SUPREME COURT OF QUEENSLAND

CITATION:	*Discovery Beach Pty Ltd v Northbuild Construction Pty Ltd* [2010] QCA 363
PARTIES:	**DISCOVERY BEACH PROJECT PTY LTD** ACN 100 500 981 (respondent/appellant) **v** **NORTHBUILD CONSTRUCTION PTY LTD** ACN 011 063 764 (applicant/respondent)
FILE NO/S:	Appeal No 4621 of 2010 SC No 10086 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2010
JUDGES:	Margaret McMurdo P and Muir JA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed with costs.** **2. The declaration numbered 1 in the 27 April 2010 Order be deleted and the following declaration be inserted in its place:** **"… that insofar as the question of the termination by DBP of the August Agreement is relevant to the Arbitrator's determination, the August Agreement should be regarded as continuing to operate."** **3. The declaration numbered 2 in the 27 April 2010 Order be set aside.** **4. The declaration numbered 4 in the 27 April 2010 Order be varied by deleting "and VO 102" and by deleting "those terms are" and inserting in lieu thereof "that term is".** **5. Paragraph 5(b) of the 27 April 2010 Order be deleted.** **6. Paragraph 6 of the 27 April 2010 Order be varied by inserting before "paragraph 5" the words and letters "sub-paragraphs (a), (c) and (d) of".**

7. Paragraph 8 of the 27 April 2010 Order be varied by excluding from it reference to VO 102.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – ERROR OF LAW – primary judge found an agreement between the parties under an Award had not been terminated – finding led primary judge to conclude that there was a manifest error of law on the face of the Award – appellant submitted that it was not common ground that the agreement had not been terminated – whether primary judge's finding was erroneous – whether there was a manifest error of law

ADMINISTRATIVE LAW – JUDICIAL REVIEW – ERROR OF LAW – appellant agreed in a clause to a building contract not to make claims or deductions from amounts payable to the respondent unless by consent or through resolution of the dispute by "expert determination or litigation" – arbitrator in interim award mistakenly construed the clause as stating "expert determination, arbitration or litigation" – appellant submitted that respondent was prevented from challenging the arbitrator's construction of the clause – whether parties are bound by the arbitrator's construction of the clause

ADMINISTRATIVE LAW – JUDICIAL REVIEW – ERROR OF LAW – arbitrator held that he had no jurisdiction to determine a variation order as it was not within the scope of the reference to arbitration – primary judge held that the variation order was before the arbitrator – whether primary judge erred in concluding that the variation order was before the arbitrator for determination

Commercial Arbitration Act 1990 (Qld), s 28, s 30, s 38(2)

Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] 1 WLR 1041; [2003] UKPC 11, cited
Chamberlain v Deputy Commissioner of Taxation (1988) 164 CLR 502; [1988] HCA 21, cited
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, applied
Discovery Beach Project P/L v Northbuild Construction P/L [2005] QSC 322, related
Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 QB 630; [1965] 2 WLR 1059, cited
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457; [1933] HCA 25, applied
Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd [2010] QSC 94, related
Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 1) [2005] 2 Qd R 174; [2005] QSC 45, related
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481; [1985] HCA 28, applied

COUNSEL:	B Porter for the appellant D Savage SC, with R Morton, for the respondent
SOLICITORS:	Clayton Utz for the appellant Crouch & Lyndon for the respondent

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for allowing this appeal and with the orders he proposes.

[2] **MUIR JA: The proceedings at first instance**
The appellant ("DBP") appeals against a decision of a judge of the trial division of this Court made after a trial of the proceedings in which the respondent ("Northbuild") sought:

(a) Leave under s 38(2) of the *Commercial Arbitration Act* 1990 (Qld) ("the Act") to appeal an Award made on 3 September 2009;

(b) An order setting aside the Award;

(c) An order that DBP pay Northbuild $1,279,252.12; and

(d) In the alternative, an order that the Award be corrected.

[3] Northbuild alleged in its originating application that the Arbitrator erred:

> "1.6 in any event not giving any or any adequate reasons for making the award given 1.1 to 1.5 above.
>
> …
>
> 1.8 in making the challenged award the Arbitrator failed to give effect to clause 8.1 of the August agreement when his award of 8 June 2009, and the interim award of 18 February 2005 proceeded on the correct (and accepted by the Respondent) finding that clause 8.1 required the Respondent to pay to the Applicant the amounts that the Arbitrator found had been wrongfully deducted from PCs 19, 20, 21 and 22 ($1,039,183.76 plus GST and interest).
>
> 1.9 in wrongly determining that the validity of the deductions made by reason of VO 99 and VO 102, respectively, was not within his jurisdiction;"

[4] Also before the primary judge was an application by DBP for leave to enforce the Award and that judgment for $1,146,644.80 be entered in its favour.

