NEW SOUTH WALES SUPREME COURT

CITATION: The Heart Research Institute Limited and Anor v Psiron Limited [2002] NSWSC 646

CURRENT JURISDICTION:

FILE NUMBER(S): 50031/02

HEARING DATE{S): 24/07/2002

JUDGMENT DATE: 25/07/2002

PARTIES:
The Heart Research Institute Limited (First Plaintiff)
The Heart Research Developments Pty Limited (Second Plaintiff)
Psiron Limited (Defendant)

JUDGMENT OF: Einstein J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
Mr S Finch SC (Plaintiffs)
Mr RJ Webb (Defendant)

SOLICITORS:
Clayton Utz (Plaintiffs)
Russell & Company and
Coudert Bros (Defendant)

CATCHWORDS:
Contract
Dispute resolution
Suit seeking specific performance of dispute resolution clause
Expert determination procedure
Whether expert determination mandatory
Whether clause ousts jurisdiction of the Court
Whether clause void for public policy
Whether clause void for uncertainty
Effect of uncertainty in agreement to submit dispute to expert determination
Specific performance of agreement to submit to expert determination of curial proceeding
Principles relating to exercise of discretion to grant specific performance
Consideration of matters which may affect the exercise of the discretion to adjourn or stay Court proceedings so as to allow alternative dispute resolution agreement to be engaged and followed.

ACTS CITED:
Commercial Arbitration Act 1984 (NSW)
Supreme Court Act 1970 (NSW)
Supreme Court Rules 1970 (NSW)

Trade Practices Act 1974 (Cth)

DECISION:
Agreement fails for lack of certainty.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
COMMERCIAL LIST

EINSTEIN J

Thursday 25 July 2002

50031/02 THE HEART RESEARCH INSTITUTE LIMITED & ANOR v PSIRON LIMITED

JUDGMENT

The Proceedings

1 Following an order that the issues arising on the plaintiffs' summons be determined separately from and prior to other issues, the issues now being determined raise principally questions going to whether or not the defendant is bound under the terms of a written agreement to participate in an expert determination procedure.

The Parties

2 The first plaintiff ("*HRI*") is a charitable research organisation whose purpose is to conduct research into cardiovascular disease. HRI is reliant on funding derived from donations, bequests, government grants and arrangements with commercial investors. HRI's activities are said to be overseen by a Board of Governors whose members are volunteers drawn from the academic and business communities.

3 HRD, a subsidiary of HRI, undertakes commercialisation of products, procedures, systems and services developed or arising out of the research conducted by HRI.

4 The defendant Psiron Limited (formerly known as Medical Innovations Limited) ("*Psiron*") is a professional investor and developer/marketer of medical products in the diagnostic and therapeutic fields. Psiron is a public company listed on the Australian Stock Exchange.

The Agreement

5 On 16 June 2000, the plaintiffs entered into a written agreement with the defendant whereby the defendant agreed to fund two research projects, a therapeutic project (the "*Therapeutic Project*") and a diagnostic project (the "*Diagnostic Project*"), to be undertaken by HRD and HRI respectively (the "*Agreement*").

The Dispute Resolution Clause

6 Clause 18 of the Agreement provides as follows:

> *"18 DISPUTE RESOLUTION*
>
> *18.1 If a dispute arises out of or relates to this agreement, or the breach, termination, validity or subject matter thereof, or as to any claim in tort, in equity or pursuant to any domestic or international statute or law, the Parties to the agreement and to the dispute expressly agree to endeavour in good faith to settle the dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC) before having recourse to expert determination.*
>
> *(a) A Party claiming that a dispute has arisen, must give written notice to the other Parties to the dispute specifying the nature of the dispute.*
>
> *(b) On receipt of the notice specified in clause 25.1(c), the Parties to the dispute must within 7 days of receipt of the notice seek to resolve the dispute.*
>
> *(c) If the dispute is not resolved within 7 days or within further period as the Parties agree then the dispute is to be referred to ACDC.*
>
> *(d) The mediation is to be conducted in accordance with ACDC Mediation Guidelines which set out the procedures to be adopted, the process of selection of the mediator and the costs involved and which terms are deemed incorporated.*
>
> *(e) In the event that the dispute has not settled within 28 days or such other period as agreed to in writing between the Parties after the appointment of the mediator, dispute is to be submitted to expert determination (administered by ACDC) conducted in accordance with ACDC Expert Determination Guidelines which set out the procedures to be adopted, the process of selection of the expert and the costs involved and which terms are deemed incorporated.*
>
> *(f) The Parties agree to accept the determination of the expert as final and binding. The expert is not to be the same person as the mediator."*

The facts

7 The parties were directed to endeavour to reach agreement upon a Statement of Agreed Facts. The plaintiffs' version which was generally agreed subject to some reservations by the defendant which do not have any real significance in the way in which the matter was finally argued, serves to provide the foundation for the matters dealt with in the judgment. That version which is set out below has been slightly adjusted following the submissions in relation to the draft Agreed Facts and I have added some short notes of explanation on one or two occasions. The Statement is set out below:

- On 12 February 2001 the Defendant gave written notice to the First Plaintiff terminating the Diagnostic Project.
- Pursuant to the Agreement the said notice of termination of the Diagnostic Project became effective on 12 February 2002.
- On 19 April 2001 the Defendant confirmed in writing termination of Diagnostic Project and Therapeutic Project (sic).

· On 15 May 2001 the First Plaintiff gave written notice to the Defendant terminating the Agreement with respect to the Therapeutic Project such termination becoming effective from 30 May 2001.
· In late June 2001 negotiations took place between the Plaintiffs and the Defendant.
· Disputes have arisen between the Plaintiffs and the Defendant concerning the performance of the parties' obligations pursuant to the Agreement and the termination of the Agreement so far as the Diagnostic Project and the Therapeutic Project are concerned ***("the Disputes***").
· On 17 August 2001 the Plaintiffs served a Notice of Disputes on the Defendant.
· On 5 September 2001 the Plaintiffs served a further Notice of Disputes on the Defendant. No Notices of Disputes have been served by the Defendant on the Plaintiffs.
· On 6 September 2001 the Plaintiffs wrote to the Australia Commercial Dispute Centre ("*ACDC*") purportedly referring the disputes with the Defendant for mediation and enclosing a cheque for the filing fee.
· On 10 October 2001 a mediation of the Disputes took place. The said mediation did not result in a resolution of the Disputes.
· On 2 November 2001 the Plaintiffs gave written notice submitting the Disputes to expert determination by the ACDC stewards to clause 18 (e) of the Agreement.
· Clause 18(e) of the Agreement incorporates by reference the ACDC Guidelines for expert determination.
· The Defendant failed to pay the registration fee required by the ACDC with respect to the expert determination as specified in the ACDC Guidelines. This was admitted on the pleadings.

