VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP715/2018

CATCHWORDS

Domestic building – whether dispute resolution clause in contract survived completion of the works – whether Determiner an 'independent industry expert' – whether Determiner carried out expert determination as contemplated by contract – Determination unenforceable.

APPLICANTS:	David Thurin, Lisa Thurin
FIRST RESPONDENT:	Krongold Constructions (Aust) Pty Ltd (ACN: 103 839 149)
SECOND RESPONDENT:	Swan Hardware & Staff Pty Ltd
THIRD RESPONDENT:	Casper Architecture and Design Pty Ltd (ACN 078 809 604)
FOURTH RESPONDENT:	Bicon Pty Ltd (ACN 070 741 374)
FIFTH RESPONDENT:	PRB Design Group Pty Ltd (ACN 066 291 076)
SIXTH RESPONDENT:	Paul Shaw Landscapes Pty Ltd (ACN 098 693 933)
SEVENTH RESPONDENT:	Tigcorp Pty Ltd (ACN 122 478 862)
WHERE HELD:	Melbourne
BEFORE:	Deputy President C. Aird
HEARING TYPE	Preliminary hearing
DATE OF HEARING	15-18 October 2018, further submissions 17 June 2019
DATE OF ORDER	9 August 2019
CITATION	Thurin v Krongold Constructions (Aust) Pty Ltd (Building and Property) [2019] VCAT 1206

ORDER

1 The Tribunal finds and declares:

a clause 15 of the Construction Contract does not apply to the dispute the subject of the Notice of Dispute dated 12 December 2017,

b alternatively, if clause 15 of the Construction Contract does apply to the dispute the subject of the Notice of Dispute,

i the Determiner did not have jurisdiction to conduct the determination process;

ii the Determiner is not an industry expert as contemplated by clause 15.3 of the Construction Contract for the purposes of determining the dispute set out in the Notice;

iii the Determination is unenforceable as the Determiner did not carry out an expert determination as contemplated by clause 15.

2 **This proceeding is listed for a directions hearing before Deputy President Aird at 2.15pm on 25 September 2019 at 55 King Street, Melbourne – allow 2 hours. All parties should attend the directions hearing.**

3 Liberty to apply.

4 Costs reserved.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr M Roberts QC with Mr L Stanistreet of Counsel.
For First Respondent	Mr J Twigg QC, Mr P Murdoch QC with Dr Weston-Schreuber of Counsel.

NOTE: The other respondents were excused from participating in this preliminary hearing.

REASONS

1 The applicant owners ('the Owners') entered into a contract with the first respondent builder ('the Contractor') for the construction of a new home and associated works in or about September 2006 ('the Contract'). The contract price was approximately $10 million. Various disputes arose between the parties in relation to alleged defective works, including a claim for the replacement of all of the pipes used in the internal plumbing works, and rectification of bathroom works and miscellaneous installations. The Owners also allege that there are defects in the irrigation system and the lawn. When the parties were unable to resolve their differences, the Owners invoked the dispute resolution clause in the Contract and Mr Manly QC ('the Determiner') was appointed as the expert by the Resolution Institute. The Contractor did not participate in the determination process, contending that the dispute resolution clause in the Contract did not apply. The Determination is dated 15 May 2018.

2 On 22 May 2018 the Owners lodged an application in the Tribunal seeking a mandatory injunction requiring the Contractor to comply with clause 15 of the Contract, the dispute resolution clause ('clause 15'), and to pay them the sum of $3,583,427.88 in accordance with the Determination plus $5,483.50 on account of the fee paid by them to the Resolution Institute, and $36,556.67 on account of the Determiner's fees – both sums being 50% of the actual fees paid. Following amendments to the Points of Claim, in the Prayer for Relief in the Further Amended Points of Claim dated 29 August 2018 the Owners now seek the following orders, in the alternative to their application for a mandatory injunction:

   a that the Contractor pay them the above amounts pursuant to clause 15;

   b a declaration they be entitled to hold the sum of $3,583,427.88 paid to them by the Contractor unless and until the Determination is reversed, overturned or otherwise changed in accordance with the Contract;

   c a declaration they are entitled to retain the sums to be paid to them by the Contractor including the amounts on account of the Resolution Institute and the Determiner's fees; and

   d further, or alternatively, damages.

3 The Contractor disputes the validity of the Determination and has counterclaimed seeking orders and/or declarations including to the effect that the expert determination process set out in clause 15 does not apply to the 'current' dispute between the parties, and the Determination is void and/or a nullity. Alternatively, that it is not final and binding as it did not comply with the process set out in clause 15, and that any cause of action to enforce clause 15 is statute barred. The Contractor also seeks an injunction restraining the Owners from taking any steps or action to give effect to the Determination, and restraining them from further proceeding with their applications in this proceeding.

4 On 27 June 2018, I listed a three day preliminary hearing, noting:

> The hearing will only concern the interpretation, application of and issues arising from clause 15 of the building contracts and the expert determination process.

5 The hearing proceeded on 15-18 October 2018 when the Owners were represented by Mr Roberts QC with Mr Stanistreet of Counsel and the Contractor was represented by Mr Twigg QC, Mr Murdoch QC and Dr Weston-Schreuber of Counsel.

ISSUES FOR DETERMINATION

6 The primary issues to be determined, and my answers to them, for the reasons which follow, are:

i does clause 15 apply or survive the completion of the works including any defects liability period ('Completion')?

No.

ii if I am wrong, and clause 15 survived Completion, did the Determiner have jurisdiction to conduct the determination process in the absence of the Contractor?

No.

iii is the Determiner an industry expert as required by clause 15.3?

No.

iv did the Determiner carry out an expert determination as contemplated by clause 15?

No.

7 The parties raised a number of other issues which, having found and declared the Determination is unenforceable, are not necessary for me to consider. These include:

i the Determination is not binding once a Notice of Appeal has been served;

ii the Determiner was not validly appointed because clause 15 provides for the appointment of an expert by the President of IAMA which no longer exists, having merged with LEADR to form the Resolution Institute;

iii the Determiner did not determine the dispute in accordance with the terms of the Contract as it was given after the expiration of the time limit prescribed by clause 15.8;

iv clause 15 is void for uncertainty because no appeal process is specified; and

v any cause of action to enforce the Determination is statute barred.

BACKGROUND

8 The first incident, relevant to this dispute, occurred on or about 21 January 2012 when a hot water pipe burst and damaged areas in the kitchen and basement. The burst pipe was identified as a PEX Plus pipe. The necessary rectification works were carried out by the Contractor and paid for by the Owners' insurer.

9 An expert engaged by the insurer, Mr Trevor Rowlands of ATTAR, concluded that the PEX plus piping was defective and recommended that all remaining PEX Plus pipe be replaced. Further, upon receipt of this report, the insurer's solicitors indicated that, as the Owners had notice of the defective piping, there was a strong possibility they would not be insured for any future failure. The Contractor refused to replace the piping.

