Supreme Court of Victoria

Raskin v Mediterranean Olives Estate Limited & Ors [2017] VSC 94 (8 March 2017)

Last Updated: 10 March 2017

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMERCIAL COURT

S ECI 2016 01239

REBECCA RASKIN	Plaint
v	
MEDITERRANEAN OLIVES ESTATE LIMITED (ACN 091 024 396) & ORS	Defendan

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JUDGE:	HARGRAVE J
WHERE HELD:	Melbourne
DATE OF HEARING:	8 March 2017
DATE OF JUDGMENT:	8 March 2017
CASE MAY BE CITED AS:	*Raskin v Mediterranean Olives Estate Limited& Ors*
MEDIUM NEUTRAL CITATION:	[2017] VSC 94

ALTERNATIVE DISPUTE RESOLUTION – Expert determination clause – Whether clause a submission to arbitration – Held: no submission –*Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38; (2011) 244 CLR 305; *In re Dawdy and Hartcup* (1885) 15 QBD 426; *In re Carus-Wilson and Greene's Arbitration* (1886) 18 QB 7 applied.

ALTERNATIVE DISPUTE RESOLUTION – Expert determination clause – clause uncertain and thus unenforceable – *WTE Co-Generation& Anor v RCR Energy Pty Ltd & Anor* [2013] VSC 314 discussed and explained.

ALTERNATIVE DISPUTE RESOLUTION – Expert determination clause – Application for stay of proceeding based on clause – Multiplicity of proceedings – Wide disputes involving questions of expert knowledge and mixed fact and law – No procedural instructions to expert – Stay refused – *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135; [2005] 2 Qd R 563; *Dance with Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332 [54] discussed and applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D F McAloon	Strongman & Crouch
For the Defendants	Mr O Bigos	Madgwicks Lawyers

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1 The plaintiff, Rebecca Raskin, invested in the Mediterranean Olives Project ('the project') in each of the 2007 and 2008 financial years. The project is a registered managed investment scheme under the Corporations Law. The responsible entity is the first defendant, Mediterranean Olives Estate Limited ('Mediterranean Olives'). The second defendant, Anthony May, is a director of Mediterranean Olives. He is also a solicitor. In his capacity as a director of Mediterranean Olives, he promoted the project to the plaintiff prior to her investment in it. Although a relevant witness in the proceeding, Mr May is acting as the solicitor for Mediterranean Olives and for himself, through the firm of Madgwicks of which he is a partner.

2 The proposed third defendant, Mediterranean Olives Land Pty Ltd ('the project landowner') owns the land on which the project is conducted. Mr May is also a director of the project landowner and, through his shareholding in Purus Nominees Pty Ltd, owns a beneficial interest in the project landowner. Purus Nominees owns 50 per cent of the shares in the project landowner.

3 The plaintiff's allegation in the proceeding may be summarised as follows:

(1) While Mr May executed a series of documents relating to the 2007 scheme for the plaintiff (on the basis that he was her 'Attorney under Power'), the execution of two of those agreements (namely, the 2007 Grove Lease and the 2007 Lease Agreement) was not authorised.

(2) Prior to June 2008 and before the plaintiff applied for hectares in the project's 2008 scheme, Mr May provided the plaintiff with year-by-year projections of income and expenses for the project ('projections'). The plaintiff relied upon the projections. The projections were misleading and neither Mediterranean Olives nor Mr May had reasonable grounds for providing them.

(3) The conduct of Mediterranean Olives and Mr May in relation to flood damage affecting the project in 2011 (which resulted in significant tree losses) amounted to multiple breaches by Mediterranean Olives and Mr May of their obligations arising under div 1 of pt

5C.2 of the Corporations Act 2001 (Cth) ('the Act') and breaches by Mediterranean Olives of the fiduciary duty it owed to the plaintiff, including in circumstances where:

(a) tree losses were not disclosed to the plaintiff in a timely or accurate fashion;

(b) invoices were issued to the plaintiff (and paid by her) in amounts exceeding her liability, as the invoiced amounts did not reflect the reduced holdings of the plaintiff following the flood event (for instance, of the 24 hectares leased by the plaintiff under the 2007 Grove Lease, only 6.5 hectares survived);

(c) extensive replanting of the plaintiff's grovelots (the replanting) was undertaken in a manner that was not disclosed to the plaintiff and in circumstances where:

(i) the primary beneficiary of the replanting was not the plaintiff but rather was Mediterranean Olives and/or the project land owner (an entity part-owned by Mr May via his shareholding in Purus Nominees Pty Ltd); and

(ii) the plaintiff has been charged significant fees in connection with the immature grovelots attributable to the replanting; and

(4) Mediterranean Olives has mismanaged the project and failed to perform its contractual obligations arising from the 2007 and 2008 management agreements relating to the project, which were executed by Mr May as the plaintiff's Attorney under Power.

