

SUPREME COURT OF QUEENSLAND

CITATION: *Yarraman Pine P/L v Forestry Plantations Queensland*
[2009] QCA 102

PARTIES: **YARRAMAN PINE PTY LIMITED**
ACN 009 661 689
(applicant/appellant)
v
FORESTRY PLANTATIONS QUEENSLAND
(respondent)

FILE NO/S: Appeal No 9659 of 2008
SC No 8461 of 2008

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 24 April 2009

DELIVERED AT: Brisbane

HEARING DATE: 12 November 2008

JUDGES: McMurdo P, Holmes JA and Fryberg J
Separate reasons for judgment of each member of the Court,
McMurdo P and Holmes JA concurring as to the order
made, Fryberg J dissenting

ORDER: **The appeal should be dismissed with costs to be assessed**

CATCHWORDS: ARBITRATION – CONDUCT OF THE ARBITRATION
PROCEEDINGS – POWERS, DUTIES AND DISCRETION
OF ARBITRATOR – GENERALLY – the appellant and the
respondent entered into a contract for the harvest and
purchase of pine wood – a dispute arose regarding the result
of a price review under the contract – appellant referred the
dispute for arbitration – whether the arbitrator had the right to
undertake a full merits-type review of the original decision

Forestry Act 1959 (Qld), s 33, s 34

*Federal Commissioner of Taxation v St Helens Farm (ACT)
Pty Ltd* (1981) 146 CLR 336; [1981] HCA 4, cited
Legal & General Life of Australia Ltd v A Hudson Pty Ltd
(1985) 1 NSWLR 314, cited
WMC Resources Ltd v Leighton Contractors Pty Ltd (1999)
20 WAR 489; [1999] WASCA 10, approved
*Xstrata Queensland Ltd v Santos Ltd & Ors; Santos Ltd &
Ors v Xstrata Queensland Ltd* [2005] QSC 323, approved

COUNSEL: J H Dalton SC with R P S Jackson for the appellant
J D McKenna SC with J Payne for the respondents

SOLICITORS: Minter Ellison for the appellant
Freehills for the respondent

- [1] **McMURDO P:** I would refuse this appeal. These are my reasons.

Background

- [2] I will refer to the appellant, Yarraman Pine Pty Limited, as Yarraman and the respondent, Forestry Plantations Queensland, as the Forestry. Yarraman entered into a contract with the Forestry to harvest and purchase *Araucaria cunninghamii*¹ (hoop pine) from areas near Yarraman and Nanango in south-east Queensland. The contract both entitles and obliges Yarraman to harvest and purchase a minimum annual quantity of timber² over 10 years from 1 July 2004 to 30 June 2014. Yarraman is to pay the Forestry a "value" for the timber, originally \$69.71 per cubic metre. The "value" can be varied in two ways. Clause 6 and Sch 4 provides for a Periodic Value Review to be carried out every six months by the Forestry's chief executive.³ Clause 7 and Sch 5 provides for two General Value Reviews during the 10 years of the contract's operation to be carried out by the chief executive on 1 July 2007 and 1 July 2012. On 7 November 2007, the Forestry notified Yarraman that the chief executive's determination from the July 2007 General Value Review was a "value" of \$74.11 per cubic metre to apply as from 1 July 2007.
- [3] Yarraman was dissatisfied with that determination. The parties engaged in the initial dispute resolution process provided for under cl 30 of the contract but they were unable to resolve their differences. Yarraman then referred the dispute to arbitration under cl 30.8. It contended that the arbitrator had a broad power to fully review the Forestry's determination of value under the General Value Review on its merits and was required to make a fresh determination, constrained only by the terms of the contract and the arbitrator's obligation to act fairly, reasonably and honestly.
- [4] The Forestry's contentions were as follows. The arbitrator had power only to determine whether or not the chief executive's process of determination of value under the General Value Review should be regarded as a determination within the meaning of the contract. If the arbitrator found that the chief executive's determination of value was not in accordance with the contract, the arbitrator could not make a fresh determination but would have to remit the matter to the chief executive for further determination in accordance with the contract.

¹ Set out in Sch 1 of the contract.

² Set out in cl 10.2 of the contract. The term "Minimum Annual Quantity" is defined in Sch 1 as "85% of each Annual Sale Quantity that [Yarraman is] obliged to fell and remove in a Year". The "Annual Sale Quantity" is set out in Sch 3.

³ The term "Chief Executive" is defined as "the chief executive of the public sector unit that administers the Act that deals with the commercial forestry and is administered by the Minister administering the relevant provision of the Act which at the time this Agreement was executed means the Chief Executive for the Department of Primary Industries and Fisheries or delegate." Subsequent amendments to the *Forestry Act 1959* (Qld) and the *Forestry Plantations Queensland Act 2006* (Qld) provide for functions of the chief executive under contracts like this to be exercised by the head of the Forestry Plantations Queensland Office. For convenience, clarity and consistency, throughout these reasons I have continued to use the term used in the contract, "the Chief Executive".

