SUPREME COURT OF QUEENSLAND

CITATION:	*Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2011] QSC 174
PARTIES:	**NORTHBUILD CONSTRUCTION PTY LTD** **ACN 011 063 764** (applicant) **v** **DISCOVERY BEACH PROJECT PTY LTD** **ACN 100 500 981** (respondent)
FILE NO/S:	785 of 2010
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	22 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2011
JUDGE:	Applegarth J
ORDER:	**Upon the giving of the undertakings in Exhibit 7, there be orders in the terms of Exhibit 2.**
CATCHWORDS:	ESTOPPEL – FORMER ADJUDICATION AND MATTERS OF RECORD OR QUASI OF RECORD – JUDGMENT INTER PARTES – ISSUE ESTOPPEL – RESPECTING WHAT MATTERS DECISION CONCLUSIVE – MATTERS NECESSARY TO THE DECISION – where parties engaged in building contract dispute – where some matters in dispute were referred to expert determination – where other matters in dispute were referred to arbitration – where arbitrator made award determining that certain agreements were entered into by the parties, and that certain documents formed part of those agreements – where arbitrator's award also included findings in relation to other matters – where expert determination yet to be finalised – where arbitrator's findings relevant to disputes awaiting expert determination – whether arbitrator's findings were "essential" to his award so as to give rise to issue estoppels – whether respondent estopped in the expert determination from contending contrary to essential findings made by the arbitrator PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – DECLARATIONS – APPROPRIATE FORM

OF RELIEF – DISCRETION OF COURT – OTHER CASES – where building dispute referred to arbitration – where arbitrator's findings were essential to award – where arbitrator's findings relevant to pending determinations by experts of other matters in dispute between the parties – whether declarations of issue estoppel should be made so as to preclude respondent in the expert determination from contending contrary to essential findings made by the arbitrator

ARBITRATION – THE AWARD – EFFECT AND PERFORMANCE – CONCLUSIVENESS OF AWARD – where arbitrator made award in building dispute – where award made findings as to contents of building contract and the performance of works – where arbitrator's findings essential to award – where arbitrator's findings also relevant to disputes awaiting expert determination – whether arbitrator's award conclusive of matters also in dispute before the experts – whether respondent estopped in the expert determination from contending contrary to essential findings made by the arbitrator

CASES: *Blair v Curran* (1939) 62 CLR 464; [1939] HCA 23 applied
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33 cited
Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd [2010] QCA 363 cited
Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd [2005] QSC 322 cited
Metwally v University of Wollongong (1985) 60 ALR 68; [1985] HCA 28 cited
Murphy v Abi-Saab (1995) 37 NSWLR 280 cited
Rogers v The Queen (1994) 181 CLR 251; [1994] HCA 42 cited

COUNSEL: D A Savage SC, with C A Wilkins, for the applicant
B T Porter for the respondent

SOLICITORS: Crouch and Lyndon for the applicant
Clayton Utz for the respondent

[1] On 23 May 2003 the applicant ("Northbuild") as the contractor and the respondent ("DBP") as the developer entered into a contract to redevelop the Surfair Resort at Marcoola. In December 2003 Northbuild and DBP entered into the "December Agreement" which comprised two documents:

(a) a Confirming and Amending Agreement; and

(b) a Record of Agreements Reached ("ROAR").

The ROAR comprised a written agreement of five pages and four signed annexures. Annexure 1 refers at various points to Attachments A-E.

[2] Numerous disputes arose between Northbuild and DBP about the work that was the subject of the contract, as it was varied from time to time. In July 2004, certain disputes were referred to expert determination. Those disputes were separated into categories. Four of those disputes became the subject of what is known as the Category 1 Expert Determination. In late 2004 and during the first quarter of 2005 Northbuild referred certain other disputes to arbitration. On 8 June 2009, after a 13 week hearing in 2008 (which the parties called the Waves Arbitration), the arbitrator, Mr Fischer, made his award.

[3] No determination has been made thus far in the Category 1 Expert Determination. However, the experts, one being a barrister and the other a quantity surveyor, are close to making their determination. The experts have defined certain "preliminary contract issues", heard cross-examination in relation to those issues, and received submissions on them.

