

The Law relating to Expert Determination

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INTRODUCTION

As noted in the Opening to this Expert Determination Workshop, the use of ADR (including Expert Determination) is on the increase in Australia. It is therefore timely to reflect on what the Courts have had to say about the Expert Determination process. In this paper, I will deal with the various types of legal issues involved as follows:

1. Challenging the agreement to refer a dispute to Expert Determination.
2. Enforcing the result of an Expert Determination.
3. Challenging the result of an Expert Determination.
4. Differences between Expert Determination and Arbitration.
5. The liability of the Expert in respect of an Expert Determination or Expert Appraisal.

These are all matters which are relevant to the conduct of an Expert Determination, irrespective of whether or not the Expert is directly involved in any Court proceedings on those legal issues. A practitioner needs to be aware of these various principles, in dealing with challenges to jurisdiction, in identifying the boundaries of what he or she can (and cannot) safely do in the conduct of the process, and in recognising the consequences of performing an Expert Determination.

1. CHALLENGING THE AGREEMENT TO REFER A DISPUTE TO EXPERT DETERMINATION

This is an issue which may arise when one party seeks to restrain another party from commencing court proceedings in breach of an agreement to refer disputes to Expert Determination. It may also arise when a party seeks to persuade an Expert that he or she has no jurisdiction to undertake an Expert Determination.¹

Various grounds have been argued for challenging an agreement to refer a dispute to Expert Determination, namely that:

- (a) any such agreement would be void as an attempted ouster of the jurisdiction of the courts;
- (b) an issue in dispute is not susceptible to Expert Determination;
- (c) an issue in dispute is not suitable for Expert Determination by the Expert appointed (or to be appointed);
- (d) the terms of the agreement are too uncertain, by failing to specify with sufficient particularity the procedure to be followed by the Expert.

I will deal with each of those grounds in turn.

(a) Ouster of Jurisdiction

It is settled law that Courts will not enforce agreements which are in effect an ouster of jurisdiction, on the grounds of public policy. For a number of years, there was not a consistent approach to this issue by judges at first instance in Courts in Australia. In the New South Wales, Victoria, and Queensland Supreme Courts, judges took the approach that they should seek to

¹ In relation to jurisdictional issues, it is worth noting that Rule 5(5) of the IAMA *Expert Determination Rules* expressly provides as follows:

‘Any dispute arising between the parties in respect of any matter concerning these Rules or the Process, (including the Expert’s jurisdiction) shall be submitted to and determined by the Expert.’

uphold the bargain made by the parties to refer their disputes to Expert Determination. In contrast, in a decision of a single judge of the Supreme Court of Western Australia in 1998, it was held that, while an agreement to refer issues within an Expert's particular expertise may be upheld by the Court, an agreement to refer issues of fact and law to a technically qualified expert (with no legal qualifications) was void as an attempted ouster of jurisdiction. In 2005, that decision was distinguished by the Western Australian Court of Appeal, so that there is now a consistency of approach in all Australian jurisdictions.

In the NSW decision of *Fletcher Construction Australia Limited v MPN Group Pty. Ltd.*², Mr Justice Rolfe held that there are grounds on which the Court's jurisdiction may be invoked to attack a 'final and binding' determination, such that a clause to that effect was not void as an attempted ouster of jurisdiction of the Courts. At p. 18 of the judgment, his Honour said:

'... in my opinion, Clause 6.1 does not purport to oust the jurisdiction of the Court. It is an agreement between the parties that the specified disputes shall be determined by an expert. There is nothing unusual about such a provision and parties are held to their bargain if they agree to such a clause. Nor is there anything unusual about the clause providing that the expert's decision shall be 'final and binding' or 'conclusive', and provisions such as that do not oust the jurisdiction of the Court. The effect of the clause is to make the decision of the expert final and binding provided the matters referred to him are ones which the agreement contemplates. The expert's decision is, however, susceptible of attack in a Court if there is a failure to comply with the contract or there is some vitiating factor relevant to the decision.' (emphasis added)

In the Supreme Court of Western Australia, in *Baulderstone Hornibrook Engineering Pty. Ltd. v Kayah Holdings Pty. Ltd.*³, Mr Justice Heenan held that the clause there being considered was an impermissible attempt to oust the jurisdiction of the court in the particular circumstances of the case, saying at p. 280:

'As a general rule, the court will recognize as proper any procedure which the parties have agreed upon to settle a dispute. As the provisions of the Commercial Arbitration Act 1985 show, if they have agreed in writing to refer present or future disputes to arbitration their agreement will be recognized and enforced. Even if the

2 NSW Sup Ct, 14 July 1997, unreported

3 (1998) 14 BCL 277

procedure agreed upon is not arbitration, the agreement might well be enforceable as a matter of contract. Thus the court usually will not intervene when the parties have referred a matter for the determination of an expert if such determination is within the referee's particular field of expertise (for example, see the judgment of the Court of Appeal in Jones v Sherwood Computer Services [1992] 2 All ER 170). However, on behalf of the plaintiff it is contended that the procedure agreed upon in this case is so contrary to fundamental principles that it must be treated as against public policy and void.

The main limitation imposed upon the power of the parties to prescribe their own rules of procedure is that they cannot by contractual provision oust the jurisdiction of the court (Scott v Avery (1856) 5 HL 810 and Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643). For a recent discussion of the topic see the judgment of Drummond J in Novamaze Pty Ltd v Cut Price Deli Pty Ltd (1995) 128 ALR 540 at 548-549. In this case, cl 20 provides for the resolution by the referee of any dispute arising out of the contract, whether or not the determination of the dispute is within the referee's particular field of expertise. Further, the clause purports to make the referee's decision final, rather than making the determination nothing more than a condition precedent to a legal right capable of enforcement by action through the court. To that extent it operates to oust the jurisdiction of the court and will not be recognised.' (emphasis added)

There were some surrounding factors which apparently had a bearing on Heenan J's decision namely that, arising out of the same project and based on the same alleged facts, court proceedings had been commenced by a third party against the plaintiff, who joined the defendant to those proceedings as a cross defendant. It therefore appears there was a good practical reason for staying the Expert Determination, because otherwise the parties would incur the trouble and expense of two sets of proceedings relating to the same dispute, and there would be a prospect of inconsistent findings. This is consistent with the approach adopted by Mr Justice Chesterman of the Supreme Court of Queensland, in Zeke Services Pty Ltd v Traffic Technologies Limited⁴, in which his Honour said:

'37 Accordingly, I conclude that some only of the complaints may be appropriately determined by an expert. There should be no stay with respect to those matters. To order a stay of the proceedings to allow the expert to determine some only of the complaints would be unsatisfactory. The same decision-maker should determine all questions in dispute. As the court must determine some, it should determine all.' (emphasis added)

4 [2005] QSC 135

In the Supreme Court of Victoria in *Badgin Nominees Pty. Ltd. v Oneida Ltd. anor*⁵, Mr Justice Gillard reviewed the earlier authorities (although not expressly mentioning *Baulderstone Hornibrook* in his judgment) and the relevant principles, and said:

- '23. *Surprisingly, there is no decision at Court of Appeal level in Australia concerning the approach by the court in respect of an application such as the present. Of course there are many cases concerning an application for stay where the dispute resolution procedure is by way of arbitration.*
24. *Nevertheless, the issue has been considered at the highest level in England.*
25. *Before considering the English case it is important to state a number of propositions.*
26. *First, the parties, both experienced in the conduct of the types of business, the subject of the sale, at arm's length and well able to look after their own interests, with the assistance of their respective solicitors negotiated the purchase agreement.*
27. *Secondly, in their wisdom they decided and agreed that certain disputes were to be resolved by an expert and not by an arbitrator.*
28. *Thirdly, their agreement expressly stated in bald terms that the dispute in question was to be decided by an expert and his "determination in writing ... will be conclusive and binding on the parties", without providing any rules concerning procedure, evidence, obtaining legal advice by the expert or complying with the rules of natural justice.*
29. *It is a trite proposition of law that parties may contract about anything and subject to the principles of public policy and illegality the agreement should be enforced unless there is some other vitiating factor such as mistake, misrepresentation or in capacity.*
30. *The parties here established a scheme concerning the resolution of a dispute in relation to the "quantity, quality or value of the Trading Stock" sold pursuant to the agreement.*
31. *It was their common intention that the dispute resolution procedure be applied in the event of a dispute.*
32. *It is their contract: and it should be enforced.*

5 [1998] VSC 188 – 18 Dec 1998 - unreported

33. *In Huddart Parker Ltd v. The Ship Mill Hill (1950) 81 CLR 502, Dixon, J stated the principles which should guide a court in an application to stay a court proceeding because of an arbitration agreement.*
34. *In my respectful opinion what his Honour said in that case applies to an application for a stay where the parties have agreed to a dispute resolution procedure involving an expert.*
35. *He said at p.508-509 -*

"But the courts begin with the fact that there is a special contract between the parties to refer, and therefore in the language of Lord Moulton in Bristol Corporation v. John Aird & Co, consider the circumstances of a case with a strong bias in favour of maintaining the special bargain or as Scrutton, LJ said in Metropolitan Tunnel and Public Works Ltd v. London Electric Railway Co, 'A guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it.'"
36. *In my opinion the court clearly has a jurisdiction to stay a court proceeding on the simple basis that "a contract is a contract" and the parties should abide by it.*
37. *I refer to the oft quoted dictum of Lord Tomlin that "the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains" - Hillas & Co v. Arcosi Ltd (1932) 38 Com. Cas. 23 at 29.*
38. *The nature of the jurisdiction was discussed by the House of Lords in Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd (1993) AC 334. In that case the construction contract contained a dispute resolution procedure which had a number of tiers. The first tier involved the resolution by a panel "acting as independent experts but not as arbitrators". The second tier involved arbitration.*
39. *Lord Mustill, delivered the leading speech.*
40. *It was recognised that the reference to the independent experts was not covered by the English Arbitration Act although it might be described as being very close to an arbitration reference.*
41. *Counsel for the moving party, sought to uphold the grant of a stay made by the courts below on two bases. The first submission was that the reference was in effect an arbitration and the second was described -*

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

42. *Lord Mustill went on to say -*

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

43. *His Lordship said at p.353 -*

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

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

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

46. *The next question is whether the court has a discretion to refuse a stay where the parties have expressly and unequivocally agreed to refer a dispute to an expert in their agreement?*

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

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

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

50. *No doubt the parties accepted that there was a difference between the two procedures.*
51. *It is clear that a valuation in the absence of any term in the contract means that the provisions of the Commercial Arbitration Act are not applicable. See Collins v. Collins (1858) 26 Beav. 306.*
52. *The distinction between arbitration and expert valuation was considered by Lord Esher MR in two cases at the end of the last century.*
53. *In Re Dawdy and Hartcup (1885) 15 QBD 426 at 430 his Lordship said -*

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

*"If it appears, from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner. On the other hand there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of mere valuation. **There may be cases of an intermediate kind where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence and arguments.**"*
55. *See Re Carus v. Wilson and Greene (1886) 18 QBD 7 at 9; I refer also to Ajzner v. Cartonlux Pty Ltd (1972) VR 919 especially at pp.927-931.*
56. *It is noted here that the parties expressly provided that the valuation should be by an expert and not an arbitrator. Clearly the parties intended that the procedure should not be by way of arbitration.*
57. *The evidence shows that the terms of the contract were negotiated over a period of two months between the parties and their representatives. It is not difficult to infer that the parties appreciate the difference between arbitration*

and expert valuation: experience shows that arbitration conducted invariably as a trial can be costly and time consuming. The parties wished to avoid this.