- [5] Yarraman applied to the Trial Division of this Court for

"Declarations that, upon the proper construction of clause 30 the arbitration of the dispute as to the quantum of the values to apply to Hoop pine final crop sawlogs got under the Sale Agreement as determined by [the Chief Executive] in a General Value Review and notified by [the Forestry] by letter dated 7 November 2007, referred to arbitration by [Yarraman] on 21 August 2008 pursuant to clause 30.8 ...:

- (a) Is an arbitration to which the Commercial Arbitration Act 1990 applies;
- (b) Is to be resolved by a determination of values payable for the Hoop pine final crop sawlogs by the arbitrator in accordance with the information provided by each of the parties to each other for the purpose of the General Value Review and by reference to the matters referred to in clause 1.2 of schedule 5 ... "

- [6] The learned primary judge refused to make these declarations and dismissed Yarraman's application. The judge distinguished *Xstrata Queensland Ltd v Santos Ltd & Ors; Santos Ltd & Ors v Xstrata Queensland Ltd*⁴ and considered the present case was analogous to *WMC Resources Ltd v Leighton Contractors Pty Ltd*.⁵ His Honour reasoned that the terms of the discretionary power to determine value given to the chief executive in Sch 5 cl 1.2 were so broad that a judicial or arbitral determination could not be substituted.⁶ His Honour found that the arbitrator was not entitled to conduct a general or merits-type review of the chief executive's determination, but was limited to considering whether the determination could properly be regarded as one within cl 7 and Sch 5 of the contract. If the arbitrator determined that it was not, the arbitrator would ordinarily remit the issue for redetermination by the chief executive.⁷

- [7] Yarraman now appeals from the primary judge's order dismissing its application. It contends that the appeal should be allowed; that the order dismissing the application should be set aside; and that instead, this Court should make the declarations sought at first instance. Yarraman has framed its arguments alleging error by the primary judge into a number of discrete grounds of appeal. But to succeed, Yarraman must persuade this Court that the contract should be construed as giving Yarraman a right to refer a dispute about the chief executive's determination of value under a General Value Review to arbitration to be determined by the arbitrator afresh.

The relevant legal principles

- [8] The parties in their contentions at first instance and in this Court gave particular prominence to the two helpful decisions referred to in the primary judge's reasons: a Western Australian Full Court case of *WMC Resources* and a decision of the Trial Division of this Court, *Xstrata*.

- [9] *WMC Resources* concerned the construction of a contract under which the respondent performed open-cut mining work for the appellant. The contract provided that where its Schedule of Rates did not apply to a variation then, in the

⁴ [2005] QSC 323.

⁵ (1999) 20 WAR 489.

⁶ *Yarraman Pine P/L v Forestry Plantations Queensland* [2008] QSC 232 at [17].

⁷ [2008] QSC 232 at [21].

absence of agreement between the parties, the appellant "shall ... determine such value in its sole discretion". The respondent disputed the appellant's determination of the value of variations and the parties referred the dispute to arbitration. The arbitrator referred to the court the question whether he had power to substitute his own valuation for the valuation made by the appellant. Ipp J, with whom Kennedy and White JJ agreed, noted that although the contract empowered the company to determine the value "in its sole discretion", the critical feature of the valuation was that it involved a discretionary judgment.⁸ A contract will often provide detailed fixed and objective criteria as to how the value of work is to be determined, providing for a mechanical exercise rather than a discretionary judgment.⁹ In such cases, there will only be one uniquely correct value and a court or arbitrator can correct any mechanical error.¹⁰ Sometimes, however, a valuer is required to exercise a very broad discretionary judgment.¹¹ Many subsidiary factors and contingencies may have to be taken into account so that there is a wide range of potential legitimate valuations of the work. In such a case, opinions may properly differ as to virtually all of the relevant issues to be considered in determining the valuation and as to the valuation itself.¹² There was an implied term in the contract that the appellant, in determining the valuation, would act honestly, bona fide and reasonably.¹³ Ipp J concluded that in the contract for his consideration, the appellant's valuation was of the broad, discretionary type. The respondent could challenge it, only if it was not in accordance with the contract, including the implied obligation to act honestly, bona fide and reasonably (as explained by McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*¹⁴) or if the appellant's valuation was entirely erroneous (as explained by Mason J in *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd*¹⁵).¹⁶

- [10] In *Xstrata*, the parties to a contract for the supply and delivery of natural gas disagreed about the price to be paid. Under the contract, either party could initiate a price review. The parties were then to negotiate in good faith but, if unable to agree, the price was to be fixed by what the contract described as an arbitration.¹⁷ The parties issued many subpoenas for the production of documents to the arbitrators. The entities on whom the subpoenas were served applied to Philip McMurdo J to have them set aside on a number of grounds. One contention was that the *Commercial Arbitration Act* 1990 (Qld) did not authorise the issuing of the subpoenas because the process in which the parties were involved was not a true arbitration.¹⁸ In the course of deciding that issue, Philip McMurdo J extensively reviewed the pertinent authorities and concluded that if the dispute between the parties was capable of being determined in a judicial manner, it was then a "'dispute' as that word is used in the context of arbitrations and in the *Commercial Arbitration Act*."¹⁹ His Honour added:

⁸ (1999) 20 WAR 489 at [5].

⁹ (1999) 20 WAR 489 at [16].

¹⁰ (1999) 20 WAR 489 at [18].

¹¹ (1999) 20 WAR 489 at [22].

¹² (1999) 20 WAR 489 at [23]-[26].

¹³ (1999) 20 WAR 489 at [46].

¹⁴ (1985) 1 NSWLR 314 at 336.

¹⁵ (1981) 146 CLR 336 at 381.

¹⁶ *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 20 WAR 489 at [39], [54], [83].

¹⁷ *Xstrata Queensland Ltd v Santos Ltd & Ors; Santos Ltd & Ors v Xstrata Queensland Ltd* [2005] QSC 323 at [2].

¹⁸ [2005] QSC 323 at [7].

¹⁹ [2005] QSC 323 at [26] and [27].