[4] Northbuild contends that certain facts relevant to the Category 1 Expert Determination have already been determined conclusively by the arbitrator in the Waves Arbitration. Once the experts have made their determination, the matter must return to the arbitrator to make further final determinations. An arbitration called the Final Claim Arbitration is on foot and concerns the proper amount of the final certificate under the contract. In determining the Final Claim Arbitration, the arbitrator will determine the final sums due as between the parties. Some disputes raised in the Final Claim Arbitration have not previously been referred to another dispute resolution process. But, to the extent that the Final Claim Arbitration involves disputes resolved by other persons (including the experts in the Category 1 Expert Determination), the process will involve combining all the other awards and determinations to reach a final amount due. The arbitrator will not be inquiring into, nor making findings about, disputes that have been determined elsewhere. The arbitrator has no jurisdiction in respect of discreet disputes referred to expert determination.[1]

[5] Northbuild's contention that certain facts relevant to the Category 1 Expert Determination have already been determined conclusively by the Waves Arbitration has given rise to these proceedings, in which it seeks a declaration that DBP is estopped from contending certain matters in the Category 1 Expert Determination. By letter dated 7 February 2011, Northbuild's in-house solicitor wrote to the solicitors for DBP and asked whether DBP admitted certain matters for the purpose of the Category 1 Expert Determination. The solicitors for DBP did not respond to that letter. Instead, the parties' positions have been stated in Northbuild's Notice of Contention and DBP's Notice of Contention in Reply.

[6] In January 2010 DBP filed an application to stay these proceedings. That was heard in March 2010. Justice Ann Lyons refused the application.

[7] In its Notice of Contention in Reply, DBP had contended that it was within the scope of the experts' appointment to determine whether findings made in the Waves Arbitration award were binding in respect of matters arising in the Category 1 Expert Determination and, if so, whether and to what extent any such issue estoppels arose. Northbuild submitted that this was not so and that the judgment of A Lyons J gave rise to an issue estoppel that prevented the experts from deciding

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1 *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2005] QSC 322 at [32], [44] and [46].

those issues. In response, DBP no longer contends that it is open to the experts to decide whether and to what extent issue estoppels arose from the award.

[8] The matters in respect of which Northbuild seeks a declaration that DBP is estopped from contending in the Category 1 Expert Determination are set out in its Amended Originating Application. The form of order sought by Northbuild is Exhibit 2. For present purposes it is sufficient to summarise the substance of the matters that Northbuild contends DBP is estopped from contending. These are that:

(a) agreements referred to by the parties as the Record of Agreements Reached and the Confirming and Amending Agreement (together, "the December Agreement"), amending an earlier agreement between the parties of 23 May 2003 whereby Northbuild was engaged by DBP to undertake the design and construction of the redevelopment of the Surfair Resort, were not made between the parties on 11 December 2003;

(b) the comments column of Annexure 4 to the Record of Agreements Reached was not incorporated in or did not form part of the December Agreement;

(c) the comments column of Annexure 4 to the Record of Agreements Reached for drawings CD-01-401 Rev F to CD-01-405 Rev F was not intended by the parties to read "RB Rendered Block change to Texture Finish";

(d) the attachments to which reference is made in Annexure 1 to the Record of Agreements Reached were not incorporated in the December Agreement;

(e) the provisional sum of $400,000 (exclusive of GST) for the works described as "Central Tower Upgrade" to which reference is made in clause 5.8 of the Record of Agreements Reached did not include the supply only of one air-conditioning chiller unit for the Central Tower (being the subject of variation order 10a);

(f) in respect of the supply and installation of barbeques:

(i) the applicant is not entitled to the restocking fee it has claimed; or

(ii) the applicant is entitled to claim for supervision costs or overhead and margin; and

(g) in respect of the air-conditioning of the south-east beach house, unit 2:

(i) the parties did not agree to install an air-conditioning system as per a quote from Statewide Air Conditioning for $19,135; or

(ii) the system was not installed.

[9] DBP submits that Northbuild's application should be dismissed because:

(a) the "Attachments finding" made by the arbitrator was not a finding of the kind which can give rise to any issue estoppel because that finding was not an essential finding which gives rise to an issue estoppel; and

(b) although the balance of the findings raised in the Amended Originating Application were essential findings capable of supporting an issue estoppel, Northbuild has not identified any contention or allegation made by DBP which is inconsistent with those essential findings, and they are not relevant to any fact or legal issue actually in dispute between the parties in the Category 1 Expert Determination.

DBP submits that, accordingly, the declarations should not be made because, if they do not deal with any issue actually in dispute between the parties in the Category 1 Expert Determination, they are unnecessary. Alternatively, the declarations should not be made because there will be further disputes about their implications. In essence, DBP submits that declarations should not be made in the form proposed, and submits that Northbuild should have formulated declarations by reference to specific allegations or contentions in dispute in the Category 1 Expert Determination.

