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58 Paragraphs

APM GROUP (AUST) PTY LTD v GALWIN PTY LTD - BC200607096

Supreme Court of Victoria -- Commercial and Equity Division
Hansen J

9866 of 2005; 4261 of 2006

29 August, 12 September 2006

APM Group (Aust) Pty Ltd v Galwin Pty Ltd [**2006] VSC 325**

CONTRACT -- Expert determination of disputes under building contract -- Whether stipulated timetable for determination followed -- Purported withdrawal from agreement by one party -- Determination made -- Whether binding.

Hansen J.

[1] The issue brought forward for determination by cross motions is whether an expert determination made pursuant to an agreement is binding on the parties thereto.

[2] The parties are APM Group (Aust) Pty Ltd ("APM") and Galwin Pty Ltd ("Galwin"). By a contract dated 19 December 2002 Galwin engaged APM to construct an apartment building at 693-697 Orrong Rd, Toorak. Warren and Rowe (Aust) Pty Ltd was appointed by Galwin as superintendent for the purpose of the contract ("the contract"). Works duly commenced but disputes arose between APM and Galwin on various matters. On 16 March 2003 APM commenced a proceeding against Galwin in the Domestic Building List of the Victorian Civil and Administrative Tribunal ("VCAT"). The proceeding was settled on 5 August 2003. The settlement agreement varied some of the terms of contract. Thereafter works continued but, disputes again occurring, on 8 January 2004 APM commenced a second proceeding in the Domestic Building List at VCAT. Then, on 21 February 2005 APM and Galwin entered into a Contract Variation and Completion Agreement ("the completion agreement"). Among other things the completion agreement provided for the settlement of the second VCAT proceeding. In Background clauses to the completion agreement it is stated, by way of explanation for entering into the completion agreement, that:

> APM and Galwin wish to minimise the expense and delay associated with litigating the matters in dispute between them and wish to facilitate completion of the remaining works under the Contract.

[3] The completion agreement provided for the basis on which the construction works would proceed to completion. As to that, the provisions of the contract continued in force except to the extent they were varied by the agreement which settled the first VCAT proceeding and the completion agreement. Further, the appointment of the current superintendent was terminated and in lieu Trevor Main and Associates ("Main") was appointed as superintendent under the contract. It

is not necessary to set out the extensive provisions in cl 4 for the completion of the works. What is important is that by cl 5.1 the parties referred all unresolved disputes between them up to the date of the completion agreement to Main for expert determination. Clause 5.2 then set out the process by which the disputes for determination by Main would be defined. The process was:

> 5.2.1 On or before 28 February 2005, APM and Galwin will
>
> provide Trevor Main with details of their claims against each other in connection with the Contract (including the claims in the 2nd VCAT Proceeding) together with supporting documentation. APM and Galwin will send a copy of this documentation to each other and to the Financier. APM and Galwin cannot submit any further information to Trevor Main after this date except in accordance with the processes in clauses 5.2.2 to 5.2.5 below.
>
> 5.2.2 APM and Galwin may respond to any inaccuracies in the other party's documentation up to 3 March 2005. APM and Galwin will send a copy of any such response to each other and the Financier.
>
> 5.2.3 Trevor Main may send APM and Galwin questions (if any) in respect of the disputes between them. Trevor Main will send a copy of all questions to the opposite party and to the Financier. Trevor Main will send the questions progressively up to 7 March 2005 or such further date as determined by Trevor Main in conjunction with the parties.
>
> 5.2.4 APM and Galwin must respond to any queries by Trevor Main pursuant to clause 5.2.3 above within 5 business days of receiving such queries. APM and Galwin must provide each other and the Financier with a copy of any such response. APM and Galwin are not permitted to make any submissions or responses dealing with the other party's material unless specifically requested by Trevor Main or in accordance with clause 5.2.2 (including the time limit in that clause).
>
> 5.2.5 Trevor Main may communicate (including conducting interviews) with any party involved in the Project or the disputes.
>
> 5.3 Trevor Main will provide his determination of the disputes identified by APM and Galwin through this process within 7 business days of the date of the responses under clause 5.2.4 or such further date as determined by Trevor Main in consultation with the parties. Trevor Main will provide a copy of his determination to APM, Galwin and the Financier.
>
> 5.4 All copies provided to another party pursuant to clause 5.2 will be provided at the same time as the original documents are submitted or produced. In the case of information provided by APM to Trevor Main prior to the date of this Agreement APM will provide copies forthwith.
>
> Expert determination to be binding
>
> 5.5 The parties agree that, in determining the disputes between APM and Galwin in accordance with this clause, Trevor Main:
>
> 5.5.1 is to reach his determination in accordance with the Contract as varied by this Agreement and the settlement in the 1st VCAT proceeding; and
>
> 5.5.2 is acting as an expert and not as an arbitrator, and that his decision will be final and binding.
>
> *Payment of the amount determined by the expert*
>
> 5.6 If Trevor Main determines in accordance with this clause that an amount is payable to APM, Galwin will pay this amount to APM within 21 days of the determination.
>
> 5.7 If Trevor Main determines in accordance with this clause that an amount is payable to Galwin, APM will pay this amount to Galwin within 21 days of the determination.

