SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Foote & Anor v Barton Property Partnership No 2; Foote v Barton Property Partnership No 2**
Citation:	**[2014] ACTSC 330**
Hearing Date:	23 October 2014
Decision Date:	18 December 2014
Before:	Mossop M
Decision:	In SC 360 of 2014: 1. The originating application is dismissed. 2. The proceedings are listed at 12 noon on 19 December 2014 for any argument in relation to costs. In SC 393 of 2014: 1. The defendant's termination of the plaintiff's lease on 9 May 2014 is confirmed. 2. The proceedings are listed at 12 noon on 19 December 2014 for any argument in relation to costs and for the making of any further or other orders necessary to finalise the proceedings.
Category:	Principal Judgment
Catchwords:	CONTRACT – dispute resolution - expert determination – whether decision of expert binding - whether expert properly appointed under partnership deed – whether decision of expert can be sustained by alternative power under the contract – whether defendant waived entitlement to contest the binding nature of the expert determination by participating in the expert determination process
Cases Cited:	*Agricultural & General v Gardiner* (2008) 238 CLR 570 *Badgin Nominees Pty Ltd v Oneida Limited* [1998] VSC 188 *Glenvill Projects Pty Ltd & Ors v North North Melbourne Pty Ltd & Ors* [2013] VSC 717 *Legal & General Life of Australia v A Hudson P/L* (1985) 1 NSWLR 314 *McGrath v McGrath* [2012] NSWSC 578 *Nund v McWaters* [1982] VR 575 *Shoalhaven City Council v Firedam Engineering* (2011) 244 CLR 305 *500 Burwood Highway Pty Ltd v Australian Unity Limited* [2012] VSC 596
Parties:	SC 360 of 2014: Andrew John Foote (First Plaintiff) Canberra Urodynamics Pty Ltd as trustee for the Foote Superannuation Fund (Second Plaintiff)

Barton Property Partnership No 2 (Defendant)

SC 360 of 2014:

Andrew Foote (Plaintiff)

Barton Property Partnership No 2 (Defendant)

Representation: **Counsel:**

Mr M Orlov (Plaintiff)

Mr C Erskine SC (Defendant)

Solicitors:

Ken Cush & Associates (Plaintiff)

Kamy Saeedi Lawyers (Defendant)

File Numbers: SC 360 of 2014

SC 393 of 2014

Introduction

1. By originating application dated 14 August 2014 (SC 360 of 2014) Dr Andrew John Foote and Canberra Urodynamics Pty Ltd as trustee for the Foote Superannuation Fund seek declarations and consequential orders against the defendant Barton Property Partnership No 2 ("**BPP2**") to enforce a decision of an expert appointed under the deed establishing the defendant ("**BPP2 Deed**").

2. There are also proceedings (SC 393 of 2014) which involve a tenancy dispute which were transferred from the ACT Magistrates Court to the ACT Supreme Court. The parties were in agreement that the outcome of the tenancy dispute would flow from the outcome of the proceedings relating to the expert determination and it is not necessary, at this stage, to say any more about the tenancy proceedings.

3. The first plaintiff ("**Dr Foote**") is a medical specialist who, along with others, was a member of the defendant partnership. Dr Foote gave notice of his retirement from the partnership and the ensuing process of unwinding his relationship with BPP2 and a number of other related partnerships has been, to say the least, a difficult process.

4. Under the BPP2 Deed there is a process for dispute resolution provided in cl 12. On 11 November 2013 Dr Foote gave a Notice of Dispute ("**Notice of Dispute**") stated to be pursuant to that clause and several other partnership deeds. Through a process which will be described in detail later in these reasons, an expert was appointed to resolve the disputes that Dr Foote had identified in the Notice of Dispute. The expert so appointed was Mr Greg Stretton SC. Mr Stretton made certain procedural directions and conducted a hearing which Dr Foote and other members of BPP2 attended. On 11 April 2014 Mr Stretton delivered his decision which, in relation to the dispute under the BPP2 Deed, found in Dr Foote's favour. In his decision Mr Stretton found that on 15 October 2013 a binding agreement had been entered into between Dr Foote and BPP2 in relation to the sale of premises referred to as "unit 88" on particular terms.

5. Clause 12.8 of the BPP2 Deed provided:

Part 12. Dispute Resolution

Application

12.1 If a Dispute between any Partner and any other Partner (herein after called the Parties) arises in connection with this Deed or its subject matter, except in relation to a question of law, then this Clause 12 will apply.

Dispute

12.2 (a) If a dispute arises then either party will give to the other a Notice of Dispute.

(b) The parties must endeavour to resolve the dispute set out in the Notice of Dispute promptly and in good faith.

(c) If the parties have not settled the dispute specified in the Notice of Dispute within 10 working days of the service of the Notice of Dispute, either party may give in writing a Confirmatory Notice of Dispute to the other of that fact and then the dispute will be determined by an expert in the relevant field agreed upon and appointed jointly by the parties.

Selecting Expert

12.3 If the parties are unable to agree upon an Expert pursuant to Clause 12.2(c) within 5 working days after giving the Confirmatory Notice of Dispute, then (except in the case of a dispute to which Clause 12.7 applies) either party may apply to the President for the time being of the ACT Branch of the Australian Medical Association (or such other body as then carries on the functions of the Association) or the President's nominee to nominate an Expert in the relevant field to be appointed jointly by the parties.

Expert not Arbitrator

12.4 The Expert appointed pursuant to this Clause 12 must act as an expert and not as an arbitrator and the decision of the Expert will be final and binding on the parties.

Powers of Expert

12.5 The parties agree that the Expert is not empowered to make any decision or determination in relation to the application of any statutory remedy or statutory damages.

No action

12.6 To the extent enforceable at law and where this clause is intended to apply, no party may commence or maintain any action relating to a dispute until it has been referred and determined as provided in this Clause 12.

Other consultants

12.7 The Expert may in its sole discretion engage other consultants to assist in the resolution of the dispute. The fees of the Expert and the costs of each of the parties (and any other consultants engaged) will be payable as directed by the Expert.

Legal Interpretation

12.8 If a dispute involves the legal interpretation of this Deed or if the parties are unable to agree upon whether the dispute involves legal interpretation of this Deed then at any time following 10 working days after the giving of the relevant Notice of Dispute where such Dispute remains unresolved, [either] party may apply to the President for the time being of the Law Society of the Australian Capital Territory (or such other body as then carries on the functions of the Law Society of the Australian Capital Territory) or his or her nominee to nominate an independent Queen's Counsel or Senior Counsel who has been practising at the Australian Capital Territory Bar for more than 10 years to act as the Expert to resolve the dispute or to determine whether the dispute involves legal interpretation of this Deed, as the case may be.

