SUPREME COURT OF QUEENSLAND

CITATION:	*Redpath Contract Services Pty Ltd v Anglo Coal (Grosvenor Management) Pty Ltd* [2016] QSC 313
PARTIES:	**In BS 11338/16:** **REDPATH CONTRACT SERVICES PTY LTD (ABN 96 133 126 904)** (applicant) v **ANGLO COAL (GROSVENOR MANAGEMENT) PTY LTD (ABN 16 153 794 122)** (respondent) **In BS 11418/16:** **ANGLO COAL (GROSVENOR MANAGEMENT) PTY LTD (ACN 153 794 122)** (applicant) v **REDPATH CONTRACT SERVICES PTY LTD (ACN 133 126 904)** (respondent)
DELIVERED ON:	22 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2016
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The originating application in proceeding number 11418/16 is dismissed.** **2. In proceeding number 11338/16 it is declared that there is no agreement between Redpath Contract Services Pty Ltd and Anglo Coal (Grosvenor Management) Pty Ltd selecting Mr Graham Easton as Expert pursuant to general condition 56.6(c) of the Contract for Major Works numbered 17305 H339205 AA030 dated 6 February 2013.** **3. The originating application in proceeding number 11338/16 is otherwise adjourned to 13 February 2017.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the parties agreed to refer

disputes for expert determination under the contract and negotiated as to which expert to appoint – where by correspondence Redpath stated it was "in principle" willing to appoint a particular expert proposed by Anglo subject to his availability, and drafted a letter enquiring as to his availability over the next four to six months – where the letter was settled by both parties, but after a delay of several months in sending it, the proposed expert advised that he was not available for nine months – whether there was a concluded agreement to appoint the expert – whether any condition that the proposed expert be reasonably available was satisfied – whether there was an implied obligation to act reasonably – whether Redpath acted unreasonably in rejecting the expert due to his availability

1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd (2009) 26 VR 551; [2009] VSCA 308, considered
Australian Laboratory Services Pty Ltd v HRL Ltd [2012] QSC 236, considered
Belvino Investments No 2 Pty Ltd v Australian Vintage Ltd [2014] NSWSC 978, cited
Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600; [1982] HCA 53, considered
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64; [1991] HCA 54, cited
Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd (1972) 128 CLR 529; [1972] HCA 36, cited
Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (2010) 15 BPR 28,563; [2010] NSWCA 268, cited
Meehan v Jones (1982) 149 CLR 571; [1982] HCA 52, cited
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537; [1982] HCA 29, cited
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234, considered
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596; [1979] HCA 51, considered
Watpac Construction NSW Pty Ltd v Taylor Thompson Whitting (NSW) Pty Ltd [2015] NSWSC 780, considered

COUNSEL: P Hastie QC for Anglo Coal (Grosvenor Management) Pty Ltd
M Hindman for the Redpath Contract Services Pty Ltd

SOLICITORS: Minter Ellison for Anglo Coal (Grosvenor Management) Pty Ltd
Allens for Redpath Contract Services Pty Ltd

[1] **Jackson J**: These cross-applications are for declarations and ancillary orders as to whether the parties by agreement selected an expert to resolve a group of disputes arising out of a contract under which Redpath Contract Services Pty Ltd ("Redpath")

agreed for reward to supply services to Anglo Coal (Grosvenor Management) Pty Ltd ("Anglo") at the Grosvenor coal mine near Moranbah in central Queensland.

[2] The parties negotiated over the appointment of the expert. Anglo applies for a declaration that Graham Easton has been selected by agreement to be the expert within the meaning of the relevant clause of the contract. Redpath cross-applies for a declaration that there is no agreement selecting Mr Easton as the expert and also applies for a declaration that the parties have failed to agree on the selection of an expert for the purposes of the relevant clause of the contract.

[3] Because Anglo alleges the existence of a concluded agreement amounting to a contract to appoint Mr Easton as the expert, it is logical to consider the disputed questions on its application first even though its application was filed second in time. If Anglo's application is unsuccessful, it will be necessary to consider Redpath's cross-application.

The facts

[4] The contract is described as a Contract for Major Works (Cost Reimbursable, Target Incentive) contract number 17305 H339205 AA030 dated 6 February 2013.

[5] A number of disputes have arisen between the parties under the contract. As to some of them, the present parties are also parties to proceeding number 4875/16 in this court which is on the Commercial List.