The factual background

[5] It is useful to extract the background facts relevant to the matters for consideration on this appeal from those parts of the primary judge's reasons which are not challenged on appeal. The primary judge relevantly found:[1]

> "[4] In May 2003, Northbuild entered into a building contract ('the contract') with DBP to rebuild the Surfair complex at Marcoola. The contract was for a guaranteed maximum price of $27,250,000.

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1 *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 94.

[5] From time to time, various disputes arose and further agreements were put in place. One of those was the further agreement of August 2004 ('the August agreement'). In clause 8.1 of the August agreement it was provided:

> '8.1 DBP agrees not to set off or make any deductions or claims from Northbuild from amounts which are otherwise payable to Northbuild unless either it has Northbuild's agreement or there is a resolution of the dispute by expert determination or litigation which authorises the deduction . . .'

[6] Between October 2004 and March 2005 DBP issued 'negative' variation orders ('VOs') and defects and omission notices ('DONs'). The VOs deleted work from the works the subject of the contract and, so, reduced the amount payable by DBP for the overall contract sum. Northbuild argues that when DBP issued those VOs it was doing so in breach of its obligations under cl 8.1 of the August agreement.

[7] After issuing the VOs, Northbuild gave notice to Napier & Blakeley (the quantity surveyor engaged under the contract). Napier & Blakeley was told by DBP that the August agreement had been terminated. Acting on that basis Napier & Blakeley deducted the amount represented by those VOs from the contract sum. Northbuild did not accept that the August agreement had been terminated.

[8] Northbuild made an application to the Institute of Arbitrators and Mediators Australia for the nomination of an arbitrator to determine disputes in relation to those VOs and DONs. Mr Warren Fischer ('the arbitrator') was nominated by the Institute. The arbitration of those variations and notices was referred to by the parties as the 'Waves Arbitration'.

[9] Disputes had also arisen between Northbuild and DBP with respect to progress certificates 19, 20 and 21 and Mr Fisher (sic) was again nominated as the arbitrator. This arbitration was referred to as the 'Progress Claims Arbitration'.

[l0] In February 2005 the arbitrator gave an interim award in the Waves Arbitration. In the interim award the arbitrator ruled that:

(a) On the proper interpretation of clause 8.1 of the August agreement, DBP was not entitled to unilaterally set off or deduct an amount from any amount payable to Northbuild whether or not a VO had been issued, unless the amount of the set off or deduction had either been agreed between the parties or determined by 'expert determination, arbitration or litigation'',

(b) DBP should make no deduction for payments to Northbuild with respect to each of 15 specified VOs until such time as the amount of any deduction had

either been agreed between the parties or determined by 'expert determination, arbitration or litigation'.

[11] The interim award was the subject of two decisions by Muir J (as his Honour then was) in 2005: *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 1)* [2005] 2 Qd R 174 and *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 2)* [2005] 2 Qd R 180.

[12] One of the orders made in the latter decision was that judgment was entered against DBP in favour of the applicant in the sum of $1,234,488. That sum was paid by DBP on or about 31 March 2005.

[13] In September 2006 the arbitrator was nominated again to deal with further disputes between the parties in respect of the final claim ('the Final Claim Arbitration'). The arbitrator made an order consolidating the Waves Arbitration, the Progress Claim Arbitration and the Final Claim Arbitration. He made an interim award in June 2009, an award on the Final Claim Arbitration in August 2009 and a further award in the Waves Arbitration ('the Waves Quantum award') in September 2009.

[14] The arbitrator had proceeded in a step-by-step fashion determining issues and then seeking further submissions. In his award of June 2009 he determined the validity of certain deductions and made declarations about whether they had been properly issued or not. He then sought further submissions as to the form of a further award. Both parties submitted that the arbitrator ought make an order for payment of money and not leave that matter until eventual resolution of the other outstanding matters in the arbitration. Each party contended that it should be the beneficiary of a payment order. The Waves Quantum award was published on 3 September 2009. Most of it deals with the allocation of dollar values to various deductions which had been included in progress certificates.

[15] The arbitrator made the following orders and declarations:

(a) That Northbuild pay DBP a total sum of $1,146,644.80 (inc. GST)

(b) That DBP is entitled to have the gross maximum price reduced by $51,227.19 (inc. GST).

(c) That further findings as to VO 91 and V085 be reserved pending expert determinations.

[16] The debate between the parties relates to the manner in which the arbitrator arrived at those findings and how he determined how much was owed and by whom."