· On 3 January 2002 the ACDC wrote to the Defendant's lawyers to progress the expert determination.
· On 19 December 2001 the Plaintiffs, at the request of ACDC, paid to the ACDC the Defendant's portion of the registration fee. This was admitted on the pleadings.
· On 21 December 2001 the ACDC issued resumes for proposed expert determiners.
· In January 2002 Ms Carmen Champion of Counsel was appointed as the expert determiner in relation to the Disputes. This was admitted on the pleadings but is not determinative of the issue dealt with in the Judgment.
· On 18 January 2002 the Defendant notified the Plaintiffs that it asserts it is not obliged to participate in the expert determination provided for in the Agreement but will seek to have the dispute resolved by a Court, which it considers to be a more appropriate forum.
· On 30 January 2002 the Plaintiffs execute the Expert Determination Agreement . There is no Agreement that this executed Agreement was that provided for under the ACDC Guidelines and this is a principal issue in what was argued.
· The Defendant has failed to participate in the expert determination and has failed to execute the Expert Determination Agreement.
· On 4 February 2002 Ms Champion notified the Plaintiffs that she could no longer proceed with the proposed expert determination by reason that she had not received a signed Expert Determination Agreement from the Defendant.
· On 27 March 2002 the Plaintiffs commenced proceedings.
· On 16 May 2002 the Defendant filed a cross-claim in the proceedings.

The plaintiffs' claims to relief

8 The Amended Summons seeks the following relief:

· A declaration that the process set out in clause 18 of the written agreement made on 16 June 2000 between the plaintiffs and the defendant (the "*Agreement*") is binding on the parties to the Agreement.

· A declaration that the defendant is bound to do all things, and execute all documents, necessary to perform its obligations in accordance with clause 18 of the Agreement.

· A declaration that the defendant is obliged to accept the decision of the Expert as final and binding in accordance with clause 18(f) of the Agreement.

· An order that the defendant specifically perform its obligations pursuant to clause 18(e) of the Agreement by participating in an Expert Determination pursuant to the Australian Commercial Disputes Centre Guidelines for Expert Determination.

· An order that the defendant do all things, and execute all documents, necessary to perform its obligations pursuant to clause 18 of the Agreement.

The issues arising for determination

9 The defendant has identified in Overview written submissions the issues which arise for determination in the following terms:

(a) whether clauses 18(e) and (f), [operate] to make expert determination mandatory;

(b) if so whether the clauses are void as against public policy;

(c) if not, whether the clauses are unenforceable by reason of their uncertainty.

(d) whether, in the event they are not void and are enforceable the remedy of specific enforcement of the clauses is available.

10 It was common ground that although the defence did not squarely treat with the uncertainty issue there was no prejudice to the Plaintiffs in permitting this matter to be litigated and it is to be regarded as if it had been pleaded.

Issues (a) and (b)

11 It is convenient in the first instance to deal with the first two matters and in the course of that analysis to cover a number of questions of principle. In what follows the detailed and carefully drafted submissions of the plaintiff are generally adopted as of substance.

12 It can be seen that clause 18.1 of the Agreement is explicit as to the procedures to be adopted by the parties in relation to disputes falling within the clause. The clause:

· operates in relation to any dispute which "arises out of or relates to this agreement, or the breach, termination, validity or subject matter thereof, or as to any claim in tort, in equity or pursuant to any domestic international statute or law" - clause 18.1;

· involves a mandatory obligation to give written notice to other parties of the fact that a dispute has arisen and specifying the nature of the dispute - clause 18.1(a);

· involves a "good faith" obligation to first negotiate and, subsequently, to attempt to settle the dispute by mediation - clause 18.1 (b), (c) and (d);

· mandates that, in the event that the dispute has not been settled as a result of those processes, the dispute be submitted to Expert Determination to be "conducted in accordance with the ACDC Expert Determination Guidelines which set out the procedures to be adopted, the process of selection of the expert and the costs involved and which terms are deemed incorporated" - clause 18.1(e); and

· expressly provides that the parties agree to accept the determination of the Expert as final and binding - clause 18.1(f).

13 The ACDC Guidelines are clearly quite detailed and cover numerous aspects of the proposed Expert Determination. These include:

· the selection of an Expert to conduct the Expert Determination including the identification by the ACDC of potential appropriately qualified Experts, the provision of information as to the

backgrounds of the appropriate Experts, the review of this information by the parties and their advisers, the provision by each party of its order of preference for the proposed Experts, the elimination of any potential conflicts of interest or perception of bias and a procedure for resolving any disagreement as to the choice of Expert - section 2;

· ensuring the neutrality of the Expert - section 3;

· requiring the parties to sign what is described as "an Expert Determination Appointment Agreement which sets out the terms of the Expert Determination" and which is said to be "consistent with the these Guidelines" - section 4;

· the process to be undertaken by the Expert in obtaining information about the disputes, meeting with the parties and the provision of procedural directions where necessary - section 5;

· the provision by the parties of statements of issues - section 6;

· representation of the parties - section 7;

· the powers of the Expert and the manner in which the Expert may conduct the Expert Determination (even including provisions for the operation of the *"slip"* rule) - section 8;

· a statement, that the determination of the Expert is final and binding - preamble and in section 8(b);

· a statement that the Expert is not obliged to give reasons for his or her determination - section 8(b); and

· confidentiality, releases for the Expert and payment of the Expert's fees - sections 9, 10 and 11.

14 The procedures provided by clause 18.1, especially in expressly incorporating the terms of the ACDC Mediation Guidelines and the ACDC Expert Guidelines, are fairly detailed and precise, and take account of every issue that could possibly arise in the course of resolving a dispute.

15 By reason of their significance to this judgment the Expert Guidelines are reproduced hereunder:

> **Guidelines for Expert Determination**
>
> Business disputes can often be best resolved by the parties with the assistance of an independent third party. Expert Determination is a dispute resolution process which assists parties resolve disputes without delay and expense of going to court or arbitration.
>
> The parties agree by contract to be bound by the decision of the Expert who has expertise in the area where the dispute has arisen. The parties select the Expert from a panel of Experts provided by ACDC. The parties then present documentation relevant to the dispute to the Expert. The Expert considers the documentation and generally arranges to meet with the parties to discuss the dispute. The Expert then makes a determination which binds the parties.
>
> **1. Notification of Parties to the Dispute**
>
> (a) If the dispute is referred to ACDC (either by way of an ACDC Expert Determination clause in the instrument of agreement or otherwise), the party claiming that a dispute has arisen must give written notice to the other parties to the dispute specifying the nature of the dispute.

(b) One receipt of the notice, the parties to the dispute must within seven (7) days seek to resolve the dispute.

(c) If the dispute is not resolved within seven (7) days or within such further period as the partis agree, then the dispute is to be referred to ACDC.

2. Selecting an Expert

(a) Upon agreement to seek an expert determination, ACDC will send the partis career details of appropriately qualified Experts. Each party informs ACDC of its order of preference for the prospective experts and strikes out any that may be unsuitable for some reason (such as well known by a party). Once preferences are received by all parties, ACDC discusses the case with the likely Expert in order to ensure that there is no conflict of interest or any reason there might be a perception of bias. If there is some cause for a perception of bias, ACDC will inform the parties and ask them to declare in writing that they are aware of the association but wish the appointment of that Expert to proceed (see also clause 3).

(b) If the parties fail to agree upon an Expert, ACDC will appoint one. If the agreement made by the parties has provided for another method of appointing the Expert, that method will be followed.

