Supreme Court
New South Wales

Case Title:	Belvino Investments No. 2 Pty Limited v Australian Vintage Ltd
Medium Neutral Citation:	[2014] NSWSC 978
Hearing Date(s):	15 July 2014
Decision Date:	15 July 2014
Jurisdiction:	Equity Division
Before:	White J
Decision:	Refer to para [71] of judgment.
Catchwords:	EQUITY - Remedies - declarations - whether proceedings should be stayed pending determination by expert - whether the plaintiff is bound to accept the terms of the retainer provided by the expert - whether terms of release and indemnity provided by expert are reasonable - whether dispute resolution process under the terms of the lease should be followed by both parties - whether term of the lease provides an independent contractual entitlement to initiate court proceedings - whether viticulture expert can express an opinion on the issues in dispute
Cases Cited:	Huddart Parker Ltd v Ship Mill Hill (1950) 81 CLR 502 Badgin Nominees Pty Ltd v Oneida Ltd [1998] VSC 188 Savcor Pty Ltd v New South Wales (2001) 52 NSWLR 587 New South Wales v Banabelle Electrical Pty Ltd (2002) 54 NSWLR 503 Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] 2 Qd R 563 Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332 Chapmans Limited v Australian Stock Exchange Ltd (1996) 67 FCR 402

	Charben Haulage Pty Ltd v Environmental and Earth Sciences Pty Ltd [2004] FCA 403 Commissioner of Railways (WA) v Stewart (1936) 56 CLR 520 Baldwin's Limited v Halifax Corp (1916) 85 LJKB 1769 The Heart Research Institute Ltd v Psiron Ltd [2002] NSWSC 646 Downer Engineering Power Pty Ltd v P&H Minepro Australasia Pty Ltd [2007] NSWCA 318 Mackay v Dick (1881) 6 App Cas 251 Butt v M'Donald (1896) 7 QLJ 68 Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596 1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd (2009) 26 VR 551
Texts Cited:	Lewison and Hughes, "The Interpretation of Contracts in Australia", Thomson Reuters, Lawbook Co. 2012
Category:	Interlocutory applications
Parties:	Belvino Investments No. 2 Pty Limited (as trustee of the McGuigan Simeon Trust) (Plaintiff) Australian Vintage Ltd (Defendant)
Representation	
- Counsel:	Counsel: R A Dick SC with D J Barnett (Plaintiff) N Hutley SC with S Goodman (Defendant)
- Solicitors:	Solicitors: Corrs Chambers Westgarth (Plaintiff) Kelly & Co (Defendant)
File Number(s):	2014/181347

JUDGMENT

1 **HIS HONOUR:** By summons, the plaintiff seeks declarations as to the meaning and effect of provisions of a lease of the Del Rios Vineyard in Kenley, Victoria. The issues are whether the proceeding commenced by

the plaintiff should be stayed pending the determination of the parties' dispute by an expert in viticulture and, if so, whether the plaintiff is bound to accept as a term of the expert's retainer that the expert not be liable except for fraud, misleading or deceptive conduct, or gross negligence.

2 I have concluded that the plaintiff's proceeding should be stayed and that the plaintiff is bound to accept such a term of the expert's retainer. These are my reasons.

3 The plaintiff and the defendant are parties to a long-term lease of the vineyard which comprises in excess of 900 hectares. The plaintiff is the lessor and the defendant is the lessee. The lease was entered into on 27 June 2003. It is for a term that expires on 30 April 2023 unless terminated earlier. There are also three options for renewal, each for five years. The defendant says the vineyard was adversely affected on three days or nights on 15, 18 and 25 October 2013, that it reduced the production capacity of the vineyard. It seeks to invoke clauses 4.26 of the lease, that it submits might entitle it, after an expert's determination, to terminate the lease.

4 Clause 4.26 of the lease relevantly provides:

> "***4.26 Disaster***
>
> ...
>
> *(b) If, in the Lessee's opinion, the amount of grapes produced (***Production***) or capable of being produced (***Production Capacity***) from all vines on the Premises in respect of any one vintage is reduced by more than 50% of Average Production Capacity for that vintage year due to a Natural Disaster, the Lessee may immediately notify the Lessor in writing (***Lessee's Notice***) that it wishes this clause to apply and if it gives that notice, the Lessee will promptly provide the Lessor with all reasonable cooperation, information (including information about the Lessee's viticultural and work practices) and access to the Premises and the Lessee's records to enable the Lessor to determine whether the reduction in Production or Production Capacity was due to a Natural Disaster.*

(c) The Lessor and the Lessee must then promptly meet and endeavour to negotiate and agree on the following matters:

(i) whether Production or Production Capacity has been reduced by more than 50% of Average Production Capacity;

(ii) whether the reduction in Production or Production Capacity was due to a Natural Disaster; and/or

(iii) the remedial works required to restore Production Capacity to at least 50% of Average Production Capacity within 3 years of the Lessee's Notice and at least 75% of Average Production Capacity within 5 years of the Lessee's Notice including the approximate time frames within which the remedial works should be carried out.

(d) If the parties are unable to agree on any of the matters referred to in subclause (c) within 30 days of the Lessee's Notice, either party may refer the dispute to the Expert (being the same Expert) referred to in clause 4.25).

(e) The Lessor may refer the matter to the Expert immediately after it receives the Lessee's Notice without having to first inspect the Premises or enter into any discussions with the Lessee or wait 30 days.

(f) The parties must promptly and in good faith use their best endeavours to cooperate with the Expert, provide all reasonable information (including information about the Lessee's viticultural and work practices) and generally provide all reasonable assistance to the Expert (including access to the Premises and to records) to enable the Expert to determine:

(i) whether Production or Production Capacity has been reduced by more than 50% of Average Production Capacity;

(ii) whether the reduction in Production or Production Capacity was due to a Natural Disaster;

*(iii) what remedial works would restore Production Capacity to at least 50% of Average Production Capacity within 3 years of the Lessee's Notice and at least 75% of Average Production Capacity within 5 years of the Lessee's Notice (***Remedial Works***) including the approximate time frames within which the Remedial Works should be carried out.*

(g) The Expert must make and deliver his written determination to the parties within 45 days of his appointment which shall be final and binding on the parties. The Expert is deemed to act as an expert and not an arbitrator. His costs shall be shared equally by the parties.

(h) If the reduction in Production or Production Capacity was due to a Natural Disaster as determined by the Expert or as agreed under subclause (c) the Lessee can elect by notice ot the Lessor within 2 months of the Expert's determination or agreement between the parties under subclause (c):

(i) to diligently and promptly and otherwise substantially within the time frames determined by the Expert carry out the Remedial Works as if the Remedial Works were an Upgrade. If the Lessee elects this option, the provisions of clause 4.18 will apply in relation to the Remedial Works. For example, the Lessor will pay Upgrade Consideration to the Lessee in respect of the Remedial Works subject to an agreed maximum cost and the presentation of invoices, statements etc, the Lessor may request an audit and/or inspection in respect of the Remedial Works and the Lessee will pay Upgrade Consideration Rent in respect of the Remedial Works and for the purposes of this Lease and any other agreement between the Lessor and the Lessee, the payment of such costs will be deemed to be Upgrade Consideration payments and the provisions of clause 4.18 shall apply accordingly;

(ii) to terminate this Lease by written notice of termination (specifying the date of termination) to the Lessor PROVIDED THAT the Lessee has complied with all of its obligations under this clause 4.26.

(i) The Lessee may also terminate this Lease under subclause (h)(ii) if the Expert determines that no remedial works would restore Production Capacity to at least 50% of Average Production Capacity within 3 years of the Lessee's Notice and at least 75% of Average Production Capacity within 5 years of the Lessee's Notice.

...

(l) For the purposes of this clause, **Natural Disaster** *means:*

(i) fire, storm or tempest;

(ii) earthquake;

(iii) flood;

(iv) other Act of God;

(v) insects and/or disease which was not reasonably capable of being prevented by the Lessee;

(vi) resumption of the Premises or any part thereof by a Government authority;

(vii) diminution in the quantity or quality of the water available to the Lessee for irrigation; and

(viii) any other similar event or circumstance beyond the reasonable control of the Lessee.

(m) For the purposes of this clause, **Average Production Capacity** *means the average yield produced from the vines growing on the Premises for the 2 vintages preceding the Natural Disaster which destroyed or affected the vines growing on the Premises.*

..."

5 Clause 4.26(j) and (k) set out the consequences if the lessee terminates the lease pursuant to clause 4.26(h) or (i), but those paragraphs are not of present relevance.

6 The Expert referred to in clause 4.26(d) is identified in clause 4.25. Clause 4.25 provides for there to be an annual inspection of the vineyard "*by a viticulturist employed by or who is a principal or consultant of Scholefield Robinson Horticultural Services Pty Limited or if no such person is available (SEL. available) by an independent Expert located and experienced in viticulture in the Region agreed between the parties (failing agreement, appointed by the president of the Australian Wine and Brandy Corporation at the relevant time)*".

7 The reference in clause 4.26(h)(i) to the carrying out of Remedial Works as if they were an Upgrade and to the payment of Upgrade Consideration and Upgrade Consideration Rent is to clause 4.18. That clause, in substance,

provides for the circumstances in which the lessee may carry out a General Upgrade being a renovation, extension or other capital or structural improvement. The cost of such a general upgrade is to be met by the lessor and the lessee is to pay an additional rent.

8 The plaintiff relies on clause 4.17. It provides:

> "***4.17 Dispute Resolution***
>
> *(a) A party must not start arbitration or court proceedings (except proceedings seeking interlocutory relief) in respect of a dispute arising out of this Lease (***Dispute***) unless it has complied with this clause 4.17.*
>
> *(b) A party claiming that a Dispute has arisen must notify each other party to the Dispute giving details of the Dispute.*
>
> *(c) Within 7 days after a notice is given under subclause (b) each party to the Dispute (***Disputant***) must nominate in writing a representative authorised to settle the Dispute on its behalf.*
>
> *(d) During the 20 day period after a notice is given under subclause (b) (or longer period agreed in writing by the Disputants) (***Initial Period***) each Disputant must use its best efforts to resolve the Dispute.*
>
> *(e) If the Disputants are unable to resolve the Dispute within the Initial Period they must within an additional 20 days, either:*
>
> *(i) appoint a mediator to mediate the dispute; or*
>
> *(ii) if the Disputants are unable to agree on a mediator, refer the Dispute for mediation to a mediator nominated by the then current president of the Law Society of Victoria.*
>
> *(f) The role of the mediator is to assist in negotiating a resolution of the Dispute. The mediator must not make a decision that is binding on a Disputant unless that Disputant's representative has so agreed in writing.*
>
> *(g) Any information or documents prepared for the mediation and disclosed by a representative under this clause:*

(i) must be kept confidential; and

(ii) must not be used except to attempt to settle the Dispute.

(h) Each Disputant must bear its own costs of resolving a Dispute under this clause 4.17 and, unless the Disputants otherwise agree, the Disputants must bear equally the cost of any mediator engaged.

(i) After the Initial Period, a Disputant that has complied with subclauses (b) to (e) in relation to a dispute may terminate the dispute resolution procedure in subclause (b) to (e) for that Dispute by giving notice to each other Disputant at which time any Disputant may institute any proceedings that the Disputant considers appropriate in the circumstances.

(j) If in relation to a Dispute a Disputant breaches any provision of this subclause (a) and (e), each other Disputant need not comply with subclauses (a) to (e) in relation to that Dispute.

(k) Nothing in this clause 4.17 prevents a party from seeking urgent interlocutory relief from a court."

9 The plaintiff submits that clause 14.17(i) confers on it a contractual right to bring court proceedings notwithstanding the defendants having invoked clause 4.26.

10 The defendant says that on 15, 18 and 23 October 2013, the vineyard experienced frosts that significantly affected yields such that the Production Capacity for the 2014 vintage year was reduced by more than 50 percent of the Average Production Capacity.

11 On 20 December 2013, the chief executive officer of the defendant Mr McGuigan sent an email to the defendant in which he referred to an earlier communication. It referred to frost events said to have had an impact on the vineyard. The defendant advised that whilst it was still assessing the extent of the damaged crop levels as a result of the frost it appeared that the effect would be significant. The defendant referred to a clause of the lease that required it to notify any loss in yield of more than 50 percent compared to the previous year and referred also to rights conferred by clause 4.26. The defendant foreshadowed that it was likely that loss in

yield would be more than 50 percent and advised that the defendant would be in further contact with the plaintiff when it was better able to assess the crop loss and its implications.

12 On 8 January 2014, the defendant gave notice by email to the plaintiff relevantly as follows:

> "*At this point in time we think it is appropriate that the process outlined in clause 4.26 of the lease be invoked.*
>
> *this message therefore serves as notice that AVL wants clause 4.26 of the Lease to apply for the reasons outlined in clause 4.26(b) namely that in AVL's opinion:*
> *the volume of grapes capable of being produced on the vineyard (Production Capacity);*
> *from all vines in V14;*
> *is reduced by more than 50% of the Average Production Capacity (APC) (defined as the average yield produced from the vineyard in the past 2 vintages - being V12 and V13);*
> *due to a Natural Disaster (namely frost).*
>
> *In reaching that opinion:*
>
> *We have estimated the Production Capacity of the vineyard for V14 to be 31,865 tonnes (refer attached Schedule - detailing the manner in which that estimate was calculated);*
> *We consider this to be a sustainable estimate based on the following:*
> *It was calculated using commonly accepted best industry practice;*
> *Actual yield from V13 was 25,757 tonnes noting that;*
> *That yield excludes a very conservative estimated crop loss of @1800 tonnes as a direct result of power outages which meant that we were unable to water certain sections of the vineyard at key times - which crop loss is now the subject of a claim against the power supplier Powercor; and*
> *Yield from V13 was negatively impacted by severe weather conditions at key times (particularly heat).*
>
> *The APC for the 2 preceding vintages is 21,236 tonnes based on the following:*
> *A yield of 25,757 tonnes in V13; and*
> *A yield of 16,715 tonnes in V12.*
>
> *Our current estimated actual yield from V14 is 16,194 tonnes (refer attached Schedule for details. Note that schedule estimates yield at 15,794 tonnes. We have added a further 400 tonnes to that estimate reflecting the volume of grapes that may be salvaged*

from some of the frosted sections of the vineyard). It should be noted that this estimate may still change as we get closer to harvest - although we expect any change to decrease rather than increase the estimate. A further round of estimates (Lag Phase Bunch Weights) is currently underway and will be completed mid-January. That information will be provided to you when it becomes available.

The difference between the current estimated actual yield from V14 (16,194 tonnes) and Production Capacity (based on our estimate of 31,865 tonnes) is 15,671 tonnes and is due to the effect of frosts.

That reduction of 15,671 tonnes is more than 50% of the APC of 21,236 tonnes (being 10,618 tonnes).

Under clause 4.26(c) the next step is for us to meet to negotiate and agree (within the next 30 days) whether the reduction in Production Capacity is more than 50% and whether it was due to a Natural Disaster, noting that if we cannot agree these matters then the issue will need to be referred to an Expert for determination."

13 On 10 January 2014, the plaintiff responded to the email of 8 January which it described as an email giving notice under clause 4.26(b) of the lease. The chief executive officer of the plaintiff confirmed that the parties were to meet to discuss the matters set out in clause 4.26(c) and suggested a meeting later in the month. It does not appear that such a meeting took place then.

14 Instead, on 29 January 2014, the plaintiff further responded to the email of 8 January as follows:

"*Del Rios Lease*

I refer to the meeting schedule for tomorrow with Neil and Mike Noack, and Neil's recent email to me of 8 January (Email).

Given the significant issues raised in your Email, you will appreciate, as Chief Executive for Belvino, I needed to confer with Belvino's Directors and lawyers regarding this matter. Unfortunately the holiday period delayed this process, but I have now had the opportunity to seek appropriate direction and revert with Belvino's position as follows:

> *1. The circumstances outlined in your Email do not apply to clause 4.26. Clause 4.26 only operates if there is a 'Natural Disaster' as defined in the Lease. The events alleged in your Email as falling within the definition of 'Natural Disaster' are in fact a series of frosts which, we understand, occurred over a number of days in October 2013. It is our view that a frost or series of frosts falls outside the contractual definition of 'Natural Disaster', and therefore clause 4.26 is not applicable to these circumstances.*
>
> *2. Any dispute between AVL and Belvino as to whether a frost or series of frosts constitute a 'Natural Disaster' under the Lease would need to be resolved as a threshold question in accordance with the dispute resolution provisions set out in clause 4.17 of the Lease. I note that clause 4.26 does not authorise a viticulturist expert to determine what event falls within the definition of 'Natural Disaster', which is a matter of legal interpretation. Rather clause 4.26 empowers any viticulturist expert appointed under clause 4.26 to determine whether any reduction in production or production capacity was* ***due to*** *a nominated Natural Disaster. Therefore it would not be appropriate to follow the dispute procedure in clause 4.26 in these circumstances. The expert procedures in clause 4.26 are clearly intended to only resolve disputed matters of fact requiring viticultural knowledge. Clause 4.17 separately covers matters of contractual legal construction of the Lease, being issues to be determined by agreement following negotiation and mediation and, failing which, by arbitration or court proceedings.*
>
> *3. In any event, as a separate and additional matter, your Email does not constitute a proper duly served 'Lessee's Notice' under clause 4.26(b) of the Lease. It has not been signed or served in accordance with the required notice provisions set out in clause 4.9 of the Lease. In particular your Email has not been signed by a director, secretary or other authorised officer of the Lessee, nor has it been delivered to the Lessor by pre-paid post or by fax. Accordingly, clause 4.26 has not been activated and no meeting can currently occur under its terms."*

15 A notice was re-served by the defendant on 30 January 2014 in accordance with the terms of the lease. The defendant wrote to the plaintiff taking issue with some of the points of construction raised by the plaintiff. The defendant said:

> "*We disagree therefore that the issue of whether a frost is a 'Natural Disaster' needs to be resolved pursuant to the dispute resolution outlined* [in] *clause 4.17. This suggestion only serves to intentionally delay and hinder the process intended by the lease.*"

16 Neither party invoked the procedures for dispute resolution in clause 4.17. The plaintiff says that there is no doubt that a mediation would be unsuccessful.

17 On 24 February 2014, the plaintiff's solicitor responded in terms that included the following:

> "*When AVL issued its notice under cl 4.26(b) of the Lease, it made certain assumptions as to the proper meaning of the expressions 'Natural Disaster' and 'Production Capacity'. It is important, we think, to have the meaning of those expressions clarified sooner rather than later.*
>
> *'Natural Disaster'*
>
> *Our client has previously explained its position that the frost events which occurred in October 2013 were not 'Natural Disasters' within the meaning of the Lease. In our client's view, frost is ready distinguishable from earthquakes, fires or 'Acts of God'.*
>
> *Even if you do not agree with our client's interpretation, we hope that you will agree that this issue needs to be determined, by a process satisfactory to both parties, before the Expert undertakes his or her task.*
>
> *In your letter, you expressed the view that 'the issue of whether a Natural Disaster exists only becomes relevant if [AVL] can establish the reduction in crop required by clause 4.26'; and that '[u]ntil then the question of whether a frost is a Natural Disaster is a moot point', such that 'there is no value in investing any time or money in determining it'. Your argument cuts both ways: there is no point in investing time and money in participating in an expert determination process which is premised on an assumption that the frost events constitute Natural Disasters if that assumption is correct.*
>
> *Whether or not the frost events constitute 'Natural Disasters' within the meaning of the Lease strikes us as a discrete issue, capable of being resolved quickly, inexpensively and definitively. It is, in the context of a clause headed 'Disaster', the threshold issue. Logically, it should be addressed first.*
>
> *'Production Capacity'*

> *The expression 'Production Capacity' is also ambiguous. As we understand it, AVL asserts that, for the purposes of cl 4.26, reduction in Production Capacity may be determined by comparing:*
>
> *(a) the volume of grapes that AVL estimated, in September 2013, that the vineyard would produce in V14; with*
>
> *(b) the actual yield for V14 (or perhaps the estimated actual yield as at the date of the Expert's determination).*
>
> *We question whether that approach is correct. If a frost event is a 'Natural Disaster', it may well be that, on its proper construction, the Lease requires the parties to compare the Production Capacity the day before the frost event with the Production Capacity the day after.*
>
> *For obvious reasons, it is also important to resolve that issue before the Expert undertakes his or her task. The resolution of that issue will inform submissions to be made, and evidence to be given, by each party to the Expert."*

18 The parties then entered into a standstill arrangement pursuant to which they each agreed not to refer the dispute between them to an expert for determination under clause 4.26 of the lease, or otherwise commence proceedings in relation to the dispute, pending the completion of the harvest for the 2014 vintage year.

19 On 4 February 2014, the defendant proposed that the independent expert from Scholefield Robinson inspect the vineyard at that time and before the vines had dropped all their leaves and before the commencement of pruning. This was proposed notwithstanding that the process under clause 4.26 had not at that point been carried forward. The plaintiff agreed.

20 On 7 April 2014, the chief executive officer of the plaintiff advised the defendant that:

> "*... Belvino has no difficulty with a representative from Scholefield Robinson inspecting the site on the basis that he or she may become an Independent Expert to whom a dispute is referred under clause 4.26 of the Lease, provided that AVL is happy for*

> *Belvino's expert, Mary Retallack, to be present during the inspection.*"

21 Doctor Scholefield inspected the vineyard on 9 April 2014. He is a principal consultant and director of Scholefield Robinson Horticultural Services Pty Limited.

22 On 10 April 2014, the defendant notified the plaintiff that harvest had been completed and the final yield from the vineyard was 15,260.62 tonnes. The defendant said that this represented a reduction of more than 50 per cent, as outlined in clause 4.26 of the lease, and the defendant maintained its position in relation to that clause, as outlined in its notices of 8 and 30 January 2014.

23 At some point, the standstill arrangement came to an end.

24 On 16 June 2014, the parties met, as contemplated by clause 4.26(c), to endeavour to agree on the three matters specified in that clause. They were unable to agree on those matters.

25 On that same day, the defendant referred the dispute to Dr Scholefield and requested that he make a written determination regarding:

> "*(a) whether Production or Production Capacity has been reduced by more than 50 percent of average production capacity;*
>
> *(b) whether the reduction as to production or production capacity was due to a Natural Disaster; and*
>
> *(c) what remedial works should restore production capacity to at least 50 per cent of average production capacity within 3 years of the lessee's notice and at least 75 per cent of average production capacity within 5 years of the lessee's notice, including the proximate timeframes within which the Remedial Works should be carried out.*"

26 The defendant asked Dr Scholefield to convene a preliminary conference to deal with various matters, including his acceptance of the referral; the

provision of all reasonable information, including information about the defendant's viticulture and work practices; the general provision and reasonable assistance and such further assistance as he might require.

27 Doctor Scholefield indicated that he would accept the referral. On 17 June 2014, he sent an email to the defendant's solicitor enclosing his terms of engagement. The terms of engagement included a statement of fees, travel charges and other services. They included some specific conditions about billing, about the use that could be made of the report and its reproduction, and a submission to jurisdiction by the parties to the Courts of South Australia. The terms of engagement enclosed with his email of 17 June 2014 included no term requiring the parties to release Dr Scholefield from any liability in respect of the engagement or to provide an indemnity.

28 On 18 June 2014 the plaintiff filed its summons in these proceedings. In its summons the plaintiff seeks the following declarations:

> "*1 Declaration that the frost events which occurred at Del Rios Vineyard in Kenley, Victoria (**Vineyard**) on 15, 18 and 25 October 2013 (**Frost Events**) do not fall within the meaning of the term 'Natural Disaster' as defined in clause 4.26(l) of the lease between the plaintiff as lessor and the defendant as lessee dated 27 June 2003 as varied by the heads of agreement executed by the parties and dated 20 December 2012 (**Lease**).*
>
> *2 In the alternative, declaration that on the proper construction of clause 4.26 of the Lease, each individual Frost Event is a separate and distinct 'Natural Disaster' for the purposes of clause 4.26(f)(i) and (ii) of the Lease.*
>
> *3 Declaration as to the meaning of the expressions 'Production' and 'Production Capacity' in clause 4.26(b) of the Lease.*
>
> *4 Declaration as to the meaning of the expression 'whether Production or Production Capacity has been reduced by more than 50% of Average Production Capacity' in clause 4.26(f)(i) of the Lease.*"

29 The plaintiff has also foreshadowed that if necessary, it would seek an additional declaration as to the meaning of the expression "Act of God" in the lease.

30 On 18 June 2014 the plaintiff's solicitor notified Dr Scholefield of the issues of construction of clause 4.26 of the lease that the plaintiff contends arise, and it informed him of the institution of these proceedings. On 20 June 2014 Doctor Scholefield sent an email to the solicitors for both parties. He advised:

> "*Scholefield Robinson has a policy that when it is asked to act as an expert in a matter where legal protection is not provided by the rules of arbitration or a Court we seek indemnity from the parties involved in the matter. Please find attached an Indemnity document for both AVL and Belvino to sign and return to me.*"

31 The enclosed document entitled "Indemnity" required by Dr Scholefield to be signed by both the plaintiff and the defendant, provided as follows:

> "*The Expert will not be liable to Australian Vintage Limited ('AVL'), or to Belvino Investments No 2 Pty Ltd ('Belvino') for any act or omission in the performance of the Expert's obligations under the relevant Memorandum of Lease dated 27 June 2003 unless the act or omission constitutes a fraud (whether at law or in equity) or amounts to misleading or deceptive conduct or gross negligence and:*
>
> *(a) AVL will indemnify the Expert against any claims which it might otherwise have made against the Expert in relation to his determination;*
>
> *(b) Belvino will indemnify the Expert against any claims which it might otherwise have made against the Expert in relation to his determination.*"

32 The defendant accepts the terms of the release and indemnity sought. The plaintiff does not.

33 On 23 June 2014 the defendant filed a notice of motion seeking an order that the action be stayed pending the delivery of the Expert Determination pursuant to clause 4.26 of the lease. On 1 July 2014 the defendant filed a cross-summons. It seeks an order that the plaintiff takes such steps as are necessary to retain Dr Scholefield as the expert for the purposes of clause 4.26 of the lease on the terms set out in the terms of engagement which are at exhibit MD1, Tab 20, and the indemnity exhibit MD1, Tab 34 of the affidavit of Mr Durrant of 30 June 2014.

34 On 3 July 2014 the Chief Judge listed the notice of motion and the cross-summons for hearing before me today.

35 In support of its application for a stay, the defendant submits that as the parties have agreed to have their disputed matters in clause 4.26 determined by an expert, they should be required to adhere to the procedure to which they had agreed unless there was a good reason to depart from that course. The defendant submitted that there was a strong bias in favour of maintaining the agreed procedure and a heavy onus on the party seeking to depart from it (*Huddart Parker Ltd v Ship Mill Hill* (1950) 81 CLR 502 at 508-509; *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 at [30]-[44]; *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587 at 598-599, [41]-[42]; *New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503 at [29]-[31]; *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563 at 568-569, [19]-[21]; *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332 at [43], [53];).

36 The plaintiff's primary submission is that by clause 4.17(i) it has a contractual right to approach the Court to have issues concerning clause 4.26 determined by the Court, and thereby to remove those issues from determination by the expert. It submits that clause 4.17(i) provides a right to take that course in advance of an expert's determination. It also says that irrespective of clause 4.17(i) there is good reason not to stay the

proceedings because the issues that it seeks to raise by its summons are issues appropriate for determination by the Court and not by the expert. It says that the determination of those questions by the Court would, in any event, be of assistance to the expert if, as a result of the Court's decision, there still remains scope for an expert determination.

37 I do not accept the plaintiff's argument as to the scope and effect of clause 4.17. The clause is a general provision. Clause 4.17(a) is a contractual restraint against the parties instituting court proceedings otherwise than for urgent interlocutory relief "*in respect of a dispute*" unless the procedures for negotiation and mediation provided for in the clause are followed. I do not think that clause 4.17 applies to the issues that arise under clause 4.26. Whilst the words "*a dispute*" *prima facie* apply to any dispute including one arising under clause 4.26, there is nothing in clause 4.17 that would preclude the lessee from giving notice under clause 4.26(a) and thereby invoking the different procedures and timeframes provided for by clause 4.26. Under clause 4.17 there must be an attempted resolution of a dispute notified by one party to the other within 20 days. Under clause 4.26 the parties are required to meet promptly to endeavour to negotiate and agree on the matters in clause 4.26(c). What is to be done "*promptly*" might take less time, or might take more time, than the particular period specified in clause 4.17, depending upon the parties' circumstances. Then under clause 4.26 there is a specified period of 30 days for either party to refer the dispute to the expert under clause 4.26(d). Moreover, the lessor can make such a reference immediately it receives the lessee's notice. There is then the process for expert determination. This is quite different from the procedures contemplated by clause 4.17 both in timeframe and as to the substance of the method for dispute resolution. Under clause 4.17 the parties will attempt to resolve the dispute by mediation with the mediator to be appointed by the President of the Law Society of Victoria. It would be incongruous if the parties were required to hold a concurrent mediation by someone so appointed, whilst also being required at the same time or approximately the same time to proceed with the expert's

determination pursuant to clause 4.26. There is nothing in clause 4.17 that precludes a party's referring the dispute to an expert under clause 4.26 whilst mediation takes place.

38 In any event, even if there is scope for clause 4.17 to apply to disputes arising under clause 4.26, I do not think clause 4.17(i) has the effect contended for by the plaintiff. When read as a whole, clause 4.17(i) is properly characterised merely as the lifting of the contractual restraint in clause 4.17(a). It is not the source of an independent contractual entitlement to institute court proceedings and thus does not qualify the party's agreement in clause 4.26 for expert determination of the matters in clause 4.26(c)(i-iii), (f)(i-iii).

39 If clause 4.17 does apply or has the potential for applying to the current dispute, nonetheless the principle stated in Lewison and Hughes, "*The Interpretation of Contracts in Australia*", Thomson Reuters, Lawbook Co. 2012 at [7.05] applies, namely:

> "*Where a contract contains general provisions and specific provisions, the specific provisions will be given greater weight than the general provisions where the fact to which the contract is to be applied fall within the scope of the specific provisions.*"

40 That is to say the general provisions in clause 4.17, if otherwise applicable, give way to the specific provisions in clause 4.26 that deal with the effects of a Natural Disaster, as defined, on Production or Production Capacity (*Chapmans Limited v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411; *Charben Haulage Pty Ltd v Environmental and Earth Sciences Pty Ltd* [2004] FCA 403 at [171].)

41 The plaintiff also submits that the expert can only determine whether there has been the requisite reduction in Production or Production Capacity due to an event which in fact in law, is a Natural Disaster. I do not agree. Clause 4.26 engaged if the lessee forms the opinion described in clause 4.26(b). There is no dispute that the lessee formed the opinion expressed

in its notices of 17 and 30 January 2014. The procedures in clause 4.26 were thus engaged. Clause 4.26(f)(ii) specifically requires the expert to determine whether the reduction in Production or Production Capacity was due to a Natural Disaster. Whether the Court would characterise the event as a Natural Disaster as defined, is not to the point. The expert's contractual authority to determine that question does not arise only if "in fact and law" the event is a natural disaster. That is the very question that the parties agreed would be for the expert's decision. Nor is this inapt. It is entirely sensible that that question should be determined by an expert in viticulture, particularly one with experience of the particular region and vineyard.

42 The plaintiff submits that clause 4.26(l) defines Natural Disaster in objective terms which do not depend on the formation of any opinion or satisfaction by the expert. That is so, but it does not meet the point. The plaintiff also submits that the expression "*Act of God*" is a legal term with a long history. That is also so, but the fact that Natural Disaster is defined in objective terms and in terms which include the phrase "*Act of God*" which has been given a legal interpretation over many years, does not mean that it is incongruous for an expert in viticulture to decide whether the frost in question were a Natural Disaster, or a series of Natural Disasters as defined, being either an "*Act of God*" or a similar event or circumstance to the event or circumstances listed earlier in clause 4.26(l) that were beyond the lessee's reasonable control.

43 So far as the expression "*Act of God*" is concerned, as I understand it, the parties are in substantial agreement that the expression is to be understood as expounded by Latham CJ in *Commissioner of Railways (WA) v Stewart* (1936) 56 CLR 520 at 528-529, and by Atkin J in *Baldwin's Limited v Halifax Corp* (1916) 85 LJKB 1769 quoted by Dixon J in *Stewart* at 536-537.

44 Latham CJ said:

> "*An 'act of God' has been defined in various ways. In some definitions the idea appears that in order to be an 'act of God' an event must be irresistible, for example, per Mellish L.J. in* Nugent v Smith *(1876) 1 CPD 423 at 441, but the more generally received definition is stated by James L.J in the same case at 444, where it is said that an event is an 'act of God' where it is shown that 'it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected'.*"

45 Frost is, no doubt, an operation of the forces of nature. The question whether the frost or frosts in October, of whatever scale they were on the days in question, could not reasonably have been foreseen and its or their effects prevented, is very much within the expertise of a viticulturist.

46 In any event, the parties agreed in the lease that this was a question that should be determined by the expert whom they had specifically identified. They should be held to that bargain.

47 The fact that a non-lawyer has been given the task by the parties of making a determination that may involve questions of law is not itself a reason for refusing to hold the parties to their agreement as to the procedure for determining the issues (*Badgin Nomines Pty Ltd v Oneida Ltd* at [133]-[134]; *Savcor Pty Ltd v New South Wales* at 599 [44]; *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [30]; *Downer Engineering Power Pty Ltd v P&H Minepro Australasia Pty Ltd* [2007] NSWCA 318 at [79]).

48 The plaintiffs have raised other questions of construction of cl 4.26 that they submit should be determined by the Court and which they submit are unfit for determination by the expert.

49 The second declaration sought in the summons is that on the proper construction of cl 4.26 each individual frost event is a separate and distinct Natural Disaster for the purposes of cl 4.26(f)(i) and (ii). Insofar as that

question raises a matter of fact, it is a question that is as well able to be addressed by a viticulturist as by a court. In fact, a viticulturist is likely to bring greater experience to such a question than would a judge.

50 The declaration sought also raises a question of law, because cl 1.2(a) of the lease provides that "*words importing the singular shall embrace the plural*". *Prima facie* it might be thought that the reference to "a Natural Disaster" in cl 4.26(b)(c)(ii) and (f)(ii) would refer to either a Natural Disaster or to Natural Disasters. If so, the question raised by the second declaration *prima facie* would not arise. Whilst this is a question of law, I do not think that that is a reason for departing from the procedure for determination of the issues to which the parties agreed.

51 The plaintiffs also submit:

> "*13. In relation to the fourth declaration sought, paragraphs (f)(iii), (h) and (i) of clause 4.26 contemplate that in order to permit AVL to terminate the Lease, the Natural Disaster will result in the Production Capacity being less than 50% of the Average Production Capacity, such that either remedial works may be carried out to raise the Production Capacity to at least that level within 3 years or, alternatively, the Natural Disaster is so severe that the Expert concludes there are no remedial works which will achieve that outcome.*
>
> *14. This suggests that paragraph (f)(i) of clause 4.26 should be read as 'whether Production or Production Capacity has been reduced to less than 50% of the Average Production Capacity'. The point has real consequences. AVL identify Average Production Capacity as 21,236 tonnes, the initial Production Capacity as 31,865 tonnes and the Production Capacity following the three frosts as 16,194 tonnes, resulting in a total reduction in Production Capacity of 15,671 tonnes. AVL does not separately identify the reduction caused by each frost (see the second declaration addressed above). Further, 50% of the Average Production Capacity is 10,618 tonnes. That is, even on AVL's numbers, the Production Capacity is never reduced to less than 50% of the Average Production Capacity. If Belvino's construction is accepted, AVL's right to terminate is not enlivened.*"

52 This is, as I understand it, a different question from that previously raised in the correspondence from the plaintiff's solicitor. Nonetheless, it does raise a question of law.

53 The defendant points to the fact that the argument requires the rewriting of the words in cl 4.26. The defendant says that there are good commercial justifications for the differences in language between cl 4.26(b)(c)(i) and (f)(i), on the one hand, and 4.26(c)(iii) and (f)(iii), on the other hand. This is not the place to resolve the argument. Again, this is a question which the parties have given to the expert for his determination.

54 If the expert determined that Production Capacity had not been reduced to less than 50 per cent of Average Production Capacity but had been reduced by more than 50 per cent of Average Production Capacity due to a Natural Disaster and if the construction of cl 4.26 contended for by the plaintiff is correct, then it would be at least arguable that the determination would not be binding as it would not have been made in accordance with the terms of the lease. Indeed, I understood counsel for the defendant to assert that that would be the position. I prefer to express no concluded view about that. However this might be, I do not think that the raising of the argument is a sufficient reason not to hold the parties to the process to which they had agreed.

55 In *Dance With Mr D Limited v Dirty Dancing Investments Pty Limited* Hammerschlag J said (at [52]):

> "*[52] When parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument:* Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd *(1996) 39 NSWLR 160 at 165 per Gleeson CJ. The same considerations apply, in my view, to*

> *agreed alternative dispute resolution mechanisms such as expert determination.*"

56 I agree with the defendant's submission that this last argument attracts the point made by his Honour in that paragraph, that where the parties have agreed to refer disputes to an alternative dispute resolution mechanism such as expert determination they are unlikely to have intended that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues or the ingenuity of lawyers in developing points of argument.

57 For these reasons, I conclude that the plaintiff's proceedings should be stayed pending the expert determination under cl 4.26.

58 As matters presently stand, that cannot be done because the expert identified through cl 4.25, and otherwise accepted by both parties, insists on a release and indemnity which the plaintiff declines to give.

59 Clause 4.26 is silent as to the terms of the expert's retainer to which the parties should agree. But there is a term implied by law or as a matter of construction that:

> "*As a general rule ... where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.*"

(*Mackay v Dick* (1881) 6 App Cas 251 at 263; *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607.)

60 In *Secured Income Real Estate v St Martins Investments* Mason J said that it was common ground that the contract in that case imposed "*an*

implied obligation on each party to do all that was reasonably necessary to secure performance of the contract" (at 607).

61 The defendant submits that:

> "*53. The Lease is silent as to the terms of engagement of the Expert. In these circumstances, there are implied terms that:*
>
> *(a) his appointment will be on terms which are reasonable:* 1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd *(2009) 26 VR 551 at 559 ([29]); and*
>
> *(b) if the terms on which he seeks to be engaged are reasonable, then the parties have accepted those terms as part of their obligation to do all that is necessary to be done on its part to secure the appointment of the Expert, in circumstances where the parties have agreed that an Expert is to be appointed but the appointment cannot occur until both parties accept the Expert's terms:* 1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd *(supra) at 560-561 ([36]-[38]).*"

62 In *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd* (2009) 26 VR 551 the lessor and the lessee had agreed to refer any dispute arising out of or relating to their agreement, other than as to the amount or payment of rent or outgoings, to expert determination. If the parties could not agree on the selection of an appropriately qualified and independent expert, then an expert was to be appointed either by the President of the Law Institute of Victoria or the President of the Victorian Chapter of the Institute of Chartered Accountants or the Victorian Chapter of the Royal Australian Institute of Architects or similar bodies according to the area involved in the dispute. It was not a case, as in this case, where the parties had identified a particular individual or small class of individuals to be appointed as expert. In that context the Court of Appeal of Victoria said that:

> "*The silence of the agreement on the question of the expert's terms gives rise to a necessary implication that his appointment will be on terms which are reasonable having regard to the qualifications he has, the function he is to perform, the expertise he is to bring to his task and the responsibility which he is to*

> *undertake. Without such a term, this agreement would be unworkable. The fact that, on the evidence, the content of such a term can be readily ascertained lends weight to a conclusion that it should be implied and answers any contention that it is uncertain. The fact that the agreement is silent as to the expert's terms indicates the necessity for the implication of the term suggested. It is reasonable and equitable. It is necessary for the effective operation of the agreement. On the evidence, it is so obvious that it 'goes without saying'. It is capable of being clearly expressed and it contradicts no express term of the contract.*" (at 559, [29])

63 The Court of Appeal also referred to and applied the principle in *Mackay v Dick* quoted earlier in these reasons (at 561, [36]-[37]).

64 The issue in that case arose because the expert sought to include in his retainer a term providing for a release from liability and an indemnity otherwise than in the case of fraud. The Court of Appeal found that such a clause was reasonable and that there was an implied term of the lease that the parties agree to the term required by the expert so that the procedure for expert determination could proceed.

65 I think this is a stronger case than *1144 Nepean Highway Pty Ltd* for two reasons. First, in this case the parties had identified the expert as being the principal or consultant of Scholefield Robinson Horticultural Services Pty Limited. I think it is at least arguable that provided such an expert were available within the meaning of cl 4.26 the term implied by *Mackay v Dick* would apply, whether the stipulation by the expert was reasonable or unreasonable, as being something that was necessary in order for the parties to have the benefit of the procedures in cl 4.26.

66 Whether that is so or not, the term sought by Dr Scholefield is reasonable. The release and indemnity is narrower than the release and indemnity considered in *1144 Nepean Highway Pty Ltd*. It is also narrower than release and indemnity provisions contained in standard or pro forma agreements for the appointment of experts by many well-established and reputable bodies, including the New South Wales Bar Association, the Law Society of New South Wales, the Queensland Law Society, the Institute of

Arbitrators and Mediators, the Australian Commercial Dispute Centre, the Centre for Effective Dispute Resolution, and the Academy of Experts (London).

67 The plaintiff submits that there is no evidence that viticultural experts are usually appointed on terms which include a release and indemnity that would cover acts of negligence. The plaintiff's solicitor contacted sixteen experts whose names were provided by the Secretariat - Australian Wine Industry Code of Conduct. He advised each of them of the nature of the dispute which had arisen for expert determination in the present case. Each person was asked to provide a copy of the terms of engagement or retainer agreement or expert determination agreement that they would require in such a case. Of the five responsive answers, only one provided terms of engagement which included a release, discharge and indemnity clause.

68 I do not think this evidence takes the matter any further. The question is not whether the inclusion of a release and indemnity clause is usual or typical in the viticultural industry. The question, at most, is whether or not the clause required by Dr Scholefield is reasonable.

69 Moreover, it does not appear what the position of any of the other fifteen persons approached might have been had the litigious nature of the dispute been specifically raised. Dr Scholefield's initial terms of engagement did not include a release and indemnity clause. I infer it is because of his perception as to the extent of the risk of being exposed to court proceedings that he insists on such a clause. Whether others in the same industry would take the same position when apprised of all of the circumstances is not known. But I do not think it would be unreasonable if they did. After all, it was not until the late 1970s that it was clearly established that experts in the position of Dr Scholefield could be liable in negligence. It is unsurprising and also reasonable that persons in that

position should seek to protect themselves in the way that Dr Scholefield has.

70 Accordingly, I think there is an implied term in this case that requires the plaintiff to accept the terms of the release and indemnity required by Dr Scholefield.

71 I make orders accordingly. The orders I have made are in accordance with the short minutes of order handed up by counsel for the defendant with the following amendments: in orders 1 and 2 and 3 I have deleted the word "and"; and in order 1 I insert the words "within seven days" after the words "order that". With those amendments, I make orders in accordance with the short minutes of order which I have signed and initialled and date today.