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# Setting Aside Expert Determinations – A Comprehensive Review

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*Dispute resolution by expert determination has become an increasingly useful tool in today's fast-paced commercial world. Nevertheless, parties dissatisfied with apparently binding determinations routinely seek to challenge the validity of those determinations in the courts, thereby undermining the purpose this procedure might otherwise serve. This article seeks to foster a wider understanding of the merits of challenges to expert determinations by considering the principles having regard to which such challenges may be made, in addition to the various circumstances in which courts commonly uphold or overturn determinations. This article concludes that there is only a limited range of circumstances in which challenges will succeed, and that the specific error made by the expert in respect of which a challenge is made ought to be closely scrutinised before it is sought to be overturned. Finally, this article examines the remedies that courts commonly grant on a successful challenge of a determination, and the juridical basis on which courts may fashion an appropriate remedy to suit the unique circumstances of a case.*

## I. INTRODUCTION

Expert determination has become an increasingly popular alternative dispute resolution avenue to litigation and arbitration in recent years. Principally, expert determination is attractive because of its expeditious, informal and inexpensive resolution of disputes between contracting parties, in which those parties are free to determine the types of disputes to be referred, the procedures for and powers of the expert in overseeing the determination process and the enforceability of the determination in superior courts. Expert determination accordingly provides economy and certainty to certain commercial processes that could otherwise take considerable time and lead to considerable cost in more formal systems.

The legal principles surrounding the determination and enforcement processes are settled and straightforward.<sup>1</sup> Notably, unlike arbitral or judicial awards,<sup>2</sup> expert determinations are entirely contractual processes<sup>3</sup> and are not given force by statute, the Constitution or common law. The scope of the expert's task is therefore a matter of construction in which ordinary rules of contractual interpretation apply.<sup>4</sup> Determinations only bind the parties by agreement and any action to enforce the determination is one of specific performance.<sup>5</sup> Its contractual character makes expert determination unique as a dispute resolution mechanism.

Courts at all levels have consistently endorsed the utility of dispute resolution by determination<sup>6</sup> and there has, over time, been a “hardening” of the courts’ willingness to give effect to the agreed determination

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<sup>1</sup> See generally *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305.

<sup>2</sup> For instance, arbitral decisions are enforceable per se under harmonised state legislation – see *Commercial Arbitration Act 2011* (Vic) s 35(1) and other state equivalents.

<sup>3</sup> *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367, 385.

<sup>4</sup> *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583.

<sup>5</sup> *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646, [79].

<sup>6</sup> See, eg, *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646, [81]–[86].

process.<sup>7</sup> Despite this, and notwithstanding the apparent simplicity of the guiding principles above, actions are routinely brought before Australian courts in which parties unsuccessfully seek to overturn determinations made by a contractually appointed expert. It is clear from the volume of cases in this area that the application of the above principles is no mean task. It also appears that parties often seek to challenge a determination as a matter of course and without a clear picture of the validity of the challenge or the prospects of a challenge succeeding.

This article seeks to shed light on the expert determination regime in Australia by engaging in a systematic review of key and common bases on which determinations are regularly upheld or overturned by Australian courts. This article first considers the construction of the expert's role as part of the parties' governing agreement, which is central in determining the scope of the expert's authority and enforceability of his or her determination. This article then considers the various circumstances in which expert determinations have been set aside by courts, including (but not limited to) where the expert applies the wrong test, values the wrong asset or dishonestly undertakes his or her role. Finally, this article considers the circumstances in which courts routinely uphold experts' determinations, and the broad procedural discretion that experts have been construed as enjoying as an incident of their decision-making authority.

## II. THE EXPERT DETERMINATION AGREEMENT

### A. What Is Expert Determination?

Expert determination is a form of alternative dispute resolution in which counterparties to a contract agree to refer certain types of disputes that arise during the course of a commercial relationship for adjudication by an independent third party. The third party is generally (though not necessarily) an expert in the field of the dispute and is tasked to make a determination on to the relevant issue largely through the application of his or her own store of knowledge, skills and/or experience. The process is more informal and flexible than litigation and is commonly used in conjunction with other modes of alternative dispute resolution such as negotiation, mediation or arbitration.

Expert determination is common in industries where disputes arise in respect of discrete technical or valuation issues, such as:

- construction – for example claims for extensions of time, variation or delay;<sup>8</sup>
- M&A – for example the price of shares sold under pre-emptive or put/call rights;<sup>9</sup>
- accounting – for example adjustments to accounts on a sale;<sup>10</sup>
- real estate – for example market or fixed rent assessments;<sup>11</sup> or
- commodities – for example the price of oil or gas.<sup>12</sup>

The key attraction of expert determination is its informality and consequent cost-effectiveness. Unlike proceedings commenced in superior courts which require a host of interlocutory steps (such as pleadings, discovery and evidence) prior to a hearing, experts are bound by only limited rules of procedure or evidence and generally make determinations “on the papers”. This drastically reduces the time in which disputes are argued and decided. As noted by the High Court in *Shoalhaven*:

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<sup>7</sup> *Holt v Cox* (1997) 23 ACSR 590, 596; *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2009] NSWSC 802, [6].

<sup>8</sup> See, eg, *Glenwill Projects Pty Ltd v North North Melbourne Pty Ltd* [2013] VSC 717; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305. For consideration of expert determinations in the construction industry see P Bradley and S Boyle, “The Overuse of Expert Determination by the Australian Construction Industry” (2012) *Australian Construction Law Bulletin* 97.

<sup>9</sup> See, eg, *Beevers v Port Phillip Sea Pilots* [2007] VSC 556; *Candoor No 19 Pty Ltd v Freixenet Australasia Pty Ltd* [2008] VSC 367.

<sup>10</sup> See, eg, *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708.

<sup>11</sup> See, eg, *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2002) 11 BPR 20,201; *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314.

<sup>12</sup> See, eg, *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173.

The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditious because they are informal and because the expert applies his own store of knowledge, his expertise, to his observation of facts, which are of a kind with which he is familiar.<sup>13</sup>

The efficacy of expert determination is now reflected in procedural rules of court, which entitle the court to refer certain matters to a special referee.<sup>14</sup>

## B. Interpreting the Expert Determination Agreement

The procedure for selection and appointment of the expert, the scope of the expert's powers in respect of procedural issues and the character of the expert's determination are all the product of the parties' agreement.<sup>15</sup> Construing the task entrusted to the expert or the character of the expert's determination will therefore fall to ordinary principles of contractual interpretation.<sup>16</sup>

Although each case necessarily falls to be construed according to its unique context, there are a number of commonalities across expert determination cases which are regularly employed as aids to interpretation. At the outset, courts have consistently held that the fact that the parties have provided for expert determination (as distinct from arbitration or litigation) is itself a factor highly relevant to how the expert determination clause will be interpreted.<sup>17</sup> In this regard, the nature of expert determination as an efficient and informal means of dispute resolution has (all else equal) led courts towards a broad reading of experts' powers. Palmer J held in *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* to this effect that:

