SUPREME COURT OF QUEENSLAND

CITATION:	*Middlemount South Pty Ltd v Anglo American Metallurgical Coal Assets Pty Ltd & Anor* [2019] QSC 211
PARTIES:	**MIDDLEMOUNT SOUTH PTY LTD ACN 611 632 314** (Plaintiff) **v** **ANGLO AMERICAN METALLURGICAL COAL ASSETS PTY LTD ACN 081 022 246** (First Defendant) **ANGLO AMERICAN AUSTRALIA LIMITED ACN 004 892 371** (Second Defendant)
FILE NO/S:	BS No 1489 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2018
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** **1. It is declared that the expert determination made on 6 July 2018 by the Independent Accountant of the disputed matters referred to the Independent Accountant under clauses 8.5(c) to 8.5(h) of the Share Purchase Agreement made between the plaintiff as Purchaser, the first defendant as Vendor and the second defendant as Vendor Guarantor dated 4 April 2016 is final and binding.** **2. The plaintiff pay the defendants' costs of the issues set down for separate consideration by paragraph 5 of the order made on 13 September 2018 assessed on the standard basis.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS

AND OTHER MATTERS – where the matter in dispute was referred to an Independent Accountant under the contract for expert determination – whether the Independent Accountant acted as an expert or as an arbitrator – whether there was a manifest error – where the expert determination was held to be final and binding

711 Hogben Pty Ltd v Tadros [2016] NSWSC 1683, cited

Drane v Aqualyng Holdings [2017] QSC 233, cited

Funtastic Ltd v Madman Film and Media Pty Ltd [2016] VSC 708, cited

Glenvill Projects Pty Ltd & Ors v North North Melbourne Pty Ltd [2013] VSC 717, cited

Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314, cited

Natoli v Walker (1994) 217 ALR 201, cited

Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd [2008] QCA 160, cited

Sutcliffe v Thackrah [1974] AC 727, cited

TX Australia Pty Ltd v Broadcast Australia Pty Ltd (2013) 29 BCL 266, cited

Veba Oil Supply & Trading GmbH v Petrotrade Inc [2001] EWCA Civ 1832, cited

Westport Insurance Corporation v Gordian Runoff Ltd (2011) 244 CLR 239, cited

COUNSEL:	P Franco QC and S Eggins for the applicants/defendants KE Downes QC and SB Whitten for the respondent/plaintiff
SOLICITORS:	Minter Ellison for the applicants ClarkeKann Lawyers for the respondents

Jackson J:

[1] This proceeding is to determine the separate questions raised by the plaintiff's challenge to the validity of an expert determination. That challenge forms one part of a wider dispute between the plaintiff and the defendants as to their respective rights under a written contract styled the Sale and Purchase Agreement dated 4 April 2016 ("SPA"). Depending on the outcome of the plaintiff's challenge to the validity of the expert determination, other related disputes between the parties in the wider proceeding may be affected.

Uncontentious facts

[2] The Foxleigh Coal Mine is an open cut mine located approximately 12 kilometres south west of Middlemount in Central Queensland. The mine is held and operated by the Foxleigh Joint Venture. A related company of the defendants, Anglo Coal (Foxleigh) Pty Ltd, directly held a 30 percent interest in the joint venture and held two-thirds of the shares in another company that directly held a 60 percent interest in the joint venture. The parties described Anglo Coal (Foxleigh) Pty Ltd as holding, in effect, a 70 percent interest in the joint venture.

[3] By the SPA, the first defendant, (styled as the "Vendor") agreed to sell all of its shares in Anglo Coal (Foxleigh) Pty Ltd to the plaintiff (styled as the "Purchaser"). The second defendant was a party to the SPA as guarantor of the first defendant (and was styled "Vendor Guarantor").

[4] By cl 3.1, the Vendor as legal and beneficial owner, agreed to sell to the Purchaser and the Purchaser agreed to buy from the Vendor the shares in the company for the "Purchase Price", subject to the SPA. The Purchase Price was defined to have the meaning given in cl 4.1, being:

> "The Purchase Price is the Initial Purchase Price, subject to adjustment under clauses 4.2 and 12.12."

[5] The adjustment provided for in cl 4.2 is relevant to this case:

> "The Purchase Price will be adjusted by adding to it an amount (that may be positive or negative) equal to the Final Completion Amount less the Base Completion Amount."

[6] Clause 1.1 defined the "Final Completion Amount" to mean the amount determined in accordance with cl 8 and Schedule 11, and so described in Schedule 12, as agreed by the parties or determined by the "Independent Accountant", as the case may be. Clause 8 provides:

> "8. Completion Accounts
>
> **8.1 Completion Accounts**
>
> The Purchaser must as soon as practicable after the Completion Date, and in any event no later than 40 Business Days after the Completion Date, prepare the Completion Accounts and provide them to the Vendor with the Purchaser's calculation of the Final Completion Amount calculated in accordance with this clause 8.
>
> **8.2 Basis of preparation**
>
> The Completion Accounts must be prepared, and the Final Completion Amount must be calculated, in accordance with the Completion Accounts principles set out in Schedule 11 and in accordance with Schedule 12.
>
> **8.3 Access to information**
>
> The Purchaser must ensure that all information and assistance requested by the Vendor is given to the Vendor to review the Completion

Accounts and must permit Representatives of the Vendor to have reasonable access to, and take extracts from or make copies of the Records to review the Completion Accounts.

8.4 Review of Completion Accounts

If the Vendor does not dispute the Completion Accounts or the Final Completion Amount within 40 Business Days after the date on which the Final Completion Amount is provided by the Purchaser to the Vendor under clause 8.1 (**Final Objection Date**) those accounts will be taken to be agreed by the parties as the final Completion Accounts and the Final Completion Amount will be final and binding on the parties. If the Vendor disputes the Completion Accounts or the Final Completion Amount before the Final Objection Date, the dispute will be determined in accordance with clause 8.5.

8.5 Dispute Resolution procedure

(a) If the Vendor disputes the Completion Accounts or the Final Completion Amount, the Vendor must give the Purchaser a notice (**Dispute Notice**) before the Final Objection Date setting out:

(i) reasonable details of each matter in dispute; and

(ii) the reasons why each matter is disputed.

(b) Within 10 Business Days of the Vendor giving the Purchaser a Dispute Notice, the Purchaser must give the Vendor a response in writing on the disputed matters and setting out any additional matters in dispute (**Response**).

