Court of Appeal
Supreme Court

New South Wales

Case Name:	Lepcanfin Pty Ltd v Lepfin Pty Ltd
Medium Neutral Citation:	[2020] NSWCA 155
Hearing Date(s):	14 May 2020
Date of Orders:	23 July 2020
Decision Date:	23 July 2020
Before:	Bell P at [1]; Payne JA at [116]; McCallum JA at [117]
Decision:	1. Grant leave to appeal but dismiss the appeal with costs on the Mandate Issue, as identified in the reasons for judgment. 2. Refuse leave to appeal with costs in respect of the Guarantee Issue, as identified in the reasons for judgment.
Catchwords:	CONTRACT – dispute resolution clauses – expert determination clause – separate Expert Determination Agreement entered into – whether expert exceeded her mandate in determining that clause in a Development Deed was a penalty – construction of ambit of separate Expert Determination Agreement – when one party to dispute initially accepted that penalty issue fell within scope of Expert Determination Agreement and then resiled from that fact – whether party estopped from resiling from initial position – whether other issues sought to be raised in Commercial List proceedings but which had not been the subject of expert determination could be litigated – whether primary judge erred in staying litigation of those issues.
Legislation Cited:	Supreme Court Act 1970 (NSW) s 101(2)(e)
Cases Cited:	Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99;

[1973] HCA 36
Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd (2019) 99 NSWLR 419; [2019] NSWCA 61
Comandate Marine Corporation v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45; [2006] FCAFC 192
Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332
Electricity Generation Corporation v Woodside Energy Ltd; Woodside Energy Ltd v Electricity Generation Corporation (2014) 251 CLR 640; [2014] HCA 7
FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association (1997) 41 NSWLR 117
Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40; [2007] 4 All ER 951
Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160; (1996) 131 FLR 422
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69
Global Partners Fund Limited v Babcock & Brown Limited (in liq) (2010) 79 ACSR 383; [2010] NSWCA 196
Hancock Prospecting Pty Ltd v Rinehart (2017) 257 FCR 442; [2017] FCAFC 170
Harrington v Browne (1917) 23 CLR 297; [1917] HCA 36
Inghams Enterprises Pty Limited v Hannigan [2020] NSWCA 82
Insigma Technology Co Ltd v Alstom Technology Ltd [2009] 3 SLR 936
Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110
Mastrobuono v Shearson Lehman Hutton Inc. 514 US 52 (1995)
Mitsubishi Motors Corp v Soler-Chrysler Plymouth Inc 473 US 614 (1985)
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37
Paper Products Pty Ltd v Tomlinsons (Rochdale) Limited (1993) 43 FCR 439; [1993] FCA 346

	PPK Willoughby Pty Ltd v Baird [2019] NSWCA 48 Rinehart v Hancock Prospecting Pty Ltd (2019) 366 ALR 635; [2019] HCA 13 Rinehart v Welker (2012) 95 NSWLR 221; [2012] NSWCA 95 TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 251 CLR 533; [2013] HCA 5 The Illawarra Community Housing Trust Ltd v MP Park Lane Pty Ltd [2020] NSWSC 751 The Life Insurance Co of Australia Ltd v Phillips (1925) 36 CLR 60; [1925] HCA 18 Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52 Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522; [2005] HCA 17 Zhu v Treasurer of the State of New South Wales (2004) 218 CLR 530; [2004] HCA 56
Texts Cited:	A Briggs, Agreements on Jurisdiction and Choice of Law (2007, Oxford University Press) G B Born, International Commercial Arbitration (2nd ed, 2014, Wolters Kluwer)
Category:	Principal judgment
Parties:	Lepcanfin Pty Ltd (Applicant) Lepfin Pty Ltd (First Respondent) Lepcon Pty Ltd (Second Respondent) Antegra Pty Ltd (Third Respondent) Domenico Capitani (Fourth Respondent) Josephine Grace Carmel Capitani (Fifth Respondent) Antegra Management Leppington Pty Ltd (Sixth Respondent) Lepdev Pty Ltd (Seventh Respondent) Berlyn Holdings Pty Ltd (Eighth Respondent)
Representation:	Counsel: V Whittaker SC, K Petch (Applicant) W Muddle SC, R Davies (First-Third and Sixth-Eighth Respondents) Solicitors:

	Colin Biggers & Paisley (Applicant) Dentons Australia Pty Ltd (First-Third and Sixth- Eighth Respondents) Submitting appearance (Fourth and Fifth Respondents)
File Number(s):	2019/307949
Publication Restriction:	N/A
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity – Commercial List
Citation:	[2019] NSWSC 1328
Date of Decision:	10 September 2019
Before:	Rein J
File Number(s):	2019/184969

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Under cl 3.3 of a Development Deed relating to the development of a home estate on land situated in Leppington, NSW, Lepcon Pty Ltd (**Lepcon**) was required to make payments to Lepfin Pty Ltd (**Lepfin**) in the sum of $3.9million, yet only $1,143,332.56 was paid. Clause 12.4 of the Development Deed provided, *inter alia*, that a Facilitation Fee payable to Lepcanfin Pty Ltd (**Lepcanfin**) was to be increased by the amount of the shortfall in payments under cl 3.3. Accordingly, Lepcanfin claimed that it was entitled to an increased Facilitation Fee, described as the "Facilitation Fee Top-Up" (**the Top-Up**), on account of the $2,756,667.44 still to be advanced.

The Development Deed also made provision for various parties to it to enter into guarantees (**the Guarantees**) with the form of the guarantees contained in a proforma guarantee which was a schedule to the Development Deed. Clause 3.1(b) of the Development Deed made execution of the guarantees a pre-condition to the Development Deed coming into effect.

A dispute arose between the parties as to whether or not Lepcanfin had waived the obligation of Lepcon to pay the balance of $2,756,667.44 and its entitlement to the increase in the Facilitation Fee, pursuant to the terms of a Second Amendment and Restatement Deed, cl 2(c) of which acknowledged that Lepcanfin "waives the Existing Defaults on and from the Effective Date", being 8 July 2015 (the date of the Second Amendment and Restatement Deed).

The Development Deed contained a dispute resolution clause providing for expert determination of various types of dispute. Pursuant to that clause, the parties appointed an independent expert, Professor Elisabeth Peden, to make a final and binding decision in relation to the dispute. A tri-partite expert determination agreement (**the EDA**) was drawn up, with Lepcanfin signing the EDA on 9 April 2018, and the counterparties executing it on 10 April 2018. A "brief description of subject matter of dispute" contained in a Schedule to the EDA outlined the following:

> "…The dispute is, in essence, as to whether or not Lepcanfin waived the obligation of Antegra to pay the balance of $2,756,667.44 and Lepcanfin's entitlement to the increase in the Facilitation Fee, pursuant to the terms of the Second Amendment and Restatement Deed. Antegra claims that the obligation and increase in Facilitation Fee was waived, while Lepcanfin claims that it was not".

Prior to execution of the EDA, on 12 March 2018, Antegra and associated companies served Points of Claim, para 13 of which claimed that clause 12.4(a)(i) of the Development Deed "was void and unenforceable as a penalty". On 9 April 2018, Lepcanfin served a Points of Defence, denying the allegation that cl 12.4(a)(i) was a penalty.

A Joint Bundle, including the Points of Claim and Points of Defence, was delivered to Professor Peden on 11 April 2018.

In the course of the expert determination process, Antegra made detailed submissions in relation to the issue of penalty. In response, notwithstanding its denial in its Points of Defence that cl 12.4(a)(i) was a penalty, Lepcanfin contended that only the "dispute as defined' in the EDA should be considered by Professor Peden, and that this did not include the penalty issue. Professor Peden did not agree and Lepcanfin subsequently made submissions on the penalty issue.

Professor Peden provided her determination (**the Determination**) on 30 June 2014, noting that the scope of the dispute included whether the "entitlement" to the increased fee had been waived by Lepcanfin by way of the Second Amendment and Restatement Deed, and whether such an entitlement was a penalty and could be enforced. She held that there had been no waiver but that the increased Facilitation Fee was a "penalty", and therefore either void or wholly unenforceable.

Lepcanfin commenced proceedings alleging that Professor Peden had exceeded her mandate in determining the penalty issue, and also sought substantive relief in relation to the Guarantees.

The primary judge held that the expert had not exceeded her mandate and dismissed, on a summary basis, this aspect of the Commercial List Summons. His Honour also held that the balance of the proceedings in relation to the Guarantees should be stayed on the basis that the dispute to which the relevant prayers for relief related fell within the scope of the expert determination clause in the Development Deed, and that the parties should be held to their contractual bargain.

The principal issues on appeal were:

1. whether the primary judge erred in holding that the expert had not exceeded her mandate; and

2. whether the primary judge erred in staying the proceedings in relation to the Guarantees.

The Court held (Bell P, Payne JA and McCallum JA agreeing):

1. With respect to the question of mandate, leave to appeal was granted, but the appeal was dismissed. Commercial common sense dictated that there should be attributed to the parties an intention to give a broad interpretation to the word "entitlement" as used in the Schedule to the EDA, and that a party's "entitlement" to rely on a particular contractual provision included whether or not there was a reason why may preclude that party from asserting or enjoying a contractual benefit otherwise conferred by it. The fact that the contractual benefit was a "penalty" amounted to such a reason: [99], [103], [108] (Bell P); [116] (Payne JA); [117] (McCallum JA).

2. It was, in the circumstances, appropriate to decide this question on a summary basis: [100] (Bell P); [116] (Payne JA); [117] (McCallum JA).

3. Observations by Bell P in relation to the construction and interpretation of dispute resolution and expert determination clauses: [80]-[96].