10 On 23 November 2015, there was a second failure whilst the Owners were away. Without prejudice discussions with the Contractor followed but a resolution was not achieved. On 17 March 2016, the Owners were advised by the insurer that it required them to replace all of the non-compliant plumbing to address any possibility of further failure.

11 It seems that discussions continued and, in July 2017, the Contractor offered to carry out an alternative method of rectification which did not include replacing all of the pipes. This was rejected by the Owners who engaged another contractor to carry out their preferred scope of works, and subsequently issued the Notice of Dispute ('the Notice'), purportedly under clause 15.1 of the Contract. As at the date of the Preliminary Hearing the works were continuing.

THE NOTICE OF DISPUTE

12 Clause 15.1 provides:

> **15.1 Notice of Dispute**
>
> If a dispute or difference arises between the Contractor and the Owner or between the Contractor and the Contract Administrator in respect of any fact, matter or thing arising out of, or in any way in connection with, the Contractors' Activities, the Works or the Contract, the dispute or difference must be determined in accordance with the procedure in this clause 15.
>
> Where such a dispute or difference arises, either party may give a notice in writing to the Contract Administrator and the other party specifying
>
> (a) the dispute or difference;
>
> (b) particulars of the party's reasons for being dissatisfied; and
>
> (c) the position which the party believes is correct.

13 The Notice is dated 12 December 2017. The Schedule to the Notice is effectively in the form of a Statement of Claim. The Points of Claim dated

22 May 2018 filed with the application in this Tribunal, are very similar to the Schedule to the Notice.

14 The Notice, after setting out the formal parts and confirming it is issued under clause 15, provides that details of the dispute or differences are set out in the Schedule, and if not resolved within 14 days of the Notice being given, then, in accordance with clause 15.2 (set out later in these Reasons), either party may refer the dispute or difference to an expert determination.

15 In summary, the following matters are set out in the Schedule:

i confirmation that it is a Notice setting out details and particulars of the difference or dispute between the parties;

ii details of the Contract including the date, address, price;

iii terms defined in the Contract including definitions for 'Contractors Activities', 'Works', 'Works Description', 'Stage' and 'Defects';

iv relevant terms of the contract in relation to the Contractor's obligations in carrying out the Works variously defined as 'the Equivalency term', 'the Workmanship Term', 'the Materials Term', 'the Requirements Term', 'the Defects Risk Term', 'the Contractual Warranties' and 'the Statutory Warranties' (implied into every major domestic building contract by s8 of the *Domestic Building Contracts Act 1995* ('the DBCA'));

v breaches of certain terms of the Contract, the Contractual Warranties and the Statutory Warranties;

vi allegations under the heading 'Breaches in relation to the use of PEX Plus pipe in internal plumbing works';

vii allegations under the heading 'Breaches in relation to internal plumbing works, bathroom works and miscellaneous installation';

viii allegations under the heading 'Breaches in relation to irrigation system, bore pump and desalination plant and lawn';

ix the following allegations under the heading 'Further breaches':

> 10. In breach of the Defects Risk Term [that the Contractor will bear absolutely the risk of any Defects in the Works arising directly or indirectly from the Contractor's Activities], the Contractor has failed or refused to accept the risk of Defects in the Works in respect of the breaches.
>
> 11. In breach of the indemnity [that the Contractor will indemnify the Owner after the issue of the Notice of Completion against any loss or damage to the Works arising from any act or omission of the Contractor during the defects liability period, and an even which occurred prior to the issue of the Notice of Completion], the Contractor has failed or refused to indemnify the Owner in respect of the breaches.

x under the heading 'Loss and Damage':

Item	Description	Amount to 30 Nov'17 (GST Inclusive)	Pending Amount (GST inclusive)	Total Amount (GST inclusive)
A	Repair costs in connection with 21 January 2012 and 23 November 2015 water leaks in kitchen and billiards room arising from the rupture of PEX Plus pipe	$148,000.13	Included in the Pending Amount for item C below	$148,000.13
B	Cost of rectifying the defective plumbing at the property	$552,368.33	$1,593,978.53	$2,146,346.86
C	Consultant costs in connection with the plumbing rectification works	$358,266.72	$189,600.00	$547,866.72
D	Other costs in connection with the plumbing rectification works			
	• Site outgoing	$14,615.25	$14,746.10	$29,361.35
	• Insurance to end of rectification works programme	$25,500	$25,500	$51,000
	• Investigation of defects	$15,028.18	n/a	$15,028.18
E	Relocation and storage costs	$94,317.38	$98,600	$192,917.38
F	Costs of rectifying various landscaping items			
	• Irrigation system	n/a	$19,181.25	$19,181.25

	• Desalination plant and Bore pump	n/a	n/a	$100,194.40[1]
	• Lawn	n/a	$335,401.28	$335,401.28
G	Claim investigation costs	Particulars to be provided		
	Total inclusive of GST (estimated)	**$3,585,297.55 (further particulars to be provided)**		

xi allegations that the Contractor is responsible for all work carried out by its subcontractors, under the heading 'Responsibility for subcontracting'.

16 Under the heading 'Conclusion':

> 14. By reason of the Contractor's breach of the Contract and the loss and damage suffered by the Owner as a result of those breaches, the Owner is dissatisfied.
>
> 15. In the circumstances, the position that the Owner believes is correct is that the Contractor is liable to compensate the Owner in the amount of at least $3,585,297.55.

This is similar to a Prayer for Relief found in a Statement of Claim or Points of Claim.

17 Paragraphs 3-15 of the Points of Claim dated 22 May 2018 are almost identical to paragraphs 2-15 of the Notice save that paragraph 14 of the Points of Claim refers to the particulars of loss and damage set out in the Notice, as updated in a Schedule dated 14 May 2018,[2] provided to the Determiner.

DOES CLAUSE 15 APPLY TO DISPUTES WHICH ARISE AFTER THE COMPLETION OF THE WORKS INCLUDING ANY DEFECTS LIABILITY PERIOD?

18 The Owners contend that the dispute resolution process set out in clause 15 applies. The Contractor contends that on a plain reading it is clear that clause 15 was only intended to apply to disputes or differences which arose during the course of the Works and not following Completion. Of particular relevance are clauses 15.1 (which it is helpful to set out again), 15.2, 15.10, 15.13 and 15.14 which provide:

> **15.1 Notice of Dispute**
>
> If a dispute or difference arises between the Contractor and the Owner or between the Contractor and the Contract Administrator in respect of any fact, matter or thing arising out of, or in any way in connection

[1] Although the two previous columns are 'n/a' this is the amount included in this column.
[2] Updated to $3,583,437.88.

with, the Contractors' Activities, the Works or the Contract, the dispute or difference must be determined in accordance with the procedure in this clause 15.

Where such a dispute or difference arises, either party may give a notice in writing to the Contract Administrator and the other party specifying

(a) the dispute or difference;

(b) particulars of the party's reasons for being dissatisfied; and

(c) the position which the party believes is correct.

15.2 Expert Determination

If a dispute or difference is not resolved within 14 days after a notice is given under clause 15.1, either party may refer the dispute or difference to an expert determination.

