Supreme Court of New South Wales

TX Australia Pty Limited v Broadcast Australia Pty Limited [2012] NSWSC 4 (16 January 2012)

Last Updated: 27 January 2012

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New South Wales

Case Title:	TX Australia Pty Limited v Broadcast Australia Pty Limited
Medium Neutral Citation:	[2012] NSWSC 4
Hearing Date(s):	23, 24 November 2011
Decision Date:	16 January 2012
Jurisdiction:	Equity Division - Commercial List
Before:	Brereton J
Decision:	Summons dismissed with costs
Catchwords:	CONTRACTS - Broadcasting and related industry contracts - plaintiff owner and operator of broadcast infrastructure - defendant has access to and use of plaintiff's infrastructure pursuant to contract - defendant exercises option to renew contract - contract provides for expert determination of licence fee if parties fail to reach agreement - expert charged with determining a reasonable fee having regard to rates charged to third parties at facility in question - term sheet determines that expert determination final and binding except if attended by manifest error or error of law - terms of contract direct task to be performed by expert and whether determination binding. CONTRACTS - Plaintiff alleges error of law on

basis expert misconceived function by adopting objective "market value" assessment to ascertain fee as opposed to a subjective "fair value" approach - function of expert determined by contractual provisions - contract provides for hybrid process requiring consideration of subjective and objective factors, with rates charged to third parties a mandatory consideration - contract requires appraisal akin to 'fair market value' - expert does not have regard to exclusively objective considerations and considers position of particular parties - expert did not misconceive function.

CONTRACTS - Plaintiff alleges error of law on basis expert failed to consider relevant factor - relevant consideration said to be 'special value' of contract to defendant - requirement for ascertainment of 'reasonable fee' refers to defendant as a willing but not anxious and involuntary purchaser - requirement for 'reasonable fee' antithetical to valuation proceeding on basis plaintiff a monopolist - expert did consider special value of contract to defendant.

CONTRACTS - Plaintiff alleges error of law on basis expert failed to give weight to current fees under original contract - expert had regard to such fees but concluded of limited relevance - not an error of law to weigh relevant factors in a particular way as opposed to not consider them - circumstances prevailing ten years previously when agreement first made materially different to present - fees agreed ten years previously not useful guide to what constitutes a 'reasonable fee'.

CONTRACTS - Plaintiff alleges error of law and manifest error on basis expert used incorrect comparator in assessing 'reasonable fee' - expert said to have incorrectly compared digital audio broadcasting with digital television broadcasting - audio broadcasting said to be inapposite comparator due to fact radio different medium to television with different cost factors - digital audio broadcasting fees considered by expert pertain to agreement between same parties and are relatively recent - errors in methodology employed by expert valuer not errors of law - matter of professional judgment as to weight to accord cost recovery and profit margin - expert evidence adduced in attempt to illustrate manifest error - fact such evidence needs to be adduced conveys error not manifest - expert did not make error of law or manifest error.

CONTRACTS - Plaintiff alleges expert failed to give detailed reasons - question whether reasons are 'reasons' within the meaning of the contract - failure to provide 'detailed reasons' entails there will not be a binding determination - due to requirement of 'detailed statement of reasons', provision of wider than usual scope to challenge binding nature of determination and fact issues are complex standard of reasons required by contract

akin to that expected of judges and commercial arbitrators - expert sufficiently identifies methodology and provides sufficiently detailed and comprehensive reasons - reasons are 'detailed reasons' within meaning of contract.
CONTRACTS - Plaintiff alleges error of law on basis determination manifestly unreasonable - determination said to be unreasonable in Wednesbury sense because of relative magnitude of reduction in licence fee - contract requires new fee to be determined with predominate regard to market based considerations and cost considerations not prevailing when original fee determined - determination not so unreasonably low - determination rewards plaintiff above avoidable cost - arguable that perpetuating current fee would be unreasonable - determination not manifestly unreasonable.

Legislation Cited:

(CTH) Broadcasting Services Act 1992, Sch 4, Pt 5, s 42
(CTH) Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000
(CTH) Television Broadcasting (Digital Conversion) Act 1998
(NSW) Court Suppression and Non-publication Orders Act 2010
(UK) Arbitration Act 1979

Cases Cited:

AGL Victoria Pty Limited v SPI Networks (Gas) Pty Limited [2006] VSCA 173
Avon Downs Pty Limited v Federal Commissioner of Taxation [1949] HCA 26; (1949) 78 CLR 353
Boland v Yates Property Corporation Pty Limited (1999) 74 ALJR 209
Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd [1981] AC 909
Campbell v Edwards [1976] 1 All ER 786
Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194
Colin Marg Pty Ltd v Mackay Medical Investment Ltd [2006] QSC 181; [2007] 1 Qd R 303
Craig v South Australia [1995] HCA 58; (1995) 184 CLR 163
Dean v Prince [1954] 1 Ch 409
Email Ltd v Robert Bray (Langwarrin) Pty Ltd [1984] VicRp 2; [1984] VR 16
Ex parte Hebburn Limited; Re Kearsley Shire Council [1947] NSWStRp 24; (1947) 47 SR (NSW) 416
Holt v Cox [1997] NSWSC 144; (1997) 23 ACSR 590
Lear v Blizzard [1983] 3 All ER 662
Legal & General Life of Aust Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314
MMAL Rentals Pty Ltd v Bruning [2004] NSWCA 451; (2004) 63 NSWLR 167

Marks v GIO Australia Holdings [1998] HCA 69; (1998) 196 CLR 494
Maurici v Chief Commissioner of State Revenue [2003] HCA 8; (2003) 212 CLR 111
Oil Basins Limited v BHP Billiton Limited [2007] VSCA 255; (2007) 18 VR 346
Ponsford v HMS Aerosols Ltd [1979] AC 63
Ricciardello & Anor v Caltex Oil (Australia) Pty Ltd & Anor [1991] ANZ ConvR 445
Shoalhaven City Council v Firedam [2011] HCA 38; 85 ALJR 1220
Spencer v Commonwealth [1907] HCA 82; (1905) 5 CLR 418
Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd (1993) 32 NSWLR 583
Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd [1980] EWCA Civ 3; [1981] 1 All ER 1077
Westport Insurance Corporation v Gordian Runoff Limited [2011] HCA 37; 85 ALJR 1188

Texts Cited:

Category: Principal judgment

Parties: TX Australia Pty Limited (plaintiff)
Broadcast Australia Pty Limited (defendant)

Representation

- Counsel: Counsel:
AJ Payne SC with M J O'Meara (plaintiff)
JT Gleeson SC with JA Potts (defendant)

- Solicitors: Solicitors:
Gilbert & Tobin (plaintiff)
Minter Ellison (defendant)

File number(s): 2011/194227

Publication Restriction:

JUDGMENT

1. By summons filed on 14 June 2011, the plaintiff TX Australia Pty Limited (" TXA") seeks a declaration that an expert determination of Mr Tony Samuel (" the Expert") dated 14 April 2011 (" the Determination") about fees payable by the defendant Broadcast Australia Pty Limited (" BA") to TXA for access to and use of certain broadcast transmission towers owned by TXA, which enables BA to provide stand-by digital television transmission services to the Australian Broadcasting Corporation (" ABC"), contains manifest errors or errors of law, and is not final and binding on TXA and BA.

2. TXA is a joint venture company equally owned by the three commercial television networks: Seven

Network (Operations) Limited, Nine Network Australia Pty Limited, and Network TEN Pty Limited (" the Networks"). TXA owns and operates broadcast transmission equipment around Australia, including the five Towers the subject of the 2000 Agreements. TXA's broadcast infrastructure, including the Towers, is used to provide broadcast services to the Networks, but also to provide broadcast services to the ABC, the Special Broadcasting Service (" SBS"), community television channels, and FM radio and community radio stations, and to provide digital audio broadcasting ("DAB") services, point-to-point microwave services, internet services and emergency radio services.

3. BA is the successor of a Commonwealth authority, resulting from the privatization by the Commonwealth in 1998 to 1999 of the National Transmission Network to form the National Transmission Company Limited, and the sale of all the shares in it to ntl Australia Pty Limited (" ntla "). In 2002, ntla was acquired by Macquarie Bank Limited and renamed BA. In 2009, the Canadian Pension Plan Investment Board acquired BA. BA provides (among other things) managed transmission services to radio and television customers using a network of 600 transmission facilities, predominately located in regional areas. BA's major customers are the ABC and SBS.

4. The Determination was issued by the Expert pursuant to an appointment under five relevantly identical agreements between TXA, BA and the ABC entitled "Licence ABC Stand-by Facility" dated 9 June 2000 ("the 2000 Agreements") - each relating respectively to one of five broadcasting transmission towers and associated facilities owned and operated by TXA at five sites in or near the capital cities of New South Wales, Victoria, Western Australia, Queensland and South Australia (" the Towers") - and under a "Term Sheet - Stand-by Agreements Determination Process" dated 17 January 2011 ("the Term Sheet"). The initial term of the 2000 Agreements was from 2000 to 2010. BA exercised an option to renew them for a further 10 years from 2011 to 2020. The Determination was to determine the "Initial Fee on Renewal", being the fees payable by BA to TXA under each of the renewed 2000 Agreements in 2011, which fees will increase by CPI increments annually thereafter until 2020. Under the 2000 Agreements, the total fees paid by BA to TXA for all the Towers for 2010 were $X. Under the Determination, the sum of the Initial Fee on Renewal for all the Towers in 2011 is set at $X. Accordingly, the effect of the Determination is that, in 2011, the total fees are less by $X or X % than the fees paid in 2010. Those reduced fees will carry forward annually, subject to CPI adjustments, until 2020.

5. TXA advances six main grounds of complaint, which may broadly be summarised as follows:

   (1) that the Expert misconceived his function in that, rather than determining (subjectively) what was a reasonable fee for TXA and BA to agree upon, taking into account the circumstances affecting them, he instead determined (objectively) what was the "market value" or "fair market value";

   (2) that the Expert failed to consider relevant considerations, and in particular the special value to BA of access to TXA's Towers, which enabled BA to provide stand-by digital TV services to the ABC under the ABC Agreement;

   (3) that the Expert wrongly gave no weight to the fees payable by BA under the 2000 Agreements during their ten year initial term (2000 to 2010), a conclusion wrongly supported on the basis that circumstances had relevantly changed between 2000 and 2011;

   (4) that, in concluding that it was appropriate to use the fees payable by BA to TXA for use of the Towers to provide DAB services to the ABC as the most relevant comparable transaction, the Expert was manifestly erroneous and erred in law;

   (5) that the Expert failed to satisfy his obligation to give detailed reasons in a number of respects;

   (6) that the Determination is manifestly unreasonable, in that it effects a X% reduction in the fees that had been payable by BA to TXA in the year prior to the renewed term, while providing BA with a "windfall" gain .

6. I have been greatly assisted by the comprehensive, articulate and well-reasoned written and oral submissions of Mr A.J. Payne SC and Mr M.J. O'Meara for TXA, and of Mr J.T. Gleeson SC and Mr

J.A.C. Potts for BA.

Establishment of ABC digital television

7. In 1998, the Commonwealth enacted the (CTH) *Television Broadcasting (Digital Conversion) Act* 1998 , an objective of which was that digital television transmission be introduced in metropolitan areas in Australia on 1 January 2001. On 25 June 1999, the ABC issued "Request for Proposal NS211 - Supply of Digital Transmission Services" (" RFP NS211"), by which it sought proposals for the supply of digital transmission services to the ABC, commencing in the metropolitan areas on 1 January 2001 . In November 1999, the ABC revised RFP NS211 to seek, in addition, proposals for the provision of stand-by digital television transmission services in the metropolitan areas. The ABC specified the Towers as the facilities to be used for the provision of the stand-by services. On 9 December 1999, BA (then called ntla) and TXA entered into a Memorandum of Understanding (" MoU") which recorded that BA was tendering to provide digital transmission services to the ABC and, if that tender were successful, BA and TXA would use their reasonable endeavours to negotiate and execute an agreement by which TXA would provide BA with access to and use of the Towers for an annual fee set out in the schedule to the MoU (which was $X). On 23 December 1999, BA was declared the successful tenderer for the provision of digital television transmission services to the ABC.

The 2000 Agreements

8. TXA, BA and the ABC executed the 2000 Agreements on 9 June 2000. Under clauses 2 and 3, TXA (a) gives BA the right to install, test, commission and maintain equipment on the sites of the Towers to broadcast stand-by ABC digital television ("the ABC equipment"); (b) gives BA the right to access the sites of the Towers to do so; and (c) assumes the obligation to connect the ABC equipment to the TXA equipment at the sites of the Towers and operate that equipment in order to broadcast the ABC signal through the antennas on the Towers. In return, BA is obliged to pay the "Total Fees", by two equal instalments each year in advance on 1 January and 1 July. The "Total Fees" are the amounts set out in Schedule A to each of the 2000 Agreements, and are subject to an annual CPI increase (clause 5). The sum of the "Total Fees", for all the Towers, in 2000 (the first year of the 2000 Agreements), was $X, which was less, by 13.7%, than the amount that had been contemplated in the MoU. By 2010, the "Total Fees" under the five Agreements had grown (by CPI adjustment) to $X.