4 In summary, the plaintiff seeks the following relief in the proceeding on the basis of the facts presently pleaded (ie before any joinder of the project landowner as proposed):

(1) a declaration that she is not a party to two of the agreements pertaining to the 2007 scheme (namely, the 2007 Grove Lease and the 2007 Lease Agreement);

(2) restitution of the sums paid by the plaintiff pursuant to the 2007 Grove Lease and the 2007 Lease Agreement;

(3) compensation from Mediterranean Olives and Mr May under s 1041I of the Act, under s 12GF of the Australian Securities and Investments Commission Act 2001 (Cth) and/or under s 159 of the Fair Trading Act 1999 for loss and damage arising from the plaintiff's reliance on the projections;

(4) damages for breach of the management agreements;

(5) a declaration that Mediterranean Olives and Mr May contravened s 601FC and s 601FD of the Act respectively and orders for compensation under s 601MA and/or s 1325 of the Act; and

(6) an order under s 601ND(1) of the Act that Mediterranean Olives be ordered to wind up the project on the basis that it is just and equitable for the Court to make such an order.

5 The defendants have not filed a defence. By summons filed 3 February 2017, the defendants have applied to stay the proceeding 'until the determination of the dispute by the independent expert in accordance with the project documents'.

6 By summons filed 31 January 2017, the plaintiff applied under r 9.06(b) to join the project landowner as a third defendant. The proposed joinder, if allowed, will enable the plaintiff to

pursue a ‘knowing receipt’ claim against the project landowner, as set out at paragraphs 44A to 44D of the proposed amended statement of claim. This claim arises out of the existing claims made in the proceeding by the plaintiff, being founded on the following allegations:

(1) the replanting was a breach of the fiduciary duty owned by Mediterranean Olives to the plaintiff (to act in her best interests and not to act for the benefit of Mediterranean Olives or a third party without her informed consent);

(2) Mr May knew or ought to have known that the replanting was not in the plaintiff’s interests but, rather, was in the interests of Mediterranean Olives and/or the project landowner;

(3) with the knowledge of Mr May (described above at (2)), the project landowner became a beneficiary of the replanting; and

(4) by reason of its knowing receipt of property (namely, the entitlement to benefits arising from the replanted grovelots at the end of the project), the project landowner is liable in equity to the plaintiff.

7 For the reasons given in the course of discussion with counsel, the plaintiff’s application was adjourned to enable a revised form of proposed pleading against the project landowner. However, the Court determined that the proposed claims were not fanciful, and ought not be shut out on the ground that they had no real prospect of success.[1]

8 This proceeding was commenced on 17 October 2016. On 26 October 2016, the defendants served a dispute notice on the plaintiff, purportedly under clause 27.1 of the constitution which governs the project (‘project constitution’). There is no issue that the project constitution governs the relationship between Mediterranean Olives and the plaintiff and that disputes under any of the project documents are within the scope of clause 27 of the project constitution. However, Mr May is not a party to the constitution or the project documents and has no contractual entitlement under them. Nor does the project landowner.

9 Clause 27 of the project constitution provides as follows:

> **27. DISPUTE RESOLUTION**
>
> 27.1 **Dispute Notice**
>
> Any party asserting a dispute in relation to the Project, including a dispute under any Project Agreement, must give the other party to the dispute a Dispute Notice. The Dispute Notice must state:
>
> (a) what is in dispute;
>
> (b) the arguments of the party giving the Dispute Notice; and
>
> (c) what should be done to rectify the dispute.
>
> 27.2 **Response to Dispute Notice**

The party receiving the Dispute Notice must respond in writing within five Business Days of receiving the Dispute Notice.

27.3 **Settlement Conference**

If the dispute is not resolved within 21 days after service of a Dispute Notice, then:

(a) the parties must attend a settlement conference in the presence of an Independent Person to attempt to resolve the dispute; and

(b) the settlement conference must be held within 21 days (or at a later time to meet the convenience of the Independent Person) from a notice convening the conference being sent by one of the parties.

27.4 **Negotiations without Prejudice**

Evidence of anything said or done in the course of attempting to settle a dispute is not admissible in subsequent proceedings.

27.5 **Continued Performance**

During the dispute resolution process the parties must continue to perform their obligations under the Constitution and the Project Agreements.

27.6 **Expert's Determination**

If the parties are unable to resolve the dispute within 7 days after attending a settlement conference with the Independent Person, then either party may require the dispute to be submitted to and settled by an Independent Expert. *The Independent Expert may be the same person as the Independent Person*. The decision of the Independent Expert will be final and binding on the parties. The Independent Expert must also determine which party or parties pays the costs of and incidental to the resolution of the dispute.[2]

10 'Independent Person' and 'Independent Expert' are defined in the project constitution in the following manner:

(a) *in the case of a dispute relating to agricultural matters, including management of the Grove* and sale of olives, an Independent horticultural expert agreed between the parties or, ...

