SUPREME COURT OF QUEENSLAND

CITATION:	*Zeke Services Pty Ltd & Anor v Traffic Technologies Ltd & Anor* [2005] QSC 135
PARTIES:	**ZEKE SERVICES PTY LTD ACN 104 705 606** as trustee of the **ZEKE DISCRETIONARY TRUST** (first plaintiff) and **ADAM PETER GEANEY** (second plaintiff) **v** **TRAFFIC TECHNOLOGIES LTD ACN 080 415 407** (first defendant) and **CONSTANTINE ANDREW SCRINIS** (second defendant)
FILE NO:	BS 2612 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	20 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	27 April 2005
JUDGE:	Chesterman J
ORDER:	**Both applications be dismissed with costs to be assessed on the standard basis.**
CATCHWORDS:	**CONTRACTS – PARTICULAR PARTIES – VENDOR AND PURCHASER – GUARANTEES CONTAINED IN CONTRACTS AND COLLATERAL PROMISES –** where the plaintiffs agreed to sell their shares in 'the company' to the defendants who were to pay by way of instalments, the first of which was duly paid – where the defendants alleged breaches of certain warranties under the share sale agreement – where the total of the warranty claims exceeded the amount of the second instalment and the first defendant paid that amount into its solicitors' trust account and sought the appointment of an expert pursuant to the agreement – whether the plaintiffs action against the defendants claiming the balance of the purchase price and seeking damages for breach of contract and a declaration that the relevant clause of the share sale agreement was void as

being against public policy should succeed – whether the defendants' cross-application seeking a stay of the action on the ground that the agreement provided a mechanism of resolution in the circumstances of the dispute or, alternatively, that the proceedings be transferred to the Supreme Court of Victoria, should succeed.

Jurisdiction of Court (Cross-vesting) Act 1987 (Qld)

Baber v Kenwood Manufacturing Co Ltd (1978) 1 LLR 179, cited;
Badgin Nominees Pty Ltd v Oneida Ltd & Anor [1998] VSC 118; 18 December 1998, cited;
Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (CIV1742/1996); 2 December 1997, discussed;
Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd & Ors [1993] AC 334, cited;
Cott UK Ltd v FE Barber Ltd (1997) 3 All ER 540, discussed;
Dobbs v National Bank of Australasia Ltd (1934) 53 CLR 643, cited;
Huddart Parker v The Ship Mill Hill and Her Cargo (1950) 81 CLR 502, cited;
In Re An Arbitration Between Dawdy and Hartcup (1885) 15 QBD 426, cited;
Lee v The Showmen's Guild of Great Britain [1952] 2 QB 329, cited;
Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314, cited;
Racecourse Betting Control Board v Secretary for Air [1944] Ch 114, cited;
Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd [2003] NSWSC 1134; 4 December 2003, cited;
The Heart Research Institute Ltd v Psiron Ltd [2002] NSWSC 646; 25 July 2002, discussed;
The South Australian Railways Commissioner v Egan (1973-1974) 130 CLR 506, discussed;
World Firefighters Games Brisbane v World Firefighters Games Western Australia Incorporated & Ors [2001] QSC 164; 17 May 2001, cited.

COUNSEL: Mr C Jennings for the plaintiffs
Mr P Riordan SC for the defendants

SOLICITORS: MacGillivrays Solicitors for the plaintiffs
Hopgood Ganim Lawyers as town agents for Middletons Lawyers for the defendants

[1] By a share sale agreement dated 6 August 2004 the first plaintiff agreed to sell its shares in Traffic Services Australia Holdings Pty Ltd ('the company') to the first defendant for $350,000.00. The first plaintiff held only half the issued shares in the company. The other shareholder was also a party to the agreement and agreed to sell its shares to the first defendant also for $350,000.00. The second plaintiff was a director of the company and was also a party to the agreement. The second defendant is a director of the first defendant and guaranteed its performance of the agreement. At relevant times, the company was under administration giving understandable concern to the first defendant, as purchaser, about the value of its acquisition.