Its purpose clearly is to avoid lengthy and expensive litigation in which the parties deploy troops of competing valuers to argue what is, in the end, a matter of opinion founded upon professional experience and judgment. Where parties to a commercial agreement have agreed to resolve a dispute by reference to an expert valuer in this way, the Court should, as a matter of general principle, be slow indeed to construe the contract in such a way as to facilitate a full-blown valuation case because one of the parties is dissatisfied with the result.<sup>18</sup>

Vickery J's comments in *Glenwill* are also instructive:

The commercial context in which a reference of disputes to an expert in a commercial contract is thus most relevant. The decision to refer disputes for determination by a contractually appointed expert will usually arise because the parties desire a particular body of expert experience, learning, skill and judgment to be applied to the resolution of defined issues which may arise in the course of the relationship and need to be dealt with. This problem-solving role is usually intended to be applied in a manner which is untrammelled by overly restrictive procedural considerations, so that the specialist skills and insights of the expert can be fully applied to the issues for resolution, in an expeditious and cost effective manner which is attended with an appropriate measure of "finality".<sup>19</sup>

The following other contextual factors in expert determination cases have been variously held by courts as supporting a more liberal reading of the expert's powers:<sup>20</sup>

<sup>13</sup> *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305, 315, citing *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563, 570 [27].

<sup>14</sup> See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) O 50 and other state and federal equivalents.

<sup>15</sup> *Glenwill Projects Pty Ltd v North North Melbourne Pty Ltd* [2013] VSC 717, [51].

<sup>16</sup> For the principles regarding contractual interpretation, see *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116–117 [46]–[53]; *Electricity Generation Corp v Woodside Energy Ltd* (2014) 251 CLR 640, 656 [35].

<sup>17</sup> *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305, 314–316; *500 Burwood Highway v Australian Unity* [2012] VSC 596, [169]–[171]; *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335–336.

<sup>18</sup> *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSWSC 405, [113] (citations omitted).

<sup>19</sup> *Glenwill Projects Pty Ltd v North North Melbourne Pty Ltd* [2013] VSC 717, [56].

<sup>20</sup> There are a range of cases where courts have, in light of some or all of these factors, liberally interpreted provisions in the expert determination agreement. For examples of such cases, see *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583; *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4; *Adnow Pty Ltd v Greenwells Wollert Pty Ltd* [2016] VSCA 282.

- the expert’s determination is expressly “binding”, “conclusive” or “final”;<sup>21</sup>
- the expert is proficient in the relevant field and selected for his or her skills, judgment and expertise;<sup>22</sup>
- the expert expressly retains a broad discretion as to the conduct of procedural matters;<sup>23</sup>
- the expert is not bound to make a determination by any method of assessment or other criteria;<sup>24</sup>
- the expert has been given only a limited period in which to make a determination;<sup>25</sup> and
- the expert is engaged only to determine a specific issue.<sup>26</sup>

The cases discussed below in this article will highlight the relevance of these factors in practical contexts.

### III. CHALLENGING FINAL/BINDING/CONCLUSIVE DETERMINATIONS – GENERAL PRINCIPLES

The principles governing whether an expert’s determination will be set aside or enforced by way of specific performance derive from the well-known judgment of McHugh JA in *Legal & General*.<sup>27</sup> In that case, as is common to many decisions in this field, a valuer was appointed to undertake a market rent assessment of leased premises. The court was required to determine whether the valuation should be set aside on the grounds that the valuer did not value the premises as they stood at the time of valuation.

After a close examination of the authorities, McHugh JA concluded that there was no authority to the effect that a court could set aside a valuation merely on the grounds of mistake.<sup>28</sup> His Honour held that by referring the dispute to a valuer (and by providing that the valuer’s decision was “final” and/or “binding”), the parties agreed to rely on that valuer’s skill and judgment and to be bound by the valuer’s decision, even where it was wrong.<sup>29</sup> In such circumstances, an error by the valuer would only vitiate the determination where it was of a kind that had the effect that the valuation was not made in accordance with the contract.<sup>30</sup> Put differently, the mistake must be of such a nature that the resultant determination was beyond anything that the parties intended be final or binding.<sup>31</sup> Pembroke J adopted this reasoning in *McGrath v McGrath* and provided:

So long as [an expert], when appointed and instructed, carries out his engagement in accordance with the terms of the [contract], and arrives at his decision honestly and in good faith, the parties will not be able to re-open it and will be bound by the result. Mistake or error by [the expert] in the process of valuation will not invalidate his decision. On the other hand, if he asks himself the wrong question or misconceives his function, he will not have performed the task required of him by the contract.<sup>32</sup>

McHugh JA’s judgment in *Legal & General* has been applied on numerous occasions by appellate courts<sup>33</sup> and cited with approval in the High Court,<sup>34</sup> and is now the settled approach in Australia. Courts

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<sup>21</sup> *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4.

<sup>22</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314. In this regard, there has been a recognition from courts that they have no greater expertise than valuers and ought to defer to that expertise: *Holt v Cox* (1997) 23 ACSR 590, 596.

<sup>23</sup> *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708.

<sup>24</sup> *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583.

<sup>25</sup> *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708.

<sup>26</sup> Compare *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305, 314–315 [25].

<sup>27</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314.

<sup>28</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 333E.

<sup>29</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335E–F.

<sup>30</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335G.

<sup>31</sup> *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173, [51], [54].

<sup>32</sup> *McGrath v McGrath* [2012] NSWSC 578, [11] (citations omitted).

<sup>33</sup> See, eg, *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173; *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367; *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2002) 11 BPR 20,201; *Adnow Pty Ltd v Greenwells Wollert Pty Ltd* [2016] VSCA 282.

<sup>34</sup> *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305, 315–316 [26].

have expressly rejected the historical approach which considered whether the valuer chose “the correct method of approach”.<sup>35</sup> The parties may, subject to any express or implied terms, have an action for negligence against the valuer in respect of an erroneous valuation.<sup>36</sup> However, as between the parties, the valuation will stand even where it is made negligently so long as it accords with the contract.<sup>37</sup>

The principle is a deceptively simple one – as will be seen below, the volume of disputes brought by parties concerning the validity of determinations under the *Legal & General* principles highlights the difficulties faced by parties applying the principle in practice. As the Victorian Court of Appeal noted in *AGL*, the rule in *Legal & General* is “more in the nature of a statement of conclusion than one which identifies relevant criteria for distinction”.<sup>38</sup> Moreover, cases have been slow to espouse any certain categories of or circumstances in which a valuation will be deemed to meet the test in *Legal & General*, and there are many grey areas in which valuers’ determinations do not squarely fall one way or another. This article seeks to shed light on those areas by systematically examining cases where determinations have been routinely upheld or overturned and providing more concrete categories for consideration.