(b) *in the case of a dispute relating to the management of the Project or the legal interpretation of this Constitution or any Project Agreement*, an independent lawyer agreed between the parties or, ...

(c) *in the case of a dispute relating to any financial or accounting aspect of the Project*, an independent chartered accountant agreed between the parties or, ...

where no agreement is reached within 2 Business Days of the parties each having submitted to the other names of potential candidates, a person appointed by the President of the Institute of Chartered Accountants In Australia (Victorian Branch).[3]

11 The dispute notice is in the following terms:

DISPUTE NOTICE

26 October 2016

To:

Rebecca Raskin

Strongman & Crouch Solicitors

Level 15, 114 William Street

Melbourne VIC 3000

Dear Ms Raskin

Mediterranean Olives 2007

Mediterranean Olives 2008

Mediterranean Olives Estate Ltd ACN 091 024 396 (**Responsible Entity**) hereby notifies you (Grower) that a dispute has arisen between the Grower and the Responsible Entity.

This dispute notice is given by the Responsible Entity to the Grower in accordance with clause 27.1 of the Project Constitution. It is addressed to the Grower care of her solicitors.

The dispute relates to claims by the Grower articulated In Supreme Court proceeding SECI 2016 1239 (a) that she is not a party to the 2007 Grove Lease or the 2007 Lease Agreement, (b) for restitution of all sums paid by her to the Responsible Entity pursuant to the 2007 Grove Lease or the 2007 Lease Agreement, (c) for compensation or damages from the Responsible Entity in respect of the Grower's Investment, (d) for interest and costs.

The Responsible Entity denies the claims by the Grower.

In order to rectify the dispute, the Responsible Entity and the Grower ought to attend a settlement conference before an independent person, in accordance with clause 27.3 of the Project Constitution. We invite you to communicate with us about an appropriate mediator and date for mediation.

If the parties are unable to resolve the dispute within 7 days after attending the settlement conference, either party may require the

dispute to be submitted to and settled by an Independent Expert, in accordance with clause 27.6 of the Project Constitution.

The Responsible Entity reserves its right to seek a stay of Supreme Court proceeding SECI 2016 1239 including under s 8 of the *Commercial Arbitration Act 2011* (Vic), at general law, and under the inherent jurisdiction of the Court.

The Responsible Entity looks forward to your prompt response.

Yours sincerely

[SIGNED]

Anthony May

For and on behalf of

Mediterranean Olives Estate Ltd

ACN 091 024 396[4]

12 Following the service of the dispute notice, the parties attended a settlement conference before an independent person in accordance with clause 27.3 of the project constitution. No settlement was reached at that conference.

13 By a 'referral to expert determination' notice dated 3 February 2017 and served on the plaintiff (the 'referral notice'), Mediterranean Olives purported to refer 'the dispute' to expert determination by a single Independent Expert. The referral notice was in the following terms:

REFERRAL TO EXPERT DETERMINATION

3 February 2017

To:

Rebecca Raskin

c/- Andrew Joseph

Strongman & Crouch Solicitors

Level 15, 114 William Street

Melbourne VIC 3000

Dear Ms Raskin

Mediterranean Olives Project 2007

Mediterranean Olives Project 2008

(together, Projects)

We refer to the Dispute Notice dated 26 October 2016 sent to you (**Grower**) by Mediterranean Olives Estate Ltd ACN 091 024 396 (**Responsible Entity**) in accordance with clause 27.1 of the Project Constitution. The Dispute Notice notified you that a dispute has arisen between the Grower and the Responsible Entity in relation to the Projects.

Since then the parties have, unsuccessfully, held a mediation in December 2016, thereby satisfying the requirement of a settlement conference under clause 27.3 of the Project Constitution.

The purpose of this notice is to notify you that the Responsible Entity *requires the dispute to be submitted to be settled by an Independent Expert, whose determination will be final and binding* on the parties, in accordance with clause 27.3 of the Project Constitution.

Enquiries will be made regarding the availability of a person to be appointed Independent Expert.

The dispute relates to the claims by you articulated in Supreme Court proceeding SECI 2016 1239. It is noted that the claims as presently articulated include claims against Anthony Henry May. Mr May has confirmed that he agrees to participate in the determination before the Independent Expert and to be bound by the result. It is also noted that you have indicated that you intend to amend your claim in the Supreme Court proceeding so as to bring a claim against Mediterranean Olives Land Pty Ltd. That company too has confirmed that it agrees to participate in the determination before the Independent Expert and to be bound by the result.

The Responsible Entity reserves its right to seek a stay of Supreme Court proceeding SECI 2016 1239 including under s 8 of the *Commercial Arbitration Act 2011* (Vic), at general law, and under the inherent jurisdiction of the Court.