"[29] A dispute is not capable of decision in a judicial manner absent the existence of certain objective criteria which define how a decision for its resolution is to be reached. If the decision maker is free to apply his or her idiosyncratic view the decision making process cannot in substance be a judicial one. It is only if the decision maker is bound by certain measures, standards or criteria, which are known to the parties, that the process can resemble a judicial one. An arbitration requires the existence of a dispute which is to be resolved according to such defined criteria. In the application of those criteria, there could be more than one answer, such as more than one revised price. Yet that is no different from where, for example, the application of the relevant statute and common law can result in a range of proper awards of damages.

[30] The applicants argue that the matter cannot be decided in a judicial manner if the determination is not one of existing rights and obligations but is what some of the cases describe as a 'legislative' prescription of future rights and obligations. But where the price must be assessed only by reference to the application of certain defined criteria, the parties have existing rights in relation to the new price. They have a right to a performance of their contract, as and from the price review date, at a price assessed by, and only by, the application of those criteria. Once the price is assessed by another according to their agreement, that right merges in their right to performance at the price assessed. Again, the process is similar to the adjudication of claims for unliquidated damages. As noted in *Apache Northwest*, cases such as *May & Butcher Ltd v R* [1934] 2 KB 17 are different, because they involve incomplete agreements, where there is no present right because there is no contract.

[31] Accordingly whether this is an arbitrable dispute depends upon whether the arbitrators are bound by the parties' contract to decide the matter according to certain objective criteria so that it is possible for them to do so in a judicial manner. That is a question of the proper interpretation of the [contract]".

After referring to the contract, the applicant's submissions, and to further authority, his Honour concluded that:

"this contract provides the objective criteria for the arbitrators' decision, such that it is a matter which can be decided by a process which is in sufficient respects analogous to a judicial inquiry. The parties are entitled to have the contract performed ... according to a price which is the result of the fair and reasonable application of those criteria to the original price. There is a dispute as to what amount represents that adjusted price, which dispute the parties have agreed should be resolved not by a court but by arbitrators. The parties have existing rights to the performance of their contract, as and from the review date, at an adjusted price. The arbitrators will be determining the matter according to those rights rather than creating rights where there presently are none."²⁰

²⁰

[2005] QSC 323 at [38].

It follows that the challenge to the issue of the subpoenas on the basis that the parties' dispute resolution process was not an arbitration failed.

- [11] It is clear from both *WMC Resources* and *Xstrata* that whether Yarraman is entitled to the declarations it sought at first instance turns on the terms of its contract with the Forestry.

The relevant statutory context

- [12] Before turning to the relevant terms of the contract between Yarraman and the Forestry, it is helpful to refer to aspects of the *Forestry Act* 1959 (Qld) which relate to the role of the Forestry in managing state forests. That is because recital F to the contract²¹ makes the contract subject to the *Forestry Act*.
- [13] The full title of the *Forestry Act* is "An Act to provide for forest reservations, the management, silvicultural treatment and protection of State forests, and the sale and disposal of forest products and quarry material, the property of the Crown on State forests, timber reserves and on other lands; and for other purposes".
- [14] The Act provides for the setting apart and declaration of State forests on Crown land.²² Part 4 of the Act concerns the "Management of State Forests, timber reserves and forest entitlement areas". The cardinal principle in the management of State forests is set out in s 33:

"33 Cardinal principle for the management of State forests

- (1) ... the permanent reservation of such areas for the purpose of producing timber and associated products in perpetuity and of protecting a watershed therein.
- (2) The chief executive must ensure each State forest is used and managed in the way the chief executive considers appropriate to achieve the purposes of this Act, having regard to—
 - (a) the benefits of permitting grazing in the area;
 - (b) the desirability of conservation of soil and the environment and of protection of water quality;
 - (c) the possibility of applying the area to recreational purposes."

- [15] Section 34 relevantly provides:

"34 Use of State forests

- (1) The chief executive in addition to all other powers conferred by this Act may from time to time for the purposes of the use and management of State forests—

...

 - (c) ... determine, in relation to the period specified in the determination, the maximum

²¹ Set out at [17] of these reasons.

²² *Forestry Act* 1959 (Qld), s 25.

quantities of forest products of any kind or description which may be removed from any State forest or State forests during such period without impairing the permanent productive capacity of the State forest or State forests in question, and any such determination may from time to time be altered, varied or rescinded;

...

(2) Any determination thereof by the chief executive of the maximum quantities of forest products of any kind or description which may be removed from any State forest or State forests during any specified period or any alteration, variation or rescission of any such determination shall be subject to the approval of the Minister.

(2A) Upon the approval of any such determination, or any alteration or variation thereof, forest products of any kind or description specified in the determination shall not during the period specified therein be removed from the State forest or State forests in question in excess of the maximum quantities thereof specified in the determination or, in the case of any alteration or variation thereof as aforesaid, in the determination as so altered or varied."

[16] Part 6 of the Act deals with the control and disposal of forest products. It gives broad discretionary powers to the chief executive.²³

The relevant contractual provisions

[17] I turn now to the relevant portions of the contract between the parties. The recitals to the contract included:

"C. On 24 December 2003 the Chief Executive released the *Araucaria Allocation Policy* to advise on the future allocation of the State of Queensland's Araucaria resource in Queensland.

D. The *Araucaria Allocation Policy* applies State-wide to cover the future allocation of log timber from the State-owned Araucaria plantations in South East, Central and North Queensland.

E. Pursuant to negotiations had between the parties as a consequence of the *Araucaria Allocation Policy* the parties have agreed to enter into this Agreement.

F. The Chief Executive agrees to sell and [Yarraman] agree to purchase Araucaria according to the terms and conditions of this Agreement and the *Forestry Act 1959*."