9. The services provided by TXA to BA under the 2000 Agreements are of a type known as "portal services", that is, services which involve TXA providing an area within the site of each Tower for installation of the broadcaster's (or intermediary's) equipment and linking it to TXA's equipment for broadcast of the transmission signal. These are to be contrasted with what are known as "managed services," where TXA takes full responsibility for the transmission of broadcast signals and owns and operates all the equipment used to do so; and also with "access services," where TXA simply allows a broadcaster to install its own equipment at the site of and on the Tower to transmit the signal, but the broadcaster or intermediary does not otherwise use TXA's equipment at the Tower.

10. The 2000 Agreements were for a term of ten years ending on 31 December 2010, but gave BA an option to renew for a further term of ten years (clause 4) by serving a notice, in which event TXA was obliged to grant BA a new licence for a further ten years on the same terms and conditions "other than the Licence Fee, the Service Fee and the Total Fees which are to apply at the commencement of the Renewed Term and which will be determined in accordance with clause 18.2", which clause provides as follows:

[BA] and TXA agree that if such notice is given and [BA] is not in breach they will enter into negotiations in good faith as to the Total Fees to apply in the first year of the Renewed Term. If [BA] and TXA are unable to agree on the Total Fees they will refer the matter to an Expert for a binding determination in the manner described in clause 3 of Schedule A.

11. Clause 3 of Schedule A provides as follows:

Fee for Renewed Term

3.1 For the first year of the renewed Term [BA] will pay to TXA a licence fee (the "Initial Fee on

Renewal") determined in accordance with paragraph 3.2.

3.2 The Initial Fee on Renewal will be determined as follows:

(a) [BA] and TXA will negotiate in good faith for up to 28 days with a view to agreeing on the Initial Fee on Renewal which will be a reasonable fee (having regard to the rates charged to the other third parties for the use of facilities located on the Tower);

(b) failing agreement, [BA] and TXA will engage an Expert nominated by the President for the time being of the Institute of Chartered Accountants to determine the Initial fee on Renewal (the "Expert");

(c) [BA] and TXA will be entitled to make written submissions to the Expert and provide such additional information as the Expert may request;

(d) the Expert will make a determination ("the Determination") as to the applicable Initial Fee on Renewal within 8 days from the date of the Expert's appointment;

(e) the Determination will be final and binding;

(f) the parties will share the Expert's costs equally.

The ABC Agreement

12. On 6 December 2000, the ABC and BA entered into the ABC Agreement, under which BA agreed to provide digital television transmission services (called "DCP Services") to the ABC for a period of 15 years, with the ABC having an option to renew for a further five years, using the Towers [redacted] .

The dispute and appointment of the Expert

13. On 29 June 2010, BA gave TXA notice of its intention to renew the 2000 Agreements. From about 29 July 2010 until 5 October 2010, BA and TXA engaged in negotiations to determine the "Initial Fee on Renewal" payable for the renewed term of each of the 2000 Agreements. Those negotiations were unsuccessful, and on 5 October 2010, TXA notified BA that it was necessary to refer the matter to an expert for determination under Schedule A of the 2000 Agreements. TXA propsed to BA a term sheet to better define the determination process and its timeline, which itself was the subject of negotiation. On 12 January 2011, BA and TXA executed the Term Sheet and exchanged lists of proposed experts, the Expert being the name commonly appearing in both lists.

14. The Term Sheet contained the following terms relating to the role of the Expert:

i. The Expert will act as an expert in determining, in his/her opinion, an Initial Fee on Renewal for the Standby Agreements according to the expert's business judgement and commercial acumen and consistently with the terms of the Agreements.

ii. The Expert will not act as a mediator or arbitrator between the parties. The Expert shall be independent of, and act fairly and impartially as between the parties and shall follow the procedure set out in this Term Sheet and in the Agreements. ...

iii. The Determination shall comprise a detailed statement of reasons for the Expert's decision, including explanation of the methodology used to determine the Initial Fees.

...

v. The Expert's determination shall be final and binding on both parties except in the case of manifest error, negligence, fraud, error of law or any breach of the Expert's acknowledgement regarding actual or possible conflicts of interest associated with his/her appointment.

15. On 17 January 2011, the parties notified the Expert that he had been nominated as expert for determining the "Initial Fee on Renewal" pursuant to the 2000 Agreements and the Term Sheet, and the Expert accepted the appointment on 10 February 2011.

The Determination process

16. On 10 March 2011, BA and TXA provided their submissions (with annexures) to the Expert (BA providing a revised version on 14 March 2011). On 21 March 2011, the Expert conferred with representatives of BA and TXA, and the next day wrote to TXA and BA requesting further information, including (from BA) a copy of the ABC Agreement, information about how the price paid by the ABC to BA under that agreement was calculated, and how the profit earned by BA under the ABC Agreement was determined. On 23 March 2011, TXA and BA provided their submissions in reply (with annexures) to the Expert. Additionally, on 23 March 2011 BA provided a letter responding to the Expert's request for information.

17. On 31 March 2011, the Expert provided his draft Determination to the parties. On 7 April 2011, both TXA and BA provided notifications of errors of fact in response to the draft Determination. On 14 April 2011, the Expert delivered the Determination. Accompanying the Determination was a document said to contain his "detailed statement of reasons" as required by the Term Sheet. The Expert determined the Initial Fee on Renewal, in total for all five Agreements, to be $X.

The basis of review

18. Although there are many similarities, this proceeding is not, strictly speaking, one for judicial review of a decision in the administrative law sense. In *Legal & General Life of Aust Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, McHugh JA recognised, and it has repeatedly been accepted, that the fundamental question is whether the exercise performed in fact satisfies the terms of the contract so as to make the determination binding. Absent fraud or collusion, a valuation is binding if it was made in accordance with the contract, and if so it is beside the point that it proceeded on the basis of error, or was a gross over or under value, or took into account irrelevant considerations [*Legal & General Life of Aust Ltd v A Hudson Pty Ltd* , 335-336 (McHugh JA); *Holt v Cox* [1997] NSWSC 144; (1997) 23 ACSR 590, 596 (Mason P)]. This does not mean that a valuation will stand regardless of error; it depends on the terms of the contract [*Holt v Cox* , 597 (Mason P)]. Accordingly, t he question is whether the Expert's determination binds the parties in accordance with their contract, and that depends on whether the Expert has performed the task allocated him by the contract, in a way that the contract makes binding on the parties.

19. Under clause 18.2, the Expert's task was to determine - the parties having been unable to agree - what was "a reasonable fee (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)". In this case, the Terms Sheet went further, to provide that the Determination would not be binding on the parties in the case of manifest error, negligence, fraud, or error of law. And the Determination was required to include "a detailed statement of reasons for the Expert's decision, including explanation of the methodology used". As, in the present case, the contract provides that the valuation is not binding in the case of particular classes of error, the question becomes whether such error is established.

20. In this context, a "manifest error" is an error presented upon the face of the Expert's determination and accompanying reasons, and does not distinguish between "facile errors" and "those of complexity", nor between obvious errors and less obvious errors, nor between errors of law and errors of fact (although, as errors of law are separately addressed, without any requirement that they be manifest, "manifest error" will usually be relevant in the case of non-legal error) [*Westport Insurance Corporation v Gordian Runoff Limited* [2011] HCA 37; 85 ALJR 1188, [42] (French CJ, Gummow, Crennan and Bell JJ), [163] (Kiefel J)]. The key requirement is that the error be apparent on the face of the determination and reasons.

21. An "error of law" includes at least the usual grounds on which courts will review the decisions of administrators or arbitrators [*Holt v Cox* , 597 (Mason P, Priestley JA agreeing); *AGL Victoria Pty Limited v SPI Networks (Gas) Pty Limited* [2006] VSCA 173, [51] - [53] (Nettle JA, Maxwell P and Bongiorno AJA agreeing)]. I shall address those that are relevant as they arise, below.

The first alleged error - misconception of function

22. TXA's first complaint - which is at the heart of its case, and is echoed in many other of the grounds - is that the Expert misconceived his function in that, rather than determining what was a reasonable

fee for TXA and BA to agree upon, taking into account the circumstances affecting them (a subjective test) - as was said to be required by the terms of his appointment - he instead applied a "principle" consistent with the "market value" or "fair market value" approaches to valuation (an objective test), and as a consequence failed to take into account or give weight to matters that ought to have been considered, and utilised an inappropriate comparison with separate agreements between TXA and BA in respect of digital *audio* broadcasting services ("DAB services"), when the five Agreements were concerned with digital *television* broadcasting services. TXA submits that the Expert essentially adopted the "exchange value test" associated with *Spencer v Commonwealth* [1907] HCA 82; (1905) 5 CLR 418 , positing a hypothetical transaction between a hypothetical vendor and purchaser having certain qualities - an objective approach to valuation [*Marks v GIO Australia Holdings Limited* [1998] HCA 69; (1998) 196 CLR 494, at 514, [49]]. This is said to be illustrated by t he Expert having instructed himself to disregard any features that would result in either of the parties not being "willing" - meaning willing but not anxious - to enter into the contract, and then proceeding to apply that principle by reference to the "standard valuation approaches" to determining market value - comparable sales, earnings-based and cost-based approaches. The result is said to be that the Expert failed to approach his task on the basis that, as a surrogate for the agreement of BA and TXA, he was to ascertain *subjectively* from BA and TXA's point of view what would be a reasonable fee for them to agree on as the Initial Fee on Renewal, and thereby misconceived his function, asked himself the wrong question, and thus erred in law, in a manner that permeates the Determination.

23. It is not in doubt that there will be an error of law, and that the determination will not be binding, if the Expert misconceived his function, asked himself the wrong question or applied the wrong test [*Ex parte Hebburn Limited; Re Kearsley Shire Council* [1947] NSWStRp 24; (1947) 47 SR (NSW) 416, 420 (Jordan CJ); *Avon Downs Pty Limited v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, 360 (Dixon J); *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194, 208-209, [31] (Gleeson CJ, Gaudron and Hayne JJ)], as in that event, he would not have addressed himself to, nor performed, the task required of him by the contract.

24. Consideration of this ground requires analysis of two issues: first, what was the Expert's task; and secondly, what did the Expert actually do.

25. As to the first, the question is whether, as TXA submits, the Expert's task required that he act as a surrogate for the agreement of BA and TXA, to ascertain *subjectively* from BA and TXA's point of view what would be a reasonable fee for them to agree on as the Initial Fee on Renewal, as distinct from determining a "market fee" .

26. In *Ponsford v HMS Aerosols Ltd* [1979] AC 63, the House of Lords held that a rent review clause which provided for "a reasonable rent for the demised premises", properly construed, required the assessment of what rent the demised premises would command if let on the terms of the lease and for the period the assessed rent were to cover, assessing the reasonable rent that others - not just the tenant - would be prepared to pay.

27. In *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1980] EWCA Civ 3; [1981] 1 All ER 1077, the Court of Appeal considered a clause that provided for "such rents as shall have been agreed between the Lessor and the Lessee". Buckley LJ (at 1088) distinguished the form of the clause in *Ponsford* - which focused attention on "a reasonable rent for the demised premises" without any reference to agreement between the parties to the lease at all (emphasis added):

But it appears to me that the terms of the clause there under consideration were noticeably different in important respects from the clause which we have, which *refers to nothing other than such rent as the parties shall have agreed. ...*

28. His Lordship noted that a contention, that the circumstance that the so-called arbitrator was to act not as an arbitrator but as a valuer suggested that the rent should be the market rent, had been abandoned in favour of a concession that the agreement was one to arbitrate and not one to abide by a valuation, so that "the rent should be such as it would have been reasonable for this landlord and this tenant to have agreed under the lease".

29. In *Lear v Blizzard* [1983] 3 All ER 662, an arbitrator referred four questions of law, involving the proper construction of a clause in a lease that referred to "rent" either "to be agreed between the parties hereto" or "in default of agreement at a rent to be determined by a single arbitrator", and the basis on which the arbitrator should assess the rent, to the Queen's Bench Division under the (UK) *Arbitration Act* 1979 . Tudor Evans J (at 667-668) distinguished *Ponsford* and applied *Thomas Bates,* concluding that the emphasis in the clause was on what the parties had agreed, and that the arbitrator was required to determine what it would be reasonable for those landlords and tenants to agree in all the circumstances of that case.