58. *They put in place what they intended was to be an inexpensive and speedy dispute resolution procedure conducted by an expert valuer.*
59. *This conclusion is supported by the requirement that each party was to pay the costs of the valuation in equal proportions.*
60. *It is also pertinent to observe that the parties provided two different procedures to accommodate different types of disputes.*
61. ***The expert chosen was to be an expert in the field which is under dispute.***
(emphasis added)

The reasoning in *Badgin Nominees* and *Fletcher Constructions v MPN Group* seems unassailable. The decisions and the reasoning were referred to with approval by Mr Justice Einstein in *The Heart Research Institute Limited v Psiron Limited*⁶. If the processes of the Court must be invoked to enforce any determination made by the expert, then it is difficult to see how the Expert Determination process can be said to oust the jurisdiction of the Courts.

This issue was further considered by the Queensland Court of Appeal in 2005 in *Zeke Services Pty Ltd v Traffic Technologies Limited*⁷, where the clause said to oust the jurisdiction of the Court was in the following terms:

'7.6 Warranty Claims

In the event the Purchaser makes a claim ... for damages for breach of any of the Warranties in accordance with this clause 7 ... and the claim arises in the period prior to payment of the Second Instalment, or in the period between payment of the Second Instalment and prior to payment of the Third Instalment ... the following will apply:

...

- (d) *for a period of 14 days from the date of the Claim, the parties must negotiate in good faith to resolve the Claim (Initial Period); and*

6 [2002] NSWSC 646 (25 July 2002)

7 [2005] QSC 135

- (e) *if the Claim has not been resolved in the Initial Period, either party may refer the matter to the Australian Institute of Chartered Accountants to appoint an independent expert (Expert) to resolve the Claim. Any decision of the Expert will be final and binding on the parties and Middletons Lawyers will be granted an irrevocable authority to release the ... Amount in accordance with the decision of the Expert. The costs of the Expert will otherwise be borne equally by the parties.'*

In rejecting the contention that the clause operated to oust the jurisdiction of the Court, Mr Justice Chesterman said in Zeke Services:

- '10 *The plaintiffs' submissions take as their starting point the well known proposition which finds expression in such cases as Lee v The Showmen's Guild of Great Britain [1952] 2 QB 329 at 342:*

"If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void..."

The principle is not to be too readily invoked, nor should courts be too astute to construe contracts so as to conclude that they are deprived of jurisdiction with respect to the relevant dispute. As Rich, Dixon, Evatt and McTiernan JJ said in Dobbs v National Bank of Australasia Ltd (1934) 53 CLR 643 at 652:

"A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might be required to adjudicate. It has never been the policy of the law to discourage the latter. The former have always been invalid. No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognized as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the Courts to enforce them ...

Parties may contract ... but yet make the acquisition of rights under the contract dependant upon the ... discretionary judgment of an ascertained ... person. Then no cause of action can arise before the exercise by that person of the functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction ...

What no contract can do is to take from a party to whom a right actually accrues ... his power of invoking the jurisdiction of the Courts to enforce it."

11 *Their Honours also said (at 654):*

"What at common law could not be done was to abandon by contract the power of invoking the Court's jurisdiction before the cause of action had been extinguished by an award ... But it was never considered that the Court's jurisdiction was ousted by an award, notwithstanding that it concluded the parties with respect to matters which otherwise would be determined by the Court. It is therefore a mistake to suppose that the policy of the law exemplified in the rule against ousting the jurisdiction of the Court prevents parties giving a contractual conclusiveness to a third person's certificate of some matter upon which their rights and obligations may depend.."

12 *In the same case Starke J said (at 656-7):*

"An agreement not to sue on a contract would doubtless be void, and so, I should think, would be a stipulation in a contract that no proceedings at law ... should be brought in respect of matters referred to arbitration ... But it has never been thought that the submission of disputes to arbitrators whose award was final and conclusive ousted the jurisdiction of the Courts. ... Again, the "conclusive evidence" clauses in various mercantile contracts have never been held to oust the jurisdiction of the Courts ... Certificates of engineers and architects under engineering and building contracts are common; they may certify facts, or approval, or sums to be paid ... In none of these cases is the jurisdiction of the Court ousted: all that has been done ... is to provide for the ascertainment of rights or facts by the parties or by some agreed person or tribunal, and to leave the enforcement of the parties' rights, so ascertained ... to the determination of the Courts of law."

13 *In The South Australian Railways Commissioner v Egan (1973-1974) 130 CLR 506 a clause in an engineering contract, when properly analysed, required any dispute between the Commissioner and a contractor 'to be referred to and decided finally and conclusively by the Chief Engineer for Railways.' **Menzies J described the clause (at 513) as 'a barefaced attempt to oust the jurisdiction of the courts.'** It amounted to a contractual denial of the contractor's right to seek redress from the courts. All the judges who decided the case held that another clause in the contract, which provided that no action could be brought by a contractor against the Commissioner to recover any money under, or arising out of any breach of, the contract without first obtaining a*

certificate from the Chief Engineer for the amount sued for, did not oust the jurisdiction of the court, and was valid.

14 *Gibbs J explained (at 519):*

‘The parties to a contract may by their agreement validly provide that the giving of a certificate ... by a third party shall be a condition precedent to the right to bring ... an action. Such a provision is construed, not as ousting the jurisdiction of the courts in respect of a cause of action already accrued, but as having the effect that no cause of action arises until the certificate ... is given ...’

The clause was valid because it made the existence of the certificate a condition precedent to the cause of action: there was no cause of action under the contract unless the certificate were obtained. The clause did not prevent recourse to the courts with respect to any cause of action which existed independently of the need to obtain a certificate.

15 ***Given this exposition of the law, I cannot accept that clause 7.6(3) purports to oust the jurisdiction of the courts. It is of the type which the High Court asserted has the approval of the common law. It does not prohibit access to the courts. It provides for a means by which an identified area of dispute, which might arise under the share sale agreement, should be resolved. It does not purport to commit all disputes which might arise under the contract to an expert, as did the clause which so angered Menzies J. The contract allows the parties to enforce their rights under the contract. The fact that some of those rights may depend upon the expert’s determination does not, as the authorities explain the law, deprive the court of jurisdiction so as to invalidate the clause.***

16 *Counsel for the plaintiffs referred me to the unreported decision of Heenan J of the Supreme Court of Western Australia, Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (CIV1742/1996; judgment given 2 December 1997), which considered a clause in an engineering contract referring all disputes arising out of the agreement to a referee who should investigate the dispute and make a decision on it ‘in any manner that he saw fit’ subject to an obligation to observe ‘the principle of procedural fairness’. The decision of the referee was to be final and binding.*

17 *Heenan J (at 6-7) observed that “... the Court will recognise as proper any procedure which the parties have agreed upon to settle a dispute ... Thus the Court usually will not intervene when the parties have referred a matter for the determination of an expert if such determination is within the referee’s particular field of expertise ...”. The clause was, however, struck down because it was:*

“... against public policy in that it (a) purports to oust the jurisdiction of the Court and (b) prescribes a procedure which is entirely unsuited to the resolution of disputes which may arise out of the contract.”

- 18 *The reasoning which led to these conclusions is not entirely clear but it seems that Heenan J took the view that the clause in question was of the type described by Menzies J in Egan. It was a clause which referred all disputes which might arise out of a complicated contract to a functionary who was given exclusive jurisdiction to determine them as he thought appropriate. The clause here in question is not of that type.’ (emphasis added)*

The issue has now been resolved at appellate level by the 2005 decision of the Western Australian Court of Appeal in Straits Exploration (Australia) Pty Ltd v Murchison United NL⁸ in 2005. The Court distinguished Baulderstone Hornibrook and followed the approach in the other Australian jurisdictions. Wheeler JA, with whom McLure JA and Murray AJA agreed, said

‘Ouster of jurisdiction

- [12] *The Master was of the view that both of the respondents' submissions were to be upheld. In relation to the first, the Master relied particularly upon the decision of Heenan J in Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (1997) 14 BCL 277. I deal with that case shortly. It is convenient first, however, to set out what I understand to be the general principles concerning expert determination provisions in contracts, and the effect of the dispute resolution clause of this particular agreement, when understood against those principles, in the absence of any considerations which might arise from Baulderstone. It is to be accepted for the purposes of the present appeal that the relevant dispute resolution clause is an "expert determination" clause rather than an "arbitration" clause. Both parties made it clear that that was the basis upon which they desired the appeal to proceed.*

- [13] *A brief history of the rule that parties cannot by contract oust the jurisdiction of the court is to be found in Mustill and Boyd, Commercial Arbitration 2nd ed (1989) at Ch 12. Various reasons suggested for that rule are there set out, and there is a brief discussion of the tension between it and other principles of law concerned with the ability of parties to enter into agreements.*

- [14] *There is increasingly, as a matter of commercial practice, a tendency of parties to provide for the determination of some or all disputes by reference to an expert. There are a number of reasons for that course, including informality and speed; suitability of some types of disputes for determination by persons with particular expertise; privacy; and a desire to resolve disputes*

8 (2005) 31 WAR 187; [2005] WASCA 241

in a way which may be seen as reasonably consistent with the maintenance of ongoing commercial relationships. The law has long recognised that those are proper considerations to which the Court should give appropriate weight, and that it is desirable therefore that parties who make such a bargain should be kept to it. The tendency of recent authority is clearly in favour of construing such contracts, where possible, in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court. A considerable number of cases demonstrating this trend are collected in the reasons for decision of Einstein J in The Heart Research Institute Ltd v Psiron Ltd [2002] NSWSC 646 at [16]–[33]. (See also Australian Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Aust) Pty Ltd [2005] VSCA 133 at [50] and Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] OSC 135 at [21].)