6. While I will return to consider this clause in some detail I note at this point that the relationship between cll 12.3 and 12.8 is of significance in this case. I also note that the reference to cl 12.7 in cl 12.3 clearly should be a reference to cl 12.8. The reference to cl 12.7 is likely to be a numbering error carried over from the deed establishing the Capital Day Surgical Centre ("**CDSC**") Partnership, of which the plaintiff was also a member, in which, due to a numbering anomaly, what should have been cl 12.8 was numbered 12.7.

Chronology

7. On 11 November 2013 Dr Foote gave the Notice of Dispute under the various provisions of several partnership deeds, including the BPP2 Deed.

8. The Notice of Dispute contained an opening introductory paragraph which particularly concentrated on the sale of unit 88 by the Foote Superannuation Fund and then, under the heading "Dispute Areas to be Determined", formally identified areas of dispute under the various deeds of the partnerships with which Dr Foote was involved.

9. The opening portion of the Notice of Dispute provided:

> **Re: Dr Tonks Letter 5/11/13 & Notices of Dispute commencing 11/11/13**
>
> Unfortunately this letter represents yet another last minute change in the terms of a purchase of Unit 88 by Foote Superannuation fund, with a significant unilateral increase in the purchase price.
>
> A vote was held on 15 October "regarding the deal involving the purchase of unit 88 by Andrew Foote's superfund ($2,098,355.58 & 3.25 units). This deal also dealt with all debts between Dr Foote & BPP2 until 1 November 2013 (including unpaid capital & rent, fit out incentive repayment for 9/3 Sydney Ave Barton, and managing partners fee). The result was 30 votes to 23 votes in favour of the deal" [Minutes 15 October page6].
>
> The meeting then discussed excluding CDSC cross payments, and so a revised deal was discussed ($2,098,355.58 & 4.5 units).
>
> I must say I am very disappointed with the ongoing last minute changes that have been made to "binding" negotiations. The essence of a fair and good faith negotiation is that there is compromise. The feature, in my opinion of this negotiation, has been to throw out a deal, then introduce a new one at a higher price or introduce non serious "competitor" bids.
>
> The original offer was for $2,200,000. The current offer from the meeting 15 October is $2,577,000. The bank values the 348m2 unit 88 at $1,348,900. The proposed new offer in the 5/11/13 letter is $2,736,000.
>
> **Is it fair to change things at the last minute by a 25% increase from the original offer, and more than double the bank value.**
>
> I am therefore forced to issue notices of dispute effective 11/11/13. The deeds require settlement of the below disputes within 10 working days. I am available to meet at a mutually convenient time to resolve these disputes in good faith. Failing this, I will issue Confirmatory Notices of Dispute on 26 November 2013.
>
> **Dispute Areas to be Determined**
>
> **A. Barton Property Partnership 2**
>
> i. That the Foote Superannuation Sale of Unit 88, 3 Sydney Ave, Barton arising from the partners vote on 15 October should be upheld with a sale of $2,098,355.58 & 4.5 units (voted & minuted with majority of 30/23 participation units). This sale incorporated resolution of all debts between the parties until 1 November 2013, including unpaid capital & rent, fit out incentive repayment for 9/3 Sydney Ave Barton, and managing partners fee

> ii. That Dr Foote is allowed to expert the partnership at the required 3 year anniversary on 7/4/14, having given notice to resign at least 6 months in advance on 18/9/13 (BPP2 Deed 6.e.i-ii). On 7/4/14 Dr Foote will be entitled to be paid his capital interest in the partnership. This payment must occur by 7/7/14 (BPP2 Deed 4.e.i-iv)
>
> These disputes are made under the provisions of BPP2 Deed 12.2.a,b,c
>
> [emphasis in original]

10. There were other disputes notified in the Notice of Dispute under the provisions of the Barton General Practice Partnership ("**BGPP**") Deed, the Barton Property Partnership Number 1 ("**BPP1**") Deed and the CDSC Deed. These disputes were described under headings B, C and D in the document.

11. On 20 December 2013 Dr Foote sent an email to the other partners dealing with a range of matters but including, relevantly:

> Regarding Unit 88, I continued to maintain in the dispute "That the Foote Superannuation Sale of Unit 88, 3 Sydney Ave, Barton arising from the partners vote on 15 October should be upheld with a sale of $2,098,355.58 & 4.5 units (voted & minuted with majority of 30/23 participation units). This sale incorporated resolution of all debts between the parties until 1 November 2013, including unpaid capital & rent, fit out incentive repayment for 9/3 Sydney Ave Barton, and managing partners fee"
>
> Conclusion
>
> I hereby issue a Confirmation of Dispute as allowed by our Deed (Part 12.2.c) and propose Mr Jeremy Gormley SC, as a relevant expert. I would be happy to agree that his findings are binding. If I do not hear from the Acting Chairman by **COB Friday, 10 January 2014**, I will assume such arrangements are acceptable and will arrange for a hearing in February with approximate costs of $20,000 to be equally shared by Dr Foote and the remaining 12 Partners of BPP2.
>
> [emphasis in original]

12. Subsequently there was no agreement as to the identity of the expert.

13. On about 25 February 2014 Dr Foote telephoned Dr Liz Gallagher who was both a partner in BPP2 as well as acting President of the ACT Branch of the Australian Medical Association. Dr Foote confirmed that she was the acting President. He said that the deed required the President of the ACT Branch of the Australian Medical Association to nominate an expert and asked whether she wanted to do that or whether she thought there was a conflict of interest. She said she did not want to do it because she thought there was a conflict of interest. Dr Foote's affidavit of 20 October 2014 then records that he said: "The next step would be to nominate the ACT Law Society president, are you ok if I do that." She is said to have replied "Yeah that's ok". In an email dated 8 March 2014 recording the chronology of events Dr Foot said of this transaction that he "contacted the ACT AMA to nominate an expert to settle the dispute. This request was declined."

14. Dr Foote then rang the Law Society and identified that the President was Martin Hockridge. He sent an email to Mr Hockridge. The email exchange was as follows. On 25 February 2014 Dr Foote emailed Mr Hockridge:

> Dear Martin
>
> Re: Request for Legal Interpretation
>
> I am involved in four medical partnerships who are governed by a Deed (one is attached).