[2] Clause 7 of the agreement provided:

> '**7.1 Vendors' and Directors' Warranties**
>
> (a) The Vendors and the Directors represent, warrant and undertake to the Purchaser as an inducement to it to enter into this Agreement that, each of the warranties contained in Schedule 3 is and will at Completion be in all respects accurate and true and not misleading or deceptive in any way.
>
> (b) Subject to clause 7.2, this clause will remain in force and be binding upon the Vendors and the Directors after and despite Completion.
>
> …
>
> **7.3 Purchaser must Give Notice of Breach**
>
> In respect of any claim by the Purchaser for breach of any of the Warranties, the Purchaser must give notice in writing of the claim to the Vendors and the Directors promptly after becoming aware of the matter providing reasonable detail of the nature of the claim and the damages sought such that the amount of the damages can be reasonably determined.
>
> …
>
> **7.6 Warranty Claims**
>
> In the event the Purchaser makes a claim … for damages for breach of any of the Warranties in accordance with this clause 7 … and the claim arises in the period prior to payment of the Second Instalment, or in the period between payment of the Second Instalment and prior to payment of the Third Instalment … the following will apply:
>
> (a) the Purchaser will deduct the warranty claim amount from the second instalment or the third instalment (as the case may be) and place the … amount in trust with Middletons Lawyers pending resolution of the claim …

…

(d) for a period of 14 days from the date of the Claim, the parties must negotiate in good faith to resolve the Claim (**Initial Period**); and

(e) if the Claim has not been resolved in the Initial Period, either party may refer the matter to the Australian Institute of Chartered Accountants to appoint an independent expert (**Expert**) to resolve the Claim. Any decision of the Expert will be final and binding on the parties and Middletons Lawyers will be granted an irrevocable authority to release the … Amount in accordance with the decision of the Expert. The costs of the Expert will otherwise be borne equally by the parties.'

[3] The first plaintiff was one of the vendors and the second plaintiff was one of the directors referred to in the clause. As its terms suggest, the purchase price was to be paid by way of three instalments each for a specified amount to be paid at a stated time. The first instalment of $100,000.00 was payable on completion of the agreement and has been paid.

[4] Schedule 3 contains the warranties which number, depending on how strictly one classifies their subject matter, 45 separate promises identified by reference to eight separate categories. The seventh category was described as "Accuracy of Disclosed Information" and provided:

'(a) All information which the Vendors, the Directors, the Company or any of their respective employees … have given to the Purchaser … relating to the Business, activities, affairs, assets and liabilities of the Company and the subject matter of this Agreement are, and were when given, complete and accurate in all respects.

…

(c) All information which is known to the Vendors relating to … the Company, the Business or otherwise relevant to the subject matter of this Agreement and which would be reasonable to disclose to a prudent purchaser … has been disclosed in writing to the Purchaser.'

[5] In letters sent from the defendants' solicitors to the plaintiffs' solicitors in September 2004 the defendants alleged various breaches by the plaintiffs of warranties 7(a) and 7(c). The complaints were that:

(a) the financial statements of the company were materially incorrect in failing to record a liability of $292,358.00 for workcover, superannuation and payroll tax and fringe benefits tax on employee allowances;

(b) there was non disclosure of a training liability of $11,470.00;
(c) there was an undisclosed liability for uniforms of $82,407.00;
(d) $16,238.00 paid to one Stephen Paul, purportedly for wages, was really a gratuity as Paul was not in fact employed by the company;
(e) $64,616.00 paid to one Michelle Geaney and recorded as wages was also a gratuity;
(f) the liability to various financiers who supplied equipment to the company on lease was understated. The understatement was $337,906.00 and related to 83 leases;
(g) liabilities to the Australian Tax Office in respect of unfranked dividends, penalties for late payment or late lodgement of returns totalling $114,309.00 were not disclosed;
(h) no provision for bad or doubtful debts was made in the accounts which thereby represented that all debts would be paid when in fact $250,000.00 of debts owed to the company were irrecoverable.

[6] The total of the warranty claims exceed the amount of the second instalment of the purchase price. Accordingly, the first defendant has paid the amount of the instalment into the trust account of his solicitors, Messrs Middletons, and has sought the appointment of an expert pursuant to clause 7.6(e) of the agreement.

[7] The President of the Institute of Chartered Accountants has appointed an expert in response to the first defendant's request. The plaintiffs have rejected the validity of the appointment and have refused to co-operate in the expert determination of the warranty claims. The determination has not begun, no doubt because of these applications.

[8] On 31 March 2005 the plaintiffs commenced an action in which they sought $688,439.49 against the first defendant as damages for breach of contract and against the second defendant as guarantor. Part of the claim, but only part, is for $250,000.00 being the balance of the purchase price. There is also a claim for damages for breach of an unrelated term by which the first defendant was to release the plaintiffs from certain liabilities they had to third parties.