²³ See especially s 45, s 46, s 47, s 48, s 61, s 69B and s 69C. See also Part 6C, s 61K-s 61P, added by *Forestry Plantations Queensland Act 2006* (Qld) s 68, Sch 1, assented to 24 April 2006 (after the contract was signed).

[18] The contract gave Yarraman a right to enter the "Supply Zone"²⁴ to harvest or "get" hoop pine for 10 years commencing on 1 July 2004 and terminating on 30 June 2014.²⁵ This right was not an exclusive right to entry or occupation.²⁶

[19] Clause 4 of the contract is in these terms:

"4. VALUES

- 4.1 Subject to the terms of this Agreement, [Yarraman] agree to pay the Chief Executive the value to get Araucaria based on-
- (a) the agreed values for Araucaria set out in Schedule 3 of this Agreement and as varied from time to time in accordance with clauses 6 and 7 of this [sic] Agreement by notice in writing to [Yarraman] from the Chief Executive; and
 - (b) the cubic metre quantity calculated by the Chief Executive using the method specified in clause 9.
- 4.2 The values payable under this Agreement are GST exclusive payments. [Yarraman] will be liable to pay any GST payable on a supply made under this Agreement."

[20] Clause 6 of the contract provides for a Periodic Value Review:

"6. PERIODIC VALUE REVIEW

Periodic Value Review

- 6.1 On and from the Commencement Date the Chief Executive will, in accordance with Schedule 4, conduct a Periodic Value Review of the value payable by [Yarraman] for each Cubic Metre of Araucaria (the "Periodic Value Review").
- 6.2 Irrespective of when the Periodic Value Review is carried out, the reviewed value is payable by [Yarraman] from the date the review is due."

[21] Schedule 4 is in these terms:

"1. PERIODIC VALUE REVIEW

- 1.1 A Periodic Value Review of the value payable by [Yarraman] for each Cubic Metre of Araucaria shall be carried out by the Chief Executive in each six (6) month period during the continuance of this Agreement ("Periodic Value Review").
- 1.2 The Periodic Value Review will apply from the first day of January and July of each Year.
- 1.3 Each Periodic Value Review will be conducted in line with this Schedule.

²⁴ Set out in Sch 2 of the contract.

²⁵ Set out in cl 2.1 of the contract.

²⁶ Set out in cl 3.4 of the contract.

- 1.4 The first such review will be carried out to take effect on 1 July 2004.
- 1.5 In undertaking each Periodic Value Review the Chief Executive will index the value payable for each Cubic Metre of Araucaria as set out in Schedule 3 in accordance with:
- (i) movements in the Consumer Price Index – All Groups – Brisbane during the preceding six (6) months to 30 September and 31 March each year, as published by the Australian Bureau of Statistics or any other index agreed to by the Chief Executive, and
 - (ii) any other relevant economic indicators as determined by the Chief Executive.
- 1.6 The Chief Executive may consider any relevant information provided by [Yarraman], provided that such information is:
- (i) Received by the Chief Executive one month before the due date of the Periodic Value Review, and
 - (ii) Supported by any relevant economic market information."

[22] Clause 7 of the contract provides for a General Value Review:

"7. GENERAL VALUE REVIEW

- 7.1 On and from the Commencement Date the Chief Executive will, in accordance with Schedule 5, conduct a General Value Review of the value payable by [Yarraman] for each Cubic Metre of Araucaria (the "General Value Review").
- 7.2 Irrespective of when the General Value Review is carried out, the reviewed value is payable by [Yarraman] from the date the review is due."

[23] Schedule 5 is in these terms:

"1. GENERAL VALUE REVIEW

- 1.1 A general review of the value payable by [Yarraman] for each Cubic Metre of Araucaria shall be carried out by the Chief Executive to take effect on 1 July 2007 and 1 July 2012 ("General Value Review").
- 1.2 In carrying out such General Value Review, the Chief Executive shall take into account insofar as the Chief Executive considers these would affect the value of Araucaria, factors including but not limited to the following:

- (a) the average log size and quality,
 - (b) the general price of competitive forest (competitive sale values for Araucaria are to be adjusted for marginal cost pricing effects) and timber products, both domestic and overseas, and
 - (c) any change in the relativity between these prices and the movements in the Consumer Price Index or other agreed Index including the causes thereof.
- 1.3 The Chief Executive will advise [Yarraman] on or about the 1st January preceding the date of the General Value Review, how the General Value Review will be conducted, the projected basket of wood available from the Supply Zone for the period relevant to the General Value Review and provide [Yarraman] with the opportunity to provide relevant information.
- 1.4 [Yarraman] will be invited to a pre-GVR briefing hosted by the Chief Executive to discuss the matters raised in Clause 1.3.
- 1.5 The Chief Executive will consider any relevant information provided by [Yarraman] in relation to these aspects provided that such information is received by the Chief Executive within the time frame specified in the advice provided under this clause.
- 1.6 The due date for [Yarraman] to provide relevant information will not be less than 30 days from the date of the letter of advice."

[24] Clause 8 of the contract requires Yarraman to provide the chief executive with a Cover of Account. Under cl 8.1, Yarraman is obliged to:

"8. COVER OF ACCOUNT

You must provide a Cover of Account

...

- (b) conduct [its] Harvesting Operations,
 - (i) in accordance with good forest industry harvesting practice,
 - (ii) in compliance with all relevant legislation and Codes and this Agreement, including but not limited to the payment of all money Due and Payable, and
 - (iii) to avoid any damage to land or improvements that may be caused by a person acting under the authority of this Agreement."