30. In *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VicRp 2; [1984] VR 16, the relevant provision of the lease referred to "reasonable rental". The Court (at 20) construed it having regard to certain factual considerations which, it could be inferred, were present in the minds of the contracting parties, including that the premises had been custom built by the landlord for the tenant, and that the complex would be difficult to let. The Court said (at 20-21):

... Looked at in the factual setting to which we have referred, the question is what the parties intended by the expression "a reasonable rental". Mr Gillard invites the Court to say that the words mean "the market rental", but we find ourselves resistant to that invitation.

The parties have selected the word "reasonable". We agree with Mr Graham that the expression "reasonable rental" is not a term of art. It has no fixed or precise meaning. It is of a quite different character from "market rental".

In *Opera House Investment Pty. Ltd. v Devon Buildings Pty. Ltd.* [1936] HCA 14; (1936) 55 CLR 110, the High Court was concerned with construing a provision in a lease which required the lessee to pay to the lessor such rate of interest as the lessor "may reasonably contract to pay on the said moneys". At p. 116, Latham C.J. said: "The word 'reasonable' has often been declared to mean 'reasonable in all the circumstances of the case.' The real question, in my opinion, is to determine what circumstances are relevant. In determining this question regard must be paid to the nature of the transaction." Starke J said, at p. 117 "'Reasonable' is a relative term, and the facts of the case must be considered before what constitutes a reasonable contract can be determined."

31. Their Honours concluded that "reasonable rental" meant "a rental which is reasonable in light of all of the relevant circumstances".

32. In *Ricciardello & Anor v Caltex Oil (Australia) Pty Ltd & Anor* [1991] ANZ ConvR 445, Malcolm CJ said (at 450):

In the context of rental valuation or assessment there is a well-established distinction between "market rent" on the one hand and a "fair rent" on the other. In the former case the rent is determined on the basis of the rent the premises would bring on the open market having regard to the rents paid for comparable premises in the same or a comparable area. The test is objective. In the latter case the rent is determined on the basis of the rent which it would be fair for the particular landlord and the particular tenant to have agreed under the lease in question having regard to all the circumstances relevant to any negotiations between them of a new rent from the review date. The test is largely subjective.

33. In *MMAL Rentals Pty Ltd v Bruning* [2004] NSWCA 451; (2004) 63 NSWLR 167, a contract provided for the price payable for certain shares upon exercise of an option to be "fair market value". Spigelman CJ said (at [47]):

It is convenient at the outset to determine the proper construction of the words "fair market value". All the words in the contractual formula in cl 11.2.3 must be taken into account in its construction. The term employed is neither "fair value" nor "market value" but "fair market value".

34. His Honour emphasised (at [52]) that what a valuation exercise will require is always dictated by the context:

There are a number of contractual, statutory and accounting standards contexts in which the administration of justice must determine the "fair value" of property. The meaning of that formulation will vary with the context. In some contexts the formulation refers to what is just or equitable in all the circumstances. In such

a case the scope of the relevant considerations which may be taken into account by the requisite decision-maker, whether an arbitrator or a judge, is wide. ... Where the relevant test is "fair value", a market value is often not decisive ...

35. As his Honour said (at [53]), "The overall context will be determinative". Allowing that, his Honour said that the terms "fair value" and "fair market value" usually imported elements of subjectivity - the former moreso than the latter - not involved when one was concerned merely with "market value". His Honour continued (at [57]-[60]):

Where the focus of the valuation process is on a "market value", even in a context, as so often occurs, where there is no or little trading history in the relevant property, the approach will usually be quite different to that which arises where a "fair value" is required to be determined. The range of relevant circumstances to be taken into account is not as wide and regard is not had to the particular history of the commercial or personal relationships between the prospective vendor and purchaser of the property to be valued.

Where, as here, the formulation is "fair market value", the valuation test requires a similarly limited focus on the range of circumstances relevant to a process of determining exchange value. A "fair market value" may diverge from a "market value" for numerous reasons, for example, where property is thinly traded, or the parcel is small, or there exist market distortions.

In the present contractual context, the intrusion of the word "market" between "fair" and "value" points away from a process of determining what is just or equitable between the parties, towards an objective standard. ...

Nevertheless, the word "fair" has, in my opinion, work to do. In a contractual context, this additional word suggests that the valuation should proceed on the assumption, which may be contrary to the facts of a particular contractual relationship, that there is no impediment to the process of bargaining, whether in terms of availability of information or restraints arising from the characteristics of a particular vendor or purchaser or otherwise. ...

36. In *Colin Marg Pty Ltd v Mackay Medical Investment Ltd* [2006] QSC 181; [2007] 1 Qd R 303, Wilson J applied *Lear* and *Thomas Bates* , in connection with an expert determination of a rent review of premises leased and used as a gymnasium, where the relevant clause provided that the rent for the first year of the new term "shall be mutually agreed upon by the Lessor and the Lessee", and then "Should the Lessor and the Lessee not reach agreement as to the rental then the annual amount for the first year shall be determined by a registered Valuer ...". The expert valued the premises on the basis that the highest and best legal use for the premises was as second tier medical suites - and thus, although appointed to value a renewed tenancy by a tenant using the premises as a gymnasium, and where the permitted use was a health and fitness centre, proceeded to value the premises on a hypothetical highest and best use basis. The tenant alleged that the determination was not in accordance with the lease, and that the determination should have been undertaken on a "subjective" basis - meaning, as Wilson J explained: "what he should have determined was the rent payable under the particular lease between the particular parties (which included the permitted use being that of a health and fitness centre)". Her Honour said (at [9]):

The further lease is in all relevant respects on the same terms and conditions as the original lease: in other words, it contains the same restriction on the use of the demised premises. The primary method for establishing the rent for the first year is by agreement of the parties (cl 15.4.3), and it is only where the parties do not agree that a valuer is to be appointed. That is a strong indicator that the valuer is to do what the parties cannot agree to do, and so to take into account all the considerations which would affect the minds of the parties when negotiating to a conclusion.

37. In a passage on which TXA particularly relies as expressing the applicable test, her Honour concluded (at [13]-[14]):

In the present case the rental is to be determined by agreement between the parties, and in the event of failure to agree, by an appointed valuer. It is therefore directly analogous to *Lear* and *Jefferies* : the valuer is to perform the task that the parties have been unable to do themselves, and so must determine the rent subjectively.

The requirement that the valuer have regard to rents for comparable premises (if any) in the locality of the demised premises does not limit the scope of his task; on the contrary it is a prescription of one matter to be taken into account in the broader inquiry into what would be a reasonable rent for the parties to have agreed having regard to all the circumstances. In *Ricciardello* the relevant clause expressly provided that the requirement that the valuer have regared to rents for comparable premises not limit the scope of his inquiry. Even though the present lease does not contain such an express provision, on its proper construction the requirement that the valuer consider rents for comparable premises does not limit the scope of his inquiry.

38. Her Honour said that a submission that the appointment of a valuer rather than an arbitrator indicated an objective rather than a subjective approach, was unconvincing in the context (at [17]):

Where the valuer is required by the clause in the lease to have regard to all the circumstances in determining a fair rent as between the particular parties, the process is no longer objective.

39. Thus the nature of the task set in the clause, rather than the character of the person appointed to perform it, was paramount (at [19]). But I do not read her Honour's judgment as excluding the possibility that the character of the appointee may illuminate the nature of the task.

40. In the present case, ultimately, the Expert had to determine, in place of the parties, what was a "reasonable fee (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)". Thus there are two aspects - a subjective one that the fee be reasonable, and an objective one that it be so having regard to the rates charged to the other third parties for the use of facilities located on the Tower. Unlike the clauses in *Lear* , *Thomas Bates* , and *Colin Marg,* clause 3.2 of Schedule A to the 2000 Agreements required the parties, in their negotiation or agreement of the fee, to have regard as a mandatory consideration to an objective factor, namely the fees being paid by others for use of the Towers. The express requirement to have "regard to the rates charged to the other third parties for the use of facilities located on the Tower" imports, as the sole specified consideration, an objective requirement. The clause provided not merely for such fee as the parties shall have agreed, but *first,* negotiation of a reasonable fee *having regard to a mandatory consideration* (namely, what other third parties are paying for use of the Towers), and *secondly,* "failing agreement" that the Expert will determine the Fee. The mandatory consideration specifically involves a criterion of comparable transactions, typical of a market value analysis. It is not without significance that the mandatory factor in clause 3.2(a), namely the rates charged to *the other third parties* for the use of facilities located on the Tower, focuses attention on *other third parties* , as distinct from the rates charged to BA under the 2000 Agreements. These features of the description of the mandatory factor weigh in favour of the objective element.

41. Moreover, while it may not be of great significance, the location of the reference to the mandatory consideration in the clause relates it more proximately as a matter of construction to what is a reasonable fee, rather than to what the Expert must take into account, and in this regard is to be distinguished from *Ricciardello* and *Colin Marg* . This too favours objective considerations.

42. Further, the Term Sheet provides that the Expert is required to form his opinion on the question bringing to bear his business judgment and commercial acumen, and to do so within defined parameters as to submissions, information requests, confidentiality and the like. The Expert is required to act as an expert valuer, not a mediator or arbitrator. This favours the view that the Expert is more than a mere surrogate for the parties' agreement, and is required to form an expert valuation opinion; it too indicate s a more objective than subjective approach.

43. The context of the 2000 Agreements was that if BA wished to secure the ABC Agreement it had no choice but to use TXA's Towers for the Standby Facility, and thus to accept TXA's terms and price; in that respect, TXA was then in the position of a monopolist, able to set its own price. There was then no market in such rights, but it was envisaged that one might soon emerge, given the impending access regime. The Agreements embodied acceptance of TXA's price for the initial decade, but preserved BA's ability, if it exercised the option to renew, to have the price determined independently, including by reference to such objective market factors as might by then have emerged. The parties did not include in the Agreements any "ratchet" clause, to the effect that the initial fee for the renewal term could not be less than the former fees. This meant that, however good or bad the initial bargain was for either party, it could be re-opened upon exercise of the option.

44. Accordingly, while the clause does not limit the Expert to exclusively market value considerations, they are given an important role at the first stage, and the Expert was not only justified but required to give them an important role at the second stage. In my view, the task was akin to ascertainment of "fair market value" in the sense described by Spigelman CJ in *MMAL v Bruning*.

45. The second issues, then, is what did the Expert actually do?

46. Having noted (at [11]) BA's submissions on what he was required to do, he also noted (at [12]) TXA's submission (to the effect that the Expert should take into account any consideration he considered relevant, but *not* the rates charged to other third parties), and (at [13]) that TXA had agreed that the fee should be "reasonable", and had submitted that "I should take into account the matters I consider relevant". He said (at [14]) that "consideration of a reasonable fee requires consideration of amounts paid by third parties for the same or similar services". He repeated (at [21]) that the 2000 Agreements required him to determine a fee that was "reasonable, having regard to the rates charged to other third parties". He observed (at [22]) that he was authorised to use his own business judgment and commercial acumen, and that that gave him considerable scope. He noted (at [23]), without apparent demur, BA's submission that a reasonable fee was not necessarily a market fee. He then described his methodology as follows (at [24]-[25]):

... The principle I have applied is that the reasonable fee would be the amount that would be determined if the Parties were entering into the contract on a willing basis, acting at arm's length, with neither party compelled to enter into the transaction. This principle is consistent with "fair market value" and "fair value" definitions used for the purpose of valuing businesses and assets, including intangible assets, as well as for the purpose of determining reasonable royalty rates and licence fees in both contentious and non-contentious circumstances.

My approach necessarily sets aside the requirement of the Parties to enter into a further agreement, which requirement can result in one party (or both parties) not being "willing".

47. The Expert then explained (at [26]) that he had had regard to the standard valuation approaches commonly used by valuers, which he described broadly as the market approaches (being the value determined by comparable transactions), income approaches (being the value determined by future cash flows) and cost approaches (being the value determined by the actual or replacement cost of the asset).

48. The statement (in [24]) that a "reasonable fee should have regard to all of the circumstances that are relevant up to the date of the Determination" is entirely consistent with *Email Ltd v Robert Bray* . In the statement (also in [24]) that a reasonable fee "would be the amount that would be determined if the Parties were entering into the contract on a willing basis, acting at arm's length, with neither party compelled to enter into the transaction", the reference to *the Parties* (a reference to these parties, as distinct from a hypothetical lessor and lessee) indicates a subjective aspect to the Expert's approach. The Expert explained that this was consistent with his understanding of "fair market value" and "fair value" definitions used for the purpose of valuing businesses and assets, royalty rates and licence fees. This bespeaks that he was undertaking the hybrid exercise described by Spigelman CJ in *MMAL* , and not a purely objective, market-based analysis.