[6] The primary judge made the following declarations and orders:

"**THE COURT DECLARES THAT:**

1. The 'August Agreement' as referred to in paragraph 64 of the 8 June 2009 award has not been determined.

2. The conditions necessary for the Respondent to be entitled to make a deduction under clause 8.1 of the August Agreement have not arisen.

3. No obligation can arise under clause 10.2 of the contract between the parties dated 23 May 2003 for the Applicant to repay to the Respondent a sum certified by a Quantity Surveyor.

4. The Arbitrator had jurisdiction to determine, and was required to determine, V099 and V0102 as those terms are referred to in paragraph 2.31 of the award made by Warren David Fischer as Arbitrator on 3 September 2009 (the Award).

THE ORDER OF THE COURT IS THAT:

5. Leave be granted to the Applicant to appeal from the Award under s.38(2) *Commercial Arbitration Act* 1990 Qld (the Act) on these questions of law:

   (a) whether the Arbitrator erred in proceeding on the basis that the August Agreement as referred to in paragraph 64 of the 8 June 2009 award had been determined;

   (b) whether the Arbitrator erred in concluding that the conditions necessary for the Respondent to be entitled to make a deduction under clause 8.1 of the August Agreement as referred to in paragraph 64 of the 8 June 2009 award had arisen;

   (c) whether the Arbitrator erred in proceeding on the basis that there had been a valid negative 'payment certificate' issued by a quantity surveyor purporting to certify amounts due from the Applicant to the Respondent; and

   (d) whether the Arbitrator erred in law in falling, contrary to s.29(1)(c) of the Act, to include in the Award a sufficient statement of the reasons for making the Award.

6. The appeal in respect of the questions of law set out in paragraph 5 be allowed.

7. The Award be remitted to the Arbitrator pursuant to s.38(3)(b) of the Act for reconsideration taking into account the opinion of the Court on those questions of law set out in paragraph 5 above and the declarations made herein.

8. In respect of those matters comprised in VO99 and VO102 referred to in the Award:

   (a) that part of the Award by which the Arbitrator held that VO99 and VO102 were not before him for the determination be set aside pursuant to s.42(1) of the Act;

   (b) those matters be remitted to the Arbitrator pursuant to s.43 of the Act; and

   (c) the Arbitrator be directed to determine each of those matters and to incorporate his determinations into any

> further or amended award made as a consequence of these orders.
>
> …
>
> 10. The Respondent pay the Applicant's costs of and incidental to the application to be assessed on the standard basis."

[7] DBP accepted that the order must be remitted to the Arbitrator for reconsideration by him, at least in respect of that part of the Award containing the reasoning leading to the Orders that Northbuild repay $1,146,644.80 to DBP. On the hearing of the appeal, DBP did not seek to pursue a number of the grounds in its notice of appeal but restricted the appeal to the three issues with which I will now deal.

Termination of the August Agreement

The parties' submissions

[8] DBP contended that the primary judge erred in declaring that the August Agreement had not been terminated. The primary judge's critical finding in this regard was:[2]

> "[27] Northbuild argues that the arbitrator's methodology was erroneous for many reasons. Not least that the quantity surveyors had proceeded on a basis which was incorrect, namely that the August agreement had been terminated. **It was common ground that the August agreement had not been terminated and that clause 8.1 was effective.** Nevertheless, the arbitrator adopted the calculations made by the quantity surveyors which, as I have said, were based on a contrary and incorrect assumption." (emphasis added)

[9] That finding led the primary judge to conclude that there was a manifest error of law on the face of the Award. It was contended by DBP that it was not common ground that the August Agreement had not been terminated.

[10] In their outline of argument before the primary judge, counsel for Northbuild submitted:

> "**Purported Termination by DBP of the August and September Agreement**
>
> 15. In January 2005, DBP told the QS that the August Agreement had been terminated.
>
> 16. In none of the Arbitrations has any party pleaded or alleged that the August Agreement has been terminated.
>
> 17. The Arbitrator proceeded on the basis that the August Agreement was on foot.
>
> 18. In a letter to the Arbitrator dated 15 February 2005, DBP informed the Arbitrator of its purported termination of the August Agreement that day but commented that 'although we have not considered the matter fully, we do not think the termination of the Agreement has any immediate bearing on your proposed interim award'. Northbuild rejected the validity of the purported termination in letters of 14 and 22 February

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2 *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 94.

2005 affirmed the August Agreement and required continued performance by DBP.

19. On 15 February 2005 DBP instituted Supreme Court Proceedings BS1208/05 seeking orders in relation to its purported termination; however those proceedings have not been pursued.