The chief executive has "the sole discretion" to determine the cost to be incurred for any breach or damage incurred by Yarraman (cl 8.11) and may retain from the Cover of Account the cost of remedying it (cl 8.10). The chief executive may suspend the agreement for non-compliance with cl 8 (cl 8.16). The chief executive may request Yarraman to increase the amount of the Cover of Account and confiscate timber in the Supply Zone until this happens (cl 8.17 and cl 8.18). The chief executive decides the value of confiscated timber in accordance with the contract (cl 8.21).

- [25] The chief executive has power to amend the measuring process of the harvested timber harvested by Yarraman (cl 9.6) and must reasonably consider any request by Yarraman for a more cost effective alternative measurement system (cl 9.8). Yarraman is obliged to keep records for two years of the timber harvested (cl 9.13) and is obliged to permit the chief executive to inspect and copy those records (cl 9.14).
- [26] The chief executive provides Yarraman with a draft Harvesting Schedule by 30 June each year setting out two years in advance the areas of the Supply Zone subject to the agreement (cl 12.1). If the chief executive and Yarraman do not agree on the draft Harvesting Schedule, the chief executive will determine its contents (cl 12.4). The chief executive can vary a Harvesting Schedule with Yarraman's agreement which cannot be unreasonably withheld (cl 12.5).
- [27] The chief executive may direct Yarraman to restrict vehicle speeds or access roads (cl 18.2(a) and cl 18.2(b)). Yarraman must comply with any directions given by the chief executive concerning the use of roads on the land controlled by the State (cl 18.3). In exercising its contractual rights to get timber, Yarraman must not allow roads to be obstructed for any time considered unreasonable by the chief executive (cl 18.4). The chief executive may give Yarraman an account for cost of repairs to roads damaged by Yarraman in accessing the Supply Zone (cl 18.5, cl 18.8 and cl 18.9).
- [28] The contract provides for a Competition Review where there is a risk of the contract contravening competition laws (cl 23.1). The Competition Review is conducted by the Chief Executive (cl 23.6) on independent advice from an appropriately qualified economist and lawyer experienced in competition law (cl 23.7). Depending on the outcome of the review, the Chief Executive is given certain powers (cl 23.9-cl 23.12). The Chief Executive is required to exercise its powers under cl 23 in good faith so as to ensure to the greatest extent possible that the burden of the changes are borne equitably among the parties to the Competition Review (cl 23.13).
- [29] Clause 30 of the contract deals with dispute resolution and relevantly provides:

"30. DISPUTE RESOLUTION

Dispute resolution – general

30.1 Without affecting any other right or entitlement under this Agreement, if a dispute arises between the Chief Executive and [Yarraman] about this Agreement (including the validity, breach, suspension or ending of it), any party ("first party") may give notice (the "Notice of Dispute") to the other party (the "other party") by:

- (a) inviting the other party to participate in any alternative dispute resolution procedure, and
- (b) designating as the first party's representative in negotiations about the dispute, a person with authority to settle the dispute.

...

- 30.5 If the dispute is not resolved within ten (10) days, the parties must seek during the next seven (7) days to agree on a process for resolving the whole or part of the dispute through means other than litigation or arbitration. The means may include further negotiations, mediation, conciliation or independent expert determination.
- 30.6 If the parties fail to agree on a process the parties will by Agreement apply for the appointment of a mediator to either the:
- (a) Dispute Resolution Centre (Mediation Service)
Magistrates Courts Building 13th Floor,
North Quay Brisbane 4000
(07) 3239 6007. For callers outside Brisbane
1800 017 288, or
 - (b) Bar Dispute Resolution Centre
Inns of Court Level 5
North Quay Brisbane
(07) 3236 0855, or
 - (c) another body/organisation as agreed between the parties.
- 30.7. Any exchange of information or documents or the making of any offer of settlement under this clause is an attempt to settle the dispute between the parties. No party may use any information or documents obtained through the dispute resolution process established by this clause for any purpose other than in an attempt to settle the dispute between the parties.
- 30.8 If the dispute is not resolved by Agreement within forty-five (45) days of the date on which the first party gave notice, either party may refer the dispute to arbitration or commence court proceedings.
- 30.9 If the dispute concerns the determination of the value payable for Araucaria the value to be applied between the date of the determination by the Chief Executive and the resolution of the dispute will be the value determined by the Chief Executive.

- 30.10 If the dispute concerns the determination of the value payable for Araucaria the information or documents which may be taken into account in resolving the dispute, whether through alternative dispute resolution, arbitration or court, will be limited to the information which was provided by the parties to each other for the purpose of the value review.

Dispute resolution – performance of Agreement

- 30.11 Each party will continue to perform this Agreement despite the existence of a dispute or any proceedings under this clause."