4. With respect to the Guarantee Issue, leave to appeal was refused. The primary judge's decision that these claims for relief "arose out of" the Development Deed was correct and the parties should be held to their bargain. The primary judge was correct to stay the proceedings and this was a discretionary decision on a matter of practice and procedure, and was not shown to be infected with error of principle or involve any injustice: [11], [114] (Bell P); [116] (Payne JA); [117] (McCallum JA).

JUDGMENT

1 **BELL P**: For the third time in a little over 12 months, this Court has been called upon to consider the terms of a dispute resolution clause in a commercial contract.

2 In *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419; [2019] NSWCA 61, this Court was engaged in the consideration of a foreign exclusive jurisdiction clause in a dispute where not all parties to the controversy were parties to the same dispute resolution clause.

3 In *Inghams Enterprises Pty Limited v Hannigan* [2020] NSWCA 82 (**Inghams**), this Court had to consider whether a particular dispute fell within the terms of

an arbitration clause. In that case, I considered at some length the wide variety of dispute resolution clauses that may be included in parties' commercial contractual arrangements and the principles applicable to the construction and interpretation of such clauses.

4 The matter currently before the Court concerns what is known as an expert determination clause contained in a multi-party deed (**the Development Deed**), and which led to the execution by counterparty of a separate expert determination agreement (**the EDA**) to which some (but not all) of the parties to the Development Deed and who were relevantly in dispute became a party, together with the expert as mutually agreed by the parties to the dispute.

5 There are two essential issues. First, whether the expert determination which was delivered in 2018 exceeded the expert's mandate (**the Mandate Issue**). This issue is an example of the fact that "[a]n expert determination clause does not oust the jurisdiction of the court, which always keeps ultimate supervision of the ambit of the expert's authority under a contractual provision": *The Illawarra Community Housing Trust Limited v MP Park Lane Pty Ltd* [2020] NSWSC 751 at [56] (**Illawarra Community Housing**). The second issue is whether an as yet unresolved dispute with regard to guarantees was required to be subjected to the expert determination process provided for in the Development Deed (**the Guarantee Issue**).

6 In the proceedings at first instance, *Lepcanfin Pty Ltd v Lepfin Pty Ltd* [2019] NSWSC 1328, Rein J (**the primary judge**), sitting in the Commercial List of the Equity Division of this Court, held that the expert had not exceeded her mandate and dismissed, on a summary basis, this aspect of the Commercial List Summons. His Honour also held that the balance of the proceedings which sought various declarations in relation to the operation of certain guarantees should be stayed on the basis that the dispute to which the relevant prayers for relief related fell within the scope of the expert determination clause in the Development Deed, and that the parties should be held to their contractual bargain.

7 Lepcanfin Pty Ltd (**the Applicant**) sought leave to appeal from this decision. The leave application was heard concurrently and was argued with

considerable skill both by Ms Whittaker SC (with whom Ms Petch appeared) for the Applicant and by Mr Muddle SC (with whom Mr Davies appeared) for the First to Third and Sixth to Eighth Respondents. The Fourth and Fifth Respondents entered submitting appearances. They were parties to the Development Deed, but not parties to, nor associated with, parties to the EDA.

8 I would grant leave to appeal in respect of the primary judge's decision on the Mandate Issue, but dismiss the appeal insofar as it related to that issue.

9 I would refuse to grant leave to appeal on the Guarantee Issue, on the basis that it involved a discretionary decision on a matter of practice and procedure and has not been shown to be infected with error of principle or involve any injustice: see, generally, *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48. The Applicant remains able to agitate its claim with regard to the Guarantee Issue before a mutually agreed or appointed expert in accordance with the expert determination clause contained in the parties' contractual arrangements.

Background to dispute

10 The proceedings arise out of a project for the development of land into a home estate in Leppington, NSW. The Applicant was a financier of that project and agreed to lend $10 million for the venture.

The Development Deed

11 On 21 August 2014, the Applicant entered into the Development Deed with each of the eight Respondents, namely, Lepfin Pty Ltd (**Lepfin**), Lepcon Pty Ltd (**Lepcon**), Antegra Pty Ltd (**Antegra**), Mr Domenico Capitani and Ms Josephine Grace Carmel Capitani (**the Capitanis**), Antegra Management Leppington Pty Ltd (**AML**), Lepdev Pty Ltd (**Lepdev**) and Berlyn Holdings Pty Ltd (**Berlyn**). The Capitanis entered a submitting appearance, other than as to costs, both at first instance and on appeal. They were also not party to the EDA. For convenience, I shall collectively refer in the balance of these reasons to the other parties to the Development Deed, other than the Applicant and the Capitanis, as the Respondents.

12 Clause 3.2 of the Development Deed outlined that the Applicant would provide funding of $10 million to pay out an existing NAB debt, and use reasonable

endeavours to procure senior debt funding to enable the completion of the residential estate.

13 Clause 3.3 of the Development Deed provided that Lepcon (described as the Builder/Vendor) would advance to Lepfin (described as the Financier) an interest-free loan of $3.9 million, as follows:

> "The Builder/Vendor must make an interest free loan to the Financier for working capital in the amount of $3,900,000, such loan to be made:
>
> (a) as to $1m within 30 days of Newco providing the funding in clause 3.2(a) above;
>
> (b) as to $2m within a further 30 days thereafter; and
>
> (c) as to the balance within a further 30 days thereafter".

14 Clauses 8.1 and 8.3(b) of the Development Deed provided that, after the repayment of all monies provided by the Applicant and Lepcon, and to the extent of available funds thereafter and payment not preventing continuation of the residential estate, Lepfin would pay a "Facilitation Fee" to the Applicant. Schedule Two of the Development Deed provided a method of calculating that fee.

15 Clause 12.4 of the Development Deed provided that if Lepcon failed for a period of 30 days to advance the Lepcon Loan, then the Facilitation Fee payable to the Applicant was increased to the extent of the failure and, should the failure continue for 90 days, the Applicant could terminate the Development Deed. Clause 12.4 is relevantly extracted below:

> "**12.4 Default (Clause 3.3)**
>
> If the Builder/Vendor fails to make any of the payments set out in clause 3.3 within the time periods allowed in clause 3.3 Newco may not immediately terminate this Deed, however if the failure to pay is not remedied within 30 days of the breach of clause 3.3, the parties agree:
>
> (a) (i) the Facilitation Fee will be increased by the amount of the shortfall in payment/s; and
>
> (ii) Newco may, in its sole discretion, contribute the amount of the shortfall itself such contribution being deemed an Additional Contribution pursuant to clause 3.5;
>
> (b) If the failure to make such payments is not remedied within 90 days Newco may elect to terminate this Agreement."

(By the first amendment deed (referred to at [19] below), the references to "Newco" in this clause were replaced by "Lepcanfin", and the clause was slightly supplemented in a manner not material to the present dispute).

16 Lepcon did not advance the full amount of the loan required to be made by cl 3.3 of the Development Deed, with $2,756,667.44 still to be advanced. Accordingly, the Applicant claimed that it was entitled to the increased facilitation fee, described as the "Facilitation Fee Top-Up" (**the Top-Up**).

17 Clause 9 of the Development Deed dealt with dispute resolution and included a mechanism for negotiated resolution and, failing that, the appointment of an expert. Clause 9 has been extracted in its entirety below:

> "**9.1 Parties to avoid disputes**
>
> Each party agrees to use its best endeavours to resolve any conflicts in good faith in accordance with the terms and intent of this agreement without such conflicts becoming disputes.
>
> **9.2 Disputes**
>
> If any dispute arises out of this agreement neither party may commence any court or arbitration proceedings unless they have complied with the following paragraphs of this clause (except where the party seeks urgent interlocutory relief).
>
> **9.3 Negotiated resolution and selection of expert**
>
> (a) On service of a notice by any party (**Dispute Notice**), the parties to this agreement must meet at least once and use reasonable endeavours to resolve the Dispute by negotiation within 14 days of service of the Dispute Notice. Any resolution must be recorded in writing and signed by each party.
>
> (b) If the Dispute is not resolved, the parties must within the 14 day period use reasonable endeavours to appoint an expert (**Expert**) by agreement. That appointment must be recorded in writing and signed by each party. The parties agree that an Expert must only be appointed if that Expert agrees to provide its decision within a period no longer than 42 days from the date of his or her appointment.
>
> (c) If the parties do not reach agreement on the appointment of an Expert the Expert must be appointed, at the request of any party, by the President for the time being (or if none, the senior elected member) of the professional body of the following organisations according to the type of dispute:
>
> an accounting dispute: by the President of the Institute of Chartered Accountants;
>
> a legal dispute: by the President of the Law Society of NSW;
>
> a construction or design dispute: by the President of the Royal Australian Institute of Architects (NSW Chapter);

an engineering dispute: by the President of the Institute of Engineers;

a valuation dispute: by the President of the Australian Property Institute;

a property dispute: by the President of the Real Estate Institute of NSW.

If the parties cannot agree on the nature of the dispute, it shall be referred to The Institute of Arbitrators and Mediators Australia to determine the Expert.

9.4 Referral to Expert

If the Dispute is not resolved under clause 9.3, a party may at any time thereafter refer the Dispute for determination by the Expert.

9.5 Assistance to the Expert

(a) Once the Expert has been instructed the parties must:

(i) each use their best endeavours to make available to the Expert all information the Expert requires to settle or determine the Dispute; and

(ii) ensure that their employees, agents or consultants are available to appear at any hearing or enquiry called by the Expert.

(b) The parties may give written submissions to the Expert but must provide copies to the other parties at the same time.

9.6 Expert's decision

(a) The decision of the Expert must:

(i) be in writing and give reasons; and

(ii) be made and delivered to the parties within 42 days from the date of appointment of the Expert.

