[2005] WASCA 241

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	THE COURT OF APPEAL (WA)
CITATION	:	STRAITS EXPLORATION (AUSTRALIA) PTY LTD & ANOR -v- MURCHISON UNITED NL & ANOR [2005] WASCA 241
CORAM	:	WHEELER JA MCLURE JA MURRAY AJA
HEARD	:	17 OCTOBER 2005
DELIVERED	:	14 DECEMBER 2005
FILE NO/S	:	FUL 152 of 2004
BETWEEN	:	STRAITS EXPLORATION (AUSTRALIA) PTY LTD (ACN 061 614 695) First Appellant STRAITS RESOURCES LIMITED (ACN 056 601 417) Second Appellant AND MURCHISON UNITED NL (ACN 009 087 852) First Respondent RENISON BELL LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 008 596 272) Second Respondent

ON APPEAL FROM:

Jurisdiction	:	SUPREME COURT OF WESTERN AUSTRALIA
Coram	:	MASTER SANDERSON
Citation	:	STRAITS EXPLORATION (AUSTRALIA) PTY LTD & ANOR -v- MURCHISON UNITED NL & ANOR [2004] WASC 198
File No	:	CIV 2594 of 2003

Catchwords:

Contract - Dispute resolution clause - Expert determination - Whether attempt to oust the jurisdiction of the court

Legislation:

Nil

Result:

Appeal allowed

Category: A

Representation:

Counsel:

First Appellant	:	Mr S K Dharmananda
Second Appellant	:	Mr S K Dharmananda
First Respondent	:	Mr S Penglis
Second Respondent	:	Mr S Penglis

Solicitors:

First Appellant	:	Corrs Chambers Westgarth
Second Appellant	:	Corrs Chambers Westgarth
First Respondent	:	Freehills
Second Respondent	:	Freehills

Case(s) referred to in judgment(s):

Australian Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Aust) Pty Ltd [2005] VSCA 133
Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (1997) 14 BCL 277
Freshwater v Western Australian Assurance Co Ltd [1933] 1 KB 515
Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd (2001) 10 BPR 18,825
Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314
Straits Exploration (Australia) Pty Ltd & Anor v Murchison United NL & Anor [2005] WASC 198
The Heart Research Institute Ltd v Psiron Ltd [2002] NSWSC 646
Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] QSC 135

Case(s) also cited:

Badgin Nominees Pty Ltd v Oneida Ltd [1998] VSC 188
Bateman Project Engineering Pty Ltd v Resolute Ltd (2000) 23 WAR 493
Bond v Larobi Pty Ltd (1992) 6 WAR 489
Cathedral Palace Pty Ltd v Hyatt of Australia Ltd [2003] VSC 385
Dobbs v The National Bank of Australasia (1935) 53 CLR 643
Fletcher Construction Australia Ltd v MPN Group Pty Ltd, unreported; SCt of NSW; 14 July 1997
Raguz v Sullivan (2000) 50 NSWLR 236
Savcor Pty Ltd v State of New South Wales (2001) 52 NSWLR 587
Stevens v Trewin [1968] Qd R 411
West of England Shipowners Mutual Insurance Association (Luxembourg) v Cristal Ltd [1996] 1 Lloyd's Rep 370
WMC Resources Ltd v Leighton Contractors Pty Ltd (1999) 20 WAR 489

WHEELER JA:

Background

1 This is an appeal from a decision of Master Sanderson dismissing an application brought by the appellants for declarations relating to a deed entered into between the appellants and the respondents. The present appellants were the plaintiffs in the application before the Master and the present respondents were the defendants. The background is set out clearly and in adequate detail in the reasons of the Master at [2] to [11] of his reasons for decision delivered 13 September 2004 (***Straits Exploration (Australia) Pty Ltd & Anor v Murchison United NL & Anor*** [2005] WASC 198). My [2] to [11] therefore reproduce the Master's reasons verbatim.