[6] Redpath separately referred the presently relevant disputes for expert determination under cl 56.5 of the general conditions of the contract. On 22 March 2016, Redpath wrote to Anglo referring the following claims:

- Contractor's Staff Personnel (711074);
- G.C.3.9 Material failure (711068);
- Variations (711073);
- Variation Profit Component – Application of Contract Fee (711075); and
- Contractor's Staff Personnel (711064).

[7] By the same letter, Redpath proposed two candidates for appointment as the expert and enclosed copies of their CVs.

[8] On 31 March 2016, Anglo wrote to Redpath in response, stating that it too proposed that the same disputes be referred for expert determination ("31 March offer"). Anglo said that it did not consider either of the candidates proposed by Redpath to be appropriate. Anglo proposed five other possible candidates for appointment as the expert, including Graham Easton.

[9] On 14 April 2016, Redpath responded as to the appointment of the expert ("14 April acceptance"). It urged that Anglo still consider one of its proposed candidates, but continued as follows:

> "Notwithstanding the above, Redpath is concerned to ensure that the dispute resolution mechanism under the contract is progressed expeditiously and the resolution of its claims referred to expert determination are [sic] not delayed as a result of the parties failing

> to reach agreement on a suitable expert. Therefore, in principle we are willing to agree to the appointment of Mr Graham Easton as the expert to determine the claims referred to expert determination. This agreement, however, is subject to Mr Easton's availability and Mr Easton confirming he has no actual or commercial conflicts. This includes Mr Easton confirming that he has not previously been involved with the Grosvenor mine and disclosing what matters, if any, he has previously been engaged on by either Anglo or the law firm acting for you.
>
> We enclose an email we propose to send to Mr Easton regarding his potential engagement as an expert. Please advise whether you are content with the form of the email and that you agree for us to forward it to Mr Easton, copied to you.
>
> Once we receive, confirmation from Mr Easton that he is suitable to act as Expert, we propose that the parties then seek to agree the timetable for the expert determination process, including dates for the service of expert submissions."

[10] The enclosed draft email to Mr Easton included the following:

> "So we may consider your suitability to act as expert, would [sic] be grateful if you could please confirm by return email:
>
> (a) Your availability over the next four to six months and whether you have capacity to determine a number of claims, totalling the value of $[complete]; and
>
> (b) …"

[11] On 13 May 2016 Anglo responded. The letter included the following:

> "We have made some minor suggested amendments to your proposed email to Mr Easton, as attached …"

[12] The attached proposed email did not change the substance of the enquiry as to Mr Easton's availability over the next four to six months and whether he had capacity to determine the disputes.

[13] On 16 May 2016, Redpath wrote to Anglo, accepting the changes to the draft email to Mr Easton proposed by Anglo and making one further addition. The questions as to Mr Easton's availability over the next four to six months and whether he had capacity to determine disputes were not altered.

[14] On 23 June 2016, Anglo returned a signed copy of the (now agreed) proposed email to Mr Easton dated 16 May 2016 ("16 May email") to Redpath.

[15] By 3 August 2016, Redpath had started proceeding number 4875/16. On that date, Redpath's lawyers wrote to Anglo's lawyers, referring (inter alia) to the disputes to be referred to expert determination and stating that Redpath intended to provide the 16 May email to Mr Easton in the following week.

[16] On 5 August 2016, Anglo's lawyers enquired of Redpath's lawyers whether Redpath had sent the 16 May email to Mr Easton and confirmed that Anglo was agreeable to it being provided to him under cover of an email setting out the timetable for submissions proposed in Redpath's lawyers' letter dated 3 August 2016.

[17] On 15 August 2016, Redpath's lawyers responded that as the parties had been discussing the timetable for the expert determination, Redpath had not yet sent the 16 May email to Mr Easton.

[18] On 8 September 2016, after another exchange over the timetable, Redpath's lawyers sent documents to Mr Easton including the 16 May email requesting his availability over the next four to six months and asking whether he had capacity to determine the disputes.

[19] On 12 September 2016 Mr Easton responded as follows:

> "I have considered the correspondence attached to your email. In particular, I note the joint letter dated 16 May 2016 …
>
> I advise that I have no conflicts of interest in the normal circumstances I would be pleased to undertake an expert determination in this matter. However at this point at time, my lack of availability would preclude me from doing so. Regrettably, I am fully booked with other matters until March 2017 and I have very limited availability thereafter until late June 2017.
>
> I am sorry I cannot assist you on this occasion."