(c) If the Vendor and the Purchaser have not resolved the dispute (including in respect of any additional matters in dispute set out in a Response) within 10 Business Days of the Purchaser giving the Response to the Vendor, the dispute must promptly be submitted for determination to the Independent Accountant to determine the matter or matters in dispute.

(d) The Independent Accountant must be agreed by the Vendor and the Purchaser. If the Vendor and the Purchaser cannot agree within five Business Days of a Response being received by the Vendor, then either the Vendor or the Purchaser may request that the President of the Institute of Chartered Accountants in Australia (**ICAA President**) nominate the Independent Accountant.

(e) If the Vendor or the Purchaser requests that the ICAA President nominate the Independent Accountant, the parties must comply with all requirements of the ICAA President for the provision of that nomination including to provide the ICAA President with:

(i) a copy of relevant provisions of this agreement;

(ii) an executed copy of any release or similar document required by the ICAA President;

(iii) a description of the dispute or issue to be resolved by the Independent Accountant, being the dispute in relation to the Completion Accounts or the Final Completion Amount; and

(iv) the approximate value of, and the technical area involved in, the dispute.

If the ICAA President nominates a list of persons to be the Independent Accountant rather than one particular person, the first person named on that list will be the Independent Accountant.

(f) The disputed matters must be referred to the Independent Accountant by written submission which must include the Completion Accounts or the Final Completion Amount (as applicable), the Dispute Notice, the Response and an extract of the relevant provisions of this agreement. The Independent Accountant must also be instructed to finish its determination no later than 20 Business Days after its appointment (or another period agreed by the Vendor and the Purchaser).

(g) The Vendor and the Purchaser must promptly supply the Independent Accountant with any information, assistance and cooperation requested in writing by the Independent Accountant in connection with its determination. All correspondence between the Independent Accountant and a party must be copied to the other parties (except the Vendor Guarantor).

(h) The Independent Accountant must act as an expert and not as an arbitrator and its written determination will be final and binding on the parties in the absence of manifest error and the Completion Accounts or the Final Completion Amount (as applicable) will be deemed to be amended accordingly and will be taken to comprise the final Completion Accounts and the Final Completion Amount and will be final and binding on the parties.

8.6 Costs

The costs of the:

(a) ICAA President (if requested) in providing his or her nomination of the Independent Accountant; and

(b) Independent Accountant (if instructed),

will be borne by the Vendor as to one half, and the Purchaser as to one half unless, in respect of the costs of the Independent Accountant only, the Independent Accountant decides otherwise having regard to the relative position of the parties on the disputed matters.

8.7 Payment in respect of Completion Adjustment Amount

(a) If the Completion Adjustment Amount is more than the Estimated Completion Adjustment Amount, then on the Determination Date the Purchaser must pay an amount equal to the excess to the Vendor.

(b) If the Completion Adjustment Amount is less than the Estimated Completion Adjustment Amount, then on the Determination Date the Vendor must pay an amount equal to the shortfall to the Purchaser."

[7] Schedule 11 provides:

"1. Accounting Principles

1.1 Principles and Policies

The Completion Accounts must be prepared in accordance with, in order of precedence:

(a) The format prescribed in Schedule 12C (with a worked example of Schedule 12C based on the trial balance set out at Schedule 12B);

(b) Where an item is not covered by the accounting principles, policies and procedures referred to in clause (a), the specific principles, policies and procedures set out in part 1.2 of this Schedule 11.

(c) Where an item is not covered by the accounting principles, policies and procedures referred to in clause (a) or (b), in a manner consistent with the principles, policies and procedures used to prepare the trial balance.

(d) Where an item is not covered by the accounting principles, policies and procedures referred to in clause (a), (b) or (c), in a manner consistent with the principles, policies and procedures used to prepare the Accounts; and

(e) Where an item is not covered by the accounting principles, policies and procedures referred to in clause (a), (b), (c) or (d), in accordance with the Accounting Standards.

1.2 Specific principles, policies and procedures

Specific principles, policies and procedures that will apply to the Completion Accounts preparation include:

(a) No item shall be included more than once and no item shall be included or excluded solely on the grounds of materiality.

(b) **Working Capital Amount**

The Working Capital Amount must be calculated having regard to the 'Working Capital' line items referred to in Schedule 12C.

To the extent not already a line item in Schedule 12C, the Working Capital Amount must:

(i) include amounts due and payable to the Vendor or any related body corporate of the Vendor in the ordinary course of operations, but excluding Intra-Group Debt;

(ii) provide for employee entitlement liabilities shall be multiplied by 0.7;

(iii) include general ledger accounts for FOXO that would ordinarily be categorised as a Working Capital Amount if Schedule 12 was prepared for FOXO; and

(iv) include general ledger accounts for FOXM that would ordinarily be categorised as a Working Capital Amount if Schedule 12 was prepared for FOXM.

(c) **Net Debt Amount**

The Net Debt Amount must be calculated having regard to the 'Net Debt' line items referred to in Schedule 12C. To the extent not already a line item in Schedule 12C, Net Debt Amount must:

(i) exclude amounts due and payable to the Vendor or any related body corporate of the Vendor in the ordinary course of operations;

(ii) exclude the Intra-Group Debt;

(iii) include general ledger accounts for FOXO that would ordinarily be categorised as a Net Debt Amount if Schedule 12 was prepared for FOXO; and

(iv) include general ledger accounts for FOXM that would ordinarily be categorised as a Net Debt Amount if Schedule 12 was prepared for FOXM."

[8] Schedule 12 is too lengthy to set out in these reasons, but comprises:

(a) a pro forma or draft chart of accounts and calculations to be performed, headed "Schedule 12A – Calculation of Estimated Completion Adjustment Amount" in seven pages;

(b) a further draft chart of accounts in a worked example as at September 2014 headed "Schedule 12B – Example of Schedule 12C, as at 31 December 2014, for illustrative purposes only and does not affect the preparation of the Completion Accounts in accordance with this agreement" in five pages; and

(c) a further pro-forma or draft chart of accounts and calculations headed "Schedule 12C" - Completion Accounts" in seven pages.