[30] Clause 31 of the contract is also pertinent:

"31. EXERCISE OF DISCRETION

- 31.1 If a party is granted discretion or the ability to determine any matter under this Agreement without reference to the other party, that discretion or ability must be exercised reasonably.
- 31.2 The Chief Executive may exercise a right or remedy or give or refuse its consent in any way it considers appropriate (including by imposing conditions), unless this Agreement expressly states otherwise."
- [31] The chief executive may suspend the agreement or harvesting operations if weather conditions on or near the Supply Zone constitute a serious fire danger (cl 32.3, cl 32.6 and cl 32.7).
- [32] The chief executive may examine mechanical equipment brought onto the Supply Zone (cl 37.1) and may direct its removal if the chief executive determines it constitutes a potential fire danger (cl 37.6(a)) or may cause environmental damage (cl 37.6(b)).
- [33] If, in the opinion of the chief executive, Yarraman or its employee, contractor, servant or agent is not a fit and proper person to remain in a Supply Zone, the chief executive or an authorised officer may require Yarraman to remove that person from the Supply Zone (cl 43.1). Such a person must not be employed or allowed to work in the Supply Zone without the prior written consent of the chief executive (cl 43.3). A decision by the chief executive under this clause is final (cl 43.4).
- [34] The chief executive may suspend the agreement by notice in writing if, in the chief executive's opinion, Yarraman fails to comply with any term or condition of this agreement (cl 48.3). Yarraman is then required to account to the chief executive for money due and payable (cl 48.6). If Yarraman does not rectify the breach within 30 days of the notice of suspension, the chief executive may immediately terminate the agreement and may seize and detain or remove the forest products for which money is due and payable (cl 48.11). The chief executive for this purpose has an irrevocable licence to enter Yarraman's land or premises without liability for trespass and retake possession of the forest products (cl 48.12). If the chief executive is of the opinion that the breach or event of default is not capable of remedy, the chief executive may terminate the agreement at any time without notice (cl 48.13).

Discussion and conclusion

- [35] Whether Yarraman is entitled to the declarations it sought at first instance depends on the construction of the relevant terms of its contract with the Forestry.²⁷ The correct construction of these terms subsumes all aspects of Yarraman's individual grounds of appeal. The present contract significantly differs from those in both *WMC Resources* and *Xstrata*. Unlike in *Xstrata*, the Forestry and Yarraman are not left to initiate a price review whenever one party chooses. The absence of such a clause in the Forestry-Yarraman contract does not support Yarraman's contentions in this appeal. By contrast, the Forestry-Yarraman contract sets out in detail the procedure for the Forestry's chief executive to conduct a review of value under a Periodic Value Review (six monthly) and a General Value Review (on 1 July 2007 and 1 July 2012). Unlike in *WMC Resources*, under the Forestry-Yarraman contract the chief executive's determination of value under a General Value Review is not determined "in its sole discretion". By contrast, the Forestry-Yarraman contract specifically provides for a dispute resolution process arising from the chief executive's determination of value, including arbitration. These factors favour Yarraman's contentions.
- [36] Recital F to the Forestry-Yarraman contract makes the contract subject to the *Forestry Act*. Under the provisions of that Act to which I have referred earlier in these reasons,²⁸ the chief executive²⁹ is empowered to effectively manage State forests (including those in the Supply Zone under the contract) and the sale and disposal of forest products³⁰ (including the Araucaria the subject of the contract). The legislature's clearly stated intention in the Act, to which the contract is subject, is that the chief executive is to manage the important public resource of State forests, the land on which the forests are situated, and products from those forests in the public interest.
- [37] I have earlier set out aspects of the contract which give broad discretionary powers to the chief executive on wide-ranging issues.³¹ By contrast, Yarraman's right to enter the Supply Zone to harvest or "get" hoop pine is not an exclusive right to entry or occupation (cl 3.4). Yarraman is obliged to take each year a significant quantity of timber at the value fixed by the chief executive under the contract. The contract's strong weighting of power in favour of the Forestry and its chief executive is, however, entirely consistent with the legislative intent of the *Forestry Act* and with the parties' objective intention entering into the contract.
- [38] Under Sch 5 cl 1.2, in carrying out a General Value Review, the chief executive "shall take into account insofar as the Chief Executive considers these would affect the value of Araucaria, factors including but not limited to" the matters set out in (a)-(c).³² Those matters are market-focussed. They can be expected to be within the specialised knowledge of the chief executive as head of the Forestry. Yarraman has the opportunity to provide relevant information to the chief executive prior to the chief executive's determination under the General Value Review (Sch 5, cl 1.3

²⁷ *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 355-356; *Xstrata Queensland Ltd v Santos Ltd & Ors*; *Santos Ltd & Ors v Xstrata Queensland Ltd* [2005] QSC 323 at [31].

²⁸ Set out at [12] to [16] of these reasons.

²⁹ Set out in footnote 3.

³⁰ *Forestry Act* 1959 (Qld), s 46.

³¹ Set out at [24]-[28] and [31]-[34] of these reasons.

³² Set out at [23] of these reasons.