15.10 Determination of Expert

The determination of the expert:

(a) must be in writing;

(b) will be:

(i) substituted for the relevant Direction of the Contract Administrator; and

(ii) final and binding,

unless a party gives notice of appeal to the other party within 21 days of the determination; and

(c) is to be given effect to by the parties unless and until it is reversed, overturned or otherwise changed under the procedure in the following clauses.

15.13 Survive Termination

This clause 15 will survive the termination of the Contract.

15.14 Continuation of Works

Despite the existence of a dispute or difference between the parties the parties must continue to carry out their obligations under the Contract; in particular (but without limitation) the Contractor must continue to carry out the Contractor's Activities and the Owner must (subject to clause 12.19 and any other right to set off which the Owner may have) pay to the Contractor any amount to which it is entitled in accordance with this Contract. [underlining added]

Clauses 15.1 and 15.10

19 The Owners submit that the wording of clause 15.1 is very broad such that it applies to all disputes and differences which arise between the parties and/or the Contract Administrator at any time. The Contractor contends that when clause 15.1 is read in conjunction with clause 15.10(b)(i) it is clear that the dispute resolution procedure is limited to a dispute or difference

concerning a direction of the Contract Administrator. In particular, clause 15.10(b)(i) provides that any Determination will be 'substituted for the relevant Direction of the Contract Administrator'. This is not qualified by the addition of the words 'if any', and there is no other provision of clause 15 specifying the effect of any Determination. If it was intended to apply to disputes or differences arising after completion of the works, then such a qualification would have been included. I agree.

20 The role of the Contract Administrator is clearly identified in the Contract, and is summarised by the Contractor in its submissions dated 15 June 2018 ('the Contractor's first submissions') at paragraph 23:

> Under clause 3.1 of the Contract, the Contract Administrator gives Directions and carries out all his or her functions under the contract as agent of the Owner. He or she is the independent certifier, assessor or valuer when performing functions pursuant to clauses 8.11(b) [price adjustment for provisional sums], 10.9 [extensions of time], 11.3(b) [costs of variations], 12.7 [payment statements] and 13.2 [completion].

21 Clause 15.1 requires any Notice of Dispute to be given to the Contract Administrator. The Contractor submits that this confirms that the expert determination process is to apply during the course of the Works. I agree.

22 Once the contract is complete (i.e. the works are complete including any defects liability period) or terminated (before completion), and the final reconciliation of claims by each party and the monies owed by one party to the other have been finalised, the Contract Administrator no longer has any role to play. There is nothing further for the Contract Administrator to do once the works are complete and the defects liability period has come to an end.

23 The Contractor also contends that the dispute set out in the Notice is effectively a claim for damages for a breach of contract and the statutory warranties, and that the reference to an expert to determine the amount of compensation payable to them is not a dispute or difference contemplated by clause 15.1. I agree.

24 Further, although clause 15.1 provides that a party may give Notice of a Dispute to the Contract Administrator, it also provides that if the Notice is given it must be decided in accordance with the procedure set out in clause 15. Once a party decides to give Notice of a Dispute they are obliged to give such notice to the Contract Administrator. Here, the Notice was addressed to the Contractor and copied to the Contract Administrator. Notwithstanding their purported reliance on clause 15, the Owners have, themselves, failed to comply with clause 15.1 when giving the Notice.

Clause 15.13

25 The Owners submit that as clause 15.13 specifies the dispute resolution procedure is to survive termination this confirms it is to survive completion

of the works. I disagree. If a building contract is terminated prior to completion it will generally be because of a dispute between the parties, whether it arises out of or in connection with the Contractor's Activities, the Works, or the Contract. The Contract Administrator still has a role to play under the Contract including issuing directions he or she considers appropriate, including carrying out a final reconciliation of any amounts owing under the Contract. Accordingly, there will be a direction of the Contract Administrator for which any expert determination can be substituted.

Clause 15.14

26 The parties have differing interpretations of clause 15.14. The Owners submit that the words *without limitation* anticipate disputes or differences arising after completion. The Contractor, on the other hand, submits that clause 15.14 makes it clear that the parties are to continue to perform their obligations under the Contract, insofar as they concern the Works, pending finalisation of the dispute resolution process so that progress of the Works is not unduly delayed. I agree.

27 I am not persuaded that the words *without limitation* should be given the broad interpretation suggested by the Owners.

Conclusion

28 Accordingly, I find that clause 15 does not apply to any dispute or difference arising after Completion. However, if I am wrong, I am not persuaded that the Determination is valid for the Reasons which follow.

THE DETERMINER'S JURISDICTION

29 Although issues have been raised by the Contractor about the validity of the Determiner's appointment as an expert, it is not necessary to consider them as I have determined his Determination is otherwise unenforceable. However, it is necessary to consider the process he adopted as part of these Reasons.

30 The Determiner was appointed by the Resolution Institute (created as a result of the merger of IAMA and LEADR) as an expert, at the request of the Owners. When requesting the appointment of an expert to conduct an expert determination, the Owners suggested senior counsel who specialises in construction law disputes be appointed. In their letter of 27 March 2018 which accompanied the 'Application for Nomination of an Expert Determiner' the Owners' solicitors state:

> …
>
> The dispute concerns defects with the internal plumbing, irrigation system and lawns at the Property arising from the works performed by [the Contractor] under a Building Contract entered into in or around September 2006.

> You will see clause 15.2, which provides for the resolution of disputes between the parties by expert determination.
>
> In accordance with clause 15.1 the [Owners] served a Notice of Dispute on [the Contractor] …claiming compensation in the amount of at least $3,585,297.55.
>
> …
>
> Considering that [the Contractor] has raised the prospect of there being jurisdictional issues for the expert to address, we request that the person appointed to conduct the expert determination be an experienced legal practitioner with construction related dispute experience. In this regard, in our view [the Determiner and senior counsel] would be suitable candidates. We also understand [senior counsel] is also available to be appointed and consider that he too would be well qualified for the role.

31 The Contractor consistently objected to the jurisdiction of the Resolution Institute to appoint an expert, and to the jurisdiction of an expert to determine the dispute, maintaining that the Contract provided for the appointment of an expert by IAMA, and further that clause 15 did not apply.[3] It refused to participate in the dispute resolution process and foreshadowed in correspondence to the Owners' solicitors and to the Resolution Institute that it would *make application to restrain the Resolution Institute and the nominated expert to make a determination*.[4]

32 Following the appointment of the Determiner, the Contractor again wrote to the Resolution Institute confirming it did not consider that his appointment was of any 'lawful effect' and that it would not be participating in the determination process. Further, that it would not be seeking an injunction to restrain the determination process but would *instead rely upon our right of appeal and the arguments set out above, which will be relied upon in relation to any subsequent attempt to enforce any purported Expert Determination.*[5]

33 That the Determiner was alive to the question of whether he was empowered to determine jurisdiction is indicated by items 8 and 9 of the Agenda for the Preliminary Conference on 19 April 2018:

> 8. Jurisdiction of Expert
>
> - Major Domestic Building Contract
> - Disputes to VCAT but need to obtain Certificate of Conciliation (**Domestic Building Contracts Act 1995)** (**DBC Act**) Sections 45, 45F)

[3] The Contractor's position, as set out in previous correspondence, was summarised in its letter to the Owners' solicitor dated 28 February 2018.
[4] Letter dated 4 April 2018 from The Contractor to Resolution Institute copied to the Owners' solicitor
[5] Letter dated 18 April 2018 from The Contractor to Resolution Institute copied to the Owners' solicitor

- Stay of Court Process (Expert Determination is not a Court process) to refer dispute to VCAT (DBC Act Section 57)
- Arbitration prohibited (DBC Act Section 14)
- Expert cannot rule on his own jurisdiction (see **Barclays Bank Plc v Nylon Capital LLP** (2011) EWCA Civ 826)

9. Does the Expert have jurisdiction to determine the dispute(s) in the Notice (clause 15.1)

34 On 19 April 2018, the Determiner wrote to the parties confirming he had conducted a Preliminary Conference that day. In item 8 under the heading 'Jurisdiction of Expert' he set out the submissions made on behalf of the Owners as to his jurisdiction. In item 9 under the heading 'Does the Expert have jurisdiction to determine the dispute(s) in the Notice?' he states:

> I confirmed that the dispute(s) in the Notice were of a kind captured by the referring words in clause 15.1 of the Contract and that I have jurisdiction to answer questions relevant to the dispute(s).

35 At paragraph 18 of the Determination the Determiner referred to the Preliminary Conference and records:

> … At that time, I raised the issue of jurisdiction and Senior Counsel for the Owners assured me that my appointment was proper and that I should proceed with the Expert Determination process. My suggestion that the Owners should consider obtaining a declaration from the Supreme Court was rejected as unnecessary. [underlining added]

36 It appears from this statement that the Determiner, having regard to the Contractor's objections, had reservations as to his jurisdiction to conduct the expert determination process, but proceeded on the assurance of senior counsel for the Owners. In doing so it seems that he has not relied on his expertise in determining jurisdiction, but simply accepted those submission.

37 At paragraph 23 of the Determination the Determiner noted that the Contractor had raised a number of objections to the determination process in correspondence provided by the Owners and concludes:

> Each of the objections has been considered in the Owners Written Submissions (Section 2) and in my opinion, satisfactorily answered [by the owners].

38 At paragraph 24 of the Determination he stated:

> I note that I am not precluded from ruling on jurisdiction and, by analogy with Arbitration in the absence of any application to the Court for a preliminary ruling, the Expert should normally do so (see Clive Freedman, James Farrell **Kendall on Expert Determination** (5th ed, Thomson Reuters, 2015, 237) ('Kendall')

39 First, it is surprising that an analogy to arbitration is mentioned, particularly in circumstances where a requirement in a domestic building contract to refer disputes to arbitration is void by virtue of s14 of the DBCA.

40 Kendall makes it clear that whilst an expert may make a preliminary ruling *The expert's decision is always subject to review after the decision has been made* by reference to *Barclays Bank Plc v Nylon Capital LLP*[6] where the Court said at [23]:

> …It is clear, however, that in any case where a dispute arises as to the jurisdiction of an expert, a court is the final decision maker as to whether the expert has jurisdiction, even if a clause purports to confer that jurisdiction on the expert in a manner that is final and binding.

41 Further, there is nothing in clause 15 which contemplates the expert determining his own jurisdiction. In *State of South Australia v Goldstein*[7] Blue J said at [126]:

> On the proper construction of the expert agreement having regard to the surrounding circumstances, it is plain that the expert was not given jurisdiction to determine conclusively his own substantive jurisdiction.

42 Whilst Part 11 – Rule 5 of the Resolution Institute Rules ('the Rules') sets out that the expert can determine jurisdiction, the Contractor expressly stated in correspondence to the Owners' solicitors, the Resolution Institute and the Determiner, that it objected to, and rejected the validity of, the Determiner's appointment as an expert determiner, and confirmed it would not execute any agreement. As there was no agreement between the parties that the Rules, and in particular Rule 5, applied (as they are not referred to in the Contract and the Contractor did not sign the 'Expert Determination Agreement'), I am not persuaded that the Determiner was empowered to determine his own jurisdiction or, that if he was, he should have.

43 In my view, although clause 15 enables one party to request the appointment of an expert, it clearly otherwise contemplates a consensual process. It is not to the point that the Contractor did not apply for an injunction to restrain the determination process. Rather, it was incumbent on the party seeking to rely on clause 15 to take all necessary steps to ensure the validity of the process and any determination.

44 Both parties referred me to *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd.*[8] When the parties were unable to agree on an expert to resolve their dispute in accordance with the dispute resolution process set out in the lease ('the process'), the landlord issued proceedings in the Supreme Court seeking an injunction restraining the tenant from proceeding with the process which contemplated the appointment of an expert by the President of the Law Institute of Victoria. The tenant subsequently sought, and the Court granted, a stay of the landlord's proceeding on the basis that the landlord was bound to comply with the process.[9] Justice Pagone's decision to grant a mandatory injunction requiring the landlord to sign the

[6] [2011] EWCA Civ 826; [2012] 1 All ER (Com) 912; [011] 2 Lloyd's Law Reports 347.
[7] [2016] SASC 202.
[8] [2009] VSCA 308, 26 VR 551
[9] 1144 Nepean Highway Pty Ltd v Leigh Mardon Australasia Pty Ltd [2009] VSC 317.

agreement of the most recently appointed expert was upheld on appeal[10] when Warren CJ, Nettle and Bongiorno JJA said at [39]:

> By imposing an injunction on the landlord, Pagone J ensured that the dispute resolution process would be carried out to its conclusion. It was an appropriate exercise of the court's equitable auxiliary jurisdiction in aid of legal rights. In the circumstances of this case, the injunction … was entirely appropriate.'

45 At paragraph 47 of the Owners' submissions of 29 May 2018, they submit:

> The decision [in 1144 Nepean Highway] confirms that courts will grant injunctive relief to ensure that a recalcitrant party does not frustrate contractually agreed dispute resolution processes.

46 Neither party referred me to any authorities where a court has enforced an expert determination where only one party participated in the face of clear objection to jurisdiction and applicability of the process to the dispute at hand. It is surprising that the Owners did not follow the process set out and approved by the Court of Appeal in *1144 Nepean Highway* to ensure that the dispute resolution process set out in the Contract, if they believed it applied, was followed. It seems nearsighted to commit to a unilateral process, and pay for that process, in the face of the Contractor's clear and repeated objections.

47 Further, I reject the Owners' submission that in failing to apply for an injunction to stop the determination process the Contractor has acquiesced to the process, or waived its rights to object. This cannot be right, particularly in circumstances where the Contractor repeatedly and consistently maintained its objections.