[4] On or about 21 February 2005 Main accepted the appointment as superintendent and expert, and commenced performance of those functions.

[5] On 28 February 2005 APM and Galwin submitted details of their claims to Main. The parties delivered their responses thereto to Main on 3 March 2005.

[6] On 4 March 2005 Main wrote to the parties advising that the collective volume of information submitted was such

that the cut off date of 7 March 2005 for Main to submit questions to the parties was impracticable and could not be achieved. Therefore, Main stated:

> ... in accordance with Clause 5.2.3 of the Contract Variation and Completion Agreement we are informing you that we propose at this stage that the cut off date is extended to 21 March 2005 with a consequential extension of the dates for your responses to our questions and our subsequent determination.
>
> We acknowledge receipt on 3 March 2005 of your submissions detailing where in your opinion errors are included in Galwin Pty Ltd initially submitted documentation.
>
> We have also received on 3 March 2005 a submission from Galwin Pty Ltd of a similar nature in respect of your submissions.
>
> Will you please acknowledge, by return, receipt of this correspondence.
>
> We trust this meets your immediate requirements but if you have any queries please do not hesitate to contact us.

The parties agreed to the extension.

[7] On 21 March 2005 Main wrote to the parties stating in part that:

> We acknowledge your acceptance to the revised date.
>
> The collective volume of information submitted by both parties on a daily basis, in an effort to complete the works, is and continues to be large and has unfortunately delayed our submission of questions to both parties. Therefore in accordance with Clause 5.2.3 of the Contract Variation and Completion Agreement we are informing you that we propose at this stage that the cut off date be extended to 31 March 2005 with a consequential extension of the dates for your responses to our questions and your subsequent determination ...
>
> Will you please acknowledge, by return, receipt of this correspondence.
>
> We trust this meets your immediate requirements but if you have any queries please do not hesitate to contact us.

APM agreed to the extension. Galwin did not respond.

[8] Main did not forward questions to the parties on or by 31 March 2005. On that day Galwin's solicitor wrote to Main recording that the expert was required to determine issues in accordance with the contract and that his authority derived from the completion agreement. That led APM's solicitor to write to Main on 6 April 2005 drawing attention to several provisions of the completion agreement.

[9] Separately on 6 April 2005 Galwin[1] wrote to Main stating that it appeared from documents provided by APM to Main, that the parties were putting substantially different facts to Main. Galwin proposed therefore that the parties confirm all statements of fact put to Main in statutory declarations. On 12 April 2005 APM's solicitor wrote to Main rejecting the suggestion. On 13 April 2005 Galwin wrote to Main pressing the suggestion of statutory declarations and awaiting his decision.

[10] On 15 April 2005 Main wrote to the parties with reference to his letter dated 21 March 2005, and saying:

> The collective volume of information submitted by both parties on a daily basis, in an effort to complete the works by 21 April 2005 which will be achieved, is and continues to be large and has again delayed our submission of questions to both parties. Therefore in accordance with Clause 5.2.3 of the Contract Variation and Completion Agreement we are informing you that we propose at this stage that the cut off date be extended to a date to be determined with a consequential extension of the dates for your responses to our questions and our subsequent determination.
>
> Will you please acknowledge, by return, receipt of this correspondence.
>
> We trust this meets your immediate requirements but if you have any queries please do not hesitate to contact us.