The Responsible Entity looks forward to your prompt response.

Yours sincerely

[SIGNED]

Anthony May

For and on behalf of

Mediterranean Olives Estate Ltd[5]

14 On 21 February 2017, Mr May proposed that any one of three named senior counsel could serve as the single Independent Expert.

15 Against this background, the issues raised by the parties for determination may be summarised as follows:

(1) Was there a submission to arbitration?

(2) Is the expert determination clause void for uncertainty?

(3) Should the proceeding be stayed?

Was there a submission to arbitration?

16 I will deal first with the contention that the Commercial Arbitration Act applies. The defendants contend that clause 27.6 of the project constitution, which I will refer to as 'the expert determination clause', is an 'arbitration agreement' within the meaning of s 7(1) of the Commercial Arbitration Act, which provides:

> (1) An ***arbitration agreement*** is an *agreement by the parties to submit to arbitration* all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[6]

17 If there is no arbitration agreement (as defined) then the Commercial Arbitration Act has no application. In particular, s 8(1) of the Commercial Arbitration Act has no application.

18 The defendants contend that the expert determination clause is, in substance, a submission to arbitration of disputes between Mediterranean Olives and Ms Raskin under the project documents. They rely upon the following factors as supporting this contention:

(1) The result of the expert determination is to be final and binding; and

(2) The expert determination clause does not contain a statement that the independent expert is to act 'as an expert and not as an arbitrator', as is frequently the case in expert determination clauses.

19 The defendants rely upon the decision of the High Court in Shoalhaven City Council v Firedam Civil Engineering Pty Ltd.[7] They point in particular to the following statement by French CJ, Crennan and Kiefel JJ:

> *Hudson's Building and Engineering Contracts* refers to the increasing diversity of dispute avoidance and resolution mechanisms in modern contracts. It points to the need to give careful consideration 'to the true nature of the specific role described in the contract, because the consequences of the different nature of the roles can be radical'. The range of issues able to be entrusted to Expert Determination under the Contract was wide. *That width, and the associated procedures, might be thought to indicate proximity to an arbitral function.* In this case, however, the Contract expressly provided that the Expert was to act 'as an expert and not as an arbitrator'. 'Expert Determination' was defined in the Contract by reference to the procedures set out in the Contract.[8]

20 The defendants place particular reliance on the lack of any reference in the expert determination clause in this case to a provision that the Independent Expert was to act 'as an expert and not as an arbitrator'. They contend that this omission assists a conclusion that arbitration was intended, because such provisions are commonplace in expert determination clauses. I do not accept that submission. The importance of such a provision is to take an alternative dispute resolution clause which might indicate an arbitration agreement outside that categorisation, as in Shoalhaven. The lack of such a provision does not assist in determining that an expert determination clause was intended to be a submission to arbitration; except, perhaps, in a borderline case — which this is not.

21 The footnote to the italicised portion of the quoted passage from Shoalhaven is important. It reads:

> The distinction between expert and arbitrator was enunciated in *In re Dawdy and Hartcup* (1885) 15 QBD 426, 430; *In re Carus-Wilson and Greene's Arbitration* (1886) 18 QB 7, 9 (Lord Esher MR), 10 (Lindley LJ and Lopes LJ). Recent decisions include *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646; *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134; *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563.[9]

22 Thus, the High Court accepted that the distinction between expert and arbitrator is that enunciated by the Court of Appeal in England in two cases. First, re Dawdy and Hartcup.[10] In that case, Lord Esher MR described an arbitration as a process:

> to be conducted according to judicial rules, where the person who is appointed arbitrator is bound to hear the parties, to hear evidence if they desire it, and to determine judicially between them. *He must have a matter before him which he is required to consider judicially*. As a consequence of this, it has been held that if a man is, on account of his skill in such matters, appointed to make a valuation, in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge.[11]

23 In the course of considering whether the agreement was a submission to arbitration, Lord Esher noted that the agreement contained 'nothing to shew the mode in which' the relevant valuation was to be made, and there was 'nothing to shew that they are to hear the parties, and determine judicially between them'.[12]

24 Second, In re Carus-Wilson and Greene's Arbitration.[13] In that case, Lord Esher MR put the matter in the following way:

> *If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry*, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. *The intention in such cases is that there shall be a*

> *judicial enquiry worked out in a judicial manner*. ... There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases, it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances. [14]

25 Returning to Shoalhaven, as noted in the above-quoted passage, the agreement in that case might have been 'thought to indicate proximity to an arbitral function',[15] because the disputes were wide and there were detailed contractual provisions as to the procedures to be adopted by the expert in that case. These were summarised in the joint judgment of French CJ, Crennan and Kiefel JJ in the following terms:

