PROCESS IN EXPERT DETERMINATION

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About the Presenter

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1 Introduction

The use of alternative dispute resolution procedures, including expert determinations, is on the increase in Australia. For at least four reasons it is timely to reflect on what the Court's have to say about the process by which an expert determination is prepared and enforced.

First, the mentioned increase in the use of dispute resolution procedures, including expert determinations.

Second, the parties to agreements can miss the significance of an expert determination process.

Third, the limited basis of challenging an expert determination is important to bear in mind when considering the mechanisms of the determination.

Fourth, when implementing an expert determination there are traps of which the participants should be wary to ensure their process is being and has the desired effect.

This paper will deal with the following issues:

1. What is an expert determination?
2. Differences between expert determinations and arbitration.
3. Challenging the agreement to refer a dispute to expert determination.
4. Enforcing the result of an expert determination.
5. The Court's refusal of a discretionary remedy.
6. The liability, if any, of an expert in respect of an expert determination.

These are all matters relevant to the conduct of an expert determination, irrespective of whether the expert is directly involved in any court proceedings. Practitioners need to be aware of these various principles, in dealing with challenges to jurisdiction, in identifying the boundaries of what he or she can (and cannot) safely do in the conduct of the process, and in recognising the consequences of performing an expert determination.

It will be seen that expert determination is largely governed by case law, as there is no specific legislation dealing with it (such as is the case with arbitration). It is largely the construction of contractual agreements between parties for the determination of a specific dispute.

2 What is an expert determination?

Justice Einstein provides a succinct summary of what is the process of expert determination. His Honour did so in *The Heart Research Institute Limited & Anor v Psiron Limited* [2002] NSWSC 646 at [16] and [17]:

> 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.
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> 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 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.

As his Honour notes, many modern commercial agreements are drafted with an expert determination clause. They can, and do, vary significantly. Common elements of them, however, are a prohibition on resolving a particular dispute by court or arbitration process unless the parties have complied with the stipulated paragraphs or the issue genuinely requires urgent interlocutory relief. An example is:

> *If any dispute arises out of this agreement (the '**dispute**'), a party to this agreement must not commence any court or arbitration proceedings unless the parties to the dispute have complied with the provision of this clause XX.*

There is then a detailed description of the mechanisms by which notice of a dispute is provided, whether mediation is required to be undertaken and (most significantly for this paper) referral of issues to an expert for binding determination.

An area where expert determination is common is in valuation of property (including shares in a private company or interests in a trust), as the Court's processes and expertise does not lend itself to the most efficient way of resolving these types of disputes. An example of a clause requiring expert determination for the valuation of shares in a private company is:

> The fair value of the shareholding shall be determined as follows:-

(a) by agreement between the parties; or

(b) in the absence of agreement by the appointment of an expert nominated by the Board of the Company by ordinary resolution to determine the fair value of the shareholding. If an expert has not been nominated by the board within 20 business days of one party notifying the other in writing that they cannot agree on the fair value the secretary of the Company must request the nomination of an expert by the President of the Institute of Chartered Accountants (NSW Division) within 14 business days of the notice date and his decision will be final and binding on the parties.

(i) The fair value of the shares will be the value determined by the expert.

(ii) The fair value of the shares will be determined as at the date on which the option event takes place and the expert must determine the fair value of the relevant shares within 60 business days of the date of his appointment and must provide a copy of his valuation to each party.

(iii) The expert so appointed may appoint a recognised experienced and qualified valuer to determine the value of any particular asset of the Company.

(c) Matters to which the expert shall have regard

Where an expert is appointed as aforesaid the expert:

(i) in making his determination will value the business as a going concern excluding any good-will attached thereto.

(ii) will have regard to the following matters (in addition to any other factors which he believes should properly be taking into account) based on the best information available at the time:

(1) the prospects of the business (including, without limitation, taking into account the continuing association or involvement of any of the principals with the Company and its subsidiaries);

(2) the value at a specified capitalisation rate appropriate to the business, of the estimated future maintainable earnings of the Company;

(3) the yield which an open-market investor would reasonably require in an acquisition of the shares;

(4) the net tangible assets of the Company as disclosed in the accounts for the last preceding financial year or, if no accounts for the Company are available, as disclosed in the latest management accounts of the Company;

(iii) in making his determination will act as an expert and not as an arbitrator; and

(iv) his determination will be final and binding upon the Company and the parties to this Deed.

Aspects of this clause that are often found in expert determination clauses are:

- the procedure operates in the absence of other agreement between the parties (clause (a));
- the procedure specifies who is to appoint: this can be by both parties (i.e. A chose three and B selects one of them) or by one of the parties (clause (b));
- the nomination of a suitably qualified expert within a period of time to undertake the process of valuation (clause (b));
- setting some parameters around the expert's task (clause (b) (i) to (iii) and clause (c) (i) and (ii));
- expressly stating that the expert will be acting as such, and not as an arbitrator (clause (c)(iii)); and
- rendering the expert's determination to be final and binding on the parties (clause (c) (iv)).

These issues will be discussed further in the paper below.

3 Differences between expert determination and arbitration

As can be seen, an expert determination process is an alternative to arbitration. If a disputed matter under the agreement proceeds to arbitration, it will be governed by the *Commercial Arbitration Act* 2010 (NSW), which provides for the mechanism by which arbitrations are to occur and what effect they are to have. Some of the differences are now set out.