[9] By an application dated 6 April 2005, the plaintiffs sought a declaration that clause 7.6(e) of the share sale agreement is void 'as being against public policy as it purports to oust the jurisdiction of the courts'. The defendants brought a cross application in which they sought a stay of the action on the ground that the share sale agreement provides a mechanism for the resolution of the dispute that has arisen between the parties. (By error this relief does not appear in the application which was amended during the hearing.) Alternatively they seek an order pursuant to the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Qld) ('*the Cross-vesting Act'*) that the proceedings be transferred to the Supreme Court of Victoria. The

principal basis for the alternative claim is clause 14.19 of the agreement which provides:

> 'This Agreement is governed by and must be construed in accordance with the laws of the State of Victoria. The parties submit to the exclusive jurisdiction of the courts of that State and the Commonwealth of Australia in respect to all matters or things arising out of this Agreement.'

[10] The plaintiffs' submissions take as their starting point the well known proposition which finds expression in such cases as *Lee v The Showmens' Guild of Great Britain* [1952] 2 QB 329 at 342:

> 'If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void…'

The principle is not to be too readily invoked, nor should courts be too astute to construe contracts so as to conclude that they are deprived of jurisdiction with respect to the relevant dispute. As Rich, Dixon, Evatt and McTiernan JJ said in *Dobbs v National Bank of Australasia Ltd* (1934) 53 CLR 643 at 652:

> 'A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might been required to adjudicate. It has never been the policy of the law to discourage the latter. The former have always been invalid. No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognized as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the Courts to enforce them …
>
> Parties may contract … but yet make the acquisition of rights under the contract dependant upon the … discretionary judgment of an ascertained … person. Then no cause of action can arise before the exercise by that person of the functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction …
>
> What no contract can do is to take from a party to whom a right actually accrues … his power of invoking the jurisdiction of the Courts to enforce it.'

[11] Their Honours also said (at 654):

> 'What at common law could not be done was to abandon by contract the power of invoking the Court's jurisdiction before the cause of action had been extinguished by an award … But it was never considered that the Court's jurisdiction was ousted by an award,

> notwithstanding that it concluded the parties with respect to matters which otherwise would be determined by the Court. It is therefore a mistake to suppose that the policy of the law exemplified in the rule against ousting the jurisdiction of the Court prevents parties giving a contractual conclusiveness to a third person's certificate of some matter upon which their rights and obligations may depend.'

[12] In the same case Starke J said (at 656-7):

> 'An agreement not to sue on a contract would doubtless be void, and so, I should think, would be a stipulation in a contract that no proceedings at law … should be brought in respect of matters referred to arbitration … But it has never been thought that the submission of disputes to arbitrators whose award was final and conclusive ousted the jurisdiction of the Courts. … Again, the "conclusive evidence" clauses in various mercantile contracts have never been held to oust the jurisdiction of the Courts … Certificates of engineers and architects under engineering and building contracts are common; they may certify facts, or approval, or sums to be paid … In none of these cases is the jurisdiction of the Court ousted: all that has been done … is to provide for the ascertainment of rights or facts by the parties or by some agreed person or tribunal, and to leave the enforcement of the parties' rights, so ascertained … to the determination of the Courts of law.'

[13] In *The South Australian Railways Commissioner v Egan* (1973-1974) 130 CLR 506 a clause in an engineering contract, when properly analysed, required any dispute between the Commissioner and a contractor 'to be referred to and decided finally and conclusively by the Chief Engineer for Railways.' Menzies J described the clause (at 513) as 'a barefaced attempt to oust the jurisdiction of the courts.' It amounted to a contractual denial of the contractor's right to seek redress from the courts. All the judges who decided the case held that another clause in the contract, which provided that no action could be brought by a contractor against the Commissioner to recover any money under, or arising out of any breach of, the contract without first obtaining a certificate from the Chief Engineer for the amount sued for, did not oust the jurisdiction of the court, and was valid.

[14] Gibbs J explained (at 519):

> 'The parties to a contract may by their agreement validly provide that the giving of a certificate … by a third party shall be a condition precedent to the right to bring … an action. Such a provision is construed, not as ousting the jurisdiction of the courts in respect of a cause of action already accrued, but as having the effect that no cause of action arises until the certificate … is given …'

The clause was valid because it made the existence of the certificate a condition precedent to the cause of action: there was no cause of action under the contract unless the certificate were obtained. The clause did not prevent recourse to the courts with respect to any cause of action which existed independently of the need to obtain a certificate.