3. Neutrality of Expert

(a) The Expert has no vested interest in the outcome of the Expert Determination.

(b) If the expert becomes aware of any circumstance that might reasonably be considered to affect adversely the Expert's capacity to act independently or impartially, the expert must inform the parties immediately. The Expert must in such circumstances terminate the proceedings, unless the parties agree otherwise.

4. Expert Determination Appointment Agreement

Prior to the Expert Determination, the parties shall sign an Expert Determination Appointment Agreement which sets out the terms of the Expert Determination. The terms of the Appointment Agreement are consistent with these guidelines. The Appointment Agreement is also signed by the Expert. Upon execution the parties shall return the agreement or a copy to ACDC with their half share of the deposit or other such proportion as agreed between the parties.

5. Meetings

(a) The Expert Determination shall commence as soon as practicable after ACDC receives necessary the documentation and deposit from parties.

(b) The expert may, if the Expert so desires, arrange a joint meeting or meetings with the parties. This meeting is not a hearing.

(c) The Expert may meet separately with the parties to discuss the dispute, unless one or both of the parties do not want separate meetings to occur, in which case the Expert will only meet jointly with the parties.

(d) The parties agree to comply with any procedural directions the Expert may give in both the preparation for and in the course of the meeting.

6. Statement of Issues

Unless otherwise agreed by the parties and ACDC, within fourteen days (14) days of the parties agreeing to the Expert Determination, each party shall provide ACDC with a brief statement outlining important issues. ACDC shall forward the statement to the Expert and the other parties.

7. Representation and Attendance

(a) Each party is entitled to be represented at any meeting by its legal representative and other people with information or knowledge relevant to the Expert Determination.

(b) Unless the parties and ACDC otherwise agree, at least seven (7) days prior to any meeting, each party shall inform ACDC who is to attend. ACDC informs the other parties and the Expert.

8. Conduct of expert Determination

(a) When conducting an Expert Determination, the Expert shall:

(i) act as an Expert and not as an arbitrator;

(ii) proceed in such a manner as the expert thinks fit without being bound to follow the rules of natural justice or the rules of evidence;

(iii) take into consideration all documents, information and other written and oral material that the parties place before the Expert, including documents, information and material relating to the facts in dispute and to arguments and submissions upon the matters in dispute;

(iv) not be expected or required to refer to any other documents, information or material but may do so if the Expert so desires;

(v) issue the certificate of determination in such form as the Expert considers appropriate stating the Expert's determination of the matters in dispute;

(vi) will act expeditiously to issue the determination at a mutually agreed date after submission of all relevant documentation and payments. The time may be extended by agreement between the parties. This determination will be forwarded to ACDC, which will forward copies of it to each party; and

(v) if the determination contains a clerical mistake, or an error arising form an accidental slip or omission, or a material miscalculation of figures or a material mistake in the description of any person, thing or matter, or a defect of form, the Expert shall correct the determination.

(b) The determination of the Expert is final and binding. Unless otherwise agreed by the parties, the Expert shall not give reasons for the determination.

9. Confidentiality

Confidentiality information disclosed to the Expert by the parties or by other attending in the course of the Expert Determination shall not be divulged by the Expert , unless authorised in writing by both parties. The Expert shall not be compelled to divulge records, reports or other documents (electronic or not) received by him or her while serving in that capacity, or testify in regard to the Expert Determination in any adversarial proceedings, judicial forum or body.

10. Liability

The parties release ACDC, its employees, and the Expert from any liability of any kind whatsoever, and indemnify them from any claim for negligence which may arise in connection with or resulting from the Expert's appointment or any omission pursuant to the Expert Determination.

11. Fees

(a) The parties agree to equally share all costs relating to the assistance provided ACDC including room hire, ACDC's registration fee of $350 (covering the first 2.5 hours of administration), any further administration fees of $120 per hour (after the first 2.5 hours covered by the registration fee), and the Expert's fee (of which 10% is payable to ACDC) for all the time expended by the ACDC and the Expert in the conduct of, or in connection with, the Expert Determination, and any other disbursements.

(b) Upon the parties agreeing to the Expert Determination, the parties shall forward to ACDC their half share or other such proportion as agreed between the parties of the deposit being ACDC's estimate of the Expert's and ACDC's fees for the conclusion of the Expert Determination.

(c) Each party shall bear its own costs of the Expert Determination.

Expert Determination and Ouster of Jurisdiction

16 As the plaintiffs point out, in practice, Expert Determination is a process where an independent Expert decides an issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the Expert. Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind.

17 Unlike arbitration, Expert Determination is not governed by legislation, the adoption of Expert Determination is a consensual process by which the parties agree to take defined steps in resolving disputes. I accept that Expert Determination clauses have become commonplace, particularly in the construction industry, and frequently incorporate terms by reference to standards such as the rules laid down by the *Institute of Arbitrators and Mediators of Australia*, the *Institute of Engineers Australia* or model agreements such as that proposed by Sir Laurence Street in 1992. Although the precise terms of these rules and guidelines may vary, they have in common that they provide a contractual process by which Expert Determination is conducted.

18 The contractual basis of Expert Determination was confirmed by Rolfe J in *Fletcher Construction Australia Limited v MPN Group Pty Limited* NSWSC, 14 July 1997 (unreported). As in the present dispute, the defendant in *Fletcher Construction* claimed that the Expert Determination clause in question was invalid and unenforceable because it amounted to a "*bare faced attempt to oust the jurisdiction of the Courts*" (at 10). The plaintiff relied upon the terms of the agreement between the parties and asserted that the defendant should be held to the bargain it made with respect to the resolution of disputes (at 9).

19 In *Fletcher Construction*, Rolfe J concluded that the Expert Determination clause in question:

> *"does not purport to oust the jurisdiction of the Court. It is an agreement between the parties that the specified disputes shall be determined by an expert. There is nothing unusual about such a provision and parties are held to their bargain if they agree to such a clause. Nor is there anything unusual about the clause providing that the expert's decision shall be "final and binding" or "conclusive", and provisions such as that do not oust the jurisdiction of the Court. The effect of the clause is to make the decision of the expert final and binding provided the matters referred to him are ones which the agreement contemplates."* (at 18)

20 Relying on the High Court authority of *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, Rolfe J held that there is a distinction between agreeing not to invoke the jurisdiction of the Courts and agreeing that some matters on which the Courts might otherwise be required to adjudicate should be determined by a third party. The latter agreement leaves the enforcement of the rights of the parties under the contract, including the dispute resolution clause, to the Courts and consequently does not oust the jurisdiction of the Court. There is no ouster because such an agreement is merely limiting the matters for consideration by the Court to the question of whether the agreed Expert has acted within the scope of the agreement between the parties. Thus, provided that the Expert acts within the scope of the dispute resolution clause, the Court will enforce his or her decision as final and binding (at 15).