> Schedule 6 to the General Conditions specified the procedure for Expert Determinations under the Contract. Relevantly to a claim for compensation, the Expert was required to determine, for each referred issue, whether there was any, and if so what, event, act or omission giving the claimant a right to compensation. The dates of any such event, act or omission were to be identified and also the legal right which would give rise to a liability for compensation. The Expert was, in the light of his answers, to state what compensation, if any, was due from one party to the other, when it fell due and the interest payable. The Expert was required to determine any other questions identified or required by the parties in respect of any referred issue, having regard to the nature of the issue. As appears below, the Expert complied 'meticulously' with these requirements.
>
> Schedule 6 also provided for submissions and for a conference of the parties. In cl 4 it defined the role of the Expert:
>
> *Role of Expert*
>
> 1. The *Expert*:

1. acts as an Expert and not as an arbitrator;
2. must make its determination on the basis of the submissions of the parties, including documents and witness statements, and the Expert's own expertise; and
3. must issue a certificate in a form the Expert considers appropriate, stating the Expert's determination and giving reasons, within 16 weeks, or as otherwise agreed by the parties, after the date of the letter of engagement of the Expert referred to in clause 75.2 of the General Conditions of Contract.

> The terms 'Expert', 'Expert Determination' and 'Issue' were all defined in the General Conditions by reference to their usage in cll 73 and 75. Specifically, the term 'Expert Determination' was defined as: 'The process of determination of an Issue by an Expert, under clause 75 and the procedure in Schedule 6 (Expert Determination Procedure).'[16]

26 These kinds of procedures are entirely lacking in this case. The expert determination clause says nothing whatsoever about the procedures to be adopted by the independent expert in settling the dispute. Nor do I think such procedures can be implied, so as to indicate an intention by the parties that the independent expert is to resolve the dispute by judicial enquiry worked out in a judicial manner. Such an implication would be inconsistent with the fact that the independent expert may be the same person as the independent person who conducted the settlement conference, and who will likely know of the without prejudice negotiations which occurred at that conference.[17] Such a situation is inconsistent with the determination of a dispute in a judicial manner.

27 I conclude that the expert determination clause does not constitute a submission to arbitration.

28 Before considering whether the proceeding should be stayed on discretionary grounds, as a means of de facto enforcement of the expert determination clause, it is necessary to consider whether the expert determination clause is void for uncertainty.

Is the expert determination clause void for uncertainty?

29 The plaintiff contends that the expert determination clause is void for uncertainty. Reliance was placed upon the decision of Vickery J in WTE Co-Generation & Anor v RCR Energy Pty Ltd & Anor.[18] In WTE Co-Generation, Vickery J considered an agreement containing a clause requiring the parties, in response to a notice of dispute served by a party, to engage in a settlement conference as a pre-condition to a party commencing a legal proceeding. The plaintiffs in that case contended that the agreement to negotiate at a settlement conference was uncertain and unenforceable. In this context, Vickery J summarised some of the legal principles relating to whether 'dispute resolution clauses' are enforceable. Relevantly, his Honour stated:

4. Dispute resolution clauses in contracts should be construed robustly to give them commercial effect. The modern approach to the construction of commercial agreements is generally to endeavour to uphold the bargain by eschewing a narrow or pedantic approach in favour of a commercially sensible construction, unless irremediable obscurity or a like fundamental flaw indicates that there is, in fact, no agreement.
5. Honest business people who approach a dispute about an existing contract will often be able to settle it. If business people are prepared in the exercise of their commercial judgment to constrain themselves by reference to express words that are broad and general, but which nevertheless have sensible and ascribable meaning, the task of the court is to give effect to and not to impede such solemn express contractual provisions. Uncertainty of proof does not detract from there being a real obligation with real content.
6. A dispute resolution clause in a contract, consistently with public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, enforceable content be given to contractual dispute resolution clauses.
7. The trend of recent authority is in favour of construing dispute resolution clauses where possible, in a way that will enable those clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court.

8. *The court does not need to see a set of rules set out in advance by which the agreement, if any, between the parties may in fact be achieved*. The process need not be overly structured. However, the process from which consent might come must be sufficiently certain to be enforceable.[19]

30 With respect, I do not accept that the emphasised sentence in paragraph 8 of Vickery J's summary is correct as a matter of general principle. The sentence is based on the decision of Warren J (as the Chief Justice then was) in Computershare Ltd v Perpetual Registrars Ltd.[20] That case relevantly concerned the enforceability of an agreement to negotiate in good faith (a specified objective standard) to either resolve the dispute or to agree on:

> (i) a process to resolve all or at least part of the Dispute without arbitration or court proceedings (eg, mediation, conciliation, executive appraisal or independent expert determination),
>
> (ii) the selection and payment of any third party to be engaged by the parties and the involvement of any dispute resolution organisation,
>
> (iii) any procedural rules,
>
> (iv) the timetable, including any exchange of relevant information and documents, and
>
> (v) the place where meetings will be held.[21]

31 It was on the basis of the particular clause in the particular contract, that her Honour held that:

> *In these circumstances*, the Court does not need to see a set of rules [set] out in advance by which the agreement, if any, between the parties may in fact be achieved.[22]

There is no general legal principle to that effect applying to all kinds of alternative dispute resolution clauses.