Conclusion

48 I am not persuaded that the Determiner had the power to determine whether he had jurisdiction. However, if he did then, rather than simply accepting the submissions made by Senior Counsel for the Owners, it would have been prudent for him to have required them to seek a mandatory injunction from the Court. This would have ensured there could be no argument about the validity of the Determination after the Owners had incurred and paid for his costs, and the resultant delays once proceedings were commenced in this Tribunal. Had the Owners simply issued proceedings in this Tribunal (with a certificate of conciliation issued by DBDRV) it is likely they would have been well progressed by now.

IS THE DETERMINER AN 'INDEPENDENT INDUSTRY EXPERT'?

49 Clause 15.3 provides:

> **15.3 The Expert**
>
> The expert determination under clause 15.2 is to be conducted by:

[10] ibid

(a) a person agreed by the parties; or

(b) where the parties fail to agree upon such a person an independent industry expert appointed by the person specified in the Contract Particulars. [emphasis added]

50 Clause 15.3(a) does not apply as there was no agreement between the parties as to the expert to be appointed. Therefore clause 15.3(b), which requires that any expert appointed in accordance with the Contract must be an *independent industry expert*, is relevant. Although I raised the meaning of this descriptor with the parties during the hearing, I was not referred to any authorities which clearly set out the principles to be applied in determining whether a person is an *independent industry expert*.

51 For the purposes of these Reasons I accept that the Determiner is an expert in the field of construction law disputes. However, the question is whether that is what is contemplated by 'an independent industry expert' in clause 15.3(b). In my view an *independent industry expert* is a person with the relevant technical expertise, whether by reason of his or her knowledge, qualifications and/or experience, to determine the particular dispute or difference identified in a notice of dispute.

52 As noted above, the Owners requested the Resolution Institute to appoint senior counsel, expert in construction law disputes, as the expert determiner. In my view, this demonstrates a misunderstanding of the type of dispute to be determined by the expert. Although clause 15.1 contemplates disputes or differences about or arising under or in relation to the contract, which may well involve a consideration of legal issues, it is clear from a careful consideration of the Notice that the primary issues in dispute concern technical rather than legal issues. These include, but are not limited to, the suitability of various materials and installations which, in my view, if the dispute resolution process applied, required, for example, an independent plumbing expert to determine the plumbing dispute and, in particular, whether the PEX Plus piping was fit for purpose and the appropriate method of rectification. Each distinct dispute of a technical nature would have required the appointment of an industry expert in the relevant discipline.

Conclusion

53 I am not persuaded that, in this instance, the Determiner is an *independent industry expert* as contemplated by clause 15.3.

DID THE DETERMINER CARRY OUT AN EXPERT DETERMINATION AS CONTEMPLATED BY CLAUSE 15?

54 If I am wrong in relation to the application of clause 15 to the dispute, and in finding that the Determiner is not an industry expert, if he, in effect, conducted an arbitration rather than an expert determination, then the

Determination is unenforceable as this is not the process contemplated by clause 15.

55 Clause 15.5 provides:

15.5 Procedure for Determination

The expert will:

(a) act as an expert and not as an arbitrator;

(b) proceed in any manner he or she thinks fit;

(c) conduct any investigation which he or she considers necessary to resolve the dispute or difference;

(d) examine such documents, and interview such persons, as he or she may require; and

(e) make such directions for the conduct of the determination as he or she considers necessary.

56 Whilst I accept the Owners' submission that clause 15.5 gives the expert a broad discretion as to the procedure to be adopted in carrying out the process, if that procedure demonstrates he conducted an arbitral or judicial inquiry it will no longer be an expert determination.

The procedure adopted by The Determiner

57 At item 12 of his letter to the parties dated 19 April 2018 reporting on the preliminary conference held that day, which the Contractor did not attend, the Determiner stated:

> I confirmed it will be necessary for the Owners to provide me with a list of questions to answer as part of the Expert Determination process.

And at item 14:

> The process by which the Expert Determination is conducted will be by way of Witness Statements, book(s) of relevant documents, Expert Reports and Submissions. It is proposed that these will be delivered progressively.
>
> I have left it to Mr Roberts QC to formulate a workable timetable and to circulate it.

And at item 15 under the heading 'Other matters':

> …
>
> Mr Roberts QC has suggested that at an appropriate time I should confer with the Experts, so as to better understand their reports which are detailed. Once I have read the reports I will make a decision about this issue and all will be notified.

58 A timetable for the expert determination process and a list of 22 questions to be answered were sent to the Determiner by the Owners' solicitors under cover of a letter dated 26 April 2018.

59 In his reply of the same date, copied to the Contractor, the Determiner requests:

> Dear colleagues
>
> Thank you for this material [the 22 questions]
>
> It will greatly assist me if the Owners Submissions due on 2 May 2018 address in turn each of the Questions posed in the List supplied today and traverse the relevant evidence the Owners rely upon as well as relevant authorities in support of the legal propositions that are put in support of the Owners proposed answers to each question
>
> Given that there will be no contradictor I expect the Submissions to be put in a balanced and fair manner consistent with the evidence that has been presented so far in Witness Statements and supporting documents as well as Expert Statements.

The Owners' claim

60 On 9 May 2019, the Owners' solicitors emailed the Determiner a table headed 'The Owner's Consolidated Loss and Damage' described in the covering letter as 'a table in both docx and pdf format setting out the Owners' consolidated claim for loss and damage'. On 14 May 2018 the Owners' solicitors emailed the Determiner a table headed 'The Owners Updated Consolidated Loss and Damage' referred to in the covering letter as 'an updated table setting out the Owners' consolidated claim for loss and damage'.

61 The Owners' submissions to the Determiner are in 9 parts. The submissions are lengthy – 52 pages not including the index and the 22 questions which are attached to it – cross-referenced to the evidence the Owners rely on, including witness statements and expert reports.

62 The headings for each section of the Index (and the relevant submissions) further demonstrate that the Determiner was being asked to determine an *inter partes* dispute rather than conduct an expert determination process, reinforced by reference throughout to the 'Owner's claims'. The section headings are:

> Section 1: Introduction & Summary
>
> Section 2: The Expert Determiner's Jurisdiction
>
> Section 3: Factual Summary
>
> Section 4: The Owner's claims in relation to the PEX Plus Pipe
>
> Section 5: The Owner's claims in relation to the irrigation system and the lawn.
>
> Section 6: The Owner's claims in relation to the internal plumbing works, bathroom works, and miscellaneous installations
>
> Section 7: The Owner's further contractual claims

Section 8: Quantum

Section 9: Conclusion

63 After setting out each of the questions to be determined, which included alleged breaches of contractual and statutory warranties, the Owners stated at the conclusion of the List of Questions:

> 194. Having regard to the evidence of [the relevant expert], the Owners respectfully submit that the Expert Determiner should answer each of [the applicable questions] in the affirmative.
>
> In relation to the questions on Quantum the Owners submit:
>
> Having regard to the evidence of Ms Hearn and Dr Shiers, it is respectfully submitted that the Expert Determiner should answer question 22 in Part E of the Questions to be Answered dated 26 April 2018 as follows:
>
> > The Contractor is liable to the Owner for the sum of $3,522,265.21.

