Age Old Builders Pty Ltd v Swintons Limited [2002] VCAT 1489 (6 December 2002)

Expert Determination agreement - whether void as requiring a dispute to be referred to arbitration, contrary to the Domestic Building Contracts Act 1995 (Vic) - the Institute's Rules for the Conduct of Expert Determinations 1997

Robert Hunt[1]

This decision of the Victorian Civil and Administrative Tribunal has created somewhat of a stir in dispute resolution circles in Victoria. It concerned disputes arising out of a contract between a builder and a developer for the construction of four townhouses in South Yarra which, by agreement of the parties, were subsequently referred to expert determination by Mr John Coghlan AM. Professor Damien Cremean, a Deputy President of the Tribunal, concluded:

> *'… upon its true analysis, the Agreement appointing Mr Coghlan an expert determiner is, in reality, and despite contrived appearances to the contrary, an agreement for arbitration.'*[2]

The Tribunal held that the agreement was void pursuant to sections 14 & 132 (1) of the *Domestic Building Contracts Act 1995 (Vic)*, which provide as follows:

> *'14* ***Arbitration clauses prohibited***
> *Any term in a domestic building contract or any other agreement that requires a dispute under the contract to be referred to arbitration is void.*
>
> *132* ***Contracting out of the Act prohibited***
> *(1) Subject to any contrary intention set out in this Act -*
> *(a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and*
> *(b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void.'*

An appeal has been lodged by the builder against the Tribunal's decision, which has been set down for hearing by the Supreme Court of Victoria on 24 & 25 June 2003. In the writer's view, the Tribunal's decision is wrong and should be overturned on appeal, more particularly because:

(a) the Tribunal failed to take into account that there is a difference between a term '*that requires a dispute under the contract to be referred*' to arbitration (which is void pursuant to section 14 of the *Domestic Building Contracts Act 1995 (Vic)*), and a term referring an existing dispute to arbitration, a distinction which is made in the second reading speeches of the Attorney-General and the Minister for Housing in October/November 1995 when the legislation was introduced, and is supported by the case law;

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2 see paragraph 26 of the decision

(b) on a correct application of the law, the common intention of the parties was to refer the existing disputes to expert determination and not to arbitration;
(c) the reasoning of the Tribunal is demonstrably flawed, takes into account irrelevant matters, and fails to take into account relevant considerations.

I will deal to some extent with those matters below, albeit relatively briefly given that they are the subject of an appeal which will be heard in the near future. A further Casenote will be published after judgement is delivered in the Supreme Court of Victoria.

The primary purpose of this Casenote is to deal with an issue which is of particular significance to the Institute and persons who use the Institute's Rules for resolution of their disputes. Unfortunately, this issue will not be considered in the appeal, because the Tribunal's decision is based on a Statement of Agreed Facts and Agreed Documents, which included an agreed (but erroneous) understanding of the content of the Institute's '*Rules for the Conduct of Expert Determinations*' (the 1997 IAMA Rules) concerning exclusion of liability.

The Facts

The relevant facts are set out in paragraphs 4–7 of the Tribunal's decision, as follows:

'4. In short, the matter concerns a "determination" made by Mr John Coghlan on 15 April 2002. This was his second determination in the matter. His first was made on 27 September 2000. He came to be involved in the matter by an agreement made between the parties on or about 13 September 2000. In a letter of that date (from the offices of John Coghlan & Associates Pty Ltd) he advised he believed "the most appropriate method" to carry out an independent assessment of various disputes between the parties, over quality of works at premises at 21 Acland Street, South Yarra, was by way of "Expert Determination". In that letter he says that under this process "you appoint me as an Expert to determine the various issues and you contract to agree that my decision on each item of dispute is final and binding upon you." The letter enclosed an agreement to be signed by the parties in order for Mr Coghlan to be engaged. It is agreed that before the date of this letter the parties had discussed a suitable person to determine disputes between them which had arisen in respect of the contract which was in the JCC-D 1994 form and was executed on 28 April 1999. It is agreed also that the Respondent provided the curriculum vitae of Mr Coghlan to the Applicant. I have perused his curriculum vitae, which I was provided with, very carefully. Mr Coghlan is, in any event, well known to many as a building expert and arbitrator and more latterly mediator.

5. The engagement agreement executed between the parties included "Rules for the Expert Determination of Commercial Disputes" formulated apparently by the Institute of Arbitrators and Mediators Australia. Mr Coghlan used to occupy official office at the Institute. Important provisions in those Rules include the following:

……

6. It is agreed between the parties that they complied with the first determination made by Mr Coghlan. That determination is signed by him as "Expert" and in the covering letter from John Coghlan & Associates Pty Ltd (described as "Dispute Resolution Practitioners") it is said it is made "in regard to…rectification and completion items at the …address" in question. The

determination is 5 pages in length and provides a reasoned basis for its conclusion which include orders and directions to be complied with by the Architect.