20. In a judgment involving the parties delivered on 4 November 2005 in Supreme Court Proceedings BS7831, 7832 and 7834 of 2005, relating to VR71 and 75 and V090 and 97 Chief Justice de Jersey, at paragraph 19 of his Judgment, commented: '. . . the parties plainly proceeded on the basis the Agreements of both August and September 2004 were on foot'. That was plainly a matter essential for that determination and the matter is now the subject of an issue estoppel." (footnote omitted)

[11] Counsel for Northbuild submitted that it was in fact common ground that the August Agreement had not been terminated. In this regard, it was submitted that:

(a) it was never suggested to the primary judge that the August Agreement had been terminated, even though the Arbitrator had proceeded on the basis that it had been terminated;

(b) there was no pleading before the Arbitrator to the effect that the August Agreement had been terminated. The Arbitrator was thus not in a position to determine that it had been terminated;

(c) because there was no contention in the proceedings before the Arbitrator that the August Agreement had been terminated, those proceedings were conducted, necessarily, on the basis that the August Agreement was on foot; and

(d) had there been a dispute about the termination of the Agreement in the proceedings before the Arbitrator, it would have been necessary for him to make findings about the status of the August Agreement and he did not.

[12] Counsel for Northbuild further submitted that even if it was not common ground that the August Agreement remained on foot, the Arbitrator had made no finding to the contrary and the Arbitrator ought not to have proceeded on the basis that the August Agreement had been terminated.

[13] DBP, in its written submissions at first instance, conceded that it did contend in the matter before the Chief Justice that the August Agreement had been terminated. It submitted, however, that no estoppel arose as that matter was concerned with accrued contractual rights and the question of the continued existence of the August Agreement was not central to its determination.

[14] Counsel for DBP accepted that DBP made no oral submission to the primary judge that the August Agreement had been terminated but he submitted that DBP's written submissions made such an allegation.

[15] The only mention of the termination of the August Agreement in DBP's outline of argument at first instance was in paragraph 40 which stated:

> "The proposition that neither party contended the August agreement had been terminated is a red herring. First, it is incorrect. As is made clear in his Honour's first judgment, DBP did contend the August agreement had been terminated, but that made no difference because the rights in respect of deductions under the PC were accrued rights under that agreement. There was no implication for this from the decision of the Chief Justice referred to in Northbuild's submissions at [20] because it was also concerned with accrued rights (in that case referral of certain matters to expert determination prior to termination by DBP)." (footnote omitted)

[16] Paragraph 40 makes no express or direct assertion that the August Agreement was not on foot. It took issue with the contention by counsel for Northbuild in paragraph 16 of their outline of argument that in "none of the Arbitrations has any party … alleged that the August Agreement has been terminated". The reference to the "first judgment" in paragraph 40 is to reasons in *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd (No 1)*.[3]

[17] In their outline of submissions in reply, counsel for Northbuild submitted:

> "6. Under the Building Contract the Certifier, Napier & Blakeley (referred to in these submissions as the QS), was required to progressively certify costs as they were incurred for work under the Building Contract on account of the GMP. [guaranteed maximum price] There is no suggestion the QS did this as certifier.
>
> …
>
> 9. In any event the QS made the deductions without consideration of the rights that had already accrued under the contract, which would not have been affected by the purported termination (the QS believed that the August agreement had been terminated).
>
> 10. Further, in making the deduction, the QS did not act as a certifier. It made deductions as instructed by DBP so that PC 21 and PC 22 became negative amounts supposedly payable by Northbuild to DBP notwithstanding that no contractual provision so provided.
>
> 11. The correct view of an alleged termination, which was not the subject of any finding and which Northbuild does not accept, namely that accrued rights are not divested or discharged, is recognised both by Counsel for DBP and by Muir J in [2005] QSC 045 (at paragraph 26) and in the Respondent's submissions."

Consideration

[18] The Arbitrator had regard to the August Agreement in arriving at the Award. He referred to it in paragraph 5 under the heading "Background". In paragraph 189 he stated that on 18 February 2005 he published the Interim Award "in respect of the interpretation of Clause 8.1 of the August Agreement and the affect (sic) of that Clause on various Variation Orders".

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[3] [2005] QSC 45.

[19] Counsel for DBP in oral submissions explained to the primary judge the methodology of the Arbitrator. He said, inter alia:

> "But in the quantum award, the next question is, well, he said, well, I've determined that. What was left over to determine was the claim by Northbuild for, in effect, damages for breach of clause 8.1 so what he's done is he's gone back, he has worked out what amount Northbuild would have been paid if the deductions hadn't occurred under clause 8.1 and he works that but by looking at what the certifier said was payable taking away - or in effect, adding back in the amounts that were purportedly deducted and working out, well, if the deductions hadn't occurred then the progress certificates would have been higher. He works that out, he comes to the conclusion that, ultimately, the amount that ought to have been paid which wasn't paid was an amount of $250,000. So if you reverse the various deductions from the progress certificates you end up with the amount of $250,000 that should have been paid."