[15] *The effect of a valid expert determination clause, however, is not to oust the jurisdiction of the court, but to limit, in some circumstances, the matters which the court can consider. Prior to the conclusion of the expert determination procedure — that is, prior to the making of a determination — any party to a contract containing such a clause remains free to sue upon the contract, unless the contract itself makes compliance with some form of dispute resolution procedure a condition precedent to the enforcement of rights under the contract. In relation to the latter type of contract, the effect of the clause is not to invalidate an action brought in breach of it, but to provide a defence and to "postpone" but "not annihilate the right of access to the Court" (Freshwater v Western Australian Assurance Co Ltd [1933] 1 KB 515 at 523 per Lord Hanworth MR). The latter type of clause is not in issue here, however. Where a contract contains a dispute resolution clause, and a party who has not first proceeded in accordance with that clause sues on the contract, the court has, however, a jurisdiction to stay the proceeding so as, in a practical sense, to force the party to fall back upon the contractual procedure. The circumstances in which a stay will be granted are considered in Jacobs, Commercial Arbitration: Law and Procedure (2001) at [12.49/5]–[12.49/8]. There are no proceedings on the agreement in the present case, and it is therefore not necessary to consider those principles.*

[16] *Assuming an expert determination has been made, it will be liable to be set aside for fraud or collusion: see Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd (2001) 10 BPR 18,825 at [48] per Palmer J. It may also be set aside if it is "not in accordance with the contract". Quite what is meant by that expression is not always easy to determine. The principle, however, is well established. Its application was discussed in some detail in Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314 at 330–336 per McHugh J (see also Jacobs, "Impugning Expert Determinations in Australia" (2000) 74 ALJ 858).*

- [17] *Applying those general principles in the present case, there is nothing in the dispute resolution clause in question which purports to prevent a party from suing on the contract, prior to the making of an expert determination. Once a determination is made, cl 17.6 restates the principles governing the review of expert determinations, or may to a degree widen the ability of the Court to review a determination. The exception for fraud is consistent with the position I have described above. A determination which was not in accordance with the agreement — for example, by determining a question not referred to the expert — would appear to fall into the category of "manifest error". It is arguable that "manifest error" may also encompass mistakes of law or fact which would otherwise be unreviewable, but which appear from the face of the determination itself. Although cl 17.8 is entitled "Exclusion", its effect is not to exclude the jurisdiction of the court, but to make it clear that any party is free, despite the dispute resolution clause (and apparently at any time, including following the making of an expert determination), to seek an injunction to prevent a breach of the agreement. Further, cl 18.3 of the agreement, which expressly provides that the agreement is to be "governed by and construed in accordance with the laws of the State of Western Australia and the Parties agree to submit to the jurisdiction of the Courts of that State" seems to be inconsistent with an intention to oust the jurisdiction of the court and one would, in any case of doubt, construe the dispute resolution clause accordingly.*
- [18] *It is my view, therefore, that the dispute resolution clause in the present case is not void as an impermissible attempt to oust the jurisdiction of the court. It is, however, desirable to consider the correctness and the applicability of Baulderstone, since that was the decision which was followed by the Master and was the decision upon which the present respondent relied.*
- [19] *Baulderstone concerned a dispute resolution clause in an engineering contract which provided for reference to a third party referee in order to resolve disputes arising out of the contract. It provided for resolution by the referee of any disputes, whether or not they were within the referee's field of expertise. The issues for determination plainly involved matters of both fact and law. A dispute arose under the contract as to whether certain drawings were completed within time and otherwise as required by the contract and whether one party was entitled to payment for additional work, delay costs and variations. The party served notice on the other, requiring that the dispute be resolved in accordance with the dispute resolution clause. Importantly, meanwhile, by writ, a subcontractor engaged on the project commenced an action against one of the parties to the contract claiming damages resulting from the late supply of and defects in the drawings. By third party notice, that party claimed from the other party to the contract an indemnity or contribution in relation to that claim. The claim made in the third party notice, therefore, was essentially the same as the matter which it was sought to have dealt with under the dispute resolution clause. The plaintiff apparently sought to have*

Heenan J restrain the defendant from proceeding with the reference to the referee.

[20] *In that case, Heenan J concluded that an order should be made restraining the defendant from proceeding with the reference. Practical reasons given by his Honour for making that order included the expense and delay occasioned by the conduct of two sets of proceedings relating to the same dispute, with the potential for inconsistent findings, and the convenience of having the claim of the third party against the plaintiff determined at the same time as the dispute between the parties to the contract. In my respectful view, those were plainly very important considerations and would, alone, have justified the order which his Honour made.*

[21] *His Honour also considered that, because of the complexity of the issues arising, satisfactory determination of those matters by a referee was, in the circumstances of that case, "impossible". Questions of whether the task entrusted is inappropriate for an expert and of whether mixed issues of fact and law arise are — it is apparent from the summary in Jacobs Commercial Arbitration: Law and Practice, to which I have referred — questions which will be relevant when a court is considering whether court proceedings should be stayed because a contract contains an expert determination clause. It would appear, logically, that those considerations would also be relevant when the court is considering whether it is appropriate to stay the expert determination procedure under the contract in favour of court proceedings which had been instituted. Although the report is brief, and it is not possible to understand from the report alone precisely what was involved in the dispute, as a matter of principle it would appear that this ground alone would also have been one upon which it was appropriate for Heenan J to have made the order which he did.*

[22] *The most controversial of the three reasons given by his Honour for granting the stay was his finding that the relevant dispute resolution clause was against public policy as purporting to oust the jurisdiction of the court, and was therefore void. It has, in that respect, been the subject of some criticism: see Zeke Services at [17], Jacobs, Commercial Arbitration: Law and Practice at [12.49/8], Campbell, "Final and Binding Expert Determination and the Discretion to Stay Proceedings" (2005) 16 ADRJ 104 at 109–110. In my view, it is not possible to tell from his Honour's brief reasons precisely why it was that he reached the view that the clause in question was an attempt to oust the jurisdiction of the court. The dispute resolution clause itself, from which his Honour quoted, provided that the decision of the referee was to be "final and binding upon the parties, except that the referee may correct his decision where in his opinion it contains a clerical mistake, an error arising from an accidental slip or omission, a defect of form, a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the decision". It may be that, in the context of the contract as a*

whole, his Honour reached the view that the clause purported to exclude the jurisdiction of the Court to review the referee's decision for such matters as fraud, collusion, or failure to act in accordance with the contract. It is not necessary for present purposes, however, to consider that question

.[23] In the context of this case, it is sufficient to note that the dispute resolution clause in Baulderstone appears to be distinguishable from that in the present case which, as I have noted, appears to preserve and perhaps to widen the court's jurisdiction to review any concluded expert determination, and which does not purport to prevent a party from approaching the court, prior to the making of such a determination. I would understand Baulderstone as being no more than an application of the principles, which I have described earlier, to particular facts. It is not authority for any wider proposition and, in particular, is not authority for any proposition about the general invalidity of expert determination provisions in contracts. It does not suggest, much less require, the conclusion that the clause in issue in the present case is an impermissible ouster of the court's jurisdiction. (emphasis added)

Following the decision of the Western Australian Court of Appeal in Straits Exploration (Australia) Pty Ltd in 2005, it is clear that Australian Courts would not consider an agreement to refer disputes to Expert Determination an impermissible attempt to oust the jurisdiction of the Courts where the result of the Expert Determination is subject to enforcement or challenge as set out below in Parts 2 and 3 of this paper.

(b) An issue in dispute is not susceptible to Expert Determination

A further argument which has been raised against enforcing an Expert Determination agreement is that the relief which is sought in the dispute can only be given by a Court.

In Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture (1981) 146 CLR 206, the High Court held that, even though an Arbitration clause contained no express reference to the awarding of interest, the scope of the power was sufficient to imply a power in the arbitrator to award interest in accordance with the *Supreme Court Act*. Similarly, in IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 466, the NSW Court of Appeal held that, subject to the terms of the particular Arbitration clause, an arbitrator may make awards and orders of the kind contemplated by the *Trade Practices Act 1974 (Cth)*, notwithstanding that this Act expresses that it is '*the Court*' which may grant such relief.

This issue was considered more recently by Mr Justice Barrett of the NSW Supreme Court in *Savcor Pty. Ltd. v State of New South Wales*⁹. Savcor commenced court proceedings seeking, amongst other things, an order pursuant to s. 72 of the *Fair Trading Act (NSW) 1987*, declaring the contract void *ab initio* in consequence of alleged misleading or deceptive conduct¹⁰. The section empowers 'the Supreme Court' to make various orders if 'the Court' finds that there has been misleading or deceptive conduct or other breach of the *Fair Trading Act (NSW) 1987*. The State sought a stay of the Court proceedings in reliance on a 'tiered' dispute resolution clause in the contract imposing a contractual regime for determination of disputes which included Expert Determination. Savcor argued that an Expert could not award relief under s. 72 of the *Fair Trading Act (NSW) 1987*. It sought to distinguish the decision of the NSW Court of Appeal in *IBM Australia Ltd. v National Distribution Services Ltd.* (1991) 22 NSWLR 466, in which it was held that, subject to the terms of the particular Arbitration clause, an arbitrator may make awards and orders of the kind contemplated by s. 87 of the *Trade Practices Act (C'th) 1974*.

Mr Justice Barrett rejected that argument, saying:

32. 'it has been the law in this State since *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 that, subject always to the terms of the particular arbitration clause, an arbitrator may make awards and orders of the kind contemplated by the *Trade Practices Act 1974 (Cth)*. Such a power of an arbitrator can, of course, derive only from the relevant arbitration clause. That clause must be such that, upon its proper construction, the parties intend an unknown person who might in future become arbitrator to dispense remedies of a kind which a statute puts in the hands of courts. In *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 it was held that, even though an arbitration provision contained no express reference to the awarding of interest, the scope of the power was sufficient to imply a power to award interest in accordance with the *Supreme Court Act*. The same reasoning caused the Court of Appeal to conclude in the *IBM Australia* case that an arbitrator might give remedies which the *Trade Practices Act* allows a court to give.

33 Does the same hold good in the case of expert determination? It was argued by Mr Rudge SC, senior counsel for the plaintiff, that while an arbitrator and the functions and role of an arbitrator have characteristics which justify the

9 [2001] NSWSC 596; reported at (2001) 52 NSWLR 587, at p. 596.