#### IV. DETERMINATIONS SUSCEPTIBLE TO CHALLENGE

Given the unique factual matrix of each commercial relationship and dispute, it is impossible to categorically list the circumstances in which a determination might be held by a court to depart from the parties’ agreement. That said, several key types of errors have emerged from the body of cases in which expert determinations have been set aside by courts. These can be loosely sorted into the following:

- (a) a failure to apply the correct methodology;
- (b) a failure to value the correct subject matter;
- (c) a failure to act impartially;
- (d) arithmetic or mechanical errors;
- (e) a failure to give reasons or, alternatively, sufficient reasons; and
- (f) in prescriptive circumstances, manifest error or an error of law.

The presence of any of these errors is likely to lead a court to impugn a given determination. Each will be discussed in turn.

##### A. Failure to Apply the Appropriate Methodology

The agreement by which parties appoint an expert will, as a matter of course, prescribe an adjudicative task for the expert. In some cases, in addition to the overarching task, parties may also set out detailed criteria by reference to which the expert must undertake that task. For example, a valuer may be broadly tasked with assessing the market rent of premises, but also to have regard to certain specific matters (eg the highest and best use of property) and to disregard others (eg improvements or goodwill).<sup>39</sup>

##### 1. Determinations “At Large”

Experts tasked with making a determination “at large” (ie without reference to any fixed criteria or where there are several possible methods of assessing value) are not, without anything more, bound to undertake that determination in any specific way. That is, provided that the expert acts honestly and in pursuit of the appointed task, the expert cannot be later criticised for applying a sub-optimal methodology or using sub-optimal inputs.<sup>40</sup>

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<sup>35</sup> See *Karenlee Nominees Pty Ltd v Gollin & Co Ltd* [1983] 1 VR 657, 670, referring to Harman J in *Dean v Prince* [1953] 1 Ch 590.

<sup>36</sup> *Arenson v Arenson* [1977] AC 405, cited in *Holt v Cox* (1997) 23 ACSR 590, 596. Compare arbitrators under the *Commercial Arbitration Act 2011* (Vic) s 39 and other equivalent State legislation which are immune from actions by participants save for cases of bad faith.

<sup>37</sup> *Holt v Cox* (1997) 23 ACSR 590, 596.

<sup>38</sup> *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173, [44].

<sup>39</sup> See the expert determination clause in *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSWSC 405.

<sup>40</sup> *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583, 592.

In *Strang Patrick*, a valuer was tasked to value (among other things) the defendant's crane. The valuer valued the crane on an ex situ basis using the comparable sales method. The plaintiff sought to challenge the valuation on the basis that there were insufficient comparable sales in the market and that the more appropriate valuation method was therefore the discounted replacement cost method. The plaintiff also challenged the valuation being undertaken ex situ.

Giles J did not find any error in the valuer's approach that was capable of invalidating it. His Honour noted that the valuer's task was simply to determine the value of the crane, and the parties' agreement did not prescribe a means of doing so. Accordingly, provided the valuer approached the task honestly and impartially, it was immaterial that the valuer could have adopted a more appropriate methodology (eg the discounted replacement cost or ex situ methods) or applied the chosen methodology incorrectly.<sup>41</sup> His Honour also held, on the same basis, that it was not fatal to have excluded hypothetical purchasers in the international market. Any such mistakes would have been "mistakes in the course of doing that which the asset sale agreement required".<sup>42</sup>

## **2. Determinations by Reference to Specific Criteria**

On the other hand, where an expert is tasked to carry out a valuation in a particular way (eg, by reference to certain fixed criteria), the expert will be bound to make his or her determination in that precise way, and a departure from the specified criteria will mean the valuation was not made in accordance with the contract.<sup>43</sup> One common example of this rule involves the assessment of the "fair value" of assets (and in particular, shares).

In *Candoora*, a valuer was appointed to determine the "fair value" of the plaintiff's 25% shareholding in a wine production company after the exercise of a put option. The valuer determined the share value according to "fair market value" using the discounted cash flow method. The plaintiff challenged the valuation on the grounds that the valuer applied the wrong test and therefore departed from the task appointed to him.

In considering the nature of the task appointed to the valuer, Hargrave J drew on previous authority<sup>44</sup> to the effect that a "fair value" test encompasses more than the objective market value of an asset – specifically, that it requires the valuer to consider any relevant subjective considerations that might affect price (such as a premium reflecting the strategic value of the shares to a trade rival, or the special value to a party of obtaining a 100% shareholding). The adoption by the valuer of a market assessment did not take into account the special potentiality for a purchaser to pay more than what the shares were objectively worth – in this case, for example, reflecting the synergies for a rival winemaker in acquiring substantial additional vineyards.<sup>45</sup> This was held by Hargrave J to constitute a departure from the specific task entrusted to the expert and the valuation was set aside.<sup>46</sup>

## **3. Incorrect Interpretation of the Expert's Task**

An expert might otherwise be held to have applied the incorrect test where he or she did not correctly interpret the effect of the task entrusted.

In *Australian Vintage*, a lease of vineyards contained a force majeure clause which required the parties to consider, in the event of a force majeure, whether "production" or "production capacity" had reduced by more than 50% of the "average production capacity" (as those terms were defined). An expert appointed

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<sup>41</sup> *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583, 592E–F. Note, however, the discussion of arithmetic or mechanical errors below.

<sup>42</sup> *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583, 592E–F.

<sup>43</sup> *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 20 WAR 489, 494–495 [16]–[18].

<sup>44</sup> For example, *Holt v Cox* (1997) 23 ACSR 590.

<sup>45</sup> *Candoora No 19 Pty Ltd v Freixenet Australasia Pty Ltd* [2008] VSC 367 [77].

<sup>46</sup> For other cases involving "fair value" where the same rationale was applied, see *Holt v Cox* (1997) 23 ACSR 590; *MMAL Rentals Pty Ltd v Bruning* (2004) 63 NSWLR 167; *Toll (FHL) Pty Ltd v PrixCar Services Pty Ltd* (2007) 17 VR 632.

by the parties after a severe frost event, adopting a certain interpretation of those defined terms, determined that production had been reduced by substantially less than average production capacity.

The lessee sought to challenge the determination on the grounds that the expert misconstrued the meaning of the terms and therefore misapplied the test. The primary judge agreed with the valuer's interpretation and dismissed the claim.<sup>47</sup> However, the Court of Appeal allowed the lessee's appeal.<sup>48</sup> The court held that there was no prima facie rule against an expert determining mixed questions of fact or law, and the parties were free to refer questions of law to an expert.<sup>49</sup> However, as a matter of construction, a term can only have one legally correct interpretation, and where the expert's construction does not accord with the clause's true meaning the court must consider whether the parties intended to be bound by that (incorrect) construction.

In this case, Bathurst CJ noted that the parties had referred three matters to the expert, all of which were technical matters and "peculiarly within the qualification of the expert".<sup>50</sup> By contrast, the construction of the production formula was an objective legal matter and outside of the expert's expertise. In the circumstances, it was held that the parties were unlikely to have intended to bind themselves to the expert's incorrect construction of the relevant terms.<sup>51</sup> The Court of Appeal therefore set aside the determination.