> We are currently having a dispute over money that has not been resolved. I have requested external dispute resolution with a Sydney group of lawyers called The Disputes Group (www.thedisputesgroup.com). A number of partners are resisting this. Our deed states that as a circuit breaker the President of ACT Law Society can make a legal interpretation (Deed Part 12.8).
>
> The Disputes Group is not happy to take on this resolution unless directed by the President of ACT Law Society. The Deed also states this directive can come from the President of the ACT AMA, however as luck would have it Dr Liz Gallagher is one of the partners (who incidentally supports this dispute resolution with The Disputes Group).
>
> I would appreciate your response to this matter.
>
> Kind regards
>
> Dr Andrew Foote

15. Three points about this email should be noted: the header refers to a request for "legal interpretation"; express reference is made to the power in cl 12.8 of the deed; and there is no reference to any nomination of the President of the Law Society by Dr Gallagher.

16. On 4 March 2014 Mr Hockridge, who appears to have been provided with a copy of at least cl 12 of the BPP2 Deed, replied:

> I refer to your email and note clause 12.8 of the Deed.
>
> In circumstances where there is a dispute involving legal interpretation of the Deed and 10 days or more have elapsed after giving a Notice of Dispute, a party may apply to the President of the Law Society to nominate a QC or SC who has practised at the ACT Bar for more than 10 years to act as an expert to settle the dispute.
>
> There is no scope for me to nominate a person who does not fall within the category outlined in clause 12.8.
>
> I am in a position to nominate a senior counsel who has been in practice at the ACT Bar for more than 10 years. Please confirm that a Notice of Dispute has been given as required, and that you, as a party, make an application to me as the current President of the Law Society.

17. Once again note that Mr Hockridge conceived that his only power was that which existed under cl 12.8. Further, he did not have access to the Notice of Dispute so as to be able to determine for himself whether there was a dispute involving legal interpretation of the deed.

18. 16 minutes later Dr Foote wrote back saying:

> The Notice of Dispute was given 11/11/2013. I can provide a copy if needed.
>
> I am confirming that I, as a party, make an application to you as the current President of the Law Society, to nominate a senior counsel who has been in practice at the ACT Bar for more than 10 years (as required in the BPP2 Partnership Deed 12.8).

19. The offer to provide the Notice of Dispute is significant in that it confirms, consistent with Mr Hockridge's earlier email, that Mr Hockridge made his nomination based on the terms of a deed but without the document describing the nature of the disputes so as to be able to satisfy himself that they were within the scope of cl 12.8.

20. One hour and two minutes later Mr Hockridge emailed Dr Foote nominating Greg Stretton SC as "the expert to resolve this dispute" and providing his contact details.

21. On 6 March 2014 Mr Stretton replied to an email from Dr Foote:

> Thank you for your email and enclosures.

> Subject to any input from the disputing parties I propose to proceed as set out below.
>
> …
>
> 2. That within 7 days the disputing parties ['Parties'] advise whether the dispute is confined to the matters set out in Dr Foote's letter of 11 November 2013 paragraphs A, B, C and D or whether other, and if so what, further issues arise.
>
> …
>
> Please circulate this to each of the disputing Parties and request that they provide me with their email addresses and comments on my tentative timetable.

22. In the email Mr Stretton set a hearing date of 5 April 2014 and identified a timetable for the provision of documents and written statements of evidence.

23. On 8 March 2014 Dr Foote emailed all of the other partners in BPP2 (except for Dr Mark Porter) including copies of his email exchanges with Mr Hockridge on 4 March 2014 and the email from Mr Stretton on 6 March 2014. In his email he sets out a chronology describing the steps that he had taken for the purposes of the dispute resolution provisions of the deeds. In relation to his contact with Dr Gallagher he said: "28 February 2014 contacted the ACT AMA to nominate an expert to settle the dispute. This request was declined."

24. Although it is clear that Mr Stretton had a copy of the Notice of Dispute, the original email from Dr Foote to Mr Stretton to which Mr Stretton replied in his email dated 6 March 2014 was not in evidence.

25. Thus, the evidence does not disclose whether or not Dr Foote's communication with Mr Stretton was limited to the matters dealt with in paragraph A of the Notice of Dispute and confirmed in the 20 December 2013 email or whether the task was broader than that. However, it is clear that Mr Stretton considered that all the matters in paragraphs A, B, C and D of the Notice of Dispute were matters which had been referred to him for expert determination.

26. On 18 March 2014 an email from Dr Tonks was sent to Dr Foote. The email commenced:

> Thank you for your email. I would be grateful if you could specify the exact nature of your dispute. Until such time the Partnership is not prepared to assume any responsibility for costs associated with this endeavour.

27. The email then recited some parts of the history of negotiations in relation to the sale of unit 88 and issues arising under the deed. It noted that Dr Foote's retirement from the CDSC Partnership and BPP1 came into effect that day. It concluded: "I await clarification of the specifics of your Dispute."

28. On 24 March 2014 Dr Foote served a bundle of documents on the CDSC Partnership, BPP1, BPP2, and BGPP.

29. On 25 March 2014 Dr Porter (who had not been copied in to Dr Foote's email of 8 March 2014) wrote to Mr Stretton saying that he would be unable to attend the conference on 5 April 2014 because of prior commitments and asking who was responsible for paying his fees. He said that at such short notice and with so many issues to consider he was not prepared to attend such a meeting and he did not agree to contribute to the costs.

30. Later that afternoon Mr Stretton responded:

> On 6 March 2014 I advised the proposed timetable for this matter and received no demur from any party. Clause 12.7 of the Deed or Partnership provides that the Expert has the power to direct who will pay my fees and I will decide this at the conclusion of the proceedings. As a party you are potentially liable.
>
> I hope this clarifies any misunderstanding you may have had.

31. Mr Stretton forwarded his communications with Dr Porter to Dr Foote and asked him to forward those communications to all parties.

32. On 27 March 2014 the solicitors for the various partnerships wrote to Dr Foote copying in Mr Stretton. The solicitors acted for each of the four partnerships. The letter referred to the Notice of Dispute and the proposed hearing for an expert determination on 5 April 2014 with Mr Stretton. It continued:

> We see that you are attempting to facilitate an expert determination of a dispute purportedly in accordance with clause 12.8 of the BPP2 partnership deed which is mirrored with the other partnerships.
>
> On our instructions, the partnerships are not required to facilitate the appointment, as:
>
> A. There is no apparent dispute;
>
> B. No legal interpretation of the deeds is required;
>
> C. You have not set out a notice of dispute as required by clause 12.2(a);
>
> D. The 'confirmatory notice of dispute' has not been provided as required in accordance with clause 12.2(c);
>
> E. There was no attempt to select an expert pursuant to clause 12.3; and
>
> F. The directions set by Mr Stretton SC have not been followed.
>
> As a minimum, the appointment of the expert determination should be adjourned until the above-mentioned issues are resolved so that it can properly proceed. Technically, it appears that it should not have been facilitated at all and that you should be liable for the cost of this improper appointment.