[9] The purpose of Schedule 12C is to identify particular ledger accounts from the Company's chart of accounts that were to be included or excluded from consideration in the preparation of the Completion Accounts and how the Final Completion Amount was to be calculated from those accounts. The purpose of Schedule 12B is to illustrate a

worked example of the preparation of the Completion Accounts and the Final Completion Amount, using data as at September 2014, for illustrative purposes only. The purpose of Schedule 12A is to set out the format of the chart of accounts, without the columns of inclusions or exclusions provided for in Schedule 12C.

[10] Each of Schedule 12A, 12B and 12C refers to a "Total per trial balance" in relation to the preparation of the Completion Accounts and the calculation of the Final Completion Amount.

[11] As well, there were 14 additional pages attached to the end of Schedule 12 comprising a printout of a report, presumably from the Company's computerised accounting database, to which the parties made no reference in submissions.

[12] It is not in dispute that the plaintiff as Purchaser prepared the Completion Accounts provided for in cl 8.1 and provided them to the first defendant as Vendor. It is in dispute that the Purchaser's preparation of the Completion Accounts and calculation of the Final Completion Amount were in accordance with cl 8.2.

[13] It is also not in dispute that the first defendant as Vendor disputed the Completion Accounts and the Final Completion Amount in accordance with cl 8.4. Accordingly, the parties engaged the dispute resolution procedure provided for under cl 8.5. In the result, the dispute was submitted to the Independent Accountant to determine the matter or matters in dispute in accordance with cl 8.5(c).

[14] It is also not in dispute that on 6 July 2018, the Independent Accountant provided a written expert determination in relation to the disputed matters. Not all of the disputed matters remain in contest between the parties. It is necessary to refer only to those that do.

[15] In the result, the plaintiff challenges the validity of the Independent Accountant's expert determination as to two matters or subject areas on a variety of grounds. It is necessary to set out the factual history in slightly more detail.

[16] On 29 August 2016, Completion under the SPA occurred.

[17] On 31 October 2016, the plaintiff provided the first defendant with its Completion Accounts along with its calculation of the Final Completion Amount under cl 8.1.

[18] By its Completion Accounts, the plaintiff adjusted the first defendant's August 2016 trial balance. The relevant adjustments are identified in paragraph 15(b)(i) and 15(b)(iii) of the Affidavit of Michael Thomas Fletcher filed on 14 August 2018. The plaintiff's Completion Accounts would have resulted in the calculation of the Final Completion Amount of $44,965,836 and required the plaintiff to pay the first defendant the amount of $3,421,389.

[19] On 30 January 2017, (a date extended by agreement from that allowed under cl 8.5(a)), the first defendant delivered a Dispute Notice under cl 8.5(a) to the plaintiff together with a schedule.

[20] On 23 February 2017, the plaintiff provided a Response under cl 8.5(b) to the Dispute Notice.

[21] Following the Response, two matters, comprising four sub-issues, in the Completion Accounts remain in dispute. The two matters are termed the "Loader Maintenance Accrual Issue" and the "Rail and Port Costs Accrual Issue".

[22] On 11 June 2018, Simon Neill of PricewaterhouseCoopers ("PwC") Brisbane signed an engagement letter by which PwC agreed to be appointed the Independent Accountant. The plaintiff and the first defendant signed the engagement letter by way of acceptance.

[23] Following submissions made by the parties, the Independent Expert requested additional information that was provided by the parties.

[24] On 6 July 2018, the Independent Accountant delivered its expert determination ("Determination").

[25] On 17 July 2018, the Independent Accountant determined the Final Completion Amount was $49,791,138 and stated that the amount payable by the plaintiff was $8,246,691.

[26] On 1 August 2018, the plaintiff's solicitors wrote to the first defendant stating that the plaintiff took issue with the Determination in respect of various matters and that the plaintiff disputed the liability to pay the amount of $3,560,577 of the amount determined to be payable by the Independent Accountant.

Independent Accountant's Determination

[27] The Determination takes the form of a report with a covering letter. The report is divided into two sections headed "Executive Report", "Matters in Dispute" and attaches an appendix in the form of the engagement letter. The Executive Report described the Independent Accountant's scope of work as follows:

> "The scope and purpose of our determination is to consider whether the Completion Accounts have been prepared in accordance with the terms of the SPA having regard specifically to the Disputed Matters and reporting to you on our findings.
>
> In forming our opinion on each of the Disputed Matters, we have considered the following:
>
> - The SPA requirements for the preparation of the Completion Accounts (in particular the requirements of Schedule 11 and Schedule 12);
> - The information provided by the Vendor and Purchaser pursuant to clause 8.5(g) of the SPA being the:
>   - Vendor's first submission dated 1 May 2018;
>   - Purchaser's first submission dated 1 May 2018;
>   - Vendor's reply submission dated 10 May 2018;
>   - Purchaser's reply submission dated 11 May 2018;
>   - Vendor's responses to requested information dated 29 June 2018 and 3 July 2018; and
>   - Purchaser's responses to requested information dated 4 July 2018.

- The accounting policies and procedures consistently applied by Foxleigh in the preparation and maintenance of its Trial Balance;
- Common industry practice in relation to the relevant accounting practices;
- Who benefited/incurred loss based on the supporting evidence provided."

[28] The Independent Accountant summarised the amounts in dispute in respect of the Disputed Matters in a table. The following entries remain relevant:

Description	**Purchaser**	**Vendor**	**Disputed Amount**
Accrual in respect of loader maintenance	$336,000		$336,000
Accrual in respect of rail and port costs	$5,710,139	$2,499,072	$3,211,067

[29] Under the table, the Independent Accountant stated, *inter alia*, that:

> "Our procedures and determination does (sic) not consider any matters other than those outlined above."

[30] The Executive Report continues by setting out relevant provisions of the SPA, including cl 1.1 of Schedule 11 as set out above. The final section of the Executive Report sets out the Independent Accountant's views in a table and with accounting notes. Relevantly, the table discloses that the Independent Accountant was in favour of the Vendor's position in respect of the Loader Maintenance Accrual Issue in the sum of $336,000 and in favour of the Vendor's position in respect of the Rail and Port Costs Accrual Issue in the sum of $3,224,577, as adjustments that should be made to the Purchaser's Completion Accounts.

[31] In footnote 2, the Independent Accountant stated the view that "no accrual or any other entry should be booked in the Completion Accounts to reduce the value of the spare parts inventory capitalised by the Vendor in the August 2016 Trial Balance" and referred to pages 12 to 14 of the "Matters in Dispute" section of the report.