2 By a written agreement between the plaintiffs and the defendants dated 19 October 1995 ("the agreement"), the first plaintiff (first appellant) and the defendants agreed to associate as an exploration joint venture in respect of certain mining leases. The second plaintiff (second appellant) guaranteed the performance of the agreement by the first plaintiff. On or about 24 January 2003 the first plaintiff and Birla Maroochydore, a subsidiary of Birla Mineral Resources Pty Ltd, a wholly owned subsidiary of Hindalco Industries, entered into an agreement in which the first plaintiff agreed, subject to its obligations pursuant to cl 15.2 of the agreement, to assign its interest arising pursuant to the agreement to Birla Maroochydore.

3 A copy of the agreement is to be found as annexure "NLJ6" to the affidavit of Nigel Lloyd Johnson ("Mr Johnson"), sworn 24 December 2003. Clause 15 of the agreement relevantly provides:

> "15.2 Pre-emptive rights
>
> (a) A Party may not assign its Interest under this Agreement without first offering the Interest in writing to the other Party.
>
> (b) If the other Party does not accept the offer within 28 days after receipt of the offer, then the offering Party may, at any time during the 3 month period after the expiration of that 28 days, sell the Interest to a third party, on terms no more favourable to such third party than those offered to the other Party.

(c) Any proposed assignee shall be subject to the approval of the non-assigning Party, which approval shall not be unreasonably withheld."

4 By letter dated 3 February 2003, the second plaintiff made the offer required in cl 15.2(a) of the agreement. By letter dated 12 February 2003 the defendants rejected the second plaintiff's offer. Subsequent to rejecting this offer, the defendants have refused to grant their approval pursuant to cl 15 of the agreement to Hindalco or its nominee becoming assignee in accordance with the proposed assignment. The various letters which make up this chain of events are found as annexures to the affidavit of Mr Johnson referred to above.

5 Clause 17 of the agreement is headed "Dispute Resolution". It is in the following terms:

"**17.1 Further steps required before proceedings**

If any dispute or difference arises between the Parties in respect of any matter under or in relation to this agreement, either Party may by notice in writing to the other, specify the nature of the dispute and call for submission of the dispute to an independent Expert in accordance with the provisions of this Part.

17.2 Identity of Expert

If the Parties cannot reach agreement on the identity of the Expert within 14 days after receipt of the notice under clause 17.1, then the Expert shall be determined in the following manner:

(a) if the dispute or difference relates to the conduct of Mining Operations or other work, or usual industry practices or matters related thereto, then the Expert shall be nominated by the President of the Australasian Institute of Mining & Metallurgy or such person occupying his or her position or performing his or her role from time to time;

(b) if the dispute relates to any financial or accounting matter including the computation of Costs and the keeping of accounts, then the Expert shall be nominated by the President of the Institute of Chartered Accountants or

such person occupying his or her position or performing his or her role from time to time;

(c) if the dispute relates to any terms of any proposed project loan, the Expert shall be nominated by the Chief Executive officer of the Australian Merchant Bankers' Association or such person occupying his or her position or performing his or her role from time to time; and

(d) if the dispute relates to the interpretation of this Agreement or the Heads of Agreement the Expert shall be nominated by the President of the Law Society of Western Australia.

In any event, the Expert shall have a reasonable commercial, practical and technical experience in the area of dispute. The Expert will act as an expert and not as an arbitrator.

17.3 Submissions

The Parties shall lodge written submissions as to the subject matter of the dispute to the Expert within 14 days of the Expert's appointment. The Expert shall be required to state his determination in writing within 28 days of his appointment.

17.4 Powers of Expert

The Expert shall have the following powers:-

(a) to inform himself independently as to facts and if necessary technical matters to which the dispute relates;

(b) to receive written submissions sworn and unsworn written statements and photocopy documents and to act upon the same;

(c) to consult with such other professionally qualified persons as he in his absolute discretion thinks fit;

(d) to take such measures as he thinks fit to expedite the completion of the dispute resolution.

17.5 Location

The dispute resolution shall be held in Perth, Western Australia unless the parties to the dispute otherwise agree.

17.6 Determination

The determination of the Expert shall be final and binding on the Parties other than in the case of fraud or manifest error.