Enforcing the Outcome

Unlike arbitration under the *Commercial Arbitration Act* 2010 (NSW), s 35 of which provides for enforcement of the arbitral awards, a party seeking to obtain the benefits of an expert determination procedure in their favour must commence proceedings in a Court of competent jurisdiction (usually the Supreme Court) for a declaration or order for specific performance of the agreement by which the parties agreed to resolve their disputes by expert determination.

This is further discussed at 5 below.

Requirements for Procedural Fairness

Arbitration is a quasi-judicial function that requires the principles of procedural fairness to be applied to its conduct. Unless the agreement by which the expert determination is established calls for the expert to act as an arbitrator (for instance, contrary to clause (c)(iii) of the example clause above), no such notions will apply to an expert determination: see the discussion of procedural fairness at heading 4 below.

If procedural fairness requirements are imposed on a process, it is to be noted that they are not fixed. They are dependent on and will vary with the circumstances and nature of the case. In *Kioa v West* (1985) 159 CLR 550 at 584-585 Mason J said (emphasis added):

> What is appropriate in terms of natural justice depends on the circumstances of the case, and they will include, inter alia, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting ... *The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the case.*

The principles of natural justice were expressed by Marks J in *Gas & Fuel Corporation of Victoria v Wood Hall Ltd* [1978] VR 385 at 396 in the following way:

> There are two rules or principles of natural justice ... The first is that an *adjudicator must be disinterested and unbiased.* This is expressed in the Latin maxim – nemo judex in causa sua. The second principle is that *the parties must be given adequate notice and opportunity to be heard.* This in turn is expressed in the family Latin maxim – audi alteram partem. In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done

> but appear to be done ... Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties.

In the context of referrals to a referee for expert determination, Cole J said in *Xureb v Viola* (1989) 18 NSWLR 453 at 468-470:

> ... non-compliance with procedures normally applied in Court proceedings does not, of necessity, result in a denial of natural justice ...
>
> Referees, no doubt, look to the Courts for elucidation upon what is meant by 'natural justice'. Its absence is readily recognised but its constituents are difficult to define. In essence it means fairness between the parties. If an allegation is put by one party against the other, the other should have the chance to respond. Yet the process of responding is not indeterminable. For once a party is aware of the case or argument or fact asserted against him, natural justice is usually satisfied by giving to his opponent the opportunity to respond. The response may, of course, throw up material not adverted to by the first party. It is usual, in the Courts, for the first party to be given a limited right of reply to deal with any such new material, whether factual, argumentative or a matter of legal concept. But it is not always essential that such a right be given. If issues are clearly defined, particularly if they be of a technical nature, and if each party is given a full opportunity to place before the Referee that which it wishes in relation to those issues, it does not necessarily follow that there is a denial of natural justice by not permitting each then to respond to any new material advanced by the other. Particularly is that so where the Referee is a person of technical competence able to understand the material placed before him by each party.
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> ... Another aspect of natural justice is that the Referee must be actually impartial, and must be perceived by a disinterested bystander to be so. Accordingly, he must not hear evidence or receive representations from one side behind the back or in the absence of the other.
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> ...
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> How are such principles to be reconciled with Pt 72 r 8, and in particular r 8(2)(b) which permits a Referee to 'inform himself ... in relation to any matter in such manner as the Referee sees fit'. Further, it has become common for orders to be made pursuant to Pt 72 r 8(1), to permit a Referee 'to communicate with experts retained on behalf of the parties or any of them'. The utility of such a direction is obvious for it enables a person technically qualified who does not understand a particular technical aspect of the report of an expert retained by a party to inquire of that expert what he meant. But such an order is not to be understood as permitting a Referee to have a private conversation with one expert. He may call the experts for opposing parties

> together to seek clarification, or he may arrange a conference telephone discussion with the experts for competing parties. Pursuant to r 8(2), the Referee may be permitted to carry out his own tests. But if he does so, ... he must give, in most cases, the information so derived to the competing parties to permit them to express their views upon it to him.

It will be seen from discussions below that a expert, undertaking an expert determination that is not an arbitration, is not bound by the restrictions Cole J outlined from the requirement to comply with natural justice.

Right to Appeal to the Court

By s 34A of the *Commercial Arbitration Act* 2010 (NSW) there is a right to appeal to the Supreme Court of New South Wales if certain matters are satisfied, including the granting of leave by the Court.

Section 34A of that Act provides:

> **34A Appeals against awards**
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> (1) An appeal lies to the Court on a question of law arising out of an award if:
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> (a) the parties agree, before the end of the appeal period referred to in subsection (6), that an appeal may be made under this section, and
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> (b) the Court grants leave.
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> (2) An appeal under this section may be brought by any of the parties to an arbitration agreement.
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> (3) The Court must not grant leave unless it is satisfied:
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> (a) that the determination of the question will substantially affect the rights of one or more of the parties, and
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> (b) that the question is one which the arbitral tribunal was asked to determine, and
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> (c) that, on the basis of the findings of fact in the award:
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> (i) the decision of the tribunal on the question is obviously wrong, or
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> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

(4) An application for leave to appeal must identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The Court is to determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required.

(6) An appeal may not be made under this section after 3 months have elapsed from the date on which the party making the appeal received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal (in this section referred to as the ***appeal period***).