[20] On 14 September 2016, Anglo's lawyers wrote to Redpath's lawyers stating that Anglo was content for the expert determination process to commence in late June 2017 when Mr Easton would be available. They continued that would "allow the parties to focus in the intervening period on the higher value disputes which are the subject of the [proceeding in this court]."

[21] On 16 September 2016, Redpath's lawyers responded saying that Redpath was "not agreeable to delaying the commencement of the expert determination process to late June 2017." They continued that they were instructed to note that the expert determination process must be finalised for the purposes of the proceeding in this court, that any delay to the expert determination would have a corresponding delay for the proceeding and that the parties had agreed the expert determination process could run in parallel with the proceeding. Redpath again urged its original nominee as the potential expert instead of Mr Easton, and enclosed a proposed email to send to that potential expert.

[22] On 28 September 2016, Anglo's lawyers responded. Importantly, they alleged that by the letters dated 31 March 2016 and 14 April 2016 the parties had agreed on the appointment of Mr Easton as the expert under cl 56.6(c) of the contract. They continued that given the delays in referring and progressing the expert determination there could be no suggestion that Redpath requires the matters to be dealt with urgently. Anglo's lawyers disagreed with the suggestion that it was necessary for the matters referred for expert determination to be resolved for the purposes of the proceeding in this court.

[23] Thereafter, the parties were in dispute about whether Mr Easton has been selected as the expert by agreement.

Clause 56

[24] Clause 56 of the contract provides as follows:

> "**G.C.56. DISPUTE RESOLUTION**
>
> **56.1 Resolution of disputes**
>
> Unless otherwise expressly stipulated in the Contract, a party must not commence court proceedings in respect of any dispute under the Contract unless it has complied with this C.G.56.
>
> **56.1A Performance disputes**
>
> The parties must attempt to resolve any minor disputes that arise in relation to the day to day performance of the Work (**Performance Dispute**) in accordance with the 'Decision Matrix' contained in Appendix R (**Decision Matrix**). Failing resolution of the Performance Dispute in accordance with the Decision Matrix, either party may issue a Notice of Dispute under G.C.56.2.
>
> **56.2 Notice of dispute**
>
> If a party considers that a dispute, which is not a Performance Dispute, exists in connection with the Contract, that party may give the other party written notice detailing the nature of the dispute (**Notice of Dispute**).
>
> If the dispute is a Performance Dispute, the parties must not issue a Notice of Dispute, unless it has complied with G.C.56.1A.
>
> **56.2A Meeting of the Company's Project Manager and Contractor's Operations Manager**
>
> If within 5 Business Days after a Notice of Dispute is served the parties have not resolved the dispute, the Company's project manager and Contractor's operations manager must confer at least once to attempt to resolve the dispute and, failing resolution of the dispute, refer the dispute to their chief executive officers.
>
> **56.3 Meeting of chief executive officers**
>
> If within 10 Business Days after a Notice of Dispute is served the parties have not resolved the dispute:
> (a) the chief executive officers of the parties; or
> (b) delegates of the chief executive officers, who have not been directly involved in the management of the Contract, must confer at least once to attempt to resolve the dispute and, failing resolution of the dispute, to agree on an alternative method of resolving the dispute.
>
> …
>
> **56.5 Expert determination**

If a dispute has not been settled 30 Business Days after a Notice of Dispute is served or such longer period as the parties agree, then either party may give written notice to the other referring the dispute to be determined by an expert (**'Expert'**) in accordance with this G.C.56.

56.6 Appointment of Expert

The expert must:

(a) act as an expert and not as an arbitrator;

(b) be an independent person with appropriate qualifications and experience; and

(c) be selected by agreement between the parties, or if the parties fail to agree, the person nominated by (which nomination binds the parties);

  (i) in the case of a solely financial or accounting matter, the President for the time being of the Institute of Chartered Accountants; and

  (ii) for all other matters, the President for the time being of the Australian Institute of Mining and Metallurgy.

56.7 Rules for Expert Determination

Unless otherwise agreed by the parties and the Expert, the expert determination will be determined in accordance with the Institute of Arbitrators & Mediators Australia Expert Determination Rules (**'Rules'**), except that:

(a) subject to G.C.56.7(b), paragraphs 1 and 2 of Rule 2 will not apply;

(b) the provisions of Rule A4 of Schedule A of the Rules apply, with 'the Institute' being the relevant institute for the purposes of G.C.56.6(c);

(c) Rule 6(2) will not apply;

(d) the procedure in Schedule B of the Rules shall apply, with the 'claimant' being the party that served the Notice of Dispute; and

(e) Rule 7 will not apply, however any information disclosed by the parties in the expert determination shall be treated by the parties as 'Confidential Information' for the purposes of G.C.57, and also kept confidential by the Expert.