(b) The Expert may conduct the determination of the Dispute in any way it considers appropriate but the Expert may, at its discretion, have regard to the Australian Commercial Dispute Centre's guidelines for expert determination of disputes or such other guidelines as it considers appropriate.

(c) The Expert's decision is final and binding on the parties.

(d) The Expert must act as an expert and not as an arbitrator.

9.7 Expert's Costs

(a) The Expert must also determine how the expenses relating to the referral of the Dispute (including the Expert's remuneration) should be apportioned between the parties and in default of a decision by the Expert those expenses must be borne by the parties equally.

(b) In determining the apportionment of costs the Expert may have regard to what the Expert, in its reasonable opinion considers to be a lack of good faith or a failure to use reasonable endeavours by any party in assisting the Expert or resolving the dispute between the parties nominated officers as required by this clause".

18 The Development Deed also made provision for various parties to it to enter into guarantees with the form of the guarantees contained in a proforma guarantee which was a schedule to the Development Deed. Clause 3.1(b) of the Development Deed made execution of the guarantees a pre-condition to the Development Deed coming into effect.

Amendment deeds

19 The Applicant and the Respondents entered into two amendment deeds, styled "Amendment and Restatement Deed" dated 18 May 2015 (**the first amendment deed**) and "Second Amendment and Restatement Deed" dated 8 July 2015 (**the second amendment deed**).

20 The recitals to the first amendment deed explained the purpose of the amendment as follows:

> "A The parties entered into the Development Deed on or about September 2014 (**Development Deed**).
>
> B On 27 November 2014, a notice of default under the Development Deed was issued by Lepcanfin Pty Ltd to Lepcon Pty Ltd as trustee of the Leppington MHE Development Trust (**Default Notice**) as a result of a default in payment by the Builder/Vendor pursuant to clauses 3.3 and 12.4 of the Development Deed.
>
> C A second default occurred under clauses 3.3 and 12.4 as the balance of the payment due to be made to Lepcanfin Pty Ltd was not received by 3 December 2014. The aggregate amount of $2,900,000 is still owing to Lepcanfin Pty Ltd under the terms of the Development Deed (**Second Default Notice**).
>
> D Lepcanfin has agreed that they may consider injecting additional funds into the Project on certain conditions up to a maximum amount of $2,900,000 (or any lesser amount as it determines in its sole discretion).
>
> E The parties acknowledge that as a result of the defaults above and the Project now being underway it has become apparent that there are amendments required to the Development Deed in order for the Project to efficiently proceed.
>
> F Amendments are permitted to the Development Deed pursuant to clause 16.5 and this deed now set out the amendments agreed between the parties to the Development Deed effective from the Effective Date".

21 The first amendment deed included the following acknowledgements, in cll 2(c) and 2(d), namely that:

> "**2 Acknowledgment**
>
> …

(c) Lepcanfin, in its sole discretion, may decide to waive the Existing Defaults if it considers appropriate in order to obtain alternate funding pursuant to the Development Deed.

(d) The parties acknowledge and confirm that in calculating the Facilitation Fee there is an additional sum payable under clause 12.4 of the Development Deed. The Facilitation Fee has increased by an amount equal to the shortfall under clause 3.3 of the Development Deed in the amount of $2,900,000 less an amount of the contribution made by the Builder/Vendor between the period of 3 September 2014 until 2 January 2015. This Facilitation Fee is payable in accordance with the Development Deed".

22 The second amendment deed included an acknowledgement in cl 2(c) that "Lepcanfin waives the Existing Defaults on and from the Effective Date", the effective date being the date of the second amendment deed, namely 8 July 2015. Under cl 1.1 of the second amendment deed, "Existing Defaults" was defined to include the following events:

"(a) On 27 November 2014, a notice of default under the Development Deed was issued by Lepcanfin Pty Ltd to Lepcon Pty Ltd as trustee of the Leppington MHE Development Trust (**Default Notice**) as a result of a default in payment by the Builder/Vendor pursuant to clauses 3.3 and 12.4 of the Development Deed;

(b) A second default occurred under clauses 3.3 and 12.4 as the balance of the payment due to be made to Lepcanfin Pty Ltd was not received by 3 December 2014. The aggregate amount of $2,900,000 is still owing to Lepcanfin Pty Ltd under the terms of the Development Deed (**Second Default Notice**); and

(c) A further default occurred in respect of the Facility Agreement between Lepcanfin Pty Ltd and Lepfin Pty Ltd as a result of a third default occurring under the Development Deed. A default notice was issued on 5 June 2015 (**Third Default Notice**)."

Emergence of a dispute

23 A dispute emerged between the Applicant and the Respondents as to whether, by agreeing to waive the existing defaults under the second amendment deed, the Applicant had also waived its entitlement to receive the Top-Up.

24 On 10 August 2017, Dentons (acting for the Respondents) issued a dispute notice to Colin Biggers & Paisley (**CBP**), acting for the Applicant, as follows:

"…We understand the position you have stated however, disagree with your interpretation of the Agreement.

We are instructed by our client that it was always his understanding that the existing defaults were to be waived on the basis that effective control of the project was to be passed to your client.

The definition of 'existing defaults' at paragraph (b) does no more than state that, as at the date of the Second Amendment and Restatement Deed the

money was owing. Clause 2(c) then makes it clear that 'Lepcanfin waives the Existing Defaults on and from the Effective Date'.

Given the Existing Defaults were waived expressly, the point you make in clause 5.5 has no application as the obligation you refer to which had not been observed and constituted an Existing Default was 'expressly waived in this document'.

We are instructed to advise that our client does not agree that distributions should include the full facilitation fee of $2.9m being paid to your client and invokes Clause 9 of the Agreement which requires the issue to be the subject of dispute resolution.

We are instructed to propose that the $2.9m be taken out of the proposed distributions, paid into a trust account and invested in a controlled moneys account pending resolution of the issue…"

25 On 19 February 2018, Dentons sent an email to CBP which contained a draft email of instruction to the proposed expert, including a suggested description of the dispute in respect of which the expert was to be appointed. Professor Elisabeth Peden, a practising barrister and expert in, inter alia, contract law, was agreed by the parties to be a suitable expert. The draft email to be sent was outlined by Dentons as follows (other than the matters either struck through or added in bold, which were amendments subsequently proposed by CBP and accepted by Dentons):

"DRAFT EMAIL TO PROFESSOR PEDEN

Dear Professor Peden

We act for Antegra Pty Ltd (ACN 080 385 011) (**Antegra**). We have copied the solicitors for Lepcanfin Pty Ltd (ACN 600 769 720) (**Lepcanfin**) to this email.

We refer to your previous correspondence with our offices regarding the dispute between our respective clients.

As you may be aware, the dispute pertains to a Development Deed entered into by the parties (and others) on 21 August 2014 (as amended by an Amendment and Restatement Deed dated 18 May 2015 and a Second Amendment and Restatement Deed dated 8 July 2015) (**Development Deed**). The Development Deed relates to the development of a Manufactured Home Estate on land situated in Leppington, NSW. Under clause 3.3 of the Development Deed, Antegra was (or is, as the case may be) required to make payments to Lepfin Pty Ltd (ACN 134 397 265) (**Financier**) in the sum of $3,900,000. Antegra paid $1,143,332.56. Clause 12.4 of the Development Deed provides, inter alia, that a Facilitation Fee payable to Lepcanfin is to be increased by the amount of the shortfall in payments under clause 3.3. The dispute is, in essence, as to whether or not Lepcanfin waived the obligation of Antegra to pay the balance of $2,756,667.44 and Lepcanfin's entitlement to the increase in the Facilitation Fee, pursuant to the terms of the Second Amendment and Restatement Deed. Antegra claims that the obligation and increase in Facilitation Fee was waived, while Lepcanfin claims that it was not.

> Clause 9 of the Development Deed provides for a dispute resolution process, culminating in the appointment of an independent expert, who is to make a final and binding decision in relation to a dispute. The parties have agreed on your appointment as the independent expert for this dispute.
>
> Can you please let us know if you remain available to act as the independent expert in this matter? If so, please provide us with your engagement letter for our review.
>
> If you remain available, we propose to appoint you as an expert effective on 23 March 2018 – following which you will have until 4 May 2018 (42 days) to provide your decision. We also propose the following timetable: The parties ***intend*** to provide you with a brief of agreed documents by 23 March 2018. ***At the time of appointment, the parties expect to have reached agreement on how the matter should proceed and we will then correspond with you as to our suggested timetable.***
>
> The parties also agree to provide you with any further information, as requested. While there is provision in the Development Deed for the independent expert to conduct a hearing or enquiry, the parties presently anticipate that it will be sufficient for you to determine the dispute on the parties.
>
> Please let us know if you have any questions or would otherwise like to discuss".

26 On 21 February 2018, CBP responded with amendments to the proposed instruction email, as indicated at [25] above, with the relevant additions included in bold font, and the deletions being struck through. CBP further requested a Points of Claim to provide sufficient detail as to the nature of the dispute, as follows:

> "…Thank you for the draft email. We have amended the proposed email to Professor Peden, as indicated in red. We do not agree with the timetable for progressing this matter.
>
> When we first spoke with Ben Allen we had indicated that our preliminary view was that the matter could proceed on the papers. We have now had the opportunity of reviewing the files in more detail and in particular your letter of 10 August 2017, which invokes clause 9 of the Agreement. *Your letter does not give sufficient detail as to the nature of the dispute which has arisen, nor does it give a description of the circumstances of the dispute. In our view, these details (preferably by way of a properly pleaded points of claim) would assist to narrow the issues and also the scope of evidence*. It would also assist us to form a view on how the matter should then proceed, that is on the papers or by way of hearing.
>
> Your proposed timetable provides over a month for an agreed bundle to be provided to Professor Peden. We suggest that this time be utilised as follows:
>
> 1. Your client serve its points of claim by 2 March 2017. We require this document in order to form our view on the agreed bundle.
> 2. Your client provide an index to the proposed bundle by 9 March.