49. While he made clear (at [26]-[28]) that, in determining the reasonable fee, he would have regard to standard valuation approaches - including market, income and cost based approaches - it is plain that in the application of each of those approaches, he had regard to the specific circumstances of TXA and BA. The Expert said (at [59]) that he had had regard "to the financial consequences of any fee on the Parties", although observing (at [60]) that confidentiality issues required his "comments in this section of my report ... [to] be brief and conceptual". He noted submissions of TXA to the effect that the fees proposed by BA would prevent cost recovery by TXA, and that a reduction in the "Total Fees" from the 2010 fees would financially benefit BA to the detriment of TXA for no sound commercial reason, and dealt with those submissions as follows (at [61]):

... I have reviewed the following documents and drawn my own conclusions as to whether this would be so, having regard to the non-arm's length nature of the fees charged by TXA to its shareholders:

i. TXA's financial statements;

ii. the effect on TXA of the fees submitted by the Parties;

iii. the effect on TXA of the fees I have determined to be ` reasonable; ...

50. He rejected (at [62]) BA's submission that the " *financial consequences of its agreement with the ABC are irrelevant* ". He took into account the circumstances of BA and TXA, and their respective positions as they were known to him (at [63]-[64]).

51. The Expert stated his conclusions as follows, indicating that the financial consequences for each of the parties were considered (at [79]) (emphasis added):

In my opinion:

(a) the [Building Blocks Methodology] approach as applied by BA undervalued the fees when compared with the amounts negotiated by parties with TXA, and therefore could not be relied upon in isolation to determine a reasonable fee;

(b) the circumstances have changed considerably since 2000, so the Initial Fees in the Agreements cannot be relied upon in isolation to determine a reasonable fee;

(c) I am *unable to comment on specific financial consequences, due to confidentiality* ;

(d) the circumstances relating to the amounts paid by other third parties differ from the circumstances for the ABC Standby facility, so cannot be relied upon in isolation. However, I found the amounts paid for DAB services to be the most comparable to the ABC Standby facilities, being the provision of portal services for digital transmission from the same zone of the towers. In my opinion, the DAB services provided a basis for determining a minimum amount from which a reasonable fee could be determined; and

(e) the amounts negotiated by TXA and BA for use of the DAB facilities need to be adjusted to allow for other factors including the additional reach of the ABC service, the Agreements, the amounts paid by other third parties, *TXA's costs and the financial consequences of the fee itself* . I have made this adjustment on the basis of business judgment.

52. The Expert did not merely engage in a wholly objective and hypothetical exchange value test exercise. He correctly identified as the fundamental question what was reasonable between the parties, having regard to the rates charged to other third parties. He correctly focused on the actual use permitted under the renewed Agreements. While he appropriately took into account, as an important factor, market considerations (as clause 3.2(a) mandated), he also took into account a broader range of considerations affecting the financial circumstances of the parties. He did not confine himself to purely market considerations. Thus the Determination evinces an approach that included subjective as well as objective factors. This is implicit in the "Income" and "Cost" approaches, which required consideration of the circumstances of each of the parties. In particular, the Expert took into account the financial position of BA and TXA and the impact of his Determination upon them; the fees under the 2000 Agreements (although giving them little weight); and that the particular purpose of the 2000 Agreements for BA was the performance of its obligations under the ABC Agreement. He did not simply adopt objective "market value", notwithstanding that under the contract, the "rates charged to the other third parties" are a relevant and important, though not exclusive, consideration. It would have been plainly erroneous not to take them into account. To give objective considerations a predominant (but not exclusive) significance does not betray a misconception by the Expert of his task. He undertook the hybrid exercise described by Spigelman CJ in *MMAL v Bruning* . He correctly conceived the task required of him by the 2000 Agreements and the Term Sheet, and he performed that task.

53. The first complaint therefore fails.

The second alleged error - failed to take into account special value to BA

54. TXA's second complaint is that the Expert failed to consider (and indeed expressly excluded from consideration) relevant considerations, and in particular a matter that would inevitably have factored in the parties' subjective assessment of a reasonable fee under the 2000 Agreements, namely the value

to BA of the use of TXA's Towers, which enabled BA to provide stand-by digital TV services to the ABC under the ABC Agreement. As BA had factored the fees it paid to TXA under the 2000 Agreements into the price paid by the ABC to BA under the ABC Agreement when it was negotiated, and the price paid by the ABC (which continues to apply for at least another 5 years, if not 10 years) [redacted], the Determination resulted in a large windfall gain to BA.

55. It is not in doubt that taking into account irrelevant matters, or excluding from consideration relevant matters, is an error of law [*Avon Downs v FCT,* 360; *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 177].

56. Special value is the value which a property or service has to a particular person over and above its market value ascertained by the exchange value test. Special value can be ascertained by asking what a particular purchaser would pay for access to the property or service rather than fail to obtain it [*Boland v Yates Property Corporation Pty Limited* (1999) 74 ALJR 209, 225 [78] - [82] (Gleeson CJ); 245 [173] (Hayne J); 269 [292] - 270 [297] (Callinan J)].

57. The value to BA of access to use of the Towers, as provided by the 2000 Agreements, was that it enabled BA successfully to tender for the contract to provide digital television transmission services to the ABC, and thereafter to perform its obligations under the ABC Agreement. BA's costs under the 2000 Agreements were taken into account in setting the price charged by BA to the ABC under the ABC Agreement, which [redacted]. TXA submits that: (1) the special value to BA of facilities and services provided under the 2000 Agreements, in enabling BA to perform its obligations under the ABC Agreement, was a (if not the) critical matter which should have informed the Expert's assessment of what price BA and TXA might reasonably agree on as the Initial Fee on Renewal, and that the facts before the Expert compelled a conclusion that, to avoid failing to obtain use of the Towers for the Renewal Term, BA would pay TXA at least as much as it was already paying under the 2000 Agreements; but (2) having erroneously adopted the position that his role was to ascertain the objective market value of the services provided under the Agreements using an exchange value test, the Expert wholly failed to consider the value to BA of those services, and expressly excluded that matter from his consideration, thus failing to consider the major issue that should have formed the basis of consideration of what, subjectively as between BA and TXA, was a reasonable fee to agree on as the Initial Fee on Renewal; (3) having done so, the Expert was led to a result that represented a large windfall gain to BA at the expense of TXA, and thereby erred in law.

58. I accept that the facilities and services it accessed under the Agreements were of "special value" to BA, as BA had no real choice but to exercise the option to use the Towers, unless it were to default under the ABC Agreement. This was even more so in 2011 than had been the case in 2000, when while it had no choice but to enter into the 2000 Agreements if it wanted to secure the ABC Agreement, it did have the freedom not to pursue the ABC Agreement if dissatisfied with the terms it could negotiate with TXA.

59. However, I do not accept that this was the, or even a, critical matter which should have informed the Expert's assessment. F or reasons explained under the first complaint, the Expert rightly set aside the commercial imperative for BA to exercise the option, which made it an anxious as distinct from merely willing purchaser. This is apparent from his statement that "the reasonable fee would be the amount that would be determined if the Parties were entering into the contract on a *willing* basis, acting at arm's length, with neither party compelled to enter into the transaction", which approach "necessarily sets aside the requirement of the Parties to enter into a further agreement, which requirement can result in one party (or both parties) not being "willing"" - meaning anxious as opposed to willing. TXA complains that this means that the Expert set aside a subjective approach and failed to take into account the "special value" of the 2000 Agreements to BA. BA submits that the Expert meant that he would not proceed on the basis that BA was "over a barrel" in 2010, and was correct to do so.

60. In my view, the requirement that the fee be "reasonable (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)" is antithetical to the suggestion that the valuation should be on the basis that TXA could, by reason of its monopolist position, extract whatsoever extravagant price it liked, or that the valuation proceed on that basis. To the contrary, the rationale for the dispute resolution process selected by the parties, including the mandatory

consideration of the fees paid by *other third parties* , was to remove the element of the monopolist's control of the price. If the expert were to proceed fundamentally on the basis that BA was not a willing but an involuntary purchaser, one would have expected to see some reference in the Agreements to that as a factor, rather than to "the rates charged to the other third parties for the use of facilities located on the Tower". In this case, "reasonable" does work similar to that attributed to "fair" by Spigelman CJ in *MMAL v Bruning,* suggesting that the valuation should proceed on the assumption, which may be contrary to the facts of the particular relationship, that there is no impediment to or constraint on the process of bargaining, arising from the characteristics of a particular vendor or purchaser. Similarly, in *Holt v Cox* it was accepted (at 594) that determination of the "fair" price of shares required an assumption that they were marketable and impelled disregard of provisions that made the holder the only eligible owner.

61. Moreover, f or reasons also explained under the first complaint, I do not accept that the Expert confined himself to market value and did not consider the particular use that BA would make of the benefit of the 2000 Agreements, namely the provision of standby services to the ABC. Throughout the Determination, the Expert has correctly assumed that that will be the nature of the use, and nowhere makes the type of error - apparent in *Colin Marg* - of valuing the rental on the assumption of a use different from and not permissible under the Agreement. The Expert was invited to consider the financial consequences to BA arising from such fee as might be set, and that a fee that was lower than the previous fee would, other things being equal, improve the financial position of BA overall, and relative to its whole of network contract with the ABC for at least 5 years. The Expert made further inquiries and received such information as BA considered itself able to give.

62. In any event, there was the countervailing consideration of how such fee as was set might impact on TXA's position, where TXA's primary function was to provide broadcast services to its three shareholders, the three commercial television channels. The provision of the use of the facilities by TXA to BA, enabling BA to provide a service to the ABC, generated value for both parties: it provided BA with an input it required to perform its whole of network agreement; but it also generated extra revenue for TXA at modest marginal cost by using otherwise excess capacity on its Towers, [redacted]. Accordingly, when considering the subjective positions of the parties, the question is not merely how much would BA be prepared to pay for access to the Towers rather than lose it; the corollary is, how low a price would TXA accept rather than lose an additional source of revenue [redacted]. In this respect too, the Expert received submissions, sought further information and received such documentation as TXA considered it should provide (although it did not provide its shareholders agreement). The Expert has manifestly taken into account the consequences of the determination on the respective financial positions of the parties: see the Determination at [24], [26(b)], [26(c)], [37(b)], [57], [59], [60], [61]-[64], [75], [78(b)], [79(c)] and [79(e)]. Specifically, the Expert reasoned that such submissions as he had about the benefits to BA under the ABC Agreement were relevant in the adjustment which he made from the DAB value in [53] to the final value in [80], but did not render the final value unreasonable. At the same time, he reasoned that the final amount did not preclude TXA from achieving costs recovery, nor did it have a material detrimental effect on it.

63. As to the supposed "windfall", the consequence of the ABC Agreement [redacted]. In this context, the Determination means no more than that, for the last 5 years of a 15 year term (or 20 years, if the ABC exercises its option to renew the ABC Agreement), there has been an adjustment in one input price favourable to BA. The Expert has taken that matter into account in adjusting what would otherwise be the fee (at [79(c), (e)]).

64. The second complaint therefore fails.

The third alleged error - failure to give weight to fees paid under Agreements for Initial Term

65. TXA's third complaint is that the Expert wrongly gave "little weight" - in truth, no weight at all - to the fees payable by BA under the 2000 Agreements during their ten year initial term (2000 to 2010), a conclusion that he justified on the basis that circumstances had relevantly changed between 2000 and 2011 - referring specifically to the ABC conditions of requiring the TXA Towers to be used for standby services provided to the ABC, and the introduction of an access regime under the (CTH) *Broadcasting Services Act* 1992 ("the Broadcasting Act") - in that the matters he mentioned had not

changed between 2000 and 2011, as the requirement that BA provide standby services to the ABC by way of TXA's Towers remained an obligation of BA under the ABC Agreement. TXA draws attention to the circumstance that despite this requirement (and the conditions of tender that preceded it), BA had been able to negotiate a downward reduction in fees payable to TXA prior to entry into the 2000 Agreements, hardly an indication that the initial fees under the 2000 Agreements were obtained under some sort of commercial duress. As for the access regime, it is said that the Expert was wrong in law, as the regime does not apply to BA, but only to licensed broadcasters; and in any event the introduction of the regime (which has not changed since its introduction) was known by both parties at the time the 2000 Agreements were negotiated in 2000. In this approach, it is said that the Expert erred in six ways, elaborated below.