(7) On the determination of an appeal under this section the Court may by order:

(a) confirm the award, or

(b) vary the award, or

(c) remit the award, together with the Court's opinion on the question of law which was the subject of the appeal, to the arbitrator for reconsideration or, where a new arbitrator has been appointed, to that arbitrator for consideration, or

(d) set aside the award in whole or in part.

(8) The Court must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.

(9) Where the award is remitted under subsection (7) (c) the arbitrator must, unless the order otherwise directs, make the award within 3 months after the date of the order.

(10) The Court may make any leave which it grants under subsection (3) (c) subject to the applicant complying with any conditions it considers appropriate.

(11) Where the award of an arbitrator is varied on an appeal under this section, the award as varied has effect (except for the purposes of this section) as if it were the award of the arbitrator.

Note. There is no equivalent to this section in the Model Law.

In contrast, other than as to the process by which the expert determination was undertaken, which may or may not include notions of procedural fairness, there is no basis on which a Court will review the expert determination. That is, the expert determination is only reviewable if it is beyond the parties' contract. This is discussed further at heading 4 below.

4 Challenging the agreement to refer a dispute to expert determination

The first point to note is that it is on limited bases only that an expert determination can be challenged. The cases, discussed below, are replete with statements of principle to the effect that a Court will not review the content of an expert determination process, but will only consider the procedural issues of how it is done and asses that process in light of the parties' agreement.

It is therefore convenient to consider the limitations on which Court's place themselves in reviewing an expert determination before consider the basis on which it may be challenged.

Court's Approach to Reviewing Expert Determinations

It is to the terms of the parties' agreement that reference is had in deciding whether a court can review the expert determination: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336; and also *Downer Engineering Power Pty Ltd v P & H Minepro Australasia Pty Ltd* [2007] NSWCA 318 at [17] and [18] per Basten JA.

In *Australian Vintage Limited v Belvino Investments No 2 Pty Ltd* [2015] NSWCA 275 at [74] Bathurst CJ said:

> If the expert in fact carried out that task, the fact that he made errors or took irrelevant matters into account would not render the determination challengeable.

In *Campbell v Edwards* [1976] 1 All ER 785 Lord Denning MR said:

> It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be different. Fraud or collusion unravels everything.

In *Nikko v MEPC* [1991] 2 EGLR 103 rent review provisions depended on a formula based upon changes in the "room rate" of a London hotel, and the issue between the parties

was whether such increases were to be calculated by reference to room rates actually charged or published rates for rooms. In following *Jones v Sherwood,* Knox J considered that:

> If [the expert] has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.

In *Jones v Sherwood Computer Services* [1992] 2 All ER 170 at 179c-d, Dillon LJ said:

> On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning MR said in *Campbell v Edwards,* a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instruction in a material respect, eg if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in *Jones (M) v Jones (RR)* [1971] 2 All ER 676, the expert had valued machinery himself whereas his instructions were to employ an expert value of his choice to do so, either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.

In *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All ER 1041 the English Court of Appeal confirmed this approach. In that case, although the parties agreed that there had been a mistake, the Court of Appeal said that the adjudicator answered exactly the questions put and thus his determination was binding on the parties. The same conclusion was reached in *Hanson v Roe* [2007] All ER 56 where an expert made an error in his valuation. At [35]-[36] Mann J said:

> All that it means is that the right thing has been valued but on an erroneous hypothesis. Such an erroneous hypothesis is a mistake which a valuer, acting as an expert, is "entitled" to make.

There is, therefore, a significant restriction on what the Court will review in relation to an expert determination.

The basis of it, clearly enough, that the parties have agreed to bind themselves to the procedure and, should the expert err in undertaking his or her task, that risk is one that was in the parties' contemplation. They took the risk, bound themselves to the agreement and, having done so, will not be heard by a court to complain of the consequences such an error may have upon them.

Has the Expert Complied with the terms of the Contract?

The Supreme Court has recently raised these issues (mostly at first instance, but also in the Court of Appeal on one occasion). Paraphrasing Pembroke's J remarks in *McGrath v McGrath* [2012] NSWSC 578 at [11] to [14], when the parties decided to have an expert appointed to determine a particular issue, they implicitly agreed to accept his honest and impartial decision as to the value of that company. On the other hand, if he asks himself the wrong question or misconceives his function, he will not have performed the task required of him by the contract: *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4 at [23] per Brereton J; and *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 at [51].

Justice Ward in *John Nelson Developments Pty Limited v Focus National Developments Pty Ltd* [2010] NSWSC 150 at [197] to [204] analysed the authorities and concluded that the Court's will intervene if the expert can be shown to have undertaken something other than that which the agreement required of him or her. Her Honour said:

> **Basis on which an expert determination may be impugned**
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> 197 In *Legal & General Life of Australia Limited v A Hudson Pty Limited* (1985) 1 NSWLR 314, the Court of Appeal considered the circumstances in which an expert determination could be rendered ineffective by reference to an error on the part of the expert.
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> 198 At first instance ([1984] 1 NSWLR 1), Waddell J had drawn a distinction between an error in the application of valuation principle or a mistake in calculation, neither of which would affect the binding nature of the valuation, and an error resulting in the valuation not being in conformity with the contract, which his Honour considered would render it ineffective to bind the parties.
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> 199 On appeal, his Honour's decision was reversed, Mahoney and McHugh JJA holding that his Honour had erred in finding that the valuer had made the error in question (said to have been an error in taking a mezzanine floor area into account in determining the rental value of the premises); Priestley JA reaching the same result on the basis that the plaintiff had not discharged the onus of proving that the valuer had taken the mezzanine area into account.
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> 200 McHugh JA, having examined the relevant authorities, distilled from them [at 335-