21 As the plaintiffs point out, similar conclusions were reached by the Supreme Court of Victoria in *Badgin Nominees Pty Limited v Oneida Limited* [1998] VSC 188, Gillard J (unreported). Considering whether proceedings should be stayed until the dispute had been considered by an Expert, Gillard J further emphasised the contractual basis of Expert Determination. His Honour referred to the judgment of Scrutton LJ in *Metropolitan Tunnel and Public Works Limited v London Electric Railway Co* [1926] Ch 371 where it was stated that "*a guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it*". Hence his Honour concluded that, "*It was their common intention that the dispute resolution procedure be applied in the event of a dispute. It is their contract; and it should be enforced.*" (para 31 - 32) and, further:

> *"It is a trite proposition of law that parties may contract about anything and subject to the principles of public policy and illegality the agreement should be enforced unless there is some other vitiating factor such as a mistake, misrepresentation or in capacity."* (para 29)

22 I accept that Gillard J applied the same contractual reasoning as Rolfe J in *Fletcher Construction* to conclude that the procedure to be applied in the Expert Determination depends on the agreement between the parties.

> *"[T]heir agreement [the parties'] expressly stated in bald terms that the dispute in question was to be decided by an expert and his 'determination in writing...will be conclusive and binding on the parties', without providing any rules concerning procedure, evidence, obtaining legal advice by the expert or complying with the rules of natural justice."* (para 28)

23 The corollary of the decisions in *Fletcher Construction* and *Badgin* is that the decision of the Expert, although stated to be final and binding, is amenable to attack where, for example, there is a failure to comply with the contract or the decision is vitiated by a factor, such as fraud: *Fletcher Construction*, per Rolfe J at 11. Considerable controversy has arisen as to whether a determination may be impugned on the basis of an error by the Expert, cf Marcus Jacobs QC: "*Impugning Expert Determinations in Australia*" (2000) 74 ALJ at 858. However, as the plaintiffs submit, in challenging a determination, the seminal question remains whether or not the Expert has acted outside the scope of the agreement which appointed him.

24 Clearly the New South Wales Courts have responded positively to the benefits which Expert Determination can entail. In *Public Authorities Superannuation Board v Southern International Developments Corporation Pty Limited*, NSWSC, 19 October 1987 (unreported), Smart J stated that, in relation to Expert Determination:

> *"There are many reasons why they may take such a course. They may prefer to have a relatively informal process which they may think is likely to be cheaper and quicker and the decision of an independent consultant who is likely to be familiar with the problems...It is not for the Court to re-write their contract."* (at 10)

25 His Honour was prepared to extend the matters which may be considered by Expert Determination to issues of liability and quantum. The arguments that the role of an Expert under such agreements should be limited to those "*usually dealt with by experts, for example, questions of value, questions of the work to be done prior to practical completion, quality of work and, presumably, extensions of time*" (at 7) were rejected.

26 A positive approach to Expert Determination can also be implied from the decisions in *Government Insurance Office of NSW v Atkinson-Leighton Joint Venture* (1979) 146 CLR 206 and *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, both cases dealing with the construction of arbitration clauses. Each of these cases indicates an acknowledgement of the commercial utility of alternate dispute resolution processes and a willingness on the part of courts to construe dispute resolution clauses in an expansive manner. In *Government Insurance* the High Court held that, even though an arbitration clause contained no express reference to the awarding of interest, the scope of the power was sufficient to imply a power in the arbitrator to award interest in accordance with the relevant *Supreme Court Act*.

27 Similarly, in *IBM* the NSW Court of Appeal confirmed the power of an arbitrator to make awards and orders of the kind contemplated by the *Trade Practices Act 1974 (Cth)*, notwithstanding that the *Commercial Arbitration Act (NSW)* expressed that it was *"the Court"* which may grant such relief (at 481). Following *Government Insurance*, Kirby P asserted that such clauses are *"not to be narrowly construed"* (at 477) citing a change in the attitude to arbitration clauses in Australia and other countries:

> *"It may be connected with a growing confidence in the skills of arbitrators. It may relate to an increasing desire of businesses (partly reflected in the agreement in this case) to have controversies dealt with confidentially, behind closed doors and not openly in courtrooms. It may be the result of the growing technicality and complexity of commercial disputes in which courts, even with expert evidence, sometimes exhibit their lack of specialist*

> *knowledge. It may be stimulated by the great pressure upon courts today and the special challenges presented by complex litigation, often requiring urgent attention. In part, the same pressures are reflected in moves generally to provide efficient means of dispute resolution alternative to the courts*." (at 472)

28 The plaintiffs' further point up that the positive approach to dispute resolution clauses suggested by Kirby P in *IBM* was also clear in *Triarno Pty Limited v Triden Contractors Limited* NSWSC, 22 July 1992 (unreported) where the Court held that failure to specify a procedure to be adopted by the Expert did not necessarily void an agreement to enter into an Expert Determination process. Cole J stated:

> *"Whilst recognising that there may be utility in the court determining procedures to be followed in an expert determination, in my opinion the court has no jurisdiction to do so….if the parties have not by their deed agreed the procedures to be followed upon an expert determination, that is not a void the court can fill. There is no reason to imply a term that the court will determine procedures. It is a matter for either agreement between the parties, or determination by the independent experts as to the procedures to be followed."* (at 5)

29 The approach of Cole J was followed by Rolfe J in *Fletcher Construction* in which he referred with approval to the decision of Cole J in *Triarno* stating that "*[i]n my opinion, this decision is authority for the proposition, which I consider is correct, that in the absence of agreement as to procedures, they are to be decided by the expert*" (at 23 – 24). In the result, Rolfe J held that an Expert Determination clause was not void for uncertainty because it made no provision about procedural matters, such as whether the parties could be legally represented, whether the parties could be compelled to provide documents, or who should bear the costs.

30 The expansive approach of the Courts outlined above has culminated in judicial acceptance of the final and binding nature of Expert Determination. In the recent NSW Supreme Court decision *Savcor Pty Limited v New South Wales* (2001) 52 NSWLR 587, Barrett J summarised the present state of the law as follows:

> *"In the absence of factors such as fraud and collusion, an expert determination declared by contract to be final and binding is open to challenge only to the extent that it is not in conformity with the enabling contract, including such implied terms as there may be as to the conduct and procedures of the expert"* (para 35).
>
> It is quite conceivable that parties may refer issues such as in IBM for determination by an Expert and *"agree to abide by the expert's decision on that question as if it were an order made by a court"* (para 37).
>
> *"where parties have by contract agreed to follow a particular dispute resolution procedure, they should be required to adhere to that procedure unless the party wishing to abandon it in favour of resort to the courts can show good reason for that course."* (para 42).
>
> Following *Badgin* the Court has the jurisdiction to stay proceedings on the basis that a contractual process provided that Expert Determination would be used to resolve disputes (para 43).
>
> Experts may consider legal matters involving questions of law which would otherwise be heard in court proceedings (para 44).
>
> A party to an Expert Determination will not be able to challenge the determination on the basis that the Expert decided the matter wrongly on the facts. Although an aggrieved party may be able to sue the Expert, that party will generally be unable to challenge the decision itself. The usual basis on

> which the result of an Expert Determination is challenged is that the Expert has not conducted himself or herself in accordance with the express or implied terms of the agreement for Expert Determination." (para 35).