[15] Given this exposition of the law, I cannot accept that clause 7.6(3) purports to oust the jurisdiction of the courts. It is of the type which the High Court asserted has the approval of the common law. It does not prohibit access to the courts. It provides for a means by which an identified area of dispute, which might arise under the share sale agreement, should be resolved. It does not purport to commit all disputes which might arise under the contract to an expert, as did the clause which so angered Menzies J. The contract allows the parties to enforce their rights under the contract. The fact that some of those rights may depend upon the expert's determination does not, as the authorities explain the law, deprive the court of jurisdiction so as to invalidate the clause.

[16] Counsel for the plaintiffs referred me to the unreported decision of Heenan J of the Supreme Court of Western Australia, *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (CIV1742/1996; judgment given 2 December 1997), which considered a clause in an engineering contract referring all disputes arising out of the agreement to a referee who should investigate the dispute and make a decision on it 'in any manner that he saw fit' subject to an obligation to observe 'the principle of procedural fairness'. The decision of the referee was to be final and binding.

[17] Heenan J (at 6-7) observed that '… the Court will recognise as proper any procedure which the parties have agreed upon to settle a dispute … Thus the Court usually will not intervene when the parties have referred a matter for the determination of an expert if such determination is within the referee's particular field of expertise ...'. The clause was, however, struck down because it was:

> '… against public policy in that it (a) purports to oust the jurisdiction of the Court and (b) prescribes a procedure which is entirely unsuited to the resolution of disputes which may arise out of the contract.'

[18] The reasoning which led to these conclusions is not entirely clear but it seems that Heenan J took the view that the clause in question was of the type described by Menzies J in *Egan*. It was a clause which referred all disputes which might arise out of a complicated contract to a functionary who was given exclusive jurisdiction to determine them as he thought appropriate. The clause here in question is not of that type.

[19] There is an undoubted jurisdiction to stay a legal proceeding where the parties have by contract agreed that their dispute shall be determined by means other than curial adjudication. As Lord Mustill explained in *Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd & Ors* [1993] AC 334 at 352, there is an 'inherent power of the court to stay proceedings brought before it in breach of an agreement to decide disputes in some other way.' The basis for the power was said to be a 'wider general principle … that the court makes people abide by their contracts and … will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined.' (Per MacKinnon LJ in *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114 at 126.)

[20] The jurisdiction has been recognised in a number of cases, in this country, at first instance: *Badgin Nominees Pty Ltd v Oneida Ltd Anor* [1998] VSC 118; *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646; *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134.

I have not included cases concerning a stay of proceedings where the parties had agreed that disputes between them should be referred to arbitration. Those cases are regulated by the various arbitration statutes.

[21] The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner. This factor was emphasised by the House of Lords in *Channel Tunnel,* by the High Court in *Dobbs* and *Huddart Parker Ltd v The Ship* Mill Hill *and Her Cargo* (1950) 81 CLR 502 (an arbitration case) and by Gillard J in *Badgin*. However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate.

[22] Ordinarily I would think that that onus can be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism the parties have chosen. This consideration includes the procedure, if any, for which the parties have contracted, and the qualification of the expert or referee to embark upon the determination of the dispute. The parties are presumed not to have intended that their dispute should be resolved by someone not qualified for the task, or in some inappropriate manner. This presumption, based on legal theory, removes any violence to the agreement which refusing the stay would otherwise have done.

[23] There is a clear distinction between arbitration and expert determination. The former involves a more or less formal adjudication of the respective cases put before the arbitrator. The court exercises a degree of supervision over the conduct of arbitrations and arbitrators, and minimum standards of procedural fairness are required. There are no such safeguards with respect to expert determination. Lord Esher MR explained the ordinary case of an expert determination *In Re An Arbitration Between Dawdy and Hartcup* (1885) 15 QBD 426 at 430:

> '… if a man is, on account of his skill … appointed to make a valuation, in such manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge … (He has) to determine the matter by using solely (his) own eyes, and knowledge, and skill.'

Einstein J (at [16]) in *Heart Research Institute* noted that 'Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind.' The most

common examples are where a valuer is appointed to fix the rent of demised premises or a man experienced in a particular line of business is called on to fix the price of stock in trade, or say whether it is saleable.