7. *On 25 September 2000 the parties agreed to have certain additional disputes determined by Mr Coghlan with respect to extensions of time, extensions of time costs and liquidated damages. Thereafter Mr Coghlan undertook the process described as "Expert Determination" having received submissions from the parties. This second determination, again providing a reasoned basis for its conclusions, was published, as I have noted, on 15 April 2002…..'*

Exclusion of Liability

In paragraph 14 of the decision, the Tribunal distinguished the decision of Einstein J in the Supreme Court of New South Wales in *The Heart Research Institute Limited v Psiron Limited* [2002] NSWSC 646, saying:

> *'… Considering whether proceedings should be stayed until the dispute had been considered by an Expert, Gillard J*[3] *further emphasised the contractual basis of Expert Determination. His Honour referred to the judgment of Scrutton LJ in Metropolitan Tunnel and Public Works Limited v London Electric Railway Co [1926] Ch 371 where it was stated that "a guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it". Hence his Honour concluded that, "It was their common intention that the dispute resolution procedure be applied in the event of a dispute. It is their contract; and it should be enforced. " (para 31-32) and, further:*
>
> > *"It is a trite proposition of law that parties may contract about anything and subject to the principles of public policy and illegality the agreement should be enforced unless there is some other vitiating factor such as a mistake, misrepresentation or incapacity. " (para 29)*
>
> *'In that case, though, unlike the present one, …. there was a provision (cl.10) expressly excluding the expert from liability. One would naturally expect that to be so, because under the Commercial Arbitration Act 1984 an arbitrator enjoys an immunity (see s. 51) but if the person appointed is appointed an expert, and not an arbitrator, an exclusion of liability might be necessary if so desired. However,* ***no such exclusion of liability is present in the arrangements made with Mr Coghlan and the converse therefore is clearly suggested: none was provided, because arbitrators have immunity already. This is one factor which on its own would support a view, inferentially, that Mr Coghlan was acting as an arbitrator in carrying out his functions****.'* (emphasis added)

3 In *Badgin Nominees Pty. Ltd. v Oneida Ltd.* & anor [1998] VSC 188

Contrary to what is suggested in that passage, the 1997 IAMA Rules contained a provision for exclusion of liability, in terms comparable to the clause cited by Einstein J in paragraph 15 of *The Heart Research Institute Limited v Psiron Limited* case[4], namely:

> ***'10 Exclusion of liability and indemnity***
> *Except in the case of fraud, the Expert, the Institute of Arbitrators Australia, its directors and officers will not be liable to a party upon any cause of action whatsoever for any act or omission by the Expert in the performance or purported performance of the Process. The parties jointly and severally hereby indemnify and shall keep indemnified the Expert, the Institute of Arbitrators Australia, its directors and officers against all claims, actions, suits proceedings, disputes, differences, demands, costs, expenses and damages arising out of or in any way referable to any act or omission by the Expert in the performance or purported performance of the Expert's role in the Process.'*[5]

The explanation for this apparent anomaly is that the 'Rules' included in the Statement of Agreed Facts and Agreed Documents were those which the parties say were included with a facsimile letter dated 13 September 2000 sent to the parties by Mr Coghlan, namely four pages of '*Draft # 2, 11 April 1997 Rules For The Expert Determination of Commercial Disputes*'. Notably, those four pages did not include Rule 8 (Costs), Rule 9 (Modification), Rule 10 (Exclusion of liability and indemnity) or Rule 11 (Contractual Obligations) of the 1997 IAMA Rules.

As is evident from the passage in paragraph 14 of the decision quoted above, the Tribunal's decision may well have been different if the 'Rules' considered by the Tribunal included clause 10 of the 1997 IAMA Rules.

The difference between a 'term requiring that a dispute be referred' and a consensual agreement referring an existing dispute

The approach taken by the Tribunal is directly contrary to the expressed intention of the Victorian Government in enacting the legislation. In submissions to the Tribunal made by the builder (which are not dealt with in the decision), attention was drawn to the Second Reading Speech of the Attorney-General (Mrs Wade) on the introduction of the Bill in the Legislative Assembly. In her speech on 24 October 1995, the Attorney-General said:

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4 The clause cited by Einstein J in *The Heart Research Institute Limited v Psiron Limited* case provided:
'The parties release ACDC, its employees, and the Expert from any liability of any kind whatsoever, and indemnify them from any claim for negligence which may arise in connection with or resulting from the Expert's appointment or any omission pursuant to the Expert Determination.'

5 Rule 17 of the IAMA Expert Determination Rules 2001 excludes liability in the following terms:
'RULE 17 Liability for acts or omissions
The parties agree that the Expert, the Institute and its officers and employees are not liable to any party for or in respect of any act or omission in the discharge or purported discharge of their respective functions under these Rules unless such act or omission is shown to have been fraudulent.'

'The bill prohibits compulsory arbitration clauses. It is the government's belief that, far from being a quick and cost-effective means of resolving building disputes, as was intended, arbitration has often become overly legalistic, time consuming and expensive. Arbitration will be permissible only where both parties to a contract have explicitly evidenced a desire to follow this sort of dispute resolution. Arbitration will not be able to appear as a standard term in general domestic building contracts.'