3. Our client provide its response with respect to the proposed bundle by 16 March.

If you agree to the proposal we do not believe it is necessary to require Professor Peden to make any formal orders. These steps can be taken immediately and prior to her appointment.

Please let us have your views as a matter of urgency". (emphasis added).

27 On 23 February 2018, Dentons agreed to provide a Points of Claim in accordance with CBP's proposal on condition that CBP provide a Points of Defence in response, as outlined in an email to CBP as follows:

"…Whilst our client believes that its position is sufficiently clear, as set out in our previous correspondence with your firm, it is agreeable to your proposal that our client serves a points of claim by 2 March 2018. That agreement is subject to your client serving a points of defence by 9 March 2018, in the interests of reciprocity.

We are otherwise agreeable to the balance of the 'informal' timetable proposed by you, leading to the provision of the agreed bundle to Professor Peden on 23 March 2018".

28 On 28 February 2018, CBP responded to this email, outlining that "[o]ur client will serve a points of defence by 9 March 2018. We look forward to receiving your client's points of claim by 2 March 2018."

29 Professor Peden's appointment as the expert was ultimately formalised in the EDA but, for reasons that will emerge, it is necessary to set out the background to its ultimate execution by counterparty.

Expert Determination Agreement and its background

30 On 23 February 2018, Dentons sent the email of instruction to Professor Peden in the form agreed between the parties, as outlined at [25] above.

31 On 28 February 2018, Professor Peden provided to the parties' solicitors a draft expert determination agreement for their consideration and their clients' execution. The draft agreement paraphrased in a Schedule what was described as a "brief description of subject matter of dispute". This description was essentially taken from the third paragraph of the email of instruction to Professor Peden, referred to at [25] above. The Schedule was in these terms:

"A dispute concerning a Development Deed entered into by the parties (and others) on 21 August 2014 (as amended by an Amendment and Restatement Deed dated 18 May 2015 and a Second Amendment and Restatement Deed dated 8 July 2015) (**Development Deed**). The Development Deed relates to the development of a Manufactured Home Estate on land situated in

> Leppington, NSW. Under clause 3.3 of the Development Deed, Antegra was (or is, as the case may be) required to make payments to Lepfin Pty Ltd (ACN 134 397 265) (**Financier**) in the sum of $3,900,000. Antegra paid $1,143,332.56. Clause 12.4 of the Development Deed provides, inter alia, that a Facilitation Fee payable to Lepcanfin is to be increased by the amount of the shortfall in payments under clause 3.3. The dispute is, in essence, as to whether or not Lepcanfin waived the obligation of Antegra to pay the balance of $2,756,667.44 and Lepcanfin's entitlement to the increase in the Facilitation Fee, pursuant to the terms of the Second Amendment and Restatement Deed. Antegra claims that the obligation and increase in Facilitation Fee was waived, while Lepcanfin claims that it was not".

32 On 12 March 2018, the Respondents served a Points of Claim, styled as "Points of Claim and Document Index for Antegra, Lepcon and Lepfin". Relevantly, para 13 claimed that "[c]lause 12.4(a)(i) was void and unenforceable as a penalty", this being a reference to cl 12.4 of the Development Deed, set out at [15] above.

33 On 9 April 2018, the Applicant served a Points of Defence. At para 13, the Applicant denied the allegation that cl 12.4(a)(i) of the Development Deed was a penalty, as follows:

> "Lepcanfin denies the allegation made; and further says that (apart from a right of termination under clause 12.4(b), which right was waived) the consequence of a breach of clause 3.3 was merely an agreed increase in the Facilitation Fee to which Lepcanfin was entitled to the extent that available funds permitted the payment of such an increase and that that consequence is incapable of being regarded in equity or otherwise as a penalty".

34 In the email of 9 April 2018 under cover of which the Points of Defence were served, CBP said:

> "**Joint bundle**
>
> In addition to the documents set out in your client's points of claim, the joint bundle should include the following documents:
>
> 1. Your client's points of claim.
> 2. Our client's points of defence.
> 3. Title searches for the property. An example is attached.
> 4. Mortgage granted in favour of Lepcanfin, a copy of which is attached.
> 5. Facility Agreement, a copy of which is attached).
> 6. Deed of Acknowledgement and Repayment, dated 23 June 2015, a copy of which is attached).
> 7. Mortgage granted in favour of Bawden Custodians Pty Ltd and Shareholding Pty Ltd, a copy of which is attached).

> Please arrange for the joint bundle to be provided to Professor Peden as a matter of urgency, with a copy provided to us. Our client reserves its rights to rely on documents not included in the joint bundle."

35 The Joint Bundle, including the Points of Claim and Points of Defence, was delivered to Professor Peden on 11 April 2018. She acknowledged this in a timetabling email to the parties on 13 April 2018.

36 Further, in an email of 12 April 2018 from Dentons, confirmation was given of delivery of the Joint Bundle to Professor Peden the previous day. That email was sent with the consent of the Applicant's solicitors. The Applicant's position was stated in it as follows:

> "… given that the parties have completed the service of their points of claim and defence, there is no reason to delay the preparation of submissions and the finalisation of this matter."

37 The Applicant signed the EDA on 9 April 2018 and it was executed on 10 April 2018 by Antegra. The evidence did not disclose when Professor Peden signed the EDA.

38 Whilst the EDA noted that the dispute was "between Antegra Pty Ltd and Lepcanfin Pty Ltd", it is clear that Antegra was seen as the protagonist for the group of Respondents of which Antegra was a member, and no point was made at the time or at the hearing before Professor Peden about the fact that the EDA was signed by Antegra alone. All of the companies described in these reasons as the Respondents (see [11] above) were referred to in the expert determination process as "McCool" or "McCool entities", by reason of the fact that Mr Bernie McCool was the sole director and secretary of each of these companies.

39 The following clauses from the EDA should be noted:

> "**Dispute**
>
> 1. The dispute that the parties have appointed the Expert to determine is set out in the Schedule (**Dispute**).
>
> **Role of Expert**
>
> 2. The Expert will
>
> (a) determine the Dispute in accordance with the terms of this Agreement; and
>
> (b) act as an expert and not as an arbitrator.

…

Submissions by the Parties

5. Subject to the terms of this agreement, the Expert is free to adopt any appropriate procedure for the Expert Determination, which will assist the Expert in the efficient conduct and resolution of the Expert Determination.

…

Expert Determination

9. The Expert will:

(a) consider any or all of the material (oral or written) put before her in the course of the expert determination;

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

(c) proceed in such manner she thinks fit without being bound to observe the rules of natural justice or the rules of evidence;

(d) make the Determination on the basis of information received from the parties and the Expert's own expertise and in accordance with the law;

(e) make the Determination as expeditiously as possible after receiving the parties' submissions; and

(f) record the Determination in writing.

…

Effect of Determination

13. The Expert's determination is final and binding on the parties.

14. The parties agree to implement the Expert's determination within 14 days of receiving the written determination or otherwise as agreed between the parties.

15. The parties will not challenge the determination in any legal proceedings or otherwise.

…

Confidentiality

21. The expert determination is private and confidential.

22. The Expert and the parties will keep the expert determination confidential except to the extent necessary to implement or enforce the determination or to the extent required by law.

…"

Submissions to expert

40 In the course of the expert determination process, the Respondents made detailed submissions in relation to the issue of penalty. In response, notwithstanding its denial in its Points of Defence of 9 April that cl 12.4(a)(i) of the Development Deed was a penalty and its positive contention that, "in equity

or otherwise", it was incapable of being a penalty (see [33] above), the Applicant contended that only the "dispute as defined" in the EDA should be considered by Professor Peden, and that this did not include the penalty issue.

41 CBP sent an email to Professor Peden on 5 June 2018 on behalf of the Applicant, noting that:

> "…For the reasons set out in Lepcanfin's submissions, Lepcanfin disagrees that anything but the Dispute as defined in the Expert Determination Agreement (**Agreement**) should be considered.
>
> …
>
> Antegra served their points of claim on 12 March 2018. Lepcanfin served a points of defence on 9 April 2018. *It was only at this stage, once Lepcanfin had become comfortable about the content of the dispute with Antegra, that Lepcanfin returned the Agreement. The content of the dispute did not, in Lepcanfin's view, include the additional issues now raised by Antegra*.
>
> Lepcanfin maintains that only the Dispute as defined in the Agreement should be considered [by] yourself and that it is beyond the scope of your mandate to determine the additional issues.
>
> In the event that you take a different view and will be considering all issues raised by Antegra, Lepcanfin seeks leave as a matter of procedural fairness to address the additional matters raised by Antegra prior to you making a determination…" (emphasis added).

42 Interpolating here, the passage in this email that has been emphasised contains a complete non-sequitur and Ms Whittaker candidly accepted that she was unable to offer any rational explanation for it. On the one hand, it clearly identifies and accepts that the ambit of the parties' dispute was reflected in the Points of Claim and Defence. This plainly involved the penalty issue. The email then, however, goes on to assert that that issue did not form part of the dispute.

43 Returning to the chronology of events, on 6 June 2018, Professor Peden received an email on behalf of the Respondents, contending that the Applicant should not be permitted an opportunity to deal with the penalty issue, since that had been on the table from the time of the Points of Claim served on 12 March 2018.