And under the heading 'CONCLUSION'

Determination

> 195. Accordingly, for the reasons set out above, the Owner respectfully submits that the Expert Determiner should make the following determination:
>
> (1) Each of the questions in Parts A to D of the Questions to be Answered dated 26 April 2018 be answered in the affirmative; and
>
> (2) Question 22 in Part E of the Questions to be Answered dated 26 April 2018 be answered in accordance with paragraph 194 above.

64 It is clear from this 'Conclusion' that the Determiner is not being asked to make a determination based on his expert opinion, but rather to determine the parties' rights and liabilities.

Discussion

65 As noted above, the Owners provided the Determiner with a list of 22 questions for him to answer, directed him to consult with their experts and provided a list of questions for him to ask one of the experts: Dr Shiers. The Determiner has not independently identified the issues. Whilst I accept the Owners' submission that it is not unusual for arbitrators and judicial officers to request parties to provide them with a list of questions or issues, this occurs in the context of a judicial or arbitral process. Further, whilst it may be that in conducting an expert determination process an expert will direct the parties to provide them with expert reports to inform them about the dispute, and to make submissions, in this instance the Determiner also received lengthy witness statements from each of the Owners with exhibits setting out the history of the dispute and their loss and damage.

66 In my view this is not the process anticipated by clause 15. Clause 15 required the parties to refer any dispute or difference [during the course of the Works] to an industry expert for that expert to make a decision using their expertise. Here, the Owners have asked the Determiner to determine an *inter partes* dispute. They seem to have ignored that the primary dispute concerns the use of PEX piping and whether all the piping needed to be replaced, or whether there was an alternative, appropriate method of rectification. From the material which has been provided to me, including the correspondence from the Determiner to the parties, the Owners' submissions and the Determination it is clear that he has not conducted an expert determination within the meaning of clause 15. Rather he has conducted an undefended arbitration. He has not used his own technical knowledge and skills to form an expert opinion and then made a determination as to the appropriate method of rectification. Rather, he has determined the parties' substantive rights and made findings and determinations 'on the balance of probabilities'. In my view, this cannot be properly described as an expert determination.

67 The Owners' witness statements are of the kind ordinarily filed by parties in building cases in this Tribunal (and the courts). A consideration of the evidence set out in the witness statements reinforces my conclusion that the Determiner was being asked to determine the parties' substantive legal rights, not to make an expert determination in relation to discrete issues.

68 In paragraph 23 of their Submissions in Reply dated 22 June 2018 the Owners refer to the Contractor's reliance on the comments by Gillard J in *Badgin Nominees v Oneida*[11] where his Honour said at [1377]:

> …it could not have been the common intention of the parties to refer disputes of mixed facts and law to an untrained and inexperienced person.

69 The Owners submit that it is unclear how this assists the Contractor as:

> …It cannot be sensibly suggested that The Determiner is not possessed of the requisite training and experience to determine issues of breach of contract and damages.

70 I accept that barristers are often appointed as experts to determine discrete legal questions. However, in this instance there were significant technical issues to be determined including whether the works were defective, the method of rectification, as well as the assessment of the Owners' loss and damage.

Consultation with the Owners' experts

71 In an email to the parties dated 3 May 2018 the Determiner reports:

> Mr Roberts QC urged me to meet with the two scientific experts (i.e. Trevor Rowlands and Dr John Shiers) so as to satisfy myself as to the

[11] [1998] VSC 188.

> veracity of their methodology and conclusions. I have agreed to meet but suggest that, as their reports cover the same ground, it would only be necessary for me to meet with Dr John Shiers. This is to occur at my Chambers on **Wednesday 9 May 2018**. No-one else will attend the meeting.
>
> Mr Roberts QC is to prepare an agenda of the matters he wishes me to discuss with Dr Shiers and this is to be circulated.[underlining added]

72 On 7 May 2018 the Owners' solicitors wrote to the Determiner confirming the appointment with Dr Shiers, and that they would circulate an agenda for his discussion with Dr Shiers, and enquiring whether he also wished to meet with Ms Hearn, the consultant engaged to assist the Owners with the plumbing issues including, in broad terms, co-ordination of the investigative and rectification works. The Determiner met with both experts.

73 An Agenda for the meeting with Dr Shiers was provided to the Determiner by email on 8 May 2018 and sets out the following questions:

> EXPERT DETERMINATION NO. 5559
>
> DAVID AND LISA THURIN (**Owner**) v THE CONTRACTOR CONSTRUCTIONS (AUST) PTY LTD (**Contractor**)
>
> Agenda for the meeting between the Expert Determiner and Dr Schiers
>
> Dated 8 May 2018
>
> 1. What are cross-linked polyethylene (**PEX**) pipes and are there different types and brands of PEX pipe?
> 2. Dr Schiers' background in polymers and PEX pipe failures.
> 3. Explanation of the terms in the Glossary contained in the expert report of Dr Schiers dated 6 December 2017, insofar as those terms require explanation.
> 4. The causes of ageing and degradation of PEX pipe, including the role of antioxidants in PEX pipe.
> 5. The Australian Standards relevant to PEX pipes.
> 6. The extraction of the PEX pipes from 2 & 2B Whernside Avenue, Toorak (Property).
> 7. The testing techniques undertaken by Dr Schiers on the PEX pipes extracted from the Property and how those tests are relevant to determining the condition and degree of ageing of PEX pipe, including whether the PEX pipe complies with the relevant Australian Standards.
> 8. What were Dr Schiers' findings in respect of the samples of PEX Plus pipe and Rehau pipe used for both hot and cold water application extracted from the Property?
> 9. Are PEX Plus pipes equivalent to Rehau pipes?

10. Does the PEX Plus pipe installed at the Property comply with the relevant Australian Standards for PEX pipe?

11. Are the PEX Plus pipe samples tested fit for purpose of use in a domestic water system?

74 Interestingly, the Agenda for the Determiner's meeting with Dr Shiers sets out the type of questions one would ordinarily expect to be asked in examination in chief of an expert witness. Although clause 15.5 enabled the expert to conduct any investigation he considered necessary to resolve the dispute or difference and to interview such persons as he required, in my view, it does not contemplate 'as directed by a party'.

75 Although the Determiner did not identify that he required further information or evidence from the experts, he was encouraged by the Owners to meet with the experts. They also provided him with a list of questions he needed to ask to enable him to make his determination. This indicates that:

i. the Owners recognised that the Determiner is not an *industry expert* in plumbing issues;

ii. although the Determiner had not indicated that he required further information from the experts, the Owners were not confident that he could formulate the relevant questions necessary to provide him with the information necessary to enable him to make his determination;

iii. despite his endeavours to act fairly and impartially by ensuring that the Contractor was copied in on all correspondence, the process was, to some extent, being directed by the Owners;

iv. the Determiner had not identified that he required the further information

v. this is not and could not be a determination by an *industry expert*.