17.7 Costs

The costs of the Expert shall be to the account of the party who is unsuccessful in relation to the issue in dispute. If there is more than one issue in dispute, the cost shall be pro-rated amongst each of the issues according to the time the Expert has spent considering each of them. The Expert's determination on this issue shall be final and binding on the parties other than in the case of fraud or manifest error.

17.8 Exclusion

Irrespective of the provisions of this clause nothing in this agreement will prevent a party from seeking or obtaining an injunction to prevent a breach of this agreement."

6 By notice dated 25 March 2003, purportedly issued in accordance with cl 17.1, the second plaintiff sought to have a dispute referred to an expert. A copy of the notice appears as part of annexure "NLJ15" to Mr Johnson's affidavit. In the notice under the heading "Matters in Dispute", there appears the following:

"Straits gives notice to Murchison and Renison that pursuant to clause 17.1 of the Agreement that the following dispute has arisen between the parties:

1.1 The true interpretation and proper construction of clause 15.2(c) of the Agreement; and

1.2 Whether Murchison and Renison have unreasonably refused to grant their approval pursuant to clause 15.2(c) of the Agreement to Birla Maroochydore becoming an assignee of Straits' interest under the Agreement."

7 The second plaintiff also nominated an expert to resolve the dispute. On 9 April 2004 the defendants indicated that they would decide whether to accept the second defendant's (second respondent) nominated expert on or about 15 April 2003. On 14 May 2003 the defendants stated they will "revert to (the second defendant) on the question of a nomination of an expert shortly". Again, these letters appear as annexures to Mr Johnson's affidavit. Despite the contents of these letters it is common ground that the defendants have refused to nominate an expert.

8 On 14 April 2003 the first plaintiff, purportedly in accordance with cl 17.2 of the agreement, referred the matter to the President of the Law Society of Western Australia, with a view to the President nominating an expert to determine the issues raised in the notice. On 9 May 2003 the then President of the Law Society nominated Roger Davis, a barrister, as the expert to determine the issues raised in the notice. The defendants have refused to submit to the jurisdiction of the expert appointed by the President of the Law Society. Again, all of this correspondence appears as annexures to Mr Johnson's affidavit. None of it is controversial.

9 Against that background, the plaintiffs seek, by their originating summons, a declaration that:

> "(a) in circumstances where:
>
> (i) there is a dispute between the parties as to whether the Defendants have unreasonably withheld their consent to the assignment of the First Plaintiff's interest in the written Heads of Agreement between the parties dated 19 October 1995 (**'Agreement'**) to Birla (Maroochydore) Pty Ltd pursuant to clause 15.2(c) of the Agreement (**'Dispute'**); and
>
> (ii) the parties have not reached agreement on the identity of an independent expert to determine the Dispute pursuant to clause 7.2 of the Agreement;
>
> (b) on a proper construction of clause 17.2(d) of the Agreement, there is a dispute falling within the scope of clause 17.2(d) of the Agreement such that the President of the Law Society of Western Australia may appoint an expert to determine the Dispute."

10 The plaintiffs' position is entirely straightforward. They say that a dispute has arisen which has triggered the operation of cl 17 and in particular, cl 17.1. They say further that the parties have not been able to reach agreement as to the identity of the expert and that the dispute relates to interpretation of the agreement. Thus, they say, the expert is to be nominated by the President of the Law Society of Western Australia pursuant to cl 17.2(d). It is implicit in this formulation of the dispute, and indeed from the notice of dispute itself, that what is to be determined by the expert is whether or not the defendants have unreasonably refused to grant their approval pursuant to cl 15.2(c) of the agreement to the second plaintiff assigning its interest under the agreement.

11 The defendants contend that the declaratory relief should be refused for two reasons. First, they say that the dispute between the parties as to whether the defendants have reasonably withheld their consent to the assignment of the first plaintiff's interest in the agreement is not a dispute which falls within the scope of cl 17.2(d) of the agreement. Alternatively, they say that cl 17 of the agreement is invalid as an impermissible ouster of the court's jurisdiction.