44 On 12 June 2018, Professor Peden wrote to the parties by email as follows:

> "Dear All,
>
> I have considered:

(a) the terms of the expert determination agreement; and

(b) the provision of the agreed timetable and bundle and its contents; and

(c) the emails and submissions concerning the scope of the dispute.

In my opinion, the dispute I must determine encompasses not only waiver, but also the nature and existence of the obligation to pay the increased fee.

I refer to clauses 5-9 of the expert determination agreement and ask that:

1. Lepcanfin provide any further submissions or documents on the issues within 7 days or notify me and Antegra that it does not propose to do so; and

2. If Lepcanfin provides further submissions or documents, Antegra respond to those further submissions within 7 days or notify me and Lepcanfin that it does not propose to do so.

I will provide my determination within 7 days of receipt of either the last submissions or notification that no further submissions will be provided".

45 The Applicant duly filed detailed submissions on, inter alia, the penalty issue on 19 June 2018. In those submissions, Mr Leopold SC, then appearing for the Applicant, contended that the penalty argument was "baseless" and "simply unsustainable". His submissions were developed over a number of pages.

46 Short written submissions in reply on the issue of penalty were filed on behalf of the Respondents on 22 June 2018.

Expert determination

47 Professor Peden provided her expert determination (**the Determination**) on 30 June 2018.

48 At para 4 of the Determination, Professor Peden noted that the scope of the Determination included whether:

"a. There is an 'entitlement' to the increased fee, which incorporates an issue of whether it is a penalty and could be enforced; and

b. If there is an entitlement, it has been waived by Lepcanfin by reason of agreed further terms".

49 It may be noted that the word "entitlement" was placed in inverted commas by Professor Peden in para 4(a) of the Determination, no doubt because the word was used in the description of the Dispute contained in the Schedule to the EDA:

"The dispute is, in essence, as to whether or not Lepcanfin waived the obligation of Antegra to pay the balance of $2,756,667.44 and Lepcanfin's *entitlement* to the increase in the Facilitation Fee pursuant to the terms of the Second Amendment and Reinstatement Deed." (emphasis added).

50 On the waiver issue, Professor Peden determined at paras 28-29:

> "…that the proper construction of the clause based on the objective intention of the parties was to waive the legal entitlement to terminate that arose by reason of the defaults in advancing the full Lepcon Loan amount. However, the obligation to advance the Lepcon Loan remained, and the obligation to pay the Facilitation Fee and any triggered increase remained.
>
> If the intention of the parties had been to waive the entitlement to the Facilitation Fee and any available increase, then it would have been expected that the parties would have used clear words to do so".

51 As to whether the increased Facilitation Fee was a "penalty", Professor Peden determined at paras 53 and 58 that:

> "…there is no legitimate interest sought to be protected by the increase in the Facilitation Fee, where the 'risk' Lepcanfin had undertaken was already contemplated by the parties through, for example, clauses concerning its advance of $10million and the mortgage given to Lepcanfin. If there is no legitimate interest sought to be protected by the provision then it must be a penalty.
>
> …
>
> The increase in the Facilitation Fee is a penalty and therefore either void or wholly unenforceable".

52 Professor Peden noted that the Applicant was entitled to the base Facilitation Fee in accordance with the Development Deed, but held that whether it was payable had not yet arisen for determination: at paras 59-61.

Proceedings at first instance

53 By its Commercial List Summons filed 14 June 2019, the Applicant sought the following relief, in addition to costs:

> "1 A declaration that the Expert's purported determination of the Penalty Issue was beyond the [E]xpert's mandate such that there has been no binding determination of the Penalty Issue.
>
> 2 A declaration that the Facilitation Fee Top-up does not constitute a penalty for the purposes of any Relevant Document and is capable of constituting and being recovered as:
>
> a. Money Owing under the Facility Agreement;
>
> b. Guaranteed Money under each Guarantee; and
>
> c. Secured Money under the Mortgage.
>
> 3 A declaration that even if the Facilitation Fee Top-up were a penalty, it is still capable of constituting and being recovered from each Guarantor as Guaranteed Money by virtue of clause 4.2(e) of each Guarantee.

4 A declaration that even if the Facilitation Fee Top-up were a penalty, it is still capable of being an amount for which the Guarantor is liable to indemnify Lepcanfin by virtue of clause 3.1(b)(i) and (ii) of each Guarantee.

5 A declaration that the Project Control Group is required to include the Facilitation Fee Top-up in:

a. the amount calculated in accordance with the formula set out in Schedule Two to the Development Deed; and

b. any reconciliation performed pursuant to clause 8.3(b) of the Development Deed,

6 An order that the Project Control Group's obligations set out in prayer 5 above be specifically performed."

54 By Notice of Motion filed 24 July 2019, the Respondents sought the following orders:

"1 That the proceedings, or alternatively the claims in paragraphs 1 to 56 of the Commercial List Statement, be dismissed pursuant to UCPR 13.4.

2 In the alternative to 1 above, that the Commercial List Statement, or alternatively paragraphs 1 to 56 thereof, be struck out pursuant to UCPR 14.28.

3 In the alternative to 1 and 2 above, that the proceedings be permanently stayed.

4 Further and in the alternative to 1, 2 and 3 above, the questions in paragraph 3 of the Commercial List Response filed by the First, Second, Third, Sixth, Seventh and Eighth Defendants on 18 July 2019 be referred to Dr Elisabeth Peden for Expert Determination pursuant to the terms of the Development Deed.

5 Costs".

55 Paragraph 1-55 of the Commercial List Statement culminated in the plea that "the Expert's decision on the Penalty Issue is not a binding determination pursuant to the Development Deed": at para 55. Paragraph 56 was a plea that:

"By virtue of the proper construction of clauses 3.2(a), 3.3, 8.1, 8.2, 8.3(a), 8.3(b) and 12.4(a)(i) and Schedule 2 of the Development Deed (as referred to in paragraph 28 above), the Facilitation Fee Top-up does not constitute a penalty."

56 The balance of the claim contained in paras 57-59 of the Commercial List Statement was as follows:

"As such, the Facilitation Fee Top-up is capable of constituting and being recovered as each of:

a. Secured Money under the Mortgage (as defined in clause 1.1 of the Mortgage and set out in para 31(a) above).

b. Guaranteed Money under the Guarantee (as defined in clause 1.1 of the Guarantee and set out in paragraph 30(a) above).

c. Money Owing under the Facility Agreement (as defined in clause 1.1 of the Facility Agreement and set out in paragraph 29(a) above.

Further, even if the Facilitation Fee Top-up is unenforceable as a penalty it is capable of constituting Guaranteed Money by virtue of clause 4.2(e) of each Guarantee (as set out in paragraph 30(g)(iv)) above).

Further, in respect of each Guarantor, even if the Facilitation Fee Top-up is unenforceable as a penalty, it is capable of being an amount for which the Guarantor is liable to indemnify Lepcanfin, by virtue clause 3.1 (i) and/or (ii) of each Guarantee (as set out in paragraph 30(d) above).

In the circumstances the Plaintiff seeks the relief set out in the Summons."

The primary judgment

57 The primary judge noted that there were two aspects to the Applicant's claims:

(1) whether Professor Peden exceeded her mandate;

(2) whether, in respect of the Guarantees, the Applicant was free to litigate the question whether the guarantors were liable for the Top-Up, even assuming it was a penalty.

58 In relation to the Mandate Issue, the primary judge dismissed prayer 1 of the Applicant's Summons, on the basis that the case that the Expert's mandate had been exceeded in relation to the penalty issue was "untenable": at [33]. At [32]-[33], the primary judge concluded that:

> "…by the time that the EDA was entered into, LPL and the Applicants were aware that the penalty issue was a matter that would form part of the dispute to be referred. This was the matrix of facts known to both parties which assists in interpreting what was meant as at 10 April 2018 by the words set alongside the description of 'brief description of subject matter of dispute': see CB 100. The words in the EDA (the tripartite agreement between the Applicants, LPL and Dr Peden) – 'and Lepcanfin's entitlement to the increase in the facilitation fee' - are broad enough to cover the penalty issue that the parties had delineated by the exchange of POC and POD.
>
> …
>
> No relevant or potentially relevant material has been identified by LPL as undermining the conclusion that LPL and the Applicants agreed that the penalty issue would be one of the matters to be determined by the expert and that they intended Dr Peden to determine the penalty issue as at the date that they signed the EDA. LPL's case is, in my view, obviously untenable and to permit LPL's case on this issue to proceed, it seems to me, would manifestly involve 'useless expense'."

59 In relation to the Guarantee Issue, the primary judge concluded (at [52]) that:

> "In my view, the dispute does not have to arise wholly or solely out of the Development Deed. It is an issue arising out of or connected with the Development Deed whether an obligation imposed on Lepcon by the Development Deed (i.e. the Top-up) can be enforced against the guarantors (who are also parties to the Development Deed) even if the obligation is found

> to be a penalty, and I think, objectively, it is clear that the parties intended that disputes of this kind (like the dispute over penalty) would be referred to an expert with a legal background".

60 The primary judge dismissed prayer 1 of the Applicant's Commercial List Summons and otherwise permanently stayed the proceedings: at [58]. This had the consequence that the issues sought to be raised in paras 57-59 of the Commercial List Statement (see [56] above) would need to be resolved by the dispute resolution process contemplated by cl 9 of the Development Deed, extracted at [17] above.