- and cl 1.6).³³ The chief executive is obliged to consider that information, if provided (Sch 5, cl 1.5).³⁴ There is nothing in the contract that obliges the chief executive to provide reasons for his determination of value under the General Value Review. These factors are only consistent with the chief executive having a broad discretion to determine value under a General Value Review.
- [39] The terms of the contract specifically envisage that a dispute may arise between the parties out of the chief executive's determination of the value of Araucaria, either under a General Value Review or a Periodic Value Review (cl 30.9 and cl 30.10).³⁵ The dispute resolution process under the contract allows either party to refer a dispute to arbitration (cl 30.8).³⁶ These dispute resolution provisions strongly suggest that, in the event of a dispute arising as to the chief executive's determination of value either under a General Value Review or a Periodic Value Review, the parties objectively intended the contract to provide for Yarraman to be able to refer the dispute to arbitration, at least in some circumstances.
- [40] This construction is consistent with the fact that the contract nowhere gives the chief executive "the sole discretion" to determine value, even though the chief executive is elsewhere given "the sole discretion" to make determinations (cl 8.11).³⁷ It is also consistent with the fact that the contractual provisions relating to the chief executive's determination of value under a General Value Review³⁸ nowhere state that the chief executive's decision is final, even though the contract elsewhere provides for the finality of the chief executive's decision.³⁹
- [41] There is nothing in cl 30⁴⁰ stipulating that the arbitrator must have knowledge of the matters listed in Sch 5 cl 1.2(a)-(c) which the chief executive is required to "take into account insofar as the Chief Executive considers these would affect the value of Araucaria" in determining the value of Araucaria under a General Value Review. It is arguable that an arbitrator without that specialised knowledge could have difficulty in determining the value of Araucaria, particularly as the information before the arbitrator is limited to that which was provided by the parties to each other for the purpose of the General Value Review (cl 30.10). This is a matter which favours the Forestry's contention that an arbitrator must refer the decision on value back to the chief executive for determination. On the other hand, an arbitrator would have access to whatever relevant information Yarraman had provided to the chief executive for the purpose of the General Value Review (Sch 5, cl 1.3 and cl 1.6).
- [42] The contract does not in its terms provide for the arbitrator to remit the determination of the value of Araucaria to the chief executive. This omission tends to favour Yarraman's contention that the parties objectively intended for the arbitrator to be empowered to make a decision as to value of Araucaria when a dispute about value is referred to the arbitrator, at least in some circumstances. This construction is also consistent with the terms of cl 30.8 and cl 30.10.
- [43] After carefully reviewing the relevant terms of the contract in the light of the parties' submissions, I remain unpersuaded of the correctness of Yarraman's contention that

³³ Set out at [23] of these reasons.

³⁴ Set out at [23] of these reasons.

³⁵ See out at [29] of these reasons.

³⁶ See out at [29] of these reasons.

³⁷ Referred to at [24] of these reasons.

³⁸ Set out at [22] and [23] of these reasons.

³⁹ Referred to at [33] of these reasons.

⁴⁰ Set out at [29] of these reasons.

the arbitrator is entitled to make a fresh determination of value once Yarraman refers this dispute to the arbitrator. The chief executive's determination of value under the General Value Review is plainly a broad discretionary decision involving, but not limited to, a consideration of the matters set out in Sch 5 cl 1.2 and cl 1.4-1.6. The chief executive's determination as to value under the contract is not a mathematical calculation. It is not limited to one absolute value. It will fall within a range of reasonable values, determined in accordance with the contract, most relevantly, cl 7, Sch 5 and cl 31.1.⁴¹ It is ordinarily difficult to set aside a discretionary valuation on the grounds that the valuation is unreasonable, even where, as here, the contract does not specifically state that the valuation is to be final and binding: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*⁴² and *WMC Resources*.⁴³

- [44] That does not mean the contract does not allow for a dispute over the chief executive's determination of value arising from a General Value Review to be referred to arbitration in some circumstances. Unlike in *Legal & General Life*, the terms of the Forestry-Yarraman contract specifically provide for the referral to arbitration of "a dispute concern[ing] the determination of the value payable for Araucaria" (cl 30.8-cl 30.10).⁴⁴ Whether an arbitrator has power to determine an arbitration and the extent of that power, if any, will depend on the terms of the contract and whether the original valuation complies with it: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*.⁴⁵ As I have noted, the chief executive's decision as to value is discretionary. It follows that unless the chief executive in determining the value of Araucaria under the General Value Review acted contrary to the contract (including the obligation to act honestly, fairly and reasonably),⁴⁶ an arbitrator has no power under this contract to set aside the chief executive's valuation: *House v The King*,⁴⁷ *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd*⁴⁸ and *WMC Resources*.⁴⁹ An arbitrator could only set aside the chief executive's determination if the arbitrator found it was dishonest, unfair or unreasonable or that the chief executive had made it in a way which was otherwise inconsistent with the contractual terms. I do not apprehend Yarraman to contend that no reasonable person in the position of the chief executive could have made the determination of value made by the chief executive under the General Value Review, consistent with the terms of the contract. Yarraman simply contends that the arbitrator can re-exercise the chief executive's discretion and re-determine a value payable for Araucaria, without Yarraman having to demonstrate error on the part of chief executive.⁵⁰ That contention is wrong. It follows that Yarraman is not entitled to the declaration it sought from the primary judge.

⁴¹ See *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, McHugh JA at 335-336 and *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 20 WAR 489 at [25]-[26].

⁴² (1985) 1 NSWLR 314, McHugh JA at 335-336.

⁴³ (1999) 20 WAR 489 at [40]-[43].

⁴⁴ Set out at [29] of these reasons.

⁴⁵ [1985] 1 NSWLR 314, McHugh JA at 335-336.

⁴⁶ *Xstrata Queensland Ltd v Santos Ltd & Ors; Santos Ltd & Ors v Xstrata Queensland Ltd* [2005] QSC 323 at [16], [24], [31]-[38]; *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 20 WAR 489 at 501 [46] and set out in cl 31.1 of the contract.

⁴⁷ (1936) 55 CLR 499 at 507.

⁴⁸ (1981) 146 CLR 336, Mason J at 381.

⁴⁹ (1999) 20 WAR 489 at [40]-[43].

⁵⁰ Transcript of the appeal hearing at p 4, lines 50-55.