33. The letter then continued and in summary:

(a) argued that the letter dated 11 November 2013 did not identify any issue of legal interpretation that was required before cl 12.8 was enlivened and that while there had been discussions about a number of issues relating to the partnerships, a dispute had not arisen;

(b) argued that there was no legal obligation on BPP2 to sell unit 88, the discussions that had occurred did not amount to an agreement and that there was no dispute nor any need to obtain Mr Stretton's expertise in determining a legal issue;

(c) contended, in relation to the fit out of 2/9 Sydney Avenue (an issue relating to Barton Property Partnership No. 1), that this was not a dispute that would enliven cl 12.8 and allow Mr Stretton's appointment;

(d) recorded instructions that Dr Foote had taken a personal benefit from the loans that were obtained through the partnership and that was an issue which did not need a legal determination.

34. The letter concluded:

> Considering what is said above, it is our opinion that the expert determination has not been properly facilitated and will not be effective. Further, it has not been properly established in accordance with the directions made by Mr Stretton in his email dated 6 March 2014. It was required that the dispute be properly set out. That has not occurred.
>
> We have not seen the proper documentation that would be required to fully brief Mr Stretton. We understand that you have provided a number of documents in no discernible order, with no index, or indication as to relevance.
>
> As there is no dispute identified we cannot provide the submissions in response and the hearing should not proceed.
>
> Kindly confirm as a matter of urgency that you will consent to the expert conference being adjourned to a later date to be fixed. We invite you to properly set out the legal question or questions that you require Mr Stretton to answer, in the event that you maintain that an expert determination should proceed in accordance with clause 12.8.

35. The letter took issue with the compliance with the contractual process required to enliven a dispute determination under cl 12.8 of the partnership deeds. It also took issue with the process to be followed for the purposes of any expert determination on the basis that it was open for such an expert determination to proceed.

36. Notwithstanding that the letter of 27 March 2014 was addressed to Dr Foote, Mr Stretton responded to the solicitors for the partnerships seeking clarification of precisely who they acted for and responding to the substance of the letter as follows:

> In answer to the specific matters you raise:-
>
> 1. There is clearly a legal dispute first notified in November 2013 and clearly articulated in Dr Foote's letter of 11/11/2013. All efforts to resolve the dispute have, as yet, not been successful, hence my appointment.
>
> 2. There is a clear legal dispute which involves the interpretation of Deeds and other documents. To assert otherwise appears fanciful.
>
> 3. The notice of dispute is clearly set out in Dr. Foote's letter.
>
> 4. You have no proper basis for asserting that I have not been properly appointed.
>
> 5. The Directions I suggested were circulated to all parties who were invited to comment on my suggested approach and timetable. As no adverse response was received the suggested timetable was adopted.
>
> 6. You say that my Directions have not been followed but failed to say why. The Directions do not make it compulsory for parties to respond but give them the clear opportunity to do so.
>
> 7. I do not intend to adjourn or postpone the hearing on 5 April. This dispute has clearly gone on for too long and requires a proper and timely resolution.
>
> 8. Subject to your proper clarification of the specific parties who have instructed you I propose treating your letter as comprising submissions to be considered at the hearing. Please advise if this is not acceptable.

37. On 29 March 2014 Jessy McGowan, Chief Executive Officer of Barton Private Hospital, Barton General Practice, and BPP1 and BPP2, provided a submission to Mr Stretton addressing each of the matters identified in the Notice of Dispute. The letter did not make any objection to the validity of Mr Stretton's appointment under the provisions of the any of the deeds.

38. On 1 April 2014 the solicitor for the partnership wrote to Dr Foote and copied in Mr Stretton to the correspondence. The letter contested the existence of any dispute and contended that no legal interpretation of the deeds was required. It also raised a variety of other matters relating to compliance with cl 12 and the substance of the matters arise in the Notice of Dispute. The letter concluded:

> Considering what is said above, it is out opinion that the expert determination has not been properly facilitated and will not be effective.
>
> …
>
> Kindly confirm as a matter of urgency that you will consent to the expert conference being adjourned to a later date to be fixed. We invite you to properly set out the legal question or questions that you require Mr Stretton to answer, in the event that you maintain that an expert determination should proceed, in accordance with clause 12.8.

39. On 2 April 2014 the solicitor for the partnership wrote again to Mr Stretton in response to his email. That letter said:

> Thank you for your email below. As noted in our letter to Dr Foote dated 27 March, to which you were copied, the remaining partners in BPP2, BPP1, BGPP and CDSC dispute that you have been properly appointed in accordance with the partnership deeds.
>
> They maintain that they have not been provided with proper notice of a dispute to enliven your appointment, that there is not a legal dispute requiring your expert opinion, that the pre-requisites under the deeds have not been fulfilled, that the partners have not been provided with notice of your directions and that there is not sufficient compliance with your directions to allow the proposed conference to proceed as scheduled.
>
> The remaining partners are further prejudiced by the fact that they will not have the benefit of legal representation on 5 April as I am not available and you seem unwilling to move to date.
>
> The remaining partners will reserve their right to dispute the appointment and whether they should be required to meet any resulting fees.
>
> Despite this, the remaining partners and the CEO of the partnerships have been scrambling to put together the information in the short time available. You have seen this through the email from Jessie McGowan sent at 12:09AM on Saturday 29 March.
>
> As we understand them, the disputes are:
>
> 1. Whether there is a right to buy U88 from BPP2,
> 2. The reconciliation of any entitlement payable to Dr Foote's on him exiting each partnership and his claimed 2.5% of partnership profits from 2013
> 3. The fit out of 2/9 Sydney Avenue
> 4. The 178K loan

40. The balance of the letter then addressed each of those matters. In relation to the purchase of unit 88 it provided:

> 1. Unit 88
>
> There is no legal entitlement for Dr Foote to purchase unit 88 which is owned in the name of BPP2. Dr Foote seems to be alleging that there has been an agreement reached through previous discussions. The negotiations occurred as follows:
>
> A. 15 October 2013-An initial proposal was put to a vote including terms that U88 be sold and all amounts owing to each of the partnership entities be resolved with a payment of $2,098,355.58 in cash and the surrender of 3.25 units from Dr Foote. This would involve a full release of all claims and Dr Foote taking on the obligations of the Medfin

loans. This was not passed by the other partnership entities which would be required to bind them to such an agreement.

B. There was an offer put to Dr Foote with the letter dated 5 November 2013 to accept $2,098,355.58 plus all six units in the partnerships. That offer was rejected with the counter offer from Dr Foote in the letter dated 11 November 2013.

C. The letter dated 11 November 2013 alleges that the partnerships should be bound to the previous proposal noted at A. above. This is not correct at law as any agreement would require the agreement of each of the partnership entities.