[20] He had earlier submitted that the Interim Award was concerned with the question of whether, as Northbuild contended, DBP had wrongly deducted certain VOs and DONs from moneys otherwise payable. Later in his oral submissions, DBP's counsel explained, at length, the approach of the Arbitrator in the Interim Arbitration with reference to Clause 8.1. In the course of that explanation he said:

> "Now, I interpolate at this point to say that this approach to clause 8.1 has got to be correct for the reason I said at the beginning. DBP could issue VO's and DON's which purport to deduct amounts from the guaranteed maximum price. It could issue as many as they want but unless it is in fact deducted from an amount otherwise payable, there isn't any breach of clause 8.1. It really falls to be determined in the final wash-up by determining whether they're valid or not which is what the substantive award does. And then if some of them are valid, working out - when eventually the GNP or the total price or the final price payable is determined - taking it into account then. If that hasn't happened, they haven't been deducted from anything. So, in my respectful submission, not only is it clear what the arbitrator's reasoning is in respect of a claim for breach of clause 8.1 but it must be correct."

[21] Not only did counsel for DBP not submit orally at first instance that the August Agreement had been terminated, he submitted positively that the Arbitrator had correctly invoked and applied it. In order to evaluate the relevance and consequence of this conduct, however, it is necessary to have regard to DBP's position that the Arbitrator was concerned, relevantly, with rights which had accrued prior to the alleged date of termination.

[22] Neither before the Arbitrator nor at first instance did counsel for DBP make submissions with a view to obtaining a finding that the August Agreement had been terminated or even venture an explanation of the circumstances in which termination was said to have occurred. Consequently, the primary judge could be forgiven for not appreciating that DBP wished to keep its options open concerning the continuation of the August Agreement. However, not without considerable hesitation, I have concluded that the finding that it was common ground that the

August Agreement had not been terminated was erroneous. Counsel for DBP accepted that it was appropriate to apply Clause 8.1 but for the reasons given above that did not import, necessarily, an acceptance of the continued existence of the August Agreement.

[23] Although DBP did not attempt at first instance or before the Arbitrator to prove that the August Agreement had been terminated, I do not think that the first declaration should stand. As counsel for Northbuild submitted, the termination of the August Agreement was not an issue before the Arbitrator. Another consideration is that both parties submitted to the primary judge, in effect, that relevant rights had accrued under Clause 8.1 before the date of the purported termination of the August Agreement.

[24] The principle, which both parties recognised, was explained as follows by Dixon J in *McDonald v Dennys Lascelles Ltd*:[4]

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach."

[25] Having regard to these considerations, it seems to me that a more appropriate declaration would be to the effect that insofar as the question of the termination by DBP of the August Agreement is relevant to the Arbitrator's determination, the August Agreement should be regarded as continuing to operate. In my view it is desirable to make such a declaration in order to give effect to the principles expressed in the following passage from the reasons of the Court in *University of Wollongong v Metwally (No 2)*[5] quoted in the joint reasons in *Coulton v Holcombe*:[6]

> "'It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.'

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4 (1933) 48 CLR 457 at 476, 477.
5 (1985) 59 ALJR 481 at 483.
6 (1986) 162 CLR 1 at 8.

The Court of Appeal recognized the great importance, in the public interest, of these principles. Their Honours summarized them in the following terms:

> 'the finality of litigation; the difficulty of inducing an appeal court to consider new facts; the undesirability of encouraging tactical decisions not to present an issue at first instance: keeping it in reserve for appeal; and the need for vigilance to avoid injustice to a party having to meet new facts and new issues of law for the first time at the appeal court.'"

Clause 8.1 of the August Agreement

The parties' submissions

[26] DBP argued that the primary judge erred in concluding that the conditions necessary for DBP to be entitled to make a deduction under Clause 8.1 had not arisen. The primary judge's conclusion was based, principally, on the fact that Clause 8.1 operated where there was a relevant agreement between DBP and Northbuild, or where there had been "a resolution of the dispute [between the parties] by expert determination or litigation which authorises the deduction …". It was not in dispute that there was no such agreement and no "arbitration".