APM agreed; Galwin did not respond.

[11] On 4 May 2005 Galwin's solicitor wrote to Main advising that Galwin no longer agreed to the issues the subject of the completion agreement being referred to expert determination. The basis for Galwin withdrawing its agreement was that the dates in the completion agreement for the expert determination process had changed substantially.

[12] On 5 May 2005 APM's solicitor wrote stating that it was not open to Galwin to resile from the completion agreement and that the expert determination should proceed.

[13] On 5 May 2005 Main wrote to Galwin advising that in accordance with cl 5.2.3 of the completion agreement the cut off date for the submission of questions to be sent by Main will be 16 May 2005 and that responses would be required no later than 23 May 2005 and that the determination would be provided by 3 June 2005.

[14] Following Galwin's letter dated 4 May 2005, on 9 May 2005 Main wrote to Galwin advising that Main did not accept Galwin no longer agreeing to the reference to expert determination, and that Main was continuing to act as expert as required by the completion agreement.

[15] On 12 May 2005 Galwin wrote to Main disagreeing with Main's letter dated 9 May and recording that the principal consultant for the project would be unavailable until 27 June 2005 and that his absence would not have been an issue if the expert determination process had been finalised as agreed on 21 February 2005. In his affidavit the sole director of Galwin, Barry Goldenberg, deposed that the consultant's input was necessary due to his role.

[16] On 30 May 2005 Main wrote to Galwin seeking answers to questions for the purpose of the expert determination and additional documentation. Galwin received the letter on 3 June 2005.

[17] On 6 June 2005 Galwin wrote to Main advising that it did not agree to the issues being referred to Main's expert determination on the basis that the process agreed and set out in the completion agreement had not been followed. It was stated that the agreed process was to have been substantially faster and cheaper.

[18] I note that in his affidavit Goldenberg referred to correspondence from Galwin to Main in the period 21 February 2005 to 23 June 2005 in relation to the performance by Main of its functions as superintendent.

[19] On 24 June 2005 Galwin commenced a proceeding at VCAT seeking orders and declarations that Galwin was no longer bound by the expert determination in the completion agreement.

[20] On or around 7 July 2005 Main issued its expert determination pursuant to the completion agreement. The determination was provided under cover of a letter dated 16 June 2005. The determination was that Galwin pay APM $534,493.81 plus GST.

[21] On 3 November 2005, at a directions hearing of Galwin's proceeding, the member of VCAT presiding expressed the view that VCAT did not have jurisdiction to grant the declaration sought and suggested that application be brought in the Supreme Court.

[22] It was in those circumstances that on 12 December 2005 APM filed its originating motion for the determination of

certain questions and a declaration that Galwin is bound by the expert determination provisions in cll 5.1 to 5.9 of the completion agreement and the determination issued on 7 July 2005. Counsel sought only the declaration.

[23] Then on 19 January 2006 Galwin filed its originating motion for declarations to establish that it was not bound by the expert determination. Other declarations were sought but that mentioned represents the essence of the matter and is the relief that counsel sought.

[24] The evidence was contained in affidavits. Brian James Sands, the managing director of APM, swore an initial affidavit, and then an affidavit in reply to the affidavit sworn by Goldenberg. Neither deponent was cross-examined. Counsel told me that no facts were in dispute and that, accordingly, the matter was appropriate for determination by way of originating motion. There are nevertheless some additional matters in the affidavits to which reference should be made.

[25] In para 11 of his affidavit Goldenberg stated that the timeframe of one month specified in the completion agreement for the expert's determination was indicative of the emphasis that Galwin placed on having the disputes resolved in a timely manner. In response Sands pointed out that the time was agreed by both parties who agreed the need for quick and cost effective resolution of the disputes rather than lengthy and expensive litigation in VCAT. In fact there were substantial savings in time and costs compared with litigating in VCAT: the expert provided the determination on 7 July 2005 and charged $111,925.

