for the dispute to be referred to expert determination, with the result that it is referred to arbitration under cl 74.1(g)(iii) of the Contract?

Project Company's submissions

50 Project Company submitted that by its conduct from 15 March to 4 April 2018, Lendlease had waived any right under the Contract for the Dispute to be the subject of expert determination, with the result that pursuant to cl 74.1(g)(iii) it was referred to arbitration. It was submitted that this result arose by the application of:

(a) waiver by an unequivocal abandonment of a right; and

(b) the doctrine of election.

51 It was contended that the facts giving rise to the unequivocal abandonment of the right to proceed under the expert determination provision arose from the Relevant Correspondence as follows:

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22 Ibid 118.

23 Ibid 117-18.

(a) Project Company's Referral to Arbitration of 14 March 2018 maintained that the effect of cl 74 was that the Dispute was to be arbitrated but specifically reserved the alternative, which allowed for the possibility that Lendlease could assert that the proper course was expert determination. In these circumstances 'the imperative for Lendlease to identify its position was particularly acute', but it did not do so.

(b) Lendlease, by its responses on 15 March, 28 March and 4 April 2018, represented an abandonment by it of any contractual right to expert determination of the Dispute. The present case was a stronger instance of waiver than Whelan J found in *La Donna Pty Ltd v Wolford AG*.[24]

(c) There is nothing in the correspondence that conveys 'any doubt, equivocation or reservation of rights on the part of Lendlease'.

52 Further, it was submitted that Lendlease's correspondence during the relevant period constituted an election between alternative and inconsistent rights. Clause 74 of the Contract provides for expert determination and arbitration as alternative remedies, and the expert determination process cannot occur if the arbitration process has been engaged. It was submitted that the choice between expert determination and arbitration was distinguishable from the choice between arbitration and court processes for the following reasons:

> Unlike court processes, which can co-exist to some extent with arbitral or expert determination processes (such as in applications for urgent relief), the two processes, and the actions which they prescribe, are wholly incompatible with one another.
>
> In this respect, whilst participation in curial proceedings *might* not necessarily be inconsistent with arbitration … the same cannot be said of the choice between the expert determination and arbitration processes in this case. In contrast to the position with court proceedings, there is no entitlement to expert determination as of right, absent agreement of the parties.

53 Accordingly, it was submitted that to allow Lendlease to maintain a right to refer the Dispute to expert determination would be to allow it to 'approbate and reprobate'.

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24 (2005) 194 FLR 26 ('*La Donna*').

Lendlease's submissions

54 Lendlease submitted that its correspondence in the relevant period did not amount to an unequivocal abandonment of the right to have the Dispute determined by an expert, nor was it an election between inconsistent rights.

55 It did not constitute an unequivocal abandonment for the following reasons:

(a) The reasoning of Whelan J in *La Donna* did not assist the contention of Project Company because Whelan J found that by making an application for security for costs the defendant had 'sought an advantage, or at least sought to impose upon La Donna a burden, which was based upon the proposition that litigation would proceed in this Court, [and] that the defendant would take steps … in that litigation …'.[25]

(b) Lendlease's engagement in the arbitral process is considerably less than was observed in *La Donna* and *Zhang v Shanghai Wool and Jute Textile Co Ltd*,[26] which both involved a defendant taking active and deliberate steps in court proceedings.

(c) The correspondence from Lendlease is consistent with the party preparing to explore the possibility of arbitration without committing to it.

(d) The evidence of Mr Croagh, Lendlease's solicitor, is that at the time of receiving Project Company's letter dated 6 March 2018, it was not apparent to Lendlease what loss or damage Project Company alleged it suffered as a result of the defects in the water system and pipe work.

(e) Although Lendlease did not expressly reserve its position on expert determination, it is not essential to do so.[27]

56 It was further submitted that the relevant correspondence could not constitute an election between inconsistent rights for the following reasons:

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25 Ibid 31 [26].
26 (2006) 201 FLR 178 ('*Zhang*').
27 *La Donna* (2005) 194 FLR 26, 30 [23].

(a) The effect of cl 7.1(g) of the Contract is that on the expiry of the Resolution Period, the Dispute was referred to expert determination. There was no choice conferred on the parties. Accordingly, on 15 March 2018, Lendlease did not have the option of choosing between two alternative rights because there was no choice under the terms of the Contract.

(b) If there was a right to choose between expert determination and arbitration, those courses are no more consistent or inconsistent than arbitral and curial proceedings (assuming the proceedings do not involve inconsistent rights).

Principles of waiver

57 Waiver is an imprecise term and must often be defined according to its context.[28] As McHugh J said in *Commonwealth v Verwayen,* '[m]ost cases which purport to apply the doctrine of waiver are really cases of contract, estoppel or election'.[29] I have considered the implied contract above,[30] and Project Company does not press a claim based on estoppel. However, as noted above, Project Company does press claims based on election and waiver.