D. There is no agreement that has been reached for the sale of unit 88 and there are no offers currently available. Dr Foote alleges an enforceable agreement which would require an exchanged contract for purchase. There is nothing in the partnership deeds that places an obligation on the partners to facilitate a sale of unit 88.

E. The partners have taken financial advice that indicated that the cash flow of the partnership would be negatively affected by the sale of unit 88 (see attached CBA analysis).

41. The letter concluded:

> The partners are continuing their work to compile the relevant documents with reference to the material above and hope to have that with you shortly.

42. On 4 April 2014 the partnerships delivered two volumes of documents and submissions to Mr Stretton.

43. On 5 April 2014 Mr Stretton conducted the hearing. Dr Foote was present and Drs Porter, Sides, Tonks, Pham, Tam and Ms McGowan represented the various partnerships. Mr Stretton advised that he would:

> ... deal with each issue in turn, have the parties identify any documentation they wished to be considered in relation to the issue and to add to their written statements anything they wished by way of oral amplification or addition.

44. On 11 April 2014 Mr Stretton delivered his decision. His decision was based on the structure of the issues identified in the Notice of Dispute. In relation to most of the issues he recorded that the issue was no longer in dispute or that there was agreement. He was only required to make decisions on issues A(i) and C(i) as outlined in the Notice of Dispute. In relation to costs he decided that 80% of costs should be paid by the "Executive Members" and Dr Foote should pay 20% of the costs.

45. It is necessary to describe in some detail the structure and content of Mr Stretton's reasons. Under the heading "appointment" he says:

> On 4 March 2014 Mr Martin Hockridge, President of the ACT Law Society nominated me as the Expert to resolve a partnership dispute.

46. He then set out the terms of cl 12.8. Although he did not state which deed he was quoting from the clause is in the same terms as cl 12.8 of the BPP2 deed.

47. He then set out the dispute that has been notified, setting out the terms of the disputes A, B, C and D from the Notice of Dispute. As will be apparent, these involve disputes under a number of different deeds.

48. In relation to the BPP2 Deed, Mr Stretton's reasons pick up the terms of the Notice of Dispute. It is worth noting at this stage that dispute A(i) as identified by Dr Foote sought a sale of unit 88 for $2,098,355.58 and 4.5 units.

49. Having set out the procedure that he adopted, including his rejection of Dr Porter's request for an adjournment, Mr Stretton's reasons then provide:

> The Dispute
>
> The dispute clearly involves legal interpretation of Deeds and other documents. No party submitted to the contrary, nor could they reasonably have done so.

50. This statement is important because it does not actually identify any dispute over the legal interpretation of any of the deeds. It does, however make clear that Mr Stretton purported to be acting under more than just the BPP2 deed. It is not clear how the reference to "other documents" is relevant having regard to the terms of cl 12.8 which was set out on the first page of his decision.

51. Mr Stretton then identified the documents that were provided, written statements that were provided, and the manner in which the hearing was conducted. Under the heading "background information" he set out the membership of the BPP2 and the CDSC Partnership. It is not clear why he did not make mention of the membership of the BGPP or the BPP1 which were the subject of dispute B and C respectively.

52. Mr Stretton then turned to deal with the issues he was required to decide and in relation to issue A(i) the decision provides:

> The legal issue raised crucially involves the interpretation of the Minutes of the meeting held on the 15 October 2013.
>
> There is no dispute that the meeting of 15 October 2013 was properly convened or that the Minutes are not a correct record of the meeting.
>
> It is important to note that the meeting was an "all partners meeting" so that both the CDSC partners and the BPP2 partners were present in person, by proxy or did not attend, despite receiving proper notice of the meeting.
>
> At page 6 of Minutes there is a first column labelled "Issue" and the following words appear below the heading:-
>
> BPP2 and BGP
>
> Sale of Unit 88:
>
> Total $2,442,855.58
>
> Comprising;
>
> 1- $2,098,355.58 in cash plus 3.25 units ($344,500.00)
> 2- All claims relating to events up to and including the settlement date are relinquished by all parties.
> 3- Foote shall assume responsibility for payment of the Medfin loans U100078472, L10086043 without any ongoing assistance or offset.
>
> The next column on page 6 of the Minutes is headed "Discussion" and at No 2 the following his recorded:
>
> 2. A vote was held regarding the deal involving the purchase of Unit 88 by Andrew Foote's super fund. It was decided that the majority of the BP 2 votes were in favour of this deal.
>
> The third column is labelled "Action" and record the following:
>
> "Votes for the sale of unit. The result was 30 votes to 23 in favour of the deal."
>
> It is Dr Foote's contention that this clearly evidences an agreement for sale and the terms of it.

The contrary argument is that the offer required the CDSC partnership to accept the sale and its terms, and that this did not occur.

Document AF29 is a letter from Ken Cush & Associates dated 17 October 2013 to Ms Jessie McGowan concerning an outstanding loan from Dr Foote to CDSC partnership. Paragraph 2 of the letter recite that Dr Foote has reached an agreement relating to the purchase of his rooms from a related partnership and, that as a gesture of good faith, he will extend the deadline for repayment of the loan to him until such time as the settlement of the purchase of his rooms from the related partnership takes place.

Document AF29A is an email from Dr Buchanan to Jessie McGowan concerning the 15 October 2013 meeting, which includes Item 3 which reads in part… "This resulted in a revised offer which was confirmed as acceptable to the buyer and the partners in support of the sale. This deal was for $2,098,355.58 in cash and 4.5 units.

The same email included at point 10:

> "Simon McCredie requested that Andrew Foote take steps to ensure he has finance from bank sorted to finance the sale in 3 above if bank finance was required.

Resolution

It is my decision that there is a legal issue arising out of the documentation referred to me and that there was a clear agreement as recorded in the Minutes for the sale of Unit 88 to Dr Foote's superannuation fund for $2,442,855.58 comprising $2,098,355.58 in cash plus 3.25 units ($344,500) with all claims relating to events up to and including the settlement date to be relinquished by all parties, and with Dr Foote to assume responsibility for the two specified Medfin loans without any ongoing assistance or offset.

This issue is accordingly resolved in Dr Foote's favour.

53. In relation to costs the decision provides:

Costs

Clause 12.7 of the BPP No 2 partnership agreement provides that the fees of the Expert and the costs of each of the parties will be payable as directed by the Expert.

Dr Foote has succeeded on all issues with the exception of the issue involving fit out, and the issue of governance.

In the circumstances and in the exercise of my discretion, I resolve that Dr Foote should pay 20% of my costs as Expert, and that the remaining 80% be paid by the Executive Members, being the parties in dispute with Dr Foote.

The total Expert's costs are $18,238 in accordance with the attached schedule. Dr Foote is to pay $3,648 of that amount and the Executive Members $14,590.00.