Grounds of appeal

61 The Applicant sought leave to appeal on 9 December 2019, pursuant to the *Supreme Court Act 1970* (NSW) s 101(2)(e). By its draft notice of appeal, the following grounds of appeal were raised:

> "1 The primary judge erred in finding that the applicant's argument that the expert's determination as to the penalty issue was beyond the expert's mandate was obviously untenable and would manifestly involve useless expense (J[33]).
>
> 2 The primary judge ought to have found it to be reasonably arguable that the expert's determination as to penalty was beyond the expert's mandate.
>
> 3 The primary judge erred in determining that the declarations sought by the applicant in relation to the construction of the Guarantees constituted a dispute within the dispute resolution provisions of the Development Deed (J[35], [49] – [52]).
>
> 4 The primary judge ought to have found that the declarations sought by the applicant in relation to the construction of the Guarantees did not constitute a dispute within the dispute resolution provisions of the Development Deed.
>
> 5 The primary judge erred in permanently staying the proceedings below".

Notice of Contention

62 The Respondents filed a Notice of Contention on 20 December 2019 in these terms:

> "Order 1 of the decision below is supported by an estoppel, operating at law or in equity, preventing the Appellant from alleging that the ambit of the dispute referred to the Expert, did not include the questions of whether there was an enforceable entitlement to an increase in a facilitation fee and whether the provision therefor[e] was void or unenforceable as a penalty".

Submissions on appeal

The Mandate Issue

63 In written submissions, the Applicant summarised the question arising on appeal in relation to the Mandate Issue as:

> "…is the applicant's case that the Expert's mandate was exceeded so weak as to be amenable to summary dismissal?"

64 In oral submissions on the appeal, Ms Whittaker candidly accepted that this was essentially a question of construction, with the only evidence that was potentially relevant but not before the Court being evidence as to when Professor Peden received the Points of Claim and Defence, and when she signed the EDA. (As to the former topic, there was in fact evidence before the Court to the effect that Professor Peden was sent the Points of Claim and Defence on 11 April 2018: see [35] – [36] above).

65 The Applicant submitted that the primary judge erred in exercising the Court's power of summary dismissal for the following reasons:

(1) First, the text of the EDA strongly supported the Applicant's position that Professor Peden was empowered to determine only the waiver issue. The Applicant submitted that the definition of the "dispute" made no reference whatsoever to any issue as to whether or not the Facilitation Fee Top-Up was a penalty. Although the primary judge found that the words used to define the dispute were wide enough to encompass the penalty issue, the Applicant contended that the "primary judge ought to have found either that the Penalty Issue was outside of the terms of the agreed dispute or that there was an extant controversy about the proper construction which was sufficient to render the dispute inappropriate for summary dismissal".

(2) Secondly, the primary judge's conclusion that the Applicant's claim ought to be dismissed was largely based upon the findings that the Points of Claim and Points of Defence constituted a legally binding agreement which brought the Penalty Issue within the Expert's remit, and that this conclusion was "erroneous", as the primary judge's reasoning did not explain how the parties could be said to have evinced any intention to enter into legal relations, and any purported "offer" would have been only to "narrow the issues and also the scope of evidence", as opposed to an offer to expand the scope of the dispute (**the Pleading Argument**).

(3) The Applicant also submitted that the fact that the Points of Claim and Points of Defence joined issue as to whether or not cl 12.4(a)(i) of the Development Deed was a penalty could not be taken into account as background matrix evidence in construing the definition of dispute in the

> EDA, because that agreement was tripartite and it was not established that the joinder of issue in the Points of Claim and Points of Defence on the penalty issue was a matter known to Professor Peden at the time she executed the EDA. (Ms Whittaker fairly conceded that this argument was not advanced at first instance, which no doubt explains why there was no direct evidence as to when Professor Peden in fact executed the EDA).

66 In response, the Respondents submitted that the primary judge's conclusion that the Applicant's argument was "obviously untenable" was correct, both as a matter of construction of the EDA and because the Applicant had, by its email of 28 February 2018 (see [28] above), agreed to delineate the dispute before the Expert by reference to Points of Claim and Points of Defence, and exchanged such documents expressly addressing the penalty issue. The Respondents submitted that, by the time the EDA came into force, the parties had expressly agreed that the penalty issue was within the scope of the dispute for determination. The Respondents submitted that this outcome followed either by way of construction of the EDA, or because the exchanged Points of Claim and Points of Defence formed part of the context in which the terms of the EDA were to be understood, by way of a collateral pleadings agreement or as a result of an estoppel. (The estoppel argument was that raised by the Notice of Contention, see at [62] above).

67 In relation to the "Pleading Argument", the Respondents submitted that:

> "First, the question of the parties' intention is to be determined by what was objectively conveyed by what was said or done, having regard to the circumstances. In commercial dealings, there is a strong presumption in favour of an intention to create legal relations, which will only be rebutted with difficulty. That must especially be the case when negotiations proceed through the parties' legal representatives.
>
> …
>
> Secondly, the Applicant contends that the offer to proceed by way of points of claim was to '*narrow the issues*'… That contention mistakes the relevant '*offer*' that was the basis for the Primary Judge's conclusion. The Primary Judge clearly identifies in his reasoning at J[30] and [31], that the relevant '*offer*' for his analysis was the counter-offer made by the Respondents on 23 February 2018, accepted by the Applicant by email on 28 February 2018 (J[13]).
>
> The contention that the Primary Judge confused an agreement to exchange pleading documents with an agreement to define the dispute by reference to what was said in those documents… is an artificial distinction which defies '*what a reasonable business person would have understood those terms to mean*'…" (emphasis in original, footnotes omitted).

Notice of Contention

68 With respect to the Notice of Contention (see [62] above), the Respondents submitted that the Applicant was estopped from denying that the penalty issue was within the Expert's mandate. The Respondents contended that the estoppel was one by representation, which was relied on by the Respondents in incurring the costs of contesting the penalty issue through multiple rounds of submissions before the Expert, and refraining from issuing a further dispute notice, and that there was an injustice to the Respondents in the Applicant being permitted to depart from that representation. Alternatively, the Respondents claimed that there was an *estoppel in pais*, due to the assumed position that the penalty issue was to be determined by the Expert, and the resulting injustice to the Respondents if the Applicant were permitted to depart from that assumption and convention.

69 The Applicant submitted that it did not accept that it made any such representation as contended by the Respondents, namely, that by the exchange of Points of Claim and Points of Defence with the Respondents, the Applicant had represented or created an assumption that it agreed to the issues before the Expert being defined by that exchange. Rather, the Applicant submitted that it was clear that the dispute to be determined by the Expert was that which was defined in the EDA.

70 In relation to reliance and detriment, the Applicant submitted that, by raising the penalty issue in its Points of Claim, it was the Respondents that created confusion that led to rounds of correspondence as to whether the Applicant agreed to the inclusion of that issue in the dispute before the Expert, and that, accordingly, the "cost of anything done by the Respondents in that regard lies at their own feet". Alternatively, the Applicant submitted that any detriment was nominal and capable of being remedied by an order for monetary compensation.

71 In response, it was submitted that the Applicant clearly represented to the Respondents, both in writing and by its conduct, that the dispute to be determined by Professor Peden was to be delineated by reference to the

Points of Claim and Points of Defence, and that these included the penalty issue.

72 With respect to reliance and detriment, the Respondents submitted that:

> "The App[l]icant's contentions with respect to detrimental reliance ignore the most obvious detriment suffered by the Respondents. By leading the Respondents to assume that the Dispute to be determined would be as delineated by the points of claim and defence, the Respondents executed the EDA in the form initially proposed between the parties and did not spend any time seeking to clarify the nature of the Dispute in that agreement, or issue an additional Dispute Notice in respect of the Penalty Issue.
>
> The contention that the detriment suffered by the Respondents can be remedied in costs only applies to the identified detriment of increased costs incurred by the Respondents in preparing submissions and running the Penalty Issue case before the expert. It has no application to the detriment of losing the opportunity to issue a further Dispute Notice or to amend the EDA prior to its conclusion. That detriment cannot be remedied except by estopping the Applicant from asserting that the Dispute did not extend to the Penalty Issue".

The Guarantee Issue

73 The Applicant summarised the question relating to the construction of the guarantees as follows:

> "…do the Dispute Resolution provisions of the Development Deed preclude the applicant from seeking declarations from the Court about the proper construction of the Guarantees?"

74 The Applicant submitted that the primary judge erred in his construction of the Guarantees as falling within the dispute resolution provisions contained in cl 9 of the Development Deed. The Applicant submitted that the Guarantees were entirely separate agreements to the Development Deed, and that the construction of cll 3.1(b)(i), (ii) and 4.2(e) of each Guarantee was not sufficiently connected to the Development Deed such that a dispute about those terms could not properly be conceptualised as "arising out of" the Development Deed, and thus be required to be resolved by expert determination pursuant to cl 9 of that Deed.

75 In response, it was submitted that the relief sought, by its very terms, was dependent upon construction of the Development Deed to have meaning. The Respondents submitted that a dispute about whether the Top-Up was payable, whether under the Development Deed or under any other Project Document, was inherently a dispute that arose out of the Development Deed, because that

was the agreement that specified the criteria for, and terms of, the Top-Up. Moreover, the Guarantees were schedules, in unexecuted form, to the Development Deed, and their execution was a precondition to the Development Deed coming into effect, as noted at [18] above.

Exercise of discretion

76 The Applicant submitted that, even if the question of construction of the Guarantees fell within the dispute resolution provisions of the Development Deed, the primary judge should have exercised his discretion to allow at least paras 57-59 of the Commercial List Statement to proceed in any event. The Applicant submitted that:

> "… only the Court can enforce the applicant's rights under the Guarantee and Mortgages in the event that the relevant clauses are construed in the applicant's favour – as such the justice of the case lies with the issue of the construction of the Guarantees being determined by the Court".