[32] In footnote 4, the Independent Accountant expressed the view that the "corrections made by the Vendor in the August 2016 Trial Balance, including the true-up of the Take or Pay accruals were consistent with the preparation of previous trial balances and would be required for the preparation of reporting period accounts, such as the Completion Accounts. As such, no additional accrual in respect of rail and port costs was considered necessary." A further note stated that the Vendor's accrual was adjusted down by $13,510 to reflect the final actual position in relation to rail and port charges based on the evidence provided by the Vendor. Cross-reference is made to pages 18 to 20 of the "Matters in Dispute" section of the report.

Loader Maintenance Accrual Issue

[33] On page 12, in the Matters in Dispute section of the report, the Independent Accountant summarised the position in relation to the Loader Maintenance Accrual Issue as follows:

> "(a) In the August 2016 Trial Balance, the Vendor capitalised $336,000 of inventory spare parts. These parts were purchased during December 2015 and January 2016 to perform maintenance repairs on its Komatsu WA900-3 Loader, with the total cost capitalised representing the purchase price of the parts. At Completion Date, the repairs were yet to be performed, leaving the spare parts inventory on hand and available for use."

[34] The Vendor submitted that capitalising the spare parts inventory in the August 2016 trial balance was done in accordance with the accounting policies and principles set out in Anglo American's "Process for Management of Goods Holding Procedure" manual and that it was also consistent with the FY15 Annual Report and AASB 102 – Inventories.

[35] The Vendor submitted that the Company had both an accounting policy in relation to spare parts and consumables and a procedure for management of goods holding procedure that were referred to by the Independent Accountant. The policy identified the basis on which spare parts were to be valued and required a review to establish the extent of any surplus items and for making provision for any potential loss on disposals. The procedure specified that items held in goods holding should be charged to the relevant job, then if not used within 45 days, but needed at a later date, they should be booked into stock.

[36] The Independent Accountant opined that in accordance with the policy and procedure, parts purchased for use in repairs are not ordinarily charged to the income statement until those parts were consumed in the repair process. Next the Independent Accountant recorded the Vendor's claim that due to an oversight, the cost of the relevant parts, previously expensed to the income statement, was not reversed and capitalised into stock when the loader repairs scheduled for April 2016 were delayed. The Vendor had asserted that it became aware of this treatment in August 2016 and sought to rectify the position by capitalising the parts in the Trial Balance.

[37] The Independent Accountant recorded the Purchaser's position that in capitalising the spare parts in the August 2016 trial balance, the Vendor had not prepared the Completion Accounts according to the order of precedence specified in paragraph 1.1 of Schedule 11.

[38] The Independent Accountant expressed the opinion on page 14 of the report, that:

> "We found that Schedule 11 paragraphs 1.1(a) and (b) were not conclusive on guiding us as to the basis of preparation of the Completion Accounts, which directed us to paragraph 1.1(c)… We note that the Vendor expensed the spare parts in the Trial Balance in December 2015 and January 2016 when they were purchased. The spare parts remained in the Income Statement until an adjustment was made by the Vendor in August 2016, capitalising the spare parts in inventory.
>
> The order of precedence gives weight to the 'consistent application of the principles, policies and procedures used to prepare the trial balance'. Only where a 'consistent' trend cannot be established shall the Completion Accounts be prepared in a manner consistent with the principles, policies and procedures used to prepare the Accounts or in accordance with the Australian Accounting Standards.

> As such, we consider the 'consistent' treatment in preparing the Trial Balance relating to this item to be the expensing of the spare parts.
>
> Although capitalisation did not occur until the preparation of the August 2016 Trial Balance, this accounting position is consistent with the accounting policies, procedures and principles which should have been applied (i.e. capitalised) in accordance with the Management of Goods Holding Policy.
>
> Hence, such policy (capitalisation) should be applied in the preparation of the Trial Balance which is also consistent with the accounting policy applied in preparing the trial balance for the 2015 Annual Report of Vendor."

[39] The Independent Accountant also considered the physical condition and location of the spare parts inventory, concluding that they were available for use in maintaining and repairing the loader with no evidence to suggest damage or obsolescence to the spare parts. In the result, the Independent Accountant concluded that an adjustment should be made in preparing the Completion Accounts with respect to the loader spare parts, consistent with the Vendor's accounting policy.

Rail and Port Costs Accrual Issue

[40] On page 18, in the Matters in Dispute section of the report, the Independent Accountant summarised the Vendor's position where it calculated the August accruals for 'Account 31450 – Sundry accruals – General' of $1,544,697 for rail and $940,865 for port, totalling $2,485,562 in respect of rail and port costs.

[41] The Independent Accountant noted that the Vendor claimed that the adjusted account had been prepared in accordance with the principles, policies and procedures used to prepare the trial balance consistently, whereby a liability for rail and port costs was only recognised when it was probable that an outflow of resources embodying economic benefits would result from the settlement of a present obligation and the amount at which the settlement will take place can be measured reliably.

[42] The Vendor claimed that in carrying out the August 2016 month end accruals, apparent errors caused it to review the August mine operating plan ("MOP") which was prepared on the basis that the accrual represented the difference between the expected year to date port and rail costs as per the plan and the actual year to date costs as per the trial balance. In effect, the Vendor performed an exercise described as trueing-up the Company's take or pay obligations under its contracts, having regard to actual expenditure. A change of methodology was also made in respect of the port and rail calculation, resulting in an increase in the accrual position to align to the methodology used across all the Vendor's mine sites and so as to bring the Company's practice into line with the principles, policies and procedures used to prepare the trial balance.

[43] On page 19, the Independent Accountant recorded the Purchaser's position as being that prior to the adjustment of the August 2016 trial balance for the accruals of port and rail charges, the Vendor had a policy of not carrying out a true up of the accruals until November or December each year.

[44] On page 20, the Independent Accountant set out its view that from a review of the information provided by both parties, the changes made by the Vendor in preparation of the August 2016 trial balance were made as follows:

> "(a) Errors were noted in the initial calculation of the MOP August file used in the preparation of the August Trial Balance;
>
> (b) Changes in methodologies were used to align the port and rail monthly accrual with other mine sites owned by the Vendor (resulting in an increase to the accrual); and
>
> (c) Upon notification of the take or pay positions from infrastructure providers for the contract year ended 30 June 2016, the Vendor sought to true up the 2015/16 port and rail accrual to reflect the final positions for that contract period."