The principle in *Australian Vintage* was recently applied in *Funtastic* where an accountant, engaged to determine adjustments to a business sale price, misconstrued the words "not dealt with" in a hierarchy of principles that the accountant was required to apply. The effect of the error was that the accountant failed to take into account the historical treatment of certain items in the company's half-year accounts in determining the proper treatment of those items. Almond J held that there was nothing in the agreement which indicated that the parties intended to be bound by the accountant's erroneous interpretation of the legal meaning of the task, and on that basis referred the matter to the accountant for re-determination by reference to the relevant accounts.<sup>52</sup>

## B. Valuation of Incorrect Subject Matter

A determination with respect to subject matter not agreed between the parties will constitute a departure from the terms of the parties' agreement.<sup>53</sup>

Though examples of this are not common, the issue arose for consideration in *Legal & General*, which concerned the market rent valuation of commercial premises. Between the date of commencement of the lease and valuation, part of the premises' mezzanine floor had been removed. The tenant sought to impugn the determination on the grounds that the valuer valued the premises at the time of commencement of the lease (including the removed area) and not at the time of the valuation; that is, valued the wrong space. Waddell J at first instance set aside the determination on this basis.

On appeal, the Court found that the valuer did include the removed space in the valuation, but did so in order to reflect the ability of the lessee to restore the space and make use of it.<sup>54</sup> This was held not

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<sup>47</sup> *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* [2015] NSWSC 168.

<sup>48</sup> *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367, 383.

<sup>49</sup> *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367, 385, citing *Downer Engineering Power Pty Ltd v P & H Minepro Australasia Pty Ltd* [2007] NSWCA 318, [79].

<sup>50</sup> *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367, 387.

<sup>51</sup> *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367, 387.

<sup>52</sup> *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708, [118].

<sup>53</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335G.

<sup>54</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 321C (Mahoney JA), 323D–E (Priestley JA), 330C–G (McHugh JA). McHugh JA held (328C) that the valuation wrongly proceeded on the basis that the council would consent to an application for a change of use without any requirement for the provision of additional parking, and this was the error on which the balance of his Honour's judgment was based.

to constitute a valuation of the wrong space. However, the Court held that had the valuer valued the premises as they stood at the time of commencement of the lease, that would have been an artificial analysis, would not have conformed with the contract and would have been liable to be set aside.<sup>55</sup>

### C. Partiality or Lack of Independence

Parties may (and routinely do) expressly agree that the expert must act honestly or impartially or is obliged to treat the parties equally. Even absent such a clause, however, it will likely be implied into any agreement (as a matter of business efficacy) that the expert is to exercise his or her independent and honest judgment in making a determination.<sup>56</sup> Any determination made by an expert that is a product of dishonesty, collusion or fraud will be open to challenge and likely set aside.<sup>57</sup>

A determination was impugned on this ground in *Beevers* in the context of an auditor's valuation of the plaintiff's shareholding to be purchased by the defendant on the plaintiff's retirement. In the course of his engagement the auditor had numerous exchanges and correspondence with the defendant's representatives, and declined to receive submissions from the plaintiff as to the value of his shares. The plaintiff challenged the auditor's certificate on the grounds that it was tainted by bias by reason of the auditor's close association with the defendant.

Dodds-Streton J found in favour of the plaintiff. Her Honour held that while it was necessary for there to be a degree of interaction with the defendant in the course of valuing the shares, the degree of interaction and the defendant's input into the preparation of the valuation was so extensive that the work could not be said to be the independent work of the auditor.<sup>58</sup> Her Honour held that the auditor's approach was informed by the erroneous understanding that he was responsible to the defendant's board and not an independent expert,<sup>59</sup> the result of which was that the valuation was not made honestly and was therefore of no effect.

### D. Arithmetic or Mechanical Errors

Courts have held it to be unlikely that parties would intend to be bound by a valuation based on incorrect data, particularly where the expert was appointed for his or her technical expertise and the correct data is readily available. On this basis, a determination affected by a purely arithmetic or mechanical error may be open to challenge for being beyond the contemplation of the parties.

An example of this is found in *AGL*, where a body corporate was required to determine tariffs payable by the appellant to the respondent based on amounts of gas recorded as being withdrawn from certain points within a gas transmission system. It was discovered after the determination was made that for some time gas had been flowing through an unmetered valve and the body corporate had used incorrect statistics, thereby significantly understating the tariffs payable. The court was required to determine whether the amount certified by the body corporate based on erroneous data answered the contractual description of its task and bound the parties.

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<sup>55</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 321C (Mahoney JA), 323D–E (Priestley JA).

<sup>56</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335D–E; *McGrath v McGrath* [2012] NSWSC 578, [12]; *Beevers v Port Phillip Sea Pilots* [2007] VSC 556, [299]. Compare obligations of procedural fairness, which are discussed below.

<sup>57</sup> Because the expert is a creature of contract (and not of a judicial or arbitration framework, where constitutional, common law or statutory obligations apply), a party must prove actual bias, not the mere appearance of bias as is traditionally the case: *500 Burwood Highway v Australian Unity* [2012] VSC 596, [182], citing *McGrath v McGrath* [2012] NSWSC 578, [16]. Although Dodds-Streton J has made comments suggesting a liberalisation of this test in *Beevers v Port Phillip Sea Pilots* [2007] VSC 556, [300], those comments have been firmly rejected by subsequent decisions: see, eg, *500 Burwood Highway v Australian Unity* [2012] VSC 596, [177]; *McGrath v McGrath* [2012] NSWSC 578, [20]–[21]; *Lahoud v Lahoud* [2010] NSWSC 1297, [42]; *Andrews v Queensland Racing Ltd* [2009] QSC 364, [24]–[25].

<sup>58</sup> *Beevers v Port Phillip Sea Pilots* [2007] VSC 556, [301].

<sup>59</sup> *Beevers v Port Phillip Sea Pilots* [2007] VSC 556, [308]–[309].

The court at first instance held that the parties agreed to be bound by the expert's figures, whatever they may be.<sup>60</sup> However, on appeal, Nettle JA<sup>61</sup> drew the distinction between an error in the exercise of judgment, opinion or discretion entrusted to an expert (which the parties are generally taken to accept) and an error involving objective facts or a mere mechanical or arithmetical exercise. His Honour held that the parties would be far more likely to contemplate an error of the former kind being immune from challenge than the latter.<sup>62</sup> Because the parties required the body corporate to make a determination based on the volume of gas withdrawn from the system, a determination based on a different amount would be beyond the parties' contemplation and not what the agreement required.<sup>63</sup> The appeal was therefore allowed.

## E. Failure to Give Reasons or Insufficiency of Reasons

An expert may be required, whether expressly or impliedly, to give reasons for a determination (ie a "speaking valuation"). A failure in such a case to give reasons, or to give reasons to the requisite standard, will have the consequence that there will not have been a valid determination.<sup>64</sup> The obligation to give reasons is in this regard as imperative to the expert's task as the determination itself.

### 1. Is the Expert Obligated to Give Reasons At All?

Often, parties will expressly require an expert to provide "reasons", "detailed reasons" or a "statement of reasons". Absent such prescription, however, it is not always clear from the governing agreement whether the expert is obliged to give reasons. Where there is no express obligation to this effect, whether an expert is required to give reasons is a matter of construction in light of the general factors set out above.