76 As he noted in his Determination, there was no contradictor and the expert determination process proceeded 'undefended'. I accept that the Determiner has considered the expert evidence, but this has not informed his opinion. Rather, as he says in the Determination he has made a decision on the 'balance of probabilities' which, I note, is the standard of proof adopted in arbitral and judicial processes.

77 It is clear from a consideration of the Schedule to the Notice and the Questions that the Determiner was required to determine issues of fact and law including whether the works were defective, the appropriate method of rectification and to assess the Owners' loss and damage.

Differences between expert determination and an arbitral or judicial process

78 The Contractor relies on the following differences between an expert determination and arbitration as set out in *Hudson's Building and*

Engineering Contracts referred to in *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd:*[12]

> If a person is appointed, owing to his skill and knowledge of the particular subject, to decide any questions, whether of fact or of value, by the use of his skill and knowledge and without taking any evidence or hearing the parties, he is not, prima facie, an arbitrator.
>
> It has been held that if a man is, on account of his skill in such matters, appointed to make a valuation, in such manner that in making it he may in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, his is not acting judicially; he is using his skill of a valuer, not of a judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators but only valuers. They have to determine the matter by using solely their own eyes and knowledge and skill.
>
> If, on the other hand, a person is appointed with the intention that he should hear the parties, and their evidence and decide in a judicial manner, then he is an arbitrator, although mere absence of a hearing, provided it does not result in unfairness to the parties, will not necessarily invalidate an award. Obviously this must depend on the subject-matter of the dispute and the terms of any written pleadings or submissions to the arbitrator. [underlining added]

79 In *Northbuild* their Honours continued at [91]:

> *Halsbury*[13] defines arbitration in these terms:
>
> "Arbitration is the process by which a dispute or a difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the Arbitral Tribunal) instead of by a court of law." [underlining added]

And at [103]:

> The judicial process, normally, if not invariably, requires the adjudicator to determine the dispute on the basis of evidence placed before the adjudicator by the parties. The judicial process does not contemplate a right on the part of the adjudicator to make his own independent investigations.[14] A process under which the adjudicator "could undertake his own investigations without disclosing them to the parties and generally could determine (the matter) according to his own experience without being constrained by the contentions of the competing parties"[15] is more distant again from a judicial process. [underlining added]

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[12] [2008] QCA 160 at [88].
[13] *Halsbury's Laws of England* 4th Ed (reissued) paragraph 601.
[14] *Sutcliffe v Thackrah* [1974] AC 727 at 735 per Lord Reid; *AGE Limited v Kwik Save Stores Limited* 2001 SC 144 per Lord Hardie.
[15] *AGE Limited v Kwik Save Stores Limited* 2001 SC 144. See also *Bernhard Schulte G.M.B.H. & Co. K.G. and Ors v Nile Holdings Ltd* [2004] Lloyd's Rep 352 at 372.

80 Although clause 15 contemplates an expert determination, the Owners effectively requested the Determiner to conduct an arbitration 'on the papers'. They provided him with 'pleadings' (the Schedule to the Notice referred to above), lay and expert evidence, the questions to be determined, and submissions. They also encouraged him to take further evidence from the experts. Whilst the Determiner met with Dr Shiers in the absence of the parties, he did so armed with questions formulated by the Owners which, as I noted earlier, are of the kind ordinarily put to an expert when giving his or her evidence in chief. I accept the Contractor's submission that this process was a contrivance by the Owners calling this process an expert determination seeking to rely on clause 15 when, in reality, it had all the features of an undefended arbitration.

81 The comments by Anderson J in *Abigroup Contractors Pty Ltd v Hardesty and Hanover International LLC*[16] are apt:

> 101. …A contrivance by definition – see *Macquarie Dictionary*, 3rd edition – is a plan or a scheme or an expedient. To contrive is to plan with ingenuity or to devise or to invent.
>
> 102. Mr Fenwick Elliott makes the point in his submissions that what was done by his client was open and transparent. Something may be open and transparent but nevertheless a contrivance. I consider that this was a plan by HHI to bring a dispute within the boundaries of the expert's jurisdiction, namely, under $500,000. It was an expedient or an invention to achieve a purpose. It is not what was intended by the parties to the contract.

82 Similarly, the referral by the Owners of what is patently an *inter partes* dispute to expert determination relying on clause 15 was, in my view, a contrivance, presumably in the hope of obtaining a 'pay now, argue later' order from this Tribunal.

83 In *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*[17] at [281]:

> Satisfactory determination of those matters [of mixed fact and law] by a referee who is required to act as an expert and not as an arbitrator is impossible; by its very nature the task is one for an arbitrator and not an expert'

84 As can be seen from the authorities referred to above, an expert determination results from an expert making a decision using their own knowledge and skill, having regard to other expert opinions and submissions as necessary to inform his or her opinion. An arbitration, or judicial determination, requires the consideration and weighing of evidence and making findings on the balance of probabilities.

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[16] [2009] SASC 95.
[17] (1998) 14 BCL 277.

The Determination

85 Under cover of a letter of the same date the Determiner delivered his signed 'Expert Determination dated 15 May 2018' together with a 'Notice of Completion' on Resolution Institute letterhead, in which he confirms the 'Value of dispute' as $3,585,297.55 and under the heading 'Part 9 – Answers to Questions' states:

> 250. For the reasons set out above, I hereby determine that the answers to the Questions to be Answered dated 26 April 2018 are as follows:
>
> i) each of the questions in Parts A to D is answered, Yes; and
>
> ii) Question 22 in Part E of the Questions is answered as, Yes, the Owners' loss and damage is determined as $3,583,437.88.

which is a repeat of the final paragraph of the Determination.

86 At paragraph 21, he states:

> Under cover of letter dated 26 April 2018, I was requested by the Owners to answer 22 questions as part of the Expert Determination process. The list of questions is Annexure 1 to the Owners' Written Submissions.

87 The Determination is divided into 9 parts consistent with the Owners' submissions. At paragraph 17, the Determiner notes that the process has proceeded in the Contractor's absence. The following extracts from the Determination indicate that he conducted an arbitration rather than an expert determination. I have underlined the indicative words.

i. At paragraph 23 he notes that the Contractor has raised a number of objections to the expert determination in correspondence he has been provided with the Owners' submissions and concludes:

> Each of the objections has been considered in the Owners Written Submissions (Section 2) and in my opinion, <u>satisfactorily answered</u> [by the Owners].

ii. At paragraph 39, after discussing in the preceding paragraphs that the process proceeded as 'undefended' he states:

> In the absence of the Contractor, it is necessary for the Owners to <u>prove on the balance of probabilities</u> each of the matters they complain of in their Notice of Dispute, and including <u>their claim for damages</u>. I am satisfied they have done so. [underlining added]

iii. At paragraph 108 after setting out a Chronology including details of the 'pipe failures' the Determiner states:

> I conferred with Dr John Shiers and he confirmed that he carried out the pipe extraction together with Trevor Rowlands and another Technician. They were careful to comply strictly with the extraction protocol. <u>I accept this uncontradicted evidence</u>.

iv. In Part 4 under the heading 'The PEX Plus pipe claims' the Determiner sets out the issues, and then summarises the expert evidence provided on behalf of the Owners before concluding at paragraph 159:

> Having regard to the unchallenged opinions expressed by Dr John Shiers and Trevor Rowlands in their Reports, and their answers to the questions posed to them, I answer each of the four questions in Part A of the Questions to be Answered dated 26 April 2018 as, Yes.

v. At paragraph 189 he makes a similar determination:

> Having regard to the unchallenged evidence of Ross Collins, Adrienne Hearn, and Trevor Rowlands, I find the items of workmanship the subject of Part 5 were all in breach of the Contract insofar as they were not carried out in a good and workmanlike manner. The answer [to] each of questions 5 to 15 in Part B of the Questions to be Answered dated 26 April 2018 is, Yes.