[24] It follows that if a dispute is not of a kind which can be determined in an informal way by reference to the specific technical knowledge or the learning of the expert, it may be appropriate to refuse a stay. Complicated disputes of fact or of law may be of such a character.

[25] In *Cott UK Ltd v FE Barber Ltd* (1997) 3 All ER 540 the court refused to stay an action on a contract which contained a clause referring disputes to the determination of an expert on the grounds that:

> (a) There were no rules identified in the contract or in the expert's professional association governing the mode of his determination.
>
> (b) The expert appointed had no experience in the areas of dispute.
>
> (c) The contract gave no guidance as to the rules or principles pursuant to which the expert was to approach his determination.
>
> (d) The nature of the dispute itself – a claim for damages for breach of contract – was inapt for determination by an expert.

[26] Gillard J in *Badgin* doubted the relevance of some of the matters relied upon by the court in *Cott* and I respectfully share those doubts. The second and fourth points do, with respect, appear to be of substance. Gillard J thought that:

> '… the fact that there were issues concerning a number of legal questions, whether there was a breach … of the agreement and whether there was an entitlement to damages are matters which may be of some importance in deciding against the grant of a stay on the basis that it could not have been the common intention of the parties to refer disputes of mixed facts and law to an untrained and inexperienced person … [I]n the end it is a question of what the term of the contract provides and the nature of the dispute.'

[27] The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditious because they are informal and because the expert applies his own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar. The less amenable the dispute is to this mode of resolution, the less appropriate this paradigm will be and the more likely it will be that the court will decline to stay an action brought on the contract so as to allow the expert determination to proceed.

[28] All but three of the defendants' complaints are suitable for expert determination. The expert is an accountant. Most of the complaints concern the state of the company's accounts and whether they properly recorded the company's liabilities. It would seem entirely appropriate that an accountant should determine these questions. If the matter went to trial the judge would be informed by expert evidence from accountants about these matters. All that is involved in the determination of these complaints is that the accountant uses his professional knowledge in a perusal of the company's accounts and other records. The determination is likely to be quick and relatively cheap. There can be no sensible objection to the parties being held to their bargain that those disputes be resolved in that way.

[29] The same is not, I think, true of two categories of complaint: those concerning the fictitious employment of staff and the alleged misrepresentation as to bad debts. They are described in paragraphs 5(d), (e) and (h) of these reasons.

[30] The second of these categories of complaint involves an alleged misrepresentation that all debts owing to the company would be recovered. The misrepresentation is said to have been made by the omission from the company's accounts of any provision for bad or doubtful debts. If that were a proper description of the complaint it may well be the sort of dispute an accountant could readily resolve. There is, however, more to it. For a start, there must be a doubt that the omission gives rise to the representation alleged. There are well known difficulties in basing actions for damages on silence. I would have thought it more likely that the omission would, at most, amount to a representation that the company's officers had insufficient reason to think that all debts would not be paid. The dispute, therefore, raises a question of what the company's officers believed about the recoverability of the debts and the reasonableness of any grounds for that belief. There are, therefore, questions of mixed fact and law to be resolved as to whether a representation was made and the content of any representation. Such questions are more readily answered by a lawyer than an accountant. Whoever makes the determination, the process must involve some argument, legal in nature. This is not the paradigm of applying one's special knowledge to one's own observations.

[31] The same considerations apply to the complaint about fictitious employees. There is clearly a dispute of fact concerning whether these people were employed by the company and performed services for it. It does not seem likely that the question can be resolved merely by an examination of the company's records. No doubt they show payments to the people in question on the basis that they were employees. The question is whether the reality was different to that which is recorded. This, too, will involve an inquiry and an examination of employer and employees. It is not a matter with respect to which an expert accountant is particularly well equipped to answer. It is more the province of a trained fact finder, such as a judge or arbitrator.

[32] It is at this point that the absence from the agreement of procedural rules to be observed by the expert becomes of importance. Their absence is unremarkable in a case where the expert relies upon his own senses and learning, but where he is obliged to investigate disputed questions of fact and/or law, and come to a

conclusion about them, the lack of a methodology for the inquiry is significant. An expert, unless obliged to do so by the contract or the terms of his appointment, does not have to comply with the requirements of procedural fairness or natural justice. The agreement does not contain such a requirement.