31 The extent to which a "*final and binding*" decision may be challenged was authoritatively considered by McHugh J in *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314. McHugh J, considering a rent review clause where the rent review was being carried out by an expert valuer, concluded that the validity of a determination is inextricably linked with the scope of the powers under the relevant contract:

> *"It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is 'final and binding on the parties'."* (at 335)

McHugh J continued, noting that by referring a matter to an Expert, "*the parties agree to accept his honest and impartial decision*" (at 335). If the parties wish to challenge the decision of the Expert, *"[t]he question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract"* (at 336).

32 The result of this line of authority is, I accept that a decision will be overturned if, as in *Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co Ltd* NSWSC, Rolfe J, 12 February 1998 (unreported), it is outside the terms of the agreement. The authorities are usefully gathered by Palmer J in *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSWSC 405, 21 May (unreported), where Palmer J states, with reference to *Legal and General* that *"these principles are now well settled"* (para 48). Where parties to an agreement have determined:

> *"that a rent review dispute is to be resolved by the determination of a valuer, acting as an expert, and not as an arbitrator and that the determination is to be final and binding, then the determination may be successfully impeached as invalid only if it is shown to be tainted by fraud or collusion, or if it is shown not to have been made in accordance with the determination process, if any, specified in the lease. In either case, this is so because the determination is not one for which the parties have contractually stipulated."* (para 47)

33 These principles are entirely consistent with, and were recently applied in, *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 and *State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited*, [2002] NSWSC 178.

34 In the present case, clause 18 does not operate so as to oust the jurisdiction of the Court.

Issue (c) - Certainty

35 The plaintiff contends that the procedure to be adopted pursuant to the clause is sufficiently certain for there to be little doubt as to the circumstances in which the clause operates and as to the process to be adopted by the Expert - *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 206; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; *State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited*, [2002] NSWSC 178 para 38.

36 The central issue raised by the defendant concerns the well-established proposition that agreements to participate in alternative dispute resolution procedures are enforceable in principle *provided the conduct required of the parties for participation in the process is sufficiently certain*. See *Hooper Bailie Associated Ltd. v Natcon Group Pty. Ltd.* (1992) 28 NSWLR 194; *Elizabeth Bay*

Developments Pty. Limited v Boral Building Services Pty. Limited (1995) 35 NSWLR 709; *Aiton Australia Pty. Limited v Transfield Pty. Limited* (1999) 153 FLR 236; *Morrow v Chinadotcom* [2001] NSWSC 209; *Banabelle Electrical Pty. Limited,* [2002] NSWSC 178.

37 In Aiton:

· emphasis was given to the statement by Giles J in Hooper Bailie:

> *"What is enforced is not cooperation and consent but participation in a process from which consent might come".* [Emphasis given in Aiton]

· The matter was put as follows:

> *"It is for this reason that the process from which consent might come must be sufficiently certain.*
>
> *This is not to suggest that the process need be overly structured. Certainly, if specificity beyond the essential certainty were required, the dispute resolution procedure may be counter-productive as it may begin to look much like litigation itself."* [Emphasis added]

38 In *Elizabeth Bay Developments* the clauses in question provided for a mediation to be administered by the Australian Commercial Disputes Centre. Further the court proceeded on the basis of a concession that the terms of the Australian Commercial Disputes Centre's Guidelines for mediation were incorporated into the agreement. Indeed the Guidelines then before the court although dealing with mediation were close to word perfect with the Guidelines presently under consideration. Paragraph 6 of the Guidelines were in the following terms:

> "Prior to the mediation, the parties shall sign a mediation appointment agreement which sets out the terms of the mediation. The terms of the appointment agreement are consistent with these guidelines. The appointment agreement is also signed by the mediator."

39 Giles J. put the matter as follows:

> *"....by the incorporation of the guidelines the parties had agreed (inter alia) to sign mediation agreements the terms of which were not settled beyond the necessity that they be consistent with the guidelines. The agreements to mediate were open ended, indeed unworkable because the process to which the parties had committed themselves would come to an early stop when, prior to the mediation, it was asked what the parties had to sign and the question could not be answered.*
>
> *No doubt it would be possible to prepare an agreement consistent with the guidelines, but there would be an infinite combination of provisions which would not be inconsistent with the guidelines, and for this reason alone the agreement of the parties fell down for lack of certainty and the process which they should follow in their mediation. The deficiency was not overcome by regard to other provisions in the guidelines because the guidelines themselves called for signature of a mediation agreement as to what was clearly an important step in the process."* [Emphasis adde]

40 The real question of substance for determination concerns the defendant's submission that in an important, indeed critical sense, the approach which should be taken by the court presently should follow the approach taken in Elizabeth Bay Developments. The defendant's submissions in the sense are follows:

· The similarity between the contractual provisions and the Guidelines considered in Elizabeth Bay and clause 18 and the Guidelines in the present matter is noteworthy.

· In particular in both instances the Guidelines provide that the parties are to sign an expert determination appointment agreement the terms of which are required to be "*consistent with these guidelines*".

· In neither case can the expert determination commence until the executed agreement is held by the ACDC. See paragraphs 4 and 5 of the guidelines at JC1 Tab 39.

· In the present case, again as in *Elizabeth Bay Developments* the guidelines do not call up any particular form of mediation agreement.

· Nevertheless, a copy of the agreement which the expert selected by HRI, is in evidence at JC1 Tab 48. Its terms illustrate the point made by Giles J in the earlier decision. Terms which are included in it but which are not dictated by the Guidelines include the following:

(a) the proposed expert was not prepared to embark on the mediation unless that agreement (no other) was signed by the parties (Tab 48 Page 1);

(b) the recitals (a) and (b) would give rise to an estoppel by deed which would not be accepted by Psiron (Tab 48 page 4);

(c) clause 8(a) requires "total confidentiality" in relation to the expert determination and clause 8(d) requires every aspect of every communication within the expert determination to be without prejudice (Tab 48 pages 6 and 7).

(d) by clause 10 the parties release the ACDC and the expert from any tortious claim they might have in respect of the expert determination. This right is an important right which the parties would otherwise have see *Goldspar Australia Pty. Limited v City of Sydney* [2001] NSWCA 246.

· It follows that the agreement to submit to expert determination, if otherwise valid, is unenforceable.

Dealing with this issue

41 It is important to bear in mind that none of the plaintiff's claims to relief concern the terms of the form of Expert Determination Agreement in fact submitted by Ms Champion. Notwithstanding that the plaintiff's Contentions include claims that, as is clear from the evidence, the defendant failed to execute that document, and although the plaintiffs do, by reason of all of the matters pleaded in the Contentions paragraphs 3- 24, rely inter alia upon that failure, the issues raised on the preliminary question are capable of being dealt with without any reference at all to that particular document. The document does however serve as a convenient vehicle for an examination of the certainty issues.

42 The approach taken by Mr Finch SC who appeared for the plaintiffs was to accept that the critical issue was whether the agreement which the parties had entered into was sufficiently certain to be enforced. He accepted that the exercise involved whether or not the terms of an Expert Determination Appointment Agreement as referred to in the Guidelines, could be sufficiently identified. If not the plaintiffs were not entitled to relief as sought.