54. There are several points which should be noted at this stage about the decision.

55. Although cl 12.8 was not identified as being from any particular deed Mr Stretton has decided disputes under the BPP2 Deed as well as under the BPP1 Deed. In dealing with costs he only referred to cl 12.7 of the BPP2 Deed rather than the equivalent provision in each relevant deed.

56. Notwithstanding that the dispute notified by Dr Foote and set out in the reasons sought a sale of unit 88 for $2,098,355.58 and 4.5 units, and document AF29A referred to a sale of that structure (namely, involving 4.5 units), the decision actually reached was that there was an agreement in the minutes for a sale involving $2,098,355.58 plus 3.25 units. There is no explanation as to why in circumstances where the dispute notice sought the 4.5 unit option that there could be a determination based on the 3.25 unit option. That would certainly be available if the expert was determining the

substantive merits of the transaction but less clearly available if simply engaged in an exercise of legal interpretation.

57. Consistently with the first sentence under the heading "Issue A(i)" which identified the exercise as one involving the interpretation of the minutes on 15 October 2013, the text under the heading "Resolution" makes it clear that Mr Stretton was engaged in an exercise of legal interpretation of documents and not in an exercise of considering substantive financial and other merits. There is, however, no reference to any dispute involving interpretation of the BPP2 Deed as opposed to interpreting the minutes and other documents.

58. On 11 April 2014, following the distribution of Mr Stretton's decision, Dr Tonks wrote to Mr Stretton saying:

> We have received your Expert Determination of Dispute today. It contains a number of factual errors. We welcome the opportunity to assist in the production of an amended report.

59. Mr Stretton responded the same day saying:

> The matter has been finalised as far as my role is concerned and I will not be entering any correspondence in relation to it. It really is time for you all to bury your differences and move on in accordance with my decision.

60. There was some subsequent correspondence between the solicitor for the partnerships and Dr Foote which it is not necessary to set out.

61. As at June 2014 the other members of the partnerships had not paid their share of Mr Stretton's fees. On 4 June 2014 Mr Stretton wrote to the Ms McGowan seeking the name and address of each member of the Executive Committee so that he could arrange for personal service of proceedings on them. That correspondence led to an email from Ms McGowan indicating that his fees would be paid in full.

Principles applicable to the review of expert determinations

62. There was no dispute as to the principles to be applied to the review of an expert determination. They are set out in the reasons of McHugh JA in *Legal & General Life of Australia v A Hudson P/L* (1985) 1 NSWLR 314 at 335-336 and subsequent decisions. Expert determination is a process established by contract where an independent expert decides an issue or issues that exist between parties. The authority for the process is derived from the contract between the parties. The contract will often declare the outcome of the expert determination process to be final, binding and conclusive between the parties. In the present case it is said to be "final and binding": cl 12.4. The expert determination process is usually intended to provide an informal, effective and speedy means of resolving disputes between parties to a contract. It is of particular benefit when the dispute is of a technical or specialised character.

63. Because it is open, subject to statute and questions of public policy, to parties to bind themselves to a dispute resolution process, courts will recognise and give effect to decisions of experts in the same way that they recognise and give effect to contracts. Because of the source of power for the expert determination process, where an expert has made a determination under a contract, the question for a court is not whether the determination is correct but instead whether the expert determination was made in

accordance with the contract. This means that there is potential for an expert determination to be clearly wrong but still be in accordance with the contract.

64. As a consequence, where there is a contest over whether or not an expert determination under a contract is binding, an error on the part of the expert will only be relevant if it discloses that the determination was not reached in accordance with the contract. The correct approach will be to identify from the contract what were the relevant requirements for a binding expert determination and to decide whether they have been met. If they have been met then the determination will be binding notwithstanding that an error may be identified in the determination. If they have not been met then the determination will not be binding because of that fact.

65. Two other points can usefully be made about expert determinations. First, where a contract does not require any particular process to be followed by an expert then the process to be followed is in the discretion of the expert, including the extent to which, if at all, the parties are permitted to make submissions: *Badgin Nominees Pty Ltd v Oneida Limited* [1998] VSC 188 at [77]; *McGrath v McGrath* [2012] NSWSC 578 at [12]; *500 Burwood Highway Pty Ltd v Australian Unity Limited* [2012] VSC 596 at [168]; *Glenvill Projects Pty Ltd & Ors v North North Melbourne Pty Ltd & Ors* [2013] VSC 717 at [50]. Second, subject to the terms of the contract, actual bias, lack of honesty or good faith will vitiate an expert determination because a requirement for the expert to act honestly and in good faith will be implied into the contract: *Legal and General Life* at 335; *McGrath v McGrath* at [12].

66. In *Shoalhaven City Council v Firedam Engineering* (2011) 244 CLR 305 the High Court was dealing with a contract which, unlike the present case, required the expert to give reasons. The argument for the High Court was that in relation to the particular contract an unexplained inconsistency in the reasons given by the expert meant that they were not in accordance with the contract. Ultimately the Court did not need to address that issue of principle because it found that there was not in fact an inconsistency in the expert's reasons. However, in relation to the giving of reasons by an expert French CJ, Crennan and Kiefel JJ said:

> 26 ... The contested question, whether the Determination accorded with the Contract, reduced to an inquiry about whether the Expert had given "reasons" within the meaning of cl 4 of Sched 6. 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.
>
> 27. 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.

> It appears to have been an unstated premise in the proceedings leading to this appeal that the contractually binding effect of the Determination between the parties was conditional upon the giving of reasons as required in cl 4 of Sched 6 to the General Conditions. In this case it was held by the Court of Appeal that the reasons for the Determination disclosed an inconsistency and did not account for it. The question whether there was an unexplained inconsistency is a threshold question. If answered in the negative, the further question whether the reasons were, on that account, insufficient to support a binding Determination will not arise. (footnotes omitted)

67. Applied to the circumstances of the present case the principles set out above indicate that the critical question is whether the determination by Mr Stretton was a determination that was in accordance with the contract. If it is not such a determination then it is not binding. If it is not binding then inevitably the plaintiff's claim for a declaration must fail.

68. The determination may not be in accordance with the BPP2 Deed which makes it "final and binding" either:

    (a) because the preconditions to the conduct of the expert determination were not satisfied; or

    (b) because, as identified in *Shoalhaven*, the reasons disclose that the expert has not made a determination in accordance with the contract.

Plaintiff's contentions

69. In the present case notwithstanding reliance by Mr Hockridge and Mr Stretton upon cl 12.8, the plaintiff does not contend that the expert determination was a determination under cl 12.8. This concession is significant because the determination plainly purported to be a determination under cl 12.8. In my view the concession was appropriately made at the very least for the reason that the dispute was not one which involved the interpretation of the BPP2 Deed.