Similar comments were made by the Minister for Housing (Hon R. I. Knowles) in his Second Reading Speech on the introduction of the Bill in the Legislative Council on 15 November 1995, namely:

'Arbitration will only be permissible where both parties to a contract have explicitly evidenced a desire to follow this sort of dispute resolution. Arbitration will not be able to appear as a standard term in general domestic building contracts.'

Given what is said in paragraphs 4 to 7 of the Tribunal's decision, it is difficult to imagine a clearer example of circumstances where '*both parties to a contract have explicitly evidenced a desire to follow this sort of dispute resolution*', which Parliament intended to preserve. As the Tribunal expressly acknowledged in paragraph 25 of the decision, Mr Coghlan '*comes to the parties only after they enter into disputation and not before*'.

There is also strong case law drawing a distinction between a term requiring disputes to be referred to arbitration (in futuro) and a term referring existing disputes to arbitration. In *Turner Corporation Ltd v Austotel Pty Ltd* [1992] 27 NSWLR 592, Giles J (as he then was) made some particularly pertinent remarks in declining to follow two earlier Victorian decisions, including *Hammond v Wolt* [1975] VR 108 which is quoted extensively in the Tribunal's decision in this case. His Honour said, at pages 598 & 599:

(598) '.. in adopting the reasoning found in Hammond v Wolt and in his own language (in Woolworths Ltd v Herschell Constructions Pty Ltd (in liq)), Smith J may not have given sufficient attention to whether there was ***an agreement to refer*** *disputes to arbitration as distinct from an* ***agreement referring*** *disputes to arbitration.* (his Honour's emphasis)

(599) … ***I have some difficulty with the proposition found in Hammond v Wolt and repeated in Woolworths Ltd v Herschell Constructions Pty Ltd (in liq) that the agreement to refer a dispute to arbitration and the referral itself are one and the same thing, because they are no****t - the referral to arbitration occurs only because of the prior agreement of the parties that there shall be a referral when an election is made by giving the notice of referral to arbitration.'* (emphasis added)

In *Manningham City Council v Dura Constructions Pty Ltd* [1999] 3 VR 13, the Victorian Court of Appeal followed the decision in *Turner Corporation Ltd v Austotel Pty Ltd*, and the decision of the High Court in *P.M.T. Partners Pty Ltd v Australian National Parks & Wildlife Service* (1995) 184 CLR 301, and overruled the decision in *Hammond v Wolt*[6]. Applying the principles referred to in those cases, the Tribunal should have held that the Agreement in

6 See particularly per Winneke P at page 15, and Buchanan JA (with whom Phillips JA agreed) at page 23.

question was '*an agreement referring*' existing disputes to a process agreed by the parties, and was not an agreement '*that requires a dispute to be referred*' to that process.

Proper Construction of the Agreement – Was it the Common Intention of the Parties to Refer their Disputes to Expert Determination or Arbitration?

Putting aside the difference between an '*agreement to refer*' and an '*agreement referring*', the exercise which the Tribunal had to undertake involved ascertaining the common intention of the parties from the language they have used. As Gibbs J (as he then was) said, in *Australian Broadcasting Commission v Australian Performing Rights Association Limited* (1973) 129 CLR 99, at page 109:

> *'It is trite law* ***that the primary duty of a Court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied****. Of course, the whole of the instrument has to be considered since the meaning of any one part of it may be revealed by other parts, and the words of every clause must, if possible, be construed so as to render them all harmonious one with another. If the words used are unambiguous, the Court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The Court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.' (emphasis added)*

With due respect, the Tribunal appears to have lost sight of the fact that its duty was to establish the common intention of the parties from the words they have used. It is readily apparent from the words used that the common intention of the parties was to refer their disputes to expert determination, not arbitration.

It is well recognised that expert determination is different to arbitration. This can be seen from an earlier passage in paragraph 14 of the Tribunal's decision, quoting a passage from the decision of Einstein J in the Supreme Court of New South Wales in *The Heart Research Institute Limited v Psiron Limited*, namely:

> *'16 As the plaintiffs point out, in practice, Expert Determination is a process where an independent Expert decides an issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the Expert. Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind.*
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> *17 Unlike arbitration, Expert Determination is not governed by legislation, the adoption of Expert Determination is a consensual process by which the parties agree to take defined steps in resolving disputes. I accept that Expert Determination clauses have become commonplace, particularly in the construction industry, and frequently incorporate terms by reference to standards such as the rules laid down by the Institute of Arbitrators and Mediators of Australia, the Institute of Engineers Australia or model agreements such as that proposed by Sir Laurence Street in 1992.*

Although the precise terms of these rules and guidelines may vary, they have in common that they provide a contractual process by which Expert Determination is conducted.'

Was the Agreed Process in fact Arbitration although called Expert Determination?