The issues

[10] The substantial issues for determination in this application are:

(1) whether the arbitrator's finding that the Attachments to which reference is made in Annexure 1 to the ROAR were incorporated in the December Agreement ("the Attachments finding") was an essential finding which gives rise to an issue estoppel;

(2) whether the matters in respect of which Northbuild seeks declarations are relevant to the determination of the Category 1 disputes ("the relevance issue"); and

(3) whether declarations in the form proposed by Northbuild should be declined as a matter of discretion because they are unnecessary, are too broad in their terms or otherwise lack utility.

The arbitrator's findings in relation to the Attachments

[11] In his award, the arbitrator concluded that the Attachments were intended by the parties to be incorporated in the December Agreement.[2] This and other findings about the documents that constituted the parties' agreement had a direct bearing upon the resolution of disputes between the parties in respect of variation orders ("VOs") and Defect Omission Notices ("DONs"). One area of contest (VO 100 and DON 10) related to the installation of split-system air conditioning units. The dispute was whether DBP was entitled to a variation deduction because Airwell air conditioning units were installed. Northbuild's case was that Airwell air conditioning units were installed in accordance with the Contract because the December Agreement provided for this.

[12] The arbitrator considered the relevant evidence and reached the following findings at paragraphs 329 and 330 of his award:

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2 Award, paragraph 63.

(a) allowance was made for the change to Airwell air conditioning units in the "Schedule of Value Management Savings" which is the document identified as Attachment C;

(b) Attachment C to Annexure 1 to the December Agreement forms part of the Agreement;

(c) the change to Airwell air conditioning units formed part of the December Agreement.

As to (b), the arbitrator in paragraph 329 stated that he had found earlier that Attachment C to Annexure 1 to the December Agreement formed part of that agreement. When regard is had to the award as a whole, this refers to his earlier finding made at paragraph 63 that the Attachments were incorporated in the December Agreement. After making these findings in relation to Northbuild's contractual entitlement, the arbitrator stated in paragraph 330 that confirmation of his finding could be found in Annexure 4 of the December Agreement. The result of the arbitrator's finding that Northbuild had complied with its contractual obligations by installing the Airwell air conditioning units was a declaration that VO 100 and DON 10 were improperly issued and are void and of no effect.

[13] DBP submits that the finding that Attachment C to Annexure 1 of the December Agreement formed part of that Agreement was not an "essential finding" but was an "evidentiary fact" in the sense described in *Blair v Curran*.[3] Northbuild submits that this finding was fundamental in the sense described by Dixon J (as he then was) in *Blair v Curran* and cannot be characterised as merely subsidiary or collateral.

Relevant principles

[14] DBP places particular reliance on the highlighted passages of the authoritative judgment of Dixon J in *Blair v Curran*:

> "A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. **The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion**, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between *res judicata* and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.
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> **Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded**. In matters of fact the issue-

[3] (1939) 62 CLR 464, [1939] HCA 23.

> estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of *Coleridge* J. in *R.* v. *Inhabitants of the Township of Hartington Middle Quarter*, **the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous**.
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> In the phraseology of Lord *Shaw*, 'a fact fundamental to the decision arrived at' in the former proceedings and 'the legal quality of the fact' must be taken as finally and conclusively established (*Hoystead* v. *Commissioner of Taxation*). But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. **Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation**.
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> The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision or judgment, decree or order or necessarily involved in it as its legal justification or foundation from matters which even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment, decree or order."[4]

[15] DBP also relies upon later authorities that have distinguished between "decisions of fact or law fundamental or cardinal to the judgment and other decisions".[5] These principles are not in dispute.

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4 (1939) 62 CLR 464 at 531-533, [1939] HCA 23 per Dixon J (emphasis in bold added, footnotes removed).

5 *Murphy v Abi-Saab* (1995) 37 NSWLR 280 at 288 per Gleeson CJ; see also *Rogers v The Queen* (1994) 181 CLR 251 at 283, [1994] HCA 42 at [7] per McHugh J, who observed that no estoppel can arise in respect of "evidentiary issues" even when they are the building blocks in the proof of an ultimate issue.