70. Notwithstanding this concession, the plaintiff submitted that the determination was binding because it was a determination under cl 12.3 of the BPP2 Deed, Mr Hockridge having acted as the nominee of Dr Gallagher, the then Acting President of the ACT Branch of the Australian Medical Association. That was notwithstanding the fact that Mr Hockridge purported to nominate Mr Stretton under cl 12.8. The plaintiff submits that it does not matter that the power to nominate came from a different source to that which Mr Hockridge thought he was exercising because it was a power that was equally available in the circumstances.

71. The plaintiff emphasised the distinction in cl 12.3 between *nomination* of the expert and *appointment* of the expert. The plaintiff submits that because both parties participated in the expert determination process they must be taken to have jointly appointed Mr Stretton. He submits that any irregularity in the nomination process has been waived or, alternatively, that the conduct of the parties was such as to constitute an agreement to have the dispute over unit 88 determined by Mr Stretton.

Consideration

72. For the reasons that I outline below my conclusions are:

    (a) Mr Hockridge was not acting as the nominee of Dr Gallagher when nominating Mr Stretton;

(b) Mr Hockridge in fact acted under cl 12.8 and not cl 12.3 of the BPP2 Deed;

(c) the defendant did not waive any entitlement to dispute the binding nature of any determination by Mr Stretton or agree that his determination would be binding notwithstanding the terms of the BPP2 Deed; and

(d) the nomination and determination cannot be supported by cl 12.3 in circumstances where Mr Hockridge and Mr Stretton acted under cl 12.8.

Was Mr Hockridge the nominee of the President of the AMA?

73. The plaintiff submitted that Mr Hockridge was acting as nominee of Dr Gallagher and hence that the appointment of the expert was made under cl 12.3. I do not accept that is the case. There is no documentary evidence of Dr Gallagher having exercised the power of nomination. The evidence in Dr Foote's affidavit set out above is to the effect that he, Dr Foote, would nominate the ACT Law Society President. He asked Dr Gallagher if that was okay. There is no contemporaneous reference to Dr Gallagher having exercised a power of nomination in, for example, Dr Foote's correspondence with Mr Hockridge. Dr Foote's email of 8 March 2014 to the other partners simply indicated that his request to nominate an expert was declined. Notwithstanding the terms of Dr Foote's affidavit, I am not satisfied that Dr Gallagher in fact exercised any power of nomination.

What power was in fact exercised?

74. If I am wrong in relation to the nomination by Dr Gallagher of Mr Hockridge, I am not satisfied that the power exercised by Mr Hockridge was the power to nominate an expert under cl 12.3.

75. The evidence is absolutely clear that Mr Hockridge considered that the only power that he had and the only power that he exercised was the power under cl 12.8 of the BPP2 Deed. His exercise of power to appoint an expert was clearly based on the limitations in cl 12.8.

76. In the light of my finding that Mr Hockridge was not the nominee of the President of the ACT Branch of the Australian Medical Association, his nomination of Mr Stretton was not in accordance with the contract. That is because he was not acting in accordance with cl 12.3 and had no power to make a nomination under cl 12.8 because the dispute was not one involving the interpretation of the BPP2 Deed.

Power of nomination not supported under cl 12.3 in any event

77. If I am wrong in my conclusions above that Mr Hockridge was not the nominee of the President of the ACT Branch of the Australian Medical Association, his nomination of Mr Stretton would still not have been in accordance with the contract. The position would then be that he had power under cl 12.3 to make a nomination but instead acted under a different power which was not available to him (ie cl 12.8) to make the nomination.

78. No relevant authorities were cited by the plaintiff in support of the proposition that the nomination could have been supported under cl 12.3 even though Mr Hockridge considered that he could only act under cl 12.8. However the submission appears to be similar to the accepted proposition that a contracting party who, after becoming

entitled to refuse performance, gives a wrong reason for doing so is not thereby precluded from relying upon a justification which in fact existed whether the party was aware of it at the time or not: see *Nund v McWaters* [1982] VR 575 at 585ff. I accept as a matter of principle that it is open to rely upon an alternative source of power available under the contract. However the capacity to rely upon an alternative source of power under a contract must be subject to the following:

(a) the preconditions to the exercise of the alternative power must have been met; and

(b) where the power in question involves the exercise of powers by a third party, the fact that one source of power was relied upon as opposed to another must not have affected the exercise of the power.

79. So far as the exercise of power by Mr Hockridge is concerned I have assumed for the purposes of this discussion that the precondition to the exercise of power, namely, nomination by the President of the ACT Branch of the Australian Medical Association has been met although in fact, as I have determined above, that was not the case. The exercise of power was clearly affected by Mr Hockridge's reliance upon cl 12.8 as opposed to cl 12.3. A nomination under cl 12.3 is conditioned upon the expert being an expert in the relevant field. Clause 12.8 requires the expert to be a Queen's Counsel or Senior Counsel who has been practising at the ACT Bar for more than 10 years. As his email of 4 March 2014 makes clear, Mr Hockridge exercised the power of nomination on the basis that the dispute was confined to one within cl 12.8 and hence was constrained in nominating an expert to the category of persons set out in cl 12.8. While it would have been open to appoint Mr Stretton as an expert under cl 12.3, I am satisfied that the fact that he considered he was exercising a power under cl 12.8 affected his decision.

80. So far as Mr Stretton is concerned it is very clear that he considered that he was applying cl 12.8. There are two possible interpretations of cl 12.8. The plaintiff submits that the use of the word "involves" in cl 12.8 is a broad connecting word so that once a dispute "involves" the legal interpretation of the BPP2 Deed then the whole of the dispute is to be determined by the Queen's Counsel or Senior Counsel. The defendant submitted that read in the context of the clause as a whole the better interpretation is that the role of the expert under cl 12.8 is to determine the proper legal interpretation of the deed or, indeed, whether the dispute involves legal interpretation of the deed. In my view the plaintiff's interpretation should be accepted. While I accept that the structure of the cl 12 generally and 12.8 in particular favour the defendant's interpretation, the use of the word "involves" is a strong textual indication that the whole of the dispute, not just the legal interpretation of the deed, is to be resolved by the Queen's Counsel or Senior Counsel.