32 Vickery J determined in WTE Co-Generation that the clause at issue was uncertain and unenforceable because:

46. as a minimum, what is necessary for a valid and enforceable dispute resolution clause, is to set out the process or model to be employed, and in a manner which does not leave this to further agreement. It is not for the court to substitute its own mechanism where the parties have failed to agree upon it in their contract. ...[23]

33 In reliance on that statement, the plaintiff contends that the dispute resolution clause is uncertain because it does not 'set out the process or model to be employed' by the expert in determining the dispute, but leaves that process or model to subsequent agreement between the parties and the expert.

34 In my opinion, care needs to be taken in applying the statements in WTE Co-Generation to cases involving expert determination clauses. That case did not involve an

expert determination clause, but a requirement to engage in a settlement conference. Although there is some commonality of approach, different kinds of alternative dispute resolution clauses may involve differing approaches. The context in which the alternative dispute resolution clause appears and is intended to operate will always be a relevant factor to consider. General rules should be viewed with caution, and each case determined on its own facts. In particular, whether an expert determination clause is uncertain will depend on the context of the clause in the contract as a whole; the nature and width of the dispute or disputes which are or may be referred to the expert; and the content of the issues he or she must consider to determine the dispute.[24]

35 The defendants also rely upon WTE Co-Generation, for the purpose of submitting that dispute resolution clauses should be construed robustly so as to give them commercial effect, and the task of the Court is to give effect to the words used by the parties. They contend that the 'trend of recent authority is in favour of construing dispute resolution clauses, where possible, in a way that will enable those clauses to work ... and to be relatively slow to declare such provisions void ... for uncertainty ...'. Applying this approach, the defendants contend that the Court should find that:

(1) the whole of the dispute relates to the management of the project and that, accordingly, it is only necessary to refer the disputes in the statement of claim, which the defendants deny without filing a defence, to a single Independent Expert who is an independent lawyer; and

(2) if that is done, the parties and the Court can reasonably expect that the independent lawyer will provide procedural fairness, as if he or she was required to act as an arbitrator or judicially.

36 On this basis, the defendants contend that the expert determination clause is not uncertain. For the following reasons, I do not accept those contentions.

37 In a simple case, involving a single issue to be determined by an expert applying his or her own observation, knowledge and expertise in the absence of disputed facts and in the ordinary course of the expert's practice, the essential elements of an expert determination clause may not include agreement as to the procedure the expert is to apply to the task. In such cases, the criterion specified in the expert determination clause may be sufficient. An example is an expert determination clause referring the market value of a property to an expert valuer. Agreement as to the procedure may be unnecessary in such a case.

38 Simple cases of that kind stand in sharp contrast to a case such as the present. In my opinion, reading the statement of claim as a whole, it is evident that the disputes relate to overlapping horticultural, accounting, and management and legal interpretation issues. Each of those issues may involve disputed questions of fact, law (including legal interpretation of the project constitution and other project agreements) and mixed fact and law.

39 Reading the expert determination clause in the context of the project constitution and related project documents (the leases and the management agreements), it is clear that the parties recognised that the possible range of disputes to be referred for expert determination included disputes in a variety of circumstances, involving the recognised need for differently qualified experts to determine disputes according to their nature. The definitions of 'Independent Person' and 'Independent Expert' make this intention plain. In these circumstances, there were two essential matters for the parties to agree in order for

the expert determination clause to be sufficiently certain to cater for the range of possible disputes and the possibility they may overlap, as here.

40 First, agreed procedural directions to the expert. There are no such directions in the expert determination clause.

41 Second, agreement as to how disputes involving overlapping fields of expert disciplines are to be resolved. The expert determination clause does not deal with that issue. For example:

(1) What is to happen if one party refers an accounting issue to a chartered accountant and another party refers a dispute concerning a horticultural issue to a horticultural expert? Was it intended that there should be two parallel expert referrals which might conflict or lead to different outcomes? Such a course could not have been intended by commercial parties acting sensibly.

(2) What is to happen if a horticultural expert reaches a different finding on a relevant fact to that reached by a chartered accountant or an independent lawyer? Was it intended that, where there is overlap, all disputes be determined by an independent lawyer in accordance with procedural fairness?

42 In my opinion, these are essential matters which ought to have been included in the expert determination clause to make it sufficiently certain to be enforceable. Their absence makes the clause uncertain and unenforceable.

Should the proceeding be stayed?