Application of these principles

[16] DBP submits that the reasoning which led to the conclusion that all of the Attachments were part of the December Agreement was not carried out as part of the essential reasoning leading to orders made for the resolution of any specific dispute before the arbitrator. I disagree. The finding (at paragraph 63) that the Attachments were incorporated in the December Agreement was conveniently located towards the start of the award where the arbitrator made findings about the terms of the parties' contract. His finding in relation to the Attachments in this regard was effectively repeated or restated at paragraph 329. His finding in relation to the Attachments was restated at this point because it was fundamental to the conclusion about Northbuild's contractual entitlement in respect of the Airwell air conditioning units. Northbuild was found to have a contractual entitlement to charge for the Airwell air conditioning units because the Attachments, including Attachment C, were part of the December Agreement and the Airwell air conditioning units were included in Attachment C. The finding that the Attachments (including Attachment C) were part of the contract was fundamental to the decision of the arbitrator. It was not, as DBP submits, only an evidentiary fact.

[17] The finding that the Attachments formed part of the contract was made without qualification in the context of a dispute over whether, as DBP contended, none of the Attachments were incorporated into the contract. As far as I can understand, and DBP did not submit to the contrary, the issue before the arbitrator was whether or not the Attachments were incorporated in the December Agreement. It was no part of DBP's case, even in the alternative, that only some of the Attachments were incorporated in the December Agreement. The dispute between the parties did not depend upon resolution of a contention that some attachments, but not others, were incorporated. There was no half-way house in which DBP sought refuge in response to Northbuild's case about the inclusion of the Attachments in the contract. In deciding that dispute it was necessary for the arbitrator to find whether or not the Attachments were incorporated in the December Agreement, and he found at paragraph 63 that they were. That finding was necessary to determine at least the air conditioning units dispute. The finding that the Attachments were incorporated in the December Agreement necessarily involved a finding that Attachment C was, and this finding was effectually re-stated at paragraph 329.

[18] DBP next submits that, even if the finding referring to Attachment C was an essential finding, it was limited to the finding that the specific item making the allowance for the change to Airwell air conditioning units was incorporated into the December Agreement. I do not agree. The substance and the terms of the arbitrator's findings involved the two fundamental findings that I have identified above. The finding that Attachment C to Annexure 1 of the December Agreement formed part of that Agreement was not limited. To this finding was added the finding that Attachment C made allowance for the change to Airwell air conditioning units. The two findings were fundamental.

[19] DBP next argues that it was not necessary for the arbitrator to find that the whole of Attachment C was incorporated into the December Agreement in order to resolve the air conditioning units dispute in the manner that he did, and *a fortiori* for the finding that *all* the Attachments were incorporated into the December Agreement. I do not accept this submission. I look at the arbitrator's award and the findings that he made. I am not required to decide how the arbitrator might have resolved a

different dispute, such as one in which DBP argued that a particular Attachment, or a particular part of an Attachment, was not intended to be incorporated into the Agreement. The arbitrator made findings in a logical, ordered fashion and adopted a conventional approach of first determining the documents that constituted the contract. His finding that the Attachments were incorporated into the December Agreement was an essential and fundamental finding that resolved the air conditioning units dispute.

[20] DBP submits that it is not bound by the arbitrator's finding that the Attachments to which reference is made in Annexure 1 to the ROAR were incorporated in the December Agreement. It submits that the correctness of its submission can be demonstrated by assuming that it contended in the Expert Determination that, on a proper construction of ROAR, other items in Attachment C were not incorporated into the ROAR. I do not agree with this analysis. The arbitrator's finding that Attachment C was incorporated into the December Agreement was an essential finding and it is not open to DBP now to contend otherwise. The consequences of Attachment C's incorporation into the Agreement are not matters which I am required to decide, either generally or in relation to matters that remain for Expert Determination.

[21] I conclude that the Attachments finding was essential to the resolution of at least the air conditioning dispute. It attracts an issue estoppel. DBP is estopped in the Expert Determination from contending that the Attachments to which reference is made in Annexure 1 to the Record of Agreements Reached were not incorporated in the December Agreement.

The relevance of the arbitrator's findings to the Category 1 disputes

[22] I have found that the Attachments finding made by the arbitrator was an essential finding which gives rise to an issue estoppel. DBP admitted that the balance of the findings raised in the Amended Originating Application were essential findings capable of supporting an issue estoppel. The relevance or otherwise of the arbitrator's findings to the Category 1 disputes were addressed in the parties' written submissions. I shall address the relevance issue in relation to the various findings of the arbitrator that are reflected in the Amended Originating Application.