[27] In his Interim Award, the Arbitrator had construed Clause 8.1 as if the word "arbitration" appeared in Clause 8.1 between "**expert determination"** and **"or litigation**". The Interim Award relevantly provided:

> "92 For the reasons set out above, I rule that:
>
> - on the proper interpretation of Clause 8.1 of the Interim Agreement dated 19 August 2004, DBP is not entitled unilaterally to set-off or deduct an amount from any amount payable to Northbuild, whether or not a Variation Order has been issued, unless the amount of the set-off or deduction has either been agreed between the parties or determined by expert determination, **arbitration** or litigation …" (emphasis added)

[28] The use of the word "arbitration" may have been the product of a typographical error or inadvertence, but neither party took steps to correct the Interim Award in this respect.

[29] Counsel for DBP contended that the primary judge erred for these reasons:

(a) The primary judge identified the error which he perceived to exist as a manifest error;

(b) However, the Interim Award was not appealed against;

(c) The parties must have agreed, by their conduct both before and after the Interim Award and the Declaratory Award to vary Clause 8.1 to permit resolution of the disputes about Deductions by arbitration;

(d) That conduct was;

(i) Northbuild referred all the extant disputes about the Deductions to arbitration (though there is an argument that some had been

referred or ought be referred to expert determination) after the August agreement but prior to the Interim Award, and referred the balance after the Interim Award was published;

(ii) The foundation of the jurisdiction of the Arbitrator to make the Interim Award was the referral of the underlying dispute about the Deductions;

(iii) Northbuild submitted to the Arbitrator that the form of order ought include the reference to arbitration;

(iv) Northbuild did not appeal the Interim Award;

(v) Following the Interim Award, Northbuild continued as claimant in the Waves arbitration, and obtained the 'resolution of the disputes' about the Deductions by the Declaratory Award and the Award.

[30] It is further argued that if the parties did not agree to resolve the disputes about the Deductions by arbitration, those disputes would remain unresolved (at least for the purposes of Clause 8.1) and would never be so resolved unless there was fresh litigation or expert determination "something neither party seeks nor wants". DBP accepted that the Award must be remitted to the Arbitrator as Northbuild contended but asserted that it was entitled to succeed in its challenge to Declaration 2 and paragraph 6 of the Order insofar as it relates to paragraphs 5(a), (b) and (c) of the Order.

[31] Counsel for DBP submitted orally that Northbuild was prevented by s 28 of the *Commercial Arbitration Act* 1990 (Qld) from challenging the Arbitrator's construction of Clause 8.1. That section provides:

> "**28 Award to be final**
>
> Unless a contrary intention is expressed in the arbitration agreement, the award made by the arbitrator or umpire shall, subject to this Act, be final and binding on the parties to the agreement."

[32] 'Award' is defined in s 4 of the Act to include 'Interim Award'. Counsel for DBP submitted that the Interim Award, in terms, ruled that on the proper interpretation of Clause 8.1 DBP was "not entitled unilaterally to set-off or deduct an amount from any amount payable to Northbuild, whether or not a Variation Order has been issued, unless the amount of the set-off or deduction has either been agreed between the parties or determined by expert determination, arbitration or litigation …".

[33] Counsel for Northbuild addressed the argument based on s 28 as follows. The determination by the Arbitrator in the Interim Award was made for the quite specific purpose of resolving the dispute then before him and was made at a time when it was not asserted by either party that there had been "arbitration, expert determination or litigation". The ruling has no application to this later arbitration to which Clause 8.1 is plainly referable.

[34] Other submissions made by Northbuild's counsel were as follows. DBP's argument confused the question of whether disputes as to the factual justification or otherwise for the deductions that DBP sought to make had been referred to arbitration (which was what the Arbitrator had to decide) with the question of whether or not Clause

8.1 authorised the Arbitrator to make the orders in the impugned Award (when the arbitration was not litigation or expert determination). The argument that the August Agreement had been varied by consent was not available. It had not been advanced at first instance and it was not possible to conclude that Northbuild would not have been able to adduce evidence which may have affected the determination of the point. The only serious contention advanced by DBP before the primary judge was that once the Arbitrator had mistakenly construed Clause 8.1 once, he was entitled to repeat the mistake. The point, however, is academic, as DBP:

> "… does not appeal against that part of [the primary judge's] reasoning which found that there was no basis for Northbuild to repay to DBP [prior to the final accounting between the parties] the amount of any negative certification on a progress certificate.
>
> 21. Thus there is no challenge to his Honour's decision that even if the Arbitrator's decision was otherwise permissible the Arbitrator nonetheless erred in finding that Northbuild should pay money to DBP. There is simply no provision of the standard form building contract or the August agreement that permits, allows, authorises or requires DBP to demand or Northbuild to pay money on a provisional basis."

[35] Counsel for DBP rejected the contention that the dispute before the primary judge was as limited as counsel for Northbuild asserted and submitted that the primary judge's findings were not as construed in the previous paragraph.