The author is not aware of any Australian decision where a court has overturned a determination for a failure to give reasons at all. However, such a possibility has been referred to in both English and Australian courts. For instance, in *Dean v Prince*, the UK High Court heard a challenge to an auditor's valuation of shares. The agreement did not require the auditor to provide a speaking valuation, though the auditor did so after pressure from the parties. In discussing whether the auditor's valuation was erroneous, Harman J held:

If (the auditors) had chosen to keep silent I do not think that any Court would have obliged them to explain their reasons; but they have not been strong minded enough to do that. It is therefore open to the plaintiff to question them.<sup>65</sup>

The Court of Appeal overturned the decision on an unrelated point, but noted similarly:

Having regard to the form of the article (whereby the auditor was appointed to value the shares) it is not in doubt that, were it not for one circumstance (namely, that the auditor chose to expose his reasons), Mrs Dean could not have questioned the validity and conclusiveness of Mr Jenkinson's certificate, since no sort of imputation has been made, or could be made, of Mr Jenkinson's integrity.<sup>66</sup>

These comments were cited with approval by Palmer J in *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd*,<sup>67</sup> who indicated similarly.

Given that the obligation is ultimately a matter of construction, the factors outlined earlier in this article will be highly relevant. For example, an expert that is obliged to give a determination on a specific

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<sup>60</sup> *AGL Victoria Pty Ltd v TXU Networks (Gas) Pty Ltd* [2004] VSC 225.

<sup>61</sup> With whom Bongiorno JA and Maxwell P agreed.

<sup>62</sup> *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173, [53].

<sup>63</sup> *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173, [81].

<sup>64</sup> *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4, [97].

<sup>65</sup> *Dean v Prince* [1953] 1 Ch 590, 594.

<sup>66</sup> *Dean v Prince* [1954] 1 Ch 409, 417.

<sup>67</sup> *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSWSC 405, [56]–[59].

question in a short time frame and without any obligation to receive submissions will have good cause to give a non-speaking determination. Conversely, as is discussed below, an expert that is obliged to receive submissions from parties or conducts an examination “in the nature of an intellectual exchange”<sup>68</sup> will be required to provide reasons to a comprehensive standard. A party may otherwise seek to argue that the obligation to provide reasons is implied in the governing agreement, for example, in order to determine whether a determination contains a “manifest error” in breach of an express term. Normal rules of implication will apply in the circumstances.<sup>69</sup>

## **2. Standard of Reasons Required**

If the governing agreement requires the expert to give reasons, the standard or quality of reasons required will depend on the facts of the case and the expert’s task.<sup>70</sup> A determination process that more closely resembles a judicial or arbitral inquiry will elevate the quality of reasons required to that akin to an arbitration or court.<sup>71</sup>

In *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd*, a judicial standard of reasons was held not to be required. There, the plaintiff sought to challenge a market rent determination of leased premises on the grounds that the valuer failed to give “sufficient written reasons” as required by the lease. The lease did not specify the valuation method required but set out various criteria to which the valuer was to have regard. The valuer valued the site based on the highest and best use of the land and in his reasons simply provided that the determined rate was based on comparable sales evidence in the surrounding area. The plaintiff raised 19 items that it alleged the valuer should have set out in the determination, including the identity of the comparable sites, particulars of the sites’ characteristics and the adjustments made for comparison purposes.

Palmer J held that the valuer had given reasons to the standard required.<sup>72</sup> His Honour held that “sufficient reasons” only obliged the valuer to disclose what he did and why he did it so that parties were able to assess whether he complied with the lease. If it was apparent that the valuer had, then the details of how he answered those questions were immaterial as those details could not impeach the valuation. That is, because the valuation was discretionary, it could only be set aside for a failure to apply the correct test, so as long as the reasons disclosed that the right test was applied further criticism could not be made. Palmer J’s decision was upheld on appeal.<sup>73</sup>

In contrast, circumstances may arise which require a broader reading of the obligation to give reasons. In *TX Australia*, various agreements governed the licensing of broadcasting transmission towers by a joint venture of major television networks to the ABC and SBS. On renewal of the agreements in 2010, an expert was appointed to determine the “reasonable fee” for the ongoing licence having regard to rates charged to other third parties for use of the facilities, and to provide a “detailed statement of reasons” for the decision.

Brereton J held<sup>74</sup> that the standard of reasons required in the circumstances more closely approached that expected of a judge or arbitrator.<sup>75</sup> This was in part because the governing agreement required a “detailed” statement of reasons and provided for wider than usual rights to challenge. Primarily, however, the issues before the expert were complex, and the expert received detailed submissions from the parties with which the expert was required to engage.<sup>76</sup> This required reasons to a far higher standard than is ordinarily the case.

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<sup>68</sup> *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4, [100].

<sup>69</sup> See generally *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266.

<sup>70</sup> *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305, 314–315 [25]–[26].

<sup>71</sup> *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4, [100].

<sup>72</sup> *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSWSC 405, [118]–[119].

<sup>73</sup> *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2002) 11 BPR 20,201, [60]–[63].

<sup>74</sup> Applying the principles set out in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305.

<sup>75</sup> *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4, [100].

<sup>76</sup> *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4, [101].

As to the difference between “detailed reasons” and “sufficient reasons”, see *Adwell Holdings Pty Ltd v Bourne*.<sup>77</sup>

## F. “Manifest Error” or “Manifest Error of Law”

Parties commonly state that an expert’s determination will not be binding where affected by “manifest error” or “manifest error of law”.<sup>78</sup> Though used ubiquitously, the phrases are not terms of art and have no particular legal meaning. Instead, as has been the case throughout this article, what is a “manifest error” will be informed by ordinary principles of contractual interpretation.<sup>79</sup>

Almond J recently surveyed the authorities surrounding “manifest errors” in *Funtastic* in the context of an accountant’s determination of the accounting treatment of certain line items. His Honour looked at the ordinary meaning of the term and the purpose of the term in the context of the agreement in question. In the circumstances of that case his Honour held that a high bar had to be met for an error to have been a “manifest” one, particularly as the parties provided for a tight timetable for the expert to provide his determination and granted to the expert considerable discretion as to procedural matters.

## V. DETERMINATIONS LIKELY TO SURVIVE CHALLENGE

The authorities above highlight that there are, as famously noted by Jordan CJ, “mistakes and mistakes” in the course of determinations;<sup>80</sup> that is, there are some mistakes which are not in the parties’ contemplation but a range of others which, while erroneous in some way, will fall short of determinations made otherwise than in compliance with the parties’ agreement. Looking at the other side of the coin to the cases discussed above, determinations are unlikely to be deemed outside that contemplated by the parties in circumstances where an expert simply:

- (a) erred in the exercise of a discretion;
- (b) failed to provide complete procedural fairness; or
- (c) proceeded on incomplete or insufficient evidence.

These “errors” have all been held to fall within the realm of errors that parties are taken to have accepted at the time of entering into the expert determination agreement. Each of these will be considered in turn.