The Attachments Finding

[23] DBP alleges in the Category 1 Expert Determination that the Attachments do not form part of the ROAR and do not form part of the Agreement. Its written submissions to the experts are that, as a result, the effect of the ROAR on the Agreement of 23 May 2003 was to leave intact the proviso to that part of the Agreement that deals with the reduction of the Provisional Sum for Beach House Fit Out, to quantify the identified Future Savings, and to restore the original Provisional Sum for this item to $700,000. The manner in which entries on the Annexures to the Agreement, and the Attachments referred to in them, affect the calculation of provisional sums, profit contributions and future savings was explained in the course of argument. I am persuaded that the arbitrator's finding in relation to the December Agreement and his finding that the Attachments were incorporated into it have a bearing upon the determination of these issues. DBP did not persuade me that these findings were not relevant to any issue that arises in the Category 1 determination.

[24] The December Agreement finding is associated with the Attachments finding. Taken together they involve essential findings about the documents that constituted the parties' contract.

The Comments finding

[25] The arbitrator found that, on a proper construction of the Agreement, it was the intention of the parties that the "Comments" column of Annexure 4 to the December Agreement was to be incorporated in and form part of the parties' agreement. Northbuild seeks a declaration to the effect that DBP is estopped from contending otherwise. DBP contends that the Comments finding "does not determine whether, and to what extent, any particular entry in the Comments column has contractual effect." In its submissions to the experts DBP submits that the arbitrator's Comments finding does not mean, and could not be interpreted to mean, that everything contained in the Comments column necessarily has any contractual effect. It further submits to the experts that the arbitrator's observations about the Comments column "have no significance in respect of these expert determination proceedings."

[26] DBP submits that in its submissions to the experts and in this proceeding it has made clear that it accepts that the Comments column is part of the December Agreement. Paragraph 14(b) of its Notice of Contention in Reply contends that the Comments finding does not determine "whether, and to what extent, any particular entry in the Comments column has contractual effect." It may be that the only point DBP was intending to make in this regard is that the particular contractual significance of each comment remains open to determination, subject to any issue estoppel. However, its contentions, particularly its contention that the Comments finding has no significance to the expert determination, are open to the interpretation (which DBP would say is a misinterpretation) that DBP contends that the arbitrator's observations about the Comments column have no significance, and that the arbitrator's finding should not be taken to mean that the Comments have contractual effect.

[27] The experts should not have to spend time at the expense of one or both of the parties pondering DBP's submission that the arbitrator's findings about the Comments column "have no significance in respect of these expert determination proceedings." The arbitrator's findings have the obvious relevance of determining that the Comments column formed part of the contract. Northbuild does not wish to re-litigate that issue, and should not be required to do so.

[28] Northbuild does not seek a declaration in respect of the Comments finding about the particular contractual implications of each comment. Instead, in reliance upon the arbitrator's Comments finding, it seeks a declaration to the effect that DBP is estopped from contending that the Comments column was not incorporated in and did not form part of the December Agreement. I consider that the Comments finding has a relevance to the Category 1 disputes since it amounts to a finding that the Comments column was intended to have contractual effect. The finding was that the column "was to be incorporated in and form part of their Agreement." A declaration in the form sought does not inappropriately address the interpretation of particular comments. It does, however, preclude DBP from requiring the experts to determine whether the Comments column has contractual effect. The arbitrator found that it did because it was incorporated in and formed part of the parties'

Agreement. DBP is estopped from contending to the contrary. This includes making a submission that the arbitrator's findings about the Comments column have no significance.

The Rectification finding

[29] The arbitrator found that there was an error in the Comments in relation to a particular drawing and that the relevant entry was intended by the parties to refer to a texture finish on certain blockwork. Northbuild contends that this finding is relevant to what is described as the "Profit Contribution Dispute". I accept Northbuild's submissions that the parties' agreement, including agreed variations, is relevant to the profit contribution issue as the agreement for DBP to pay the profit contribution was reached on the basis of, among other things, the relevant variation. DBP does not particularly submit that the finding in relation to this matter is irrelevant to the Profit Contribution Dispute. On the basis of Northbuild's submissions, I accept the apparent relevance of the Rectification finding to the Profit Contribution Dispute.

The Central Tower air conditioning findings

[30] The arbitrator made findings in relation to this topic at paragraphs 158 and 165. Northbuild submits that these findings are relevant to the manner in which the expert should determine the Profit Contribution issue. I accept the argument in paragraph 31 of Northbuild's submissions that this finding has a relevance to the Profit Contribution issue. The fact that DBP has made a submission to the experts concerning the extent of the Profit Contribution does not persuade me that the findings made by the arbitrator in relation to Central Tower air conditioning are not relevant to the experts' determination of the Profit Contribution Dispute.