58 In the context of an application for a stay of proceedings on the basis of an arbitration clause, Austin J in *Tridon*, reviewed the authorities and identified the following three relevant forms of waiver:

(a) waiver by election (or common law waiver);

(b) waiver by abandonment; and

(c) waiver by non-insistence.[31]

28 *Zhang* (2006) 201 FLR 178, 185 [14] (Chernov JA).
29 (1990) 170 CLR 394, 491 (McHugh J) ('*Verwayen*').
30 Paragraphs [44]-[49] above.
31 [2002] NSWSC 896, [56]-[60].

Waiver by election

59 In *Zhang*, Chernov JA said that 'waiver by election may be established by demonstrating that the party in question had elected to pursue a substantive right that is inconsistent with that which it is now seeking to press'.[32] His Honour referred to the statement by Brennan J in *Verwayen* that '[e]lection consists in a choice between rights which the person making the election knows he possesses and which are alternative and inconsistent rights'.[33]

60 An example of an election between inconsistent rights arises when an innocent party entitled to terminate a contract for repudiation acts on the basis that the contract still exists. In such circumstances, the innocent party will be said to have elected to maintain the contract and will not be permitted to subsequently terminate for repudiation.[34]

Waiver by abandonment

61 A right may be waived although there is no alternative inconsistent right.[35] Austin J described this as 'waiver in the stronger sense';[36] and said it was explained in *Verwayen* by Toohey J as follows:

> Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge.[37]

62 In *Zhang*, Chernov JA said that 'waiver is constituted by the deliberate, intentional and unequivocal release or abandonment of the right that is later sought to be

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32 (2006) 201 FLR 178, 185 [15]

33 *Verwayen* (1990) 170 CLR 394, 421; quoted with approval in *Zhang* (2006) 201 FLR 178, 185 [15]. Also see *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 641 (Stephen J).

34 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 589 [58] (Gummow, Hayne and Kiefel JJ) ('*Gardiner*').

35 *Verwayen* (1990) 170 CLR 394, 424 (Brennan J).

36 *Tridon* [2002] NSWSC 896, [62]. It is described as waiver 'in the true sense of the word' in S Wilkin, *Wilken and Villiers The Law of Waiver, Variation and Estoppel* (Oxford University Press, 2nd ed, 2002) [4.45]; which is quoted with approval in *Zhang* (2006) 201 FLR 178, 185 [14].

37 *Tridon* [2002] NSWSC 896, [59]; quoting *Verwayen* (1990) 170 CLR 394, 472; quoting Buttersworths, *Halsbury's Laws of England*, vol 16 (at 1976) [1471]. To similar effect see *Banning v Wright* [1972] 1 WLR 972, 979; quoted with approval in *Zhang* (2006) 201 FLR 178, 186 [14].

enforced'.[38] He referred to the following statement by Brennan J in *Verwayen*, which speaks of the waiver constituting a new relationship:

> The time when waiver of a right occurs depends on the relationship between a party possessed of such a right and the party whose interests may be affected by exercise of the right. When the party possessed of the right knows that a new legal relationship is to be constituted between him and the party whose interests are liable to affection by the exercise of the right and that the right, if exercised, might affect the new relationship, the party possessing that right must enforce the right before the new relationship is constituted or he will be held to have waived that right.[39]

63 Gaudron J similarly observed the significance of a waiver resulting in a change in the relationship of the parties saying:

> Perhaps there is a principle of wider application, but it is clear that a party to litigation will be held to a position previously taken (that position having been intentionally taken with knowledge) if, as a result of that earlier position, the relationship of the parties has changed.[40]

64 Gaudron J gave the following examples of a change in relationship:

(a) A failure to raise a jurisdictional defect or irregularity results in the parties becoming or being treated as having become parties to a proceeding.

(b) A failure to raise a matter going to the disqualification of the person constituting a court results in the parties entering into a new relationship, namely parties to a proceeding which is in the course of adjudication.

(c) Allowing a matter to pass into judgment results in the relationship of the parties being in accordance with the judgment.

(d) A failure to object to an appeal not being properly instituted results in the parties being in a new relationship – that of appellant and respondent.[41]

65 In *Zhang*, Chernov JA also adopted the elements of waiver identified in *Wilken and Villiers The Law of Waiver, Variation and Estoppel* being:

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38 *Zhang* (2006) 201 FLR 178, 186 [14].
39 *Verwayen* (1990) 170 CLR 394, 427.
40 Ibid 484.
41 Ibid.

1. an unequivocal representation by X either by words or conduct that it will forgo certain rights;

2. X makes that representation when it is aware of the facts that give rise to the rights which are being forgone, of the right to forgo those rights and the connection between the two.[42]

Waiver by non-insistence

66 Austin J identified a further form of waiver arising from the non-insistence on a right, which was not a legal doctrine, but would be relevant to the exercise of a discretion.[43] He referred to this as waiver in the 'weaker sense', and cited as an example '[d]elay in an application to refer a dispute to arbitration [which] might, eventually, give rise to discretionary grounds for refusing the application'.[44]

67 Project Company did not rely on waiver by non-insistence.

Equitable doctrine of election

68 For completeness, I should refer to the equitable doctrine of election. Project Company submitted that to permit Lendlease to refuse to arbitrate would be to allow it to approbate and reprobate. The complaint of 'approbation and reprobation' is a reference to the equitable doctrine of election which has limited application.[45] The doctrine 'fastens upon the conscience of a party taking under a deed or will and requires the party to choose between taking the benefit and accepting the burden of any stipulated conditions or rejecting the benefit'.[46] It has no application to the facts before me.