[26] Sands next referred to the extent of the material that Galwin provided Main in relation to its claims on 28 February 2005. Galwin provided Main with 26 separate issues which went beyond the issues contemplated in the completion agreement. Sands said that that substantially increased the scope and duration of the determination. He exhibited a copy of the material submitted by Galwin.

[27] Then, between 28 February 2005 and 31 March 2005 Galwin submitted approximately two lever arch files of material to Main in its capacity of superintendent.

[28] In concluding his affidavit Goldenberg stated that Galwin was disadvantaged in relation to the expert determination in that Galwin was never in a position to provide substantive responses to the questions posed by Main in the letter to Galwin dated 30 May 2005, due to the extensions of time sought by Main "and the absence of its expert Mr Warren, and did not do so". As a result, Main's determination was unbalanced. How and in what way, and with what result, it was "unbalanced" was not stated or developed. It is, moreover, to be noted that although referred to as Galwin's "expert", Warren was in fact the former superintendent to the project to which role Main was appointed by the completion agreement.

[29] I mention these evidentiary matters while noting, as I have said, that there was no cross-examination and that counsel stated that there was no dispute on the facts.

[30] I turn then to the submissions of counsel.

[31] It is convenient to commence with the submissions of Galwin's counsel. First noting the object of the parties to minimise the expense and delay associated with litigation (stated in the Background clause quoted at [2]), counsel submitted that cl 5 prescribed the process to be undertaken by the expert in the determination process. That contemplated a determination by the end of March 2005, a period of one month or so from the making of the agreement.

[32] The parties complied with the times in cll 5.2.1 and 5.2.2. Main then had until 7 March 2005 to send questions to the parties, subject to Main determining an extension in conjunction with the parties. The parties agreed to an extension to 21 March 2005.

[33] It was submitted that from 21 March, when Main "unilaterally varied" the date to 31 March and later to a date to be determined, Main departed from his "instructions". By "instructions" counsel meant the process stated in cl 5

understood in light of the object of minimising expense and delay. The departure constituted a failure by the expert to carry out his functions in accordance with the completion agreement. Counsel referred to *Badgin Nominees Pty Ltd v Oneida Ltd*[2] for the proposition that the expert derives his authority from the appointment in accordance with which he must act.

[34] It was next submitted, really in the alternative, that on Galwin withdrawing on 4 May 2005 the expert determination process could not practically be completed. That is, the consequence of the withdrawal meant that the full processes in cl 5 could not work, in particular under cl 5.2.4. In proceeding with the determination process Main thus departed from the "instructions" in cl 5. With Galwin no longer participating, the expert did not have a response from Galwin. Therefore the determination lacked balance and was not a determination contemplated by the completion agreement.

[35] For either or both of these reasons, or departures from his "instructions", Main did not, to use the language in cl 5.5.1, reach his determination in accordance with the completion agreement. Counsel referred to *Veba Oil Supply and Trading GmbH v Petrotrade Inc*[3] for the consequence of a departure from "instructions", which is that Galwin is not bound by the determination.

[36] These submissions, and those of APM, require attention to be paid to the relevant terms of the completion agreement providing for the expert determination.

[37] The first point to note is that the parties referred their subject disputes to the determination of Main acting as an expert and not as an arbitrator and whose decision would be final and binding. That meant, on its proper construction, that the completion agreement was not an agreement to refer disputes to arbitration, and, in consequence, that the Commercial Arbitration Act 1984 did not apply to the reference. The distinction between the role of an arbitrator on the one hand, and an expert, valuer or certifier on the other hand, has been considered in numerous cases[4]. An arbitration is conducted in the manner of a judicial inquiry whereas a determination by an expert, certifier or valuer is not. In *Legal and General Life of Australia Ltd v A Hudson Pty Ltd*[5] McHugh JA said that the effect of the words "acting as an expert and not as an arbitrator" was that:

> They avoid the necessity for the valuer to hear evidence and the parties and to determine judicially between them. They enable him to rely on his own investigations, skill and judgment: *Re Dawdy* (1885) 15 QBD 426 at 429 and 430. Indeed, they reinforce the view that the parties, as between themselves, rely on the honest and impartial skill and judgment of the valuer.