Ouster of jurisdiction

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

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

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

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

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

17 Applying those general principles in the present case, there is nothing in the dispute resolution clause in question which purports to prevent a party from suing on the contract, prior to the making of an expert determination. Once a determination is made, cl 17.6 restates the principles governing the review of expert determinations, or may to a degree widen the ability of the Court to review a determination. The exception for fraud is consistent with the position I have described above. A determination which was not in accordance with the agreement - for example, by determining a question not referred to the expert - would appear to fall into the category of "manifest error". It is arguable that "manifest error" may also encompass mistakes of law or fact which would otherwise be unreviewable, but which appear from the face of the determination itself. Although cl 17.8 is entitled "Exclusion", its effect is not to exclude the jurisdiction of the court, but to make it clear that any party is free, despite the dispute resolution clause (and apparently at any time, including following the making of an expert determination), to seek an injunction to prevent a breach of the agreement. Further, cl 18.3 of the agreement, which expressly provides that the agreement is to be "governed by and construed in accordance with the laws of the State of Western Australia and the Parties agree to submit to the jurisdiction of the Courts of that State" seems to be inconsistent with an intention to oust the jurisdiction of the court and one would, in any case of doubt, construe the dispute resolution clause accordingly.

18 It is my view, therefore, that the dispute resolution clause in the present case is not void as an impermissible attempt to oust the jurisdiction of the court. It is, however, desirable to consider the correctness and the applicability of ***Baulderstone***, since that was the decision which was followed by the Master and was the decision upon which the present respondent relied.

19 ***Baulderstone*** concerned a dispute resolution clause in an engineering contract which provided for reference to a third party referee in order to resolve disputes arising out of the contract. It provided for resolution by the referee of any disputes, whether or not they were within the referee's field of expertise. The issues for determination plainly involved matters of both fact and law. A dispute arose under the contract as to whether certain drawings were completed within time and otherwise as required by the contract and whether one party was entitled to payment for additional work, delay costs and variations. The party served notice on the other, requiring that the dispute be resolved in accordance with the dispute resolution clause. Importantly, meanwhile, by writ, a subcontractor engaged on the project commenced an action against one of the parties to the contract claiming damages resulting from the late supply of and defects in the drawings. By third party notice, that party claimed from the other party to the contract an indemnity or contribution in relation to that claim. The claim made in the third party notice, therefore, was essentially the same as the matter which it was sought to have dealt with under the dispute resolution clause. The plaintiff apparently sought to have Heenan J restrain the defendant from proceeding with the reference to the referee.

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

21 His Honour also considered that, because of the complexity of the issues arising, satisfactory determination of those matters by a referee was, in the circumstances of that case, "impossible". Questions of whether the task entrusted is inappropriate for an expert and of whether mixed issues of fact and law arise are - it is apparent from the summary in Jacobs Commercial Arbitration: Law and Practice, to which I have referred - questions which will be relevant when a court is considering whether court proceedings should be stayed because a contract contains an expert determination clause. It would appear, logically, that those considerations would also be relevant when the court is considering whether it is appropriate to stay the expert determination procedure under

the contract in favour of court proceedings which had been instituted. Although the report is brief, and it is not possible to understand from the report alone precisely what was involved in the dispute, as a matter of principle it would appear that this ground alone would also have been one upon which it was appropriate for Heenan J to have made the order which he did.

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

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

Whether the dispute involves the "interpretation of the agreement"

24 The Master accepted that the dispute did not involve an interpretation of the agreement and therefore that there were no circumstances which would allow for the appointment of an expert nominated by the President of the Law Society. One can see why the Master reached that conclusion, particularly having regard to a letter of 12 February 2003 from the first respondent to the second appellant, and the second appellant's letter in reply of 17 February 2003. In the letter of 12 February, the first respondent refers to what it regards as the desirability of exploring and developing a project such as that the subject of the venture in the near future, because of anticipated high prices. It advises that it has been told that the proposed assignee "has neither the expertise nor experience, nor is it motivated to undertake such plans for the exploration and development of this project". The response from the second appellant is to set out some information about the expertise, experience, motivation and financial capacity of the proposed assignee.