[45] The Independent Accountant then opined that although adjustments to correct calculation errors were not made on a consistent basis, the correction should be made in determining the final monthly accrual for port and rail costs in the Completion Accounts. Further, the Independent Accountant opined that finalisation of the take or pay position for the FY15/FY16 year and accruing for only invoiced obligations in the August 2016 Trial Balance was consistent with the Vendor's policy of only recognising a liability where there is a present obligation that will require a further outflow of economic benefits (i.e. cash).

Acting as an arbitrator

[46] The plaintiff's challenge to the validity of the Determination is wide ranging. The overarching contention is that the Independent Accountant failed to perform the task required by cl 8.5(c) to 8.5(h) of the SPA to determine the matters in dispute as an expert and in accordance with the requirements of cl 8 and Schedules 11 and 12.

[47] The first ground of invalidity advanced by the plaintiff is that the Independent Accountant acted as an arbitrator not as an expert.

[48] An arbitration is subject to statutory regulation, now in this State in the form of the *Commercial Arbitration Act* 2015 (Qld). There have been arbitration statutes in force for over a hundred years. In contrast, an expert determination is not subject to either statutory regulation or common law principles as to the conduct of arbitrations. The distinction between an expert determination of a dispute and an arbitration of the same dispute is well recognised.[1]

[49] By cl 8.5(h) of the SPA the Independent Expert must act as an expert not an arbitrator. It follows that should it cross the line between what amounts to an expert determination into what amounts to an arbitration the determination will not be made in accordance with the contract and will not bind the parties in the absence of their agreement. The plaintiff submits that the Independent Expert crossed that line because it requested further information from the parties, after receiving their written submissions, before making the Determination.

[50] Clause 8.5(f) of the SPA provides that the disputed matters must be referred to the Independent Accountant by written submission which must include the Completion Accounts or the Final Completion Amount (as applicable), the Dispute Notice, the

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[1] *Sutcliffe v Thackrah* [1974] AC 727; *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 336.

Response and an extract of the relevant provisions of the agreement. But, in addition, cl 8.5(g) provides that the Vendor and the Purchaser must promptly supply the Independent Accountant with any information, assistance and cooperation requested in writing by the Independent Accountant in connection with its determination.

[51] The plaintiff submits that the Independent Accountant acted as an arbitrator by calling for and receiving submissions and evidence from the parties. At that level of generality the argument must fail. Requesting submissions or information on particular points is not a matter that distinguishes an arbitrator from an expert. Receiving documents from the parties is not hearing evidence in the sense of a judicial or quasi-judicial proceeding. [2]

[52] In my view, there is no substance in the argument that by requesting further information from the parties after receipt of their submissions, or in having regard to that information as well as its own expertise in accounting, in this case, the Independent Expert crossed the line between an expert determination and an arbitration. What the Independent Accountant did fell within the powers conferred by cl 8.5(f) under which the dispute is to be referred by written submission and the parties must promptly supply the Independent Accountant with any information assistance and cooperation it may request.

[53] The plaintiff also submits that the Independent Accountant took into account matters not relevant to or within the scope of its contractual function but they are not matters which would constitute acting as an arbitrator.

Manifest error

[54] Both parties submit that there are two relevant legal bases for the plaintiff to challenge the validity of the Determination: first, if the Independent Accountant did not carry out the task required by cl 8 of the SPA; second, if the Determination is affected by a manifest error, within the meaning of cl 8.5(h). It is not submitted by the defendants that invalidity requires both a failure to carry out the task required by the contract and that the relevant error must be a manifest error.

[55] However, the parties are in dispute as to what constitutes manifest error within the meaning of cl 8.5(h). Simplifying, the plaintiff submits that the error must be manifest, in the sense that it appears on the face of the written determination.[3] The defendants submit, in effect, that it must also be sufficiently obvious and material in nature to warrant the conclusion of invalidity.[4]

[56] In advancing these submissions, the parties relied on case law drawn from both the independent expert determination and arbitration contexts. Under the now repealed *Commercial Arbitration Act* 1984 (NSW) and its comparators in other State jurisdictions, it was a condition of the right of appeal from an arbitral award that there be a "manifest error" of law on the face of the award. Some cases required not only that the error be

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2 Compare *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160, [27]-[37] [94]-[95], [100].

3 *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* (2013) 29 BCL 266, [20]; *Glenvill Projects Pty Ltd v North North Melbourne Pty Ltd & Ors* [2013] VSC 717, [68].

4 *Drane v Aqualyng Holdings* [2017] QSC 233, [17]-[19]; *711 Hogben Pty Ltd v Tadros* [2016] NSWSC 1683, [19]; *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708, [52]-[54]; *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832, [33].

apparent on the face of the award but that it must be of a serious kind.[5] But the High Court held that it was only required that it be apparent on the face of the award, including the reasons, and there was no additional requirement of "egregious error".[6]

[57] It will be necessary to return to this question only if there is an error made by the Independent Accountant apparent on the face of the Determination.

Trial balance

[58] A question of importance is the meaning of the term "trial balance" in cl 1.1(c) of Schedule 11. It is not a term used outside Schedule 11 in the SPA, except for the references to a trial balance in Schedules 12A, 12B and 12C previously mentioned. In those Schedules, the reference is to executing the trial balance for the preparation of the Completion Accounts themselves. That is not its meaning in cl 1.1(c). It is not in dispute between the parties that the "trial balance" referred to in cl 1.1(c) must be to some one or more of the monthly trial balances carried out by the Company before the preparation of the Completion Accounts.

[59] It may seem trite, but it is appropriate to identify what a trial balance is. The Australian Accounting Standards Board Framework for the Preparation of Financial Statements applies as part of the Accounting Standards to a company, such as the first defendant, by virtue of Part 2M of the *Corporations Act* 2001 (Cth). A simplified description of some of the concepts under the framework is in evidence, and includes definitions of well-known accounting concepts as follows:

Journal entries	General ledger	Trial balance	Reports
• Chronological record of entities transactions • Classifies the accounts affected • Provides initial summarisation (eg transaction, date, amount, increase or decrease of the accounts affected)	• Separate record for each journal entry • Transactions effects and balances displayed • Organised in accordance with the chart of accounts	• Organised list of all general ledger accounts together with their balances at a date	• Periodic reports (eg annual, semi-annual) of financial position (ie balance sheet) and financial performance (ie profit and loss statement)

[60] The "trial balance" referred to in cl 1.1(c) of Schedule 11 is not to be confused with the accounting principles, policies and procedures used to prepare the accounts from which the list and balances of the ledger accounts comprising the trial balance are compiled.