As Hamilton J said in the New South Wales Supreme Court in *Owners - Strata Plan No 51487 v Broadsand Pty Ltd* [2002] NSWSC 770, at paragraph 24:

'There is also a well established legal doctrine that, where a relationship of a particular sort is established by the ambit of the rights conveyed or duties imposed by an agreement between parties, then a declaration in the agreement that the relationship is not to have that legal characterisation will be ineffective: the characterisation of the transaction will be governed by the substance of the agreement and not by the parties' declaration in such cases. A well known example which has been cited is the decision of the High Court of Radaich v Smith (1959) 101 CLR 209 relating to leases. If one party gives another exclusive occupation of premises for a term, this being of the very nature of a lease, then a stipulation that the arrangement is one of licence and not of lease will be ineffective. As Windeyer J said at 222, if "the rights that the instrument creates ... be the rights of a tenant, it does not avail either party to say that a tenancy was not intended." And see The Wik Peoples v The State of Queensland (1996) 187 CLR 1 per Toohey J at 110 - 111 and Gaudron J at 152; Lewis v Bell (1985) 1 NSWLR 731; KJRR Pty Ltd v Commissioner of State Revenue [1999] 2 VR 174. The principle had been earlier discussed in the English Court of Appeal in Weiner v Harris [1910] 1 KB 224 where Cozens-Hardy MR said at 290:

> *'It is quite plain that by the mere use of a well-known legal phrase you cannot constitute a transaction that which you attempt to describe by that phrase. Perhaps the commonest instance of all, which has come before the Courts in many phases, is this: Two parties enter into a transaction and say "It is hereby declared there is no partnership between us." The Court pays no regard to that. The Court looks at the transaction and says "Is this, in point of law, really a partnership? It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is." So here the mere fact that goods are said to be taken on sale or return is not in any way conclusive of the real nature of the contract. You must look at the thing as a whole and see whether that is the real meaning and effect of it.'*

The Tribunal approached the exercise of whether the 'expert determination' was in fact an arbitration by reference to criteria cited in *Hammond v Wolt*. At paragraph 18 of the decision, the Tribunal said:

'18 Other indicia, in my view, are present, sufficient for me to be satisfied that, in this case, the process undertaken by Mr Coghlan was in reality an "arbitration". I refer, in particular, to the criteria enunciated by Menhennitt J

in Hammond v Wolt [1975] VR 108 at 112-3. Although his Honour said it was "unnecessary and undesirable" in that case to attempt an exhaustive definition of arbitration, he did say, materially, as follows:

'(a) Arbitration involves "an inquiry in the nature of a judicial inquiry": per Lord Esher, M.R., in Re Carus-Wilson and Greene (1886), 18 Q.B.D. 7, at p. 9; see also Re Dawdy (1885), 15 Q.B.D. 426, at p. 429; Re Hopper (1867), L.R. 2 QB. 367, at p. 373; Gartside v. Outram (1857),26 L.J.Ch. 113, at p. 115; Aizner v. Cartonlux Pty. Ltd., [1972] V.R. 919, at pp. 928-9; Re Fenwick (1897), 18 L.R. (N. S.W.) 405, at pp. 410-1, and The Myron, [1970] 1 Q.B. 527, at pp. 534-5; sub nom. Myron (Owners) v. Tradax Export S.A. Panama City R.P., [1964] 2 All E.R. 1263.

(b) The cases to which I have just referred and Montrose Canned Foods Ltd. v. Eric Wells (Merchants) Ltd., [1965] 1 Lloyd's Rep. 597, also lead to the conclusion; I think, that on an arbitration the parties have the right to be heard if they so desire. It has been held that where on an arbitration there was no request for an oral hearing but both parties wrote to the arbitrator setting out their cases and put documents and information before the arbitrator, partly in response to his written request, the award made by the arbitrator should not be set aside: Star International Hong Kong (U.K.) Ltd. v. Bergbau-Handel G.m.b.H., [1966] 2 Lloyd's Rep. 16. However, in The Myron, Donaldson, J., said, at (Q.B.) p. 535: "If either party wishes to see the whole of the other party's evidence and to be informed in detail of his arguments, he should require a formal hearing. Any such request must be granted and at the hearing the usual court procedure will be followed." Cases in which it has been held that an award of an arbitrator was not invalidated by the fact that the arbitrator or arbitrators had not heard the parties are, it appears to me, cases where the parties did not exercise their right to be heard or concurred in a procedure which involved them not being heard: see French Government v. Tsurushima Maru (1921), 8 Lloyd's L.R. 403, at pp. 404-5; 37 T.L.R. 961, at p. 962, referred to in The Myron, at (Q. B.) p. 533.

(c) If the parties have the right to call evidence if they so desire, that is an indication that the reference is to arbitration: see Re Carus-Wilson and Greene; Re Hopper; Re Fenwick, and Re an Arbitration between Hammond and Waterton (1890), 62 L.T.N.S. 808, at p. 809.

(d) It is unnecessary to decide whether it is an essential element of an arbitration that the parties have the right to call evidence if they so desire. The cases to which I have last referred suggest that it is, although they are consistent with the view that the right to call witnesses if so desired is an indication that arbitration is intended

without it being a necessary ingredient. In Jordeson & Co. v. Stora (1931), 41 Lloyd's L.R. 201, the parties were heard and put evidence before the umpire and it was held that his award was not invalidated by the fact that on one point he took notice of a matter of law which came before him and certain limited matters of fact which were in his cognizance as an expert. This is similar to a Court taking judicial notice of certain matters. In Johnston v. Cheape (1817), 5 Dow 247; 3 E.R. 1318, Lord Eldon, L.C., said at (Dow) p. 264; (E.R.) p. 1324, that the arbitrator saw all the evidence. In Ajzner v. Cartonlux Pty. Ltd., supra, Pape, J., said at p. 932 that Eads v. Williarm (1854), 4 De G.M. & G. 647; 43 E. R. 671, was a case of arbitration but it seems to me, with respect, not clear whether the persons authorized to determine the rent and terms of working of a mine were appointed as arbitrators or experts.