77 In response, it was submitted that the Applicant's assertion that only the Court could enforce the Applicant's rights under the Guarantees and Mortgage was incorrect as a statement of law, that many of the remedies under the Mortgage do not require the Court's assistance, and that, fatally, the Applicant's Summons below did not seek any of the relief which could be obtained from the Court, including an order for possession or sale.

Legal principles

78 In *Inghams*, although in dissent as to the construction of the arbitration clause in issue in that case, I stated the principles applicable to the construction of dispute resolution clauses in terms which did not attract any demur from the members of the majority. Aspects of that statement of principles were recently applied in the context of consideration of an expert determination clause by Hammerschlag J in *Illawarra Community Housing* at [42], [45] and [49]. It is convenient to repeat the summary of applicable principles from *Inghams* for the purposes of consideration of the present case.

79 It has been rightly observed that "the starting point is that the clause should be construed, just as any other contract term should be construed, to seek to discover what the parties actually wanted and intended to agree to": A Briggs, *Agreements on Jurisdiction and Choice of Law* (2007, Oxford University Press)

at 4.58; *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR 936 at [30]-[33]. In Australia, of course, the search is for the parties' intention, objectively ascertained: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52.

80 In short, the orthodox process of construction is to be followed: *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442; [2017] FCAFC 170 at [167] (**Hancock Prospecting**); *Rinehart v Hancock Prospecting Pty Ltd* (2019) 366 ALR 635; [2019] HCA 13 at [18] (**Rinehart**). Thus, a dispute resolution clause, like any other clause of a commercial contract, must be construed by reference to the language used by the parties, the circumstances known to them and the commercial purpose or objects to be secured by the contract: see *Electricity Generation Corporation v Woodside Energy Ltd; Woodside Energy Ltd v Electricity Generation Corporation* (2014) 251 CLR 640; [2014] HCA 7 at [35] (**Woodside**); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 at [47].

81 Further, as the plurality observed in *Woodside* at [35], citing *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530; [2004] HCA 56 at [82], a commercial contract is to be construed so as to avoid it making commercial nonsense or working commercial inconvenience.

82 Contextual considerations are also important, as the High Court's decision in *Rinehart* (at [26]ff) illustrates. The context in which the dispute resolution clauses had been entered into in the two deeds under consideration in *Rinehart* bore heavily upon the interpretation in that case of the expression "dispute under this deed". The plurality (at [26]) cited with approval the observations of the Full Court of the Federal Court of Australia in *Hancock Prospecting* (the decision under appeal in the High Court), that "[c]ontext will almost always tell one more about the objectively intended reach of such phrases than textual comparison of words of a general relational character": see *Hancock Prospecting* at [193]. In his separate judgment in *Rinehart*, in agreement with that of the plurality on the question of construction, Edelman J observed at [83] that:

> "Every clause in a contract, no less arbitration clauses, must be construed in context. No meaningful words, whether in a contract, a statute, a will, a trust, or a conversation, are ever acontextual."

83 It is also axiomatic that, in the construction of a contract including an arbitration agreement or an arbitration clause in a commercial agreement, as with the interpretation of a statute, a particular contractual clause or sub-clause must not be construed in isolation but as part of the contract as a whole: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109; [1973] HCA 36; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 at [16]; *Mastrobuono v Shearson Lehman Hutton Inc.* 514 US 52 (1995). In the former case, Gibbs J (as his Honour then was) famously said (at 109):

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another."

84 One consequence of this is that the same clause, or the same phrase in a particular clause, may not bear an identical meaning from case to case: see *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association* (1997) 41 NSWLR 117 at 120-124 for a discussion of cases where identically worded jurisdiction agreements have been given different constructions.

85 In the context of dispute resolution clauses, whether they be arbitration or exclusive jurisdiction clauses, much authority can be found in support of affording such clauses a broad and liberal construction. A particularly well known statement in this area of discourse is that of Gleeson CJ in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165; (1996) 131 FLR 422 (**Francis Travel**):

> "When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument."

86 In *Francis Travel*, Gleeson CJ referred to the decision of the United States Supreme Court in *Mitsubishi Motors Corp v Soler-Chrysler Plymouth Inc* 473 US 614 (1985). In that case, at 626, the Supreme Court said that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." (The Court's reference to "arbitrability" was, in context, a reference to the scope of the arbitration agreement.)

87 In *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95 at [118] (**Welker**), Bathurst CJ made reference not only to *Francis Travel* but also to the similarly well known observations of Allsop J (as his Honour then was and with whom Finn and Finkelstein JJ agreed) in *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; [2006] FCAFC 192 at [164] (**Comandate**), namely that:

> "The authorities … are clear that a liberal approach should be taken. That is not to say that all clauses are the same or that the language used is not determinative. The court should, however, construe the contract giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration."

88 See also *Global Partners Fund Limited v Babcock & Brown Limited (in liq)* (2010) 79 ACSR 383; [2010] NSWCA 196 at [60], per Spigelman CJ who identified the rationale for the broad construction of arbitration and exclusive jurisdiction clauses in the following passage (at [67]):

> "A significant purpose of an exclusive jurisdiction clause is to ensure that all disputes are determined in a coherent manner by a single jurisdiction. There is a clear commercial interest in minimising the possibility of a dispute being determined by multiple tribunals, with the consequent prospect of divergent findings. Furthermore, the parties, in advance, have determined that a particular jurisdiction is acceptable to them, both in terms of the speed and efficacy of its civil dispute resolution procedures and for the competence and skill of its judges and lawyers."

89 A similar rationale had been identified by French J (as his Honour then was) in *Paper Products Pty Ltd v Tomlinsons (Rochdale) Limited* (1993) 43 FCR 439 at 448; [1993] FCA 346, where his Honour noted that:

> "When the language of the arbitration clause in question is sufficiently elastic, then the more liberal approach of the courts to which Kirby P and others have referred can have some purchase. A wide construction of such clauses can be supported on the basis advanced by Clarke JA that it is unlikely to have been

> the intention of the parties to artificially divide their disputes into contractual matters which could be dealt with by an arbitrator and non-contractual matters which would fall to be dealt with in the courts. When, as here, the parties have agreed upon a restricted form of words which in their terms, and as construed in the courts, limit the reference to matters arising ex contractu, there is little room for movement."

90 In *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 at [16], French CJ and Gageler J observed that "…parties who enter into an arbitration agreement for commercial reasons ordinarily intend all aspects of the defined relationship in respect of which they have agreed to submit disputes to arbitration to be determined by the same arbitral tribunal".

91 In Australia, unlike other jurisdictions, the process of contractual construction of dispute resolution clauses has not been overlaid by presumptions of the jurisdictions surveyed in G B Born, *International Commercial Arbitration* (2nd ed, 2014, Wolters Kluwer) at 1325-1338. Thus, in *Welker* at [122], Bathurst CJ, although not eschewing the liberal approach that had been adumbrated in both *Francis Travel* and *Comandate* to the construction of arbitration clauses, rejected the adoption of a presumption that had arguably commended itself to the House of Lords in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2007] 4 All ER 951 (**Fiona Trust**). To quote from Lord Hoffmann's speech, the presumption was that the court should, in the construction of arbitration clauses, "start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal", and that the clause should be construed in accordance with that presumption, "unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction": at [13]. The Full Court of the Federal Court in *Hancock Prospecting* (at [193]) treated *Fiona Trust* as not saying anything different in substance from *Francis Travel* and *Comandate* (the latter case being itself referred to in *Fiona Trust* at [31]).

92 In *Rinehart*, the plurality indicated that the appeals could be resolved with the application of orthodox principles of construction, which required consideration of the context and purpose of the Deeds there under consideration, without

reference to *Fiona Trust*: at [18]. In his separate judgment, Edelman J described as a "usual consideration of context" the fact that "reasonable persons in the position of the parties would wish to minimise the fragmentation across different tribunals of their future disputes by establishing 'one-stop adjudication' as far as possible": at [83]. This may have been to treat the considerations underpinning cases such as *Francis Travel*, *Comandate* and *Fiona Trust* as not necessarily giving rise to a presumption, but rather as stating a commercially commonsensical assumption. It may be observed that Lord Hoffmann's speech in *Fiona Trust* (at [13]) slides from the language of "assumption" to that of "presumption".

93 The proper contemporary approach was eloquently articulated in the following passage in *Hancock Prospecting* (at [167]) which I would endorse:

> "The existence of a 'correct general approach to problems of this kind' does not imply some legal rule outside the orthodox process of construction; nor does it deny the necessity to construe the words of any particular agreement. But part of the assumed legal context is this correct general approach which is to give expression to the rational assumption of reasonable people by giving liberal width and flexibility where possible to elastic and general words of the contractual submission to arbitration, unless the words in their context should be read more narrowly. One aspect of this is not to approach relational prepositions with fine shades of difference in the legal character of issues, or by ingenuity in legal argument (Gleeson CJ in *Francis Travel* at 165); another is not to choose or be constrained by narrow metaphor when giving meaning to words of relationship, such as 'under' or 'arising out of' or 'arising from'. None of that, however, is to say that the process is rule-based rather than concerned with the construction of the words in question. Further, there is no particular reason to limit such a sensible assumption to international commerce. There is no reason why parties in domestic arrangements (subject to contextual circumstances) would not be taken to make the very same common-sense assumption. Thus, where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it."