43 My conclusion that the expert determination clause is uncertain and thus unenforceable makes it unnecessary to consider whether the proceeding should be stayed on the basis of the clause. However, should that conclusion be wrong, I would nevertheless have refused the stay application. My reasons follow.

44 The defendants rely upon the inherent power of the Court to stay a proceeding where the parties have by contract agreed that their dispute shall be determined by a means other than legal proceedings. The submission was summarised in paragraph [21] of the defendants' written outline of submissions, as follows:

> The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner. However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate: *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135; (2005) 2 Qd R 563 [19], [21]; *Mineral Resources Ltd v Pilbara Minerals Ltd* [2016] WASC 338, [54].

45 Although I accept that the plaintiff bears a heavy onus in opposing a stay application in circumstances where a defendant has invoked an enforceable expert determination clause extending to resolution of the issues raised in the plaintiff's statement of claim, this is a case where that heavy onus has been discharged. My reasons follow.

46 I accept that the two cases relied upon by the defendants support the general propositions for which they contend. However, while establishing those propositions, the cases also contain relevant statements as to the circumstances where the heavy onus may be discharged, and it will be appropriate to refuse a stay.

47 In Zeke Services Pty Ltd v Traffic Technologies Ltd,[25] Chesterman J considered a stay application based on an expert determination clause in a share sale agreement concerning a vendor's warranty claim. The clause was in the following terms:

> **7.6 Warranty Claims**
>
> In the event the Purchaser makes a claim ... for damages for breach of any of the Warranties in accordance with this clause 7 ...
>
> ...
>
> (e) if the Claim has not been resolved ... either party may refer the matter to the Australian Institute of Chartered Accountants to appoint an independent expert (Expert) to resolve the Claim. Any decision of the Expert will be final and binding on the parties ... The costs of the Expert will otherwise be borne equally by the parties.[26]

48 Apart from agreeing to the basis on which costs of the expert determination would be paid, there was no agreement as to any procedures to be applied by the expert accountant in determining the dispute.

49 After recognising the existence of the Court's inherent power to stay proceedings on the basis of an expert determination clause binding the parties, and setting out the general position that 'parties should be held to their bargain to resolve their dispute in the agreed manner',[27] Chesterman J continued:

> [21] ... However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate.
>
> [22] *Ordinarily I would think that that onus can be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism the parties have chosen. This consideration includes the procedure, if any, for which the parties have contracted, and the qualification of the expert or referee to embark upon the determination of the dispute.* The parties are

> presumed not to have intended that their dispute should be resolved by someone not qualified for the task, or in some inappropriate manner. ...
>
> ...
>
> [24] It follows that if a dispute is not of a kind which can be determined in an informal way by reference to the specific technical knowledge or the learning of the expert, it *may be appropriate* to refuse a stay. Complicated disputes of fact or of law *may be of such a character*.[28]

50 Chesterman J then proceeded to explain why, in the circumstances of the particular case, it was appropriate to refuse a stay in the exercise of his discretion. In summary, this was because three significant aspects of the dispute were not suitable for expert determination by an accountant,[29] as those issues involved disputed questions of mixed fact and law which were 'more readily answered by a lawyer than an accountant',[30] or by a 'trained fact-finder such as a judge or arbitrator'.[31] In his Honour's opinion, these aspects of the dispute were not appropriate for determination by an accountant exercising special knowledge.[32] Chesterman J continued:

> [32] It is at this point that the absence from the agreement of procedural rules to be observed by the expert becomes of importance. Their absence is unremarkable in a case where the expert relies upon his own senses and learning, but where he is obliged to investigate disputed questions of fact and/or law, and come to a conclusion about them, the lack of a methodology for the inquiry is significant. *An expert, unless obliged to do so by the contract or the terms of his appointment, does not have to comply with the requirements of procedural fairness or natural justice.* The agreement does not contain such a requirement.[33]

51 In the result, Chesterman J concluded that the answers to the three aspects of the dispute could not 'be found in expert observation, nor in formal, one-sided, fact-finding.'[34] On this basis, given that the Court would need to determine the three issues, it was appropriate that the Court should determine all issues involved in the dispute between the parties and the stay application in that case failed.[35]

52 With one qualification, I generally agree with the approach undertaken by Chesterman J in Zeke Services. The qualification is that these may be cases where the Court will imply a term in an expert determination clause providing for referral of a dispute to an independent lawyer, to the effect that the independent lawyer must provide procedural fairness to the parties in reaching his or her determination. There is no general rule to the contrary. It all depends on the terms of the particular clause as construed by the Court. In this case, however, the parties have agreed to refer disputes relating to different expert disciplines to differently qualified experts, without reaching any agreement as to which kind of expert should determine disputes involving overlapping disciplines. In these circumstances, an implied term of that kind will not make the expert determination clause work, because it will not address the issues arising from the overlapping nature of the disputes.