(e) It is not inconsistent with arbitration for the arbitrator to be entitled to rely upon his own expertise in arriving at a determination: see Ajzner v. Cartonlux Pty. Ltd., supra; Jordeson & Co. v. Stora, supra; Johnston v. Cheape, supra.'

The Tribunal did not cite the next paragraph in *Hammond v Wolt*, which is particularly relevant, and which appears at page 113 of the judgement, namely:

'Whereas the term "arbitration" and "arbitrator" have come to involve certain recognized concepts, the expressions "assessment" and "assessor" have not, although they suggest concepts more akin to those applicable to ***an expert assessing or determining the nature and extent of pre-existing rights and liabilities, without conducting an inquiry in the nature of a judicial inquiry****… The concepts involved in assessment are, I think, more akin to those involved in valuation than arbitration.' (emphasis added)*

The Tribunal then considered the criteria cited in *Hammond v Wolt* in the following terms, from paragraph 19 of the decision:

'19. As to each of these criteria, I make the following points:

(1) Mr Coghlan's process to be undertaken was, in my view, "an inquiry in the nature of a judicial inquiry". By cl.4(b) of the Rules of his engagement he was required to make a "determination". A "determination", in my view is not contemplated by the Agreement to be otherwise than the outcome of a rational enquiry undertaken by him. A "judicial inquiry" is a rational enquiry. Not all judicial decisions moreover necessarily follow a hearing and the reception of evidence: these days especially perhaps, many decisions of a judicial nature are made in chambers without formal evidence. By cl.4(b) Mr Coghlan is required to make that determination "according to law". Making decisions according to law is the business of courts and others acting in a judicial or quasi judicial capacity such as this Tribunal. It seems to

me that to make a decision "according to law" is in its nature inconsistent with expert determination as such in that the law may dictate to the contrary of what the determiner's expertise may tell him or her. Moreover by, cl.4(b) also, the process leading to the determination must be conducted "in accordance with the requirements of procedural fairness". I cannot view this except as an importation of the rules of natural justice. Arbitrators must follow those rules and under s4 of the Commercial Arbitration Act 1984 "misconduct" by an arbitrator is defined to include a breach of those rules. But the rules of natural justice have been formulated by the courts and must be followed by the tribunals of the land, exercising undoubted judicial powers, unless excluded. The important point though is that arbitrators must follow the rules of natural justice and in my view those rules are imported by a requirement to observe "procedural fairness". How else might the words "procedural fairness" be interpreted? What else could they mean? For most purposes it is clear that a duty to observe procedural fairness is a duty to act fairly which, in turn, requires observance of the rules of natural justice see Kioa v West (1985) 159 CLR 550 at pp 583-7. It can hardly be contended, therefore, in my view, that Mr Coghlan was not acting as an arbitrator in being required to observe procedural fairness. His duty in that regard was, in my view, clearly consistent, and consistent only with, with the role of arbitrator. Very seldom, if ever, would an expert, called upon because of his or her expertise to proffer a view or make a decision, be required to observe the rules of natural justice. They seem simply inimical to one another.

(2) *Further, as I have noted, the determination to be made by Mr Coghlan is expressed to be "final and binding". Except as there may be appeals provided for, this is also a hallmark of a judicial enquiry in that courts do not make decisions which are provisional only. I refer again to the observations made in Sport Maska Inc v Zittrer, above. Furthermore, decisions of courts and awards of arbitrators, even if not final, are "binding" as between the parties to a dispute. Again it is a hallmark of a judicial enquiry (and is a requirement of judicial power under the Constitution: see Re Advisory Opinions case (1921) 29 CLR 257 that there be an actual dispute between parties and not merely a speculative one. The whole of the Rules, in the case of Mr Coghlan, are prefaced upon the basis of there being a "dispute" which is "submitted". There must be therefore at least a "dispute". The dispute given to him by the Rules is also a formulated one, in which issues are set out and positions clarified in submissions. I note, moreover, the use of the word "submitted": It was formerly an aspect of arbitrations under the old*

Arbitration Act 1958 that present or future differences be agreed in writing to be "submitted" to arbitration. This is suggestive, in my view, of an early, cruder form of arbitration replaced by the Commercial Arbitration Act 1984 but nonetheless indicative again of arbitration as such.