[38] The second point derives from the fact that Main was appointed by the private agreement of the parties. It follows that what the parties have given Main authority to do is to be found in the agreement. That authority can be as specific and detailed as the parties to such an agreement may desire to provide both as to matters of substance and matters of procedure. By way of example, in *Veba* the agreement provided for a mutually agreed independent inspector to determine the quantity and quality of a consignment of gasoil at the loading installation by "Test Limit Method ASTM". But however the authority and the appointed task be expressed, the fact is that in this case Main's authority came from the relevant provisions of the completion agreement and that Main was bound to carry out his function in accordance with the agreement[6].

[39] A further factor in relation to the operation of such an agreement is that as with other contracts it must operate according to its terms. Thus, as Cole J pointed out in *Triano Pty Ltd v Triden Contractors Ltd*[7]

> If the parties have not by their deed agreed the procedures to be followed upon an expert determination, that is not a void the court can fill. There is no reason to imply a term that the court will determine procedure. It is a matter for either agreement between the

> parties, or determination by the independent experts as to the procedures to be followed.

Rolfe J referred to this statement with approval in *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*[8]. In *Fletcher* Rolfe J decided "that in the absence of agreement as to procedures they are to be decided by the expert" as the contractually agreed dispute resolver. Doubtless, as Rolfe J observed, the procedures would be formulated having regard to the circumstances of the case.

[40] I turn from those considerations to the relevant provisions of the completion agreement and the events which occurred. The first thing to note is that the parties acted as provided for in cll 5.2.1 and 5.2.2. That is, they provided details of their claims, and their responses thereto within the stipulated times. The quantity of material submitted by Galwin as detail of its claims was substantial.

[41] Clause 5.2.3 then provided that Main send questions up to 7 March 2005 or such further date as determined by Main in conjunction with the parties. The volume of material submitted rendered it impracticable to submit questions by that date, and the parties agreed to Main's proposal to extend the date for doing so to 21 March 2005.

[42] By 21 March 2005 however Main had not sent questions to the parties and proposed an extension to 31 March 2005 with consequent extensions to responses under cl 5.2.4 and a determination under cl 5.3. APM consented to the extension. Galwin did not do so expressly but, at the same time, did not object; it let the matter run. Galwin's silence and its subsequent request that statements of fact be confirmed by statutory declaration indicate an ongoing engagement in the determination process and concurrence in the extension.

[43] Counsel for Galwin described the extension from 21 March 2005 as a unilateral variation by Main and as constituting a departure from his "instructions". By "instructions" she meant cl 5.2.3. But the clause provided for an extension of time. This was not surprising in view of the very short timetable from commencement to completion of the determination process and having regard to Main's role at the same time in the completion of the contract work. An extension of time, under cl 5.2.3 or another clause or clauses, must have been within the contemplation of the parties and it self evidently was in light of the express provisions for extension in cll 5.2.3 and 5.3. In addition, of course, the parties could agree to extend any of the times or otherwise vary cl 5 as they considered appropriate from time to time.

[44] It is important to bear in mind that the expert determination process was one aspect but one only of a commercial agreement that was designed to resolve disputation. As far as concerned the determination of the subject disputes by the appointed expert, what the parties did was entrust that task to the expert and provide both for the steps in the process and the time of performance of those steps and provision of a determination.

[45] What cl 5.2.3 makes provision for is an extension of time to "such further date as determined by Trevor Main in conjunction with the parties". Some attention was paid to this phrase in counsel's submissions. APM's counsel submitted that it meant either that Main will determine a further date having received input from the parties, or that a further date required the tripartite agreement of the three parties. He submitted that the former was the correct view. In her submissions Galwin's counsel supported the latter construction. She also said that "consultation" in cl 5.3 had "a tendency to be like negotiation", but it did not authorise Main to force a party into an agreement.