43 The approach was to take the Court extremely carefully through the Expert Determination Appointment Agreement which had been proffered by Ms Champion and in relation to each of the

recitals and paragraphs, to engage in a very close comparison between this document and the Guidelines. The proposition for which the plaintiffs contended was that this was a search for consistency. The proposition was that it was not necessary for the proffered agreement to be word for word identical to paragraphs in the Guidelines but that it would be sufficient to find that the provisions of the proffered agreement were *precisely reflective* of the same *concepts* as were to be found in the Guidelines. It was put that the necessary consistency would be seen to be present if, for example, the Guidelines included a generic power and the proffered agreement included a provision which fell within that generic power. If, on the other hand, one found provisions in the proffered agreement which could be categorised as *extensions* of what had been provided for in the Guidelines, by falling outside the generic consistency test it would be appropriate for the Court to apply a blue pencil approach by deleting such provisions. The Court could then order specific performance in terms of the execution of so much of the proffered Appointment Agreement as survived this set of tests.

44 Without travelling exhaustively through a repetition of this careful analysis it may be convenient to give one only example. Clause 11 (c) of the proffered agreement provided:

> *"Each party shall bear its own costs of the Expert Determination. The parties understand that they are jointly and severally liable for all costs relating to the Expert Determination".*

45 The first sentence of clause 11 (c) is in fact word perfect with paragraph 11 (c) of the Guidelines. Hence it was submitted that this clause should remain in the proffered agreement. However it was accepted that the second sentence could not survive the blue pencil test because there was no question of the Guidelines having dealt with any joint and several liability of the parties for all costs relating to the Expert Determination.

46 The exercise engaged in by the plaintiffs suffers from the difficulty that it seems to me to amount to a colourable attempt to have the Court in effect, engage in drafting for the parties, the very Expert Determination Appointment Agreement which, by the terms of paragraph 4 of the Guidelines they clearly intended to settle themselves.

47 The words used in the second sentence of paragraph 4 of the guidelines:

> *"the terms of the appointment Agreement are consistent with these guidelines"*

require to be construed. At first sight that sentence may seem to the reader to suggest that at the time when the Guidelines were prepared there was in fact an available form of Appointment Agreement to which reference was being made. As the evidence discloses and as the parties accept, this was obviously not the case. In those circumstances the proper construction of the sentence is to treated as if the word "*are*" is to be replaced by the words "*are to be*", so that the sentence would read:

> *"The terms of the Appointment Agreement are to be consistent with these guidelines".*

48 That being the case it is clear beyond doubt that the parties intended that a stage in the relevant procedure would require the parties to negotiate about and to endeavour to settle the terms of an Expert Determination Appointment Agreement. And it does not seem to me that it is in any fashion now appropriate for the Court to endeavour to second-guess what that negotiation may have produced. Not that Mr Finch suggested any such thing. His proposition was that the Court would require to tether its analysis and comparison so as:

· to allow only those sentences in the proffered agreement as, upon examination, were seen to be completely consistent with the Guidelines or could be subsumed under the rubric of a generic power or agreement.

· to apply the blue pencil test by way of disallowing all other sentences.

49 The alternative approach taken by Mr Finch was to submit that as the Guidelines themselves, on examination, included, a clear set of workable provisions to govern the Expert Determination, the parties and presumably the Expert, could be required to sign the Guidelines so that there could then be an acceptance that the Guidelines *themselves* amounted to the Expert Determination Appointment Agreement for which provision had been made in the Guidelines.

50 The submission was presented in some detail, the gravamen of the submission relying upon the following propositions:

· That the parties intended that the terms of the Appointment Agreement would be negotiated and would be consistent with the guidelines;

· That in the absence of the parties being in a position to successfully negotiate the terms of the Appointment Agreement, they could be compelled to accept the terms of such an agreement, providing that those terms included, *and included only,* terms which were consistent with the Guidelines.

51 In submissions Mr Finch put the matter as follows:

> *"It is true that you can have, if not an infinite, a very large number of contracts which are also consistent with the agreement. For instance, you could use a thesaurus and use words similar to but not exactly the same as the words in each of the clauses, and that would be an agreement consistent with it or you could have, as I said earlier, an agreement which is full of further and better particulars of generic powers.*
>
> *But if you don't agree on them, what the agreement says is this: the agreement that you must enter into must be consistent; something you have already agreed on, so you can't go outside that. If you can't agree upon what is consistent, we say it is sufficiently certain that there is at bare minimum a skeletal agreement which contains all of the crucial things necessary for the process which can be insisted on in the absence of any other agreement. That is the option that was not presented to His Honour Justice Giles.*
>
> *True it is that you can. We acknowledge the force of what His Honour says and don't quibble with it because, with respect, the reasoning is free of defect. There, of course, are - it is possible to postulate a number of possibilities all consistent with the generic terms, but we say in the absence of agreement about that which is allowed, there is mandated at minimum an agreement which is in the same terms or the terms sufficiently changed to constitute an agreement."*

52 The submission is misconceived and requires to be rejected. It fails to cope with and to give proper effect to the parties' obvious intent as reflected by the wording of paragraph 4 of the Guidelines that they be permitted to attempt to negotiate the terms of the Appointment Agreement. It fails also to cope with and to give proper effect to the clear intent that the Expert to be appointed and who was to sign the Appointment Agreement as a party, be also permitted to suggest his or her own suggested terms. Finally and most importantly it fails to cope with the proposition, the subject of the judgment of Giles J. in Elizabeth Bay, that notwithstanding that it would be possible to prepare an agreement consistent with the guidelines, there would be an infinite combination of provisions which would not be inconsistent with the guidelines, and that for this reason, the agreement of the parties must fail for lack of certainty in the process to be followed.

53 The argument also exposed significant problems, as it seemed to me, in relation to several areas of real difficulty involved in the proposed application of the "*consistency*" test. The Appointment Agreement which was proffered by Ms Champion provided inter alia that the Expert Determination may be terminated by a party giving written or oral notice to each party to the Expert Determination and the Expert. Whilst this may be consistent with the common law approach to agreements determinable at will, it is difficult to see why the proposed provision would likely have been intended by the parties. Indeed this proposed provision seems to me to be antithetical to the whole endeavour to ensure that the Expert Determination process would lead to a resultant determination. And there was also a provision that the Expert Determination might be terminated by the Expert giving written or oral notification to the parties if, after consultation with them, the expert formed the view that the expert would be unable *for whatever reason*, to complete the Expert Determination. This led to a close inquiry as to what types of reason the parties may have been content to include in such an agreement permitting the expert to terminate the Expert Determination. Likewise questions would arise in relation to the proposed Appointment Agreement proffered by Ms Champion, where a term included provision that every aspect of every communication within the Expert Determination was to be 'without prejudice'. These and other matters make entirely unpalatable and inappropriate, the notion that it would be a simple matter for the Court to apply the so-called "*consistency*" test.