6], the following as to the circumstances in which mistake on the part of an expert would justify the setting aside of the expert's determination:

(a) the question whether an expert determination is binding depends in the first instance on the terms of the contract, express or implied;

(b) a determination obtained by fraud or collusion can usually be disregarded (for almost certainly it would be the case that in such a case there had been no valuation in accordance with the terms of the contract; it being easy to imply a term that the determination must be made honestly and impartially);

(c) it will be difficult, and usually impossible, to imply a term that the determination can be set aside on the basis of mistake or because it is unreasonable, since, by referring the decision to an expert on the basis that the decision will be final and binding, the parties will be said to have agreed to accept the expert's honest and impartial decision, relying on the expert's skill and judgment, and have agreed to be bound thereby;

(d) *the critical question in cases where it is alleged that the expert has made a mistake is whether the determination was made in accordance with the terms of the contract* – if the mistake is of a kind which shows that the determination is not in accordance with the contract (such as where a valuer values the wrong premises), then the determination may be rendered ineffective; if the mistake is as to the application of the expert's judgment or as to what the expert has or has not taken into account, this is not a matter which affects the binding nature of the determination. (my emphasis)

201 As his Honour, much later when speaking extra-judicially in an address to the Chartered Institute of Arbitrators (Australia) Limited on 30 April 2007, noted, the statements of principle he enunciated in *Legal & General* have been recognised as well settled (referring to the judgment of Palmer J in *Kanivah Holdings Pty Limited v Holdsworth Properties Pty Limited* [2001] NSWSC 405, [at 48]). More recently, in *AGL Victoria Pty Limited v SPI Networks (Gas) Pty Limited* [2006] VSCA 173, the Court of Appeal in Victoria held that the principles outlined by McHugh JA in *Legal & General* remain applicable.

202 Mr Reuben relies upon what was said by Mason P, with whom Priestley JA agreed, in *Holt v Cox* (1997) 23 ASCR 590 at p597, namely that:

> A close reading of McHugh JA's judgment in *Legal & General* indicates that his Honour was not propounding the view that a valuation will stand regardless of error. Rather, he was making the point that mistake is not itself a ground of

> vitiation: see also *Wamo Pty Limited v Jewel Food Stores Pty Limited* (1983) ANZ Conv R 50.
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> 203 There, Mason P said that the critical question was whether the mistake was such as to render the valuation one which was not in accordance with the terms of the contract. In the *AGL* case, Nettle JA noted [at 51] that a mistake may "be of such a nature that the resultant determination is beyond the realm of contractual contemplation – *beyond anything which the parties may be supposed to have intended to be final and binding* – and therefore susceptible to review". (my emphasis)
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> 204 In *Holt v Cox*, at first instance ((1994) 15 ACSR 313), Santow J held that where there was a direction to the expert (in that case the auditor) to determine the fair price for shares compulsorily acquired, the expert was entitled to adopt his or her own methodology for so doing and that any mistakes in the methodology adopted by the expert were "mistakes in the course of doing what the contract required". It was a matter for the expert to make his or her determination in the manner in which, as a matter of his or her expert opinion, it was appropriate to do so (at 333). There, however, his Honour observed that a valuation made contrary to the principles of valuation might not produce what was contractually demanded in that case (a 'fair value').

One basis of challenging an expert report, therefore, is that the mistake is of such a fundamental error that the expert has not done what the contract asked him or her to do.

Error of Law

There does not seem to be any clear decisions in Australia where an expert has misdirected himself on a point of law and thereby made a determination on the basis of an incorrect interpretation of the legal position.

In *Fermentation Industries (Aust) Pty Limited v Burns Phil & Co* (unreported, Rolfe J NSWSC 12 February 1998; BC9800135 (reversed on appeal in [2000] NSWCA 71 but on different grounds) a distinction was drawn between an error in the exercise of discretion arrived at by the valuer and one where the expert arrived at a value that was not the current annual open market rental value as required under the contract. In the latter case Rolfe J expressed some difficulty in adopting the proposition that one could pre-suppose that notwithstanding that a valuation was made negligently, or in mistaken application of principles of valuation, it will nonetheless be made in accordance with the contract.

In the United Kingdom it has been held that if there is an error on the question of construction of the relevant agreement and, therefore, on a question of law, if the expert misinterpreted the relevant phrases and makes a determination on the basis of an incorrect interpretation, he

does not do what he was asked to do: *Mercury Communications Limited v Director General of Telecommunications* [1996] 1 WLR 48 at 58 (House of Lords).

But Ward J had this to say in *John Nelson Developments Pty Limited v Focus National Developments Pty Ltd* [2010] NSWSC 150 at [229] and [230]:

> 229 Reliance was placed by Mr Reuben on what was said in *Mercury Communications Limited v Director General of Telecommunications* [1995] UKHL 12; [1996] 1 WLR 48 at 58, namely that if there is an error on the question of the construction of the relevant agreement and the expert makes a determination on the basis of an incorrect interpretation, then the expert does not do what he or she was asked to do. There, however, the issue for determination was not the very issue in respect of which the error of law was said to have been made.
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> 230 Here, Mr Molloy was asked, as a legal expert, to construe certain clauses of the JVA. If he made an error of law in that regard (by disregarding words or by misconstruing phrases in the agreement as is submitted), this surely is an error of judgment of the kind of which the parties should be taken to have assumed the risk. His skill and judgment in construing provisions of a contract are the very matters on which the parties have placed reliance and, if he has erred in that regard, that is a risk the parties must be taken to have accepted. Therefore, I do not consider the reasoning in *Mercury* to be of assistance.