66. The first, and foremost, answer to this submission is that the Expert stated (at [41]) that he had "had regard" to the fees paid under the 2000 Agreements in their initial terms, "but accorded them little weight", for reasons that he explained - namely, that "the circumstances under which the fees for the initial 10 year period were agreed in 2000 are different to the circumstances for determining a reasonable fee today ", by reason of:

(a) " *the date at which the Agreements were entered into, being more than 10 years ago* ";

(b) " *the timetable under which the Agreements were developed* ". This referred to the circumstance that the 2000 Agreements were executed in a context where the ABC was under pressure to comply with the Federal Government policy requiring digital television to commence by 1 January 2001 and, for this reason, required tenderers (including BA) to use TXA sites for the provision of stand-by services;

(c) " *the ABC requirement that BA use the TXA sites for a stand-by facility, and that this requirement was known prior to the negotiation and signing of the Agreements* ". The Expert concluded (apparently on the basis of the matters summarised in sub-paragraph (b) above) that "in my opinion, in order to comply with the [ABC's tender requirements], BA had no option but to use the nominated TXA facilities", and observed that the ABC Agreement will continue to run for another 5 years and that the ABC has an option to renew it for a further 5 years;

(d) " *the provision of Federal Government funding to support the use of the sites* ". The Expert noted that the Commonwealth provided funding support to the ABC for the purpose of the introduction of digital television, and that provision of this funding was a condition precedent to the 2000 Agreements; and

(e) " *the relevance of the Access regime* ". The Expert found that "there was no access regime or other mechanism in place at the time the 2000 Agreements were signed that could moderate the fees that TXA could charge BA for access to the nominated facilities". He referred to the (CTH) *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000* , which amended the *Broadcasting Services Act* to create an access regime applicable to the Towers for persons holding commercial television broadcast licences and the ABC and SBS, which came into force in August 2000. However, the Expert also accepted that the 2000 Agreements were negotiated with knowledge of the impending commencement of the access regime.

67. The Expert's statement that he took this matter into account is not to be gainsaid; and he expressly listed it amongst the factors that inclined him to adjust upwards the result obtained on analysis of third party transactions (at [79(e)]). No legal error is involved in the weighting accorded to various relevant factors, as distinct from failing to consider them at all. Legal error could be established only if it were shown that, contrary to the Expert's stated reasons, he had in substance not taken this consideration into account at all, and I see no sufficient ground to disbelieve his reasons in that respect.

68. Next, it is to be borne in mind that, the Expert's task being to determine what was a "reasonable fee (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)", while he was required to take into account, as a mandatory consideration, "the rates charged to the other third parties for the use of facilities located on the Tower", there was no such stipulation in respect of the rates charged by TXA to BA under the 2000 Agreements. While it is unnecessary and inappropriate to resort to the " *expression unius"* rule, it could not be said to be wrong in that context to give but slight weight to the latter consideration.

69. Further, the conclusion reached above (at [57]) that the requirement for a "reasonable fee (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)" is antithetical to the suggestion that the valuation should be on the basis that TXA could, by reason of its monopolist position, extract whatsoever extravagant price it liked, or that the valuation proceed on that basis, leads to the conclusion that it was correct to give little weight to the original fee. Essentially, what the Expert did in this respect was to attribute little weight to the fees payable under the 2000 Agreements because they were a relatively poor indicator of what was a "reasonable fee (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)", having been negotiated in circumstances in which there was no market, and TXA was a virtual monopolist.

70. Turning to the six specific points raised by TXA, the *first* is that whereas the role of the Expert was to determine what, from the subjective viewpoint of BA and TXA, was a reasonable fee for them to agree on as an Initial Fee on Renewal, it was no part of his function to revise, as if providing an opinion on behalf of a competition regulator, the commercial history of the agreements between BA and TXA and to conclude that the fees paid under them should be ignored for the purposes of setting a reasonable Initial Fee on Renewal on the basis that they did not adequately reflect the outcome of a competitive market. But the Expert's task was far from purely subjective, and the market evidence was a mandatory and important consideration. Moreover, he did not determine, expressly or implicitly, that the fees under the 2000 Agreements were unreasonable in the circumstances in which they were negotiated; the effect of his reasoning was that he considered them of little utility in determining what was reasonable in 2010 - because of its remoteness in time and its different factual and commercial setting .

71. The *second* was that the Expert was manifestly in error in concluding that the fact that BA was obliged to use the Towers to provide the ABC stand-by digital TV services under the ABC Agreement in 2000 represented any change in circumstances between 2000 and 2011, because, on the Expert's own findings, BA is still obliged under the ABC Agreement to use the Towers to provide the stand-by digital TV services and remains so obliged for at least another five years, if not ten. However, this misunderstands the Expert's reasons: t he point of his reference to the circumstance that BA had been required to use TXA's Towers in 2000 was not that there was no longer any such requirement, but that the imperative of using those Towers meant that BA was then an anxious - if not involuntary - purchaser, such that little weight should be given to that transaction as a comparable when it came to determining what was reasonable now. It is not implicit in this approach that the original price was then unreasonable, or was known or believed to be unreasonable.

72. The *third* was that the Expert's conclusion ignored that in the period between entry into the MoU between BA and TXA, and the execution of the 2000 Agreements, the fees to be paid by BA to TXA for the use of the Towers were negotiated downwards by 13.7%, and also ignored TXA's submissions to the effect that that downward negotiation, together with the fact that in 2000 (and today) BA was, by any measure, a large commercial enterprise which had the opportunity to obtain independent advice and which had never sought to set aside the 2000 Agreements or objected to the fees payable under them, was inconsistent with any conclusion that BA had agreed to enter the 2000 Agreements under any sort of duress. I am unpersuaded that the Expert ignored this matter, to the extent that it was before him. H e sought further information from both parties to come to a better understanding of the rather distant historical circumstances surrounding the MoU, and neither was able to assist with contemporaneous records. But the MoU was even more remote in time than the 2000 Agreements; and it was not legally binding, and so did not provide any sound evidence of a "sale" for comparison purposes. That the initial fee under the 2000 Agreements was less than that referred to in the MoU does not mean that the 2000 Agreements necessarily provide useful evidence informing the valuation 10 years later. And the circumstance that between the MoU and the 2000 Agreements BA had been able to negotiate some reduction in price does not detract from the conclusion that, due to its vulnerability to TXA's monopolist position, the 2000 Agreements were an unsafe guide to what was a "reasonable fee (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)" in 2011.

73. The *fourth* was that the Expert erred in treating the creation of the access regime in the *Broadcasting Act* as a matter that effected a relevant change of circumstances between the date of the execution of the 2000 Agreements in 2000, and 2011: it was said that the access regime in the *Broadcasting Act*

could only be a relevant change if it had the capacity to apply to the benefit of BA in relation to the Towers, whereas *Broadcasting Act*, Sch 4, Pt 5, s 42, makes clear that only the holders of a commercial television licence or a "National Broadcaster" (meaning, in effect, the ABC or SBS) can seek access under the access regime, and as BA is not the holder of a commercial television licence nor a "National Broadcaster", the access regime in the *Broadcasting Act* cannot constitute a material change of circumstances from those which prevailed in 2000 relevant to BA and TXA. However, the Expert's reasoning was that whereas in 2000 there was no access regime in place that could moderate the fees that TXA could charge to BA ([39(a)]), the parties knew one was likely ([39(c)]); by 2010 there was in place an access regime, which, where it applies, confines TXA to a price representing cost plus a reasonable return ([29]); that approach to valuation was relevant to but not determinative of what was a reasonable free - regardless of whether or not BA was an eligible applicant under the access regime ([29]); moreover, the existence of the access regime was an influence on the prices *negotiated* with third parties ([47]).

74. The *fifth* was that the Expert's conclusion that the advent of the access regime under the *Broadcasting Act* represented a change of circumstances from those which prevailed in 2000 was inconsistent with his statement that he did not decide whether BA could avail itself of the access regime under the *Broadcasting Act*, and with his conclusion that the 2000 Agreements were negotiated in the shadow of the impending creation of the access regime in the *Broadcasting Act* . But the point of the Expert's reference to the introduction of an access regime - as had admittedly been anticipated in 2000 - was not that it applied to BA, but that its materialization resulted in the development of a market, and a mechanism for third parties to access it, which did not exist in 2000 but by 2011 provided relevant guidance, not available in 2000, better to inform the valuation exercise.

75. The *sixth* was that insofar as the Expert's application of the access regime in the *Broadcasting Act* was in the nature of an analogical application of its terms outside of their strict application, the Expert has again misconceived his function and adopted the role of competition regulator and not an Expert charged with determining what BA and TXA, from the subjective point of view of those parties, would find was a reasonable Initial Fee on Renewal; and that if the access regime in the *Broadcasting Act* did not apply in its terms (and it did not) it was not a matter that could reasonably inform what subjectively BA and TXA might agree on as a reasonable fee for the Initial Fee on Renewal. However, this submission again understates the objective, and overstates the subjective, aspects of the Expert's task. And he has not acted as a "competition regulator", but rightly considered that the access regime, which influences what TXA can charge third parties, informs what is a "reasonable fee (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)" in 2011.

76. The Expert identified a set of circumstances that prevailed in 2000, when the Agreements were negotiated - including that BA really had no choice but to adopt the site dictated by the ABC, and thus accept the fees dictated by TXA. Ten years is indeed, in commercial terms, a lengthy period in which economic considerations and cost factors change considerably. He reasoned that, in the context of an approach to valuation that required setting aside any element that rendered BA an involuntary or anxious rather than merely willing purchaser, those circumstances meant that the fees negotiated in 2000 were not a very useful guide to what was a "reasonable fee (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)" in 2011 - all the moreso when there had indeed been relevant changes (including the emergence of a market) which made it possible to ascertain what was a "reasonable fee (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)", something that was not possible ten years earlier. Once it is accepted that he was correct to set aside aspects that might have the consequence that BA would be more anxious than merely willing, the conclusion that the (ten year old) Agreements were not of great assistance in informing assessment of what was a *reasonable* fee was inescapable.

77. Accordingly, the third complaint fails.

The fourth alleged error - use of DAB Agreements as most relevant comparable

78. TXA's fourth complaint is that, in concluding that it was appropriate to use the fees payable by BA to TXA for use of the Towers to provide DAB services to the ABC as the most relevant comparable transaction, the Expert was manifestly erroneous and erred in law, because DAB is not properly

comparable with digital television broadcasting, for reasons that include (but are not limited to) that the latter yields greater commercial return to its providers than DAB.

79. TXA invoked the judgment of the High Court in *Maurici v Chief Commissioner of State Revenue* [2003] HCA 8; (2003) 212 CLR 111 for the propositions that (1) the use of sales evidence as comparable sales for the purposes of ascertaining value where the sales are not truly comparable is an error of law; (2) sales are not truly comparable and capable of providing a reliable indication of value if the supposedly comparable asset is one that will attract a different type of purchaser than the subject; (3) an essential element of a truly comparable sale capable of providing a reliable indication of value is that it is comparable from the point of view of the purchaser and the value the purchaser looks to extract from the asset; and (4) to provide reliable evidence of value, sales evidence must be sufficient in volume, so that one piece of sales evidence will not suffice. In particular, reference was made to the following passage (at [18]) (citations omitted):

... In valuing the land, the respondent's valuer, ... "ignored a principle of assessment of [value]", the principle being, that sales to be treated as comparable sales need to be truly comparable; or, to put it another way, in valuing the land the respondent's valuer did not proceed rationally, in that he was unreasonably selective in ultimately confining himself to two sales of scarce vacant land for the purposes of the comparison. The respondent could not, and did not suggest that he would be performing his statutory duty if he made other than a fair estimate of the value of the subject land. A fair estimate could only be made here on the basis of a fair, that is to say, a reasonably representative group of comparable sales. A group of comparable sales cannot be representative if it does not go beyond sales of scarce vacant land. That is not to say that sales of comparable vacant land may not provide useful evidence of value. But as J F N Murray observes in *Principles and Practice of Valuation* [4 th ed (1969), p 120] in discussing valuations under federal land tax legislation of land in its notionally unimproved state, "sale evidence *[must be] relevant and sufficient in volume* " (emphasis added). So too, sales relied on, such as of scarce vacant land, are likely to be to a special and different class of buyer from buyers of improved land. As Waddell J said in *Sher v Commissioner for Main Roads* [(1975) 24 *The Valuer* 150 at 151], sales of properties of a different character are likely to attract a different class of buyer and are unlikely to provide a reliable indication of value.