88 In Part 8 at paragraph 233 under the heading 'Quantum' the Determiner states:

> I approach the damages assessment on the basis of the principles set out by the High Court in **Belgrove v Eldridge** (1954) 90 CLR 613 (affirmed in **Tabcorp Holding Ltd v Bowen Investments Pty Ltd** (2009) 236 CLR 272).

Before concluding at paragraph 240:

> In my opinion, the necessary and reasonable measure of damages on the uncontested evidence is the cost of demolition and rebuilding. That is the way the Owners have put their damages case.

Discussion

89 Clause 15 anticipates an *independent industry expert* determining a dispute or difference which is clearly defined in a notice of dispute, not, in my view, determining an owner's claim for damages for an alleged breach of contract by the builder. The underlined extracts from the Determination indicate the use of language ordinarily used by arbitrators and judicial officers when determining *inter partes* disputes, after weighing the evidence. An expert determiner does not weigh evidence – rather they make an expert determination using their skill and expertise after carrying out any investigations and/or inquiries they consider relevant to inform them in the making of that determination.

90 It is apparent from the Determination that the Determiner did not rely on his knowledge and expertise. Rather, he considered the evidence presented to him by the Owners and made a decision on the balance of probabilities which confirm that he conducted an arbitration rather than an expert determination. This is further demonstrated by paragraphs 38, 39 and 40 .

> 38. As the process has proceeded as undefended by the Contractor, it was necessary as far as I was concerned, that the Owners prove by admissible evidence that the Contractor had been

properly served with the documents to be relied on and to prove that it has been given adequate notice of the process. I am satisfied that this has occurred.

39. In the absence of the Contractor, it is necessary for the Owners to prove on the balance of probabilities each of the matters they complain of in their Notice of Dispute, and including their claim for damages. I am satisfied that they have done so.

40. The Contractor has elected to provide no material to support whatever defence it may have wished to adopt to dispute the various matters in the Notice of Dispute or to contradict anything said in the Owners' Witness Statements, Expert Reports, supporting documents and the Owners Written Submissions all of which it received. By its letter dated 17 January 2018 it said it had engaged an Expert, Mr Alexander. However, on the basis of the evidence, I find that he did not inspect the property and it is not known if he produced any report to the Contractor. I have confirmed with HSF that no Report has been received by it or the Owners from the Contractor. There is nothing in the correspondence folder delivered with the Owners' Written Submissions that establishes any defence by the Contractor to the claims about defective work set out in the Notice of Dispute.

91 The Determiner appears to have simply accepted the expert evidence because it was unchallenged. There is no indication that he has used his *knowledge and expertise* as permitted by clause 15.4 or acted as an *independent industry expert* as contemplated by clause 15.3. It is apparent that the Determiner made the Determination having regard to the Owners' expert evidence and submissions which were provided to the Contractor whom he invited to respond. That the Contractor did not participate does not change the nature of the task carried out by the Determiner.

92 Accordingly, an expert determination has not been carried out as contemplated by clause 15, the Determination is unenforceable.

THE PARTIES' FURTHER SUBMISSIONS

93 The hearing proceeded on 15 to 18 October 2018 when I reserved my decision.

94 On 25 March 2019 the Owners solicitors emailed the Tribunal drawing my attention to the recent decision of Judge Woodward VP in *Owners Corporation No 1 of PS613436T & Ors v L.U. Simon Builders & Ors* ('Lacrosse').[18] As this is lengthy decision I made directions for the parties to file submissions. The Owners submissions are dated 14 May 2019 and the Contractor's Reply Submissions are dated 17 June 2019.

95 The Owners' further submissions focus on whether there would be any prejudice to the Contractor were I to grant them a mandatory injunction

[18] [2019] VCAT 286.

enforcing the Determination: in other words, granting them the 'pay now, argue later' relief they contend is contemplated by clause 15. However, as I have found the Determination is unenforceable, this is not a matter I need turn my mind to.

96 Subsequently, on 25 June 2019 the Owners' solicitors emailed the Tribunal drawing my attention to *Western Australian Land Authority v Simto Pty Ltd* (*'Simto'*).[19] The Contractor emailed the Tribunal the same day requesting this authority not be brought to my attention and, if necessary, for the proceeding to be listed for a further directions hearing. By the time the Contractor's correspondence had been referred to me, I had already read the judgement.

97 However, as I have found that even if clause 15 survives completion of the works the Determination is otherwise unenforceable, and in any event, am not persuaded this authority is relevant, for the reasons which follow, I did not consider it appropriate to list a directions hearing which would have caused the parties to incur further, unnecessary costs.

98 Although I consider it entirely appropriate for a party to bring a recent authority to the attention of a decision maker, this decision dates from 2001. The time to bring existing authorities to the attention of the decision maker is at the time of the hearing, or when filing submissions. On checking my notes I see that this authority was brought to my attention at the preliminary hearing by Mr Roberts QC when addressing me during the Owners' Reply.

99 Although in *Simto* it was held that a dispute resolution clause survived termination of the contract and applied to a dispute which arose some years after termination, the extract from the dispute resolution clause which appears in the judgement is not identical to clause 15. Although very similar to clause 15.1, there is no indication of an equivalent clause to clause 15.14 which I have found material in considering whether clause 15 survives completion of the works. Further, for the Reasons set out above, I have found that if I am wrong and clause 15 does survive completion of the works, the Determination is unenforceable as the Determiner has conducted an arbitration, not an expert determination, which is not what was contemplated by clause 15.

CONCLUSION

100 The Tribunal finds and declares:

a clause 15 of the Construction Contract does not apply to the dispute the subject of the Notice of Dispute dated 12 December 2017,

b alternatively, if clause 15 of the Construction Contract does apply to the dispute the subject of the Notice of Dispute,

[19] [2001] WASC 136.

i the Determiner did not have jurisdiction to conduct the determination process;

ii the Determiner is not an ‘independent industry expert’ as contemplated by clause 15.3 of the Construction Contract for the purposes of determining the dispute set out in the Notice;

iii the Determiner did not carry out an expert determination as contemplated by clause 15 and accordingly the Determination is unenforceable.

101 I will reserve costs and list the proceeding for a further directions hearing.

DEPUTY PRESIDENT C. AIRD