It therefore seems that, other than a Court considering the expert has erred sufficiently to render their task not met, the misinterpretation of the agreement or particular terms or concepts under it will not invalidate the determination.

Fraud or Collusion

Fraud or collusion will, however, justify the Court's setting aside the determination. This is because there has not been a true, or genuine, determination of an expert of the issue at hand. Nor, it may be said, would the expert have undertaken what was asked of them by the parties' agreement.

In this regard what constitutes collusion is of interest. As discussed under the heading "Need for Independence" below, merely interacting with the expert, or having prior dealings with them, will not be sufficient to make out a collusion allegation.

Failure to Comply with Procedural Fairness

Expert determinations contain an implied term that the expert will determine the relevant issue honestly and impartially: *Baber v Kenwood Manufacturing Co Limited* [1978] 1 Lloyd's Rep 175 at 181; *Legal & General Life of Australia v A Hudson Pty Limited* [1985] NSWLR 314 at

335.

But this requirement stops short of requiring the expert to afford the parties natural justice.

Justice Ward, again, succinctly summarises the relevant issues in *John Nelson Developments Pty Limited v Focus National Developments Pty Ltd* [2010] NSWSC 150 at [206] and [210]:

> **Duty to accord procedural fairness?**
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> 206 As to whether the expert is under a duty to accord procedural fairness, in the absence of express agreement this depends on whether the task being carried out by the expert is in the nature of a judicial enquiry. In his address to the Institute of Arbitrators, the Hon Michael McHugh AC observed that the fact that a determination was being carried out as an expert and not as an arbitrator pointed against the rules of natural justice being generally applicable to expert determinations but considered that there was a strong case for saying that where the expert was required to receive submissions from parties then the rules of natural justice should apply (on the basis that the expert determination was there analogous to a quasi-judicial enquiry).
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> 207 In *Enron Australia Finance Pty Limited (in liq) v Integral Energy Australia* [2002] NSWSC 753, Einstein J noted at [111-113] that:
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> > It is plain that when one is examining the conduct of a judicial or quasi-judicial hearing, there is an expectation of impartiality and adherence to procedural fairness (or what was formerly referred to as natural justice).
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> > However, where what is involved falls outside the realm of judicial or quasi-judicial determination, the issue is whether the principle of procedural fairness can be or should be maintained...
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> > It is of assistance to address this issue by first asking whether the ... task is to be seen as that of an arbitrator, ie a quasi-judicial determination which will automatically invoke the principles of impartiality, *or whether the task is merely that of an expert*, valuer or appraiser. (my emphasis)
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> 208 This is consistent with the authorities referred to by the Hon Michael McHugh AC, in his 2007 address referred to above, commencing with *Re Carus-Wilson and Greene* (1886) 18 QBD 7, where the Court of Appeal in England (considering the question whether an umpire appointed to make a valuation in circumstances where the respective valuers appointed by each party had disagreed was an arbitrator, decided the issue by reference to whether the umpire was bound by the rules of natural justice) drew a distinction between the conduct of an arbitration (an enquiry of a

judicial nature to be worked out in a judicial manner) and the appointment of a person to ascertain a matter, not for the purposes of settling a dispute but of preventing disputes (the latter such appointment, by inference, not being seen by the court as one for the carrying out an enquiry to be worked out in a judicial manner); and *Capricorn Inks Pty Limited v Lawter International (Australasia) Pty Limited* [1989] 1 Qd R 8, where McPherson J in the Supreme Court of Queensland at [15], contrasting an arbitration and an appraisement, said of the former that "generally what must be in contemplation is that there will be an 'inquiry in the nature of a judicial inquiry'" and where, on appeal, the Full Court was of the view that there was no right on the part of the parties to be heard where the relevant enquiry was being carried out by the accountants acting as experts not as arbitrators. Thomas J there noted that the arbitral function was to hear and resolve opposing contentions of the parties (as opposed to an appraisal or expert decision which typically would be made through specialist knowledge or skills, without any requirement or obligation of first hearing from the parties).

209 Mr Reuben pointed out that in *Fletcher Construction Australia Limited v MPN Group Pty Limited* (unreported 14 July 1997), Rolfe J, after referring to and seemingly concurring with the decision of Cole J in *Triarno Pty Limited v Tridon Contractors Limited* NSWSC (unreported 22 July 1992) (where Cole J had held that if the parties had not agreed the procedure for the expert to follow it was then a matter for the expert and not the court to determine), added that:

> In devising procedures the expert is no doubt obliged to ensure that he or she affords natural justice to both parties but, subject to that, he or she is to enter upon the determinative task as an expert and not as an arbitrator

though without explaining the basis on which there was said to be no doubt as to an obligation to afford natural justice in that instance.