80. I do not agree that *Maurici* establishes that the use by a valuer of sales for the purposes of ascertaining value where the sales are not truly comparable is necessarily an error of law. In *Maurici* , the Chief Commissioner had proceeded to ascertain the unimproved value of improved land in Hunters Hill by reference to very scarce sales of unimproved land in the vicinity (which, due to its rarity, had a higher value), and ignoring comparable sales of improved land; that amounted to ignoring a valuation principle resulting in the valuer not performing his statutory duty of making a fair estimate of value. This was an appellable error because deliberate exclusion of a significant and substantial body of relevant sales had the consequence that the valuer could not perform his statutory duty of ascertaining a fair value, by reason of ignoring a principle of valuation. However, not every decision as to whether a sale is or is not sufficiently comparable to be taken into account amounts to disregarding a principle of valuation. Valuation is an inexact science, and precise correlation with a comparable transaction is often impossible. Even where there are multiple similar transactions - such as units in the same building - differences in size, elevation and aspect will often mean that adjustment is required. Comparability is a question of degree, and sometimes the only available sales evidence will involve property with quite marked differences from the subject, in which case extensive adjustment using the valuer's professional judgment will be required. Thus "errors" in valuation methodology are, at least generally speaking, mistakes in the course of doing what the contract requires, within the judgment of the valuer, and are not errors of law [*Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583, 592; *Holt v Cox* , 594]. In *Maurici* , the valuer, in performing a statutory function, wrongly determined to ignore a highly relevant body of available sales evidence. That is far removed from making a determination whether a particular body of sales is sufficiently similar to the subject to provide some relevant evidence, to which adjustments can then be made to allow for the differences. That this is so is apparent from the acknowledgement, in the passage in *Maurici* cited above, that the statement that a group of comparable sales cannot be representative if it does not go beyond sales of scarce vacant land, does not mean that sales of comparable vacant land may not provide useful evidence of value.

81. The Expert rejected the relevance of the fees paid by the Networks to TXA because they "are not at

arm's length as they are shareholders of TXA and the amounts paid do not vary in a manner consistent with the amounts paid by other parties".

82. The Expert identified four relevant third parties who paid for services from the Towers: SBS stand-by services, DAB services for ABC and SBS, and community television broadcasting in Melbourne and Perth. He also identified the factors he had taken into account "that may influence the fees negotiated by a third party", being the service provided, the costs and non-fee benefits to TXA and other terms of the relevant agreement, market conditions (in substance, the availability of broadcast infrastructure other than TXA's), the existence of an access regime and " *TXA's submission as to the factors it uses to determine a fee* ". The Expert explained that he had had regard " *to the amounts paid by third parties and other transactions between BA and TXA* ", but gave more weight to the DAB services than to other potentially comparable services. In doing so, h e recorded both BA's submission that the DAB services were "directly comparable" and "very comparable" to the services provided under the 2000 Agreements , and the following submissions of TXA (at [50]-[51]):

TXA submitted that the DAB service is not comparable to the ABC digital television service, as:

(a) "radio is a completely different medium to television with substantially less extensive production costs and substantially lower advertising revenue and cannot sustain the same transmission costs as television";

(b) "in relation to the DAB services provided to BA in respect of SBS, in addition to the ongoing fees, BA made significant upfront capital payments to TXA in respect of the DAB infrastructure, which BA did not do in relation [to] the broadcast communication transmission infrastructure which is now used to transmit the ABC"; and

(c) "DAB is a relatively new technology".

In reply to BA's Submission, TXA further submitted that the services were not comparable, stating:

(a) "only the tower space (or aperture) is shared - the DAB antenna is completely separate, as is the whole transmission system, including combiners and feeders";

(b) "DAB services use a bandwidth of 1.5MHz, whereas the ABC digital television services used a bandwidth of 7MHz" (but did not discuss why this is relevant);

(c) "BA's analysis only takes into account 1 DAB ensemble or service per Site, whereas in Sydney and Brisbane there are 3 services and in Adelaide and Perth there are 2"; and

(d) "BA made a $X capital contribution towards the rollout of DAB services".

83. The Expert dealt with these submissions as follows (at [52]):

In my opinion, the agreements between BA and TXA for the DAB services are the most comparable agreements as:

(a) they are agreements between the same parties, TXA and BA;

(b) they were agreed relatively recently, having been signed on 6 February 2009;

(c) BA had the option of using its own facilities, as it did in Melbourne; and

(d) they were for a portal service (as with the ABC Digital TV Standby service) for digital transmission (as with the ABC Digital TV Standby Service) and, when used in the same Towers, are used in the same zone of the Towers (VHF Band III).

84. Thus the Expert found that the fees paid to TXA by BA for the use of the Towers to provide DAB services provided the *most* relevant comparable for the purposes of determining the Initial Fee on Renewal, and used them to establish a starting point, by grossing up the fees paid to TXA in connection with DAB services to account for capital contributions made by BA in respect of those services (being $X per annum), and which he then adjusted having regard to various differences between the DAB transactions and the Agreements (at [79(e)], to determine the Initial Fee on

Renewal. T he Expert (at [52]) gave four reasons for adopting DAB services as the relevant comparator. Contrary to TXA's approach, an assessment of comparability does not involve independent analysis of each of these four reasons; they are inter-related and must be viewed as a whole. However, the significance of the first - that the relevant agreements were between the same parties (BA and TXA) - is that because the DAB Agreements were also between TXA and BA, they would have been influenced by the subjective positions of the very same parties - thus (unlike third party transactions) taking into account the subjective aspect that TXA contends should have been considered. The significance of the second - that the DAB transactions were relatively recent - is that a recent transaction is far more likely to provide relevant market evidence at the date of valuation than one that is a decade old. The third - that BA had the option of using its own facilities to provide DAB services - is significant because it means that, as BA had the option of using its own facilities where it contracted with TXA to use its Towers for the DAB services, the fees agreed were commercial, and therefore reasonable; consistently with the approach, which I have accepted to be correct, that excludes the factor of compulsion which impinges on the 2000 Agreements.

85. As to the fourth reason - that they were for portal services and located on the same zone of the Towers as the subject services - which I accept is fundamental to the question of comparability, both parties adduced expert evidence - as to the similarities and differences between digital television broadcast services and DAB services - from experienced engineers in the broadcast industry: Mr Peter Gough and Mr Chris Gill, between whom there was a significant measure of agreement, as to the following matters:

(a) the data carrying capacity (or "payload") of the digital television signal broadcast by TXA under the 2000 Agreements is 23 megabits per second (mbps), which is significantly - 6.66 times - greater than the data carrying capacity of all the DAB signals broadcast by TXA, namely 3.456mbps;

(b) related to (a), the product transmitted by a digital television signal is different to the product transmitted by the DAB signal: the former consists of moving pictures and sounds (television), whereas the latter is sound only (radio);

(c) it is intended that analogue television cease broadcasting in 2013, which will leave digital television as the only television broadcasting service, but there are no similar plans to phase out analogue radio broadcasting, which predominates in the radio industry over DAB. As a result, digital television transmission is of much greater relative importance to the consumer - and therefore to a television broadcaster - than digital audio transmission to a radio consumer and broadcaster; and

(d) the broadcast of ABC digital television occurs on channel 12 of Band III of the spectrum reserved for TV broadcasting, which has a bandwidth of 7 megahertz (MHz), whereas all DAB broadcasting occurs in channel 9A in Band III, which is currently 6MHz wide and carries up to three frequency blocks of 1.536MHz, which together can carry upwards of 50 separate radio programs.

86. Mr Gough concluded that "whilst there are some technical similarities between [digital television broadcasting] and DAB, there are significantly greater technical differences between those two forms of broadcasting". Significantly, Mr Gough focuses on the "forms of broadcasting". On the other hand, Mr Gill concluded that "digital radio broadcasting and digital television broadcasting can be considered comparable services", focusing on "the point at which the digital radio service and/or digital television service pass from BA to TXA". TXA submits that the effect of the "narrow" focus of Mr Gill's opinion is, as he concedes, that the points of comparison he identifies can only inform the *cost* of the provision of digital television and digital broadcasting services, as distinct from the *price* that might reasonably be charged for those services insofar as the latter reflects the value of the services *to the purchaser* , demonstrating that the point of comparison between digital television broadcasting and DAB on which the Expert rested his conclusion (that they were both portal services) was relevant, and only relevant, to the *cost* of providing the services, as distinct from what was a reasonable price for them. TXA emphasized that w hen asked whether there was a recognised body of opinion which regarded DAB as sufficiently comparable to digital television to justify taking the former into account when determining what the fees for the former should be, Mr Gill, who has 40 years international experience in the broadcasting industry, said:

With the exception of the Final Determination by Tony Samuel about this case, I am not aware of other commercial contracts or expert opinion that have previously regarded digital audio broadcasting services as

sufficiently comparable to digital television broadcasting services in order to justify taking the price of digital audio broadcasting services into account when determining renewal fees.

87. TXA submits that, by using DAB as the comparator for digital television broadcasting services, the Expert adopted a comparison that wholly ignored the *value* of the service being provided to the purchaser, and therefore what price they would reasonably be prepared to pay for it, and that the matters that inclined Mr Gough to the view that DAB and digital television were *not* comparable were substantially associated with what value the purchaser (BA) might extract from the product: digital television has more data carrying capacity than DAB; it includes pictures as well as sound; it occupies more space on the broadcasting spectrum (what is, in effect, "broadcasting real estate"); and it is of more significance in the television broadcasting industry than DAB is in the radio broadcasting industry. It is said that commercial parties in the position of BA and TXA negotiating the Initial Fee on Renewal would consider not only matters that inform the cost (to TXA) of providing the service, but also matters that inform the value the purchaser extracts from the service, and that an expert standing in their shoes to ascertain a reasonable Initial Fee on Renewal, should also do so.

88. I agree that a reasonable fee must take into account, not only the cost to TXA of providing access, but also the value of the benefits derived by BA from its provision - just as rents for premises are influenced to some extent by the profits that the tenant can generate from their use. But within those parameters, the weight to be attributed to each of the elements of cost recovery and profit share is a matter for professional judgment.

89. It is to be remembered that the nature of the service being provided by TXA to BA was, essentially, access the Towers from which to broadcast, and in that respect there was close comparability with the DAB transactions. Most of the differences pointed to through the expert evidence pertain to technical radio transmission matters, such as the respective characteristics, payloads, and spectrum use of DAB signals and DTV signals. TXA was not granting BA a licence to broadcast, or to use a particular part of the spectrum, nor foregoing an opportunity to do itself; it was granting a licence to place the ABC Equipment on TXA's Towers and linking it to TXA's equipment to feed the signal to that equipment. The subject matter of the 2000 Agreements was not space in the broadcasting spectrum, but space on the broadcasting Towers .

90. Moreover, the commercial advantages to the broadcaster of digital television over DAB are less significant in this case, where the broadcaster is the ABC. While TXA submitted that evidence before the Expert demonstrated that much greater value could be extracted from television broadcasting than from radio broadcasting, in that in the order of $3.68 billion was spent on television advertising in 2010, as distinct from $612 million on radio (of which DAB likely represented only a small percentage, because in that year only 5.6% listened to digital radio, while around 100% had access to analogue radio), and that "radio is a completely different medium to television with substantially less extensive production costs and substantially lower advertising revenue and cannot sustain the same transmission costs as television", the extraction of commercial revenue from television advertising was irrelevant in the present case, as the broadcast facility was being procured for use by the ABC, which does not broadcast commercial advertising.

91. In this context, and bearing in mind that the statutory access regime provided for TXA to charge only a reasonable return on cost, it is impossible to see error in giving predominant weight to the cost factor, and in those circumstances no legal or manifest error was involved in treating the DAB transactions as the most relevant comparables to provide a starting point for adjustment having regard to differences.

92. Notably, the Expert concluded that a cost basis alone would provide insufficient reward to TXA (see at [75]-[77], [79(a)]). He was conscious of the need to have regard as well to "the relative value derived by the users" (see [76]). He adjusted the results derived from the DAB Agreements to take into account "other factors including the additional reach of the ABC service, the Agreements, ... and the financial consequences of the fee itself" (see [79(e)]. Absence of specific reference to the greater commercial potential and the use of spectrum, where he did refer to the "additional reach" of the ABC service, does not mean that those matters were overlooked. To the contrary, the passages to which I have referred, read together, demonstrate that in the adjustments he made, he took into

account the value to the user - BA - of the additional potential and reach of digital TV over and above that of DAB.

93. In my view, it has not been shown that the Expert erred in selecting the DAB Agreements as the best comparable starting point, to which adjustments could be (and were) then made to take account of differences between them and the subject Agreements. He did not treat them as equivalent, but acknowledged that adjustments were required. The reasons he gave as regarding them as the most relevant - albeit not identical - comparable, were sound. He recognized, and made adjustments to allow for, the relevant differences.

94. If he were wrong in his preference for the DAB Agreements, he was not manifestly so: if it requires the adducing of contentious expert opinion before me to establish error, the error was certainly not "manifest". And if he were in error, it was not an error of law: an opinion that the DAB Agreements provided the best comparable was a matter of valuation judgment, in the heartland of the professional expertise for which the Expert was selected. He did not (like the valuer in *Maurici)* wholly disregard a relevant body of evidence, such as to render his approach irrational; nor did he slavishly adopt the prices from the DAB Agreements without adjustment to recognize that there were differences.