- [45] That effectively disposes of the appeal. But the question arose in argument as to whether, if the arbitrator determined that the chief executive had erroneously set the value of Araucaria under the General Value Review, the arbitrator was obliged to then decide the value; or was the arbitrator obliged to refer the matter back to the chief executive to determine the value. The contract does not make unequivocal provision in its terms for either course of action. It does, however, envisage that a dispute as to value may sometimes be resolved by arbitration (cl 30.8 - cl 30.10). It does not provide for remission of the decision about value to the chief executive. Nor does it provide that the determination of value under a General Value Review is to be in the sole discretion of the chief executive. Nor does it provide that the chief executive's decision as to value is final. Under cl 30.10, a dispute before an arbitrator "concern[ing] the determination of the value payable for Araucaria" is to be resolved on information limited to that provided by the parties to each other for the purpose of the General Value Review. These matters in combination lead me to conclude that the preferable construction of the terms of the contract is that if, and only if, the arbitrator concludes that the chief executive has erred in the sense I have described in determining the value under the General Value Review, the arbitrator is empowered under the contract to substitute the arbitrator's own discretionary decision as to value, "limited to the information which was provided by the parties to each other for the purpose of the value review" (cl 30.10).

Summary

- [46] Yarraman did not seek at first instance nor in this appeal to challenge the chief executive's determination as to value under the General Value Review on the basis of error in the sense discussed in *House v The King, Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* and *WMC Resources*. It did not contend that the chief executive's determination was not made in accordance with the terms of the contract or that the chief executive acted unreasonably, unfairly or dishonestly in determining the value. Yarraman merely wanted the arbitrator to second-guess the chief executive's discretionary determination of value under the General Value Review.⁵¹ It follows that the present dispute as to value is not one in which the arbitrator could set aside the chief executive's determination of value. There is presently no justiciable dispute: see *Xstrata*.⁵² Yarraman is not entitled to the declaration it sought. The primary judge was correct in dismissing Yarraman's application. The only point from which I depart from the primary judge's reasoning is on a matter which does not affect the orders made by his Honour nor the outcome of this appeal. It would arise only if Yarraman's dispute was based on the chief executive's error and the arbitrator determined that the chief executive had erred in determining the value of Araucaria under the General Value Review, in the sense I have discussed. Then, under this contract, the arbitrator would be empowered to substitute the arbitrator's own discretionary determination as to value for that of the chief executive, consistent with the terms of the contract.
- [47] The appeal should be dismissed with costs to be assessed.
- [48] **HOLMES JA:** I agree with the President, for the reasons she has given, that the appeal should be dismissed with costs to be assessed. The learned primary judge was right to conclude that the carrying out of the General Value Review for which clause 7 provided was an exercise of a "broadly discretionary character".⁵³ As well

⁵¹ Transcript of the appeal hearing at p 4, lines 50-55.

⁵² [2005] QSC 323 at [29].

⁵³ *Yarraman Pine P/L v Forestry Plantations Queensland* [2008] QSC 232 at [17].

as deciding how the Review was to be conducted, and identifying the “projected basket of wood available”, the Chief Executive had to apply knowledge and expertise peculiar to him (or her) in determining what factors in addition to those prescribed in clause 1.2 of Schedule 5 would affect the value of Araucaria, and in determining to what extent the prescribed factors might affect the timber’s value, before assessing the available information, including that provided by the appellant, against those factors and reaching a view as to value. Those functions were to be performed in the context of a broader statutory role in management of forestry resources under the *Forestry Act 1959* (Qld).

- [49] A similar exercise in judgment was not, in my view, feasibly to be undertaken by an arbitrator, who could not be assumed to have similar knowledge or expertise, on the limited material available (by virtue of clause 30.10) for consideration on arbitration. The essentially discretionary nature of the exercise to be performed by the Chief Executive on a General Value Review favours the conclusion that merits review of a determination as to value was not intended under this contract.
- [50] **FRYBERG J:** Clause 30.10 of the contract⁵⁴ demonstrates that disputes concerning the determination of the “value” payable for the trees obtained under this contract may be referred to arbitration or heard in a court. The respondent would have it that the jurisdiction of an arbitrator or a court is limited to errors of process, such as a failure to act in good faith or to act reasonably on the part of the Chief Executive.
- [51] Such an approach is in my judgment inconsistent with the terms of that clause. If the clause were applied to such cases, the appellant would be precluded from proving that the respondent had taken a bribe except in the unimaginable case where the evidence of that bribe was contained in the information provided by the parties to each other for the purpose of the value review. The clause makes sense only if it refers to what counsel for the appellant described as merits review.
- [52] In my judgment, nothing in the text of the remainder of the contract outweighs this consideration.
- [53] *WMC Resources Ltd v Leighton Contractors Pty Ltd*⁵⁵ contained nothing equivalent to cl 30.10. It is distinguishable on that ground and also on the ground that the determination of the mine owner in that case was expressly to be made “in [the owner’s] sole discretion”. In the present case the determination is much more circumscribed. It more resembles the process of assessment by way of quantum meruit.
- [54] It is unnecessary to consider whether that decision should be followed in this State. The appellant did not submit that it was wrongly decided. If a case should arise in which the decision is indistinguishable, it may be necessary to consider whether the reasoning incorrectly equated a referral to arbitration following a value determination with an appeal; and whether it is correct to accord to a determination of a contract price, particularly a determination by a party to the contract, the same deference as a valuation properly so called. Monetary determinations are not valuations simply because the parties to the contract use the word “value”. They may be “adherents to Humpty Dumpty's principle as expounded by him to Alice.

⁵⁴ Paragraph [29].

⁵⁵ (1999) 20 WAR 489; [1999] WASCA 10.

But his latitude and his command of his words as his servants are not generally allowed to lawyers. They are called upon to *interpret* other men's words."⁵⁶

- [55] In my judgment the appeal should be allowed with costs, the orders made below set aside and in lieu thereof orders should be made in accordance with paras 1 and 2 of the application.

⁵⁶ *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at p 458 per Windeyer J (emphasis added).