210 Here, the JVA was silent as to the procedure to be adopted by an expert in determining a dispute whether that be a dispute under clause 15.3.1 or 15.3.2. Absent agreement between the parties, in accordance with *Triarno*, the procedural requirements for the determination would therefore be a matter for the expert to determine.

Thus, the significance of clauses such as clause (c)(iii) of the draft at hearing 2 above is that the expert – if not held to be performing a quasi judicial rule, such as by acting as an arbitrator – will be able to determine how they best go about their conducting the determination.

There are two basis justifying this: the parties have agreed to bind themselves in this way and, secondly, by the very nature of the task it is the expert's knowledge that will best inform how

the process is to be conducted.

Justice Brereton held to similar effect in *Carbotech-Australia Pty Limited v Yates* [2008] NSWSC 540 at [39] where his Honour said absent contrary directions by the Court in making the referral, a court appointed referee may conduct proceedings and inform himself or herself in such manner as he or she thinks fit.

The fact that the parties have called a particular procedure an "arbitration" or an "expert determination", while persuasive in determining the intention of the parties, it being a matter of contractual construction, will not be determinative of the issue: See, for example, *Edmund Barton Chambers (Level 44) Co-op Ltd v Mutual Life 7 Citizens' Assurance Co Lte* [1984] NSW Conv R 55-177; see also *IOOF Aust Trustee v SEAS Sapfor Forests* (unreported, SA Supreme Court, 3 November 1995).

In *IOOF Aust Trustee v SEAS Sapfor Forests* (unreported, SA Supreme Court, 3 November 1995) Debelle J said:

> There is no formula of universal application which will determine whether the decision-maker is an arbitrator and each case must be decided on its own facts: *Arenson v Casson Beckman Rutley & Co* [1997] AC 405 per Lord Wheatley at 427. Nevertheless, there are some indicia which provide assistance.

It is a question of which procedure the agreement lays down.

Need for Independence

Arguably, absent the requirement for the expert to be independent of the parties, expressly stipulated in the agreement, there is no need for independence on the part of the expert.

In *500 Burwood Highway v Australian Unity & Ors* [2012] VSC 596 the agreement expressly required an "independent" expert. At [121] and [131] Vickery J said:

> [121] ... The defined term refers to an "independent quantity surveyor" who the purchaser is entitled, at the cost and expense of the vendor, to appoint. Either DCWC met the contractual requirement of independence, or it did not. In determining that question, it is necessary to construe the word "independent" as it was used in Special Condition 14.5 of the Contract.
>
> ...
>
> [131] The "independent quantity surveyor" was to be nominated at AU's sole discretion. The only limitation on the appointment of the expert, apart from the description "Quantity Surveyor", was provided by the qualifying term

> "independent". The description "Quantity Surveyor" called for the appointment of a person with sufficient qualifications and experience to carry out the contractual task. Here, with the appointment of Mr Hogg and DCWC, that is not in doubt. However, the qualifying term "Independent" also needs to be given its full effect to achieve the contractual purpose of the parties. That contractual purposes has two elements.

To require independence in these circumstances is to merely construe the terms of a written agreement.

Subject to the next paragraph, there does not seem to be any decision where the need for independence has been implied into an agreement governing an expert determination process. In *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335 McHugh JA thought it easy to imply a term that a valuation must be made honestly and impartially and that parties in referring a decision to a valuer agree to accept his/her honest and impartial decision as to a valuation. His Honour is absolutely silent on implying the term of independence.

In *Thomas v UTS Rail Pty Ltd* [2016] NSWSC 991 the defendants asked Pembroke J to imply the need for independence. His Honour refused to do so but, arguably, did so by way of constructing the terms of the agreement relevant to that case.

In this regard it is also relevant that a Court is reluctant to find a professional man to have been biased or partial absent significant evidence to that effect: *McGrath v McGrath* [2012] NSWSC 578 at [16] per Pembroke J.

That an expert can have prior communications and dealings with one side of a valuation dispute is clear from the cases where the Court has upheld the expert valuations in those circumstances: *McGrath v McGrath* [2012] NSWSC 578 at [9] and [10] per Pembroke J and *Macro v Thompson (No 3)* [1977] 2 BCLR 36 at 66. The latter case also confirms at 65 that it remains open to a company to appoint as an expert ongoing advisors and consultants:[1]

> Otherwise auditors (like architects and actuaries) who have a long-standing professional relationship with one party (or persons associated with one party) to a contract might be unduly inhibited, in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of partiality.

Macro v Thompson (No 3) [1977] 2 BCLR 36 at 65-66 is significant as it shows the report of an expert, who had subsumed his mind to one party, nonetheless not being set aside:

[1] Cited by Debelle J in *Ceneavenue Pty Ltd v Martin* (2008) 106 SASR 1 at 17.