10 s. 72 of the *Fair Trading Act (NSW) 1987* is in similar terms to s. 87 of the *Trade Practices Act (C'th) 1974*

conclusions in GIO v Atkinson-Leighton and IBM Australia, the same cannot be said of an expert acting under an expert determination clause. He pointed to provisions of the Commercial Arbitration Act which facilitate the proceedings of arbitrators and assimilate them in certain respects to court proceedings. Arbitrators may compel the attendance of persons and the production of documents. They may administer oaths. They must give reasons for their decisions. All these things are provided for in the Act.

34 *Mr Rudge also referred to the distinctions drawn between arbitration and expert determination in Boulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (1997) 14 BCL 277. Heenan J there observed that, as Lord Esher MR said in In Re Carus-Wilson and Greene (1886) 18 QBD 7, arbitration is "a judicial enquiry worked out in a judicial manner". An arbitrator, it was said, "must not only be impartial but, unlike an expert, must decide the dispute in accordance with the substantive law".*

35

36 *The various statutory incidents of and adjuncts to the role of an arbitrator were not in any way the source of the conclusions in GIO v Atkinson-Leighton and IBM Australia. Nor was any underlying assumption that an arbitrator would preside over some form of quasi judicial inquiry. **Those decisions turned wholly on what Mason J described in the former as "the real question", namely:***

"... whether there is to be implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter."

37 *That is also "the real question" here in relation to expert determination. It is quite conceivable that parties will refer to an expert the question whether, in the circumstances in which they are placed, a court would make an order, pursuant to ss.72(1) and 72(5)(a) of the Fair Trading Act, declaring their contract void, and that they will agree to abide by the expert's decision on that question as if it were an order made by a court under those sections. If such an agreement may be made expressly, it may also arise by implication if the terms of the referral clause so warrant.' (emphasis added)*

(c) An issue in dispute is not suitable for Expert Determination by the Expert appointed (or to be appointed)

In his judgment in *Badgin Nominees*, in relation to determination of issues of law by a non-legally qualified person, Mr Justice Gillard expressed a different view to Mr Justice Heenan in the earlier case of *Baulderstone Hornibrook Engineering Pty. Ltd*, saying:

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

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

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

134. They put it in place, it binds them'. (emphasis added)

Similar views were expressed in the Victorian decision of *Age Old Builders Pty Ltd v Swintons Limited*¹¹. On this issue, Mr Justice Osborn said, at paragraph 70:

'(a) First, the Tribunal appears to give substantial weight to the fact that the dispute went beyond matters in respect of which the building consultant had apparent expertise. There are two factual observations to be made with respect to this. The first is that the curriculum vitae of the building consultant which was supplied by the respondent to the appellant as evidence of his appropriateness before his appointment, is in fact so extensive as to suggest he could properly be regarded as

¹¹ [2003] VSC 307 (21 August 2003). An appeal from His Honour's decision was dismissed on other grounds by the Victorian Court of Appeal [2005] VSCA 217.

*having expertise in assessing claims under a contract of the type in issue. An expert may become an expert through experience as well as through qualification. It is very far from clear that the building consultant's expertise should be regarded as necessarily limited in the manner contemplated by the Tribunal. Secondly, the respondent put forward the building consultant as an expert presumably precisely because it believed he did have appropriate expertise to make an appropriate determination. **The essence of the agreement between the parties was that the expert would perform an agreed role. It was for the parties to that agreement to agree as to whether he was for their purposes sufficiently qualified to perform that role. In circumstances of this kind considerations of convenience and cost effectiveness may lead to an agreement that a person having some relevant expertise (only) is to be regarded as sufficiently expert by the parties. I can see nothing in such an agreement which is improper or transforms the character of the expert's role into that of an arbitrator. Once it is accepted as the Master of the Rolls said in Carus Wilson that there is an intermediate category which is not to be regarded as arbitration, where though a person is appointed to settle disputes that have arisen, it is still not intended he or she should enter into an inquiry in the nature of a judicial inquiry, the extent of the expert's expertise cannot be decisive of the characterisation of his role.**' (emphasis added)*

In the Queensland decision in Zeke Services Pty Ltd v Traffic Technologies Limited¹², Mr Justice Chesterman took a slightly different approach to that taken in Victoria in Badgin Nominees and Age Old Builders, and in New South Wales in The Heart Research Institute (and other cases). His Honour said, in relation to this issue:

*'19 There is an undoubted jurisdiction to stay a legal proceeding where the parties have by contract agreed that their dispute shall be determined by means other than curial adjudication. As Lord Mustill explained in Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd & Ors [1993] AC 334 at 352, there is an "inherent power of the court to stay proceedings brought before it in breach of an agreement to decide disputes in some other way." **The basis for the power was said to be a "wider general principle ... that the court makes people abide by their contracts and ... will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined."** (Per MacKinnon LJ in Racecourse Betting Control Board v Secretary for Air [1944] Ch 114 at 126.)*

20 The jurisdiction has been recognised in a number of cases, in this country, at first instance: Badgin Nominees Pty Ltd v Oneida Ltd Anor [1998] VSC 118;

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The Heart Research Institute Ltd v Psiron Ltd [2002] NSWSC 646; Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd [2003] NSWSC 1134.

I have not included cases concerning a stay of proceedings where the parties had agreed that disputes between them should be referred to arbitration. Those cases are regulated by the various arbitration statutes.

- 21 ***The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner. This factor was emphasised by the House of Lords in Channel Tunnel, by the High Court in Dobbs and Huddart Parker Ltd v The Ship Mill Hill and Her Cargo (1950) 81 CLR 502 (an arbitration case) and by Gillard J in Badgin. However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate.***
- 22 ***Ordinarily I would think that that onus can be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism the parties have chosen. This consideration includes the procedure, if any, for which the parties have contracted, and the qualification of the expert or referee to embark upon the determination of the dispute. The parties are presumed not to have intended that their dispute should be resolved by someone not qualified for the task, or in some inappropriate manner. This presumption, based on legal theory, removes any violence to the agreement which refusing the stay would otherwise have done.***
- 23 ***There is a clear distinction between arbitration and expert determination. The former involves a more or less formal adjudication of the respective cases put before the arbitrator. The court exercises a degree of supervision over the conduct of arbitrations and arbitrators, and minimum standards of procedural fairness are required. There are no such safeguards with respect to expert determination. Lord Esher MR explained the ordinary case of an expert determination In Re An Arbitration Between Dawdy and Hartcup (1885) 15 QBD 426 at 430:***

“... if a man is, on account of his skill ... 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 ... (He has) to determine the matter by using solely (his) own eyes, and knowledge, and skill.”

Einstein J (at [16]) in Heart Research Institute noted that “Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind.” The most common examples are where a valuer is appointed to fix the rent of demised premises or a man experienced in a particular line of business is called on to fix the price of stock in trade, or say whether it is saleable.

24 *It follows that if a dispute is not of a kind which can be determined in an informal way by reference to the specific technical knowledge or the learning of the expert, it may be appropriate to refuse a stay. Complicated disputes of fact or of law may be of such a character.*

25 *In Cott UK Ltd v FE Barber Ltd (1997) 3 All ER 540 the court refused to stay an action on a contract which contained a clause referring disputes to the determination of an expert on the grounds that:*

(a) *There were no rules identified in the contract or in the expert’s professional association governing the mode of his determination.*

(b) ***The expert appointed had no experience in the areas of dispute.***

(c) *The contract gave no guidance as to the rules or principles pursuant to which the expert was to approach his determination.*

(d) ***The nature of the dispute itself – a claim for damages for breach of contract – was inapt for determination by an expert.***

26 ***Gillard J in Badgin doubted the relevance of some of the matters relied upon by the court in Cott and I respectfully share those doubts. The second and fourth points do, with respect, appear to be of substance. Gillard J thought that:***

“... the fact that there were issues concerning a number of legal questions, whether there was a breach ... of the agreement and whether there was an entitlement to damages are matters which may be of some importance in deciding against the grant of a stay on the basis that it could not have been the common intention of the parties to refer disputes of mixed facts and law to an untrained and inexperienced person ... [I]n the end it is a question of what the term of the contract provides and the nature of the dispute.’

27 ***The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence***

of the first: expert determinations are, at least in theory, expeditious because they are informal and because the expert applies his own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar. The less amenable the dispute is to this mode of resolution, the less appropriate this paradigm will be and the more likely it will be that the court will decline to stay an action brought on the contract so as to allow the expert determination to proceed.

- 28 *All but three of the defendants' complaints are suitable for expert determination. The expert is an accountant. Most of the complaints concern the state of the company's accounts and whether they properly recorded the company's liabilities. It would seem entirely appropriate that an accountant should determine these questions. If the matter went to trial the judge would be informed by expert evidence from accountants about these matters. All that is involved in the determination of these complaints is that the accountant uses his professional knowledge in a perusal of the company's accounts and other records. The determination is likely to be quick and relatively cheap. There can be no sensible objection to the parties being held to their bargain that those disputes be resolved in that way.*
- 29 *The same is not, I think, true of two categories of complaint: those concerning the fictitious employment of staff and the alleged misrepresentation as to bad debts. They are described in paragraphs 5(d), (e) and (h) of these reasons.*
- 30 *The second of these categories of complaint involves an alleged misrepresentation that all debts owing to the company would be recovered. The misrepresentation is said to have been made by the omission from the company's accounts of any provision for bad or doubtful debts. If that were a proper description of the complaint it may well be the sort of dispute an accountant could readily resolve. There is, however, more to it. For a start, there must be a doubt that the omission gives rise to the representation alleged. There are well known difficulties in basing actions for damages on silence. I would have thought it more likely that the omission would, at most, amount to a representation that the company's officers had insufficient reason to think that all debts would not be paid. The dispute, therefore, raises a question of what the company's officers believed about the recoverability of the debts and the reasonableness of any grounds for that belief. There are, therefore, questions of mixed fact and law to be resolved as to whether a representation was made and the content of any representation. Such questions are more readily answered by a lawyer than an accountant. Whoever makes the determination, the process must involve some argument, legal in nature. This is not the paradigm of applying one's special knowledge to one's own observations.*
- 31 *The same considerations apply to the complaint about fictitious employees. There is clearly a dispute of fact concerning whether these people were employed by the company and performed services for it. It does not seem likely*

that the question can be resolved merely by an examination of the company's records. No doubt they show payments to the people in question on the basis that they were employees. The question is whether the reality was different to that which is recorded. This, too, will involve an inquiry and an examination of employer and employees. It is not a matter with respect to which an expert accountant is particularly well equipped to answer. It is more the province of a trained fact finder, such as a judge or arbitrator.