81. It is difficult to determine from the terms of his written reasons precisely how Mr Stretton viewed the scope of cl 12.8 in the context of the disputes before him. There are some indications that he considered that he was limited to considering questions involving a legal conclusion. That appears from (a) the fact that cl 12.8 is set out in full on page 1 of the decision; (b) the reference to the dispute involving "legal interpretation of Deeds and other documents" on page 3; and (c) the statement in relation to dispute A that "[t]he legal issue raised crucially involves the interpretation of the Minutes of the meeting held on the 15 October 2013". These limitations on the role Mr Stretton

identified for himself could, instead of coming from the terms of cl 12.8, have come from the terms of the identified disputes although if the terms of the Notice of Dispute narrowed the dispute in this way, it is difficult to see how he could have reached his decision on issue A which involved a payment plus 3.25 units when the Notice of Dispute sought enforcement of a right to the payment plus 4.5 units. The reasons do not appear to be consistent with an unconstrained consideration of the merits of the positions of the disputing parties. Because of the conclusions I have reached about the exercise of the nomination power by Mr Hockridge it is not necessary to reach a final conclusion on this point.

82. In summary, even if Mr Hockridge was appointed nominee under cl 12.3 of the BPP2 Deed by the President of the ACT Branch of the Australian Medical Association (which I have found above he was not) the plaintiff cannot rely upon cl 12.3 to make the expert determination binding because the nomination by Mr Hockridge was affected by the limited scope of the power that he thought that he was exercising, namely, the power under cl 12.8.

No waiver or separate agreement to make determination binding

83. I do not consider that the necessity for the expert to be both *nominated* and *appointed* by the parties or the participation by the other members of the defendant renders the determination by Mr Stretton binding upon the defendant. There was no formal appointment of Mr Stretton. If the nomination was effective then the parties were obliged to appoint Mr Stretton. Instead of formally documenting the appointment Mr Stretton appears to have proceeded on the basis that his appointment was effected by the nomination and the disclosure of his fees and that it was not necessary to further document his appointment by the parties. While there could be circumstances where, by a separate agreement, parties agree to the appointment of an expert to resolve their disputes and agree to the consequences of that appointment, in this case I am not satisfied that there was any separate agreement that would permit a departure from the requirements of the BPP2 Deed. The letter from the defendant's solicitor dated 27 March 2014, the letter from the defendant's solicitor to Dr Foote on 1 April 2014 and the email from the defendant's solicitor to Mr Stretton dated 2 April 2014 each made it clear that the capacity to make a binding determination of the notified dispute relating to unit 88 was contested and is inconsistent with there being an agreement to be bound notwithstanding the terms of the BPP2 Deed.

84. The plaintiff's submissions in relation to waiver were made without reference to authority. Clearly the concept of waiver is subject to "uncertainties and difficulties": see *Agricultural & General v Gardiner* (2008) 238 CLR 570 at [53]. It appears in this case to have been used in the sense of their having been an election by the defendant to abandon any entitlement to contest the binding nature of the expert determination by participation in the expert determination process. The fact that the defendant supplied documents and submissions to Mr Stretton did not, in my view, amount to an election not to rely upon any entitlement to contest the binding nature of any determination. The defendant maintained in its solicitor's letter of 27 March 2014, which Mr Stretton treated as a submission, that the determination should not be made because the expert had not been properly appointed. Thus, even within the hearing process the validity of its constitution remained a live issue and was not abandoned. While, a point at which

an election might have arisen at some later time it did not arise at the point of participation in the hearing before Mr Stretton.

85. In those circumstances it is not possible to find that the determination is binding notwithstanding that it was a power exercised outside the contractual process available under the BPP2 Deed.

Ruling on admissibility of affidavits

86. Counsel for the plaintiff objected to paragraphs 3 to 31 and 34 to 36 of the affidavit of Tony Tonks sworn 19 September 2014 and the documents referred to in those paragraphs. The objection was based on relevance. I admitted the paragraphs subject to a ruling upon relevance. The relevance objection was that the paragraphs could not be relevant because they could only go to an attempt to impugn the correctness of Mr Stretton's decision and that was not a permissible exercise in a case such as this. The plaintiff submitted that the contested issue was what was the dispute referred to the expert and that could not be decided by material that was not before the expert. Further, he submitted that there was a vice in the admission of the material when there was no evidence as to the oral amplification of the dispute by the parties which was referred to in Mr Stretton's reasons.

87. In my view the material is admissible. There was no dispute that the court's task was not to review the correctness of the expert's decision but instead to determine whether it was reached in accordance with the contract and hence binding upon the parties. The material falls into the category of evidence providing background to the dispute, a description of the transactions the subject of the dispute, the process relating to the expert determination and events since the expert determination. Some of the material is repeated elsewhere in the evidence but the parties did not identify what appeared elsewhere and what did not. Dealing with the matter at the level of generality at which it was argued, I am satisfied that the material is relevant. Evidence which permits an understanding of the expert decision, even if involving material not before the expert, may be relevant even if the correctness of the experts decision is not open to review. That is because it can assist the court in reaching a conclusion as to whether or not the decision was made in accordance with the contract and hence binding on the parties. The real issue is not whether it is relevant but ensuring that it is used appropriately having regard to the role of the expert. For these reason I admit the evidence.

88. I also indicated that I was reserving my decision on the admissibility of two other affidavits of Mr Tonks relevant only to the tenancy proceedings dated 22 August 2014 and 15 September 2014. I admit those affidavits as relevant to the tenancy proceedings although note that having regard to the position adopted by the parties in relation to the tenancy proceedings the evidence in those affidavits has not been of significance in the resolution of the case.

Conclusion and orders

89. In the light of my reasons above, Mr Stretton was not nominated in accordance with the BPP2 Deed and his determination is not binding upon the defendant. Therefore it is appropriate to dismiss the plaintiff's claim for a declaration to the contrary.

90. The parties agreed that the tenancy dispute would effectively follow the outcome of the claim for a declaration. At the core of those proceedings was the issue whether the

termination by the defendant of the plaintiff's tenancy should be confirmed under s 123 of the *Leases (Commercial and Retail) Act 2001* (ACT). There may be an issue as to quantification of rent which will need to be resolved in the light of my decision.

91. During the course of submissions the parties agreed that there was no reason why costs would not follow the event. However, the defendant brought a further application dated 25 November 2014 which was adjourned pending delivery of my decision. In the light of the pendency of this application I will hear the parties further as to costs if that is necessary.

92. In proceedings SC360 of 2014 the orders of the Court are:

    1. The originating application is dismissed.
    2. The proceedings are listed at 12 noon on 19 December 2014 for any argument in relation to costs.

93. In proceedings SC393 of 2014 the orders of the Court are:

    1. The defendant's termination of the plaintiff's lease on 9 May 2014 is confirmed.
    2. The proceedings are listed at 12 noon on 19 December 2014 for any argument in relation to costs and for the making of any further or other orders necessary to finalise the proceedings.

I certify that the preceding ninety-three [93] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Master Mossop.

Associate:

Date: 18 December 2014