(3) *There is a "right to be heard" given by the Rules. This would or could exist as an aspect of the "procedural fairness" requirement in cl.4(b) in my view. But there is a clear right for the parties in Mr Coghlan's case to make submissions in writing, both in support of and in response to contentions of fact and law. It is not a requirement of an arbitration that a party has a right to be heard orally. I refer to the decision of Mocatta J in Star International Hong Kong (UK) Ltd v Bergbau - Handel GmbH [1966] 2 Lloyd's Rep 16. His Lordship held that mere absence of a hearing does not, ipso facto, constitute unfairness in the conduct of an arbitration as would warrant interference by the courts. Mocatta J was a very experienced commercial judge yet his ruling in that case was criticized, I think, on the unhelpful basis, that it was nearly 40 years old. That is not a sound criticism of it. But I am not aware of anywhere where his Lordship's decision has been not followed. Menhennitt J saw fit to refer to it, moreover, in Hammond v Wolt, above. But if an oral hearing is not required in order for a process to be an arbitration, then it cannot matter that the arbitrator/determiner does not have power to administer the oath and take sworn evidence. In any case the Commercial Arbitration Act 1984 in ss. 19(1) and 19(2) contemplates quite clearly that an arbitration is able to be conducted otherwise than by evidence on oath or affirmation. It contemplates, even, as in this case, that the evidence before the arbitrator may only be in writing: see s. 19(1)(a). In any event the Rules of engagement of Mr Coghlan do contemplate attendances at conferences convened by him as "necessary and appropriate" to enable the process to proceed: cl.4(g). At any such conference, moreover, a party may have legal representation: cl4(h). As well, it is contemplated that Mr Coghlan may require even a transcript of the conference to be taken and made available: see again cl.4(h). This in itself is, in my view, a clear sign that a much more sophisticated regime is intended than would be suggested by the simple words "Expert Determination". No basic or rudimentary model is, in truth, contemplated at all.*

(4) *The Rules do not give a right to call evidence as such unless this is a right given by the requirement to observe "procedural fairness" which, considering the content or the duty to act fairly, it could very well be. But Mr Coghlan is required by cl.4(c) to make his determination "on the basis of information received from the parties". This could mean*

any information whatever, and from any source, and does not exclude information given orally or called from a witness. In any case, the Rules certainly do give a right to the parties to make submissions. So they have a right to call evidence at least in that sense even if one or the other does not seek to exercise that right. Indeed it is a duty to provide written submissions unless otherwise agreed: see cl.5. Submissions could well include Witness Statements or short summations of what people say. In any event, I note that Menhennitt J said in Hammond v Wolt, above, that it was "unnecessary to decide whether it is an essential element of an arbitration that the parties have the right to call evidence if they so desire".

(5) Not only must Mr Coghlan make his determination on the basis of information received from the parties: he must also do so on the basis of his "own expertise". It might be thought that this is not consistent with conducting an enquiry in the nature of a judicial enquiry required of a process in order for it to be an arbitration. Ordinarily it would be thought that those conducting a judicial enquiry do so only upon the evidence advanced by the disputing parties, usually according to the rules of evidence. However by cl.4(c) Mr Coghlan is not bound by the rules of evidence. Yet this is true of arbitrators too unless otherwise agreed: see s. 19(3) of the Commercial Arbitration Act 1984. It is true also of this Tribunal which undoubtedly does exercise judicial powers in various areas. And as regards the notion that Mr Coghlan cannot be carrying out an enquiry in the nature of a judicial enquiry, because, he must call upon his own expertise as well, I would quote again from the judgment of Menhennitt J in Hammond v Wolt, above, that it "is not inconsistent with arbitration for the arbitrator to be entitled to rely upon his own expertise in arriving at a determination".

20. Other indicia of an enquiry in the nature of a judicial enquiry include the propriety required of Mr Coghlan and the nature of the powers conferred upon him in making determinations, so called. An expert, if truly called upon as such, might be expected to bring to the resolution of a dispute his or her expertise. But Mr Coghlan is required by the Rules also to observe a duty of impartiality. By cl.4(d) Mr Coghlan must disclose "all information and documents received from either party to the other party". He is not able to consult with a party other than in the presence of the other party except where allowed. Further, by cl.4(e) if he becomes aware of circumstances "that might reasonably be considered to adversely affect [his] capacity to act independently and impartially" he must inform the parties immediately and unless the parties agree otherwise he must terminate the process. None of these requirements is, in my view, consistent with a view that Mr Coghlan was acting solely as an expert in a capacity as determiner. They are, rather, supportive of a view that

he was acting only in an arbitral capacity. An expert, making a determination, might not care for anything about these sorts of requirements. The independence and impartiality requirements imposed by the Rules are not, therefore, in my view suggestive of someone applying their expertise, like a valuer for example, to resolve a dispute. They give an appearance of judicial authority to Mr Coghlan, in my view. They make him look like a disinterested observer and not just an expert who has a particular line of technical thought. He is not a "mandatory" of one side only and his fees are paid by both parties - said by the Supreme Court of Canada in the Sport Maska case (at 604) to be indicative of impartiality - "a fundamental characteristic of arbitration".