32 ***It is at this point that the absence from the agreement of procedural rules to be observed by the expert becomes of importance. Their absence is unremarkable in a case where the expert relies upon his own senses and learning, but where he is obliged to investigate disputed questions of fact and/or law, and come to a conclusion about them, the lack of a methodology for the inquiry is significant. An expert, unless obliged to do so by the contract or the terms of his appointment, does not have to comply with the requirements of procedural fairness or natural justice. The agreement does not contain such a requirement.***

33 ***Equally significant is the point that as long as an expert acts within the terms of the contract pursuant to which he was appointed the parties are bound by his determination. Lawton LJ described the position well in Baber v Kenwood Manufacturing Co Ltd (1978) 1 LLR 179 at 181:***

“They were to be experts. Now experts can be wrong; they can be muddle-headed; and, unfortunately, on occasions they can give their opinions negligently. Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening.”

34 ***If an expert has conducted his examination in accordance with the contract, that is he has determined or valued that which he was to do, the only basis on which the determination can be set aside is dishonesty. (See the judgment of McHugh JA in Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314 and, more generally, ‘Impugning Expert Determinations in Australia’ by Marcus S Jacobs QC (2000) 74 ALJ 858.)***

35 ***These three complaints are not readily amenable to expert determination. That paradigm does not accommodate these aspects of the dispute, which require an adjudication between opposing contentions. The answers cannot be found in expert observation, nor informal, one sided, fact finding. The designated expert, an accountant, has no obviously relevant skill or learning to equip him for an adjudication of disputed fact. This point was important to Heenan J in Baulderstone. The determination may be made without hearing both sides of the dispute and, therefore, without giving them, or any one of them, an opportunity to bring relevant evidence to the expert's attention. One complaint requires an answer to a question of law or mixed fact and law,***

more suitably given by a lawyer. These points were important to the outcome in Cott.

- 36 *When one adds to these concerns the point that should the expert fall prey to muddle, or make a mistake, his determination will nevertheless be binding in the absence of fraud, a good ground has been shown for refusing to stay the action.’ (emphasis added)*

It can be seen that there is a difference between the approach respectively taken in the Western Australian and Queensland decisions of *Baulderstone Hornibrook* and *Zeke Services Pty Ltd*¹³, and the approach taken in Victoria in *Badgin Nominees* and in New South Wales in *The Heart Research Institute* (and other cases).

It is worth noting, in relation to this issue, that Rule 3(1) of the IAMA *Expert Determination Rules* expressly provides as follows:

‘The parties agree that the Expert is an expert in the subject matter of the Dispute.’

While Rule 3(1) of the IAMA *Expert Determination Rules* has not been the subject of judicial consideration, a party which agrees to Expert Determination under those Rules should be precluded from arguing to the contrary. This position is reinforced by Rule 12 of the IAMA *Expert Determination Rules*, which provides as follows:

‘RULE 12 Waiver of Right to Object

1. *Subject to any rule of law or equity or written agreement of the parties to the contrary, if a party to the Process takes part, or continues to take part, in the Process without making within a reasonable time thereafter any objection:*

- a. *that the Expert lacks substantive jurisdiction;*
- b. *that the Process has been improperly conducted,*
- c. *that there has been any other irregularity affecting the Expert or the Process,*

then that party shall be deemed to have waived its right to make such objection later, before a Court, unless it shows that, at the time it took part or continued

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to take part in the Process, it did not know and could not with reasonable diligence have discovered the grounds for the objection.

2. *Subject to any Statute Law or principle of common law or equity, or written agreement of the parties to the contrary, where the Expert rules that he or she has substantive jurisdiction and a party to the Process who could have questioned that ruling in a Court does not do so within any time fixed by the Expert (or if no time is fixed, within a reasonable time), then that party shall be deemed to have waived any right it may otherwise have had to later object to the Expert's substantive jurisdiction on any ground which was the subject of that ruling, and shall be deemed to have submitted to the Expert's jurisdiction.'*

(d) Uncertainty in the procedure to be followed

It has been argued that an Expert Determination agreement should not be enforced because the terms of the agreement are too uncertain for the agreement to be enforceable in law by failing to specify with sufficient particularity the procedure to be followed by the Expert.

This issue was considered by Mr Justice Cole in the New South Wales Supreme Court, in *Triano Pty Limited v Triden Contractors Limited*¹⁴, where his Honour said, at p. 307:

'Whilst recognising that there may be utility in the Court determining procedures to be followed in an expert determination, in my opinion the Court has no jurisdiction to do so. The Court has power in an arbitration subject to the Commercial Arbitration Act 1974 to make interlocutory orders in relation to arbitration proceedings (Section 47). However the contemplated proceedings are for a determination by an expert, and are not intended to be an arbitration. That seems clear from the provisions of Clause 25 and the draft agreement advanced either by the experts or Triarno. The difference in function between an independent expert and an arbitrator is well recognised. See for instance Hudsons Building Contracts 3rd Ed., Volume 1, p. 707-717 and cases there collected; In Re: Carus-Wilson and Greene 1887 18 QBD 7 at 9; Legal and General Life of Australia Limited v A Hudson Pty Limited 1985 1 NSWLR 314 at 336 per McHugh JA (as he then was).

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

14 (1992) 8 BCL 305

That approach was followed by Mr Justice Rolfe in *Fletcher Construction Australia Limited v MPN Group Pty. Ltd.*, in which he referred with approval to the decision of Mr Justice Cole in *Triamo Pty Limited v Triden Contractors Limited*, and said, at pp. 23 – 24:

‘In my opinion, this decision is authority for the proposition, which I consider is correct, that in the absence of agreement as to procedures, they are to be decided by the expert. There is, accordingly, no uncertainty of the type for which MPN contended.

In various clauses of the present agreements there is provision for disputes to be determined pursuant to clause 6.1 but, upon a consideration of the whole document, I reach the conclusion Cole J reached, namely that there is nothing in the terms of the agreements, which suggests or necessarily implies that a determination by the independent expert, which is favourable to one party or the other, should result in the unsuccessful party paying the costs of the independent experts. Nor, in my opinion, is there any express or implied power in the independent expert conferred by the Deed to make an order for costs.’ (emphasis added)

In the result, Mr Justice Rolfe held that an Expert Determination clause was not void for uncertainty because it made no provision about procedural matters such as whether the parties could be legally represented, whether the parties could be compelled to provide documents, who should bear the costs etc.

Accordingly, unless the parties have agreed between themselves on matters of procedure, an Expert Determination will proceed largely as the Expert sees fit. In those circumstances, the Expert will not have to apply the rules of procedural fairness usual in an Arbitration (eg. calling of witnesses, cross-examination, not receiving submissions from one party in the absence of the other etc.) and will not have to provide reasons for the determination.

On the issue of certainty, in *The Heart Research Institute Limited v Psiron Limited*¹⁵, Mr Justice Einstein set out the relevant principles in the following terms:

‘35 The plaintiff contends that the procedure to be adopted pursuant to the clause is sufficiently certain for there to be little doubt as to the circumstances in which the clause operates and as to the process to be adopted by the Expert - Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194 at

15 [2002] NSWSC 646 (25 July 2002)

206; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; *State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited*, [2002] NSWSC 178 para 38.

- 36 *The central issue raised by the defendant concerns **the well-established proposition that agreements to participate in alternative dispute resolution procedures are enforceable in principle provided the conduct required of the parties for participation in the process is sufficiently certain.** See *Hooper Bailie Associated Ltd. v Natcon Group Pty. Ltd.* (1992) 28 NSWLR 194; *Elizabeth Bay Developments Pty. Limited v Boral Building Services Pty. Limited* (1995) 35 NSWLR 709; *Aiton Australia Pty. Limited v Transfield Pty. Limited* (1999) 153 FLR 236; *Morrow v Chinadotcom* [2001] NSWSC 209; *Banabelle Electrical Pty. Limited*, [2002] NSWSC 178.’ (emphasis added)*

In *The Heart Research Institute Limited v Psiron Limited* , Mr Justice Einstein then repeated what he previously said in *Aiton*, in the following terms:

‘37 In *Aiton*:

- *emphasis was given to the statement by Giles J in Hooper Bailie:*
"What is enforced is not cooperation and consent but participation in a process from which consent might come". [Emphasis given in Aiton]
- *The matter was put as follows:*
"It is for this reason that the process from which consent might come must be sufficiently certain. This is not to suggest that the process need be overly structured. Certainly, if specificity beyond the essential certainty were required, the dispute resolution procedure may be counter-productive as it may begin to look much like litigation itself." [Emphasis added in judgment]

On the facts of the case, his Honour found that the agreement was too uncertain to be enforceable, for the following reasons, set out at paragraph 40 of his judgment:

- ‘40 *The real question of substance for determination concerns the defendant's submission that in an important, indeed critical sense, the approach which should be taken by the court presently should follow the approach taken in Elizabeth Bay Developments. The defendant's submissions in the sense are follows:*
- *The similarity between the contractual provisions and the Guidelines considered in Elizabeth Bay and clause 18 and the Guidelines in the present matter is noteworthy.*

- *In particular in both instances the Guidelines provide that the parties are to sign an expert determination appointment agreement the terms of which are required to be “consistent with these guidelines”.*
- *In neither case can the expert determination commence until the executed agreement is held by the ACDC. See paragraphs 4 and 5 of the Guidelines at JC1 Tab 39.*
- *In the present case, again as in Elizabeth Bay Developments the guidelines do not call up any particular form of mediation agreement.*
- *Nevertheless, a copy of the agreement which the expert selected by HRI, is in evidence at JC1 Tab 48. Its terms illustrate the point made by Giles J in the earlier decision. Terms which are included in it but which are not dictated by the Guidelines include the following:*
 - (a) *the proposed expert was not prepared to embark on the mediation unless that agreement (no other) was signed by the parties (Tab 48 Page 1);*
 - (b) *the recitals (a) and (b) would give rise to an estoppel by deed which would not be accepted by Psiron (Tab 48 page 4);*
 - (c) *clause 8(a) requires “total confidentiality” in relation to the expert determination and clause 8(d) requires every aspect of every communication within the expert determination to be without prejudice (Tab 48 pages 6 and 7).*
 - (d) *by clause 10 the parties release the ACDC and the expert from any tortious claim they might have in respect of the expert determination. This right is an important right which the parties would otherwise have see Goldspar Australia Pty. Limited v City of Sydney [2001] NSWCA 246.*
- *It follows that the agreement to submit to expert determination, if otherwise valid, is unenforceable.’*

2. ENFORCING THE RESULT OF THE EXPERT DETERMINATION

Unlike Arbitration under the *Uniform Commercial Arbitration Acts*, where an Arbitrator's award may be enforced as if it were a judgment or order of the Court (s. 33), to obtain the fruits of a successful Expert Determination, a party must commence proceedings in a Court of competent jurisdiction for a declaration or order for specific performance of the agreement by which the parties agreed to the resolution of the dispute by Expert Determination.