> No one suggests that Mr Foster was in this case guilty of fraud, or of collusion in the sense of an conscious and positive co-operation with Mr Graham in forwarding Mr Thompson's interest. But I have to say that Mr Foster was extremely imprudent, after instructing his own solicitor (Mr Rands) and an independent firm of experts (P-A), to continue to seek advice (as well as information) from Mr Graham (as Mr Foster, on his own evidence, did on 30 April 1994) and to discuss figures with Mr Graham and Mr Mullett (as he did both on 30 April and on 3 May, though the later meeting seems to have been relatively innocuous). Mr Foster seems to have allowed Mr Graham to obtain a position of psychological ascendency over him, and I regret to say that Mr Graham seems to have been prepared to take advantage of it. Mr Foster should have taken a much more independent line from the outset.
>
> Nevertheless it is clear that Mr Foster did not in fact agree with Mr Graham, and accept his views, at the heated meeting on 30 April (when Mr Graham called him a bloody fool, which is indicative of some independence on Mr Foster's part). He continued to work on figures for a mismanagement adjustment (although he later changed his mind about this). Apart from the relatively innocuous meeting with Mr Graham and Mr Mullett on 3 May, Mr Foster seems to have taken only his own counsel, and that of P-A, during the last five days leading up to the signing of the valuation certificates.
>
> On the whole, although the entire episode is a classic example of how not to conduct an articles valuation of shares in a private company, I am not persuaded that Mr Foster yielded sufficiently to Mr Graham's influence as to invalidate his valuation on the ground of partiality. ... I would not therefore have invalidated the valuations (if otherwise binding) on the ground of lack of impartiality.

An expert is able to have taken *'only his own counsel'*. As it did in *Macro v Thompson (No 3)* [1977] 2 BCLR 36, where such activities occurred, the valuation need not be set aside.

Equity is Broader than Common Law?

An interesting issue arises as to the extent of a Court of equity's ability to review an expert determination. Although not picked up as often as the issues raised above, the following passage of Ward J in *John Nelson Developments Pty Limited v Focus National Developments Pty Ltd* [2010] NSWSC 150 at [205] is significant:

> 205 However, relevantly, for present purposes, in *Legal & General*, McHugh JA noted (at p 336) the distinction between cases where a party sought an equitable remedy to enforce an agreement to abide by an expert determination (in which case reliance on a defence based on mistake could be made) and a case seeking a

> common law remedy (where a defence of mistake would only lie if the express or implied terms of the contract permitted). Hence, his Honour recognised that it would be open to a court in equity to decline to enforce an expert determination even though it might be binding on the parties as a matter of contract between them.

It remains to be seen whether courts of equity will take up this broader approach. It was not done so in a recent decision (*Thomas v UTS Rail Pty Ltd* [2016] NSWSC 991 per Pembroke J) but it was also not argued specifically before his Honour.

5 Enforcing the result of an expert determination

Unlike arbitration under the *Commercial Arbitration Act* 2010 (NSW), s 35 of which provides for enforcement of the arbitral awards, a party seeking to obtain the benefits of an expert determination procedure in their favour must commence proceedings in a Court of competent jurisdiction (usually the Supreme Court) for a declaration or order for specific performance of the agreement by which the parties agreed to resolve their disputes by expert determination.

The unsuccessful party may then seek to resist the plaintiff's relief sought on the basis that the Court should, in its discretion not enforce the expert determination agreement for one of the reasons referred to below or otherwise to challenge the expert determination process on the basis set out at heading 4.

Resisting the Enforcement

Various grounds have been argued for challenging an agreement to refer a dispute to expert determination. They include that:

1. Any such agreement would be void as an attempted ouster of the jurisdiction of the courts. This has succeeded in Western Australia (see *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (1998) 14 BCL 277 per Heenan J) but not in New South Wales (see *Fletcher Construction Australia Limited v MPN Group Pty Ltd* (NSW Sup Ct, 14 July 1997, unreported). Further, where the enforcement of the determination requires court intervention, can it be said there has been an ouster of the court's jurisdiction?

2. An issues in dispute is not susceptible to expert determination. This relates to the kind of relief that, it is said, can only be provided by a court.

3. An issue in dispute is not suitable for expert determination by the expert appointed (or to be appointed). However, at least in New South Wales and Queensland, if the parties have agreed the procedure for expert determination and that procedure (or the parties specifically) appoint the expert it will be binding: *Age Old Builders Pty Ltd v Swintons Limited* [2003] VSC 307[2] and *The Heart Research Institute Limited v Psiron Limited* [2002] NSWSC 646; and

4. The terms of the agreement are too uncertain, by failing to specify with sufficient particularity the procedure to be followed by the expert. It merely will not be a matter for the courts to imply terms to make good the process – but if the parties have not specified the detail, the expert will: *Triano Pty Limited v Triden Contractors Limited* (1992) 8 BCL 305 at 307 per Cole J.

[2] An appeal from this decision was dismissed, but on other grounds: [2005] VSCA 217.

Discretionary Remedy

As the Plaintiff seeking to enforce a successful expert determination will be seeking a decree of specific performance, they are seeking a discretionary remedy. They Court may, or may not, exercise that discretion.

In *Parken v Whitby* (1823) 37 ER 1142 Sir Thomas Plummer MR affirmed the right of the Court of Chancery to refuse specific performance of a contract if it thought that the sum fixed by a third party was erroneous.

In the seminal case of *Collier v Mason* (1858) 53 ER 613 it was said by Sir John Romilly that the Court acts upon the principle laid down by Lord Eldon in *Emory v Wayse* (1803) 31 ER 889, where the Court must act on a valuation unless there be proof of some mistake or some improper motive, such as if the value had valued something not included or had valued it on a wholly erroneous principle.