54 In the result and for the above reasons it is clear that in the absence of identification in the Guidelines, presumably by reference, of precisely which terms were to be included in the Expert Determination Appointment Agreement, the parties agreement fails for relevant uncertainty. It may seem surprising that in the light of the Judgment in Elizabeth Bay delivered in early 1995, the ACDC has apparently not seen fit to amend its procedures, so as to cope with the necessity to ensure that the parties are committed, with *precision*, to the terms of the relevant Appointment Agreement which they are said to be contractually obliged to execute.

55 It was also the case that there were some limited areas in respect of which the Guidelines themselves, if signed, have a capacity to confuse. Clause 2 (a) for example speaks of ACDC sending career details of qualified experts "*upon agreement to seek an expert determination*". The plaintiffs case is that there had already been reached the agreement to seek the expert determination so that even if the Guidelines were signed, this subclause would require to be so understood. Likewise in relation to clause 11 (b), the language would have to be read somewhat differently because of the particular circumstances. Whilst these are relatively minor matters, it may be thought, for attention, they do throw up the type of difficulties which arise when an artificial approach is taken to what was obviously otherwise intended.

56 For those reasons the plaintiffs claims to relief in the form earlier identified must fail. It is however common ground that, reserving the question of costs of the separate question for submission, the appropriate orders are to permit the plaintiffs to further amend the Amended Summons so as to plead the issues on their merits and so as effectively to submit the relevant disputes and their claims for the adjudication of this Court.

Specific Performance

57 Detailed submissions were also addressed by both parties in relation to whether specific performance should be ordered in the event that clause 18 (e) and (f) would be held to be enforceable in principle. Whilst that matter does not now require to fall for determination it seems reasonable in deference to these submissions and against the possibility that the matter may go on appeal, to treat with the general subject matter as a matter of principle.

58 The defendant's further submissions included the following:

· "If, contrary to the foregoing, clause 18(e) and (f) are enforceable in principle, the court will not order specific performance at the suit of HRI. See *Hooper Bailey* at 210; *Aiton* at 244; *Banabelle* para 29.

· The rule enunciated in those cases is applicable in respect of the subject clause for expert determination having regard to the need for co-operation between the parties in agreeing upon the terms of a suitable expert determination agreement.

· Further, as a matter of discretion, the court ought not order any specific performance of clause 18(e) having regard to:

(a) the complexity of the disputes between the parties as disclosed by the cross claim;

(b) the unfettered right of the expert to conduct the process without following the rules of natural justice (guidelines paragraph 8(a) (ii), and otherwise without any formality whatsoever.

· That combination of circumstances is likely to be productive of further conflict and give rise to the need for extensive continuing supervision by the court of the conduct of the determination process.

59 Here again the plaintiffs advanced very detailed written submissions which are generally set out below and accordingly adopted

60 The most recent decision of this Court considering these issues is that in *State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited*, [2002] NSWSC 178. In the discussion of the relevant principles one there finds the following:

> *"Equity will not order specific performance of a dispute resolution clause, notwithstanding that it may satisfy the legal requirements necessary for the court to determine that clause is enforceable. This is because supervision of performance pursuant to the clause would be untenable - see Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194 at 210. The court may, however, effectively achieve enforcement of the clause by default, by ordering that proceedings commenced in respect of a dispute subject to the clause be stayed or adjourned until such time as the process referred to in the clause is completed".* (para 29)

61 In *Hooper Bailie, which has already been mentioned in some detail,* Giles J ordered a stay in the proceedings pending the completion of a conciliation process between the parties.

62 As the plaintiffs point out, in reaching this decision Giles J deals with the issue of specific performance of an implied term. The plaintiff in that case contended that there was an implied term in the conciliation agreement between the parties that the parties *"would take all reasonable steps to endeavour to resolve the conciliation issues under the chairmanship of Mr Eric Schick, by discussion, consideration and agreement"* (at 202G). It is with reference to this implied term that Giles J states "*[i]t was, I think, common ground that equity would not order specific performance of the implied term for which Hooper Bailie contended, because supervision of performance would be impossible"* (at 210E).

63 As already stated, the holding was that an agreement to resolve a dispute by alternative processes is enforceable in principle, provided that the conduct required of the parties for participation in the process is sufficiently certain (discussed at 209D-E). Giles J continued that such agreements may be indirectly enforced by the stay or adjournment of any other proceeding initiated in conflict with the agreed alternative dispute processes. The court's power to make such orders derives both from its inherent jurisdiction to prevent abuse of its process and from its statutory jurisdiction to make interlocutory orders in relation to arbitration proceedings under the Commercial Arbitration Act 1984, s 47 (discussed at 210E-211E).

64 Giles J further considered that:

> *"there may be a stay of proceedings having the consequence that a party to the proceedings must give effect to an arbitration agreement, even against its will (see s 53 of the Commercial Arbitration Act 1984), and that illustrates that there is nothing offensive in indirectly requiring participation in a process of dispute resolution provided there is sufficient certainty in the conduct required by way of participation."* (at 210G)

65 Giles J referred to *Aztec Mining Co Limited v Leighton Contractors Pty Limited* (1990) 1 ADRJ 104 (at 204 F), where Murray J refused an interlocutory injunction restraining Leighton from proceeding with the submission of a dispute for the determination of an Expert in accordance with the dispute resolution clause in the contract. This was despite the fact that the determination by the Expert was expressed to be *"final and binding upon the parties except in the case of manifest error"*.

66 Giles J went on to distinguish the *Aztec Mining* case on the basis that the clause in *Aztec Mining* did not provide for conciliation and mediation but for binding determination by third parties.

67 As the plaintiffs point out, in *Hooper Bailie* Giles J enunciated the principle that equity would not decree specific performance of an implied term *in the circumstances of that case*. The basis for this principle is said to be the impossibility of supervision by the Court of such a term.

68 In *Aiton*: one finds the following

> *"it is clear that if parties have entered into an agreement to conciliate or mediate their dispute, the Court may, in principle, make orders achieving the enforcement of that agreement as a pre-condition to commencement of proceedings in relation to the dispute: Hooper Bailie."*

69 *Aiton* was also a case where the Court was asked to imply a term concerning payment of a mediator's costs. The holding was that the mediation agreement was *"unenforceable by reason of its failure to spell out how responsibility of payment of the mediators' cost was to be dealt with"* (at 271 para 174). The Court held that the basis upon which the mediator's remuneration was to be paid was not sufficiently clear to justify the implication of a term to that effect.

70 In *State of NSW v Banabelle*, as in *Hooper Bailie* and *Aiton*, the precise terms of the dispute resolution provision were uncertain, namely while the clause provided for a person prescribed in the annexure to nominate an Expert in default of agreement between the parties, there was in fact no person named in the annexure. Once again, as in *Hooper Bailie* and *Aiton*, the Court was asked to imply a duty to co-operate in the choice of an Expert.

71 As the plaintiffs point out, these cases are, undoubtedly correct in circumstances where the contractual provision concerning the alternative dispute resolution processes is not sufficiently certain to be specifically enforced. The principle of equity grounding such decisions, namely that it is impossible or untenable for the Court to supervise such vague and uncertain terms, is clear.