### A. Mistakes in the Exercise of a Discretion

An expert is only limited in the way he or she may perform the relevant task by the express or implied prescriptions in the determination agreement.<sup>81</sup> For example, as was the case in *Strang Patrick* above, an expert that is entrusted to value an asset such as a crane without further instruction will not be obliged to value that asset in any particular way, nor will he or she be obliged to take any specific matters into account.<sup>82</sup> Likewise, where an expert is required to apply a specific valuation method, as long as that method is applied it will be immaterial that the expert took into consideration matters which should not ideally have been taken into account, or vice versa.<sup>83</sup>

A further example of this principle is found in *Legal & General*, the facts of which are set out above. McHugh JA held in that case that the valuer made an error as a hypothetical lessee would not be prepared

<sup>77</sup> *Adwell Holdings Pty Ltd v Bourne* [2007] NSWSC 730.

<sup>78</sup> Reflecting the language governing statutory rights of appeals of arbitral awards prior to the amendment of the harmonised state legislation in 2011 – see, eg, *Commercial Arbitration Act 1984* (Vic) s 38(5)(b)(i) (repealed) and other State equivalents.

<sup>79</sup> *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708, [52]–[54].

<sup>80</sup> *Holt v Cox* (1997) 23 ACSR 590, 597, quoting Jordan CJ in *Hebburn Ltd, Ex parte; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416, 420.

<sup>81</sup> *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 20 WAR 489, 494–495 [16]–[18].

<sup>82</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335G–336B.

<sup>83</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335G–336B.

to pay the same rate for the void as they would for the remainder of the ground floor.<sup>84</sup> However, his Honour held that this error was not of a kind that enabled the court to set aside the variation. Instead, the error was akin to a valuer taking into account rents that were not comparable – although technically erroneous, it was not a departure from the question asked of the valuer.<sup>85</sup> The market rent assessment was therefore upheld.

## B. Failure to Provide Procedural Fairness

Obligations and rights of procedural fairness (including to treat the parties equally, provide documents filed by one party to the other party and to give reasons)<sup>86</sup> apply in general to arbitrations (through the harmonised legislative schemes)<sup>87</sup> and curial processes (through the common law and Constitution). However, such obligations have no foundational application to contractual determination processes unless they are expressly or impliedly incorporated into the determination agreement.<sup>88</sup>

Parties may (and commonly do) expressly incorporate the Resolution Institute rules<sup>89</sup> into the determination agreement to avoid circumvention by the expert of procedural fairness obligations. Even absent such prescription, however, obligations of procedural fairness may be implied, particularly in circumstances where an expert receives submissions, hears the parties or is obliged to provide the parties with an opportunity to respond to materials (ie more closely resembles a judicial inquiry).<sup>90</sup>

In this regard, *Lahoud* concerned an audit of amounts contained in a settlement deed reached between the parties. The plaintiff argued that the auditor's determination was not binding as the auditor failed to give procedural fairness in only briefly providing important documents received from one party to the other for inspection. Ward J held that in the circumstances, no obligation of procedural fairness was implied. This finding was made in light of the fact that the expert was not obliged to receive or consider evidence or submissions from the parties (ie, could make an assessment based on the records alone), and his task was not in the nature of a judicial inquiry.<sup>91</sup> To the extent any obligation might have arisen, it could only require the auditor to give the parties a reasonable opportunity to consider and respond to submissions, not to provide files to the other party.<sup>92</sup>

## C. Proceeding on Insufficient or Incomplete Evidence

An expert is not faced with the same evidentiary standards as an arbitrator or judge<sup>93</sup> and may make findings or “fill the gaps” where there is insufficient or incomplete evidence from the parties.

For example, in *Funtastic*, the accountant in question was also required to determine whether certain goods had been delivered from one party to another in order to decide the accounting treatment of various

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<sup>84</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 330G–331A. Priestley and Mahoney JJA did not find that an error had been made (on the basis that there was no evidence that the area should be valued differently), so McHugh JA's judgment in this regard was a minority one.

<sup>85</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 336G.

<sup>86</sup> See *Commercial Arbitration Act 2011* (Vic) ss 18, 24, 31.

<sup>87</sup> Such as the *Commercial Arbitration Act 2011* (Vic) and other State equivalents, which are based on the *UNCITRAL Model Law on International Commercial Arbitration* (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

<sup>88</sup> *Lahoud v Lahoud* [2010] NSWSC 1297, [70], citing *John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd* [2010] NSWSC 150; *Enron Australia Finance Pty Ltd v Integral Energy Australia* [2002] NSWSC 753; *500 Burwood Highway v Australian Unity* [2012] VSC 596, [168]; *McGrath v McGrath* [2012] NSWSC 578, [11]–[14]. Providing that the expert is appointed “as an expert and not an arbitrator” has the effect of excluding the operation of state-based commercial arbitration legislation.

<sup>89</sup> Resolution Institute, Expert Determination Rules (2016) <<http://www.resolution.institute/documents/item/1845>>

<sup>90</sup> *Lahoud v Lahoud* [2010] NSWSC 1297, [75].

<sup>91</sup> *Lahoud v Lahoud* [2010] NSWSC 1297, [72], [75].

<sup>92</sup> *Lahoud v Lahoud* [2010] NSWSC 1297, [83].

<sup>93</sup> See, eg, *Evidence Act 2008* (Vic) Pt 4.1 and other State equivalents.

line items on a sale of a business. The parties had each provided the accountant with spreadsheets that asserted (without anything more) that the goods had or had not been delivered. It was not apparent that the accountant had any further materials in support of either party's assertions. The accountant preferred one party's submissions over the other's and determined that the majority of goods had been delivered.

The plaintiff complained that the valuer had made a "manifest error" under the agreement as he had no evidence on which to reach his conclusion. However, Almond J held that the accountant was entitled under the terms of his engagement (which granted a wide discretion as to procedural matters and specifically did not require the accountant to verify information provided to him) to prefer one party's bare submissions over another's.<sup>94</sup> His Honour held that the accountant may have been right or may have been wrong; however, it could not be said that the accountant made a manifest error in absence of convincing proof that the goods had not been delivered.<sup>95</sup> The accountant was entitled to make a decision on the evidence before him and his determination on the issue was upheld.<sup>96</sup>

## VI. WHEN A DETERMINATION IS SUCCESSFULLY CHALLENGED

An issue often overlooked with respect to expert determinations is what may occur when a determination is set aside by a court. Parties routinely seek (and courts routinely order) that a defective valuation be remitted to the valuer for re-determination in accordance with the court's direction.<sup>97</sup> To this effect, Kendall on *Expert Determination* states that:

The usual consequence of a material departure from instructions is that the expert must come to a new decision in accordance with the instructions, as clarified by the court, and it is not usually appropriate for the court to fill the gap by ordering an inquiry.<sup>98</sup>

In other cases, courts have remitted the determination to a different expert (eg, on the grounds that the initial expert is unable to bring an impartial mind to the task),<sup>99</sup> referred a dispute to a special referee under procedural rules of court,<sup>100</sup> or undertaken the determination itself and put the court in the shoes of the expert.<sup>101</sup> Courts have tended to adopt a practical approach, seeking to resolve the dispute through whatever means it considers most effective and expedient in the circumstances.