[46] In my view the former construction is to be favoured although as expressed it is somewhat incomplete. A party may fail to provide any input. Nevertheless it is the construction which, on consideration of all relevant factors, is to be taken as reflecting the intention of the parties objectively considered. The completion agreement was entered into as a means or pathway to resolution of disputes under the construction contract. It was a commercial agreement advisedly entered into by parties operating at arm's length. Such an agreement should be interpreted in a manner that conduces to achievement of the purpose. That is, of course, provided that and to the extent that the terms of the agreement permit. Among the many statements in cases to the manner of approach to the interpretation of commercial agreements, counsel for APM referred to *Mannai Ltd v Eagle Star Life Assurance Co Ltd*[9] and *Antaios Compania Naviera SA v Salen Rederierna AB*[10] referred to with approval in *Maggbury Pty Ltd v Hafele Australia Pty Ltd*[11].

[47] The latter interpretation would require that Main, APM and Galwin actually agree on an extended date. In the absence of such an agreement the date could not be extended. The consequence would be, on the submission, that the determination process could not proceed, unless and until the parties otherwise agreed. This would seem to mean an actual or express agreement and not an agreement implied from the circumstances. Under the phrase so interpreted, in the event that Main required an extension, a party could refuse to agree and thereby thwart the whole process for no reason other than a change of heart as to participation in the process. When understood in that light, and having regard to the burden on the expert to act within very short timeframes in relation to substantial disputation, it is seen that a requirement of a tripartite agreement would be amenable to capricious use and potentially productive of a commercially absurd result. It is in my view barely likely that the parties so intended that meaning. Furthermore, that interpretation would deny effect to the provision that the date be "determined" by Main.

[48] In my view the correct interpretation is that Main is to determine the further date seeking and taking into account the views of the parties. This interpretation both recognises Main's role in the process and gives sensible meaning and operation to the phrase "in conjunction with". In that sense the word "conjunction" means and refers to the parties being involved in the process.

[49] For these reasons then, the date was properly extended to 31 March 2005.

[50] The next issue concerns the events after 31 March 2005 following the failure of Main to submit questions by that date. As to this it is to be noted that cl 5.2.3 did not require that the determination of an extended date be made prior to the expiration of the existing date. There is nothing in cl 5, expressly or by necessary inference, that would require that interpretation and there is every reason of commonsense and commercial practicality to regard the clause as not having that operation. That is not to say that Main could delay indefinitely beyond such time as was reasonable in the circumstances. But that was not this case. I do not overlook the somewhat non-specific and conclusion lacking letter that Galwin's solicitor wrote on 31 March 2005 but its subsequent conduct in seeking statutory declarations was consistent only with the determination being on foot. It was only a few days later on 15 April that Main wrote proposing an extension to a date to be fixed. APM agreed but Galwin did not respond until 4 May 2005 when it purported to withdraw its agreement to the disputes being determined by the expert. Thereafter there occurred the events referred to earlier, including that on 5 May 2005 Main wrote fixing 16 May 2005 as the date by which questions be sent. It is clear that APM agreed with Main's actions and wished Main to complete the determination.

[51] The submission of Galwin was that in acting as he did Main departed from his "instructions" in the sense of not proceeding as stipulated in cl 5.2.3 and, more generally, in an expeditious manner as stated in the Background clause quoted earlier. It is here that Galwin's counsel relied on the conclusion in *Veba* that a determination made in circumstances of a material departure from instructions (being a departure that was not trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party) was not binding on the parties. That is for the simple reason that the parties did not agree to be bound by a determination arrived at in that way. Thus, in *Veba* the determination was not binding because the inspector had used a test other than that specified by the parties in their agreement. In my view that result does not obtain in this case.

[52] I am of that view for several reasons. In the first place, the letter proposed an extension to a date to be fixed and invited a response. APM responded in the affirmative. Galwin chose not to respond. Rather, over a fortnight later it wrote withdrawing its agreement to the determination process. On the same day Main wrote fixing 16 May 2005 as the date for submission of questions with further dates for responses and the determination. And it later wrote responding to Galwin's purported withdrawal stating that it would continue to act as expert. Galwin's response a few days later referring to the absence of the consultant is somewhat curious in that it suggests that if the consultant had been available Galwin could and would have dealt with questions from Main. But that may not be a reasonable understanding of the letter and I do not rest my decision on it.

[53] Regarding the matter overall, Main is seen to have acted on notice to the parties under terms which provided for extensions of the time for the submission of questions (and in consequence responses thereto) and the determination.