72 Another way of expressing the same principle is that the Court will not generally order specific performance where it would be required to constantly supervise the order. And as the plaintiff points out, the difficulties faced by the Court in such circumstances are described by Lord Hoffman in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 as follows:

> *"It may at first sight suggest that the judge (or some other officer of the court) would literally have to supervise the execution of the order... supervision would in practice take the form of rulings by the court, on applications made by the parties, as to whether there had been a breach of the order. It is the possibility of the court having to give an indefinite series of such rulings in*

> *order to ensure the execution of the order which has been regarded as undesirable."* (at 12)

73 *Co-Operative Insurance* was considered by the High Court of Australia in *Patrick Stevedores Operations No. 2 Pty Limited & Ors v Maritime Union of Australia & Ors (*1998) 195 CLR 1, where the Maritime Union sought various orders such as the continuance by Patrick's administrators of the running of the business and the employment of its members. The High Court noted that such orders sometimes contained the problem of the Court being involved in constant supervision. The Court referred to *Co-Operative Insurance* by stating:

> *"What is significant is the acceptance by the House of Lords that the concept of 'constant supervision by the court' by itself is no longer an effective or useful criterion for refusing a decree of specific performance. Rather, Lord Hoffman placed stress on other propositions. First, a person who is subject to a mandatory order attended by contempt sanction... ought to know with precision what is required; and, second, the possibility of 'repeated applications for rulings on compliance' with orders requiring a party 'to carry on an activity... over a more or less extended period of time' should be discouraged."* (at 46 - 47)

74 I accept as correct the plaintiffs' submission that it follows from the above cases, including *Co-Operative Insurance* and *Patrick Stevedores*, that the Court may order specific performance of a contractual provision where it will not be necessary to constantly supervise the order.

75 As the plaintiff submits, when a Court considers ordering specific performance of a dispute resolution clause the question then becomes, would such an order create the possibility of repeated applications for rulings coming before the Court? If a dispute resolution clause was drafted with sufficient clarity and certainty, there should be no need to seek regular directions from the Court on the execution of the order.

76 The plaintiffs strongly contend that the defendant in this case been obstructionist and, on one view, has done all within its power to avoid complying with its contractual obligations in relation to the Expert Determination in that it is said to have:

· failed to pay the ACDC filing fee for the mediation;

· failed to pay the ACDC filing fee for the Expert Determination;

· failed to reply to certain correspondence from the ACDC;

· failed to express a view on an appropriate Expert,

· necessitating the appointment of the Expert by the ACDC;

· refused to execute the Expert Determination Agreement as required by the ACDC Expert Guidelines; and

· belatedly raised (including in its Cross-Claim in these proceedings) matters which have not been the subject of formal dispute notification under clause 18.1(a) of the Agreement.

77 It was accepted during argument that it was not necessary for the Court in determining the separate question to make any findings in relation to these claims of the plaintiff.

78 HRI is a charity and is, I accept, unable to afford protracted litigation and the attendant costs. Consequently, Expert Determination should, but regrettably here does not, offer a speedy and cost effective means of resolving disputes, an alternative that was chosen in this case.

79 Had the subject Agreement not been vitiated for uncertainty, the indirect mechanism of giving effect to the alternative dispute resolution clause discussed in *Hooper Bailie*, *Aiton* and *Banabelle*, namely the grant of a stay or adjournment of the proceedings pending the completion of the alternative dispute resolution process, would not have been needed as the Court would likely have been in a position to grant specific performance. The process contemplated by the clause is likely to have been entirely appropriate to the subject matter of the Agreement, namely medical research into cardiovascular disease and the creation of possibly patentable processes. An Expert who can combine a knowledge of intellectual property law issues with an understanding of research processes may well be ideally placed to resolve the disputes.

80 As the plaintiffs correctly point, out the comments of the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (1993) AC 334 per Lord Mustill at 353 are appropriate to be borne in mind in litigation raising these issues where enforceable agreements not lacking the requisite certainty, are entered into:

> *"those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go."* (Quoted with approval by Gillard J in Badgin at para 43).

Public Policy Demands

81 The positive perception of alternative dispute resolution in case law has accorded with the development of case management in Australian jurisprudence. In New South Wales, for example, the Courts are now guided by Pt 1 r 3(1) of the *Supreme Court Rules 1970 (NSW)* which provides that:

> *"The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings."*

82 Indeed, the aims of case management, for example such as ensuring that the parties are on an equal footing; saving expense; dealing with cases in ways which are proportionate to the amount involved, the importance, the complexity, and the financial position of each party; ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the Court's resources, can seemingly be promulgated through a positive approach to alternative dispute resolution.

83 On a public policy level the rationale behind supporting alternative dispute resolution includes:

· harnessing the influence of the Courts to encourage the use of alternative dispute resolution as a way of overcoming the reluctance of litigants and lawyers;

· making procedures more simple, and closer to normal business activities;

· decreasing or better focusing paperwork;

· simplifying the work done in preparing disputes for the resolution process;

· facilitating the resolution of disputes by allowing parties to choose an arbitrator or mediator with special knowledge or expertise;

· improving efficiency by finding earlier or more convenient dates for alternative dispute resolution than is permitted by the court listing process;

· reducing costs; and

· achieving results which do not necessarily demand that one side wins and one looses.

84 In recent years dispute resolution legislation and trends in resolving commercial disputes by alternative means have developed common themes and objectives including better case management, increased speed and reduced expense, party autonomy and greater involvement by the parties themselves. As the High Court has recognised, concepts of public policy are not fixed but change according to developments in society: *Stevens v Keogh* (1946) 72 CLR 1 at 28.

85 Both the Federal Government and the Government of New South Wales have in recent years publicly encouraged disputants to consider dispute resolution procedures other than judicial and arbitral proceedings, as reflected in the 1993 report of the Standing Committee on Legal and Constitutional Affairs, *"The Cost of Justice: Foundations of Reform"*. By advocating such alternatives, those governments seek to reduce court delays and expense to disputants of dispute resolution. Indeed, as Robert Hunt notes in *"The Law Relating to Expert Determination"* (2002) 18 BCL 2, *"[t]he increasing cost of litigation and arbitration up to the late 1980s has led to a significant increase in the use of ADR"* (at 2).

86 More specifically, the increasing use of Expert Determination in lieu of arbitration or litigation in commercial disputes confirms, as Hunt suggests, *"that the users of dispute resolution services have created a demand for an additional adjudicative process called expert determination as an alternative to litigation or arbitration"* (at 14). Principally, as Hunt continues, *"[p]roponents of these processes saw them as offering the prospect of less formal processes (often with no lawyers involved) with substantial savings in time and legal costs"* (at 2). Indeed, on a practical level, Expert Determination has apparently been attractive, largely because it is less expensive and speedier, avoids the rigours of the application of the rules of evidence and procedure and offers a finality which avoids delays, potential re-hearings and appeals, which is particularly suitable especially where an expert knowledge of the subject is required or where the parties may have a continuing relationship.

Short Minutes

87 Short minutes are to be brought in. Costs may then be argued.

I certify that paragraphs 1 - 87
are a true copy of the reasons
for judgment herein of
the Hon. Justice Einstein
given on Thursday 25 July 2002

_____
Susan Piggott
Associate

25 July 2002

LAST UPDATED: 02/09/2002