56.8 Expert's decision

The Expert's decision is final and binding on the parties unless:

(a) the decision:

  (i) requires a party to pay an amount in excess of $2 million (excluding GST); or

  (ii) relates to a dispute with respect to a claim for more than $2 million (excluding GST); and

(b) within 28 days of receiving such decision, a party gives to the other party a notice of referral to litigation.

After notice of referral to litigation is given under this clause, either party may commence litigation in respect of the dispute. Any such referral will be by way of a hearing de novo.

56.9 Continued Performance

> Notwithstanding the existence of a dispute, and subject to G.C.48, G.C.49, G.C.50 and G.C.51, the parties must continue to perform the Contract.
>
> **56.10 Rights Not Affected**
>
> Nothing in this G.C.56 prejudices any right of a party to institute proceedings to enforce payment due under the Contract or to seek urgent injunctive or declaratory relief in respect of a dispute under G.C.56 or any matter arising under the Contract."

Anglo's alternative case theories

[25] Anglo's first contention is that a concluded agreement amounting to a contract ("14 April contract") was made between Anglo and Redpath by the 31 March offer and the 14 April acceptance.

[26] The relevant part of the 14 April acceptance is as follows:

> "… in principle we are willing to agree to the appointment of Mr Graham Easton as the expert to determine the claims referred to expert determination. This agreement, however, is subject to Mr Easton's availability and Mr Easton confirming he has no actual or commercial conflicts …"

[27] Anglo characterises Redpath's reservation that the "agreement … is subject to Mr Easton's availability …" ("the availability condition") as a condition subsequent to formation of the 14 April contract to select Mr Easton by agreement, in the sense discussed in *Perri v Coolangatta Investments Pty Ltd*.[1] That is, the condition operates after the time of making the relevant contract as a condition precedent to performance, but is not one that has to be fulfilled before any contract is made. I will call this Anglo's primary case theory.

[28] The alternative contention by Anglo is that the 31 March offer and the 14 April acceptance did not amount to a contract because satisfaction of the availability condition was a condition precedent to formation of a concluded contract as to the selection of Mr Easton. However, because the availability condition was satisfied on 12 September 2016 a concluded contract then came into being on the terms of the 14 April contract. I will call this Anglo's secondary case theory.

Anglo's primary case theory

[29] The field of discourse in the law of contract relating to the implication of terms of good faith or reasonableness in the performance of obligations or exercise of powers (rights) under a commercial contract is an area of some subtlety and controversy.

[30] On Anglo's primary case theory, if the existence of the 14 April contract is accepted, a critical step in the argument is that, on the proper construction of the contract, Mr Easton's appointment was subject to his "reasonable" availability. If he was reasonably available, the availability condition was satisfied. There is no express provision as to reasonableness of availability under the availability condition. That requirement must be reached either as a matter of construction or as an implied term.

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1 (1982) 149 CLR 537, 550-553.

[31] Next, Anglo relies on the implied duty of cooperation under *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*,[2] as supporting an implied term of reasonableness as to Mr Easton's availability. In that case, the amount of the purchase price of a commercial office building was agreed to be reduced unless the vendor provided leases to the purchaser for a certain rental amount before a fixed date after settlement. The contract also provided that any leases to be entered into after the date of the contract were subject to the purchaser's approval. The purchaser refused to approve some leases provided by the vendor. A question was whether the purchaser was obliged to act reasonably in refusing to approve a proposed tenant. It was held that the purchaser was only obliged not to act capriciously or arbitrarily.

[32] Mason J said:

> "But it is common ground that the contract imposed an implied obligation on each party to do all that was reasonably necessary to secure performance of the contract. As Lord Blackburn said in *Mackay v Dick*:
>
> > 'as a general rule … where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'
>
> It is not to be thought that this rule of construction is confined to the imposition of an obligation on one contracting party to co-operate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract. As Griffith CJ said in *Butt v M'Donald*:
>
> > 'It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.'
>
> It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the

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2 (1979) 144 CLR 596.