[61] Second, I note, as context for the meaning of "trial balance" in cl 1.1(c) of Schedule 11, that there is a reference in cl 1.1(a) to the trial balance set out in Schedule 12B, being the worked example as at September 14 for illustrative purposes. However, neither of the parties contended that it was the accounting principles, policies and procedures used in preparation of the accounts only for the month of September 14, as compiled into the list

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5 *Natoli v Walker* (1994) 217 ALR 201, 215-217.

6 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 267-268 [42]-[45] and 301 [163].

of accounts and balances that formed the trial balance as at that month, to which regard must be had under cl 1.1(c).

Was the task confined to applying clause 1.1(c) of Schedule 11?

[62] Clause 1.1(c) of Schedule 11 is part of the contractual mechanism for preparation of the Completion Accounts to arrive at the Final Completion Amount. Clause 1.1 provides for an "order of precedence", by an iterative process of applying the relevant group or groups of principles, policies and procedures under paragraphs (a) to (e) successively, until an answer is ascertained. Each subsequent step is conditioned on the relevant item not being covered by the principles, policies and procedures to be taken into account up to the end of the application of the prior step.

[63] The plaintiff contends, in effect, that the dispute referred to the Independent Expert was confined to how to apply cl 1.1(c) of those steps, relying upon the Vendor's Notice of Dispute as confining the dispute in that respect.

[64] In fact, the Vendor's Notice of Dispute, by the attached Schedule, stated:

> "12. The appropriate calculation of any of the Disputed Accounts:
>
> (a) is not a matter that can be ascertained from the format prescribed in Schedule 12C of the Foxleigh SPA; and
>
> (b) is not specified in Schedule 11, Clause 1.2 of the Foxleigh SPA, as this clause does not identify the principles, policies and procedures to be used when calculating items relevant to the Disputed Accounts.
>
> 13. The Disputed Accounts are therefore, by Schedule 11, Clause 1.1(c), to be prepared in a manner consistent with the principles, policies and procedures used to prepare the trial balance.
>
> 14. **To the extent an item relevant to the Disputed Accounts is not covered by the principles, policies and procedures used to prepare the trial balance, then the item is to be prepared in accordance with clauses 1.1(d) and 1.1(e) in that order of precedence.** However, in practice those principles, policies and procedures were adopted by the Vendor and Company in preparation of the trial balance." (emphasis added)

[65] Even if, properly construed, the disputed matter referred to the Independent Expert included an agreement that clause 1(a) and 1(b) of Schedule 11 did not cover the items in dispute, unless the parties expressly or impliedly agreed to limit the Independent Expert's determination to the application of cl 1.1(c), the task was not so confined. The Independent Expert was required by cl 1.1 of Schedule 11 to follow the order of precedence, so that if it was not satisfied that cl 1.1(c) covered an item in dispute, it was required to continue to cl 1.1(d) and so on.

[66] In my view, paragraph 14 of the Vendor's Notice of Dispute made clear that if cl 1.1(a), (b) and (c) did not cover an item, the Independent Expert was to follow the order of precedence onto cls 1.1(d) and 1.1(e).

[67] I reject the contention that the Independent Expert's task was contractually constrained to the application of cl 1.1(c) to the relevant items.

Analysis of the Loader Maintenance Accrual Issue

[68] From the time of the Company's acquisition of the relevant loader spare parts in December 2015 and January 2016, the Company posted the amount of the acquisition costs to an expense account, with the consequence that they were reflected in the income statement for the relevant accounting period, and did not increase the balance of any relevant asset account in the ledger accounts.

[69] In the August 2016 trial balance the Company reposted the amount of the acquisition costs of those loader spare parts to inventory and thereby increased the balance of an asset account. The amount was no longer reflected as being for an item or items that had been expensed in the income statement for the relevant period.

[70] Accordingly, for the Company's trial balance at month's end, for January 2016 through to July 2016, the relevant spare parts were treated as items of expense, even though they had not been used in the repair or maintenance of the loader at those times, and even though at the end of each month they remained on hand and in the inventory of spare parts available for use. In a general sense, therefore, it is not surprising that in August 2016 the Company sought to re-post the relevant items into inventory as the appropriate asset account.

[71] The plaintiff submits that to do so ignored the requirements of cl 1.1(c) of Schedule 11. It submits that because the Company had in fact posted the relevant items as expenses in the accounts on which the Company's monthly trial balances were compiled, cl 1.1(c) covered their treatment so that they must be included in the Completion Accounts on that basis and the Final Completion Amount must be determined on the same basis.

[72] In my view, the plaintiff's submission does not pay close enough attention to the text of cl 1.1, in general, and that of cl 1.1(c), in particular. Clause 1.1(a) directs attention to the format of the trial balance in Schedule 12C, meaning the list of ledger accounts and the directions as to the included and excluded accounts for compiling that trial balance.

[73] Clause 1.1(b) is engaged where the accounting principles, policies and procedures of 1.1(a) do not cover an item. There is an uneasy textual assumption that Schedule 12C articulates relevant accounting principles, policies and procedures. It does not explicitly do so, but the format of the pro forma schedule reflects a number of recognisable accounting conventions that presumably permit at least some principles, policies and procedures to be discerned. In that context, cl 1.1(b) requires the Completion Accounts to be prepared in accordance with the specific principles, policies and procedures set out in part 1.2 of Schedule 11.

[74] If the item is still not covered, cl 1.1(c) requires the Completion Accounts to be prepared **in a manner consistent with the principles, policies and procedures used** to prepare the trial balance (emphasis added). Assuming that means the month's end trial balances, from time to time, a point that was not contested by the parties, the inquiry is as to the relevant principle, policy or procedure that was used to prepare a relevant trial balance in respect of the item.

[75] The plaintiff submits that because, in fact, the relevant items for the spare parts for the loader maintenance accrual issue were posted to an expense account for the prior months, that means cl 1.1(c) requires that the Completion Accounts must be prepared on the same basis, without regard to the adjustments made by the Company for its August 2016 trial balance.