Barbeque Works findings

[31] The arbitrator made findings in relation to this matter, and declared that Northbuild was entitled to recover a "restocking fee" and was not entitled to recover an alleged supervision cost or overhead and margin. The arbitrator reserved his determination in respect of any entitlement to "Profit Contribution" pending the delivery of the experts' determination on the point. Annexure 1 to the ROAR makes provision for a profit margin in relation to certain works. The Profit Contribution to which Northbuild is entitled in respect of, among other things, the supply and installation of barbeques is before the experts as part of the Profit Contribution issue. The matter is explained in paragraphs 6 and 7 of Mr Nash's affidavit filed by leave before me. Both parties have made submissions as to the relevance of the arbitrator's findings. DBP submits that events have moved on since earlier submissions were made in respect of Profit Contribution, and submits that Northbuild's submissions do not address these later developments. However, on the material before me, the arbitrator's findings concerning the entitlement or lack of entitlement of Northbuild in respect of, inter alia, the barbeque works should be applied by the experts in making a decision in the course of deciding the Profit Contribution Dispute (namely, in deciding what, if any, profit or loss Northbuild made from the barbeque works).

Beach House air conditioning findings

[32] The arbitrator found at paragraph 347, on the basis of uncontested evidence, that the parties reached agreement to install an air conditioning system in the South East Beach Houses for $19,135, and that the system was installed. Not surprisingly, Northbuild relies upon this finding, which DBP admits was essential, as proof of its entitlement, and contends that DBP is precluded from re-litigating the issue. It submits that the finding is relevant to the dispute about the Provisional Sum for the South East Beach Houses (VR 65) which the experts are to decide. In response, DBP submits that, to the extent that there is a dispute about the direct costs of the works referable to the Provisional Sum, DBP has conceded that the work the subject of the beach house air conditioning findings was included in DBP's assessment of direct costs and at an amount "approximating the amount claimed by Northbuild." I was taken during the hearing to documents evidencing the quotation for $19,135. Counsel for DBP took me to other documents to show that DBP conceded an amount of $19,800. I can understand why Northbuild wants the experts to proceed on the basis of a finding that was made by the arbitrator more than two years ago rather than concern themselves with the difference between $19,135 and $19,800. It is sufficient for present purposes to conclude that the findings in relation to the South East Beach House air conditioning are relevant to the disputes to be determined by the experts, including the Provisional Sum for the South East Beach Houses.

[33] In summary, I consider that the findings which DBP acknowledges to be essential, along with the Attachments finding that I have found to be an essential finding, are relevant to issues in dispute between the parties in the Category 1 Expert Determination.

Should declarations be made in the form sought?

[34] Northbuild submits that the declarations sought have utility. The experts have indicated that they will give effect to them. The declarations sought are founded, in part, on admissions made by DBP that all but one of the findings were essential findings capable of supporting an issue estoppel. I have found that the Attachments finding was also of this character. The making of the declarations will enable the experts to proceed to make findings on remaining matters that are in dispute. Northbuild cites authorities concerning the making of declarations on admissions and submits that there is no other reason why the declarations sought should not be made. It submits that the declarations are in an appropriate form and reflect the terms of the findings on essential issues that DBP is estopped from contesting. It rejects DBP's contention that the declarations should be formulated by reference to specific contentions or allegations that DBP has raised to date in the Category 1 Expert Determination. Northbuild submits that formulating the declarations in the terms proposed by it quells the controversy between the parties in appropriate terms, namely the terms of the findings that DBP admits are essential. It submits that the declarations are in a form that is pragmatic and useful, and that recasting them in different terms by reference to specific areas of contention, such as aspects of the profits contributions dispute, would simply invite further debate about what was meant by matters such as the "profits contributions dispute".

[35] Northbuild relies upon the statement of principle of Muir JA, with whom McMurdo P and Cullinane J agreed, in *Discovery Beach Project Pty Ltd v Northbuild*

Construction Pty Ltd,[6] and submits that it is desirable to make a declaration to give effect to the principle of finality of litigation. Justice Muir cited the reasons of the High Court in *Metwally v University of Wollongong* and *Coulton v Holcombe* which articulate that principle.[7]

[36] DBP submits that the declarations sought are either unnecessary (if they are not relevant to answering any allegation or contention by DBP) or simply will cause litigation. I consider that the declarations are relevant to the issues in dispute before the Category 1 experts. I consider that they have utility in that they effectively remove the need for the experts to re-determine matters that have been found by the arbitrator, being the matters identified in Northbuild's Amended Originating Application.