[33] Equally significant is the point that as long as an expert acts within the terms of the contract pursuant to which he was appointed the parties are bound by his determination. Lawton LJ described the position well in *Baber v Kenwood Manufacturing Co Ltd* (1978) 1 LLR 179 at 181:

> 'They were to be experts. Now experts can be wrong; they can be muddle-headed; and, unfortunately, on occasions they can give their opinions negligently. Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening.'

[34] If an expert has conducted his examination in accordance with the contract, that is he has determined or valued that which he was to do, the only basis on which the determination can be set aside is dishonesty. (See the judgment of McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 and, more generally, 'Impugning Expert Determinations in Australia' by Marcus S Jacobs QC (2000) 74 ALJ 858.)

[35] These three complaints are not readily amenable to expert determination. That paradigm does not accommodate these aspects of the dispute, which require an adjudication between opposing contentions. The answers cannot be found in expert observation, nor informal, one sided, fact finding. The designated expert, an accountant, has no obviously relevant skill or learning to equip him for an adjudication of disputed fact. This point was important to Heenan J in *Baulderstone*. The determination may be made without hearing both sides of the dispute and, therefore, without giving them, or any one of them, an opportunity to bring relevant evidence to the expert's attention. One complaint requires an answer to a question of law or mixed fact and law, more suitably given by a lawyer. These points were important to the outcome in *Cott*.

[36] When one adds to these concerns the point that should the expert fall prey to muddle, or make a mistake, his determination will nevertheless be binding in the absence of fraud, a good ground has been shown for refusing to stay the action.

[37] Accordingly, I conclude that some only of the complaints may be appropriately determined by an expert. There should be no stay with respect to those matters. To order a stay of the proceedings to allow the expert to determine some only of the complaints would be unsatisfactory. The same decision-maker should determine all questions in dispute. As the court must determine some, it should determine all.

[38] There remains for consideration the question whether the action should be transferred to, and tried by, the Supreme Court of Victoria, pursuant to section 5(2)(b) of the *Cross-vesting Act*. Mr Riordan SC, who appeared for the defendants, did not persist with the application that the action be stayed by reason of the presence of clause 14.19, which purports to give exclusive jurisdiction to the

Supreme Court of Victoria. He accepted the correctness of *World Firefighters Games Brisbane v World Firefighters Game Western Australia Incorporated& Ors* [2001] QSC 164 that the *Cross-vesting Act* provides a code for determining which of two competing State courts should have jurisdiction to determine proceedings and that the existence of an exclusive jurisdiction clause in a contract from which the proceedings arise is but one factor to consider in the exercise of the discretion conferred by the Act.

[39] The parties are agreed that, in deciding this aspect of the application, the criterion for deciding which of the Supreme Courts of Victoria and Queensland is the more appropriate court to hear the action is which jurisdiction has the closest connection with the litigation. The overriding consideration is that the interests of justice are served by the choice of forum.

[40] On this approach, the presence of clause 14.19 is a relevant consideration for the exercise of the discretion conferred by section 5(2)(b) because 'the "interests of justice" require that due acknowledgment be accorded to such a clause as representing the bargain between the parties and that proper regard be given to the need to hold parties to their bargain.' (See *World Firefighters* at [38].)

[41] The competing considerations between the two courts are closely balanced. There is no advantage, one way or the other, on the grounds of substantive or procedural law or cost and delay. The only points urged concerned convenience to the parties and the jurisdictional connection with the action.

[42] The first plaintiff and its principal, the second plaintiff, are resident in Queensland. The first defendant and its principal, the second defendant, are resident in Victoria. Both have retained counsel and solicitors in their respective States. The company whose affairs will be the subject of the litigation carried on business in Queensland and a number of its employees, and former employees, are in Queensland. There is a dispute as to where its records are, whether here or in Victoria. I am unable to make any decision about their location. There will be a degree of inconvenience to one side wherever the matter proceeds. Either the plaintiffs and their lawyers must go to Melbourne or the defendants and their lawyers must come to Brisbane. There is, however, a preponderance of convenience in favour of Queensland. The claim concerning fictitious employees and whether the company had grounds for believing that its debts were recoverable will involve testimony from witnesses in Queensland. There will be greater cost and inconvenience if they were required to testify in Victoria.

[43] This consideration outweighs the point that the plaintiffs agreed that they should litigate the disputes in Victoria. That agreement cannot make Queensland unsuitable as a venue when otherwise this court is the appropriate forum.

[44] Accordingly, I order that both applications be dismissed with costs to be assessed on the standard basis.