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42 *Zhang* (2006) 201 FLR 178, 186 [14]; quoting S Wilken, *Wilken and Villiers The Law of Waiver, Variation and Estoppel* (Oxford University Press, 2nd ed, 2002) [4.45].

43 *Tridon* [2002] NSWSC 896, [60] quoting from Dawson J in *Verwayen* (1990) 170 CLR 394, 457. Austin J considered that Dawson J was referring to conduct that would be a relevant factor in the exercise of a court's discretion with respect to matters such as an applications for a stay, leave to amend or to strike out a relevant pleading.

44 *Tridon* [2002] NSWSC 896, [69].

45 *Lissenden v CAV Bosch Ltd* [1940] AC 412, 417-19 (Viscount Maugham); *APT SEA Gas Holdings Pty Ltd v ANP SEA Gas Holdings Pty Ltd* [2010] NSWSC 1221, [48] (Brereton J).

46 *Gardiner* (2008) 238 CLR 570, 588 [57] (Gummow, Hayne and Kiefel JJ).

Determination with respect to Issue 3

Election

69 I accept the submission of Lendlease that the effect of cl 74.1(g) was that, on the specified events not occurring within the Resolution Period, the Dispute was referred to expert determination under cl 74.3. Each party had a choice to insist on enforcement of cl 74 or to agree to determine it in some other manner. I do not consider that choosing to select another procedure for the adjudication of the Dispute would constitute an election between inconsistent substantive rights, any more than selecting between arbitration and litigation.[47]

70 Neither do I consider that the Relevant Correspondence, in which Lendlease acquiesced in the preliminary stages of the appointment of an arbitrator, constituted an unequivocal election to arbitrate and not to enforce rights under the Contract. As Whelan J observed in *La Donna*:

> If all that was relied upon here were the steps taken on the interlocutory injunction, the directions and the mediation, I would find … that there had been no abandonment, as a party could rationally take the view that it was desirable to participate in those steps even though one believed, and intended to persuade the Court at an appropriate time, that the dispute should be arbitrated.[48]

However, Whelan J found that applying for security for costs was an attempt to take advantage of the litigation process and fell 'into an entirely different category'.[49] In that case, the application for a stay was made only after the application for security for costs, which proceeded on the basis that the litigation would proceed to trial, had been dismissed. It is unsurprising that the application for a stay was unsuccessful.

Waiver by abandonment

71 Similarly, the Relevant Correspondence cannot constitute a waiver by abandonment. The Relevant Correspondence does not constitute an unequivocal representation

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47 *Tridon* [2002] NSWSC 896, [58]; *Zhang* (2006) 201 FLR 178, 186-7 [15]; *Comandate Marine Corp v Pan Australian Shipping Pty Ltd* (2006) 157 FCR 45, 64 [62] (Allsop J, with whom Finn and Finkelstein JJ agreed).

48 (2005) 194 FLR 26, 30-1 [24].

49 Ibid 31 [25].

that Lendlease will forego certain rights. There is no reference to the foregoing of rights and a reasonable business person reading the correspondence would infer no more than that the parties believed (wrongful as I have found) that the Contract did require arbitration of the Dispute.

72 Further, the fact that no arbitrator was appointed militates strongly against a conclusion that a 'deliberate, intentional and unequivocal … abandonment of the right'[50] to an expert determination was demonstrated by the Relevant Correspondence.

73 In the circumstances, I do not consider that Lendlease's conduct relevantly changed the relationship of the parties in the manner discussed by Brennan J[51] and Gaudron J,[52] as referred to above.

74 Even if it could be said that Lendlease had waived its right to have the Dispute referred to expert determination pursuant to cl 74.1(g)(ii), it is not apparent how that could give rise to the result that pursuant to cl 74.1(g)(iii) it was referred to arbitration. Under the terms of the Contract, the Dispute was not referred to arbitration. For Lendlease to be compelled to arbitrate, it must have entered into an agreement to arbitrate.[53]

75 I have already concluded, in determining Issues 1 and 2, that there was no such agreement by Lendlease and Project Company to arbitrate.

Conclusion

76 As I have found there is no agreement between Project Company and Lendlease to arbitrate the Dispute, which is the subject of this proceeding, the plaintiff's application must fail. It is not necessary for me to determine Issues 4 and 5.

77 I will dismiss the summons.

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50 *Zhang* (2006) 201 FLR 178, 186 [14].
51 *Verwayen* (1990) 170 CLR 394, 427; quoted in *Zhang* (2006) 201 FLR 178, 186 [14].
52 *Verwayen* (1990) 170 CLR 394, 484.
53 *Balfour* [1989] 2 Qd R 105, 117-18 (Dowsett J).