[37] DBP submits that making these declarations "is almost certain to invite further litigation about the meaning and application of the declarations". I do not agree. The capacity of these parties to litigate cannot be doubted. The possibility that one or other of them will wish to debate and even litigate about the meaning of the declarations cannot be excluded. However, I am not persuaded that this possibility should lead me to exercise my discretion to decline declaratory relief.

[38] There is a certain tension between DBP's submission that the declarations are unnecessary because they relate to matters which are no longer in dispute in the light of concessions that have been made by it (subject to my finding that the Attachments finding was essential), and its submission that making the declarations will cause further litigation. If, as DBP would have it, the declarations are unnecessary because DBP does not raise allegations or contentions before the experts that are inconsistent with the relevant findings, then the declarations should not cause DBP or anyone else any practical difficulty. The worst that could be said is that they lack utility.

[39] If, however, DBP has raised allegations and contentions that are inconsistent with the relevant findings in respect of which issue estoppel arises, or if the experts are left under the apprehension that certain matters have not been conceded by DBP, then the declarations have utility. They will enable the experts to proceed on the basis of declarations that are cast in terms of the findings made by the arbitrator, which DBP is estopped from disputing.

[40] DBP argued that Northbuild should have sought different and more specific declarations, rather than declarations in the more general form sought. I accept Northbuild's submission that declarations in the form sought are appropriate. One problem with recasting declarations so as to capture specific contentions or allegations made by DBP and terms that have been used in the Category 1 Expert Determination, such as "Future Savings", is that declarations in such a form are likely to invite debate about the meaning of such terms, and to permit unmeritorious arguments that, because the declarations were not in the more general form proposed by Northbuild, the Court did not rule that DBP was precluded from re-litigating those findings but simply declared that DBP was only precluded from making certain contentions.

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6 [2010] QCA 363 at [25].

7 *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71, [1985] HCA 28 at [7] per the Court; *Coulton v Holcombe* (1986) 162 CLR 1 at 8, [1986] HCA 33 at [9]-[10] per Gibbs CJ, Wilson, Brennan and Dawson JJ.

[41] I see little utility, and some disadvantage, in formulating declarations, or requiring Northbuild to reformulate the declarations sought, so that they identify specific contentions or allegations that DBP has raised to date, either expressly or implicitly. The preferable course is to declare, by reference to the essential findings which support an issue estoppel, the matters which DBP is estopped from disputing in the Category 1 Expert Determination.

[42] The experts are familiar with the issues and it is appropriate to make declarations that are in the form proposed by Northbuild, leaving the experts to work out the implications of those declarations on the matters they are required to determine. I will later address the limited extent to which the parties may need to assist the experts in that regard.

[43] Finally, the possibility that the parties will argue about the implications of the declarations is not a compelling reason to refuse to make those declarations. Declarations that are uncertain should not be made. Declarations that lack utility should not be made. However, it would be inappropriate to decline to make the declarations sought because there is a possibility that one or other of the parties will argue about their implications.

[44] On balance, I consider that making the declarations in the form sought is necessary to quell a dispute between the parties concerning issue estoppels arising out of the specified findings. The declarations have utility. I intend to make them.

Limitations on further submissions to the experts

[45] During argument before me, an issue arose as to whether one or both of the parties should undertake not to make further submissions to the experts, save for informing the experts that the declarations had been made. I permitted counsel for Northbuild to seek instructions on the matter. On 3 June 2011 Northbuild proposed certain undertakings which are set out below, together with comments that appeared in italics and brackets in the relevant email which do not form part of the undertaking that Northbuild offers, but which seek to explain why Northbuild takes the stance it does. The undertakings and associated comments are as follows:

> "On the basis of DBP's undertaking given on Monday, 30 May, to make no further submissions to the experts in the Category 1 Expert Determination in the event the declarations sought by Northbuild are made, Northbuild also undertakes to make no further submissions to the experts in the Category 1 Expert Determination in that event – save in that Northbuild may make submissions to and inform the experts as follows:
>
> 1. Northbuild may provide to the experts a copy of the declarations made and reasons for judgment.
>
> 2. Northbuild may: (a) inform the experts that in the Supreme Court proceeding DBP conceded that it is not for the experts, but for the court, to determine the question of whether Mr Fischer's award of 8 June 2009 created issue estoppels precluding DBP from making inconsistent contentions in the Category 1 Expert Determination; and (b) submit to the experts they must therefore

ignore or reject the submission DBP made to them that they have the ability to decide this question. *[As to DBP's submission, see, for example, the Bundle, tab A34, at paragraphs 41 to 51. Northbuild has already made submissions to the experts on this question with respect to the 'preliminary contract issues' (described at paragraphs 23 and 24 of its notice of contention): see Bundle, tab A33 at paragraph 77. Northbuild will make no further submission to the experts on this question other than as permitted by the exceptions to its undertaking.]*