Although the above approaches are often a matter of common sense, the juridical bases for such approaches are not always clear or settled, and courts have at times overlooked the precise power with which decisions are made in pursuit of the approach that resolves the parties' disagreement most efficiently and pragmatically. This broad approach is consistent with (and in some cases relies on)<sup>102</sup> the principle laid down by the Privy Council in *Cameron v Cuddy*, where the Full Court provided that:

[i]t is the duty of a Court of law, in working out a contract of which such arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a Court in such circumstances and it is the duty to come to the assistance of the parties by the removal of the impasse and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, and

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<sup>94</sup> *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708, [81].

<sup>95</sup> *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708, [84].

<sup>96</sup> For a decision on similar grounds, see *Hanratty v The Carrington Redevelopment Pty Ltd* [1999] NSWSC 327.

<sup>97</sup> See, eg, *Candoora No. 19 Pty Ltd v Freixenet Australasia Pty Ltd (No. 2)* [2008] VSC 478; *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708; *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367; *Eureka Funds Management Ltd v Freehills Services Pty Ltd* (2008) 19 VR 676, [73].

<sup>98</sup> John Kendall, Clive Freedman and James Farrell, *Expert Determination* (4<sup>th</sup> ed, 2008) 246.

<sup>99</sup> See, eg, *Candoora No. 19 Pty Ltd v Freixenet Australasia Pty Ltd (No. 2)* [2008] VSC 478.

<sup>100</sup> See, eg, *Beevers v Port Phillip Sea Pilots* [2007] VSC 556.

<sup>101</sup> See, eg, *Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No 9)* [2012] NSWSC 984; *Bounty Systems Pty Ltd v Odyssey Gaming Services Pty Ltd* [2007] QSC 230.

<sup>102</sup> See, eg, *Candoora No. 19 Pty Ltd v Freixenet Australasia Pty Ltd (No. 2)* [2008] VSC 478, [13]; *Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No 9)* [2012] NSWSC 984, [110].

it furnishes by an appeal to a Court of justice the means of working out and of preventing the defeat of the bargain between the parties.<sup>103</sup>

This statement of principle, while on one level unarguable, does not, however, outline a juridical basis on which the court may make decisions of the kind noted above. For instance, it is generally the case that parties do not expressly state what is to take place when a determination, properly referred to an expert under the dispute resolution mechanism, fails. Moreover, given the different options available to the parties on such an event occurring, a term that the dispute be decided in a certain way is unlikely to be implied.<sup>104</sup> How, then, can a court derive the power to remit a valuation to a valuer (whether the same valuer that undertook the initial valuation or a different one), or undertake an assessment in the valuer's place?

The authorities suggest several potential justifications. First, the answer may be found in the terms of the parties' contract. A determination by an expert that is not made in accordance with the parties' agreement is not, at law, a determination at all.<sup>105</sup> In such a case, it is as if the dispute had not yet been referred for determination.<sup>106</sup> Accordingly, subject to any express time or other limitations (discussed below), the parties will still be bound to avail themselves of the expert determination procedure in the ordinary course. An order referring the dispute for re-determination in these circumstances is simply giving effect to the parties' initial expert determination agreement.

It may otherwise be the case that a term can be implied into the parties' agreement. For example, Hargrave J held that the parties may be taken to intend that on a determination being set aside for fraud or impartiality, a different valuer should be appointed.<sup>107</sup> Similarly, where an expert's determination is affected by an arithmetic error, it may be the case that the parties would have intended that the expert re-determine the matter referred to him with proper data.<sup>108</sup> In such cases, courts may fashion orders that simply give effect to those implied terms.

While these are neat solutions, they are not universal ones. For example, in some cases the parties may be expressly required to submit a dispute notice, or nominate a valuer, within a certain time frame that can no longer be met.<sup>109</sup> In others, the contract might name a specific expert to carry out the task (eg, a company's auditor) that due to circumstances is no longer able to act.<sup>110</sup> In such cases, the express or implied contractual machinery for resolving the dispute has effectively been frustrated or "spent" once the determination has been declared invalid and can no longer be relied upon by the court to justify an order (in furtherance of the parties' presumed intentions) that the dispute be remitted for re-determination.

Circumstances such as these have not stifled the court's authority, however, and even in these circumstances courts have fashioned appropriate remedies by straining the interpretation of the parties' agreement in a manner that permits its intervention. The House of Lords' decision in *Sudbrook Trading Estate Ltd v Eggleton (Sudbrook)*<sup>111</sup> epitomises this approach. In that case, a lessee was given an option to purchase premises at a price to be agreed between two valuers (one nominated by each party) or, failing agreement by the valuers, by an umpire appointed by the valuers. The lessor refused to appoint a valuer and sought to resist the lessee's claim for specific performance on the grounds that the contract for

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<sup>103</sup> *Cameron v Cuddy* [1914] AC 651, 656.

<sup>104</sup> *Candoora No. 19 Pty Ltd v Freixenet Australasia Pty Ltd (No. 2)* [2008] VSC 478, [16].

<sup>105</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335; *South Australia v Goldstein* [2016] SASC 202, [227]; *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSWSC 405, [118].

<sup>106</sup> *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173, [77].

<sup>107</sup> *Candoora No. 19 Pty Ltd v Freixenet Australasia Pty Ltd (No. 2)* [2008] VSC 478, [17].

<sup>108</sup> *Candoora No. 19 Pty Ltd v Freixenet Australasia Pty Ltd (No. 2)* [2008] VSC 478, [17]. This was the case in *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173.

<sup>109</sup> *Vercorp Pty Ltd v ACN 096 278 483 Pty Ltd (No 2)* [2010] QSC 405.

<sup>110</sup> See, eg, *Macro v Thompson (No 3)* [1997] 2 BCLC 36.

<sup>111</sup> *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444.

sale was uncertain for want of an agreed price. The House of Lords granted specific enforcement of the contract and determined a fair price for the sale itself. Their Honours held that on its true construction, the agreement the subject of the option was for the sale of land at a fair and reasonable price by the application of objective standards, and that determination by the valuers was merely machinery giving effect to that agreement and was subsidiary and non-essential to that purpose.<sup>112</sup> In light of this, if the machinery broke down for whatever reason (as it had here), the court could substitute its own machinery to ascertain a fair and reasonable price in accordance with the primary purpose. Lord Fraser of Tullybelton stated to this effect:

Where, as here, the machinery consists of valuers and an umpire, none of whom is named or identified, it is in my opinion unrealistic to regard it as an essential term. If it breaks down there is no reason why the court should not substitute other machinery to carry out the main purpose of ascertaining the price in order that the agreement may be carried out.<sup>113</sup>