21. *There is also, as I have said, the nature of the powers conferred upon him when making determinations. Determinations are not merely the expressions of expert opinion one might have expected if only expert determination and not arbitration was involved. His power to make determinations, like any court or this Tribunal, or like other arbitrators, includes power to award monetary sums. Also he may include interest even, which he considers reasonable, "on any monetary sum awarded". Merely if an expert's opinion was being sought, I would doubt if the expert would have power to award any "monetary sums" or more especially perhaps interest. Moreover Mr Coghlan's power is not only to make "directions" but also to make "declarations": see cl.7(b). A power to make a declaration, I would have thought, is characteristically a power of a judicial nature exercised by courts or by this Tribunal in certain circumstances by a presidential member. A power to make "directions" is certainly something which is exercised by courts and tribunals on a daily basis. One does not often encounter experts, even expert determiners, either making declarations or giving directions.*

22. *When making a determination it is required of Mr Coghlan by cl.7(a) that he give the parties "a brief statement of the reasons for determination". So, a determination must have reasons in support of it and cannot be given capriciously. Many times it must be, I would think, that an expert may not be able to give actual reasons for a view because of the very nature of expertise. And, in any event, why, would an expert bother to give reasons? An expression of their expert opinion should suffice because they are an expert after all. Yet Mr Coghlan is required to give a brief statement of reasons. So the process must be a reasoned one in the nature of a rational enquiry. In my view this means it must be an inquiry of a kind carried on by a judicial person or person acting judicially. It is not truly an expert drawing upon expertise only at all. Moreover, the Rules, like most court and tribunal rules, and like the Commercial Arbitration Act 1984 (see s. 30) in arbitrations, provide for a slip rule in cl.7(c) which is in the same form as those various rules. If Mr Coghlan were truly only acting as an expert, and not as an arbitrator, why should he be concerned to have the capacity to correct a determination for "a defect of*

form"? See cl.7(c)(iv) and compare s. 30(d) of the 1984 Act. The answer to that question, I would think, is that he has that power because, in reality, he is arbitrating and not merely expert determining.

23. *It is said though, as I seem to recall, that cl.4(j) is inconsistent with holding Mr Coghlan to be an arbitrator carrying on an arbitration. It is said, I believe, that arbitrators do not have the power, which the Rules give Mr Coghlan, of determining his own jurisdiction. But cl.4(j) may not be able to be read so widely - it arises only when there is a dispute between the parties "in respect of any matter concerning [the] Rules or Process". The reference to "the Expert's jurisdiction" which is stated to be included, occurs only as an aspect of that, and that appears to be a clause relating to procedural concerns. But that may not be so because the clause is far from clear. In any event, I am not satisfied it is correct to say that an arbitrator cannot ever determine her or his own jurisdiction. See for example s. 25 of the Commercial Arbitration Act 1984 by which an arbitrator may extend an arbitration to include a further dispute but in order to be able to do so must first determine whether that dispute is the dispute between the parties or is "some other dispute".*

24. *In any case I am unable to make great sense of the reference to jurisdiction in cl.4(j) except as indicating, lawful authority. And I would think it is a mark of a person acting judicially that they should in the first place have lawful authority and secondly be able to determine whether they may lawfully proceed or not, considering their authority. Clause 4(j) surely on any analysis would not entitle Mr Coghlan to determine he had any jurisdiction at all. If it did, it might lead him to decide anything. If cl.4(j) does, however, have that unlimited operation, then I would think that Mr Coghlan has a power completely inconsistent with being called upon to be an expert determiner only. For he would have the power to give himself jurisdiction in any matters at all in no way related to his expertise. This means, in my view, that the reference in cl.4(j) to the Expert determining her or his jurisdiction cannot be taken at face value. But if it can be and is to be taken at face value, it is inconsistent with Mr Coghlan being only an expert determiner, for his power to determine extends well beyond the range of his expertise.*

25. *There is also this point. The Agreement with Mr Coghlan does not call upon him to bring his expertise to solve some particular technical problem or to fill out the arrangement between the parties in some technical matter or matters. He is standing between the parties in making his determinations, which he must make "according to law", not according to the usages of the building trade, and "in accordance with the requirements of procedural fairness" and "on the basis of information received from the parties and [his] own expertise". He comes to the parties only after they enter into disputation and not before. He does not provide any building expertise for the better operation of the principal agreement between them in the JCC-D 1994 form. He has in my view*

the function of all arbitrators. To quote from the judgment in Road Regenerative & Repair Services v Mitchell Water Board (15 June 1990, unreported, Nathan J) his function, as with theirs, "is to stand between the parties, hearing submissions and adjudicating if required." In the end there is nothing about the Agreement, apart from its name, which satisfies me it is anything else; and simply its name, and how Mr Coghlan is referred to in it, cannot be determinative of its exact character or be allowed to circumvent the operation of a section of an Act namely s14.

26. For these reasons I have come to the clear conclusion that, upon its true analysis, the Agreement appointing Mr Coghlan an expert determiner is, in reality, and despite contrived appearances to the contrary, an agreement for arbitration.'

In the writer's view, the Tribunal's reasoning is fundamentally flawed, as can be seen from a few examples.

In paragraph 19(1), the reasoning appears to be that, because a determination involves a rational inquiry, and a judicial inquiry is also a rational inquiry, it somehow follows that a determination is a judicial inquiry. That is illogical.