3. Northbuild may make submissions to the experts concerning the issues in the Category 1 Expert Determination other than the 'preliminary contract issues' (to which reference is made at paragraphs 23 and 24 of Northbuild's notice of contention) about recalculations the experts should make in view of the declarations that have been made (and will do so on the basis that DBP may make submissions to the experts in reply about the matter of such recalculations). *[Northbuild considers it needs to be able to do this. An example of why this is appropriate may be found at tab A16 of the Bundle, viz., DBP's submissions to the experts dated 24 August 2004. Northbuild says it ought to be able to explain to the experts that DBP's cost of works assessment in respect of air-conditioning SE beach-house #2 reducing the claim from $19,150/$19,135 to $9,000 (on the third last page of tab A16) has to be ignored in deciding the VR65 dispute.]*

4. Northbuild may make further submissions on any issues about which the experts require submissions to be made (as they are permitted to require under rule 2 of the Rules for Expert Determination), and will not object to DBP likewise making any such submissions. *[The Rules for Expert Determination are pleaded at paragraph 6 of the notice of contention, which paragraph has been admitted.]*

5. Northbuild may make a submission to the experts that the concession of DBP in the Supreme Court proceeding that it is not for the experts, but for the court, to determine the question of whether Mr Fischer's award created issue estoppels is a concession by which DBP should be bound for the rest of the (yet to be dealt with) Categories Claims Expert Determinations.

6. Northbuild may inform the experts that it will be making submissions in the rest of the Categories Claims Expert Determinations about findings Mr Fischer made in his award which Northbuild says created issue estoppels; with the consequence that Northbuild may need to apply again to the Supreme Court for further declarations if, in the future, DBP is unwilling to concede that a particular finding made by Mr Fischer created an issue estoppel." (italics in original)

[46] DBP responded to these proposed undertakings. It raised concerns that undertakings in the form offered by Northbuild will permit submissions to be made about recalculations and other matters, and that the form of undertaking offered by Northbuild shows that the concerns identified by DBP about the scope for further argument are justified.

[47] I am not persuaded that the undertakings proposed by Northbuild are inappropriate.

[48] I do not consider that it is appropriate to require Northbuild or DBP simply to provide a copy of the declarations and a copy of my judgment to the experts. The limited further submissions contemplated in Northbuild's proposed undertaking are appropriate.

[49] The occasion to make declarations, and to seek undertakings concerning the extent of further submissions to the experts, arises principally because DBP has not availed itself of the opportunity to inform the experts that they should not decide the question of issue estoppels and that DBP acknowledges that issue estoppels arise in respect of findings which it has acknowledged were essential findings of the arbitrator. Even if DBP wished to persist with the argument that the Attachments finding was not an essential finding, it might have advised the experts of matters that were no longer in dispute in the light of the arbitrator's findings. At some stage prior to this judgment, DBP might have communicated appropriate concessions to the experts and assisted the experts by supplementary submissions on calculations that flowed from findings by the arbitrator which DBP was precluded from contesting. DBP not having done so, the appropriate course is to permit the parties to make further submissions to the experts in the form proposed by Northbuild. The process contemplated in the undertakings offered by Northbuild will assist the experts to identify matters that they no longer have to concern themselves with and the consequences, in terms of calculation, of findings that give rise to issue estoppels in the form to be declared.

Other matters

[50] During the hearing of the application, I noted that Northbuild sought a declaration that DBP is estopped in the expert determination known as the Category 1 Dispute, and did not seek declarations in relation to later categories. I queried whether declarations should be made in respect of all of the categories that are the subject of expert determination. However, on reflection, I consider that it was reasonable for Northbuild to seek declarations only in respect of the Category 1 Dispute at this stage. The Category 1 Dispute is close to determination. Arguing in these proceedings about issues in relation to estoppels in connection with the other categories would have expanded the case and delayed its resolution. It was reasonable for Northbuild to confine the declaratory relief sought by it at this stage to the Category 1 Expert Determination.

Orders

[51] The form of order will incorporate the undertakings offered by Northbuild in its counsel's email of 3 June 2011 (Exhibit 7). Upon the giving of those undertakings, there will be orders in terms of the draft order which is Exhibit 2. I direct Northbuild to submit draft orders that incorporate the undertakings. I will hear the parties in relation to costs, but as presently advised the appropriate order is that costs follow the event.