[76] In my view, that is neither what cl 1.1(c) provides, nor what it means on its proper construction. The fact that an item is posted to a particular account is not an accounting principle, although it might be expected to have been done in accordance with such a principle. The same applies in relation to an accounting policy. It might be arguable that if an item is regularly posted in a particular way, that amounts to an accounting "procedure" in the preparation of the trial balances. But, logically, that is not an absolute proposition. If it were, the Company would not be able to correct any error made in posting items to a particular account, simply because the error was made in the first place and then persisted, in the sense of not being corrected, over a number of monthly trial balances. Not only that, it assumes that the accounting treatment of an item acquired cannot vary over time, depending on the transaction that is being recorded and the use to which the subject of the transaction is to be put.

[77] The treatment of the spare parts acquired for the loader maintenance usefully illustrates the point. If the parts were intended to be consumed by using them in a repair operation shortly after acquisition, the principle for posting the acquisition cost to an expense account emerges. On the other hand, if the parts were acquired so as to be available for use at an indefinite future time, not immediately, the principle for posting them to inventory as an asset account until they are consumed by using them in a repair appears.

[78] What then was the accounting principle, policy or procedure that the Company employed in treating the acquisition of the spare parts for the loader maintenance as expenses in the December 2015 and January 2016 trial balances and the monthly trial balances thereafter, until the August 2016 trial balance and the preparation of the Completion Accounts?

[79] The plaintiff submits that the answer to that question was foreclosed, so far as the Independent Accountant's task was to apply cl 1.1(c) of Schedule 11, because "whatever policies and procedures [the Company] may have had in place, the procedures in fact used to prepare the trial balance prior to August 2018 were to expense these spare parts."

[80] I do not agree. In making the expert determination required under cl 8.5(c) to (h), the Independent Accountant was obliged to consider, for itself, the relevant principles, procedures and policies used in preparing the monthly trial balances and was not confined, in doing so, to the entries made for items in the accounts for the December 2015 to July 2016 trial balances.

[81] It follows, in my view, that the plaintiff's challenge to the Determination based on the contentions that the Independent Accountant was necessarily required to apply cl 1.1(c) and, in the application of that clause, necessarily required to conclude that the treatment of the relevant spare parts in the Company's December 2015 to July 2016 trial balances constituted a procedure that dictated how that item must be treated for the Completion Accounts, must fail.

[82] In reaching that conclusion I have considered but am not assisted by the expert accounting evidence tendered by the plaintiff in support of its contentions. Whether the Company

did or did not do something is a matter of fact, including whether or not the Company had or did not have a particular policy or procedure and whether the Company posted an item to one account or another, not a matter of expert opinion. The meaning of cl 1.1 of Schedule 11 is a question of the proper construction of the SPA as a contract and a matter of law that is not within the province of expert opinion on accounting.

[83] On the other hand, the defendants made detailed submissions as to the submissions made by the parties to the Independent Accountant and as to the facts put before the Independent Accountant, in support of the conclusion that the Independent Accountant was wholly correct in its conclusions. I have considered those submissions and the evidence tendered in this proceeding in support of them, but I refrain from accepting the invitation to engage in that exercise. It is not the court's function to hear the proceeding as if it were an appeal de novo from the expert determination. To do so would undermine the agreement of the parties that the written determination will be final and binding in the absence of manifest error.

Analysis of the Rail and Port Costs Accrual Issue

[84] In preparation of the Company's August 2016 trial balance, three adjustments were made by the Company to the accounts for the amounts in respect of "take or pay" liabilities for rail and port costs. Although the parties did not explicitly explain the nature of these liabilities, I assume them to be in the nature of take or pay obligations under a contract or contracts to rail coal to a coal terminal for shipping and take or pay obligations under a contract or contracts to load coal onto ships at the coal terminal, or similar.

[85] The obligations under such contracts create liabilities to pay amounts that the Company accrued in the accounts used to compile the trial balances on a monthly basis. It is not in dispute that during the relevant months at and from the time of the SPA, the Company accrued take or pay liabilities by a process of estimating in advance what the monthly amounts would be over the following relevant period.

[86] In August 2016, the Company made three adjustments to the amounts accrued in the accounts for those liabilities, summarised as follows:

(a) it increased the amount of the accrued liabilities to correct errors it had identified in the mine operating plan data from which the previous monthly amount had been posted;

(b) it also increased the amount of the accrued liabilities for the months of July 2016 and August 2016 because of a change in the methodology previously used to calculate the amounts of the accruals. The reason for the change was to conform the methodology used at Foxleigh with that used for the Vendor's other mines; and

(c) it decreased the amount of the accrued liabilities to true up the amounts owing up to the end of the financial year on 30 June 2016 based on advice received as to the amounts owing up to that time from the rail and port infrastructure suppliers.

[87] The plaintiff submits that in making the Determination on the amount of the take or pay liabilities for port and rail costs the Independent Accountant did not comply with the requirements of cl 1.1(c) of Schedule 11 on two principal grounds.

[88] First, it relies on the point previously considered and rejected by me that the contractual agreement between the parties was that the Independent Accountant was limited to a

consideration of cl 1.1(c) in making the Determination. I need not consider that ground further.

[89] Second, the plaintiff submits that the rail and port costs take or pay liabilities were an item required to be dealt with in a manner consistent with the principles, policies and procedures used to prepare the trial balance in the prior months in accordance with cl 1.1(c) of Schedule 11. As previously discussed, that contention requires identification of the relevant principle, policy or procedure that had been so used.

[90] The plaintiff appears to submit that in making the true up of the accrual in accordance with the end of financial year advice from the rail and port infrastructure suppliers the Company did not use the correct policy or procedure because the monthly trial balances for an undefined period prior to August 2016 did not make that adjustment.

[91] It was not in dispute (although one of the experts was mistaken as to the month) that in November 2015 the Company performed a "true up" for the financial year ending 30 June 2015 of a similar kind made by the Company in August 2016 for the financial year ending 30 June 2016. Since the true up depended on taking into account information provided by the rail and port infrastructure suppliers as at the end of the financial year, the adjustment was not made before 30 June of the relevant year. Accordingly, the true up for the financial year ending 30 June 2016 did not appear in any monthly trial balance in 2016 prior to July 2016. The failure of it to appear before then cannot have amounted to a policy or procedure of any kind.

[92] The complaint of the plaintiff is that in prior trial balances the Company used a policy or procedure of not making the true up of the accrual in accordance with the end of financial year advice from the port and rail infrastructure suppliers until late in the calendar year (November 2015 for the financial year ending 30 June 2015).