Failing concurrence Main was empowered to determine the issue under cll 5.2.3 and 5.3. That is what he did. The fact that one party might choose to stand out from the process did not mean that Main was not able to proceed. Indeed, he was bound by the agreement to do so.

[54] Let it be assumed that, as submitted by Galwin's counsel, Main's actions in varying the date or dates after 31 March 2005 took the timetable out of the contemplated scheme. Would that mean that the determination was not binding on Galwin, on the reasoning in *Veba*? I think not. The task that Main undertook was to determine the disputes advanced by the parties. He did that by a substantial reasoned document. Save for a non-specific assertion that the determination was "unbalanced" as a result of Galwin not being in a position to provide substantive responses to Main, and Galwin not providing a response, no case has been outlined let alone developed of any particular error of approach, treatment or conclusion on any item in the determination. Then, of course, it goes without saying that Galwin could have sought additional time in which to respond. Whereas in *Veba* the error was in not testing by the agreed method which went to the quality of the test and its result, here there was no failure of such a nature by Main. The requirement in *Veba* was like a condition of the expert's task which if not performed meant that the expert had not performed the appointed task.

[55] In the present case what is complained of is a failure to provide a determination in an expeditious manner as contemplated in the Background clause and the timeframes in cl 5. But, as mentioned, the parties provided for extensions of time and left the ultimate determination thereof with the expert. It seems to me that the proper analysis is that the initially expressed timeframes were not conditions in the sense of the contractually stipulated test in *Veba* but were a machinery or procedural mechanism for the timely conduct of the process but with an inbuilt allowance for time to be extended, as it might reasonably have been foreseen could be necessary. Even if there had been a departure from "instructions", as Galwin submitted, such departure did not render the determination unenforceable because it was not material. It is not established to any reasonable degree of satisfaction that such departure, relating to a matter of procedure only, had any effect on the determination.

[56] Finally, I reject the further submission of Galwin's counsel that Galwin's withdrawal meant that the process could not continue. The submission has no substance. It amounts to saying that it was open to Galwin to unilaterally and without cause bring the determination process to an end. In effect the submission is an attempt by Galwin to benefit from its own decision to not respond to Main or seek additional time in which to do so. Of course Galwin was not bound to respond to questions from Main or to cooperate, but it was another thing altogether to assert that it could unilaterally terminate the determination process. That constituted a repudiation, but it was not accepted by the other parties. Hence, Galwin remained bound.

[57] Overall it is seen that, for disputes of the nature involved, the process from entry into the completion agreement and making of the determination was relatively short and must have been such as saved costs and further time that would have been involved if the disputes had been litigated.

Order

[58] For these reasons I conclude that Main did make his determination in accordance with his authority under the completion agreement, and that Galwin is bound thereby. There will be a declaration accordingly and Galwin's proceeding will be dismissed.

Counsel for the plaintiff: *Mr C W R Harrison*

Counsel for the defendant: *Ms S L Bingham*

Solicitors for the plaintiff: *Phillips Fox*

Solicitors for the defendant: *McMullan Solicitors*

1 All correspondence from Galwin was signed by its sole director Barry Goldenberg. It is convenient to refer to these letters as being written by Galwin.

2 [1998] VSC 188 at [62], [73] and [74].

3 [2002] 1 Lloyd's Rep 295 at [26].

4 See *Re Carus-Wilson & Greene* (1887) 18 QBD 7 at 7; *Briscoe & Co Ltd v Victorian Railways Commissioners* [1907] VLR 523; *Ajzner v Cartonlux Pty Ltd* [1972] VR 919 at 928-933; *Australian Mutual Provident Society v Overseas Telecommunications Commission (Australia)* [1972] 2 NSWLR 806 at 813 and 818; *Brooking on Building Contracts*, 3rd Ed, at 17.5.

5 (1985) 1 NSWLR 314 at 336.

6 *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 at [62].

7 (1992) 10 BCL 405; BC9201735.

8 Unreported, Supreme Court of New South Wales, 14 July 1997; BC9705205.

9 (1997) AC 749 at 771.

10 [1985] AC 191 at 201.

11 (2002) 210 CLR 181 at 198.