Consideration

[36] The primary judge rejected DBP's argument that once the Arbitrator had made the mistaken construction of Clause 8.1 in the Interim Award, he was entitled to repeat it in the Award as follows:[7]

> "[30] I do not accept that an arbitrator does not make an error of law by following an earlier ruling made in an unappealed decision which was an error of law itself. The construction of documents is a question of law and a failure to properly construe a document is an error of law. An arbitrator who follows an earlier unappealed decision does not achieve any form of protection for the later decision simply on that basis. The error is committed each time the arbitrator applies an incorrect construction. Thus, the construction which was applied in the award under attack, being incorrect, constitutes an error of law."

[37] I accept the submission by counsel for Northbuild that the argument that the August Agreement had been varied by consent was not raised with the Arbitrator, or at first instance, and cannot be pursued on appeal.[8]

[38] Although it seems likely that the word "arbitration" was included in the Arbitrator's ruling in the Interim Award by mistake, while the mistake, if it was one, remains uncorrected, the parties are bound by it. The ruling was part of the Arbitrator's Award and it is final and binding by operation of s 28 of the Act.

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7 *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 94.

8 *Coulton v Holcombe* (1986) 162 CLR 1 at 8.

[39] The doctrines of issue estoppel and *res judicata* apply to arbitration awards, including interim awards.[9] The proper construction of Clause 8.1 insofar as it bore on DBP's entitlement to set off or deduct moneys from any sums payable to Northbuild, was an issue directly raised and necessarily decided by the Interim Award.[10] Accordingly, while the Interim Award remains uncorrected the parties are bound by the subject finding of the Arbitrator. An award may be corrected pursuant to s 30 of the *Commercial Arbitration Act* 1990 (Qld) in the case of "a clerical mistake" or "error arising from an accidental slip". The primary judge was not invited to correct the Interim Award by exercising powers under s 30. Nor was he referred to s 28 of the Act.

Jurisdiction in respect of VO 102

[40] The Arbitrator held that he did not have jurisdiction to determine VO 102. He omitted it from the Declaratory Award and noted expressly in the table at paragraph 231 of the Award that it was not before him. The primary judge held that VO 102 was before the Arbitrator as, "Each of those VOs [referring to VO 99 and VO 102] was either referred to in the pleadings, the subject of evidence, the subject of written submissions or each amounted to the same thing as a DON".

The parties' submissions

[41] Counsel for DBP contended that:

(a) There was no evidence before the primary judge that VO 102 had been referred to arbitration;

(b) The references to arbitration recited in the Declaratory Award omit VO 102 and the letter from Northbuild's solicitors to the chairman of the Queensland Chapter of the Institute of Arbitrators and Mediators of Australia requesting the nomination of an arbitrator to determine the disputes in particularised notices of dispute which deals with the adjacent variation claims omitted it;

(c) Although Northbuild referred to VO 102 in its points of claim, DBP maintained its response that it was not before the Arbitrator;

(d) Northbuild included a claim based on VO 102 in its submissions on quantum but VO 102 was omitted from DBP's response. Northbuild's inclusion cannot establish the Arbitrator's jurisdiction; and

(e) Northbuild's repeated submission that failure to deal with VO 102 was an oversight is unsustainable.

[42] Counsel for Northbuild referred to page 2570 of the transcript of the proceedings before the Arbitrator in which the Arbitrator said:

> "I believe I need to deal with VOs 71 through to 79, 82 through to 91, less VOs 90, 93, 94, 97, 98, 99 right through to 106, and then DONs 1 all the way through to 40. … So, there is the withdrawn; then, as far as those remaining, there is the determination of value; then, really, just the reconciliation against what has been paid …"

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9 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, 640 and 643; *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 and 2 *Halsbury's Laws of England*, 4th ed, para 582.

10 See *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 507 citing *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 597.

[43] It was further submitted that given that DBP conceded that VO 102 is not maintainable and had purported to withdraw it, the Arbitrator should have taken the withdrawal into account in calculating the amount payable. The progress certificates on which the Arbitrator based his impugned Award proceeded on the basis that the moneys the subject of VO 102 were lawfully deducted. DBP now concedes that they were not.

[44] In response to Northbuild's submissions, counsel for DBP contended that reference to VO 102 in Northbuild's points of claim was not sufficient in itself to confer jurisdiction. DBP's pleaded response to Northbuild's pleading was that VO 102 had "been referred to expert determination". In *Discovery Beach Project P/L v Northbuild Construction P/L*[11] the Chief Justice held that disputes in respect of the provisional sums and fit-out for the North-East beach houses (with which VO 102 is concerned) had been referred to expert determination and accordingly the Arbitrator had no jurisdiction.