25 The conclusion which one would draw from that correspondence would be that it was accepted on both sides that an assignee should have expertise, experience in mining and mineral processing, the motivation to engage in the project and the financial capacity to do so. The dispute appears to be about whether the proposed assignee possesses those characteristics. To the extent that questions of expertise are involved, the factual dispute would appear most readily to fall within cl 17.2(a) relating to such matters as "usual industry practices", and to the extent that it involves issues of financial capacity, it may readily fall within cl 17.2(b), which deals with disputes relating to financial or accounting matters. The Master's view, which has some attraction, was that a dispute relating to the interpretation of the agreement would be a dispute only as to what factors would be relevant to the question of whether consent had been unreasonably withheld, and not a dispute about whether, as a matter of fact, any of those factors were present or absent.

26 I would, on balance, take a different view, however. The expression "relates to" has a very broad meaning. The term "relate" means, *inter alia*, "to have some relation (to)" (The Macquarie Dictionary, 3rd ed). It appears therefore that a dispute will relate to the interpretation of the agreement not only if the interpretation of the agreement is directly in issue, but also if the dispute involves or requires, as part of its resolution, the interpretation of the agreement. In one sense, of course, any dispute arising under the agreement will "relate to" its interpretation in that sense. Given that fact, and given the obvious intention of cl 17.2 that the expert

with the most relevant experience should be selected, I would understand a dispute as relating to the interpretation of the agreement where, in a practical and significant, and not merely theoretical or remote, way, the interpretation of the agreement appears to be relevant to the determination of the dispute.

27 In relation to the dispute in question here, a construction of the agreement and its factual matrix - so as to ascertain the mischief against which cl 15.2 was intended to guard - will be important not only in order to ascertain the factors which the non-assigning party may properly consider in order to determine whether that party's consent should be withheld. It will also be relevant to the question of what weight should be given to each of the relevant factors, where more than one factor is involved; to the nature of enquiries which the non-assigning party should be expected to make, or the information which it should be expected to consider, in determining whether to withhold consent; and to the degree to which relevant factors are required to be established before it would be appropriate to expect the non-assigning party to give consent. For example, it may be that there will be questions not only as to whether the expertise of the proposed assignee in mining operations is relevant, but also what extent or degree of expertise the non-assigning party might reasonably expect, and the way in which such expertise would appropriately be demonstrated (whether by actual experience, qualifications of key staff, or in some other way).

28 Finally, in my view, in cl 17.2 the parties have endeavoured to ensure that a broad range of disputes can be determined by the relatively speedy and informal process of expert determination. A sensible commercial construction would read pars (a) - (d) in a relatively generous way, recognising that there may well be some overlap between the various categories, so as to permit an appropriate expert to be nominated wherever reasonably possible, to deal with the whole of any given dispute.

Conclusion

29 For the reasons which I have given, it would be my view that the appeal should be allowed, and the order of the learned Master set aside. In lieu thereof, I would make the declaration sought.

30 However, it is important to note the limited nature of this decision. It appears from some of the correspondence between the parties that the respondents take the view that it is appropriate for their contractual dispute to be dealt with by this Court, rather than by determination of an expert. We were not advised that any such proceeding had been

instituted. However, it is important to note that, as I observed earlier in these reasons, the Court has jurisdiction either to stay proceedings brought in this Court, or to restrain a party from proceeding with an expert determination where there are proceedings in this Court dealing with the same dispute. The present decision and order would not have the effect of preventing any party from taking whatever proceedings it saw fit in this Court in relation to the agreement, rather than by the determination, and says nothing whatever about what would be the appropriate course for the Court, in the exercise of its discretion, were the question to arise of staying either court proceedings or any expert determination procedure.

31 **McLURE JA**: I agree with Wheeler JA.

32 **MURRAY AJA**: I agree with Wheeler JA, for the reasons given by her Honour, that the appeal should be allowed and the declaration sought by the originating summons should be made.