95. The fourth complaint therefore fails.

The fifth alleged error - inadequate reasons

96. TXA's fifth complaint was that the Expert failed to satisfy his obligation to give detailed reasons in a number of respects, and that significant aspects of how and why he reached his conclusions remain unexplained, in particular that while stating that he had regard to the financial circumstances of BA and TXA in reaching the Determination, he did not say how he did so or what particular circumstances he took into account, or how he considered the parties' financial circumstances at all.

97. A failure to give reasons of the requisite standard may amount to an error of law [*Westport v Gordian,* [36]], but in this case the express stipulation in the Term Sheet that the Expert's determination "shall comprise a detailed statement of reasons for the Expert's decision, including explanation of the methodology used to determine the Initial Fees" means that there will not have been a determination for the purposes of the 2000 Agreements such as to bind the parties if that stipulation is not satisfied. However, what will amount to a sufficiently "detailed statement of reasons" in this context is illuminated by the authorities.

98. In *Shoalhaven City Council v Firedam* [2011] HCA 38; 85 ALJR 1220, French CJ, Crennan and Kiefel JJ said (at [26]-[27]):

... The content of the requirement to give reasons must reflect the nature of the expert determination process, which is neither arbitral nor judicial. It must also be informed by the nature of the issues to be determined. Judicial observations in other cases about contractual requirements to give reasons in expert determinations or in arbitrations must be read according to their context. It may be accepted, as a general proposition, that a mistake in the reasons given for an expert determination does not necessarily deprive them of the character of reasons as required by the relevant contract nor deprive the determination of its binding force. There are mistakes which may have that effect and others that will not.

A deficiency or error in the reasons given by an expert may affect the validity of the determination in two ways:

1. The deficiency or error may disclose that the expert has not made a determination in accordance with the contract and that the purported determination is therefore not binding.

2. The deficiency or error may be such that the purported reasons are not reasons within the meaning of the contract and, if it be the case that the provision of reasons is a necessary condition of the binding operation of the determination, the deficiency or error will have the result that the determination is not binding.

99. Gummow and Bell JJ observed (at [39]) that "[t]he character and quality of the "reasons" [required of an Expert] in any particular instance may be expected to respond to the nature of the issues before the Expert for determination".

100. I accept that in this case, the standard of reasons required of the Expert more closely approached that expected of judges, or arbitrators deciding commercial cases, than may often be the case. This is for a number of reasons. *First,* the Term Sheet expressly requires "a *detailed* statement of reasons. *S econdly* , the parties expressly provided for wider than usual rights to challenge the binding nature of the Determination, including error of law and manifest error; just as the judicial and arbitral obligation to give reasons exists in part to facilitate an examination by a court on appeal of a decision for error of law or other error, so here that rationale applies with similar force. *Thirdly* , the issues before the Expert were complex; he received detailed submissions that involved "something in the nature of an intellectual exchange", so that the issues before him were not merely matters of impression susceptible to a so-called "look-sniff" reference [cf *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909, 919 (Donaldson J)].

101. Accordingly, I accept that the content of the Expert's obligation to give reasons in the present case is aptly described in the following passage from the judgment of the Victorian Court of Appeal in *Oil Basins Limited v BHP Billiton Limited* [2007] VSCA 255; (2007) 18 VR 346, 367-368 (Buchanan, Nettle and Dodds-Streeton JJA), recently referred to with approval by the High Court in *Westport v Gordian* (at [53], fn 35) :

[57] ... [I]n complex commercial arbitrations, it may appear that the determination of the dispute demands reasons considerably more rigorous and illuminating than the mere ipse dixit of a 'look- sniff' trade referee. And in cases like the present, which involve an intellectual exchange with reasons and analysis advanced on either side, conflicting expert evidence of a significant nature and substantial submissions, the parties to the dispute are almost certain to be left in doubt as to the basis on which an award has been given unless the reasons condescend to an intelligible explanation of why one set of evidence has been preferred over the other; why substantial submissions have been accepted or rejected; and, thus, ultimately, why the arbitrator prefers one case to the other. Hence, in our view, the reasons in this case should have been of that standard.

102. That said, it is to be observed that that passage does not dictate that it will invariably be necessary to explain why every unsuccessful submission has been rejected; the touchstone is that the reasons should enable the parties to understand the basis on which the determination had been made.

103. TXA's contends that a fundamental obscurity attends why and how the Expert has reached his conclusion, on accounts of the following matters, individually and cumulatively:

(a) *While the Expert stated that he had had regard to the rates charged for services provided to a number of other third parties who use the Towers for services other than DAB - being the SBS standby service, and two community broadcasting channels - and that he had assessed the amounts those third parties pay by reference to a number of cr iteria, nowhere did the Expert explain how those criteria were applied to each of the third party services, or how the facts and his assessment of the criteria in each case influenced his assessment of a reasonable fee under the 2000 Agreements* . However, the Expert noted (at [46]) TXA's submission that those services were not comparable; listed (at [47]) the factors which influenced comparability of rates charged to a third party; and concluded (at [48]) that while having regard to those arrangements he did not do so in isolation and gave more weight to the DAB agreements. His treatment of those rates did not require further exposition, particularly in circumstances where the DAB agreements were treated as the predominant comparable, and his analysis of them was disclosed (at [53], [54], [79] and [80]); given the partly intuitive nature of the valuation exercise when adjusting comparables; and bearing in mind the constraints of confidentiality (as to which see [46]);.

(b) *The Expert's treatment of the relevance of the access regime under the Broadcasting Act contained the alleged inconsistency referred to at [73] above, which inconsistency was said to be unexplained* . However, for the reasons also advanced at [73] above, there was no such inconsistency.

(c) *While the Expert stated that he had considered the financial consequences to TXA of his determination "in conjunction with charging TXA's shareholders arm's length amounts", he did not say what he had determined to be the "arm's length amount" he considered TXA should charge its shareholders, nor how he had ascertained that amount, what evidence and methodology he had used to ascertain it and how that "arms-length amount" - whatever it was and however it had been ascertained - had been applied by him to inform his assessment of the "financial consequences to TXA" of his Determination.* However, the Expert rejected (at [56]) the amounts paid by TXA's shareholder networks as a comparable, because they were not at arm's length and did not vary in a manner consistent with the amounts paid by other parties. [Redacted].

But he added (at [57]):

In determining a reasonable fee, I have considered the financial consequences for TXA of charging the reasonable fee to BA as determined by me in conjunction with charging TXA's shareholders arms-length amounts.

The Expert explained his approach (at [61]). He specifically considered whether there would be *an unreasonable positive effect* on BA (at [62]). It was not necessary for the Expert to determine an "arm's length amount" that TXA should (notionally or otherwise) charge its shareholders; provisional determination of the amount payable by BA would sufficiently enable comparison with the amounts actually paid by TXA's shareholders to inform a view as to the consequences to TXA of the determination "in conjunction with charging TXA's shareholders arm's length amounts". In my view the Expert's rationale is clear enough without further exposition in this respect - again, bearing in mind the constraints of confidentiality (as to which see [55] and [60]).

(d) *While the Expert said that he had had regard to the financial circumstances of BA and TXA in arriving at his Determination, he did not, even at a general level, explain how he had had regard to them and what those circumstances were.* However - in addition to the foregoing (at (c) above) - the Expert was constrained by confidentiality from descending to much detail (see at [60]); moreover, it is clear enough that while aware that the Determination would result in BA having markedly reduced outgoings [redacted] in connection with the 2000 Agreements, he considered that *if* TXA's shareholders were treated at arm's length it would not have an unreasonable detrimental impact on TXA nor an unreasonable positive impact on BA (see [62]).

(e) *While the Expert addressed TXA's submission that BA's approach to the reasonable Initial Fee on Renewal would prevent cost recovery by TXA, and said that he had drawn his own conclusions on the basis of the documents supplied to him, he did not explain what that conclusion was or how he had reached it.* However, it is clear that he rejected the approach urged by BA in this respect, as it would result in a lower than reasonable fee (see [77]). The Expert noted (at [67]-[69]) that both TXA and BA had submitted that the range in which a reasonable fee could fall was bounded (on the high side) by the stand-alone cost to BA of building a facility to replicate the Towers and (on the low side) by the avoidable costs to TXA were it not to provide the services under the 2000 Agreements; (at [70]) that the submissions of BA and TXA as to the cost of providing the facilities at the Tower and the weighted average cost of capital applied to those costs were "reasonably similar," and (at [71]) that the primary difference between BA and TXA was in the allocation methodology used to allocate the costs of the Towers between BA and the other users of the Towers. He rejected (at [72]) TXA's submission that all of the costs should be allocated to BA. He also rejected (at [74]-[77]) BA's allocation methodology that, in his view, allocated too little to BA.

(f) *While the Expert noted TXA's submission that a reduction in the fees paid to TXA under the 2000 Agreements would financially benefit BA and be detrimental to TXA for no good commercial reason, he did not say what his conclusion was in relation to that submission or how and why he had reached it. However* , the Expert was amply aware that a reduction in fees payable to TXA would be relatively beneficial to BA and detrimental to TXA vis-a-vis the status quo, but considered that result appropriate in the context of determining what was a reasonable fee, bearing in mind the non-arm's length fees charged to TXA's shareholders (at [57]).

(g) *While the Expert said that he had adjusted the amounts paid for DAB services to allow for "other factors including the additional reach of the ABC service, the 2000 Agreements, the amounts paid by other third parties, TXA's costs and financial consequences of the fee itself", and that he had made that adjustment on the basis of "business judgment", he did not explain how he had brought to bear his judgment on those issues, what his judgment was in relation to them, and how he had applied it to produce the result he reached* . However, the considerations that informed these final adjustments, reflected in [79(e)], are explained; their quantification is a matter of holistic value judgment, of the type in which valuers must often engage, incapable of further exposition. To the extent that it was capable of further exposition by reference to the financial position of TXA and/or BA, that would have involved revealing confidential financial information.

104. To the above might be added the following matters, advanced by TXA under its fourth ground of complaint but more conveniently addressed here:

(h) *The Expert failed to deal with the submission that radio is a completely different medium to television with lower production costs and lower advertising revenue and cannot sustain the same transmission costs as television and therefore erred in law* . However, he recorded the submission (at [50(a)] of the Determination), as well as TXA's other submissions as to why DBA was not comparable (at [50] and [51]), and then set out (at [52]) his conclusion that the DBA Agreements were the most comparable transactions, and his reasons for that conclusion. Those reasons appearing in the context of the competing submissions that precede them, I do not accept that it can be said that the Expert has overlooked, or failed to take into account, the submission in question; and he has given reasons for reaching a different conclusion.

(i) *The Expert failed to deal with submissions to the effect that, even if DAB could be considered an appropriate comparator for digital television broadcasting, a significant adjustment needed to be made to reflect that he was not comparing like services from a spectrum or bandwidth perspective; and ignored the fact that while TXA was able to generate further significant revenue for DAB services from the unused spectrum left on the DAB channel after the DAB service provided to BA is accounted for, it cannot do in respect of the ABC digital television services because they use all the spectrum available on the channel.* However, a gain, I do not accept that the Expert failed to consider this submission, having recorded it (at [51(b)]) immediately before his conclusion (at [52]) that the DAB Agreements were the most comparable and his reasons for it . The Expert's allowance for the differences is to be found in [79(e)], where he adjusted the results derived from the DAB Agreements to take into account "other factors including the additional reach of the ABC service, the Agreements, the amounts paid by other third parties, TXA's costs and the financial consequences of the fee itself".

105. Regardless of those answers to the several particular complaints, I do not accept that "fundamental obscurity" attends why and how the Expert reached his conclusion. T he Expert rightly noted the tension between the requirements that he provide a detailed statement of reasons, and that he keep confidential information supplied to him by the parties on a confidential basis, and resolved this by stating that his report contained his " *detailed reasoning and methodology, but not any calculations that rely on confidential information* ". He identified his methodology and gave sufficiently detailed and comprehensive reasons to enable its essence to be understood. In particular, his reasons enable the reader to understand that he adopted a "hybrid" approach of the type described in *MMAL* ; that he determined that the DAB Agreements provided the best comparable (though requiring further adjustments), and why; that he considered that the 2000 Agreements were of little assistance as a comparable in 2011, and why; that he considered that the fees paid by TXA's shareholders were not of assistance as a comparable, and why; and what factors he took into account in making an holistic adjustment to the amounts derived from the DAB Agreements, to allow for the differences between them and the subject Agreements and other considerations. In my judgment, his reasons - although, for confidentiality reasons, not providing calculations - satisfy the contractual obligation to give reasons that were detailed, as opposed to simply producing a dollar figure as the Initial Fee on Renewal. (This conclusion relieves me of the need to consider BA's submission that the Court could resolve any defect in reasons without holding the Determination to be not binding, by making an order pursuant to (NSW) *Supreme Court Act* 1970, s 65, that the Expert give further and better reasons).