Consideration

[45] What was before the Arbitrator depended on what was referred to him. He cannot confer jurisdiction on himself, as one of Northbuild's submissions implied.[12] Nor can an allegation in a pleading or a submission concerning an issue not within the scope of a reference to arbitration, of itself, bring the issue within the terms of the reference. It was not submitted that if the dispute concerning VO 102, including the consequences of its withdrawal, was not part of the reference to arbitration, the Arbitrator was given jurisdiction as a result of the parties' conduct.

[46] The Arbitrator concluded that VO 102 was not before him and none of the matters identified by counsel for Northbuild established that the Arbitrator erred. The mere advancing of arguments relating to VO 102 in Northbuild's submissions could not have had the effect of referring matters concerning VO 102 to Arbitration if they were not within the scope of the reference.

[47] In order to determine what was before the Arbitrator in the arbitration which led to the 3 September Award, it is necessary to go beyond the Award itself. The Award, under the heading "OVERVIEW" states:

> "On 18 February 2005 I published an interim Award in this arbitration (the '2005 Award'). On 8 June 2009 I published a further interim Award in this arbitration (the 'June Award'). This Award refers to and should be read in conjunction with both of those Awards. The June Award made a series of declarations, and findings, and made provision for the parties to make further submissions in respect of the form of further Award. This Award deals with the questions of quantum, GST and interest that flow from the June Award with the benefit of the parties submissions."

[48] Paragraphs 8 and 9 of the Award, under the heading "THE ORDERS SOUGHT" state:

> "8. In its submissions dated 3 July 2009, the Claimant, Northbuild, has applied for an Award:
>
> - *'I order that DBP pay to Northbuild the sum of $1,797,987.07'*

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11 [2005] QSC 322.

12 2 *Halsbury's Laws of England*, 4th ed, paras 577 and 610.

> 9. In its submissions dated 21 July 2009, the Respondent, DBP, has applied for an Award:
>
> - that Northbuild pay DBP the sum of $635,368.79 together with interest thereon at the rate of 10% pa since 11 March 2005;
> - of interest to both DBP and Northbuild as set out in the submissions;
> - that Northbuild pay the costs of and incidental [to] the proceedings (including reserved costs)."

[49] The award of 8 June 2009 identifies the matters referred to arbitration, under the heading "THE REFERENCE", in paragraphs 10 to 24 inclusive. The matters identified were disputes in respect of specified DONs and VOs. There was no reference to VO 102. The Interim Award of 18 February 2005 also made no reference to VO 102. The only notice of referral to arbitration in the appeal record, a letter from Northbuild's solicitors to the chairman of the Queensland Chapter of the Institute of Arbitrators and Mediators, identifies disputes by reference to specified DONs and VOs, not including VO 102.

[50] The fact that VO 102 was not one of the VOs referred to in the referral to arbitration would not be fatal to Northbuild's argument if it was necessary or appropriate to have regard to the withdrawal in order for the Arbitrator to determine properly the matters referred to him. However, the Court was not referred to anything from which it might be concluded that it was necessary or appropriate for the Arbitrator to consider the withdrawal of VO 102 or its monetary consequences in order to determine the matters referred to him. Consequently, I have concluded that the primary judge erred in concluding that VO 102 was before the Arbitrator for determination.

Conclusion

[51] Although I would order that the appeal be allowed with costs, I would not disturb the order for costs at first instance. The respondent had a considerable measure of success on its application before the primary judge and such little emphasis was placed on the alleged termination of the August agreement that the primary judge was led to believe that there was no issue about it.

[52] I would order that:

- the appeal be allowed with costs.
- the declaration numbered 1 in the 27 April 2010 Order be deleted and the following declaration be inserted in its place:

  > "… that insofar as the question of the termination by DBP of the August Agreement is relevant to the Arbitrator's determination, the August Agreement should be regarded as continuing to operate."

- the declaration numbered 2 in the 27 April 2010 Order be set aside.
- the declaration numbered 4 in the 27 April 2010 Order be varied by deleting "and VO 102" and by deleting "those terms are" and inserting in lieu thereof "that term is".
- paragraph 5(b) of the 27 April 2010 Order be deleted.

- paragraph 6 of the 27 April 2010 Order be varied by inserting before "paragraph 5" the words and letters "sub-paragraphs (a), (c) and (d) of".
- paragraph 8 of the 27 April 2010 Order be varied by excluding from it reference to VO 102.

[53] **CULLINANE J:** I have had the opportunity to read the reasons of Muir JA in this matter. I agree with those reasons and the orders he proposes.