53 In Mineral Resources Ltd v Pilbara Minerals Ltd,[36] Banks-Smith J referred to the decision of Chesterman J in Zeke Services with approval,[37] and continued:

> There are circumstances where it may be appropriate that a stay be refused. In *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd*, Hammerschlag J said:
>
> Examples of when a stay may be refused include where:
>
> a. it would result in a multiplicity of proceedings;
>
> b. the dispute is inapt for determination by an expert because it does not involve the application of his special knowledge to his own observations or the area of dispute is outside of the expert's field of expertise; or
>
> c. the agreed procedures are inadequate for determination of the dispute that has arisen.[38]

54 Of particular relevance to this case is the reference in the decision of Hammerschlag J in Dance with Mr D Ltd v Dirty Dancing Investments Pty Ltd[39] to the prospect of a multiplicity of proceedings as a relevant factor in the exercise of the Court's discretion as to whether or not to grant a stay. In this case, even if the expert determination clause permitted a single expert to determine the various disputes (which it does not), the claims in this proceeding against Mr May and, if leave is granted, against the project landowner as a proposed third defendant, would continue. There would be a multiplicity of proceedings and the prospect of conflicting findings of fact and law. Further, the parties would be required to fund and conduct two substantial proceedings, namely, this proceeding and an expert determination process.expert accountant

55 I do not accept the defendants' submission that the allegations against Mr May, or the proposed allegations against the project landowner, involve the plaintiff endeavouring to 'circumvent' the expert determination clause. The plaintiff is entitled to frame her case as she sees fit without constraint by the clause. The clause does not bind her to agree to claims against non-parties to the contract being determined under the expert determination clause.

56 The fact that Mr May and the project landowner are prepared to participate in and abide the result of an expert determination process is not to the point. The plaintiff is not bound to agree to that course and would be foolish to do so in circumstances where there is no guarantee of procedural fairness.

57 In all the circumstances, it would in my opinion, be unjust to the plaintiff, indeed all parties, to stay the proceeding so that the expert determination process proposed by the defendants can proceed. The proposed process before a single Independent Expert would not, in the absence of agreement by the plaintiff, accord with the expert determination clause as the dispute involves more than the mere management of the project and legal interpretation issues, but includes accounting and horticultural issues raised by the pleadings. If such a process were undertaken, it would likely lead to further multiplicity of proceedings, based on the ground that the process was not contractually authorised by the expert determination clause.

58 The stay application is dismissed.

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[1] Eg *Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Construction) v Blanalko Pty Ltd* [2013] VSCA 158; (2013) 42 VR 27, 40 [35]; *CA & CA Ballan Pty Ltd v Oliver Hume (Australia) Pty Ltd* [2017] VSCA 11 [24]–[25].

[2] Emphasis added.

[3] The set-out of the definitions has been altered to aid unnecessary repetition (emphasis added).

[4] Emphasis added.

[5] Emphasis added.

[6] Emphasis added.

[7] [2011] HCA 38; (2011) 244 CLR 305.

[8] Ibid 314–15 [25] (emphasis added) (citations omitted).

[9] Ibid 314–5 [25] n 41.

[10] (1885) 15 QBD 426.

[11] Ibid 429–30 (emphasis added).

[12] Ibid 430.

[13] (1886) 18 QB 7.

[14] Ibid 9 (emphasis added).

[15] *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38; (2011) 244 CLR 305, 314–15 [25].

[16] Ibid 310–11 [12]–[13] (citations omitted).

[17] Cf clause 27.4.

[18] [2013] VSC 314.

[19] Ibid [39] (emphasis added) (citations omitted).

[20] [2000] VSC 233.

[21] Ibid [3], quoting from clause 24.5 of the dispute resolution clause in that case.

[22] Ibid [15] (emphasis added).

[23] *WTE Co-Generation & Anor v RCR Energy Pty Ltd & Anor* [2013] VSC 314 [46] (emphasis added).

[24] *Coal Cliff Collieries Pty Ltd v CG Harmer Sijehema Pty Ltd* (1991) 24 NSWLR 1, 26–1; *Computershare Ltd v Perpetual Registrars Ltd* [2000] VSC 233 [15].

[25] [2005] QSC 135; [2005] 2 Qd R 563.

[26] Ibid 564–5 [2].

[27] Ibid 569 [21].

[28] Ibid 569 [21]–[22], 570 [24] (emphasis added).

[29] Ibid 570–1 [28]–[31].

[30] Ibid 571 [30].

[31] Ibid 571 [31].

[32] Ibid 571 [30].

[33] Ibid 571 [32] (emphasis added).

[34] Ibid 572 [35].

[35] Ibid 572 [37].

[36] [2016] WASC 338.

[37] Ibid [54].

[38] Ibid [56] (citations omitted).

[39] [2009] NSWSC 332 [54].