106. The fifth complaint therefore fails.

The sixth alleged error - manifest unreasonableness

107. TXA's sixth complaint is that the Determination is manifestly unreasonable, in that it: (1) effects a X% reduction in the fees that had been payable by BA to TXA in the year prior to the renewed term, while providing BA with a "windfall" gain over the rate of return it had assessed as adequate when negotiating the price paid to it by the ABC under the ABC Agreement; and (2) proceeds on the basis that digital television services and DAB services are comparable when it is obvious that the value of those services to those who obtain them are significantly different - a circumstance that would have been taken into account by the parties when negotiating the renewal fees. It is said that, apart from any specific error of law or manifest error, the result arrived at by the Expert is one which lies outside the range of Initial Fees on Renewal at which the Expert could reasonably arrive, considering the circumstances from BA and TXA's subjective point of view.

108. Although BA submitted to the contrary, I accept that manifest unreasonableness in an expert

determination - that is, unreasonableness in the *Wednesbury* sense - would amount to error of law, and that this would be established in the case of a determination so extravagantly large or inadequately small that it leads to the inference that some error though not precisely identified must have occurred. This accords with the statement of Denning LJ, as he then was, in *Dean v Prince* [1954] 1 Ch 409 (at 427) , in the context of an appeal from a judgment on a challenge to a valuation of shares in a private company by an auditor pursuant to the company's Articles of Association (emphasis added):

Even if the court cannot point to the actual alleged error, nevertheless, if the figure itself is so extravagantly large or so inadequately small that *the only conclusion is that he must have gone wrong somewhere* , then the court will interfere much in the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate.

109. To like effect is the following observation of Dixon J (as he then was) in *Avon Downs Pty Limited v FCT* , that a decision by an administrative official might be liable to review if (at 360):

The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some misconception ... It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

110. In *Dean v Prince,* Denning LJ said (at 427) that "if the courts are satisfied that the valuation was made under a mistake, they will hold it not to be binding on the parties". Later, in *Campbell v Edwards* [1976] 1 All ER 786, his Lordship withdrew that observation (at 788c):

In former times (when it was thought that the valuer was not liable for negligence) the courts used to look for some way of upsetting a valuation which was shown to be wholly erroneous. They used to say that it could be upset, not only for fraud or collusion, but also on the ground of mistake. See for instance what I said in *Dean v Prince.* But those cases have to be reconsidered now. I did reconsider them in the *Arenson* case [[1973] 2 All ER 235, [1973] 1 Ch 346]. I stand by what I there 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.

It may be that, if a valuer gives a speaking valuation - if he gives his reasons or his calculations - and you can show on the face of them that they are wrong, it might be upset. But this is not such a case. ...

111. In *Campbell v Edwards,* Denning MR did not hold that manifest unreasonableness was not error of law; rather, his Lordship held that where the parties had contracted to be bound by a valuation, then absent fraud or collusion, error did not vitiate the valuation. In this respect, his Lordship (at 788g) distinguished the position of a valuer from that of an arbitrator, pointing out not only that the former but not the latter could be sued in negligence, but also that the latter's award was amenable to review on a number of bases, including error of law on the face of the award. In the present case, the contract to be bound by the valuation was not unqualified, and one of the exceptions was error of law.

112. The New South Wales cases are to like effect. While, absent fraud or collusion, a valuation is binding if it was made in accordance with the contract, and if so it is beside the point that it proceeded on the basis of error, or was a gross over or under value, or took into account irrelevant considerations [*Legal & General Life of Aust Ltd v A Hudson Pty Ltd* , 335-336 (McHugh JA)], this does not mean that a valuation will stand regardless of error; it depends on the terms of the contract [*Holt v Cox* , 597 (Mason P)]. If, as in the present case, the contract provides that the valuation is not binding in the case of particular classes of error, then the question is whether such error is established.

113. TXA submits that the Expert's Determination is outside the range of reasonable conclusions such as to compel the conclusion that something has gone seriously awry, the proper inference being that he has made some error in the performance of his function. TXA contends that:

(a) the reduction of more than X% from the fees paid under the 2000 Agreements in 2010 was not within the range of Initial Fees on Renewal on which BA and TXA might reasonably agree, particularly as it [redacted];

(b) the Determination rests principally on an assimilation of digital television transmission services with DAB services when digital television and digital radio are obviously fundamentally different, the class of persons who acquire those services is obviously different, and the value they produce to the person acquiring them (and thus the amount they are prepared to pay for them) is obviously different, so that no rational commercial parties could ever reasonably be thought likely to adopt such an inappropriate comparison to guide their negotiations; and

(c) The Expert's reasons are otherwise irremediably obscure, and i f the reasons for his Determination have not been rationally explained, the proper inference is that they cannot be rationally explained.

114. The contentions referred to in (b) and (c) above have been addressed and rejected above, under the fourth and fifth grounds of complaint. This ground therefore relies in substance on the size of the decrease in the fees relative to those previously payable under the 2000 Agreements, and that in the absence of increased costs to BA this worked a "massive" adjustment in the apportionment of the benefits derived from the enterprise in favour of BA.

115. The Agreements did not stipulate that, following exercise of the option, the immediately preceding fee provided a basis for the new fee, or even that it was a mandatory consideration. The new fee was derived from an evaluation of market-based transactions not in existence at 2000, and an examination of cost considerations which were not the subject of debate in 2000. I do not accept that there is significance in the circumstance that the result "benefitted" BA, in the sense that because BA's costs under the ABC Agreement were unchanged, there would be a large increase in BA's profits - which TXA characterizes as a "windfall". Under the ABC Agreement, [redacted]. To the extent that the result will improve BA's profitability, the Expert took that factor into account. It is clear enough that while aware that the Determination would result in BA having markedly reduced outgoings [redacted] in connection with the 2000 Agreements, he considered that *if* TXA's shareholders were treated at arm's length it would not have an unreasonable detrimental impact on TXA nor an unreasonable positive impact on BA (see [62]). The circumstance that a reasonable apportionment of the benefits of the enterprise between BA and TXA, having regard to the fees paid by third parties, required a very substantial re-adjustment from the prevailing arrangements made in circumstances where TXA was in a position of negotiating strength and before there was any market, does not bespeak error.

116. The parties agreed that the "bottom end" of the scale would be "avoidable cost" to TXA, and the upper end "replacement cost" to BA. In that context, unreasonableness in the relevant sense might well have been demonstrated had the result been outside that range. But the Determination results in a fee that rewards TXA above avoidable cost, and is not so unreasonably low as to bespeak error. Indeed, it could be argued that perpetuating the 2010 level of fees would be unreasonable. Over the first 10 year period, BA has - for its partial and limited use of a facility much more extensively used by TXA's shareholders - paid TXA a sum in excess of X% of the capital cost of the facilities. If TXA were to charge to what is but one partial user X% of the full capital cost for a second time over the next 10 years, it would have recovered the whole cost, and much more, from one relatively minor user.

117. The sixth complaint therefore fails.

Conclusion

118. My conclusions may be summarized as follows.

119. *First,* while clause 3.2 does not limit the Expert to exclusively market value considerations, they are given an important role at the first stage, and the Expert was not only justified but required to give them an important role at the second stage. His task was akin to ascertainment of "fair market value" in the sense described by Spigelman CJ in *MMAL v Bruning.* The Expert did not merely engage in a wholly objective and hypothetical exchange value test exercise. While he appropriately took into account, as an important factor, market considerations (as clause 3.2(a) mandated), he also took into account a broader range of considerations affecting the financial circumstances of the parties. To give objective considerations a predominant (but not exclusive) significance does not betray a misconception by the Expert of his task. He undertook the hybrid exercise described by Spigelman CJ in *MMAL v Bruning* . He correctly conceived the task required of him by the 2000 Agreements

and the Term Sheet, and he performed that task. TXA's first ground of complaint therefore fails.

120. *Secondly,* the facilities and services it accessed under the Agreements were of "special value" to BA. However, this was not the, or even a, critical relevant consideration. T he Expert rightly set aside the commercial imperative for BA to exercise the option. The requirement that the fee be "reasonable (having regard to the rates charged to the other third parties for the use of facilities located on the Tower)" is antithetical to the suggestion that the valuation should be on the basis that TXA could, by reason of its monopolist position, extract whatsoever extravagant price it liked, or that the valuation proceed on that basis. Moreover, the Expert did not confine himself to market value, and did consider the particular use that BA would make of the benefit of the 2000 Agreements, namely the provision of standby services to the ABC. In any event, there was the countervailing consideration of how such fee as was set might impact on TXA's position, where TXA's primary function was to provide broadcast services to its three shareholders, the three commercial television channels. As to the supposed "windfall", the Determination means no more than that there has been an adjustment in one input price favourable to BA (which could as easily have been detrimental), and the Expert has taken that matter into account. The second ground of complaint therefore fails.

121. *Thirdly,* the Expert's statement that he took into account the fees payable under the 2000 Agreements, though affording them little weight, is not to be gainsaid. No legal error is involved in the weighting accorded to various relevant factors. W hile the Expert was required to take into account, as a mandatory consideration, "the rates charged to the other third parties for the use of facilities located on the Tower", there was no such stipulation in respect of the rates charged by TXA to BA under the 2000 Agreements. Once it is accepted that he was correct to set aside aspects that might have the consequence that BA would be more anxious than merely willing, the conclusion that the (ten year old) Agreements were not of great assistance in informing assessment of what was a *reasonable* fee was inescapable. Accordingly, the third ground of complaint fails.

122. *Fourthly,* the Expert did not treat the DAB Agreements as equivalent to the subject Agreements, but acknowledged that adjustments were required. The reasons he gave for regarding them as the most relevant - albeit not identical - comparable, were sound. He recognized, and made adjustments to allow for, the relevant differences. Even if he were wrong in his preference for the DAB Agreements, he was not manifestly so. And if he were in error, it was not an error of law. The fourth complaint therefore fails.

123. *Fifthly,* the Expert identified his methodology and gave sufficiently detailed and comprehensive reasons to enable its essence to be understood. In particular, his reasons enable the reader to understand that he adopted a "hybrid" approach of the type described in *MMAL* ; that he determined that the DAB Agreements provided the best comparable (though requiring further adjustments), and why; that he considered that the 2001 Agreements were of little assistance as a comparable in 2011, and why; that he considered that the fees paid by TXA's shareholders were not of assistance as a comparable, and why; and what factors he took into account in making an holistic adjustment to the amounts derived from the DAB Agreements, to allow for the differences between them and the subject Agreements and other considerations. His reasons, although - for confidentiality reasons - not providing calculations, satisfy the contractual obligation to give reasons that were detailed. TXA's fifth ground of complaint therefore fails.

124. *Sixthly,* the parties agreed that the lower end of the scale for a reasonable fee would be "avoidable cost" to TXA, and the upper end "replacement cost" to BA. While unreasonableness in the relevant sense might well have been demonstrated had the result been outside that range, the Determination results in a fee that rewards TXA above avoidable cost, and is not unreasonably low. The circumstance that the result "benefitted" BA, [redacted] - which TXA characterizes as a "windfall", does not bespeak error: a reasonable apportionment of the benefits of the enterprise between BA and TXA, having regard to the fees paid by third parties, might legitimately require a very substantial re-adjustment from the prevailing arrangements made in circumstances where TXA was in a position of negotiating strength and before there was any market . The sixth ground of complaint therefore fails.

125. It follows that all TXA's grounds of complaint fail.

126. My order is, therefore, that the Summons be dismissed, with costs.

127. Pursuant to (NSW) *Court Suppression and Non-publication Orders Act* 2010, s 7, and upon the ground referred to in s 8(1)(a) that the order is necessary to prevent prejudice to the proper administration of justice, and the ground referred to in s 8(1)(e) that it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice, I make a suppression order prohibiting the disclosure, by publication or otherwise, of the information specified in the Confidential Schedule and redacted from the published judgment. Pursuant to s 9(4), this order does not prohibit disclosure of the said information to the legal representatives of the parties. Pursuant to s 11, it is specified that this order applies throughout the Commonwealth. Pursuant to s 12, it is specified that this order operates until the earlier of further order of the Court, or 31 December 2020 (or such other date as the Court might substitute), unless before then it has been extended by the Court. I reserve liberty to the parties, and to any interested party, to apply by arrangement with my associate to vary or set aside this order.

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