> intention of the parties as manifested by the contract itself."[3] (footnotes omitted)

[33] Anglo submits that the implied duty of cooperation means that Redpath had an obligation to act reasonably in deciding whether or not the availability condition had been fulfilled. However, the reasons in that case do not, in terms, support an obligation to act reasonably. Mason J asked the question whether the purchaser's refusal of the proposed lease was "capricious" or "arbitrary".[4] If the approach in *Secured Income* were followed, Redpath was entitled not to agree to continue with Mr Easton's appointment if it was not acting capriciously or arbitrarily.

[34] As an alternative, Anglo submits that by the 14 April contract Redpath should be taken to have agreed to the appointment of Mr Easton on terms of engagement that are reasonable. In support of that contention, Anglo submits that it is well accepted in the context of agreements for the appointment of experts to resolve disputes that there is an implied term to do all that is necessary to be done on the party's part to give effect to what is agreed to be done and therefore a party should be taken to have agreed to appoint an expert on terms that are reasonable. Three cases are said to support those propositions: *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd*,[5] *Australian Laboratory Services Pty Ltd v HRL Ltd*[6] and *Watpac Construction NSW Pty Ltd v Taylor Thompson Whitting (NSW) Pty Ltd*.[7]

[35] There is a question whether those propositions, so widely stated, should be accepted. First, *1144 Nepean Highway* concerned a dispute resolution clause for the appointment of an expert under an agreement for lease. The clause provided that if the parties were unable to agree upon an appropriate expert either party might apply to the President of the Law Institute of Victoria or his nominee to appoint an independent practising barrister or solicitor to resolve the dispute as an expert. The parties in *1144 Nepean Highway* were unable to agree on an expert. Successive appointments of proposed experts were then made by the President's nominee, but the defendant refused to accept any of them. It was held that until the parties made an agreement with the expert to resolve the dispute including the terms of his appointment the appointment was incomplete. However, there was an implied term that the parties agreed to be bound by the appointment of the expert provided his terms of engagement were not unreasonable.[8] It is important to note, however, that *1144 Nepean Highway* was concerned with the implication of that term in the deadlock breaking mechanism of nomination by the President that operated only after the parties had been unable to agree upon an expert. Otherwise, the contractual provision for the appointment of an expert would have failed.

[36] Second, *Australian Laboratory Services* concerned a clause where the parties agreed to work together in good faith to arrange for environmental assessments by a consultant agreed by the parties or, failing agreement, appointed by the President of the Institution of Engineers. The consultant to be appointed was agreed and the proceeding was adjourned to permit the terms of the appointment to be negotiated with the consultant. A dispute arose as to whether the agreed consultant should be

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3 (1979) 144 CLR 596, 607-608.
4 (1979) 144 CLR 596, 609.
5 (2009) 26 VR 551.
6 [2012] QSC 236.
7 [2015] NSWSC 780, [59].
8 (2009) 26 VR 551, 558 [25] and 559 [29].

appointed. It was held that the duty to cooperate under *Secured Income* required the parties' continued cooperation in relation to the appointment of the consultant, so that one of them was obliged to do all things necessary in relation to the engagement of the consultant on the facts of that case.[9]

[37] This is consistent with other High Court authority. Where the renewal of a contract depends on a condition for the appointment of a third party to fix the price, a question arises as to the obligations of the parties to cooperate in the appointment of the third person. In *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*[10] the plurality said:

> "However, in order to give business efficacy … it is necessary to imply a term that ... both parties will do all that is reasonably necessary to procure the nomination by the President of an arbitrator. If authority is needed for this proposition, reference may be made to such cases as *Butts v O'Dwyer* where it was held that if parties entered into an agreement to transfer land subject to a condition that it was not to become effective unless the Minister's consent had been obtained, there would be implied an obligation on the part of the person giving the transfer to do all that was reasonable on his part to the end that the Minister's consent might be obtained, and *Kennedy v Vercoe* where a contract for sale of a business conducted in a shop of which the vendor was the lessee was subject to the purchaser being accepted by the landlord as tenant, and it was held that an implied obligation lay on the purchaser to do whatever might reasonably be required of him to enable the vendor to obtain the landlord's consent. In the recent decision of the House of Lords in *Sudbrook Trading Ltd v Eggleton*, a case concerning a lease which contained an option to purchase 'at such price not being less than £12,000 as may be agreed upon by two valuers one to be nominated by the lessor and the other by the lessee and in default of such agreement by an umpire appointed by the … valuers', Lord Diplock said that an obligation on the parties to appoint their respective valuers would be a necessary implication to give business efficacy to the option clause. It may be that in the present case the President might nominate an arbitrator at the request of one of the parties, but he might decline to do so unless both parties requested him to act. