SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

STATE OF SOUTH AUSTRALIA v GOLDSTEIN

[2016] SASC 202

Judgment of The Honourable Justice Blue

22 December 2016

CONTRACTS - BUILDING, ENGINEERING AND RELATED CONTRACTS - THE CONTRACT

CONTRACTS - BUILDING, ENGINEERING AND RELATED CONTRACTS - PERFORMANCE OF WORK - REMEDIES FOR BREACH OF CONTRACT

ARBITRATION

Action seeking declarations of invalidity of expert determinations and that they are not binding on the plaintiff. Third party action seeking parallel relief against the third parties in the alternative to the defence.

The plaintiff entered into a head contract with the second defendant for, inter alia, the design and construction of the new Royal Adelaide Hospital. The second defendant entered into a back to back construction contract with the third parties for the design and construction of the Hospital.

Clause 40.3(b) of the head contract, and clause 40(g) of the construction contract, provided that any dispute as to whether:

i. something is a Defect or related to the rectification of a Defect; or

ii. damage to the Facility that has been caused by a Defect,

will be referred by either party for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures.

Plaintiff: THE STATE OF SOUTH AUSTRALIA Counsel: MR R WHITINGTON QC WITH MR B DOYLE - Solicitor: LIPMAN KARAS
First Defendant: STEVEN GOLDSTEIN
Second Defendant: SA HEALTH PARTNERSHIP NOMINEES PTY LTD Counsel: MR P O'SULLIVAN QC WITH MR N FLOREANI - Solicitor: JOHNSON WINTER & SLATTERY
Third Partys: CPB PTY LTD AND HANSEN YUNCKEN PTY LTD Counsel: MR M HOFFMANN QC WITH MR C GOODALL - Solicitor: CRAWFORD LEGAL
Hearing Date/s: 28/11/2016 to 30/11/2016
File No/s: SCCIV-16-1101
A

In February 2016, the plaintiff served amongst others defect notices alleging defects by undersized floor distribution rooms, an under-height loading dock, undersized ceiling exclusion zones and sewer pipes encroaching into the primary data room.

In July 2016, the third parties served on the second defendant and the second defendant served on the plaintiff dispute notices referring disputes to expert determination in respect of amongst others the alleged defects.

Disputes emerged concerning amongst other things:

1. whether there had been informal agreement by State officers or employees to reduce the specified size of floor distribution rooms;

2. whether defects involving the loading dock height, clinical areas ceiling exclusion zones and the primary data room pipes are reasonably capable of rectification;

3. whether the State intends to rectify the defect involving the loading dock height;

4. whether risk mitigation works carried out by the third parties are reasonable and sufficient to mitigate the defect involving the primary data room pipes.

In August 2016, the parties appointed the first defendant as independent expert to determine the disputes. It was agreed that the first defendant would determine whether the disputes fell within the scope of clause 40.3 and, if so, determine the substantive disputes (the expert agreement).

In September 2016, the first defendant issued expert determinations. He determined amongst other things that:

1. State officers or employees had informally agreed to a reduction in the size of floor distribution rooms and the alleged defect in this respect was not a defect;

2. the defects involving the loading dock height, clinical areas ceiling exclusion zones and the primary data room pipes are not reasonably capable of rectification;

3. the State does not intend to rectify the defect involving the loading dock height;

4. risk mitigation works carried out by the third parties are reasonable and sufficient to mitigate the defect involving the primary data room pipes.

The plaintiff contends that the expert lacked jurisdiction under clause 40.3(b) of the head contract to make those determinations. The second defendant denies this and in the alternative makes parallel claims against the third parties under the construction contract.

The State contends that in any event it is not bound by the determination or alternatively it is not bound in respect of its right to damages or the issue of achievement of Technical Completion.

In October 2016, the State purported to refer to arbitration the matters the subject of the expert determination. The validity of this referral is in issue.

The second defendant contends that, by the agreement appointing the first defendant, the parties agreed that he was to determine conclusively his own jurisdiction and it is not open to the plaintiff to challenge his determination of his jurisdiction in this action.

Held:

1. On the proper construction of the expert agreement, the parties did not agree that the expert was to determine conclusively his own jurisdiction (at [126]).

2. The expert did not have jurisdiction to determine whether there was a defect in respect of floor distribution room sizes by reference to matters other than the original contractual specification (at [227]).

3. The expert had jurisdiction to determine whether defects involving the loading dock height, clinical areas ceiling exclusion zones and primary data room pipes are capable of remedy and was entitled to take into account practical and economic considerations as well as theoretical and physical considerations (at [253], [281], [306]).

4. The expert did not have jurisdiction to determine whether the State intended to rectify the defect involving the loading dock height (at [257]).

5. The expert did not have jurisdiction to determine whether risk mitigation works carried out by the third parties are reasonable and sufficient to mitigate the defect involving primary data room pipes (at [311]).

6. The plaintiff is bound by the expert determination insofar as the expert determined that something is or is not a defect (at [319]). However, the parties are not bound by the determinations that defects are not capable of remedy for the purposes of claims for damages by reason of the defects or on the issue of achievement of Technical Completion (at [320]-[322]).

7. The State's referral to arbitration was valid in respect of the determination by the expert concerning the extent of the defect involving clinical areas ceiling exclusion zones and concerning whether the defects involving the loading dock height and clinical areas ceiling exclusion zones are capable of remedy (at [351]).

8. No declarations should be granted concerning disputes originally the subject of the dispute notices but in respect of which referral to expert determination was abandoned by the second defendant and third parties (at [355]).

9. Declarations should be granted in favour of the State in accordance with the above conclusions (at [356]).

Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd (2015) 90 NSWLR 367; *Bellgrove v Eldridge* (1954) 90 CLR 613; *Byrnes v Kendle* (2011) 243 CLR 253; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, discussed.
AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd [2006] VSCA 173; *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99; *Holt v Cox* (1997) 23 ACSR 590; *Miwa Pty Ltd v Siantan Properties Pty Ltd* [2011] NSWCA 297; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd & Ors* (2004) 219 CLR 165; *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392; *Westfield Management Limited v AMP Capital Property Nominees Limited* (2012) 247 CLR 129, considered.

STATE OF SOUTH AUSTRALIA v GOLDSTEIN
[2016] SASC 202

Civil:

1 **BLUE J:** This is an action seeking declarations of invalidity of an expert determination pursuant to a development contract or alternatively that it does not relevantly bind the plaintiff and a third party action seeking parallel declarations in respect of a parallel construction contract.

2 The plaintiff, the State of South Australia, entered into a contract with the second defendant, SA Health Partnership Nominees Pty Ltd (*SAHP*), for the design, construction, financing, maintenance and non-clinical operation of the new Royal Adelaide Hospital (*the Hospital*).

3 SAHP entered into a contract with the third parties, Hansen Yuncken Pty Ltd and CPB Pty Ltd who comprised the HYLC Joint Venture (collectively *HYLC*) for the construction of the Hospital in terms largely mirroring the construction aspects of the head contract.

4 HYLC and SAHP referred disputes relating to 12 alleged defects to the first defendant, Steven Goldstein, for expert determination under the respective contracts. In the course of proceedings before Mr Goldstein, the parties resolved the issues relating to five alleged defects and they were withdrawn from the referrals.

5 Mr Goldstein relevantly determined that he had jurisdiction to make determinations concerning the existence and extent of each alleged defect; in respect of found defects whether the State intended to rectify the defect and whether rectification of the defect was reasonable; and in respect of one found defect whether risk mitigation works carried out by HYLC were reasonable and sufficient to resolve the defect.

6 The State purported to refer to arbitration its disputes in respect of the expert's substantive determinations.

7 The State seeks declarations that the expert had no jurisdiction to determine that:

1. there was no defect in the size of floor distribution rooms by reference to ex-contractual conduct of the State's officers and employees rather than the contractual specification;

2. the rectification of defects involving the loading dock height, clinical areas ceiling exclusion zones and primary data room pipes is unreasonable;

3. the State does not intend to rectify the defect involving the loading dock height;

4. risk mitigation works carried out by HYLC were reasonable and sufficient to mitigate the defect involving primary data room pipes.

8 SAHP contends that, by the agreement appointing Mr Goldstein as independent expert, the parties agreed that he was to determine conclusively his own jurisdiction to determine the substantive disputes and it is not open to the State to challenge in this action his determination of his jurisdiction.

9 The State seeks declarations that, pursuant to the terms of the head contract, it is not in any event bound by Mr Goldstein's determinations or alternatively in respect of its right to damages or on the issue of achievement of Technical Completion.

10 The State seeks declarations that Mr Goldstein did not have jurisdiction to determine that it should accept a Modification Change Notice at a nil sum or upon provision of a credit to the State determined by the expert or to be determined subsequently or that a defect be treated as a Technical Completion Outstanding Item.

11 SAHP and HYLC contend that the State's purported referral to arbitration was ineffective because the State was not entitled to refer the matter to arbitration pursuant to clause 71(o) of the head contract because the value of the determination was not greater than $1 million. SAHP also contends that it was ineffective because it was expressed to be conditional.

12 The following issues arise in the action:

1. Did the parties agree, by their agreement appointing Mr Goldstein as the independent expert, that he was to determine conclusively his own jurisdiction to determine the substantive disputes?

2. Did Mr Goldstein have jurisdiction under the contracts to determine whether there was a defect in respect of floor distribution room sizes by reference to matters other than the original contractual specification?

3. Did Mr Goldstein have jurisdiction under the contracts to determine whether the rectification of defects involving the loading dock height, clinical areas ceiling exclusion zones and primary data room pipes is reasonable?

4. Did Mr Goldstein have jurisdiction under the contracts to determine whether the State intends to rectify defects involving the loading dock height?

5. Did Mr Goldstein have jurisdiction to determine whether risk mitigation works carried out by HYLC were reasonable and sufficient to mitigate the defect involving primary data room pipes?

6. Is the State bound by Mr Goldstein's determinations and if so to what extent and for what purposes?

7. Was the State's referral to arbitration of its disputes in respect of the expert's substantive determinations ineffective because the value of the determination was not greater than $1 million or because the referral was expressed to be subject to the outcome of this action?

8. Should declarations be granted at the instance of the State that Mr Goldstein did not have jurisdiction to make determinations that he did not make?

Background

13 On 20 May 2011, the Minister for Health on behalf of the State entered into the New Royal Adelaide Hospital Project Project Agreement (*the head contract*) with SAHP (designated "Project Co") for the design, construction and financing of the Hospital to be completed by 4 April 2016 and the maintenance, licensed non-clinical operation and financing of the Hospital from the Date of Commercial Acceptance until 35 years after satisfaction of the conditions precedent (*the Operating Term*). SAHP's remuneration was payable by quarterly service payments in arrears between the Date of Commercial Acceptance and the conclusion of the Operating Term (clauses 50.1, 1.1 and Schedule 3).

14 On 20 May 2011, SAHP entered into the New Royal Adelaide Hospital Project Construction Agreement with HYLC (designated "the Builder") for the design and construction of the Hospital for $1,849,834,546 exclusive of GST (*the construction contract*).

15 For ease of reference, I refer to the head and construction contracts indiscriminately as *the contracts*.

16 Clause 2.6(b) of the head contract summarises the principal responsibilities of SAHP in the following terms:

> Project Co must, in accordance with this Agreement:
>
> (i) finance or procure the financing of the Project;
>
> (ii) design the Works and in so doing manage the Design Development Process and procedure prepare the Design Documentation;
>
> (iii) construct the Facility;
>
> (iv) achieve Technical Completion and Commercial Acceptance;

(v) provide the Services;

(vi) deliver the Facility in accordance with the Handback Condition;

(vii) perform all other obligations under this Agreement (except those obligations expressly required to be performed by the State under this Agreement); and

(viii) pay the Licence Fee to the State under the Operating Term Licence to occupy and use the Site for the performance of the Services.

17 Clause 2.5 of the head contract provides that SAHP warrants that from the Date of Commercial Acceptance throughout the Operating Term the Facility will be Fit for the Intended Purposes by reference to the Law, technology and the intended use of the Facility as at the Date of Commercial Acceptance.

18 Clause 1.1 defines Fit for the Intended Purposes to mean that the Facility satisfies the Design Specifications and all other requirements of the head contract for the design and construction of the Facility; enables SAHP to provide the Services so as to meet the performance standards set out in the Services Specification; facilitates and does not adversely affect the provision of the Facility Functions by the State and State Associates, and satisfies the Quality Standards.

19 Clause 21.1 requires SAHP to design the Facility in accordance with, amongst other things, the Design Requirements. The Design Requirements are defined by clause 1.1 to include the Design Specifications and the Design Departures Schedule. The Design Specifications are defined to comprise the Functional Brief and Technical Specifications contained in Schedule 18 (Design Specifications). The Design Departures Schedule is defined to mean the schedule of departures to the Design Specifications set out in Annexure B (Design Departures Schedule).

20 Clause 41.1(b) of the head contract requires SAHP to achieve Technical Completion by the Date for Technical Completion being 4 April 2016. Clause 41.1(c) requires SAHP to achieve Commercial Acceptance by the Date for Commercial Acceptance being 3 July 2016. Technical Completion is achieved when SAHP has satisfied each of the Technical Completion Criteria set out in Schedule 10 (Completion Requirement Schedule), which include practical completion of the Works in accordance with the Technical Specifications (as modified by the Design Departures Schedule). Commercial Acceptance is achieved after a period of testing and commissioning when SAHP has satisfied each of the Commercial Acceptance Criteria set out in Schedule 10.

21 Clause 41A.4 of the head contract provides that SAHP agrees to pay liquidated damages to the State during the period between the original Date for Commercial Acceptance and the actual Date of Commercial Acceptance in an amount equal to each State Loan Payment calculated under Schedule 3 (Payment Schedule). The State's recourse against SAHP is limited, amongst other things,

to liquidated damages received by SAHP from HYLC under the construction contract. Under clause 42.1 of the construction contract, HYLC agrees to pay liquidated damages to SAHP during the same period at the rate of $827,000 per day (capped at ten per cent of the contract price).

22 Clause 69.1 provides that any dispute arising between the parties out of or in connection with the Project, the Facility, the Designated Commercial Area, the Works or the head contract is to be resolved in accordance with clauses 69 to 72. Clause 69.2 provides that, if there is a dispute, a party may deliver to the other party a Notice of Dispute.

23 Clause 70(a) provides that, if a Notice of Dispute is delivered, unless another provision of the head contract provides for referral for expert determination, the parties are within five business days to meet and attempt in good faith to resolve the dispute and otherwise to refer the dispute for expert determination under clause 71 or arbitration under clause 72.

24 Clause 70(b) operates in default of the parties resolving the dispute under clause 70(a)(i) or referring it under clause 70(a)(ii) within ten business days of delivery of a notice of dispute. It provides for referral to expert determination where the dispute is in respect of a claim for payment of an amount equal to or less than $1 million and otherwise to arbitration.

25 Clause 71 provides "Accelerated Dispute Resolution Procedures" for disputes referred for expert determination under either clause 70 or directly pursuant to another provision of the head contract. Clause 71(o) provides that, if the value of the expert determination is greater than $1 million, a party may by written notice refer the matter to arbitration under clause 72 within 15 business days of the expert determination.

26 Clause 72 provides for arbitration of disputes referred to arbitration under clause 70(b) or clause 71(o).

27 Clause 40.1 addresses all defects other than Defects in the ICT Network. Clause 1.1 defines a Defect to mean an aspect of the design of the Facility not in accordance with the requirements of the head contract or a defect, shrinkage, fault or omission in the Works or the Facility. For ease of reference, I refer to a Defect as defined in clause 1.1 as a *defect*.

28 Clause 40.1(b) requires SAHP to rectify all defects whether or not the subject of a Defect Notice.

29 Clause 40.1(c) and (d) empower but do not require the State Delegate to give a Defect Notice to SAHP if the State Delegate is of the reasonable opinion that there is a defect. The Defect Notice must contain details of the Defect and, to the extent that the defect is in the reasonable opinion of the State Delegate capable of remedy, a completion time by which SAHP must rectify the defect.

30 Clause 40.1(e) provides that, if the State Delegate gives a Defect Notice identifying a defect that in the reasonable opinion of the State Delegate is capable of remedy, SAHP must rectify the defect by the completion time specified.

31 Clause 40.1(e) provides that, if SAHP does not rectify the defect by the completion time specified in the Defect Notice, the State is entitled to rectify or have rectified the Defect and the cost of the rectification work and any damage to the Facility caused by or arising from the defect is to be Moneys Owing. Moneys Owing are defined by clause 1.1 to mean moneys which SAHP is actually liable to pay to or for the account of the State.

32 Clause 40.2 creates a similar regime in respect of Defects in the ICT Network to that created by clause 40.1 in respect of other defects and is not directly relevant.

33 Clause 40.3(a) provides that the State's rights with respect to defects and SAHP's Liability with respect to defects under the head contract and otherwise at Law are not affected or limited by the State's rights under clause 40, by any failure by the State or State Delegate to exercise the State's rights under clause 40, any direction given by the State Delegate or by any other provision of the head contract.

34 Clause 40.3(b) provides that:

> Any dispute as to whether:
>
> (i) something is a Defect (including a Defect in the ICT Network) or related to the rectification of a Defect; or
>
> (ii) damage to the Facility that has been caused by a Defect,
>
> will be referred by either party for resolution by an independent expert in accordance with the Accelerated Dispute Resolution Procedures.

35 Clause 40 of the construction contract contains parallel provisions conferring rights upon SAHP and imposing obligations on HYLC in largely identical terms to clause 40 of the head contract. The obligation of HYLC under clause 40(a) to rectify defects is confined to defects for which HYLC is responsible. SAHP's reasonable opinion as to whether a Defect is capable of remedy is to be consistent, where relevant, with the opinion of the State Delegate under the head contract. Clause 40(f) is the equivalent of clause 42.3(a). Clause 40(g) is the equivalent of clause 42.3(b). Clause 40(i) provides that any dispute arising in relation to clause 40 shall be determined in accordance with the Accelerated Dispute Resolution Procedures.

36 Clause 79.5 of the head contract provides that, subject to two irrelevant exceptions, no amendment or variation of the contract is valid or binding on a party unless made in writing executed by both parties.

37 In general, the construction contract contains provisions which parallel the provisions in the head contract summarised above. The parties do not suggest that the differences in the relevant provisions are material to the issues in the action. For ease of reference, I generally refer only to the provisions of the head contract on the understanding that the equivalent provisions of the construction contact are not materially different.

38 The design of the Hospital incorporates a Primary Data Equipment Room to house central computer and communications equipment and cabling (*the primary data room*). The Technical Specification sections 22.4(b)(xv) and 22.5(c)(iv) provide that no other service is to be housed in the primary data room.

39 The design of the Hospital incorporates Floor Distribution Rooms to house local communications equipment and cabling (*the floor distribution rooms*). The Technical Specification, section 22.1 table 32 (as clarified by the Design Departures Schedule TS:178) requires floor distribution rooms to be a minimum of 40 square metres per room. Section 3.4 table 1 requires a 50 per cent contingency space and 100 per cent future flexibility space.

40 The design of the Hospital incorporates a loading dock to receive deliveries by truck of supplies for the Hospital (*the loading dock*). The Functional Brief section 97.2(s) states that the ceiling height of the loading dock must allow for the stacking of pallets and safe use of a forklift up to 3.5 metres.

41 The design of the Hospital incorporates the installation of various fittings and services in the cavity between the ceilings of a given floor and the slab of the floor above (*ceiling cavity*). The Technical Specification Part B section 3.3(a)(vii) (as qualified by the Design Departures Schedule TS:008 Table 2) requires a horizontal services zone of 200 mm minimum and left clear immediately above fittings in the ceilings in all Clinical Areas (exclusive of services that are required to serve ceiling mounted fixtures immediately below them) to allow for the installation of future services.

42 On 5 February 2016, the State Delegate gave to SAHP defect notice 580 entitled "Loading Dock Ceiling Height" (*the loading dock defect notice*). The Notice included:

> **Notice Details**
>
> I notify Project Co that I am of the opinion that the ceiling height of the loading dock is not in accordance with the requirements of the Agreement.
>
> I am of the opinion the Defect is not capable of remedy and I require Project Co to submit a Change Notice.

43 On 8 February 2016, the State Delegate gave to SAHP defect notice 579 entitled "Floor distribution room size and spare capacity" (*the FDR defect notice*). The Notice included:

Notice Details

I notify Project Co that I am of the opinion that some of the floor distribution rooms are not in accordance with the requirements of the Agreement. The rooms do not meet the minimum size requirement of 40m² per room and spare capacity for racks (50% redundant capacity) as required by the Design Specifications (as departed by TS:178).

I am of the opinion that in certain floor distribution rooms, the Defect is not capable of remedy and I require Project Co to submit a Change Notice. Floor distribution rooms that are capable of remedy will require rectification.

Completion time to rectify the Defect

To be determined upon receipt of Project Co's Change Notice

Conditions and Clarifications

Project Co's Change Notice must include a detailed assessment of all floor distribution rooms and the extent to which they are capable of remedy.

44 On 10 February 2016, the State Delegate gave to SAHP defect notice 621 entitled "Horizontal services zone of 200 mm minimum in all Clinical Areas" (*the clinical areas exclusion zone defect notice*). The Notice included:

Notice Details

I notify Project Co that I am of the opinion that the horizontal services zone immediately above fittings in the ceiling in all Clinical Areas is not in accordance with the requirements of the Agreement, which are to provide a clear horizontal services zone of 200mm minimum immediately above fittings in the ceiling.

I am of the opinion the Defect is not capable of remedy and I require Project Co to submit a Change Notice.

45 On 16 February 2016, the State Delegate gave to SAHP defect notice 632 entitled "Primary Data Equipment Room Sewer Pipes" (*the PDR defect notice*). The Notice included:

Notice Details

I notify Project Co that I am of the opinion that the sewer pipes that have been installed in the Primary Data Equipment Room (01.DAC.008) are not in accordance with the requirements of the Agreement.

The sewer pipes running through the Data Equipment Room pose a risk of water infiltration to a sensitive, high risk area.

I am of the opinion the Defect is not capable of remedy and I require Project Co to submit a Change Notice.

46 In each case, SAHP gave to HYLC a defect notice in the same terms *mutatis mutandis* as the State's notice.

47 On 8 July 2016, HYLC delivered to SAHP a notice of dispute in respect of 12 defect notices which included the four defect notices the subject of this action (*the HYLC dispute notice*). HYLC disputed that there was a defect in respect of the ceiling exclusion zone as alleged in the clinical areas exclusion zone defect notice but accepted that there was a defect in respect of the defects alleged in the other three defect notices although it made submission that the pipes were not prohibited in the primary data room. On 15 July 2016, SAHP delivered to the State a notice of dispute in respect of the same 12 defect notices (*the SAHP dispute notice*). The notice was in the same terms *mutatis mutandis* as the HYLC notice. For ease of reference, I refer to the dispute notices indiscriminately as *the dispute notice*.

48 On 17 August 2016, there was a meeting between representatives of the State, SAHP, HYLC and Mr Goldstein. At the meeting:

1. the State, SAHP and Mr Goldstein executed an Independent Expert Agreement (*the SAHP expert agreement*) whereby the parties appointed Mr Goldstein to act as an independent expert to determine disputes set out in the SAHP dispute notice; and

2. SAHP, HYLC and Mr Goldstein executed an Independent Expert Agreement in the same terms *mutatis mutandis* as the SAHP Expert Agreement (*the HYLC expert agreement*) whereby the parties appointed Mr Goldstein to act as an independent expert to determine disputes set out in HYLC dispute notice.

49 For ease of reference, I refer to the Expert Agreements indiscriminately as *the expert agreement*.

50 At the meeting, Mr Goldstein determined that submissions would be made about jurisdictional and substantive issues simultaneously and those issues would be determined simultaneously.

51 On 25 August 2016, the State instituted this action seeking declaratory and injunctive relief contending that the expert did not have jurisdiction to determine matters subject of the SAHP dispute notice. Ultimately, SAHP brought a third party action against HYLC making, in the alternative to its denials in its defence, parallel contentions against HYLC.

52 On 26 August 2016, the solicitors for HYLC wrote to the solicitors for the State and SAHP agreeing that three matters the subject of the dispute notice were outside Mr Goldstein's jurisdiction, namely the terms of Modifications the State should accept to remove Defects; the Independent Expert should exercise the State's discretion to accept a Modification; and certain Defects should be treated as Technical Completion Outstanding Items. On 30 August 2016, the solicitors for SAHP agreed that those three matters were outside Mr Goldstein's jurisdiction and should not be determined by him.

53 On 31 August 2016, the State sent to the expert and the other parties written submissions in response to the dispute notice (*the State's primary submission*). The State said that its submissions on substantive matters were without prejudice to its position that many of the determinations sought were outside the scope of clause 40.3. The State also said that, by reason of clause 40.3(a), its rights with respect to Defects were not affected by the referral or any determination. The State attached to its submission a defect notice assessment dated 27 May 2016 by its cost consultant Aquenta providing assessments of the cost of rectification or mitigation on various scenarios in respect of some of the defect notices including the FDR, loading dock and clinical areas exclusion zone defect notices (*the Aquenta cost assessment*).

54 On 7 September 2016, HYLC sent to the expert and the other parties written submissions in response to the State's submissions (*HYLC's reply submission*). SAHP adopted HYLC's reply submission and made some additional submissions of its own.[1]

55 On 12 September 2016, Mr Goldstein conducted a conference with the parties. Several issues were discussed.

56 On 14 September 2016, the State sent to the expert and the other parties written submissions in response to SAHP's reply submission and in respect of matters arising out of the conference (*the State's rejoinder submission*).

57 On 14 September 2016, HYLC sent to the expert and the other parties written submissions in respect of matters arising out of the conference (*HYLC's further submission*). SAHP adopted HYLC's further submission and made some additional submissions of its own.[2]

58 On 16 September 2016, the State sent to the expert and the other parties written submissions in response to HYLC's further submission (*the State's further reply submission*).

59 On 16 September 2016, HYLC sent to the expert and the other parties written submissions in response to the State's rejoinder submission (*HYLC's surrejoinder submission*). SAHP adopted HYLC's surrejoinder submission.

60 During the course of the submissions, the parties resolved the disputes that had been referred to the expert in relation to five of the defect notices the subject of the dispute notices and withdrew them from the expert determination.

61 On 26 September 2016, Mr Goldstein issued an Expert Determination between the State and SAHP determining the issues raised by the parties in respect of the seven defect notices still the subject of dispute (*the head contract*

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1 SAHP on 7 and 16 September adopted HYLC's submissions.

2 SAHP on 16 September adopted HYLC's submissions and on 14 September made some additional submissions of its own.

determination). On the same date, Mr Goldstein issued an Expert Determination between SAHP and HYLC determining the issues raised by the parties in respect of the seven defect notices in a parallel manner (*the construction contract determination*). For ease of reference, I refer to the determinations indiscriminately as *the determination*.

62 On 12 October 2016, the State served on SAHP a notice of referral to arbitration of the subject matter of the head contract determination (*the notice of arbitration*). The validity of the purported referral is in issue in this action.

63 During the course of the action, the parties resolved the disputes the subject of three of the defect notices the subject of the expert determination. This left four defect notices the subject of the action.

The trial

64 The State was *dux litus*. HYLC has a common interest in defending the State's action against SAHP. Indeed, HYLC took the lead role in adducing evidence and in address.

65 SAHP's primary position is in opposition to the State's contentions. However, its alternative position in the third party action is to adopt the State's contentions and seek parallel relief against HYLC as the State seeks against SAHP.

66 In a legal sense, there are two separate actions and no *lis* between the State and HYLC. In a commercial sense, the issues are primarily between the State and HYLC, with SAHP interposed. For ease of expression, I generally only describe SAHP's position in opposition to the State but it should be understood that generally SAHP adopts the State's position against HYLC in the third party action on the assumption (denied by SAHP) that the State will be successful in the action.

67 SAHP and HYLC generally adopted a uniform approach in opposition to the State in respect of the State's claims against SAHP, subject to two or three exceptions.

68 The trial was documentary. Documents tendered included the head contract (including schedules 1, 3, 4 and 10); the construction contract (including schedules 3, 4, 7 and 8); deeds amending the contracts; the four defect notices and a selection of correspondence relating to the alleged defects; the dispute notices; correspondence leading up to the expert agreements; the expert agreements; the party's submissions to the expert; the expert determinations; and subsequent correspondence.

69 Several documents were received subject to a relevance objection by the State. I now rule on the admission of those documents as follows:

1. Tab 11 comprises a defect notice not the subject of the action and associated correspondence. No substantive reference was made to these documents during addresses at trial. They are irrelevant and are not admitted.

2. Tabs 8 and 9 include correspondence associated with defect notices that were originally the subject of the action but are no longer. No substantive reference was made to these documents during addresses at trial. They are irrelevant and are not admitted.

3. Tabs 10 and 12 to 14 include correspondence associated with defect notices the subject of the action. Correspondence preceding the defect notices is relevant to provide the context for and better understand the defect notice. Correspondence succeeding the defect notices is relevant to provide the context for and better understand the dispute notices because it identifies disputes between the parties. I admit these documents.

4. Tabs 17, 19 to 21 and 24 comprise some of the correspondence leading up to the expert agreements. Other correspondence in this period was tendered and relied upon as evidence of surrounding circumstances for the purpose of better understanding the expert agreement. The documents to which the State objects are relevant for the same reason. I admit these documents so that there is a complete picture of the correspondence leading up to the expert agreement.

5. Tabs 60, 64, 65, and 67 to 72 comprise correspondence after the expert determination relating to the State's arbitration notice. They are relevant to the issues in the action concerning the validity of that arbitration notice. I admit these documents. I note however that no substantive reference was made to them during addresses at trial.

6. Tab 73 comprises Mr Goldstein's curriculum vitae. SAHP relies upon it as evidence of surrounding circumstances known to the parties in aid of the construction of the expert agreement. I admit the document as relevant for that purpose.

70 The State tendered an affidavit by one of its solicitors Scott Foreman sworn on 28 November 2016 and HYLC tended an affidavit by one of its solicitors Peter Pether sworn on 14 November 2016. The affidavits both relate to what was said at the preliminary conference on 17 August 2016 and the further conference on 12 September 2016. Neither deponent was cross-examined on his affidavit although there are differences between their accounts. The parties in closing address made extremely limited reference to the discussions during those conferences and determination of the issues in the action does not turn on those discussions.

The expert's determination

71 Mr Goldstein summarised the proceedings before him, his findings, and relevant provisions of the head contract. He then summarised his approach to jurisdictional issues.

72 Mr Goldstein addressed each alleged defect sequentially. In relation to each defect, he first set out matters of background, followed by a summary of the submissions. He then generally made determinations on the jurisdictional issues (where applicable), followed by determinations on substantive issues when he had concluded that he had jurisdiction to deal with them.

73 In relation to the floor distribution room size defect, Mr Goldstein noted that the State contended that, to the extent that HYLC may be submitting that conduct falling short of that required to amend the design requirements under the head contract gave rise to an estoppel, the expert determination process was inappropriate for a determination of that sort. Mr Goldstein considered that, in circumstances in which State officers or employees had informally agreed to a change in floor distribution room sizes, it was unreasonable for the State to insist on its strict legal rights under the head contract. Mr Goldstein concluded that the necessary preconditions that would give rise to an estoppel had been satisfied, but refrained from finding estoppel because he had not been specifically asked to do so. Mr Goldstein concluded that, by virtue of informal agreement by State officers or employees, the fact that floor distribution rooms had been designed and constructed to comprise less than 40 square metres did not comprise a defect. I address Mr Goldstein's reasoning in more detail at [221] below.

74 In relation to loading dock height, Mr Goldstein first addressed his jurisdiction to determine whether the State intended to rectify the defect. Mr Goldstein noted that the State had moved from a position expressed in the defect notice that the defect was not capable of remedy and implicitly that the State did not intend to rectify the defect, to the position expressed in its primary submission that the defect was capable of physical remedy and it did not seek rectification at that stage but sought damages so that it could carry out the rectification works in future. Mr Goldstein considered that the State thereby put in issue the question whether it intended to rectify the defect and he therefore had jurisdiction to determine that question. Mr Goldstein considered that he had jurisdiction to determine whether rectification was reasonable for the same reasons. In addition, he considered that the issue whether rectification was reasonable was "related to rectification of a Defect" within the meaning of clause 40.3(b)(i) of the head contract.

75 Mr Goldstein then addressed the substantive issues. He determined that the State did not intend to rectify the defect and rectification was not reasonable. I address Mr Goldstein's reasoning on these two substantive issues in more detail at [244] to [245] below.

76 In relation to the clinical areas ceiling exclusion zone, Mr Goldstein resolved the first construction issue whether the lower boundary of the exclusion zone of 200 mm is to be measured from the top of the ceiling tiles or the top of fittings affixed to the ceiling in favour of HYLC; the second construction issue whether 200 mm was required where vertical services descended towards the ceiling in favour of HYLC; and the third construction issue whether Blue Space, Green Space and Circulation Space form part of the clinical areas for which the exclusion zone is required in favour of HYLC. Mr Goldstein determined that there was a defect but that it involved less than one per cent of the relevant area.

77 Mr Goldstein considered that he had jurisdiction to determine whether rectification was reasonable for the same reasons as in respect of the loading dock height. Mr Goldstein determined that rectification was not reasonable. I address Mr Goldstein's reasoning on this substantive issues in more detail at [276] to [278] below.

78 In relation to the primary data room pipes, Mr Goldstein said that the State accepted that he had jurisdiction to determine the adequacy of the rectification/risk mitigation works undertaken by HYLC but that he did not have jurisdiction to determine whether redirection and/or removal of the offending pipes was reasonable. Mr Goldstein considered that the State's position in this respect was inconsistent and that he had jurisdiction to determine both matters.

79 Mr Goldstein determined that rectification by redirection and/or removal of the offending pipes was not reasonable and that the risk mitigation works carried out by HYLC were reasonable and sufficient to resolve the defect. I address Mr Goldstein's reasoning on these two substantive issues in more detail at [301] to [303] below.

The parties' contentions

80 SAHP makes an *in limine* contention that, by the expert agreement, the parties agreed that Mr Goldstein was to determine conclusively his own jurisdiction to determine the substantive disputes and it is not open to the State to challenge Mr Goldstein's determination of his jurisdiction in this action. It is necessary to address that contention first because, if it is accepted, many of the remaining issues in the action do not arise. On the other hand, if that contention is rejected, it is a matter for me to determine the scope of Mr Goldstein's jurisdiction independently of his own consideration of that question.

81 The State accepts, as it accepted before Mr Goldstein, that Mr Goldstein had jurisdiction to determine a dispute as to whether an alleged defect comprised a defect within the meaning of the contracts. However, the State contends that, in determining that there was no defect as defined in the contract in respect of the size of the floor distribution rooms, Mr Goldstein acted outside jurisdiction because he made his determination by reference to ex-contractual conduct by the State's officers and employees which he found to be unreasonable and by which

he held the State was bound independently of the terms of the contract. The State contends that his determination that there was no defect by reason of the size of the floor distribution rooms is a nullity.

82 The State contends that Mr Goldstein had no jurisdiction to determine a dispute about whether rectification of a defect is reasonable and that his determination that it was not in respect of the loading dock height, clinical areas ceiling exclusion zone and primary data room pipes was a nullity.

83 The State contends that Mr Goldstein had no jurisdiction to determine a dispute about whether the State intended to rectify a defect and that his determinations that the State did not so intend in respect of the loading dock height was a nullity.

84 The State contends that Mr Goldstein had no jurisdiction to determine a dispute about whether risk mitigation works undertaken by HYLC were reasonable and sufficient to resolve the defect in respect of the primary data room pipes and that his determination that they were reasonable and sufficient was a nullity.

85 The State contends that, by reason of clause 40.3(a) of the contract, it is not bound by any adverse determination by an expert under clause 40.3(b) or alternatively it is not adversely affected in respect of any claims for damages or issue whether Technical Completion has been achieved.

86 SAHP and HYLC take issue with each of the above contentions by the State. In the alternative, SAHP advances the same contentions as against HYLC.

87 The State contends that its 12 October 2016 notice of arbitration was valid and effective to refer its disputes the subject of adverse determination by Mr Goldstein to arbitration. SAHP and HYLC contend that the notice was not effective because the value of the determination was not greater than $1 million and in addition SAHP contends that it was not effective because it was conditional.

88 The State seeks a declaration that six proposed determinations originally sought in July 2016 in the dispute notices but abandoned in August 2016 and not addressed by Mr Goldstein were beyond the scope of the submission of a dispute for expert determination pursuant to clause 40.3(b) of the contract. SAHP and HYLC oppose such a declaration on the ground that it does not relate to a matter in dispute and is hypothetical.

Construction principles

89 The issues in the action turn essentially on the proper construction of the contract and the expert agreement.

90 There is no dispute concerning the legal principles that apply to the construction of contracts.

91 In the law of contract, the terms of a contract are determined by reference to the intention of the parties. The reference to intention is not to the subjective unexpressed intentions of the parties but to the intention objectively manifested to a reasonable observer observing from a neutral position or, where applicable, from the perspective of the other party.[3]

92 The construction of a contractual provision involves consideration of the text, context, evident purpose and fairness of the provision.[4]

93 A contractual provision is not construed in a vacuum but against the background and in the context of the surrounding circumstances known to both parties at the time of the contract.[5]

94 Evidence of the surrounding circumstances is admissible to give an understanding of the background and context against which a contractual provision is to be construed.[6] However, evidence of pre-contractual negotiations is not admissible as such and is only admissible if and to the extent that it is evidence of surrounding circumstances for the purpose of background and context.[7]

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3 *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35, (2004) 218 CLR 451 at [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd & Ors* [2004] HCA 52, (2004) 219 CLR 165 at [38], [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. This is subject to the doctrines of sham, *non est factum,* duress, illegality, unconscionable dealing or fraud in equity, estoppel, rectification, mistake, misrepresentation and undue influence (*Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253 at [115] per Heydon and Crennan JJ), none of which are applicable in the present case.

4 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5, (2002) 76 ALJR 436 at [10] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ and [68]-[70] per Kirby J; *Westfield Management Limited v AMP Capital Property Nominees Limited* [2012] HCA 54, (2012) 247 CLR 129 at [27] per French CJ, Crennan, Kiefel and Bell JJ; *Victoria v Tatts Group Ltd* [2016] HCA 5, (2016) 90 ALJR 392 at [51] per French CJ, Kiefel, Bell, Keane and Gordon JJ.

5 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 429 per Stephen, Mason and Jacobs JJ; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 348-352 per Mason J (with whom Stephen J agreed) and 401 per Brennan J; *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7, (2014) 251 CLR 640 at [35], [48] per French CJ, Hayne, Crennan and Kiefel JJ; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37, (2015) 256 CLR 104 at [47]-[51] per French CJ, Nettle and Gordon JJ; *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392 at [51] per French CJ, Kiefel, Bell, Keane and Gordon JJ.

6 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 429 per Stephen, Mason and Jacobs JJ; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 348-352 per Mason J (with whom Stephen J agreed) and 401 per Brennan J; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35], [48] per French CJ, Hayne, Crennan and Kiefel JJ; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [47]-[51] per French CJ, Nettle and Gordon JJ; *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392 at [51] per French CJ, Kiefel, Bell, Keane and Gordon JJ.

7 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 348-352 per Mason J (with whom Stephen J agreed) and 401 per Brennan J; *Byrnes v Kendle* (2011) 243 CLR 253 at [98] per Hayne and Brennan JJ.

95 Unless a contractual provision manifests a contrary intention, it should be construed to give a businesslike interpretation and produce a commercial result.[8] If the language of a contractual provision is ambiguous, and one construction giving rise to capricious, unreasonable, inconvenient or unjust consequences and the other does not, the latter is to be preferred.[9] However, a court is not entitled to rewrite a contractual position so as to depart from unambiguous language used by the parties.[10]

96 In *Byrnes v Kendle*,[11] Heydon and Crennan said:

> The approach taken to statutory construction is matched by that which is taken to contractual construction. Contractual construction depends on finding the meaning of the language of the contract – the intention which the parties expressed, not the subjective intentions which they may have had, but did not express. A contract means what a reasonable person having all the background knowledge of the "surrounding circumstances" available to the parties would have understood them to be using the language in the contract to mean. But evidence of pre-contractual negotiations between the parties is inadmissible for the purpose of drawing inferences about what the contract meant unless it demonstrates knowledge of "surrounding circumstances". And in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* this Court said:
>
> > "It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe."[12]

97 In *Electricity Generation Corporation v Woodside Energy Ltd*,[13] French CJ, Hayne, Crennan and Kiefel JJ said:

> The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties ... intended to produce a commercial result". A commercial contract is to be

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8 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35] per French CJ, Hayne, Crennan and Kiefel JJ; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [51] per French CJ, Nettle and Gordon JJ.

9 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 per Gibbs J.

10 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 per Gibbs J; *Miwa Pty Ltd v Siantan Properties Pty Ltd* [2011] NSWCA 297 at [18] per Basten JA (with whom McColl and Campbell JA agreed).

11 (2011) 243 CLR 253.

12 At [98]. (Citations omitted)

13 (2014) 251 CLR 640.

construed so as to avoid it "making commercial nonsense or working commercial inconvenience".[14]

Expert's determination of own jurisdiction

98 SAHP contends that, by the expert agreement, the parties agreed that the expert was empowered to determine conclusively the extent of his own jurisdiction under the contract to determine substantive disputes between the parties. The State takes issue with this contention and HYLC makes no submissions on this issue. If this contention is successful, most of the substantive issues in this action will not arise because they will have been determined conclusively by Mr Goldstein.

99 It is common ground that, absent specific agreement between the parties, under the head contract itself an expert appointed under clause 40.3 (or clause 70(b)) to determine a substantive dispute does not have jurisdiction to determine conclusively the extent of his or her substantive jurisdiction and such jurisdiction is to be exercised by a court of competent jurisdiction.

100 It is common ground that, if the parties specifically agreed that an expert was empowered to determine conclusively the extent of his or her substantive jurisdiction, such an agreement would be effective to empower the expert to so determine.

101 The issue raised by SAHP's contention turns on the proper construction of the expert agreement.

102 The SAHP expert agreement provides:

> By clause 40.3 of a contract dated 20 May 2011 between State of South Australia and SA Health Partnership Nominees Pty Ltd (the **Contract**), the parties agreed to submit certain disputes that they might that might arise between them to an Independent Expert (hereinafter referred to as the **Expert**), for determination through an Accelerated Dispute Resolution Procedure.
>
> A number of disputes have arisen between the parties which Project Co seeks to have determined by the Accelerated Dispute Resolution Procedure (the **Disputes**). The Disputes are set out in a Dispute Notice dated 15 July 2016.
>
> The parties have agreed to appoint STEVEN GOLDSTEIN … to act as the Expert to (i) determine whether the Disputes fall within the scope of clause 40.3; and (ii) insofar as the Disputes fall within the scope of clause 40.3, determine the Disputes in accordance with, and subject to, the Accelerated Dispute Resolution Procedure.
>
> … The determination of the dispute must be completed by 30 September 2016 unless the time is extended by agreement of the parties.

[14] At [35]. (Citations omitted)

103 The parties and Mr Goldstein were required by clause 71(e) to execute an Independent Expert Agreement within ten business days of nomination of Mr Goldstein as the expert.

104 SAHP contends that, by placitum (i) of the third paragraph of the expert agreement, the parties empowered Mr Goldstein to determine conclusively his own jurisdiction under clause 40.3 with respect to determining substantive disputes. The State contends that the purpose of inserting placitum (i) was to ensure that Mr Goldstein first considered his own jurisdiction (on a non-conclusive basis) before proceeding to determine the dispute set out in that notice and to avoid the possibility that the agreement might be construed as a concession by the State that Mr Goldstein had jurisdiction under clause 40.3 to determine all of the disputes set out in the dispute notice and.

105 SAHP relies on communications between the parties leading up to the execution of the expert agreement as extrinsic evidence of surrounding circumstances admissible in aid of construction of the agreement in the manner articulated by the High Court in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*.[15]

106 The State contends that extrinsic evidence of surrounding circumstances is only admissible in aid of construction of a contract if it has first been determined that the relevant provision is ambiguous on its face. I reject that contention. As a matter of principle, it would be artificial to attempt to construe a contractual provision in a vacuum without any reference to the background context.

107 As a matter of authority, in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*,[16] Stephen, Mason and Jacobs JJ expressed admissibility in unconditional terms:

> A court may admit evidence of surrounding circumstances in the form of "mutually known facts" "to identify the meaning of a descriptive term" and it may admit evidence of the "genesis" and objectively the "aim" of a transaction to show that the attribution of a strict legal meaning would "make the transaction futile".[17]

108 In *Codelfa Construction Pty Ltd v State Rail Authority (NSW),*[18] Mason J (with whom Stephen and Wilson JJ agreed) said:

> … it has frequently been acknowledged that there is more to the construction of the words of written instruments than merely assigning to them their plain and ordinary meaning … This has led to a recognition that evidence of surrounding circumstances is admissible in aid of the construction of a contract…

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15 (1982) 149 CLR 337.
16 (1978) 138 CLR 423.
17 At 429. (Citations omitted)
18 (1982) 149 CLR 337.

… in *Prenn* … It was held that, although evidence of prior negotiations and of the parties' intentions, and a fortiori the intentions of one of the parties, ought not to be received, evidence restricted to the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively of the "aim" of the transaction, was admissible.

…

Lord Wilberforce said:

> "The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, antiliteral, tendencies, for Lord Blackburn's well-known judgment in *River Wear Commissioners v. Adamson* provides ample warrant for a liberal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. Moreover, at any rate since 1859 it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term."

…

Lord Wilberforce returned to the same theme in *Reardon Smith*. In a speech concurred in by a majority of the members of the House of Lords he acknowledged that it is legitimate "to have regard to … 'the surrounding circumstances'". He went on to say

> "In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

…

> "…what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicitly to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed."[19]

Mason J quoted the above passage from *DTR Nominees* and added:

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.[20]

Brennan J said:

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[19] At 348-350. (Citations omitted)
[20] At 352.

> The meaning of a written contract may be illuminated by evidence of facts to which the writing refers, for the symbols of language convey meaning according to the circumstances in which they are used.[21]

109 The passage referring to ambiguity, properly understood in the context of the earlier passages and the reference to *DTR Nominees*, means that reference to the surrounding circumstances cannot change the meaning of a provision which is plain on its face and evidence of the surrounding does not assist in such a case. It does not mean that a finding of ambiguity must be made first before the context is considered.[22]

110 In *Electricity Generation Corporation v Woodside Energy Ltd,*[23] French CJ, Hayne, Crennan and Kiefel JJ said:

> Both Verve and the Sellers recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating".[24]

111 In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,[25] French CJ, Nettle and Gordon JJ said:

> In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
>
> Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
>
> However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to

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21 At 401.

22 See also the formulation of the rule by Stephen, Mason and Jacobs JJ in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 429 which describes admissibility in unqualified terms and to which Mason J referred in *Codelfa Construction*.

23 (2014) 251 CLR 640.

24 At [35]. (Citations omitted)

25 (2015) 256 CLR 104.

> the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
>
> …
>
> These observations are not intended to state any departure from the law as set out in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* and *Electricity Generation Corporation v Woodside Energy Ltd*. We agree with the observations of Kiefel and Keane JJ with respect to *Western Export Services Inc v Jireh International Pty Ltd*.[26]

Kiefel and Keane JJ said:

> That regard may be had to the mutual knowledge of the parties to an agreement in the process of construing it is evident from *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*. Mason J, with whom Stephen and Wilson JJ agreed, accepted that there may be a need to have regard to the circumstances surrounding a commercial contract in order to construe its terms or to imply a further term. In the passages preceding what his Honour described as the "true rule" of construction, his Honour identified "mutually known facts" which may assist in understanding the meaning of a descriptive term or the "genesis" or "aim" of the transaction. His Honour had earlier referred to the judgment of Lord Wilberforce in *Prenn v Simmonds*, where it was said that "[t]he time has long passed when agreements … were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations".
>
> In a passage from *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*, to which Mason J referred, it was said that the object of the exercise was to show that "the attribution of a strict legal meaning would 'make the transaction futile'". In *Electricity Generation Corporation v Woodside Energy Ltd*, French CJ, Hayne, Crennan and Kiefel JJ explained that a commercial contract should be construed by reference to the surrounding circumstances known to the parties and the commercial purpose or objects to be secured by the contract in order to avoid a result that could not have been intended.
>
> The "ambiguity" which Mason J said may need to be resolved arises when the words are "susceptible of more than one meaning." His Honour did not say how such an ambiguity might be identified. His Honour's reasons in *Codelfa* are directed to how an ambiguity might be resolved.
>
> In reasons for the refusal of special leave to appeal given in *Western Export Services Inc v Jireh International Pty Ltd*, reference was made to a requirement that it is essential to identify ambiguity in the language of the contract before the court may have regard to the surrounding circumstances and the object of the transaction. There may be differences of views about whether this requirement arises from what was said in *Codelfa*. This is not the occasion to resolve that question.
>
> It should, however, be observed that statements made in the course of reasons for refusing an application for special leave create no precedent and are binding on no one.[27]

Bell and Gageler JJ said:

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[26] At [47]-[49], [52]. (Citations omitted)
[27] At [108]-[112]. (Citations omitted)

> These appeals do not raise an important question on which intermediate courts of appeal are currently divided. That question is whether ambiguity must be shown before a court interpreting a written contract can have regard to background circumstances.
>
> Until that question is squarely raised in and determined by this Court, the question remains for other Australian courts to determine on the basis that *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* remains binding authority. That point, which of itself says nothing about the scope of the holding in *Codelfa*, was made in the joint reasons for judgment in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*. The point was reiterated, but taken no further, in the joint reasons for refusing special leave to appeal in *Western Export Services Inc v Jireh International Pty Ltd*. It should go without saying that reasons for refusing special leave to appeal in a civil proceeding are not themselves binding authority.
>
> The question whether ambiguity must be shown before a court interpreting a written contract may have regard to background circumstances does not arise for determination in these appeals.[28]

112 I address first the proper construction of the third paragraph of the expert agreement without regard to the extrinsic evidence and then address its proper construction having regard to that extrinsic evidence. As will be seen, the same construction applies whether or not regard is had to the extrinsic evidence.

113 It is evident from the face of the expert agreement that there was a dispute whether the disputes the subject of the dispute notice fell within the scope of clause 40.3: otherwise there would have been no motivation for inclusion of placitum (i) of the third paragraph of the expert agreement. As it was SAHP who issued the SAHP dispute notice and sought to enliven the jurisdiction of the expert to determine the disputes the subject of a notice, it must have been the State who disputed the jurisdiction of the expert to determine at least some of the disputes the subject of the notice.

114 If placitum (i) of the third paragraph had not been included in the expert agreement, it is possible that it might have been contended that, in appointing the expert, the parties were accepting that the expert had jurisdiction to determine all of the disputes the subject of the dispute notice at one or two different levels. At the higher level, it might have been contended that the parties could not institute proceedings in a court of competent jurisdiction seeking a declaration that the expert did not have such jurisdiction (albeit such a contention would not in fact have been successful). At the lower level, it might have been contended that the expert was not to consider his or her own jurisdiction but merely to proceed to make the substantive determination (albeit the expert would not in fact have been thereby precluded from considering his or her own jurisdiction). The inclusion of placitum (i) of the third paragraph is readily explicable by the State, out of an abundance of caution, wishing to avoid these theoretical risks and there is no reason to look for a more profound explanation for inclusion of the clause.

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[28] At [118]-[120]. (Citations omitted)

115 It is an unlikely construction of the placitum that, the State being concerned that the expert did not have jurisdiction to determine some of the substantive disputes the subject of the notice, the State agreed to be bound by the expert's determination of his own jurisdiction. It is an unlikely construction of the placitum that either party was relinquishing its right to have recourse to the courts to determine the expert's jurisdiction.

116 The source of the expert's jurisdiction to determine the substantive disputes the subject of the dispute notice was not the expert agreement but rather clause 40.3 of the head contract. The referral for expert determination was achieved by the unilateral act of SAHP pursuant to clause 40.3(b) of the head contract and did not require the concurrence of the State. Under clause 71(a), the parties were required to agree on the identity of the expert but not on the anterior referral of the dispute to an expert.

117 The first paragraph of the expert agreement makes it plain that the juristic basis for the referral for expert determination was clause 40.3 of the head contract. This is reinforced by the reference in placitum (ii) of the third paragraph which confines the substantive disputes the expert is to determine to those that fall within the scope of clause 40.3 of the head contract. If the expert agreement confers jurisdiction on the expert to determine conclusively his own jurisdiction under clause 40.3 to determine substantive disputes, that jurisdiction was conferred outside clause 40.3 and outside the head contract: it must have been conferred by an agreement between the parties manifested in the expert agreement extraneous to the head contract. If the parties had intended to take such a profound step, it may be expected that they would have expressed this in the expert agreement. However, the structure and content of the expert agreement suggest that it was merely made in prosaic implementation of the provisions of the head contract.

118 Clause 71(o) of the contract gives to each party the equivalent of a right of review or appeal to an arbitrator against a determination of an independent expert under the contract when the value of the determination is greater than $1 million. If the parties had by the expert agreement given to the expert an independent jurisdiction to determine his own substantive jurisdiction to determine the substantive disputes, that independent jurisdiction would not have been subject to clause 71(o) and the parties would have had no right of appeal or review of the experts jurisdiction decision. This is an unlikely intention to attribute to the parties.

119 On the proper construction of the expert agreement on its face, it is plain that the expert was not given jurisdiction to determine conclusively his own substantive jurisdiction.

120 I turn to the evidence of surrounding circumstances. On 27 July 2016, the State wrote to the President of the Resolution Institute requesting on behalf of the parties that the President nominate an independent expert to determine the

dispute the subject of the dispute notice. The letter concluded with the following passages:

> The Dispute Notice gives rise to a variety of complex technical, engineering and legal issues, including issues of contractual interpretation under the Agreement. The dispute will require the determination of: (i) scope of the submission to Expert Determination under clause 40.3(b) of the Agreement; (ii) whether the Category 2 Defects set out in the Dispute Notice comprise Defects; and (iii) the quantification of the damage to the Facility caused by each of the Category 1 and Category 2 Defects (as determined), including the legal and/or contractual basis for those calculations.
>
> The State considers that the scope of the Independent Expert's jurisdiction under clause 40.3 will need to be determined as a preliminary issue.

121 On 28 July 2016, the State wrote to SAHP expressing disagreement with the proposition set out in the dispute notice regarding the scope of the matters available for determination by the independent expert. The State contended that several of the determinations sought in the dispute notice fell outside the scope of clause 40.3(b) of the contract.

122 On 15 August 2016, the State's solicitors wrote to SAHP's solicitors contending that several of the determinations sought in the dispute notice fell outside the scope of clause 40.3(b) of the contract. The State's solicitors observed that, if SAHP did not withdraw those matters, it would be necessary for Mr Goldstein to determine the scope of the submission as a preliminary matter. The State's solicitors enclosed a marked up version of the expert agreement to reflect the State's position regarding the scope of the procedure. That version included placitum (i) and the qualification and limitation in placitum (ii) (each of which had not been previously included).

123 Evidence of the negotiations over the wording of the expert agreement is not admissible as such to aid in the construction of the expert agreement. However, this correspondence is admissible as evidence of the surrounding circumstances known to both parties in aid of its construction.

124 These three items of correspondence from the State confirm what is evident from the expert agreement itself that the State contended that several of the determinations sought in the dispute notice fell outside the scope of clause 40.3(b) of the contract. It shows the genesis and purpose of the inclusion of placitum (i). It shows that, before placitum (i) was included, the State had said that the scope of the independent expert's jurisdiction under clause 40.3 would need to be determined as a preliminary issue and the State took this position in the absence of any suggestion of the inclusion of placitum (i) in the expert agreement.

125 This evidence of the genesis of the matter confirms that the purpose of inserting placitum (i) was to ensure that Mr Goldstein first considered his own

jurisdiction (on a non-conclusive basis) before proceeding to determine the disputes set out in that notice.

126 On the proper construction of the expert agreement having regard to the surrounding circumstances, it is plain that the expert was not given jurisdiction to determine conclusively his own substantive jurisdiction.

Judicial determination of expert jurisdiction principles

127 There is no dispute concerning the legal principles that apply to the judicial determination of an independent expert's determination.

128 If the expert has determined an issue that he or she is not authorised by the contract to determine, not carried out the task he or she is required to undertake, carried it out in a manner that he or she is not authorised to undertake or acted otherwise than in accordance with the contractual requirements for an expert determination, the determination will be ineffective.[29]

129 On the other hand, the mere fact that an expert makes an error or mistake does not render the determination ineffective.[30]

130 In *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd*,[31] Bathurst CJ (with whom Beazley P and McColl JA agreed) said:

> The parties accepted that the question depended upon whether the determination was made in accordance with the contract. As Nettle JA pointed out in *AGL Victoria*, in one sense, this test is conclusionary. The question of whether the determination is open to review rather depends on whether or not the expert has carried out the task which he or she was contractually required to undertake. If the expert in fact carried out that task, the fact that he made errors or took irrelevant matters into account would not render the determination challengeable.
>
> On the other hand, if the expert had not performed the task contractually conferred on him or her, but rather performed some different task, or carried out his or her task in a way not within the contractual contemplation of the parties, objectively ascertained, then the determination will be liable to be set aside.[32]

Context of clause 40

131 Before turning to clause 40 itself, it is useful to consider other provisions of the contract that form part of the context in which clause 40 is to be considered.

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[29] *Holt v Cox* (1997) 23 ACSR 590 at 596-597 per Mason P (with whom Priestley JA agreed); *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 at [51] per Nettle JA (with whom Maxwell P and Bongiorno AJA agreed); *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38, (2011) 244 CLR 305 at [26]-[27] per French CJ, Brennan and Kiefel JJ; *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* [2015] NSWCA 275, (2015) 90 NSWLR 367 at [74] per Bathurst CJ (with whom Beazley P and McColl JA agreed).

[30] *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 at [51] per Nettle JA (with whom Maxwell P and Bongiorno AJA agreed); *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367 at [74] per Bathurst CJ (with whom Beazley P and McColl JA agreed).

[31] (2015) 90 NSWLR 367.

[32] At [74]-[75]. (Citations omitted)

Clause 58 Default Notices

132 Clause 40 operates in conjunction with clause 58 which addresses defaults, major defaults and default termination events.

133 Clause 58.1 empowers the State Delegate, if a Default occurs, to give to SAHP a Default Notice. The Default Notice is to state that a Default has occurred and, if capable of remedy, to require SAHP to cure the Default within a specified period being not more than 20 business days (*the Default Cure Period*).

134 A Default is defined by clause 1.1 to mean:

> the occurrence of any event of default or breach of any obligation by Project Co under any State Agreement, but excludes any Major Default, Default Termination Event or Service Failure.

135 Constructing the Hospital in a manner giving rise to a Defect falls within the definition of Default.

136 If SAHP acting diligently is unable to cure the Default within the specified Default Cure Period and has provided to the State a cure plan setting out its actions and timetable to cure the default, clauses 58.1(d) and 58.1A(a) to (c) provide mechanisms for the State, acting reasonably, to extend the Default Cure Period twice by periods determined by the State.

137 If SAHP fails to cure the Default within the Default Cure Period (as extended when applicable), the Default becomes a Major Default (clauses 58.1(e) and 58.1A(d) and (e)).

138 Clause 58.3 empowers the State Delegate, if a Major Default occurs, to give to SAHP a Major Default Notice. The Major Default Notice is to state that a Major Default has occurred and that SAHP has 20 business days (*the Initial Cure Period*) to cure the Default, failing which a Default Termination Event will *prima facie* occur.

139 Upon receipt of a Major Default Notice, SAHP is required to submit promptly to the State a detailed cure plan and diligently pursue cure of the Major Default (clause 58.4).

140 If SAHP acting diligently is unable to cure the Major Default within the specified Default Cure Period and has provided to the State a revised cure plan setting out its actions and timetable to cure the default and why an extension is required, clauses 58.5 and 58.6 provide mechanisms for the State, acting reasonably, to extend the Cure Period twice by periods determined by the State. The Cure period is suspended while SAHP is prevented from performing actions under a Cure Plan by an Extension Event, Intervening Event or Force Majeure Event (clause 58.7).

141 If SAHP fails to cure the Major Default within the Cure Period (as extended when applicable), the failure to remedy the Major Default becomes a Default Termination Event entitling the State amongst other things to terminate the Agreement (clauses 58.8 and 58.10).

142 If, in the view of the State acting reasonably, there are no reasonable requirements that can be satisfied by SAHP to overcome the consequences of, or to compensate the State for, a Default, the State is entitled to treat the Default as a Major Default (clause 58.1A(f)).

143 If a Major Default or its cause is not capable of being remedied or cured, SAHP is required to notify the State promptly setting out why and to diligently comply with any reasonable requirements of the State to overcome the consequences of, or compensate the State for, that Major Default (clause 58.9(a)). If SAHP fails to so act, or if in the view of the State acting reasonably there are no reasonable requirements that can be met by SAHP to overcome the consequences of, or compensate the State for, a Major Default and it will have a Material Adverse Effect, the State is entitled amongst other things to terminate the contract (clauses 58.9(c) and 58.10).

144 Clause 1.1 defines a Material Adverse Effect to mean a material adverse effect on:

(a) the ability of Project Co to perform and observe its obligations under any Project Document;

(b) the rights of the State under any Project Document, or the ability or capacity of the State to exercise its rights or perform its obligations under a State Agreement; or

(c) the performance of, or the cost of undertaking or delivering the Then Current Facility Functions.

145 Clause 58.12(a) *prima facie* defines the words "remedy" and "cure" for the purposes of clause 58 in the following terms:[33]

> Where the word "remedy" or "cure" or any other grammatical form of that word is used in this Clause 58, it means to cure or redress the relevant occurrence or overcome its consequences so that there ceases to be any continuing detrimental effect of that potential or actual Major Default or Default Termination Event and so that any prior detrimental effect is rectified so that the State and each State Associate is in the position it would be in as if the relevant occurrence had not taken place.

Clause 52 and 23 modifications

146 Clause 52 of the contract sets out the party's rights and obligations in respect of Modifications and FF&E Modifications (other than Minor Modifications during the Design and Construction phase).

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[33] Paragraphs (b) and (c) address the removal of subcontractors and tenants and can be ignored for present purposes.

147 Modifications are defined by clause 1.1 in the period prior to Commercial Acceptance to mean *prima facie*:

> in the period prior to Commercial Acceptance, any change to the Design Requirements including any addition, decrees, omission, deletion or removal to or from the Works which results from a change to the Design Requirements;
>
> ...
>
> (d) those events or circumstances which are expressly deemed to be a Modification pursuant to the terms of this Agreement.

148 However, paragraphs (e) to (q) exclude certain changes from the definition, including paragraph (l) which excludes:

> (l) any change referred to in paragraphs (a) to (c) which are required to rectify a Defect (whether or not the subject of a Direction from the State); …

149 Clauses 52.2 to 52.11 create a mechanism for the State to issue a Modification Price Request in respect of a proposed Modification, to which SAHP is to respond with a fixed price quotation for a Change Notice. If the State decides to proceed, SAHP is required to prepare a Change Notice at the accepted price if the State accepts the quotation or at a price to be determined by an Independent Expert if it does not. By reason of the definition in clause 1.1 of a Change Notice, the Change Notice must comply with the Change Compensation Principles set out in Schedule 4 (Change Compensation Principles) to the contract. By reason of the definition of Modification referred to above, these clauses do not apply to changes to address a defect, and this would be the case in any event because it is self-evident that the State will not be paying a price for a change to address a defect.

150 Clauses 52.13 to 52.15 create a mechanism for SAHP to initiate a Project Co Modification by submitting a Change Notice, which the State may accept by issuing a Modification Order. If the State issues a Modification Order, any actual net cost savings resulting from the modification are to be calculated in accordance with the Change Compensation Principles and to be equally shared between SAHP and the State. By reason of the definition of Modification referred to above, these clauses do not apply to changes to address a defect, and this would be the case in any event because it is self-evident that the State will not be sharing with SAHP the savings resulting from a change to address a defect.

151 Clause 23 addresses Minor Modifications during the design and construction phase. Clause 23.3 provides that a Minor Modification may be approved in writing by the Project Director by reference to the Minor Modifications Running Schedule. Payments in respect of Minor Modifications are to be calculated in accordance with the Change Compensation Principles. A Minor Modification is defined by clause 1.1 to be a subset of a Modification or

FF&E Modification. By reason of the definition of Modification referred to above, these clauses do not apply to changes to address a defect, and this would be the case in any event because it is self-evident that the State will not be sharing with SAHP the savings resulting from a change to address a defect.

Clauses 69-72 dispute resolution

152 Clause 40 operates in conjunction with clauses 69 to 72 which address dispute resolution.

153 Clause 69.1 provides:

> If any dispute arises between the parties in respect of any fact, matter or thing arising out of, or in any way in connection with the Project, the Works, the Facility, the Designated Commercial Area, or the Designated Commercial Area Works the Site or this Agreement (**Dispute**) then the Dispute will be resolved in accordance with Clauses 69 to 72.

154 Clause 69.1 has a general application to all disputes arising under the contract or in connection with the Project, regardless of whether there is a specific provision in the contract (such as clause 40.3(b)) providing for the resolution of disputes in accordance with, say, clause 71 being the Accelerated Dispute Resolution Procedures.

155 Clause 69.2 provides:

> If there is a Dispute, then a party may deliver to the other party a Notice of Dispute together with its submissions in relation to the Dispute. The submissions will set out its contentions including any relevant legal basis of claim

156 A Notice of Dispute is defined by clause 1.1 to mean a written notice specifying:

> (a) that the party giving the notice disputes a fact, opinion, matter or thing;
>
> (b) detailed particulars concerning the fact, opinion, matter or thing in dispute;
>
> (c) the legal basis for the dispute, whether based on the terms of this Agreement or otherwise, and if based on the terms of this Agreement, clearly identifying the relevant terms;
>
> (d) the facts relied upon to dispute the fact, opinion, matter or thing; and
>
> (e) the outcome sought (including the quantum where applicable).

157 Clause 69.2 uses the permissive word "may" to reflect the fact that it is not mandatory for a party to refer a dispute for resolution by Executive Dispute Resolution, Accelerated Dispute Resolution or Arbitration under clauses 70 to 72. However, the provisions of clauses 70(h) and 71(a)(i) make it clear that, if a party wishes to refer a dispute for resolution under clauses 69 to 72, it is mandatory for the party to deliver a Notice of Dispute in accordance with clause 69.2.

158 Clause 70(a) provides that, if a Notice of Dispute is delivered, the parties are within five business days to meet and attempt in good faith to resolve the dispute and otherwise to refer the dispute for expert determination under clause 71 or arbitration under clause 72. By virtue of clause 71(a)(i), clause 70 does not apply when another provision of the agreement (such as clause 40.3(b)) expressly provides for referral for expert determination.

159 Clause 70(b) operates in default of the parties resolving the dispute under clause 70(a)(i) or referring it under clause 70(a)(ii) within ten business days of delivery of a Notice of Dispute. Clause 70(b) provides that in this event:

> the Dispute shall be referred to arbitration under Clause 72 save where the Dispute is in respect of a claim for payment of an amount which is equal to or less than $1 million (as set out in the Notice of Dispute) in which case, within 10 Business Days of the delivery of the Notice of Dispute, the Dispute shall be referred for resolution by an Independent Expert under Clause 71.

160 Clause 71(a) requires the parties within five business days of referral of a dispute for expert determination (whether the referral is unilateral under an express provision of the contract such as clause 40.3(b) or bilateral under clause 70(a)(ii) or automatic under clause 70(b)), to agree on the identity of and appoint a person as the Independent Expert. Clause 71(c) provides in default of agreement on the identity of the Independent Expert for nomination by presidents of defined institutes. Clause 71(e) requires the Independent Expert and the parties to execute an Independent Expert Agreement within ten business days of agreement on or nomination of the expert.

161 Clause 69.2 and the definition of Notice of Dispute in clause 1.1 require a party delivering a Notice of Dispute to include submissions including detailed particulars concerning the fact, opinion, matter or thing the subject of the dispute; the legal basis for the dispute; the facts relied upon to dispute the fact, opinion, matter or thing in question and outcomes sought.

162 Clause 71(g)(ii) requires the respondent to provide submissions in response within five business days of execution of the Independent Expert Agreement or any extended time allowed by the expert.

163 Clause 71(g)(iii), (h), (i) and (l) empower the expert to call for further submissions, documents or information, call and conduct conferences and/or visit the site.

164 Clause 71(g) requires the expert to make the determination based on the submissions and information received as identified in the previous three paragraphs.

165 Clause 71(m) requires the expert to make the determination within 30 business days of receipt of the respondent's submissions (normally within 35 business days of execution of the Independent Expert Agreement) and in any

event within ten business days of the last of the steps referred to in the previous paragraphs.

166 Clause 71(n) provides that the Independent Expert will act as an expert and not an arbitrator and may make a decision from his or her own knowledge and expertise.

167 Clause 71(o) provides:

> (**Final and binding**): To the extent permitted by Law, the determination of the Independent Expert will be final and binding on the parties, unless:
>
> (i) the value of the determination is greater than $1 million; and
>
> (ii) a party gives written notice to the other party within 15 Business Days of the determination referring the matter to arbitration under Clause 72.

168 If a party exercises the right conferred by clause 71(o) to refer to arbitration the subject matter of an expert determination, the arbitrator will (subject to agreement between the parties that the arbitration should proceed in some other manner) determine the underlying dispute *ab initio* in accordance with clause 72. Nevertheless, in practice the arbitration is likely to proceed by way of review of the expert's determination and it might be likened in a very loose sense to an appeal *ab initio*. While the analogy to appeal is imperfect, for ease of reference only I refer to a reference to arbitration under clause 71(o) as *an appeal* and to the party making the referral as *the appellant*.

169 Clause 72 addresses arbitration. Clause 72.1(a) provides that all disputes referred to arbitration are to be finally determined in accordance with clause 72 before an arbitrator to be agreed between the parties within five Business Days of referral to arbitration or, in default, an arbitrator nominated by the Australian Centre for International Commercial Arbitration.

170 Clause 72.1(b) provides:

> The arbitrator will have power to grant all legal, equitable and statutory remedies and to open up, review and substitute any determination of an Independent Expert under Clause 71 which has been referred to arbitration.

Scope of expert determination under clause 40

171 The substantive issues in this action turn essentially on the construction of clause 40.3(b) of the contract. That construction is to be determined by reference to the text of clause 40.3(b), its context within clause 40 and the contract as a whole, and its evident purpose.

172 Clause 40 relevantly provides:

> **40. Defects**

40.1 Generally

(a) This Clause 40.1 does not apply to Defects in the ICT Network.

(b) Project Co will rectify all Defects:

(i) whether or not the subject of a notice under this Clause 40; and

(ii) whether occurring:

A. before Technical Completion or Commercial Acceptance; or

B. during the Operating Term;

(c) If the State Delegate is of the reasonable opinion that there is a Defect, then the State Delegate may give a written notice to Project Co (**Defect Notice**).

(d) A Defect Notice must contain the following information:

(i) details of the Defect; and

(ii) to the extent that the Defect is, in the reasonable opinion of the State Delegate, capable of remedy, a completion time by which Project Co must rectify the Defect (which completion time must take into account the nature of the Defect and otherwise allow for a reasonable period of time for the execution of any rectification works).

(e) If a Defect Notice is given under paragraph (c) and the Defect is, in the reasonable opinion of the State Delegate, capable of remedy, subject to Project Co's rights under Clause 52.20, Project Co must rectify the defect by the completion time specified in the Defect Notice. If the Defect is, in the reasonable opinion of the State Delegate, capable of remedy, and is not rectified by Project Co by the completion time specified in the Defect Notice, then the State is entitled to rectify the Defect itself or engage a third party to rectify the Defect and the cost of any:

(i) such a rectification work; and

(ii) damage to the Facility caused by or arising from the Defect,

will be Moneys Owing.

…

40.3 Liability not limited and disputes

(a) The State's rights with respect to Defects (including Defects in the ICT Network) and Project Co's Liability with respect to Defects under this Agreement and otherwise at Law will not be affected or limited by:

(i) the State's rights under this Clause 40;

(ii) any other provision of this Agreement;

(iii) any failure by the State or the relevant State Delegate to exercise the State's rights under this Clause 40; or

(iv) any Direction of the relevant State Delegate.

(b) Any dispute as to whether:

(i) something is a Defect (including a Defect in the ICT Network) or related to the rectification of a Defect; or

(ii) damage to the Facility that has been caused by a Defect,

will be referred by either party for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures.

173 Clause 40.2 addresses Defects in the ICT Network. It is common ground that it does not apply to the four defects the subject of this action and is not therefore directly relevant. Essentially it contains provisions applicable to the ICT Network which parallel the provisions in clause 40.1. I have taken into account its provisions in the construction of clause 40.3 but that they do not change the construction of that clause.

174 Clause 1.1 defines the following relevant terms appearing in clause 40 (not already explained above) as follows:

Defect means:

(a) any aspect of the design of the Facility which is not in accordance with the requirements of this Agreement; or

(b) any defect, shrinkage, fault, or omission in the Works or the Facility (but excludes any normal shrinkage of materials unless that shrinkage would have been accommodated for in accordance with Industry Best Practice).

Law means:

(a) any statute, regulation or subordinate legislation of the Commonwealth of Australia, the State of South Australia or local or other government in force in the State of South Australia, irrespective of where enacted; and

(b) the common law and the principles of equity as applied from time to time in the State of South Australia.

Moneys Owing means all moneys which Project Co, alone or with any other person, at any time becomes actually liable to pay to, or for the account of, the State (alone or with any other person) on any account whatsoever under, or in relation to, any Project Document (including by way of principal or interest, fees, costs, charges, expenses, indemnity, damages or abatement under the Abatement Regime).

175 Clause 1.2(l) provides that headings are for convenience only and do not affect the interpretation of the contract.

176 The subject matter of clause 40 is "Defects" as defined by the contract. Clause 21.1 requires SAHP to design the Facility in accordance with, amongst others, the Functional Brief and Technical Specifications as modified by the Design Departures Schedule. It follows that one species of defects includes construction of the Hospital otherwise than in accordance with the Technical Specification as modified/clarified by the Design Departures Schedule. Another species (not arising in this action) is defective workmanship or use of defective materials.

177 Clause 40.3(b) is to be construed in the context of clause 40 as a whole. Clause 40.1 creates a regime for the State to give a Defect Notice. For ease of reference, I refer to a Defect Notice as defined as a *defect notice*.

178 Clause 40.1(c) creates a precondition to the right of the State Delegate to issue a defect notice that the State Delegate is of the reasonable opinion that there is a defect. The purpose of the imposition of this precondition appears to be that issue of a defect notice may create an obligation by SAHP to rectify the defect. However, it is common ground, and in any case evident from the provisions of clauses 40 and 71 that, if a dispute arises as to the existence of a defect alleged in a defect notice, the existence of the defect is to be determined objectively rather than by reference to the reasonable opinion of the State Delegate.

179 Similarly, clause 40.1(d)(ii) creates a precondition to the right of the State Delegate to specify in a defect notice a completion time for rectification of a defect that the State Delegate is of the reasonable opinion the defect is capable of remedy. The purpose of the imposition of this precondition appears to be that issue of such a defect notice creates an obligation by SAHP to rectify the defect. However, it is common ground, and in any case evident from the provisions of clauses 40 and 71 that, if a dispute arises as to whether the defect is capable of remedy, the existence of the defect is to be determined objectively rather than by reference to the reasonable opinion of the State Delegate.

180 Clause 40.1 refers to or contemplates seven aspects of an alleged defect that might be the subject of dispute in the context of a defect notice given by the State:

1. whether a defect exists;

2. if so, whether the defect is capable of remedy;

3. if so, what is a reasonable period of time for execution of rectification works to remedy the defect;

4. whether SAHP has rectified the defect by the completion time specified in a defect notice or at all;

5. if not, the cost of rectification work undertaken by the State in default of rectification by SAHP that is recoverable as Moneys Owing by SAHP;

6. whether any damage to the Facility has been caused by or arises from the defect;

7. if so, the cost of the damage recoverable as Moneys Owing by SAHP.

181 Clause 40.1 contemplates that ordinarily such potential disputes will arise in the context of a defect notice given by the State. However, by virtue of clause 40.1(b)(i) and 40.3(a)(i) and (iii), SAHP is required to rectify all defects regardless of whether a defect notice is issued. These provisions, and clause 40.3(b), are to be read in conjunction with clause 40.3(a), which preserves the State's rights and SAHP's liability with respect to defects notwithstanding that the State Delegate chooses to issue a defect notice (paragraph (iv)) or not to issue a defect notice (paragraph (iii)) and notwithstanding the rights of the State under clause 40 to issue a defect notice, require rectification where capable of remedy by a specified completion time and recover the cost of rectification work undertaken in default of SAHP doing so.

182 Disputes could theoretically arise in the absence of a defect notice in relation to:

1. whether a defect exists, if the State asserts independently of the issue of a defect notice that there is a defect or if SAHP calls on the State to acknowledge that a particular item does not comprise a defect and the State refuses or fails to do so;

2. whether a defect is capable of remedy, if the State asserts independently of the issue of a defect notice that a defect is capable of remedy or if SAHP calls on the State to acknowledge that a defect is not capable of remedy and the State refuses or fails to do so;[34]

3. whether SAHP has rectified a defect, if the State asserts independently of the issue of a defect notice that a defect has not been remedied or if SAHP calls on the State to acknowledge that a defect has been remedied and the State refuses or fails to do so.

183 The subject matter of the types of disputes identified at [180] above can be assigned to three broad categories:

(a) existence of a defect (item 1);

[34] The State accepts that, if the State contended that a defect is not capable of remedy and SAHP contended that it was, there would be a dispute about rectification. While this is a theoretical possibility, in practice it is unlikely to occur because SAHP could simply proceed to rectify the defect without needing the concurrence of the State.

(b) rectification of a defect (items 2 to 5);

(c) damage to the Facility caused by a defect (items 6 and 7).

184 Clause 40.3(b) refers to the same three broad categories as clause 40.1. This, together with the relative locations of clauses 40.3 and 40.1 within clause 40, is a strong indication that the disputes referred to in clause 40.3(b) correspond with the matters the subject of clause 40.1.

185 Clause 40.3(b) is poorly constructed in at least two respects. First, the second clause of placitum (i), namely "related to the rectification of a Defect" is preceded by the word "whether" in the chapeau so that read literally with the chapeau it reads "Any dispute as to whether … related to the rectification of a Defect" (which is ungrammatical) or "Any dispute as to whether … something is … related to the rectification of a Defect" (which is virtually meaningless). Secondly, placitum (ii) is also preceded by the word "whether" in the chapeau so that read literally with the chapeau it reads "Any dispute as to whether … damage to the Facility that has been caused by a Defect" (which is ungrammatical). Clause 40.3(b) is a camel that has the hallmarks of a horse having been designed by a committee.

186 The fact that placitum (ii) is ungrammatical suggests that placitum (i) is also ungrammatical rather than virtually meaningless.

187 In order to give clause 40.3(b) a grammatical construction and avoid a nonsensical construction, it should be construed as having the following effect:

(b) Any dispute:

(i) A. as to whether something is a Defect (including a Defect in the ICT Network), or

B. related to the rectification of a Defect; or

(ii) A. as to whether damage to the Facility has been caused by a Defect, or

B. related to damage that has been caused by a Defect,

will be referred by either party for resolution by an Independent Expert in accordance with the Accelerated Dispute Resolution Procedures.

188 The first type of dispute as to whether something is a defect corresponds with the type of dispute identified at item (a) at [183] above by reference to clause 40.1.

189 The second type of dispute related to the rectification of a defect corresponds with the type of dispute identified at item (b) at [183] above by reference to clause 40.1. This encompasses disputes whether a defect is capable of remedy; if so, what is a reasonable period of time for execution of rectification

works to remedy a defect; whether SAHP has rectified the defect by the completion time specified in a defect notice or at all; and if not, the cost of rectification work undertaken by the State in default of rectification by SAHP that is recoverable as Moneys Owing by SAHP.

190 The third type of dispute as to whether damage to the Facility has been caused by a defect and, if so, as to that damage, corresponds with the type of dispute identified at item (c) at [183] above by reference to clause 40.1.

191 Clause 40.1 uses the words "rectify"/"rectification" and "remedy" interchangeably. Clause 40.3 uses the word "rectification" evidently with the same meaning that word has in clause 40.1. The Oxford English Dictionary defines "rectify" relevantly to mean:

> To put or set right, to remedy (a bad or faulty condition or state of things)

"rectification" relevantly to mean:

> The correction of error; a setting straight or right; amendment, improvement, correction

and "remedy" relevantly to mean:

> To cure (a disease, etc.); to put right, reform (a state of things); to rectify, make good

192 Clause 40.1(d)(ii) creates a precondition to the right of the State Delegate to specify in a defect notice a completion time for rectification of a defect , namely that the State Delegate is of the reasonable opinion the defect is "capable of remedy". The State contends that the only test whether a defect is capable of remedy is whether it can theoretically and physically be remedied and practical considerations of time, cost, and consequence are irrelevant. SAHP and HYLC contend that the question whether a defect is capable of remedy is determined by reference not only to theoretical considerations but to practical considerations as well.

193 The fact that the entitlement of the State to issue a defect notice requiring rectification is dependent on the State Delegate forming the reasonable opinion that the defect is capable of remedy connotes that some defects will not be capable of remedy. If the test whether a defect is capable of remedy is confined to physical considerations, all defects are capable of remedy given sufficient time and expenditure. In an extreme case, part of the Hospital or even an entire building within the Hospital could be demolished and rebuilt. This strongly suggests that there is a practical constraint on which defects are capable of remedy.

194 The State attempts to meet this line of reasoning by contending that demolition and rebuilding involve something more than remedy or rectification of the defect. However, in a physical sense, in order to remedy most defects, the rectification work necessarily would not be confined to the part that is defective

and it would be necessary to cause damage to adjacent parts of the Hospital and repair or replace those adjacent parts. There is no bright line between merely remedying the part that is defective and affecting adjacent parts of the Hospital.

195 In addition, if the State Delegate is of the reasonable opinion that a defect is capable of remedy, SAHP is under a specific obligation to rectify the defect. If there is no constraint on the concept of "capable of remedy" by reference to practical or economic considerations, SAHP would be obliged to rectify a defect notwithstanding that specific performance would never be granted to compel it to do so. This is an unlikely construction.

196 The State argues that the role of the independent expert is not intended to extend to making value judgments to determine whether a defect is capable of remedy. However, the analogous question whether specific performance would be granted to compel rectification of a defect under an ordinary building contract might be seen to call for an evaluative judgment whether the time and expense that would be incurred and the consequence that would ensue in achieving physical rectification is disproportionate to the detrimental effect of the defect from the building owner's perspective; but it is generally accepted that this is an objective determination.

197 On the proper construction of clause 40, a defect is capable of remedy if rectification is physically possible and practical in the sense that the time, cost and consequences involved in rectification are not grossly disproportionate to the detrimental effect of the defect on the State.

198 The concept of rectification in clause 40, when the defect has arisen because of non-compliance with the Technical Specification (or Functional Brief), involves remedial work so that the relevant part is brought into compliance with the Technical Specification (or Functional Brief). A defect is not rectified within the meaning of clause 40 if work is undertaken to reduce the risk that the defect will result in detriment and/or the extent of the detriment if the risk eventuates without bringing the relevant part into compliance with the Technical Specification (or Functional Brief). Such works are properly characterised as mitigation works rather than rectification works.

199 This conclusion is reinforced by the consideration that the concept of rectification involves both physical and practical considerations. If rectification embraced mitigation, all defects would be capable of remedy because it is always possible to reduce the risk that the defect will result in detriment and/or the extent of the detriment if the risk eventuates. This conclusion is also reinforced by a comparison between the concept of rectification or remedy in clause 40 and the concept of cure or remedy in clause 58. The definition of cure or remedy in clause 58.12(a) requires there to be no continuing detrimental effect; not merely a reduction in the risk of detrimental effect or extent of detriment if the risk eventuates. Clause 58 provides for compensation to the State in a case in which a

major default is not capable of being remedied or cured, which concept of compensation finds no expression in clause 40.

Source of jurisdiction of expert determination under clauses 69 and 71

200 In their written openings filed and served before trial, HYLC and SAHP contended that, if the expert did not have jurisdiction under clause 40.3(b) to determine any of the matters that he determined, he nevertheless had jurisdiction conferred by clause 69.2 in conjunction with clause 71. My understanding is that this contention was abandoned at trial but in any event I reject it for reasons which can be shortly stated.

201 There are two separate and independent paths to an expert determination under clause 71. One path (*the specific path*) commences with a specified type of dispute under a specific clause (*a specified dispute*), such as clause 40.3(b), which proceeds directly to expert determination under clause 71(a)(i) without proceeding through the gate of executive dispute resolution under clause 70. The other path (*the generic path*) commences with a generic dispute under clause 69.1 (*a generic dispute*) and must pass through the gate of executive dispute resolution under clause 70, under which the parties must first meet and attempt in good faith to resolve the dispute and then attempt to agree whether the dispute is to be referred for expert determination under clause 71 or arbitration under clause 72 before it can proceed to expert determination under clause 71(a)(ii).

202 Under the specific path, the dispute proceeds to expert determination regardless of the amount involved and there is no discretion for the dispute to be referred to arbitration rather than expert determination. Under the generic path, the dispute can only proceed to expert determination if the amount of the claim is less than $1 million unless both parties agree to referral for expert determination under clause 70(a)(ii).

203 A party cannot graft onto a specific dispute that proceeds directly to expert determination on the specific path a generic dispute and thereby avoid the obligation under clause 70 to meet and attempt in good faith to resolve the dispute or the limitations on referral of generic disputes for expert determination under clause 70.

204 The dispute notice is expressed to be delivered under clause 40.3(b) and it was only on that basis that it validly referred any disputes for expert determination. The dispute notice did not purport to be given under clause 69.1. The parties giving the dispute notice did not take any steps under clause 70 to meet and attempt to resolve the disputes the subject of the notices, nor to agree whether the dispute should be referred for expert determination or arbitration. The dispute notice is only capable of being supported by clause 40.3(b).

Floor distribution room size

Background

205 The Technical Specification, clause 22.1 table 32 (as clarified by the Design Departures Schedule TS:178) requires floor distribution rooms to be a minimum of 40 square metres per room. Clause 3.4 table 1 requires a 50 per cent contingency space and 100 per cent future flexibility space.

206 On 13 December 2011, there was an ICT State workgroup meeting attended by Mr Baird and Mr Hunt on behalf of the State. The minutes included the following item:

8.	**Issues register**
8.1	An ICT list of potential items was reviewed with 3 items agreed to migrate to the official issues list. These are – … – Communication room sizes – to be sized with requirement plus 50% – not min 40 m² –…

207 On 7 February 2012, there was a further ICT State workgroup meeting attended by Mr Baird and Mr Hunt on behalf of the State. The minutes attached the issues register list which included as item 74:

Issue Number	Date Initiated	Name Of State Associate/ Facility User Group	Description	State Comments	Discussion Comments
74	24/12 0211	ICT	Deletion of minimum 40m² criteria for communications rooms (FDR). Now using 50% spare capacity	Agreed with Alan Baird	The rooms with AV racks are larger than 40 m^2

208 On 2 August 2013, HYLC provided a Stage 2 ICT Network Infrastructure report to the State, which included the following text:

> There are a number of no cost modifications of which Project Co have informally discussed and agreed informally with the State and of which this Stage 2 submission has been based on. Whilst these will be addressed formally, below are the more important modifications which should be recognised when reviewing this submission:

Table 10: Proposed Modifications			
Technical Specification Clause	Technical Specification Clause Description	Proposed Clause Description Amendment	Reason For Proposed Modification

3.4(b) Table 1	Table 1 - Infrastructure Spare Capacity: Communication Rooms: -Contingency provision: Redundant Space = 50% -Future flexibility provision: Redundant Space = 100%	Table 1 - Infrastructure Spare Capacity: Communication Rooms: ~~-Contingency provision:~~ ~~Redundant Space = 50%~~ -Future flexibility provision: Redundant Space = ~~100~~50%	Request to provide communications floor distribution rooms sized to house the required rack quantities from practical completion plus 50% spare capacity/rack space for future expansion. In addition, all racks will incorporate 30% spare space internally within the racks.
22.1 Table 32(7)	Project Co shall provide the backbone Telecommunications in accordance with the following requirements: Communications Distribution Rooms & primary risers-(7) Minimum 40 m² room	Project Co shall provide the backbone Telecommunications in accordance with the following requirements: Communications Distribution Rooms & primary risers-(7) ~~Minimum 40 m² room~~ Sized accordingly to suit requirements plus 50% spare capacity/rack space for future provision.	

209 On 26 August 2013, the State responded to the report, including the following:

Project Co Document or Drawing Reference	**Agreement or Design Specification Reference**	**Reviewing Party Detail Commentary**
BSE-DRPT-11-ST2(D2.4), pp15-18 Section 8, Table 10	N/A	The State notes the proposed modifications listed in Table 10, pp 15-18 and acknowledges the requirement for Project Co to address them formally as Builder's Modifications.

210 HYLC constructed 66 floor distribution rooms, of which 34 were less than 40 square metres.

211 On 8 February 2016, the State Delegate gave to SAHP the FDR defect notice. The Notice included:

> **Notice Details**
>
> I notify Project Co that I am of the opinion that some of the floor distribution rooms are not in accordance with the requirements of the Agreement. The rooms do not meet the minimum size requirement of 40m² per room and spare capacity for racks (50% redundant capacity) as required by the Design Specifications (as departed by TS:178).

> I am of the opinion that in certain floor distribution rooms, the Defect is not capable of remedy and I require Project Co to submit a Change Notice. Floor distribution rooms that are capable of remedy will require rectification.
>
> **Completion time to rectify the Defect**
>
> To be determined upon receipt of Project Co's Change Notice.
>
> **Conditions and Clarifications**
>
> Project Co's Change Notice must include a detailed assessment of all floor distribution rooms and the extent to which they are capable of remedy.

On 8 February 2016, SAHP gave to HYLC a defect notice in the same terms *mutatis mutandis* as the State's notice.

212 On 29 February 2016, HYLC issued to SAHP a Change Notice proposing a change to the specification of the size of floor distribution rooms. It said that there would be no financial consequences of the change. On 1 March 2016, SAHP onforwarded the Change Notice to the State.

213 On 2 March 2016, the State responded to SAHP regarding the change notice observing that it made no reference to the defect notice and did not address the requirement therein for a detailed assessment of the extent to which floor distribution rooms were capable of remedy.

214 On 11 March 2016, HYLC responded to the State's communication stating that none of the floor distribution rooms described in the change notice was capable of remedy without changes to clinical spaces.

215 On 24 March 2016, the State responded to HYLC's communication acknowledging that the defects were unable to be cured by increasing the floor space without unacceptable loss of adjacent clinical spaces. It suggested that alternative equipment might be able to be installed to use the space more efficiently to provide the same port capacity as standard racks in a full sized room.

216 On 8 July 2016, HYLC issued the dispute notice. HYLC assigned this defect to category 1 in respect of which it accepted that a defect existed. HYLC contended that rectification to bring the works into line with the relevant specification was not possible and the defect did not represent a substantial departure from the relevant design requirements. HYLC repeated the position in its change notice (which conceded a failure to comply with the specification). Notwithstanding these concessions that a defect existed, HYLC nevertheless sought a determination that the alleged defect was not a defect and then sought alternative determinations that need not be considered. HYLC did not refer to the history before 8 February 2016. These submissions were mirrored in SAHP's dispute notice.

217 In its primary submission, the State took issue with the contention that the alleged defect was not a defect.

218 In its 7 September reply, HYLC referred to the events between 13 December 2011 and 26 August 2013 referred to above and contended that the State should withdraw this item from dispute and approve HYLC's nil sum modification. HYLC sought a determination that there was no relevant defect and then sought alternative determinations that were later abandoned and need not be considered.

219 In its 14 September rejoinder, the State complained that HYLC and SAHP were changing their position and should be held to the determinations sought in the dispute notices insofar as they were within jurisdiction, namely whether the alleged defects were defects and the scope of works necessary to rectify them. Without prejudice to its objection to jurisdiction, the State contended that the proposed modification was never agreed on and was always subject to agreement on a Modification which never occurred. The contract prescribed a formal mechanism for any departure from the Design Requirements and the Accelerated Dispute Resolution process was inappropriate for determination of matters such as estoppel.

220 In its 14 September further submissions and 16 September surrejoinder submissions, HYLC took issue with the State's contentions and relied amongst other things upon a collateral contract and estoppel.

Determination

221 The expert determined that "any alleged non-compliance with regard to minimum FDR sizes and spare capacity [is not] a Defect". The expert said:

> … In my opinion, the approach taken by the State in purporting to reject, after 4 years [since 7 February 2012], a previously agreed modification to the Technical Specification, is unreasonable;
>
> … The fact that the Project Director [on 26 August 2013] all but formally approved this change almost 2½ years before the State decided to issue the Defect Notice makes the present actions of the State seem even more unreasonable;
>
> I am in no doubt that following the approval by the Project Director, HYLC completed the design and constructed the Facility on the basis that this change had been expressly approved by either the State's representatives and/or by the Project Director…
>
> …
>
> Although the failure by the Builder to submit a Change Notice prior to the issue of the Defect Notice was unexplained, I am still of the opinion that the State could not reasonably assert that a Defect exists in circumstances where it had all but formally approved these proposed modifications;
>
> …

> Although the State submitted that I am not entitled to make a finding against the State to the effect that it is bound by its conduct, I see no reason why that is so …
>
> I do not accept the assertion by the State that findings against it about its conduct cannot be made because it does not get the opportunity to call evidence … the State's submissions all but admitted that an informal agreement had in fact been reached. However, it sought to overcome that informal agreement by unreasonably relying on the absence of any formal agreement as grounds for asserting that no agreement had been reached …
>
> Although neither Project Co nor HYLC specifically asked me to make a finding that the facts give rise to an estoppel, and therefore, I make no such finding, it is plain on the evidence before me that the necessary preconditions which would give rise to an estoppel have been satisfied, in respect of this alleged Defect.

Jurisdiction to make determination

222 The State contends that, in determining that there was no defect as defined in the contract, Mr Goldstein acted outside jurisdiction because he made his determination by reference to ex-contractual conduct by the State which he found to be unreasonable and by which he held the State was bound independently of the terms of the contract.

223 Clauses 2.5, 21.1 and 41.1(b) of the contract require SAHP to construct the Hospital in accordance with the Technical Specification (as modified by the Design Departures Schedule). This includes the requirement that all floor distribution rooms be at least 40 square metres in area. The Technical Specification was not amended in accordance with the formal mechanisms prescribed by the contract as essential for amendment. Within the four corners of the contract, SAHP remained responsible to construct the floor distribution rooms to have at least 40 square metres in area.

224 In general, the Technical Specification could be amended by the Modification process under clause 52 (or in the case of a Minor Modification under clause 23). However, this process does not apply to changes to address defects. In the case of such changes, clause 79.5 requires a formal amendment or variation of the contract in writing executed by both parties. In any event, no Modification Order was issued by the State under clause 52.

225 The expert was required by clause 40.3(b) of the contract relevantly to determine whether the size of the floor distribution rooms comprised a "Defect" within the meaning of the definition of that term in the contract. By virtue of that definition, the expert was required to confine his attention to the design of the Facility in accordance with the requirements of the contract. The expert was not entitled to go outside the four corners of the contract by reference to unreasonable conduct of the State to determine whether the size of the floor distribution rooms amounted to a defect within the meaning of the contract.

226 It is not clear on what juridical basis the expert determined that the floor distribution rooms amounted to a defect. In reaching that conclusion, he placed repeated emphasis on his finding that the conduct of the State was unreasonable. He made findings that each of the elements of estoppel existed but said that he stopped short of explicitly finding estoppel because SAHP and HYLC did not specifically ask him to make such a finding. Nevertheless, it is possible that the expert relied upon the existence of each of the elements of estoppel without relying upon the doctrine of estoppel itself. HYLC had made submissions in support of the existence of a collateral contract, and it is possible that the expert relied upon the doctrine of collateral contract. Alternatively, the expert's references to the State's conduct being unreasonable might be understood as a finding that the State acted in breach of an implied term imposing a duty of cooperation. Whatever be the juridical basis for the expert's conclusion, it is clear that the expert did not find that the size of the floor distribution rooms was not a defect by reference limited to the terms of the contract which required compliance with the Technical Specification.

227 In purporting to determine that "any alleged non-compliance with regard to minimum FDR sizes and spare capacity [is not] a Defect", the expert determined an issue that he was not authorised by the contract to determine, failed to carry out the task he was required to undertake, carried out the task in a manner that was not authorised and acted contrary to the contractual requirements for an expert determination. His determination was null and void insofar as he determined that the size of the floor distribution rooms did not comprise a defect.

228 I note for completeness that this conclusion does not entail that SAHP and HYLC cannot advance contentions based on estoppel, breach of an implied term imposing a duty of cooperation, collateral contract or some other juridical basis in a different forum. It would be open to them to articulate a contention to the State based on one or more of these doctrines and, in the event of a dispute arising by reason of the State's response, to refer the dispute to arbitration under clauses 69 to 72 provided that it is a dispute that falls within the definition of Dispute in clause 1.1. If it falls outside the definition of Dispute (which for example might be the case if reliance were placed on collateral contract), or if urgent injunctive or declaratory relief were sought within the meaning of clause 69.3A, it would be open to them to institute a proceeding in a court of competent jurisdiction.

Loading dock height

Background

229 Section 97.2(s) of the Functional Brief states the following specific design requirement in respect of the loading dock:

> The ceiling height must allow for the stacking of pallets and safe use of a forklift (3.5 metres).

230 The actual ceiling height as constructed in some areas of the loading dock is only 2.8 or 2.9 metres.

231 On 21 August 2015, HYLC wrote to the State and SAHP in relation to the loading dock height. It referred to the Functional Brief requiring a usable ceiling height of 3.5 metres and said that the loading dock as constructed allowed only a clear height of 2.9 metres. It said that Spotless (the relevant subcontractor) had said that the constructed height would not cause any problem. It requested an amendment to the Functional Brief to remove the reference to a specific height.

232 On 10 September 2015, the State responded to HYLC's 21 August 2015 correspondence stating that the reduction in usable height of the loading dock would likely require a change to smaller deliveries more often which would impact on logistics efficacy. It said that the State expected that any modification submitted for consideration would include estimated savings reflecting the loss of amenity and impact on efficiency. I note that the reference by the State to a modification was misconceived if it was intended to refer to the Modification process under clause 52. However, it was apt to refer to the contract amendment process under clause 79.5.

233 On 5 February 2016, the State Delegate gave to SAHP the loading dock defect notice. The Notice included:

> **Notice Details**
>
> I notify Project Co that I am of the opinion that the ceiling height of the loading dock is not in accordance with the requirements of the Agreement.
>
> I am of the opinion the Defect is not capable of remedy and I require Project Co to submit a Change Notice.

234 The reference by the State to a "Change Notice" was misconceived if it was intended to refer to the Modification process under clause 52. However, it was apt to refer to the contract amendment process under clause 79.5.

235 On 8 February 2016, SAHP gave to HYLC a defect notice in the same terms as the State's notice.

236 On 9 February 2016, HYLC issued to SAHP a Change Notice proposing a change to the specification of the clearance in the loading dock from 3.5 metres to 2.8 metres. It said that there would be no financial consequences of the change.

237 On 8 July 2016, HYLC issued the dispute notice in which HYLC explicitly acknowledged a failure to comply with the specification and existence of a defect. HYLC contended that all parties accepted that rectification to bring the works in line with the relevant specification was not possible without unreasonable and disproportionate rework. HYLC contended that the defect

would not have an adverse effect on operation of the Hospital. HYLC sought a determination that HYLC's nil sum Modification Change Notice be accepted unconditionally or alternatively subject to payment of an amount determined by the expert in accordance with the Change Compensation Principles; or alternatively the expert should approve the Modification Change Notice to remove the roadblock to Technical Completion and determine the fact and extent of any loss suffered by the State as a consequence of the defect. These submissions were mirrored in SAHP's dispute notice.

238 On 26 August 2016, the solicitors for HYLC wrote to the solicitors for the State and SAHP agreeing that three matters the subject of the dispute notice were outside Mr Goldstein's jurisdiction, namely the terms of Modifications the State should accept to remove defects; that the expert should exercise the State's discretion to accept or reject a Modification; and that certain defects should be treated as Technical Completion Outstanding Items.

239 On 30 August 2016, the solicitors for SAHP agreed that those three matters were outside Mr Goldstein's jurisdiction and should not be determined by him.

240 On 31 August 2016, in its primary submission, the State contended that the expert had no jurisdiction to make any of the three alternative determinations sought by SAHP (reflecting the determinations sought by HYLC). The State attached the Aquenta cost assessment which set out, amongst others, scenario 1 rebuilding the loading dock to meet the 3.5 metre high clearance specification by lowering the floor (including entrance) by 700 millimetres with a cost estimate of $4.224 million (including allowances of $300,000 for temporary operation of a loading dock and $833,000 for contingencies). The Aquenta cost assessment stated that the scenarios identified were theoretical only.

241 In relation to rectification, the State said:

> The Notice of Dispute does not seek any determination regarding the rectification works required in relation to this Defect. The State agrees that no such determination is necessary.
>
> However, the State submits that the Defects are capable of cure by physical works and that it is reasonable to do so.
>
> [The State then addressed the criteria for the award of rectification damages that it had addressed at length in the context of the floor distribution rooms dispute, which it addressed in the context that it disputed the jurisdiction of the expert to determine damages]
>
> This Defect is capable of physical rectification by:
>
> 1. The removal of the services fixed to the ceiling, which reduce the clearance provided for in the loading dock;
>
> 2. The excavation of part of the floor of the loading dock and the slab below; and

3. The reinstallation of services underground below the loading dock and make good.

The State's cost consultants have estimated the cost of these rectification works are $3.21 million. While these costs are not relevant to the determination of whether the Defect is capable of cure, they demonstrate that the cost of doing so is reasonable. …

…

Finally, while the State does not seek rectification at this stage, it seeks damages assessed on the basis of rectification costs so that the State will be able to carry out the rectification works when the need arises (i.e. when the Defect impacts on the State's operations). The State notes that the cost associated with the delay caused by actual rectification costs would be significant. However the State does not require physical rectification. Compensation for the cost of the State doing so is both sufficient and reasonable. This results in a significant financial advantage to Project Co compared with if the State required actual rectification.

Accordingly, in the event that the Independent Expert determines that he has jurisdiction to do so, he should determine that:

1. the Defects are capable of cure by physical works;

2. it is reasonable to do so; and

3. Project Co should compensate the State for its loss of $3.21 million in lieu of physical rectification.

242 It is clear from the State's submission that the State did not contend that the Defect should be rectified and this is reinforced by the fact that the February Defect Notice had not required rectification (and indeed stated that rectification was not possible) and the State did not issue any subsequent defect notice requiring rectification or specifying a completion time.

243 In its reply, HYLC said:

The State's assumptions concerning rectification works that might be possible for this item completely ignore the wider design brief restrictions on the dimensions of the Facility. The lower levels of the Facility, including the loading dock, are constrained by the flood plain... Accordingly, it was not open to the Builder and it would not be open to the State to adjust the loading dock floor level...

The State's proposal concerning excavating the loading dock floor also faces the following civil design constraints:

(a) The gradient from the entrance to the loading dock and then down to the platform area, was set no steeper than 5% (1 in 20) to enable B-Double vehicles to turn around safely;

(b) Lowering the dock by 750 mm would require extensive rework of the surrounding pavements to maintain safe gradients for large vehicles;

(c) The RL of the finished surface level at the entrance to the loading dock cannot be lowered to any significant extent before the concrete slab on ground clashes with the top of the box culvert associated with the Council stormwater division;

(d) The current hydraulic gradient (water level) in the loading dock for a 2 x 100 year ARI event is currently limited to ankle depth – as previously conveyed to the State in the Stage 2 and Stage 3 submissions; and

(e) Lowering the loading dock pavement will significantly increase this flood depth, potentially creating an unsafe environment.

…

Determination sought

To the extent the head clearance in the loading dock is not 3.5 m in all areas:

(a) the State does not intend to rectify it;

(b) rectification would not be reasonable;

(c) no reasonable rectification cost has been established; and

(d) there is no damage to the Facility.

Determination

244 The expert determined that the State did not intend to rectify the defect. The expert relied on the fact that the defect notice stated that "the Defect is not capable of remedy"; the State's communication of 10 September 2015 referring to monetary compensation rather than rectification; and to the fact that rectification was not reasonable for the reasons given by the expert under that heading.

245 The expert determined that "rectification of the defect would not be reasonable". The expert relied on the fact that the defect notice stated that "the Defect is not capable of remedy"; the fact that Aquenta described the rectification scenario as "theoretical only" and Aquenta had not addressed any of the obstacles identified by HYLC in its submissions; and the obstacles identified by HYLC in its submissions.

Jurisdiction to determine rectification reasonableness/capability

246 The State accepts that the expert had jurisdiction to determine whether the defect was "capable of remedy" within the meaning of clause 40.1(d)(ii) of the contract. However, the State contends that this means physically and theoretically capable of remedy and that practical and economic considerations are irrelevant.

247 HYLC contends that a dispute whether rectification of a defect is reasonable is a dispute "related to the rectification of a Defect" within the

meaning of clause 40.3(b)(ii) and this is sufficient to give the expert jurisdiction to determine whether rectification is reasonable.

248 SAHP adopts HYLC's contention and puts an additional contention. SAHP contends that a dispute about the quantum of loss suffered by the State as a result of a defect is a dispute "related to the rectification of a Defect" within the meaning of clause 40.3(b)(ii) over which the expert has jurisdiction; and the question whether it is reasonable to rectify the defect is relevant to assessment of the quantum of loss under the principle articulated by the High Court in *Bellgrove v Eldridge*[35] and by the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth*.[36]

249 I reject each of the parties' contentions. In respect of the contentions by HYLC and SAHP, it is not sufficient for referral to expert determination merely that in a generalised sense it might be said that a dispute is related in some way, shape or form to rectification. For the reasons given at [192] to [197] above, having regard to the language, structure, context and evident purpose of clause 40.3(b), the dispute must be a dispute corresponding with the matters the subject of clause 40.1 (or clause 40.2). In respect of rectification, this means that it must be a dispute whether a defect is capable of remedy; if so, what is a reasonable period of time for execution of rectification works to remedy the defect; whether SAHP has rectified the defect by the completion time specified in the defect notice or at all; and if not, the cost of rectification work undertaken by the State in default of rectification by SAHP that is recoverable as Moneys Owing by SAHP. The question whether rectification is reasonable, *in and of itself*, is not a question that an expert is authorised to determine.

250 In respect of the separate contention advanced by SAHP, a dispute about the quantum of loss suffered by the State as a result of a defect is not within the scope of clause 40.3 unless the State has rectified the defect under clause 40.1(e) and there is a dispute about the quantum of Moneys Owing under that provision.

251 In respect of the contention advanced by the State, for the reasons given at [192] to [197] above, the phrase "capable of remedy" is not confined to purely physical and theoretical considerations but incorporates practical and economic considerations. In a very loose sense, the question whether a defect is capable of remedy within the meaning of clause 40.1(d)(ii) is analogous to the main criterion whether a court will grant specific performance to require its rectification. If the time, expense and consequences occasioned by rectification would be completely disproportionate to the detrimental effect of the defect, a court would generally not grant specific performance and a defect would not generally be regarded as "capable of remedy".

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[35] (1954) 90 CLR 613 at 618 per Dixon CJ, Webb and Taylor JJ.
[36] [1996] AC 344 at 368 per Lord Lloyd of Berwick (with whom Lord Keith of Kinkel agreed).

252 Although the expert expressed his determination in the form "rectification of the Defect is not reasonable", his reasons for reaching his conclusion demonstrate that in substance he determined that "the Defect is not capable of remedy". Indeed, he did not reach his conclusion by reference to the time, expense and consequences that would be occasioned by physical rectification by excavating the floor and relocating the services within a re-laid floor slab. Rather, he reached his conclusion by accepting HYLC's submission that such physical rectification was impossible due to flooding considerations and other unavoidable constraints. The expert had jurisdiction to reach such a conclusion and the question whether it was justified on the materials produced to him is not a question that arises in this action.

253 Notwithstanding the form in which the expert expressed his determination, he had jurisdiction to determine whether the defect was capable of remedy and in substance he determined that it was not capable of remedy.

Jurisdiction to determine State did not intend to rectify

254 The State contends that the expert did not have jurisdiction to determine whether the State intended to rectify a defect. This could only be relevant to the assessment of quantum of damages for breach of contract, which is beyond the jurisdiction of the expert.

255 HYLC contends that a dispute whether the State intends to rectify a defect is a dispute "related to the rectification of a Defect" within the meaning of clause 40.3(b)(ii) and this is sufficient to give the expert jurisdiction to determine whether the State intends to rectify a defect.

256 SAHP adopts HYLC's contention and puts an additional contention. SAHP contends that a dispute about the quantum of loss suffered by the State as a result of a defect is a dispute "related to the rectification of a Defect" within the meaning of clause 40.3(b)(ii) over which the expert has jurisdiction; and the question whether the State intends to rectify the defect is relevant to assessment of the quantum of loss under the principle articulated by the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth*.[37]

257 I accept the State's contention and reject the contentions of HYLC and SAHP. For the reasons given above, an expert does not have jurisdiction to determine a dispute about the quantum of loss suffered by the State as a result of a defect unless the State has rectified the defect under clause 40.1(e) and there is a dispute about the quantum of Moneys Owing under that provision. The mere fact that it might be said in a generalised sense that a dispute is related in some way, shape or form to rectification is not sufficient to bring the dispute within the scope of clause 40.3.

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[37] [1996] AC 344 at 368 per Lord Lloyd of Berwick (with whom Lord Keith of Kinkel agreed).

258 In most cases, the question whether the State intends to rectify a defect will not be probative of the question whether a defect is "capable of remedy" within the meaning of clause 40, over which latter question an expert does have jurisdiction. This consideration cannot in any event avail HYLC or SAHP for two reasons. First, as explained above, the expert did not reason in this manner or in this direction. On the contrary, the expert reasoned in the opposite direction from his conclusion that the defect was not reasonably capable of remedy to his conclusion that the State did not intend to remedy the defect. Secondly and more fundamentally, the expert made an ultimate determination on the question whether the State intended to remedy the defect and did not merely use it as a step in his reasoning to an ultimate determination on a question that he had jurisdiction to determine.

Existence of a dispute

259 The wording of clauses 40.3(b)(ii) and 69.2 might be taken to suggest that it is a precondition to the delivery of a notice of dispute and referral for expert determination that there is an extant dispute between the parties concerning the subject matter of the notice of dispute.

260 The wording of those clauses in conjunction with clause 71 might be taken to suggest that it is a precondition to the appointment of an expert that there is an extant dispute between the parties concerning the subject matter of the notice of dispute.

261 When the dispute notices were delivered in July 2016 and when the expert was appointed on 17 August 2016, it was common ground between the parties that the loading dock height defect was not capable of remedy within the meaning of clause 40 because the State's defect notice stated that expressly and the other parties agreed. This also applies to the clinical areas ceiling exclusion zone defect and the primary data room pipes defect.

262 The position changed on 31 August 2016 when the State asserted that the defect was capable of remedy, albeit the State's concern was to preserve an entitlement to damages for breach rather than to require rectification pursuant to clause 40.1(d)(ii) and (e).

263 It might be considered that, if there was no dispute about whether the defect was capable of remedy at the time of delivery of the dispute notices in July and appointment of the expert in August, the expert lacked jurisdiction to determine a dispute that only subsequently arose. If so, there would have been no impediment to one of the parties issuing a fresh dispute notice to encompass a new dispute and consolidate the new referral with the old referral or for the parties to agree that the new dispute would be encompassed within the existing referral.

264 However, at trial each party proceeded on the basis that there was no impediment to the jurisdiction of the expert in the present case merely because

the dispute whether the defect was capable of remedy arose after his appointment. In particular, the State articulated what was characterised as the "organic/dynamic theory", as opposed to the static theory, of dispute identity and this was embraced by the other parties. For this reason, it is unnecessary to further consider the consequences of the fact that there was no dispute whether the defect was capable of remedy when the dispute notices were given and the expert was appointed.

Clinical areas ceiling exclusion zone

Background

265 The Technical Specification Part B section 3.3(a)(vii) provides:

> Project Co must ensure the design of the Facility:
>
> vii. provides a horizontal services zone of 200 mm minimum and left clear immediately above fittings in the ceilings in all Clinical Areas to allow for the installation of future services.

266 The Design Departures Schedule TS:008 Table 2 provides:

Issue No	Technical Specification Section Reference Section	Nature of Requirement	Description of Departure	Commentary
TS: 008 Deletion of Absolute Requirement for a 200 mm Clear Zone to be Left above all Ceiling Fittings in Clinical Areas	Volume 5 Part B – General Requirements Technical Specification Section 3 Facility Design Strategy, Flexible, Adaptable and Modular Design section 3.3.a.vii on p4.	"*Project Co must ensure that the design of the Facility provides a horizontal services zone of 200 mm minimum and left clear immediately above fittings in the ceilings in all Clinical Areas to allow for the installation of future services*"	Amend Section 3.3.a.vii to read: "Project Co must ensure that the design of the Facility provides a horizontal services zone of 200 mm minimum and left clear immediately above fittings in the ceilings in all Clinical Areas (exclusive of services that are required to serve ceiling mounted fixtures immediately below them) to allow for the installation of future services"	The 200 mm zone immediately above the ceiling cannot be left clear of all services. Ducts, sprinkler pipe droppers and other services are required to traverse this area. In some areas specified services, installation etc also result in equipment being located closer to ceiling fittings than 200 mm … Project Co understands the intent of the Section and will ensure that services are laid out in a horizontally structured and coordinated way and that services are

placed as high as possible in order to maximise the opportunities for future service placement
Project Co acknowledges the State's requirements with respect to maintaining the 200 mm clear zone and proposes that the Section be amended as set out in the Departure column so that it is clear that the Section does not preclude the traversing of required vertical service pipework, ducts etc from upper level zones to the ceiling through this zone.
State accepts that there will be some services required to vertically drop through this zone from the upper in-ceiling zones down to the ceiling such as fire sprinkler pipes, ducts etc)

267 On 10 February 2016, the State Delegate gave to SAHP the clinical areas exclusion zone defect notice. The notice included:

> **Notice Details**
>
> I notify Project Co that I am of the opinion that the horizontal services zone immediately above fittings in the ceiling in all Clinical Areas is not in accordance with the requirements of the Agreement, which are to provide a clear horizontal services zone of 200 mm minimum immediately above fittings in the ceiling.
>
> I am of the opinion the Defect is not capable of remedy and I require Project Co to submit a Change Notice.

On 11 February 2016, SAHP gave to HYLC a defect notice in the same terms *mutatis mutandis* as the State's notice.

268 On 7 March 2016, HYLC issued to SAHP a Change Notice taking issue with the State's construction of the Technical Specification and proposing a change to the Technical Specification by stating that the lower boundary of the horizontal services zone of 200 mm is to be measured from the top of the ceiling rather than the top of fittings affixed to the ceiling; the requirement that the space immediately above fittings be left clear is a qualitative rather than quantitative requirement; and horizontal traversal of services is permitted where services are serving a specific functional area required by relevant fittings. It said that there would be no financial consequences of the change. On 8 March 2016, SAHP issued to the State a corresponding Change Notice.

269 On 4 April 2016, the State issued a Change Response rejecting the Change Notice because it did not offer a credit that properly compensated the State for the ongoing operational consequences of the non-compliance.

270 On 8 July 2016, HYLC issued the dispute notice in which it denied the existence of a defect, putting the three contentions reflected in its Change Notice summarised at [268] above. HYLC contended in the alternative that instances of non-conformance were of such a low magnitude that they would not have any impact on Facility functions. HYLC sought a determination that there was no defect or alternatively the same three alternative determinations sought in respect of the loading dock height summarised at [237] above. These submissions were mirrored by SAHP in its dispute notice. As noted at [238] to [239] above, by 30 August 2016, the requests for the three alternative determinations had been withdrawn.

271 In its primary submission, the State took issue at length with each of the three contentions by HYLC why there was no defect. The State attached the Aquenta cost assessment which set out, amongst others, scenario 3 involving re-design of all horizontal services to be accommodated within the current ceiling zone to clinical areas by rerouting and mechanical protection with a cost estimate of $1,360 million. The cost estimate included allowances totalling $1.159 million for temporary operation of the Hospital elsewhere. It stated that the scenarios identified were theoretical only.

272 In relation to rectification, the State said:

> In order to rectify this Defect, Project Co must:
>
> 1. audit the Facility to identify all instances in which services have been installed in the 200 mm exclusion zone from the top of ceiling mounted fixtures; and;
>
> 2. reinstall those services so that they do not protrude into the exclusion zone except insofar as it is necessary to *vertically traverse* the exclusion zone to service a ceiling mounted fixture immediately below it.
>
> The State's cost consultants have estimated that the cost of this rectification work will be $201 million plus delay costs …

…

Accordingly, while the State does not require physical rectification work to be carried out, the appropriate determination is that:

1. the Defects are capable of cure by physical works;

2. it is reasonable to do so; and

3. Project Co should compensate the State for its loss of $201 million plus delay costs in lieu of physical rectification.

273 It is clear from the State's submission that the State did not contend that the defect should be rectified and this is reinforced by the fact that the February defect notice had not required rectification (and indeed stated that rectification was not possible) and the State did not issue any subsequent Defect Notice requiring rectification or specifying a completion time.

274 In its reply, HYLC took issue with the State's contentions about the existence and extent of a defect. In relation to rectification, HYLC said:

> The State does not require rectification, but rather seeks payment of $201 million in lieu of rectification works, in circumstances where:
>
> (a) the State has not audited or provided any probative evidence on the extent of the alleged ceiling space deficiencies;
>
> (b) the costing materials provided by the State as part of its Submissions disclose flawed assumptions and heavily conditioned estimates regarding outlandish scenarios (one proposal is a cost of $7.9 billion!); and
>
> (c) the costs claim by the State bear no discernible relation to the estimates in the cost report.
>
> ***Determination sought***
>
> The Builder seeks the following determination:
>
> (a) there is no relevant defect;
>
> (b) the State does not intend to rectify the ceilings in the Clinical Areas;
>
> (b) rectification would not be reasonable;
>
> (c) no reasonable rectification cost has been established; and
>
> (d) there is no damage to the Facility.

275 In the subsequent submissions, the parties debated at length the meaning of the Technical Specification and Design Departures Schedule. Three constructional issues emerged concerning the existence and extent of a Defect: first, whether the lower boundary of the horizontal services zone of 200 mm is to

be measured from the top of the ceiling or the top of fittings affixed to the ceiling; secondly, whether the requirement in the vicinity of the fittings was qualitative or quantitative; and thirdly, whether Blue Space, Green Space and Circulation Space form part of the Clinical Areas in which the exclusion zone is required.

Determination

276 The expert decided the three construction issues in favour of HYLC. The expert concluded that there was a defect, but it was probably limited to 0.67% of the relevant Clinical Areas.

277 The expert said that, the State having expressly stated that it does not require physical rectification and seeks compensation in lieu of physical rectification, it was clear that the State does not intend to rectify the defect and there was no issue for him to determine. He therefore made no determination of this question.

278 The expert determined that "rectification is not reasonable". The expert relied on the fact that the defect notice stated that "the Defect is not capable of remedy"; the limited extent of the intrusion into only about 0.67% of Clinical Areas being such a low percentage that it did not justify large-scale rectification work of the kind propounded by the State; the opinion expressed by Aquenta that "generally, the current ceiling zone could accommodate further services"; and HYLC's submission that there is ample space in the ceiling to install future services.

Jurisdiction to determine rectification reasonableness/capability

279 For the reasons given at [192] to [197] above, the phrase "capable of remedy" is not confined to purely physical and theoretical considerations but incorporates practical and economic considerations. If the time, expense and consequences occasioned by rectification would be completely disproportionate to the detrimental effect of the defect, a defect would not generally be regarded as "capable of remedy".

280 Although the expert expressed his determination in the form "rectification of the Defect is not reasonable", his reasons for reaching his conclusion demonstrate that in substance he determined that "the Defect is not capable of remedy". The expert had jurisdiction to reach such a conclusion and the question whether it was justified on the materials produced to him is not a question that arises in this action.

281 Notwithstanding the form in which the expert expressed his determination, he had jurisdiction to determine whether the defect was capable of remedy and in substance he determined that it was not capable of remedy.

Jurisdiction to determine State did not intend to rectify

282 The expert did not determine whether the State intends to rectify the defect. The issue of his jurisdiction to do so does not arise. For the avoidance of doubt, for the reasons given at [257] to [258] above, the expert lacked jurisdiction to do so.

Primary data room pipes

Background

283 The Technical Specification sections 22.4(b)(xv) and 22.5(c)(iv) each provide:

> no other services shall be housed in this room.

284 The Telecommunications Infrastructure Standard for Data Centres ANSI/TIA-942-2005 section 4.4.10 provides:

> Any water and drain pipes that run through the room should be located away from and not directly above equipment in the room.

and section 5.3.8 provides:

> Where risk of water ingress exists, a means of evacuating water from the space shall be provided (e.g. a floor drain).

285 The Australasian Health Facility Guidelines part E section 1.07 provides:

> Engineering Services should not cause any unacceptable hazard resulting from loss of operation

286 On 14 January 2016, Bestec prepared a strategy report concerning pipework in the primary data room. The report recommended that a drip tray be installed below horizontal pipework, together with a moisture sensor, and a sheet metal bund be fixed around the vertical soil stack with a moisture sensor.

287 On 16 February 2016, the State Delegate gave to SAHP the PDR defect notice. The notice included:

> **Notice Details**
>
> I notify Project Co that I am of the opinion that the sewer pipes that have been installed in the Primary Data Equipment Room (01.DAC.008) are not in accordance with the requirements of the Agreement.
>
> The sewer pipes running through the Data Equipment Room pose a risk of water infiltration to a sensitive, high risk area.
>
> I am of the opinion the Defect is not capable of remedy and I require Project Co to submit a Change Notice.

On 16 February 2016, SAHP gave to HYLC a defect notice in the same terms *mutatis mutandis* as the State's notice.

288 On 7 March 2016, HYLC issued to SAHP a Change Notice contending that the sewer pipework was not "housed" within the primary data room and stating that in any event the sewer pipe could not be rerouted due to its location and gravitational requirements for falls. It proposed a change to the Technical Specification sections 22.4(b)(xv) and 22.5(c)(iv) to except "small bore overhead pipework located not directly above equipment" from the prohibition on the housing of other services within the room. It offered a commercial credit to the State of $23,021.88 to resolve the Technical Specification changes, future risk, and construction as installed.

289 On 6 April 2016, the Project Director sent a communication to SAHP and HYLC stating that, if SAHP issued to the State a corresponding Change Notice, it was her intention to reject it as it was not an appropriate response to a serious non-compliance. She added that there may be an alternative solution through additional physical isolating barriers and/or agreement that SAHP remain responsible for the defect through the Operating Term and requested consideration of this.

290 On 12 April 2016, the State elaborated upon the possible alternative solution querying whether, for horizontal runs, waterproof bulkheads could be installed or larger trip trays provided and, for vertical stacks, whether bunding, mechanical drainage etc had been considered.

291 On 24 May 2016, HYLC responded stating that, for horizontal runs, it was not possible for waterproof bulkheads to be installed and that the trays that had been installed were adequately sized according to the drainage pipework size and, for vertical stacks, the suggestions had been considered but discounted because it was at the bottom of the building.

292 On 9 June 2016, the State responded that, in relation to the vertical stacks, it reasonably expected SAHP at least to undertake the provision of a suitable bund and BMS moisture monitoring recommended by Bestec in its report. It sought clarification that this was what HYLC was proposing to do.

293 On 4 July 2016, Spotless sent a communication to HYLC saying that it accepted the proposed solution.

294 On 8 July 2016, HYLC issued the dispute notice in which it assigned this defect to category 1 in respect of which it accepted that a defect existed. However, HYLC also denied the existence of a defect, putting the contentions reflected in its Change Notice. HYLC said that it had installed appropriately sized sheet metal drip trays under the relevant pipework, complete with drainage discharging outside the room to an appropriate discharge point, and was incorporating moisture sensors which would alert the operator should moisture

be detected in the drip tray as a consequence of a leak. HYLC contended that this had minimised any possible risk of water ingress to more than an acceptable level. HYLC sought a determination that there was no defect or alternatively the same three alternative determinations sought in respect of the loading dock height summarised at [237] above. These submissions were mirrored in SAHP's dispute notice. As noted at [238] to [239] above, by 30 August 2016, the request for the three alternative determinations had been effectively withdrawn.

295 In its primary submission, the State took issue at length with the contentions by HYLC why there was no defect or that it had been satisfactorily rectified. It contended that the loss mitigation works were an inadequate remedy because they did not bring the Works into conformity with the contract; the vertical sewer stack was subject to a risk of blockage requiring access and rectification; there was no inspection point through the casing to the vertical sewer stack; the vertical sewer stack had no floor drain; and the drip trays and moisture sensors in respect of the horizontal pipes were not fully enclosed. The Aquenta cost assessment did not address this defect.

296 In relation to rectification, the State said:

> The Notice of Dispute does not seek any determination regarding the rectification works required in relation to this Defect.
>
> However, for completeness, the State notes that the Defect is capable of cure by physical works and that it is reasonable to do so.
>
> This Defect is capable of physical rectification by the relocation of the offending sewer pipes. The Builder's Change Notice dated 7 March 2016 identifies that the pipework could have been rerouted for approximately $23,000. While the Builder's Change Notice is presumably based on the cost saved by the nonconforming approach taken by the Builder, rather than the cost of now making the Works conform with the Design Specifications, the question of cost goes to reasonableness, not the question of whether the Defect can be rectified at all.
>
> …
>
> Finally, in its Defect Notice, the State did not require that Project Co rectify the Defect and instead invited Project Co to propose an alternative solution to remove the risk posed by the Defect. The State suggested that the Defect be addressed by:
>
> 1. the installation of waterproof bulkheads;
>
> 2. bunding and mechanical drainage; and
>
> 3. agreement that Project Co would remain liable for any damage caused by the Defect if the risk mitigation strategies failed.
>
> However, Project Co rejected this proposed solution and has not come up with an alternative solution that excludes the risk of water leakage posed by the Defective presence of sewer pipes in the Primary Data Equipment Storage Room. This leaves rectification as the only solution.

The Independent Expert should therefore order physical rectification of this Defect.

297 The State did not however issue a further defect notice requiring rectification or specifying a completion time.

298 In its reply, HYLC took issue with the State's contentions about the existence and extent of a defect. In relation to rectification, HYLC said:

> The State said expressly in its Defect Notice that it did not require rectification of these works and it required the submission of a Change Notice from Project Co/the Builder (i.e. a Modification to remove the non-conformance with the Technical Specification). The Builder provided the Change Notice and undertook the risk mitigation works in accordance with the Strategy Report and in consultation with the State and Spotless. The State has now resiled from that position and says it requires physical rectification of this Defect.
>
> The Builder contends that the risk mitigation works that have been undertaken are more than sufficient to remove what the States refers to as a "low but real and avoidable" risk of water leaks into the PDER. The Builder had also proposed a reasonable credit to Project Co/the State in the requested Change Notice.
>
> …
>
> ***Determination sought***
>
> If and to the extent that the sewer pipes and vertical sewer stack located in the PDER do not comply with the Technical Specifications:
>
> (a) the Builder's rectification/risk mitigation works, carried out in accordance with the Strategy Report, are reasonable and sufficient rectification works to resolve the Defect;
>
> (b) rectification by substantial rework, involving redirection/removal of the sewer pipes and vertical sewer stack to outside of the PDER, would not be reasonable;;
>
> (c) no reasonable rectification cost has been established; and
>
> (d) there is no damage to the Facility.
>
> of the Clinical Areas to which the exclusion zone is required.

Determination

299 The expert decided the construction issue (the meaning of "housed") in favour of the State and concluded that there was a defect.

300 The expert determined that the rectification/risk mitigation works carried out by HYLC in accordance with the strategy report were reasonable and sufficient to resolve the defect. He reached this conclusion because he considered that compliance had now been achieved with the Telecommunications Infrastructure Standard for Data Centres sections 4.4.10 and 5.3.8 and Australasian Health Facility Guidelines part E section 1.07 (albeit not with Technical Specification sections 22.4(b)(xv) and 22.5(c)(iv)); the pipes were not

under pressure and there was no risk of catastrophic failure; any leaks would be detected before water could cause damage to equipment; the sewer pipes could not be relocated; and the State's proposed alternative was unnecessary and not a reasonable alternative.

301 In relation to the possibility of relocation, the expert said:

> The report from Bestec dated 14 January 2016, which I accept, relevantly states that… The horizontal sewer lines cannot be relocated due to the fixtures located above. …
>
> …
>
> Although the State asserted that this Defect was capable of physical rectification by the relocation of the offending sewer pipes, it did not explain the extent of any such work and how that work could be done… the State's position that this Defect could be fixed was inconsistent with the opinion expressed by the Project Director in the Defect Notice which stated that: "*the Defect is not capable of remedy*"…
>
> Consistent with the opinions expressed in the Defect Notice, the Builder also took the view that rectification was not possible "*due to location, and gravitational requirements to falls on the sewer line*". On the assumption that this is correct, this would mean that relocation of the offending pipes is not a viable, let alone a reasonable alternative.
>
> Although the Independent Certifier took the position that it would be "*better, best practice, I would suggest, to design out a potential problem rather than mitigate for a risk event especially in a critical area like the Data Centre*", it seemed to me that the Independent Certifier gave no consideration as to whether these pipes could in fact be relocated.

302 In relation to the assessment of risk, the expert said:

> Although I accept that the rectification/risk mitigation works do not completely remove the "risk" and that it does not bring the Works into strict conformity with the Agreement as there are pipes which are still located within this room, contrary to clauses 22.4 and 22.5 of the Technical Specification, I am of the opinion that the risk of water ingress and any consequential damage from these sources is so minor as to be inconsequential.
>
> …
>
> …the Independent Certifier gave no consideration as to whether these pipes could in fact be relocated. The Independent Certifier also seemed to give no proper consideration as to the issue of risk, which in my opinion is inconsequential, and also seemed to give no proper consideration … to the proposed methods of mitigating any such extremely minor risk.

303 The expert determined that "rectification by substantial rework, involving redirection/removal of the sewer pipes and vertical stack to outside of the PDER is unreasonable" for the reasons summarised and extracted above.

Jurisdiction to determine rectification reasonableness/capability

304 For the reasons given at [192] to [197] above, the phrase "capable of remedy" is not confined to purely physical and theoretical considerations but

incorporates practical and economic considerations. If the time, expense and consequences occasioned by rectification would be completely disproportionate to the detrimental effect of the defect, a defect would not generally be regarded as "capable of remedy".

305 Although the expert expressed his determination in the form "rectification of the Defect is not reasonable", his reasons for reaching his conclusion demonstrate that in substance he determined that "the Defect is not capable of remedy". He concluded that the time, expense and consequences that would be occasioned by physical rectification were completely disproportionate to the detrimental effect of the defect. The expert had jurisdiction to reach such a conclusion and the question whether it was justified on the materials produced to him is not a question that arises in this action.

306 Notwithstanding the form in which the expert expressed his determination, he had jurisdiction to determine whether the defect was capable of remedy and in substance he determined that it was not capable of remedy.

Jurisdiction to determine risk mitigation works reasonable and sufficient

307 The expert determined that the risk mitigation works carried out by HYLC were reasonable and sufficient to resolve the defect.

308 The State contends that, while the expert had jurisdiction to determine whether a defect existed and whether a defect was "capable of remedy" within the meaning of clause 40, he did not have jurisdiction to determine that works undertaken to mitigate the risks or consequences of damage occurring as a result of the risk eventuating were reasonable and sufficient.

309 HYLC and SAHP contend that, if a defect has been rectified, it is no longer a defect for the purposes of clause 40. They also contend that a dispute whether risk mitigation works were reasonable and sufficient to resolve a defect is a dispute "related to the rectification of a Defect" within the meaning of clause 40.3(b)(ii) and this is sufficient to give the expert jurisdiction to determine whether the State intends to rectify a defect.

310 I accept the State's contention and reject the contentions of HYLC and SAHP. For the reasons given at [198] to [199] above, the concepts of remedy and rectification in clause 40 refer to the elimination of a defect so that the relevant area conforms to the Technical Specification: they do not refer merely to mitigating the risks or consequences of damage occurring as a result of a continuing defect.

311 The expert did not have jurisdiction to determine whether the risk mitigation works carried out by HYLC were reasonable and sufficient to resolve the defect.

Binding effect of determinations

312 The State contends that it is not bound, and its rights are not constrained, by the expert determination insofar as the expert determined that an alleged defect was not a defect or insofar as the expert validly determined that a defect was not capable of remedy.

313 The State contends that SAHP is bound by a valid adverse determination but the State is not bound by virtue of the provisions of clause 40.3(a). I reject that contention.

314 Clause 40.3(a) provides:

> The State's rights with respect to Defects (including Defects in the ICT Network) and Project Co's Liability with respect to Defects under this Agreement and otherwise at Law will not be affected or limited by:
>
> (i) the State's rights under this Clause 40;
>
> (ii) any other provision of this Agreement;
>
> (iii) any failure by the State or the relevant State Delegate to exercise the States rights under this Clause 40; or
>
> (iv) any Direction of the relevant State Delegate.

315 The evident purpose and effect of placita (iii) and (iv) are that the State's rights under clause 40 and other provisions of the contract are not to be prejudiced by the mere fact that the State Delegate does, or does not, give a defect notice under clause 40.1(c) alleging a defect or a defect notice under clause 40.1(d)(ii) claiming that a defect is capable of remedy, or the State chooses to rectify, or not rectify, a defect under clause 40.1(e) after SAHP has failed to do so. For example, the State can still allege that there is a defect notwithstanding that a defect notice has not been given. Similarly, the State can still allege that a defect is capable of remedy notwithstanding that a defect notice requiring remedy has not been given.

316 The evident purpose and effect of placitum (i) is that the State's rights under other provisions of the contract are not to be prejudiced by the existence or exercise of the State's rights under clause 40. The evident purpose and effect of placitum (ii) is the converse that the State's rights under clause 40 are not to be prejudiced by the existence or exercise of the State's rights under other provisions of the contract.

317 None of the placita of clause 40.3(a) have the effect, or evident purpose, of providing that the State's rights are not affected by an expert determination under clause 40.3(b). This would be such an extraordinary provision that express language would be required before such an intention would be attributed to the parties. On the contrary, the evident purpose of clause 40.3(b) is that both parties

will be bound by an expert determination insofar as the determination determines the rights of the parties under or by reference to clause 40.

318 Nevertheless, the doctrines of *res judicata* and issue estoppel do not apply to an expert determination. The extent to which both parties are bound by an expert determination must be decided by reference to the parties' contractual intention.

319 If an expert determines under clause 40.3(b) that an alleged defect is not a defect, both parties are bound by that determination not only for the purpose of deciding the obligation of SAHP to rectify the defect after being served with a defect notice under clause 40.1(d)(ii), but also for other purposes including any claim by the State for damages for breach of contract or any question whether that Technical Completion has not been achieved by reason of the existence of the alleged defect.

320 The position is different in respect of an expert determination under clause 40.3(b) that a defect is or is not capable of rectification. Both parties are bound by that determination for the purpose of deciding the obligation of SAHP to rectify the defect after being served with a defect notice under clause 40.1(d)(ii) and for the purpose of deciding the State's entitlement to rectify the defect itself and add the cost to Moneys Owing under clause 40.1(e) because the expert has jurisdiction over those subject matters. However, the fact that an expert determines that a defect is not "capable of remedy" within the meaning of and for the purposes of clause 40 does not bind either party if the defect is not in fact rectified and the State claims damages for breach of contract by reason of the defect. An expert appointed under clause 40.3(b) has no jurisdiction in respect of a claim for damages.

321 The forum in which a claim for damages is made – whether it be arbitration under clauses 69(1) and 72, a separate expert determination under clauses 69(1) and 71 or a court of competent jurisdiction – is obliged to decide the damages claim by reference to ordinary damages principles on the evidence adduced therein and in the circumstances pertaining at that time. The fact that there is some similarity between the concept of a defect being "capable of remedy" within the meaning of clause 40 and the factor taken into account on a damages claim whether rectification is unreasonable makes no difference to the analysis. The circumstances might have changed from the time of the clause 40.3(b) expert determination to the time of the assessment of damages such that it is now reasonable to rectify a defect that was previously not "capable of remedy" for the purpose of the deciding the obligation of SAHP to rectify the defect after being served with a defect notice under clause 40.1(d)(ii) or vice versa.

322 The fact that an expert has determined under clause 40.3(b) that a defect is not "capable of remedy" does not entail that the State is not entitled to deny that Technical Completion has been achieved by reason of the existence of that defect. If the position were otherwise, the State would be obliged to accept that

the Hospital has been satisfactorily completed notwithstanding the existence of what might be a very significant defect, albeit one which is not practically capable of remedy. In addition, there could be a series of defects which individually are assessed as not capable of remedy but collectively are very significant for completion of the Hospital.

323 This is not to say that, if the State has not required a defect to be rectified or has engaged in conduct on the basis that a defect is not "capable of remedy", the State might not be precluded by the doctrine of estoppel or impeded by a claim of breach of an implied term imposing a duty of cooperation from later contending in a different context that the defect was in fact capable of remedy. This might apply, for example, in the different context of a claim by the State for damages for breach of contract on the basis of an assertion that the defect is in fact capable of remedy or a claim by the State that Technical Completion has not been achieved by reason of the existence of the defect and that it is in fact capable of remedy. However, these questions do not arise in this action.

Validity of referral to arbitration

324 The State seeks a declaration that on 12 October 2016 it validly referred to arbitration under clause 71(o) the subject matter of the head contract determination.

325 HYLC and SAHP contend that the precondition reflected in placitum (i) of clause 71(o) is not satisfied because the value of the determination is not greater than $1 million. SAHP alone contends that the precondition reflected in placitum (ii) of clause 71(o) is not satisfied because the State's 12 October 2016 referral was expressed to be conditional.

Value of determination

326 HYLC and SAHP contend that, in contrast to the provisions of clause 70(b) which refer to the amount of the claim as set out in the disputes notice, clause 71(o)(i) refers to the value of the determination being the actual outcome. As the expert determined that the defects involving the loading dock height, clinical areas ceiling exclusion zones and primary data room pipes are not capable of remedy, the value of the determination is zero.

327 The State makes three alternative contentions. First, by reason of the provisions of clause 40(3)(a), the State's right under clauses 69(1) and 72 to proceed to arbitration on the same issues the subject of the expert determination is not affected or limited by the State's rights under clause 40 and in particular by the expert determination. I reject that contention for the reasons given at [315] to [319] above.

328 The State's second contention is that, where a dispute does not involve a monetary claim, such as where the dispute is merely about the existence of a defect and no question of value arises, clause 71(o) is inapposite and clause 71(o)

is to be read down so as to ignore placitum (i). The State's third contention is that "the value of the determination" for the purpose of placitum (i) is to be assessed objectively by reference to the difference between the value to the "appellant" (the party "appealing" under clause 71(o)) if it had been successful at expert determination and the value under that expert determination.

329 Clause 71(o)(i) provides:

> (**Final and binding**): To the extent permitted by Law, the determination of the Independent Expert will be final and binding on the parties, unless:
>
> (i) the value of the determination is greater than $1 million

330 By contrast, clause 70(b) provides:

> If the meeting required by paragraph (a):
>
> (i) does not occur; or
>
> (ii) having occurred fails to resolve the Dispute or to agree that the Dispute be referred to an Independent Expert under Clause 71 or to arbitration under Clause 72,
>
> within 10 Business Days of the delivery of the Notice of Dispute, the Dispute shall be referred to arbitration under Clause 72 *save where the dispute is in respect of a claim for payment of an amount which is equal to or less than $1 million (as set out in the Notice of Dispute)* in which case, within 10 Business Days of the delivery of the Notice of Dispute, the Dispute shall be referred for a resolution by an Independent Expert under Clause 71. (Emphasis added)

331 Several observations can be made about the drafting of these two provisions. First, the clause 70(b) provision applies on its face to all generic disputes proceeding via the generic path to expert determination or arbitration other than those agreed under clause 70(b)(ii) to proceed to expert determination. Generic disputes may involve disparate types of claim by either the State or SAHP and may involve a monetary claim where the amount is identified in the notice of dispute, a monetary claim where the amount is not so identified, a non-monetary claim which can nevertheless be measured in monetary terms, or a claim which has no monetary dimension whatsoever. Clause 70(b) is drafted to accommodate what appears to have been contemplated as the paradigm case involving a monetary claim by SAHP against the State in which the amount of the claim is set out in the notice of dispute (and in the case of the construction contract such claim by HYLC against SAHP). It is apt, at least in some cases, to apply to a case involving a monetary claim by the State against SAHP in which the amount of the claim is set out in the notice of dispute (or such a claim by SAHP against HYLC under the construction contract). It is not apt to apply to a monetary claim when no amount is set out in the notice of dispute or to a non-monetary claim.

332 The clause 71(o)(i) provision applies on its face to all generic and specified disputes proceeding via either the generic or the specific path. Specified disputes,

like generic disputes, might involve monetary or non-monetary claims. A specified dispute arrives at expert determination under clause 71 directly without having passed through the gate of clause 70(b) and hence might involve a monetary claim in which the amount is not set out in the notice of dispute or a non-monetary claim that, if it had passed through the gate, would have proceeded to arbitration.

333 Secondly, the clause 70(b) provision is expressed as a primary rule for referral to arbitration subject to a secondary *exception*, namely that where the dispute is in respect of a claim for payment of an amount which is equal to or less than $1 million as set out in the notice of dispute, it proceeds to expert determination. By contrast, the clause 71(o)(i) provision is expressed as a rule for referral to arbitration subject to a *precondition*, namely that the value of the determination is greater than $1 million.

334 Thirdly, the two provisions must be intended to work in conjunction with each other and harmoniously. The same threshold of $1 million applies to each provision. It must be the intention that, if a generic dispute proceeds to expert determination via clause 70(b) because the amount of the claim is equal to or less than $1 million, clause 71(o) will operate so as to give to the disappointed party a right of "appeal" to arbitration after the expert determination.

335 Fourthly, clause 70(b) is expressed in terms of the *amount* of the claim set out in the notice of dispute; whereas clause 71(o)(i) is expressed in terms of the *value* of the determination.

336 Fifthly, a broader construction of clause 71(o)(i) will advantage the party dissatisfied with an expert determination, which as a matter of construction is as likely to be SAHP as it is to be the State. Conversely, a narrower construction will advantage the party who was successful on the expert determination, which again is as likely to be the State as SAHP.

337 Sixthly, clause 71(o)(i) is to be construed having regard to its text, context and evident purpose. Unless a contrary intention is manifested, it should be construed to give a businesslike interpretation and produce a commercial result. If its language is ambiguous, a construction giving rise to capricious, unreasonable, inconvenient or unjust consequences is to be avoided. This consideration favours a broader construction of the clause rather than a narrower construction.

338 As a matter of construction, when clause 71(o)(i) uses the word "value" in the phrase " the value of the determination", that word has been deliberately chosen to have a broader connotation than the "amount" of the claim (referred to in clause 71(b)). Similarly, the reference to "the determination" as the object of the value has been chosen to have a broader connotation than "the claim" (referred to in clause 71(b)). First, it is not confined to a claim expressed in monetary terms but is capable of applying to a non-monetary claim the value of

which can be reasonably ascertained. Secondly, it is not confined to the "amount of the claim" but refers to the "value" of the subject matter of the dispute. Thirdly, the reference to "the determination" as the object of the value is not one-sided (as is the reference in clause 71(b) to the amount of "the claim" set out in the notice of dispute) but invites a comparison between the appellant's case and the outcome of the determination.

339 It follows that I accept the State's third contention. The "value of the determination" for the purpose of placitum (i) is to be assessed objectively by reference to the difference between the value to the "appellant" if it had been successful at expert determination and the value under that expert determination. For the purpose of the assessment, the two values to be compared are to be ascertained objectively rather than being limited to the materials adduced before the expert or necessarily being limited (depending on the circumstances) by an amount the subject of the determination.

340 It appears to be common ground that there is only a single determination within the meaning of clause 71(o) even if the determination encompasses multiple disputes, ie the "value of the determination" is to be determined by reference to the expert's determination and not by reference to the value of each dispute in respect of different aspects of the Hospital. If I am wrong in that understanding, I will give the parties liberty to make submissions on this question.

341 In respect of the loading dock, the expert determined in substance that the defect was not capable of remedy. Aquenta assessed the cost of rectification (if undertaken) at $4.224 million and the State's case is that the cost of rectification is $3.2 million. The other parties' case is that these costs involved under-estimates if rectification were actually undertaken but in reality the State has suffered no loss as a result of the defect. To assess the "value of the determination", it is neither necessary nor appropriate to make any finding whether the State would be entitled to damages for breach of contract measured by reference to rectification costs. $3.2 million is the relevant value for the purpose of clause 71(o) insofar as this matter formed part of the determination.

342 In respect of clinical areas ceiling exclusion zones, the expert determined that there was a defect, but decided the construction issues in favour of HYLC which had a dramatic effect upon the extent of the defect (effectively limiting it, on the finding by the expert – albeit contested by the State – to less than one per cent of the relevant areas). The expert also determined in substance that the defect was not capable of remedy. Aquenta assessed the cost of rectification at $201 million on the assumption that the rectification work was undertaken without having to relocate operations to the old Royal Adelaide Hospital during the works and the State's case is that the cost of rectification is $201 million. To assess the "value of the determination", it is neither necessary nor appropriate to make any finding whether the State would be entitled to damages for breach of

contract measured by reference to rectification costs. $201 million is the relevant value for the purpose of clause 71(o) insofar as this matter formed part of the determination.

343 In respect of the dispute about the primary data room pipes, the expert determined in substance that the defect was not capable of remedy. No assessment was undertaken by Aquenta of the cost of re-routing the pipes to avoid encroachment into the primary data room. While HYLC offered a commercial credit to the State of $23,021.88, the expert found and I agree that this did not represent an estimate of the cost of re-routing the pipes to avoid encroachment into the primary data room. No evidence was adduced at trial about the cost of re-routing the pipes to avoid encroachment into the primary data room. I am unable to determine whether that cost, or the State's claim in respect of the defect, exceeds or does not exceed $1 million.

344 The value of the determination is well over $1 million and it satisfies the criterion contained in clause 71(o)(i).

345 If I had not accepted the State's third contention, I would have been disposed to accept its second contention because clause 71(o) should be construed harmoniously with clause 70(2) so that, if the "value of the determination" has no meaning in respect of a particular determination, a dissatisfied party has a right of "appeal" to arbitration. However, in light of my acceptance of the State's third contention, it is unnecessary to form a final view on this question.

Conditionality of referral

346 SAHP alone contends that the precondition reflected in placitum (ii) of clause 71(o) is not satisfied because the State's 12 October 2016 notice of arbitration was expressed to be conditional.

347 The notice of arbitration included the following provisions:

> 1. By this Notice of Arbitration, the Claimant, the State of South Australia … require that its dispute with the Respondent, namely SA Health Partnership Nominees Pty Ltd be referred to arbitration.
>
> …
>
> 12. On 26 September 2016, the Independent Expert published a determination in relation to the Notice of Dispute (**Determination**). The Determination included a determination in relation to Defect Notice 0621: Clinical Areas Ceiling Space that [the determination addressing the existence and extent of the defect is then set out].
>
> 13. The Claimant disputes these determinations and seeks to have them reviewed by the arbitration tribunal pursuant to clause 72.1(b) of the Project Agreement and substituted by a determination that the extent of the Defect is as set out in Defect Notice 0621.

14 The Determination also included the following purported determinations (**Purported Determinations**):

…

14.2 in respect of Defect Notice 0580: Loading Dock Ceiling Height, that: … (ii) rectification of the Defect would not be reasonable;

14.3 in respect of Defect Notice 0632: Primary Data Equipment Room Sewer Pipes that: … (ii) rectification of the Defect would not be reasonable;

…

14.5 in respect of Defect Notice 0621: Clinical Areas Ceiling Space – 200 mm Services Exclusion Zone, that … (ii) rectification of the defect would not be reasonable;

…

15. The Claimant contends that the Purported Determinations are beyond the contractual remit of the Independent Expert, as provided for in clause 40.3 of the Project Agreement, and are a nullity. On 25 August 2016, the Claimant commenced proceedings in the Supreme Court of South Australia… seeking declaratory relief that the Purported Determinations are a nullity.

16. The Claimant disputes the Purported Determinations and to the extent that the Purported Determinations are found to be valid and binding on the Claimant, seeks to have the Purported Determinations reviewed by the arbitration tribunal and:

…

16.2 in relation to the other Purported Determinations, setting aside those determinations,

pursuant to clause 72.1(b) of the Project Agreement.

17. The value of the Determination, including the Purported Determinations, is in excess of $500 million and exceeds the amount stipulated in clause 71(o) of the Project Agreement as enabling recourse to arbitration.

…

20. This reference to arbitration is subject to the outcome of the Proceedings.

348 On its proper construction, the notice of arbitration is not conditional. First, the notice of arbitration accepts the validity of the expert determination in respect of the clinical areas ceiling exclusion zones and it cannot be contended that the referral to arbitration in respect of that dispute is conditional.

349 Secondly and more fundamentally, in respect of the other disputes, it was no doubt considered necessary by the State to include paragraph 15 lest it be contended by SAHP that, by the referral to arbitration, the State was precluded from continuing to contend in this action that those determinations were a nullity. The operative paragraphs in respect of these disputes are paragraphs 1 and 16

which in conjunction referred the dispute to arbitration unconditionally. The mere fact that paragraph 20 was included to express that the reference to arbitration was subject to the outcome of the proceedings does not connote that the reference was conditional. It connotes that the State was preserving its rights to contend in the action that the expert determination was a nullity and expressing the obvious logical point that, to the extent that it succeeded in that action, there would be no subject-matter to refer.

350 I reject SAHP's contention that the notice of arbitration is invalid because it was conditional.

Conclusion

351 The State was entitled pursuant to clause 71(o) to refer to arbitration the disputes the subject of the determination and it did so by its notice of arbitration dated 12 October 2016.

Declarations concerning determinations sought but abandoned

352 When the State instituted the action, HYLC and SAHP by the dispute notices were seeking determinations in respect of one or more of the four defects that ultimately became the subject of the trial including the following determinations:

1. the defect complained of presents no loss of functionality or amenity and the nil sum modification change notice should be accepted by [Project Co/the State] as it will have no effect on the matters particularised in the change notice … and will not result in any Costs or Savings to be apportioned;

2. alternatively, if the Independent Expert determines that there will be any savings associated with the modification, the modification change notice should be accepted for the reasons above subject to the payment to [Project Co/the State] of an amount determined by the Independent Expert as being [Project Co/the State]'s share of the net cost savings calculated in accordance with cl 52.13(c) and the change in compensation principles in schedule 4;

3. further to 2 or in the alternative, if [the State/Project Co] contends and the Independent Expert agrees, that [the State/Project Co] has suffered loss as a consequence of the defect, the Independent Expert should approve the modification to remove the roadblock to technical completion and determine the fact and extent of any loss. Compensation for such loss should be agreed by the parties within seven days of the Independent Expert determination or, failing that, be determined by the Independent Expert in accordance with orthodox legal principle;

4. If the Independent Expert finds that there is a defect, the defect complained of presents a minor loss of functionality or amenity and [HYLC/SAHP]'s rectification works, together with the modification change notice, providing a credit of [amount] should be accepted by [Project Co/the State].

353 HYLC and SAHP by the dispute notices were also seeking determinations in respect of one or more of the other eight defects the subject of the dispute

notices that ultimately did not become the subject of the trial including the following determinations:

1. if … the defect can be remedied, a determination … whether the defect could be treated as a technical completion outstanding item in order to mitigate any further loss or damage that would be suffered by [the State/Project Co] as a result of delays flowing from that rectification;

2. If the … Defect cannot be rectified, the terms of a modification that would be required in order to remove the Defect …;

354 The State seeks a declaration that these six proposed determinations were beyond the scope of the submission of a dispute for independent expert determination pursuant to clause 40.3(b) of the contract. SAHP and in turn HYLC resist the making of a declaration on the ground that they withdrew their requests for these six determinations at the end of August 2016 when they acknowledged that they were outside the expert's jurisdiction, and a declaration should not be granted on matters not in dispute or matters that are hypothetical.

355 I accept the submissions of SAHP and HYLC. It is plain on the proper construction of clause 40.3(b) that an expert does not have jurisdiction to determine that a Modification Change Notice should be accepted or to approve a Modification; to determine the amount that should be paid to the State/SAHP in the absence of rectification of a defect under clause 40.1(e); or to assign a defect to the Technical Completion Outstanding Items list. There is no extant dispute about this and no reason to grant declarations concerning this.

Conclusion

356 Declarations should be made in the action and the third party action that:

1. the expert did not have jurisdiction to determine whether the size of the floor distribution rooms comprised a defect other than by reference to the Functional Brief, Technical Specifications and Design Departures Schedule and his determination that it did not comprise a defect is null and void;

2. the expert did not have jurisdiction to determine whether the State intended to rectify the defect in respect of the loading dock height and his determination that it did not so intend is null and void;

3. the expert did not have jurisdiction to determine whether the risk mitigation works carried out by HYLC were reasonable and sufficient to resolve the defect in respect of the primary data room pipes and his determination that they were reasonable and sufficient is null and void;

4. while the parties are bound by the determinations by the expert that the defects in respect of the loading dock height, clinical areas ceiling

exclusion zones and primary data room pipes are not capable of remedy for the purposes of clause 40(1)(d)(ii), they are not bound by those determinations for the purposes of claims for damages or on the question whether Technical Completion has not been achieved by reason of the existence of those defects;

5. the State was entitled pursuant to clause 71(o) to refer to arbitration the disputes the subject of the determination insofar as it is valid and it did so by its notice of arbitration dated 12 October 2016.[38]

357 I will hear the parties as to the form and wording of the declarations to be made.

358 I will hear the parties as to costs and any other orders sought in the action and third party action.

[38] This is subject to the liberty to apply referred to at [340] above.