94 To the principles identified in *Inghams* I would also add my endorsement of and adopt the recent observations of Hammerschlag J in *Illawarra Community Housing* in relation to expert determination agreements or clauses. His Honour there said (at [60]-[64]) that:

> “Some cases have endeavoured to catalogue differences between the characteristics of arbitration and those of expert determination: see e.g. *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134 at [22]-[23]; *Zeke Services v Traffic Technologies* [2005] QSC 135; *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd*

[2008] QCA 160 at [118]; *Lighter Quay* at [50]-[51]. The view has been expressed that a characteristic of expert determination is that there will ordinarily be a dispute of a kind which can be determined in an informal way by reference to the specific technical knowledge or learning of the expert. In *Nylon Capital* at [28], Thomas LJ expressed the view that in contradistinction to arbitration, expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the Court (or if there is an arbitration provision, by arbitrators). I do not consider that this approach reflects orthodox canons of construction which apply in this jurisdiction.

What the parties intend is to be determined from the words they choose read in the context in which they chose them.

It is to be borne in mind that expert determination is simply a private contractual mechanism to which parties agree. The determination does no more than create binding contractual rights and obligations. It has no statutory backing as a process. It does not resolve the dispute by the exercise of judicial, quasi-judicial, administrative, statutory, or other power or jurisdiction: *Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd* [2019] NSWSC 576 at [59]. Agreement to expert determination does not bring with it an assumed expectation that procedures which are the hallmark of judicial or quasi-judicial proceedings will apply.

In my view, it is contrary to the orthodox approach to construction to make an *a priori* presumption or generalisation:

(1) as to the type of disputes parties will agree should be covered by an expert determination provision;

(2) that parties did not intend any dispute to be resolved quickly and informally without procedures reminiscent of judicial or quasi-judicial proceedings if it is complex and involves disputes of fact or questions of mixed fact and law;

(3) that commercial parties intend certain types of disputes to be dealt with procedurally in one way and other types of disputes to be dealt with procedurally in another;

(4) that parties intended multiple venues or occasions for their disputes even though they never said so; and

(5) that a single person selected by them to be the expert is not considered by them to be competent to resolve the dispute, including by adopting an appropriate procedure to achieve resolution.

Regularly, significant and complex commercial transactions which come before the Commercial List and the Technology and Construction List contain provisions that all disputes in connection with the transaction are to be resolved by expert determination."

95 As the expert determination clause in the present case and cl 9.3(c) of the Development Deed in particular illustrates, the parties to the commercial arrangements associated with the development sought to have all aspects (including legal questions) resolved by expert determination.

Consideration

96 The first point to be made is that, in an appropriate case, and recognising the need for due caution, a legal question, even one involving some complexity, may be disposed of in a summary fashion. As Barwick CJ said in a well-known passage in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130; [1964] HCA 69 (**General Steel)**:

> "…I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

97 Accordingly, to the extent that the first and second grounds of appeal complained that the matter was dealt with on a summary basis and that the construction posited by the Applicant was "not obviously untenable" and "reasonably arguable", these arguments need to be assessed with Barwick CJ's observations in *General Steel* in mind. They also need to take into account the matter candidly conceded by Ms Whittaker that I have noted at [64] above, namely that the issue was essentially a question of construction. As Isaacs J said in *Harrington v Browne* (1917) 23 CLR 297 at 307; [1917] HCA 36, "there can only be one construction given to a contract". See also *The Life Insurance Company of Australia Ltd v Phillips* (1925) 36 CLR 60 at 78; [1925] HCA 18.

98 In the circumstances of the present case, it was both open and appropriate, in my opinion, for the primary judge to dispose of the matter on a summary basis. The primary judge's construction was, in my opinion, correct.

99 As a matter of plain English, a party's "entitlement" to rely on a particular contractual provision comprehends, or at least includes, whether or not there is any reason which may preclude that party from asserting or enjoying a contractual benefit otherwise conferred by it. If a clause is properly characterised as a penalty, that will be a classic instance where a party is not entitled to enjoy the benefit the contractual provision otherwise offers.

100 The fact that, as the primary judge held at [29] that, when the description of the dispute was first drafted in the email sent to Professor Peden on 23 February 2018, the contention that cl 12.4(a)(i) was a penalty had not been asserted by

the Respondents in correspondence with the Applicant, is not to the point. It is a question fundamentally of construing the language used by the parties. In any event, the EDA was only executed by the Applicant after it was aware that the penalty issue was being run and had joined issue with it (see [41] above).

101 It is also important to observe that the description of the dispute set out in the Schedule to the EDA was said to be a "brief description of subject matter of dispute", and the actual description of the dispute was qualified by the phrase "in essence". The EDA did not contain an entire agreement clause. It provided a "brief description" of the subject matter of the dispute. The EDA also provided in cl 5 that:

> "Subject to the terms of this agreement, the Expert is free to adopt any appropriate procedure for the Expert Determination, which will assist the Expert in the efficient conduct and resolution of the Expert Determination".

102 One of the procedures adopted by the Expert, and urged on her by the parties, was the use of Points of Claim and Defence. As is conventional, such documents are designed to identify with particularity the full ambit of a dispute, the essence of which may have been stated elsewhere, for example in a letter of demand. The exchange of Points of Claim and Defence provided a fuller but not, in my opinion, broader statement of the parties' dispute than the brief description of it contained in the Schedule to the EDA. Indeed, the email from CBP of 5 June 2018 to which I have referred at [41] above accepted as much, and it ill behoves the Applicant to contend that the penalty issue fell outside the scope of the description of the dispute in the EDA.

103 If the consequence of this analysis is to give the description of the dispute in the Schedule to the EDA a broad meaning, that is consistent, in my opinion, with the proper approach to the construction of a dispute resolution clause (see the cases referred to at [85]-[90] and [93] above) or, I would add, the identification of the ambit of the dispute for the purposes of a dispute resolution process. Commercial commonsense dictates that there should be attributed to the parties an intention to give a broad interpretation to the word "entitlement" as used in the Schedule to the EDA, especially when it is recalled that that term appeared in the following sentence:

> "The dispute is, in essence, as to whether or not Lepcanfin waived the obligation of Antegra to pay the balance of $2,756,667.44 and Lepcanfin's entitlement to the increase in the Facilitation Fee, pursuant to the terms of the Second Amendment and Restatement Deed".

The use of the word "and" in this sentence is capable of being read disjunctively.

104 The parties were in heated dispute and wished an expert to resolve not a limited question of entitlement, reserving to one or the other the potential to raise some other aspect of entitlement at a later point in time, but the whole of the dispute as to entitlement to the Top-Up. The more narrow construction contended for by the Applicant would result in duplicated expense and be of limited utility. Neither of these is a consequence readily to be attributed to commercial parties.

105 This analysis does not depend upon when Professor Peden executed her counterpart of the EDA and, in particular, whether or not it was before or after she had been supplied with the Points of Claim and Defence: see [65(3)] above. That was a clever argument developed by Ms Whittaker on appeal but one which was not, as I have noted, made at first instance.

106 An objective analysis of the circumstances is that the contracting parties retained Professor Peden to resolve their dispute, and submitted the dispute to her for determination by reference to the Points of Claim and Defence which she then proceeded to address. As McHugh JA (as his Honour then was) said in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117, "a contract may be inferred from the acts and conduct of the parties as well as or in the absence of their words". On this footing, as well as on a plain English interpretation of the brief description of the dispute in the EDA, Professor Peden clearly acted within her mandate in resolving the penalty issue in her Determination.

107 Had it been necessary to determine the estoppel argument raised by the Notice of Contention, I would also have been inclined to uphold the primary judge's decision on that alternative footing, even on a summary basis.

108 By its Points of Defence, the Applicant unequivocally represented that it accepted that the penalty issue formed part of the dispute, albeit that it did not

accept that characterisation of cl 12.4(a)(i) of the Development Deed. Had it, at that early point in time (prior to execution of the EDA), flagged that it considered that the penalty issue fell outside the ambit of the dispute, the Respondents could simply have triggered a further dispute under the provisions of cl 9 of the Development Deed. It is fanciful to suppose that that closely associated dispute would not have been joined to the waiver argument, and that both matters would not have been jointly determined by a single expert; and there is no credible basis for supposing that that expert would not have been Professor Peden who was eminently qualified to consider both the waiver argument and the penalty issue.

109 The Applicant's subsequent resiling from the position it had unequivocally advanced in its Points of Defence in the course of the expert determination process was unconscionable. An aspect of the unconscionability resided in the lack of any ultimate utility in the point being taken insofar as, as I have already explained, there was a simple means for the Respondents to trigger a new additional dispute to bring it to the fore. The Applicant's stance in the dispute resolution process was unmeritorious.

110 For all of the above reasons, this aspect of the appeal should be dismissed.

The Guarantee Issue

111 As indicated at [9] above, I would not grant leave to appeal in respect of the primary judge's decision to grant a stay of the Commercial List proceedings, insofar as they sought substantive declaratory relief in respect of the matters pleaded at paras 57-59 of the Commercial List Statement (see [56] above).

112 The primary judge's decision was, in essence, that these claims for relief "arose out of" the Development Deed. That phrase is one of great amplitude which the cases that have been referred to at [85] – [90] and [93] above illustrate. The parties should be held to their bargain (see, for example, *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332 at [53]), and the primary judge was correct to stay the proceedings to the extent that the Applicant sought to circumvent cl 9 of the Development Deed by seeking to agitate the Guarantee Issue in proceedings in this Court.

113 To qualify for a grant of leave to appeal, it is generally necessary for a party to point to some error of principle or clear injustice. In my opinion, there was neither. On the latter point, the Applicant will not be shut out from having the points in relation to the Guarantees that it seeks to agitate determined, but that determination will be by an expert by reference to the elaborate process to which it agreed in cl 9 of the Development Deed.

Conclusion and orders

114 I would grant leave to appeal but dismiss the appeal with costs on the Mandate Issue.

115 I would refuse leave to appeal with costs in respect of the Guarantee Issue.

116 **PAYNE JA**: I agree with Bell P.

117 **MCCALLUM JA**: I agree with Bell P.

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