Justice Ward, again, made relevant comments in *John Nelson Developments Pty Limited v Focus National Developments Pty Ltd* [2010] NSWSC 150 at [205], extracted at the end of heading 4 above, and then at [300] to [304]:

> [300] As noted by Mr Reuben, the grant of a declaration is a discretionary remedy (Mr Reuben citing *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 581-2). There, the High Court said that declaratory relief will not be granted if the question is hypothetical or the relief will produce no foreseeable consequences for the parties. Another ground for refusing declaratory relief, to which the authors of *Equity Doctrine & Remedies* (4th edn) R Meagher, D Heydon, M Leeming (2002) at [19-130] have adverted, is that no good purpose will be served by granting it – citing *Rivers v Bondi Junction Waverley RSL Sub-Branch Limited* (1986) 5 NSWLR 362.
>
> [301] In relation to the Molloy determination, it was submitted that the court should refuse to exercise its discretion to grant a declaration where the conclusion reached in the determination is clearly wrong. I am not persuaded that it is the case that the Molloy determination is clearly wrong (if the Molloy determination is read as being restricted to the construction of particular clauses in isolation, rather than the operation of the contract as a whole in the circumstances which have arisen).
>
> [302] Declaring that the Molloy determination (as so limited) is binding on the parties would not amount to a finding that Mr Molloy's construction of the contract is correct as a matter of law (simply that the parties had agreed to accept it as such) nor would it require the court to endorse what, on balance, I have found to be an incorrect application of the contract clauses in the particular circumstances of this case. Rather, it would simply acknowledge what the parties had agreed would be the case – that they would, as between themselves, be bound by a determination made in good faith by an impartial expert (implicitly accepting that it might not accord with what a court would determine) insofar as such a construction might be relevant. To hold otherwise

would, in my view, undermine the process of expert determination.

[303] I understand the force of the comment by the Hon McHugh AC that there is a natural judicial reluctance to uphold a decision which is regarded as unreasonable (or, here, to declare binding a determination of the construction of the contract with which I respectfully disagree). However, I am conscious also of the fact that it is well accepted in the context of expert determinations that parties choosing this means of alternative dispute resolution (whether for disputes involving legal or other issues) do so accepting that the expert may make errors of judgment or principle which will not be susceptible to review by the courts at a later stage.

[304] Accordingly, I would have been prepared to make the declaration sought as to the binding nature of the Molloy determination as to the construction of the various clauses of the agreement but for my concern that to do so will confuse the real issue between the parties and that it will be of no real utility.

It can be seen that a court will be reluctant to refuse to enforce an expert determination that otherwise is not subject to fraud or collusion, but the relief remains discretionary and the courts discretion must, as a matter of course, be invoked.

7 The liability, if any, of an expert in respect of an expert determination

An expert acting in the context of an expert determination (as opposed to an arbitration) is not carrying out an arbitral or quasi-arbitral function and, therefore, does not have the protection from liability which is provided by s 39 of the *Commercial Arbitration Act* 2010 (NSW) or the common law immunity: see *Sutcliffe v Thackerah* [1974] AC 727.

In the absence of an appropriate release and indemnity, an expert may be liable to the parties (and perhaps to third parties) in either contract or tort (or both) for failing to act in accordance with the terms of their appointment, or for failing to exercise the standard of care and diligence expected of an expert in his or her position. Given that the expert is often sought because of their particular expertise and the appointment is in the context of a dispute this standard could be quite high.

Until relatively recently, there was some uncertainty in Australia in relation to the recoverability of pure economic loss, in negligence, and the nature and extent of any duty of care in negligence concurrent with an existing contractual duty. Any such uncertainties have been resolved in three decision:

- *Bryan v Maloney* (1994-1995) 182 CLR 609;
- *Hill v Van Erp* (1997) 142 ALR 687; and
- *Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg)* (1997) 142 ALR 750.

Earlier, in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 84 Windeyer J[3] referred to the standard of care owed by an architect to his or her client (emphasis added):

> *He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainment. But he must bring to the task he undertakes the competence and skill that is usual among architects, practising their profession.* And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from a breach of his contract or in tort.

Subsequently, when dealing with the question of liability to a third party, Windeyer J said at 84:

> Whatever might have been thought to be the position before the broad principles of the law of negligence were stated in modern form in *Donoghue v Stevenson* [1932] AC

[3] With whom Dixon CJ and Owen J agreed.

> 562, it is now beyond doubt that, for the reasonably foreseeable consequences of careless or unskilful conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence. To such a person he owes a duty of care quite independently of his contract of employment.

It follows that an expert would seek a release and indemnity from the parties to the dispute on which he or she is called to inquire. Such a release and indemnity would be well placed in the parties' agreement. A failure to do so may mean that an expert cannot be found who will be prepared to determine the dispute and the whole process – which exists to resolve disputes between the parties without the need for litigation – may break down. See, for example, the case of *Triamo Pty Limited v Triden Contractors Limited* (1992) 8 BCL 305.

8 Conclusion

Expert determinations are already commonly used and seem to becoming more common in time. They are likely to continue to play the extra-curial role in dispute resolutions that they have fixed. Their benefit is obvious: a person with skills targeted to the dispute will, in their own way and process, address the dispute. The parties, knowingly at the time of their agreement, agree to be bound by that process.

The courts are reluctant to enter the field of the expert, but this does not mean the expert is immune from review or liability.

Many of the pitfalls that exist with expert determination procedures can be addressed in the careful drafting of the clause that governs the process.

Defining in the agreement what matters are to be considered is critical. Some parameters about how that is to occur is very helpful. As is an indemnity and release for the proposed experts.

They must, of course, avoid fraud or collusion.