The unsuccessful party may then seek to resist the making of such a declaration or order on the basis that the Court should, in its discretion, not enforce the Expert Determination agreement for one of the reasons referred to above or, alternatively, challenge the result of the Expert Determination on the bases set out below.

3. CHALLENGING THE RESULT OF THE EXPERT DETERMINATION

Parties to an Expert Determination cannot 'appeal' from that determination. The case law make it clear that the only basis on which an aggrieved party may challenge the result of an Expert Determination is by establishing that the Expert has not conducted himself or herself in accordance with the express or implied terms of the agreement for Expert Determination. Any such challenge would usually be made in opposing an application by the successful party to enforce the Expert Determination.¹⁶

The relevant principles were summarised in the following terms by Mr Justice Barrett in *Savcor Pty. Ltd. v State of New South Wales*¹⁷, at pp. 596 - 597:

'35 *Mr Rudge also made reference to the cases which have examined the enforceability of the determinations of experts and the grounds on and extent to which those determinations may be reviewed or corrected by courts. He referred to the decision of Rolfe J in Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co Ltd (unreported, NSWSC, 12 February 1998) and to the*

16 An aggrieved party may also choose to bring an action against the Expert in negligence or breach of contract (see Part 5 below in this paper).

17 (2001) 52 NSWLR 587

*cases there cited, particularly the decision of the Court of Appeal in Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314. The relevant authorities on this are conveniently collected and discussed by Palmer J in Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd [2001] NSWSC 405 and by Mr M S Jacobs QC in "Impugning Expert Determinations in Australia" (2000) 74 ALJ 858. It is sufficient to note, for present purposes, that there is no equivalent, in relation to a determination of an expert, of the judicial review and judicial enforcement jurisdiction conferred by ss.38 and 33 of the Commercial Arbitration Act in the case of an arbitrator's award. **In the absence of factors such as fraud and collusion, an expert determination declared by contract to be final and binding is open to challenge only to the extent that it is not in conformity with the enabling contract, including such implied terms as there may be as to the conduct and procedures of the expert.**' (emphasis added)*

Similar views were earlier expressed by Mr Justice Rolfe in Fletcher Construction Australia Limited v MPN Group Pty. Ltd.¹⁸, who said, at p. 18:

'The effect of the clause is to make the decision of the expert final and binding provided the matters referred to him are ones which the agreement contemplates. The expert's decision is, however, susceptible of attack in a Court if there is a failure to comply with the contract or there is some vitiating factor relevant to the decision.'

The extent to which a 'final and binding' determination may be challenged was considered by McHugh JA of the New South Wales Court of Appeal (as he then was) in Legal and General Life of Australia Ltd v A Hudson Pty Ltd¹⁹, which was a case concerning a rent review clause, where the rent review was being carried out by a qualified valuer. His Honour said, at p. 335:

*'In my opinion the question whether a valuation is binding upon the parties depends in the first instance upon the terms of the contract, express or implied. This was pointed out by Sir David Cairns in the Court of Appeal in Baber v Renwood Manufacturing Co Ltd (at 181). **A valuation obtained by fraud or collusion can usually be disregarded even in an action at law. For in a case of fraud or collusion the correct conclusion to be drawn will almost certainly be that there has been no valuation in accordance with the terms of the contract. As Sir David Cairns pointed out, it is easy to imply a term that a valuation must be made honestly and impartially. It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of a valuer's mistake***

18 NSW Sup Ct, 14 July 1997, unreported

19 (1985) 1 NSWLR 314

*or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is “final and binding on the parties”. By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision..... While a mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties but a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. **In each case the critical question must always be: Was the valuation made in accordance with the terms of the contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should not have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract.**’ (emphasis added)*

Later cases make it clear that some errors (including factual errors) by the Expert may be categorised as a ‘*jurisdictional error*’, which may be reviewed by the Court. In the decision of the New South Wales Court of Appeal in *Holt v Cox*,²⁰ Mason P (with whom Priestley JA agreed) said, at pp. 596 – 597:

‘.... the modern cases show that a certificate may be “valid” though it embodies some factual error without necessarily exposing the expert valuer to liability in negligence. It appears to me that the trend in recent years has also been influenced by a recognition that courts have no greater expertise than expert valuers; and that where parties have chosen voluntarily to commit the determination of valuation to an expert, judicial restraint is an appropriate response.

*Nevertheless, it is recognised that there are limits to the types of error which will be overlooked in the courts, even in the most robust statements of the modern position. As Sir Frederick Jordan once reminded us, “there are mistakes and mistakes”: Ex parte Hebburn Ltd; Re Kearsley Shire Council (1947) 47 SR (NSW) 416 at 420. Especially where, as here, the valuer exposes his or her reasoning process, then **the ultimate issue for judicial determination remains that of deciding whether the valuation was in accordance with the parties’ contract. A close reading of McHugh JA’s judgment in Legal & General indicates that his Honour was not propounding***

20 (1994) 23 ACSR 590

*the view that a valuation will stand regardless of error. Rather he was making the point that mistake is not itself a ground of vitiation: see also Wamo Pty Ltd v Jewel Food Stores Pty Ltd (1983) ANZ Conv R 50. A valuation may contain factual error or embody consideration of matters which should not have been taken into account, but it does not follow that the result is outside that which the contract contemplated would be within the realm of determination by the valuer. As McHugh JA makes plain, “in each case the critical question must always be: Was the valuation made in accordance with the terms of [the] contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value” (emphasis added). The statement in the next sentence (“Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account”) must be read in the same context. His Honour is not saying that these matters are never relevant. Rather he is saying that they are not relevant if the valuation was in accordance with the terms of the contract. **I have already mentioned Sir Frederick Jordan's apophthegm about “mistakes and mistakes”. It was uttered in a mandamus case. It seems to me that administrative law provides a useful analogy in the present context. There, the decision maker has an area within which he or she may make mistakes, even mistakes of relevance or law, without failure to exercise the jurisdiction conferred, or exposing the decision to quashing. It is only those mistakes which involve a failure to address something which the statute requires to be taken into account that will expose the decision to judicial review on jurisdictional grounds: Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363 at 385 (Deane J); Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 39 ; 66 ALR 299. The criteria of discrimination between “mistakes and mistakes” are not determinable in advance: cf R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd (1979) 144 CLR 45 at 49 ; 27 ALR 321. ’** (emphasis added)*

A similar approach was taken in the August 2006 decision of the Victorian Court of Appeal in AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd anor,²¹ in which Nettle JA (with whom Maxwell P and Bongiorno JA agreed) analyzed ‘*jurisdictional error*’ in terms of whether or not the error occurred in the exercise of a judgment, opinion or discretion entrusted to the expert. His Honour said:

*[51] I agree with the (trial) judge that the question of whether it is open to review an expert determination on the ground of error is in the first place to be decided according to whether the determination answers the contractual description of what the expert was required to determine. **I also agree with the judge that the question of whether an error in determination deprives the determination of compliance with the contractual description of what the expert was required***

21 [2006] VSCA 173

to determine is in the first place to be answered according to whether the error occurred in respect of a task which the contract entrusted to the expert. As Mason, P. explained in Holt v Cox, although mistake is not itself a ground for vitiation of a final and binding expert determination, a mistake may still be of such a nature that the resultant determination is beyond the realm of contractual contemplation — beyond anything which the parties may be supposed to have intended to be final and binding — and therefore susceptible to review.

[52] *The situation is analogous to that which faces a court in a cases of judicial review of administrative error. Just as an administrative decision maker has an area within which he or she may make mistakes without relevant consequence, so too an expert appointed under contract has an area within which the contract contemplates that he or she may make mistakes without relevant consequence. Similarly, just as there are some administrative mistakes which amount to jurisdictional error, and so expose a decision to judicial review, those appointed under contracts to make determinations may make errors which are beyond the area of tolerance which it is to be supposed the contract had in view.*

[53] *Therein lies the distinction drawn in some of the authorities, and observed by the judge in this case, between an error in the exercise of a judgment, opinion or discretion entrusted to an expert, and an error which involves objective facts or a mere mechanical or arithmetical exercise. Subject to the contract in question, it is easier to suppose that parties to a contract contemplate that an error of the former kind be beyond the realm of review than it is to think that they intend to be fixed with errors of objective fact or in processes of mechanical calculation.*

[54] *As this case demonstrates, however, matters are likely to be more complex where error occurs in the course of an exercise which is partly comprised of discretion, judgment or opinion and partly constituted of objective fact or mechanical calculation. In some such cases, the overriding discretionary or judgmental character of the exercise may so inform each step in the determination as to put even those steps which are matters of objective fact or mere mechanical calculation beyond the scope of permissible review. In other instances it may appear that, despite the overall character of the exercise, the various steps in the determination are severable, according to whether they are essentially discretionary or judgmental or simply matters of objective fact or mechanical calculation, and that those steps which are of the latter kind are within the scope of permissible review. The question in each case is what the parties should be presumed to have intended, and that is to be determined objectively from the terms of the contract, bearing in mind the context in which it was created.’ (emphasis added)*

An interesting question arises if the Expert Determination agreement does not expressly provide that the Expert's determination shall be according to law. In those circumstances, the case law indicates that an Expert's determination should be made in accordance with law. In *Fermentation Industries (Aust) Pty. Ltd. v Burns Philp & Co Ltd.*²², the plaintiff argued that the Expert was proposing to pursue a course, in arriving at his determination (in fixing a price), which involved a misinterpretation of the agreement under which the price was to be fixed. Such a misinterpretation would constitute an error of law, given that the proper construction of a contract is a question of law²³. After a review of the authorities, Mr Justice Rolfe said, at pp. 34 to 35:

'The conclusion to which I have come is that the views expressed by Mr Finney in relation to items 5 & 6 constitute, in my respectful opinion, a misinterpretation of the supply agreement. If he pursues a course of fixing the price having regard to this misinterpretation then, in my view, he will not be acting conformably with the agreement between the parties for the determination of the selling price to FI. He will be imposing another pricing regime, which the agreement relevantly for the present purposes.... does not countenance, and, therefore, he will be going beyond considering the correctness of the calculation of the prices. This he is not permitted to do. If he fails to act in accordance with the agreement, then conformably with the authorities to which I have referred, he acts outside the charter conferred on him by it and his determination is amenable to review by the Court.' (emphasis added)

On this approach, an error of law would be 'a vitiating factor relevant to the decision', using the words of Mr Justice Rolfe in *Fletcher Construction Australia Limited v MPN Group Pty. Ltd.*, and accordingly subject to correction by the Court.