Perhaps even more surprising are the further passages in the same paragraph that '*[m]aking decisions according to law is the business of courts and others acting in a judicial or quasi judicial capacity such as this Tribunal' and 'to make a decision "according to law" is in its nature inconsistent with expert determination as such in that the law may dictate to the contrary of what a determiner's expertise may tell him or her*'. That is contrary to what was said by Gillard J in *Badgin Nominees Pty. Ltd. v Oneida Ltd.* anor [1998] VSC 188, and by Rolfe J in the New South Wales Supreme Court in *Fermentation Industries (Aust) Pty. Ltd. v Burns Philp & Co Ltd.* (BC9800135 - 12 Feb 1998 - unreported).

In *Badgin Nominees*, Gillard J said:

'132 I refer to what I said in the Commonwealth of Australia case, supra at p.5 as to what the parties should accept on a reference to an expert. I said -

"The parties to a contract agree that the value is to be determined by an expert acting as such using his own skill, judgment and experience. He is not a lawyer. His authority derives from the contract. The terms of the contract are to be considered by him. It would be contrary to the parties common intention to expect the valuer to construe the contract and apply it as a court would. The parties have entrusted the task to an expert valuer, not a lawyer. They must be taken to accept the determination 'warts and all' and subject to such deficiencies as one would expect in the circumstances. The parties put in place a procedure; they must accept the result unless it would be contrary to their common intention."

133 ***In my opinion the matters raised by Mr Loewenstein are matters which the parties contemplated. They put in place the procedure and if it involves a question of law as to construction of the agreement, the***

> ***gathering of evidence without regard to rules or procedures, a determination in which the expert may rely upon his own experience and knowledge and without hearing the parties or any valuation experts on their behalf, the parties are bound by it.***
>
> *134* ***They put it in place, it binds them****'.* (emphasis added)

In *Fermentation Industries*, Rolfe J held that a term should be implied in an expert determination agreement that the determination be according to law, unless otherwise expressly agreed by the parties.[7] In that case, the plaintiff argued that the expert was proposing to pursue a course, in arriving at his determination (in fixing a price), which involved a misinterpretation of the agreement under which the price was to be fixed, which would constitute an error of law, given that the proper construction of a contract is a question of law. After a review of the authorities, his Honour said, at pages 34 to 35:

> *'The conclusion to which I have come is that the views expressed by Mr Finney in relation to items 5 & 6 constitute, in my respectful opinion,* ***a misinterpretation of the supply agreement. If he pursues a course of fixing the price having regard to this misinterpretation then, in my view, he will not be acting conformably with the agreement between the parties*** *for the determination of the selling price to FI. He will be imposing another pricing regime, which the agreement relevantly for the present purposes.... does not countenance, and, therefore, he will be going beyond considering the correctness of the calculation of the prices. This he is not permitted to do.* ***If he fails to act in accordance with the agreement, then conformably with the authorities to which I have referred, he acts outside the charter conferred on him by it and his determination is amenable to review by the Court****.'* (emphasis added)

What is said about natural justice and procedural fairness overlooks the fact that the requirements of natural justice are not fixed and immutable, but are dependent on and will vary with the circumstances and nature of the case. As Mason J (as he then was) said in the *High Court in Kioa v West* [1985] 159 CLR 550, at pages 584 – 585:

> *'What is appropriate in terms of natural justice depends on the circumstances of the case, and they will include, inter alia, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting.....The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the case?'*

The point made in paragraphs 24 and 25 of the Tribunal's decision regarding the use which could be made of Mr Coghlan's expertise shows a lack of understanding of the purpose of expert determination. It is also inconsistent with what was said by Gillard J in *Badgin Nominees Pty. Ltd. v Oneida Ltd. & anor* [1998] VSC 188, in the passages set out above, as well as the passages from the same decision cited by the Tribunal in paragraph 14 of its decision, namely:

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7 An appeal to the Court of Appeal was allowed on grounds which relied on Rolfe J's analysis on this point being correct.

'It was their common intention that the dispute resolution procedure be applied in the event of a dispute. It is their contract; and it should be enforced. " (para 31-32) and, further:

"It is a trite proposition of law that parties may contract about anything and subject to the principles of public policy and illegality the agreement should be enforced unless there is some other vitiating factor such as a mistake, misrepresentation or incapacity. " (para 29)'

Taking Account of Irrelevant Matters

There are various instances in the decision where the Tribunal took account of irrelevant matters. For example, in paragraph 14 of the decision, the reasons given by the Tribunal for distinguishing the decision of Einstein J in *The Heart Research Institute Limited v Psiron Limited*[8] included the following irrelevant matters:

'In that case, though, unlike the present one, the expert determination provided for was said to arise only after the parties had been to mediation. So mediation had to be undertaken first. There was no requirement of mediation in this case at all before Mr Coghlan could act. The expert determiner was, moreover, a member of Counsel and chosen from a panel. The method of dispute resolution (expert determination) was not, furthermore, one suggested or advised by the expert determiner whereas it was by Mr Coghlan in this case.'

8 [2002] NSWSC 646