[93] The defendants submitted that in fact there was no such policy or procedure used to prepare the monthly trial balances for prior financial years, because it had only been done in the same way for the item in dispute on one prior occasion, being in November 2015, for the financial year ending 30 June 2015 and that did not support the policy or procedure contended for by the plaintiff.

[94] In my view, strictly speaking, it is not necessary to decide whether the defendants are correct on this question. For the purposes of this proceeding, it is enough that whether there was a relevant accounting policy or procedure used to prepare the trial balance for the purposes of cl 1.1(c), as to the month or months in which the true up was to be carried out, was itself a contestable matter of fact to be determined by the Independent Accountant in making the Determination. In my view, whether or not that fact was correctly found or not found is not relevant to the validity of the Determination as an expert determination.

[95] The plaintiff advanced another curious ground of invalidity based on the increase of the amount of the liabilities for port and rail costs for the months of July 2016 and August 2016 because of the change in the methodology of calculation of the amount. It is curious, first, because the effect of the change in methodology was to increase the balance of a liability account, so that when taken into the Completion Accounts it decreases the amount of the Final Completion Amount payable by the plaintiff to the first defendant. Second, the amount involved is minor (on the pleadings, about $13,000). The plaintiff's

challenge in this respect is reasonably viewed as tactical, rather than substantive, made for the purpose of setting aside the Determination generally in respect of the remaining disputed matters, which presumably the plaintiff considers would be to its advantage.

[96] The point made by the plaintiff is that, in considering the amount of the accrual for rail and port charges, the Independent Accountant was required to apply cl 1.1(c) of Schedule 11. Accordingly, to the extent that the adjustment made by the Company in the August trial balance was not consistent with the manner of the preparation of the prior monthly trial balances, the Independent Accountant did not follow the contractually required method.

[97] The defendants make a range of submissions to hold up the Determination against this point. First, the defendants submit that there was an absence of any accounting principle, policy or procedure in the preparation of the trial balance within the meaning of cl 1.1(c) involved in the methodology selected for the calculation of the amount of the accrual for rail and port charges. The defendants submit that the approach taken by the Company in making this adjustment in the August trial balance, and by the Independent Accountant in accepting it, was to adopt the best methodology to reflect the best estimate of the actual liability for rail and port costs so as to measure reliably the amount that it was probable would be paid. Whether or not that is true, in my view, does not speak to the question whether there was a policy or procedure used in preparing the trial balances before August 2016 that should have been followed in accordance with cl 1.1(c).

[98] Second, the defendants submit that because the plaintiff's Response to the Vendor's Notice of Dispute and subsequent submissions did not complain about the adjustment made by the Company in the August 2016 trial balance to increase the accrual for rail and port costs for the change in the methodology of calculating the amount, the dispute referred to the Independent Accountant did not include that question.

[99] In my view, there is substance in this submission. The Independent Accountant was not apprised by the plaintiff's submissions that the plaintiff required that the Purchaser's Completion Accounts in respect of the Rail and Port Costs Accrual Issue should be adjusted in favour of the Company and against the plaintiff as Purchaser on this ground because the plaintiff rejected the allowance made in the plaintiff's favour as not being in accordance with a principle, policy or procedure used to prepare the trial balances before August 2016. It is hardly surprising that the Independent Accountant did not make a reversal of the adjustment on that ground when neither of the parties submitted that he should do so.

[100] In my view, the plaintiff should not be permitted to challenge the validity of the Determination based on this point because it was not part of the dispute submitted for determination to the Independent Accountant.

[101] Again, in reaching these conclusions I have considered, but am not assisted by, the expert accounting opinion evidence tendered by the plaintiff on the hearing of this proceeding, for similar reasons to the views expressed above about that opinion evidence in relation to the Loader Maintenance Accrual Issue. More specifically, as to particular paragraphs of the accountant's first report relied upon by the plaintiff in submissions, I observe as follows:

(a) as to paragraph [5.8] – in my view it was not within the Independent Expert's function to identify other errors that may or may not have existed in the August

2016 trial balance and adjust for them because those matters were not matters in dispute that were referred to the Independent Expert for determination;

(b) as to paragraph [5.9] – in my view the Independent Expert should not have adjusted the amount upwards for this point when neither of the parties submitted that it should do so because the point was not within the matters in dispute that were referred to the Independent Expert for determination;

(c) as to paragraph [5.5.7] –[5.5.8] – in my view, it may be accepted that the Completion Accounts were not prepared for the purpose of preparing the Annual Financial Statements, but that does not make the Accounting Standards irrelevant, whilst accepting that the order of precedence in cl 1.1 must be followed;

(d) as to paragraph [5.5.6] – the Completion Accounts were to be prepared on a special basis, by the agreed exclusion of numerous accounts from the Company's chart of ledger accounts and the successive steps of the principles, policies and procedures to be followed under cl 1.1. The Completion Accounts were also for a shorter period than a usual reporting period, being the period up to the date of Completion and as at that date. Accordingly, it is difficult to understand what is meant by the statement that it is "erroneous" to conclude that the Completion Accounts are representative of reporting period accounts, albeit with a special basis of preparation and for a shorter reporting period. In my view, that opinion does not assist in deciding the issues presented for decision in this proceeding.

Severance

[102] Alternatively, the defendants submit that if the Independent Expert erred in failing to apply cl 1.1(c) of Schedule 11 to reverse the methodology adjustment, any error does not affect the validity of the Completion Accounts or the Final Completion Amount derived by the Independent Accountant in the Determination otherwise. They submit that the proper construction of the contractual requirement that the Independent Accountant is to make a determination of the matters in dispute does not require a single decision or determination of the separate matters. Accordingly, the defendants submit that an error in deciding the question of the methodology adjustment for accrual of the rail and port charges issue does not invalidate any other aspect of the Determination of that issue or of the other matter decided.

[103] In substance this is a form of severance argument. A potential difficulty in the way of its acceptance is that the evidence does not establish what the amount of the methodology adjustment was so as to separate that amount from the remainder of the Determination. Fortunately, because the amount was an increase in favour of the plaintiff, there is no need to make any adjustment of the Final Completion Amount.

[104] However, because I have concluded that this point was not part of the matters in dispute submitted for determination to the Independent Accountant it is unnecessary to decide this question.

Conclusion

[105] It follows that the Determination is final and binding and a declaration to that effect should be made.