4. DIFFERENCES BETWEEN EXPERT DETERMINATION AND ARBITRATION

There may be situations where a question arises as to whether a particular dispute resolution procedure is an Expert Determination or an Arbitration.

(a) Home Building Legislation

22 NSW Sup Ct, 12 Feb 1998, unreported

One such situation arises under home or domestic building legislation in New South Wales and Victoria, in relation to agreements to refer future disputes to Arbitration. Section 7C of the *Home Building Act 1989 (NSW)* provides:

'A provision in a contract or other agreement that requires a dispute under a contract to be referred to arbitration is void.'

Section 14 of the *Domestic Building Contracts Act 1995 (Vic)* similarly provides:

'Any term in a domestic building contract or other agreement that requires a dispute under the contract to be referred to arbitration is void'.

In *Age Old Builders Pty Ltd v Swintons Limited*²⁴, Mr Justice Osborn allowed an appeal from a decision of the Victorian Civil and Administrative Tribunal, which had held that an agreement of the parties to refer an existing dispute to Expert Determination under the 1997 IAMA Rules was void pursuant to s. 14 of the *Domestic Building Contracts Act 1995 (Vic)*.

In relation to whether a dispute process was an Expert Determination rather than an Arbitration, his Honour said:

'68 The Tribunal also set out the relevant "rules" for the expert determination of commercial disputes which the parties adopted in the present case as the basis on which the building consultant was retained. In my view a consideration of these rules demonstrates the following:

(a) The parties expressly agreed that the expert was not an arbitrator. They agreed:

"The expert is not an arbitrator of the matters in dispute and shall not be deemed to be acting in an arbitral capacity. The Process or any process conducted under or in any connection with these Rules is not an arbitration within the meaning of any legislation or rules dealing with commercial, industrial, court annexed or any other form of

23 See, for example, *Pioneer Shipping Limited v B.T.P. Tioxide Limited* (1982) AC 724, per Lord Diplock at p.736

24 [2003] VSC 307 (21 August 2003). An appeal from His Honour's decision was dismissed by the Victorian Court of Appeal [2005] VSCA 217, on the basis that the prohibition in s. 14 of the Act applied only to agreements to refer future disputes to arbitration, and did not apply to an agreement to refer an existing dispute to arbitration. The members of the Court did not deal with the other basis of the decision of Osborn J, that the agreement was for expert determination and not arbitration.

arbitration. Any conference conducted under these Rules is not a hearing conducted under any legislation or rules dealing with commercial, industrial, court annexed or any other form of arbitration."

Such an agreement cannot be conclusive of the characterisation of the referral (see See Ajzner v Cartonlux Pty Ltd [1972] VR 919). But it must be regarded as significantly indicative of the intention of the parties as to the nature of the task the building consultant was to undertake. In Badgin Nominees Pty Ltd v Oneida Ltd & Anor [1998] VSC 188, Gillard J stated:

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

(b) Although the parties might be required by the building consultant to attend a preliminary conference the agreed Rules simply did not provide for any right to a hearing as to the substance of the dispute. The Rules provided a discretion to the building consultant to convene a preliminary conference "to make such procedural and administrative arrangements as are necessary."

(c) The core procedure provided for was simply the making of initial submissions in writing by one party, a submission in response by the respondent and a submission in reply. If, but only if, the building consultant decided "further information or documentation is required to determine the dispute" the building consultant might require further submissions or documentation and/or call a conference between the parties and the expert. If a conference were called it might take the form of a view and at the conference the expert might permit the making of further submissions and the provision of further information.

69. In my opinion the Rules simply do not provide for an inquiry in the nature of a judicial inquiry. After the conclusion of the initial submission process no adversarial process is envisaged. Further the process thereafter is at the discretion of the expert. Most significantly the parties do not have the fundamental right to a hearing. It is not to the point that this process requires a "determination", no referral to an expert for determination could be expected to do otherwise than envisage a rational determination. Nor is it to the point that the expert is required to make his determination according to law and in accordance with procedural fairness. The parties and the expert are entitled to agree as to these matters and they are subsidiary to his essential role. The notion of procedural fairness is a flexible one applicable to a process which falls short of an inquiry in the nature of a judicial inquiry (cf Kioa v West (1985) 159 CLR 550 at 585 per Mason J: "In this respect the

expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case."). Therefore, the fact an expert may be bound to accord procedural fairness (as that notion is applicable to the particular case) to the parties does not necessarily give the process the character of a judicial inquiry or an arbitration (see *Sutcliffe v Thackrah* [1974] AC 727; *Arenson v Casson Beckman Rutley & Co* [1977] AC 405). **The fact that the process results in a determination which is agreed to be final and binding is also hardly surprising. An expert determination would be no more than an advisory opinion if it did not have this effect. In summary although the Rules provide for some matters which would be appropriate in an arbitration the essential character of the procedure was not that of an arbitration.**

70. There are three further aspects of the Tribunal's reasoning which deserve specific consideration.

(a) First, the Tribunal appears to give substantial weight to the fact that the dispute went beyond matters in respect of which the building consultant had apparent expertise. There are two factual observations to be made with respect to this. The first is that the curriculum vitae of the building consultant which was supplied by the respondent to the appellant as evidence of his appropriateness before his appointment, is in fact so extensive as to suggest he could properly be regarded as having expertise in assessing claims under a contract of the type in issue. An expert may become an expert through experience as well as through qualification. It is very far from clear that the building consultant's expertise should be regarded as necessarily limited in the manner contemplated by the Tribunal. Secondly, the respondent put forward the building consultant as an expert presumably precisely because it believed he did have appropriate expertise to make an appropriate determination. **The essence of the agreement between the parties was that the expert would perform an agreed role. It was for the parties to that agreement to agree as to whether he was for their purposes sufficiently qualified to perform that role. In circumstances of this kind considerations of convenience and cost effectiveness may lead to an agreement that a person having some relevant expertise (only) is to be regarded as sufficiently expert by the parties. I can see nothing in such an agreement which is improper or transforms the character of the expert's role into that of an arbitrator. Once it is accepted as the Master of the Rolls said in *Carus Wilson* that there is an intermediate category which is not to be regarded as arbitration, where though a person is appointed to settle disputes that have arisen, it is still not intended he or she should enter into an inquiry in the nature of a judicial inquiry, the extent of the expert's expertise cannot be decisive of the characterisation of his role.**

- (b) ***Secondly, the Tribunal expressed the view that the expert was not a preventer of disputes but a "settler" of them in terms of the principles stated by the Master of the Rolls. In Ajzner Pape J observed:***

*"I must confess to having some difficulty in understanding quite how far these observations in Re Carus Wilson and Greene in relation to avoiding disputes from arising go, for I find it difficult to imagine any case where a matter is referred to another for determination where there is not some dispute or difference. No reasonable man would incur the expense of referring a matter to the determination of another if both interested parties were in agreement with regard to the matter to be referred. However that may be, the important consideration is, in my view, not whether a dispute has arisen, but what the parties have referred to the determination of another. If there is a dispute and the parties have referred their differences to the determination of another, it may well be that the scope of the reference is limited by the extent and area of the dispute. This may be the position of an arbitration pursuant to cl 18 of the lease. But if they have not referred their differences to the determination of another, but have agreed upon an open reference and have merely referred an objective fact, such as a rental or a price, to him for determination in default of their agreement, then I fail to understand why the mere fact that they, at some stage, have disagreed should lead to the conclusion that an arbitration *stricto sensu* was intended. In this case the difference arising from the offer and counter offer has relevance only to show that there has been a default of agreement which brings the agreement to refer into operation." [1972] VR 919, at p. 930*

*In the present case the initial terms of agreement and in particular the rules adopted, did not determine what was submitted to the expert. It might be an objective fact "such as a rental or price" or it might be a competing set of contentions. In turn it can be seen that it may not be entirely straightforward to characterise a claim for assessment of extension of time, consequential costs of the extension of time, and consequential liquidated damages payable as a result of the builder exceeding the completion date under the contract despite the extension of time. The matters to be assessed are essentially matters which were initially assessed by the architect under the contract and are fundamentally matters of "price". Nevertheless **it was contemplated that the parties would have the opportunity to make written submissions with respect to these matters and they in fact did so. Accordingly the expert may be regarded as being retained to settle a dispute. Accepting that this is the correct view the critical characteristic which determines whether the role carried out by the expert was that of an arbitrator or whether the expert was retained to undertake an inquiry in the nature of a judicial inquiry. For the reasons I have stated the making of initial***

written submissions by the parties was not in my view sufficient to give rise to a judicial inquiry.

- (c) *Thirdly, the Tribunal identified a whole series of related ancillary procedural attributes of an arbitration. These included the lack of immunity being given to the expert [14], the propriety required of the expert [20], the powers given to make orders giving effect to the determination [21], the requirement to give reasons [22] and the power to govern his own proceedings [23]. Once again none of these matters in my view govern the fundamental character of the expert's role which was not that of an arbitrator simply because it did not have at its heart an inquiry in the nature of a judicial inquiry.*

71. *It follows that in my view it has been established that the Tribunal erred in law in its conclusion that the referral to the building consultant should not be regarded as a referral to expert determination as distinct from arbitration.....'*
(emphasis added)

(b) Manner in which the process is conducted

Another situation is where the manner in which the dispute resolution process is actually conducted attracts the operation of the *Uniform Commercial Arbitration Acts*, more particularly in relation to whether the decision is susceptible to appeal.

There is no simple answer to this question. As Mr Justice Debelle of the South Australian Supreme Court said, in *IOOF Aust Trustee v SEAS Sapfor Forests*:²⁵

'There is no formula of universal application which will determine whether the decision-maker is an arbitrator and each case must be decided on its own facts: Arenson v Casson Beckman Rutley & Co [1 9971 AC 405 per Lord Wheatley at 427. Nevertheless, there are some indicia which provide assistance.'