By viewing the “machinery” for the agreement (ie the expert’s determination) as subsidiary to the main purpose of the parties’ agreement, a failure of that machinery is not fatal to the determination of the issue, and the court may give effect to that purpose even without giving effect to the relevant machinery. The principle in *Sudbrook* has received general acceptance in Australian courts. In *GPI Leisure Corporation Ltd v Herdsman Investments Pty Ltd*, Young J held that since *Sudbrook*, Australian courts have been more ready to construe a contract to the effect that if the essential agreement was for a fair and reasonable price and the agreed machinery to ascertain that price had broken down, the court could supply the necessary machinery.<sup>114</sup> Similarly, in *Bounty Systems*, Muir J referred to *Sudbrook* in construing a software licence agreement where a fee was to be assessed by an expert. The expert chosen by the parties withdrew from the exercise. Muir J held:

Courts endeavour, wherever possible, to give effect to parties’ agreements not to frustrate them. Clause 14 requires the question of the fee for service, in the event that the parties are unable to agree the fee, to be referred to an independent expert for determination. If referral is made and the determination miscarries for whatever reason the appointment of the expert can be revoked and a new expert appointed in his stead. This is not a case in which the expert is appointed because of some particular quality or special knowledge on his part to which the parties attach particular importance. The expert is merely a person to be appointed by the President of a particular professional body. The fee to be determined is not one to be arrived at on any idiosyncratic basis. Although the basis for determining the fee is not fully specified, there is no reason to suspect that the parties had in mind anything other than the determination of a reasonable fee in the circumstances.<sup>115</sup>

*Sudbrook* was decided after argument but before judgment in the High Court decision in *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*.<sup>116</sup> The Full Court referred to the decision. In particular, Brennan J cited the decision with approval, stating:

[t]hese cases tend to show that where the express terms of a lease reveal an hiatus in the machinery for fixing the rent, the court will lean towards a construction of the lease which treats the machinery merely as a means of ascertaining what is capable of being ascertained objectively as a fair and reasonable rent and which thus avoids an hiatus in an essential stipulation.<sup>117</sup>

In the majority of expert determination cases (where the expert is simply the means of obtaining a fair value), this approach may empower the court to make the orders that it considers appropriate to achieve the parties’ (ultimate) goal.

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<sup>112</sup> *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, 483.

<sup>113</sup> *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, 484.

<sup>114</sup> *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 1)* [1990] ANZ ConvR 367, 369.

<sup>115</sup> *Bounty Systems Pty Ltd v Odyssey Gaming Services Pty Ltd* [2007] QSC 230, [61].

<sup>116</sup> *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600. For other decisions applying *Sudbrook* in the context of expert determinations see *Green v Wilden Pty Ltd* [2005] WASC 83; *Kinivan v Maoudis* [1988] ANZ ConvR 320; *Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No 9)* [2012] NSWSC 984.

<sup>117</sup> *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600, 616.

The corollary of the above principle is that the court will not be able to fashion a remedy through its own machinery where the agreed machinery is more than merely incidental to the main purpose of the contract (ie, is an essential term). In *Vercorp*, for example, an option to purchase land was required to be completed within 30 days of exercise at a price to be determined by a valuer. A valuer was properly nominated under the contractual procedure but did not make his determination within the 30-day period. One party then sought to terminate the agreement and the other party sought specific enforcement at a price determined by the court. The court refused to grant specific performance, holding that the 30-day period was expressly agreed between the parties and a condition precedent to performance, and the failure by the valuer to make a determination within 30 days meant that remittal to the valuer or determination by the court itself would not be consistent with the parties' intentions.<sup>118</sup> This is an example of a case where the court could not construe a contract in a way that permitted it to substitute its own machinery for resolution of the issue.

In such a case, is there any other basis (outside of the parties' contract) on which the court could remit a valuation for re-determination or make a determination in an expert's place? It is arguable that the power to make an order of this kind is simply incidental to the court's power under statute to make a declaration that the determination was not made in accordance with the contract. The court has express statutory authority to make declarations under each of the State *Supreme Court Acts*<sup>119</sup> and the court's power to make orders that are incidental and necessary to the exercise of its jurisdiction is well known.<sup>120</sup> Moreover, the various Acts also provide that the court should exercise its jurisdiction so as to secure that, as far as possible, all matters in dispute are completely and finally determined.<sup>121</sup> This would be furthered by the court making orders finally resolving the parties' dispute, rather than simply declaring the expert's determination to be invalid and empowering a party to litigate. To this effect, in *Neeta (Epping) Pty Ltd v Phillips* in the context a declaration regarding the validity of a rescission of a contract, the High Court held:

Unless the parties are agreed on the consequences which flow from a declaration that such a contract has or has not been validly rescinded it is generally undesirable that a court should so declare without any orders for consequential relief ... if a declaration be made that a contract has been validly rescinded but no consequential orders for damages or for return or retention of the deposit are made in those proceedings the purpose of s 63 is not achieved.<sup>122</sup>

It does not appear to date that a court has expressly based a decision regarding an expert's determination on this power, but in circumstances where the court's power is challenged and authority cannot be derived from the parties' contract this incidental decision-making power may be an appropriate source.

## VII. CONCLUSION

The benefits of expert determination are palpable and are reflected by its increasing adoption in industry. Practitioners and courts alike recognise the advantages of expert determination for certain kinds of disputes as compared to more formal avenues of arbitration and litigation, as well as the time, cost and effort that can be saved by private resolution. Though not a panacea to technical disputes, determinations are appropriate where commercial counterparties require disputes resolved expeditiously and certainly and can confidently refer the dispute to an expert in the field.

That said, it is equally clear that the benefits of expert determination only exist due to the character of the determination as a binding and enforceable award. What is intended to be a speedy and cost-effective process can therefore be undermined by parties challenging the result of that process in the courts as a matter of course. Though the above decisions illustrate that certain grievances with respect

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<sup>118</sup> *Vercorp Pty Ltd v ACN 096 278 483 Pty Ltd (No 2)* [2010] QSC 405, [61]–[64].

<sup>119</sup> See, eg, *Supreme Court Act 1986* (Vic) s 36; *Supreme Court Act 1970* (NSW) s 75.

<sup>120</sup> See, eg, *Parsons v Martin* (1984) 5 FCR 235, 401.

<sup>121</sup> See, eg, *Supreme Court Act 1986* (Vic) s 29; *Supreme Court Act 1970* (NSW) s 70.

<sup>122</sup> *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286.

to determinations are actionable, many proceedings appear simply to be the result of dissatisfaction with the determination and a lack of appreciation of the circumstances in which determinations can be challenged under the principles in *Legal & General*. This has the potential to erode the utility of an otherwise effective dispute resolution avenue.

The cases above highlight that before parties seek to have a determination set aside, they should consider whether the expert has made an error of the kind that courts will overturn – that is, one that was not in accordance with the parties’ agreement – or whether it was an error within the expert’s discretion and the parties’ contemplation. Though this is not always a simple task, it is hoped that this article clarifies the circumstances in which a determination will fall one way or another, and in turn assists parties in avoiding unnecessary litigation. It is also hoped that the final portion of this article clarifies the options available to parties in circumstances where they do succeed on such a challenge.