The fact that the parties have called a particular procedure an 'arbitration' or an 'expert determination', while persuasive in determining the intention of the parties, will not necessarily

25 Unreported - SA Supreme Court - 3 November 1995

be determinative of the issue of whether the particular dispute resolution procedure is either an Arbitration or an Expert Determination.²⁶

While there is some debate between academic commentators as to whether one should look generally to the nature of the process to be undertaken or whether one should look at the function to be performed (ie, the sorts of disputes to be decided and the nature of the determination to be made), in my view it is the nature of the process to be undertaken which will usually be determinative of the issue.

From a practical point of view, it must be remembered that the procedures which are adopted may mean that an Expert Determination is effectively turned into an Arbitration. In *Commercial Arbitration, Law and Practice*, Marcus Jacobs QC cites the Canadian case of *Sports Maska Inc v Zitter*²⁷. In that case, the Canadian Supreme Court reviewed Canadian, United States, English and French law, and said:

'One of the principal aspects that emerges from an analysis of the Code of Civil Procedure, academic opinion and the case law is the similarity that must exist between arbitration and the judicial process. The greater the similarity, the greater the likelihood that the reference to a third party will be characterized as arbitration.. The facts that the parties have a right to be heard, to argue, to present testimonial or documentary evidence, that lawyers are present at the hearing and that the third party delivers an arbitration award with reasons establish a closer likeness to the adversarial process than the expert opinion and tend to establish that the parties meant to submit to arbitration, but contrary what was argued by the respondents, that criterion is not exclusive to arbitration.

The function assigned to the third party is indicative of the status conferred on him by the parties. If the third party has to decide between opposing arguments presented by the parties on a given point, we are much closer to arbitration. If however, the parties call on a third party solely to supply a necessary component of the contract, it is less certain that they intended to submit the present dispute to the third party, but rather tried to ensure that such a dispute did not arise, unless there are other criteria to the contrary. In the same vein, is the third party called on to make a decision in the light of his personal knowledge or must he choose among the various positions put forward by the parties concerned? In the first case, the

26 See, for example, *Edmund Barton Chambers (Level 44) Co-op Ltd v Mutual Life & Citizens' Assurance Co Ltd* [1984] NSW Conv R 55-177; and *IOOFAust Trustees v Seas Sapfor Forests*, as well as the passage from *Age Old Builders* (extracted above).

27 [1988] 1 SCR 564

situation will probably be one of an expert opinion, while in the second it will probably be an arbitration.' (emphasis added)

(c) **The differing requirements of natural justice**

The differences between Arbitration and Expert Determination are illustrated by the differences between what would be required to comply with the rules of natural justice in each case. The requirements of natural justice are not fixed and immutable, but are dependent on and will vary with the circumstances and nature of the case. In Kioa v West, Mr Justice Mason (as he then was) said: ²⁸

*'What is appropriate in terms of natural justice depends on the circumstances of the case, and they will include, inter alia, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting.....**The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the case?**'* (emphasis added)

The principles of natural justice were expressed by Mr Justice Marks in Gas & Fuel Corporation of Victoria v Wood Hall Ltd. in the following terms:²⁹

*'There are two rules or principles of natural justice... The first is that an **adjudicator must be disinterested and unbiased**. This is expressed in the Latin maxim - *nemo iudex in causa sua*. The second principle is that **the parties must be given adequate notice and opportunity to be heard**. This in turn is expressed in the familiar Latin maxim - *audi alteram partem*. In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done..... Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties.'* (emphasis added)

In that case, the Court was considering what was required in an Arbitration, not an Expert Determination. The requirements of natural justice were explained by Mr Justice Cole in Xureb

28 [1985] 159 CLR 550, at pp. 584 – 585.

29 [1978] VR 385, at p. 396

*v Viola*³⁰, a case which concerned a Reference under Part 72 of the *New South Wales Supreme Court Rules*³¹. His Honour said:

'...non-compliance with procedures normally applied in Court proceedings does not, of necessity, result in a denial of natural justice.....'

Referees, no doubt, look to the Courts for elucidation upon what is meant by 'natural justice'. Its absence is readily recognised but its constituents are difficult to define. In essence it means fairness between the parties. If an allegation is put by one party against the other, the other should have the chance to respond. Yet the process of responding is not indeterminable. For once a party is aware of the case or argument or fact asserted against him, natural justice is usually satisfied by giving to his opponent the opportunity to respond. The response may, of course, throw up material not adverted to by the first party. It is usual, in the Courts, for the first party to be given a limited right of reply to deal with any such new material, whether factual, argumentative or a matter of legal concept. But it is not always essential that such a right be given. If issues are clearly defined, particularly if they be of a technical nature, and if each party is given a full opportunity to place before the Referee that which it wishes in relation to those issues, it does not necessarily follow that there is a denial of natural justice by not permitting each then to respond to any new material advanced by the other. Particularly is that so where the Referee is a person of technical competence able to understand the material placed before him by each party.

.....Another aspect of natural justice is that the Referee must be actually impartial, and must be perceived by a disinterested bystander to be so. Accordingly, he must not hear evidence or receive representations from one side behind the back or in the absence of the other.'

His Honour then concluded:³²

'How are such principles to be reconciled with Pt 72 r 8, and in particular r 8(2)(b) which permits a Referee to 'inform himself...in relation to any matter in such manner as the Referee sees fit'. Further, it has become common for orders to be made pursuant to Pt 72 r 8(1), to permit a Referee 'to communicate with experts retained on behalf of the parties or any of them'. The utility of such a direction is obvious for it enables a person technically qualified who does not understand a particular technical aspect of the report of an expert retained by a party to inquire of that expert what he meant. But such an order is not to be

30 [1989] 18 NSWLR 453.

31 It should be noted that the wording of Part 72 Rule 8(2)(b) of the N.S.W. *Supreme Court Rules* being considered by Cole J. in *Xureb v Viola* is identical to the wording of s. 19(3) of the *Uniform Commercial Arbitration Acts*.

32 at p. 470

understood as permitting a Referee to have a private conversation with one expert. He may call the experts for opposing parties together to seek clarification, or he may arrange a conference telephone discussion with the experts for competing parties. Pursuant to r 8(2), the Referee may be permitted to carry out his own tests. But if he does so, ... he must give, in most cases, the information so derived to the competing parties to permit them to express their views upon it to him.'

5. THE LIABILITY OF THE EXPERT IN RESPECT OF AN EXPERT DETERMINATION OR APPRAISAL

An Expert acting in the context of an Expert Determination is not carrying out an arbitral or quasi-arbitral function, and does not have the protection from liability which is provided by the provisions of the *Uniform Commercial Arbitration Acts*³³ or provided by operation of the common law.³⁴

In the absence of an appropriate release and indemnity, an Expert may be liable to the parties (and perhaps third parties) in either contract or the tort of negligence (or both), for failing to act in accordance with the terms of the appointment, or failing to exercise the standard of care and diligence expected of an Expert in his or her position.

Until relatively recently, there was some uncertainty in Australia in relation to the recoverability of pure economic loss, in negligence, and the nature and extent of any duty of care in negligence concurrent with an existing contractual duty. Any such uncertainties have been resolved in three decisions of the High Court in *Bryan v Maloney*³⁵, *Hill v Van Erp*³⁶ and *Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg)*³⁷.

33 see, for example, section 51 of the *Commercial Arbitration Act (NSW) 1984*

34 see *Sutcliffe v Thackerah* [1974] AC727

35 (1994-1995) 182 CLR 609

36 (1997) 142 ALR 687

37 (1997) 142 ALR 750

Earlier, in *Voli v Inglewood Shire Council*³⁸, the standard of care owed by an architect to his or her client was referred to by Mr Justice Windeyer, with whom the other members of the Court (Dixon CJ and Owen J) agreed. His Honour said, at p. 84:

'He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainment. But he must bring to the task he undertakes the competence and skill that is usual among architects, practising their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from a breach of his contract or in tort.' (emphasis added)

Subsequently, when dealing with the question of liability to a third party, Mr Justice Windeyer continued, at p. 84:

*'Whatever might have been thought to be the position before the broad principles of the law of negligence were stated in modern form in *Donoghue v Stevenson* [1932] AC 562, it is now beyond doubt that, for the reasonably foreseeable consequences of careless or unskillful conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence. To such a person he owes a duty of care quite independently of his contract of employment.'*

It is obviously advisable, from an Expert's point of view, that a release and indemnity be provided by the parties to the dispute. It is also advisable for the parties to include such a release and indemnity in the dispute resolution provision.³⁹ A failure to do so may mean that an Expert cannot be found who will be prepared to determine the dispute and the whole process may break down. That is what ultimately happened in the Ritz-Carlton matter (*Triamo Pty Limited v Triden Contractors Limited*).

It is worth noting that Rule 17 of the IAMA *Expert Determination Rules* expressly provides as follows:

'The parties agree that the Expert, the Institute and its officers and employees are not liable to any party for or in respect of any act or omission in the discharge or

38 (1963) 110 CLR 74

39 The absence of such a provision may provide an indicator that the process conducted, or intended to be conducted, is an arbitration, given the statutory immunity provided to arbitrators by section 51 of the *Uniform Commercial Arbitration Acts*.

purported discharge of their respective functions under these Rules unless such act or omission is shown to have been fraudulent.'

CONCLUSION

Whether, as a process, Expert Determination offers worthwhile advantages over '*documents only*' Arbitration may be debatable.

It seems likely that Expert Determination will continue to play a role in extra-curial dispute resolution in Australia. The extent of the role Expert Determination will play in the future may well depend on the policy approach taken by Courts in the various Australian jurisdictions in considering whether or not to reject submissions that contested findings of fact contain '*jurisdictional errors*' as was found by the Victorian Court of Appeal in *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd anor.*⁴⁰

As demonstrated by the cases cited in this paper, particular care needs to be taken in drafting an Expert Determination agreement to enable it to be enforced. It is a purely contractual process. Unlike Arbitration, the Courts have no power to make directions or orders so as to fill voids left by the parties if the process they have agreed is not sufficiently certain for enforcement. The extent to which the Court can intervene is much more limited than with Arbitration. If the Expert's determination is in accordance with the Expert Determination agreement, then the Court cannot properly intervene.

Similarly, the powers and functions exercised by the Expert are determined wholly and solely by the agreement between the parties. The Expert and the parties do not have the luxury of backup from statutory provisions such as those contained in the *Uniform Commercial Arbitration Acts*.

The fact remains, however, that the users of dispute resolution services have created a demand for an additional adjudicative process called Expert Determination as an alternative to litigation or Arbitration. While that demand continues, Experts and professional advisers will need to be mindful of the principles expressed in the cases referred to above.

40 [2006] VSCA 173

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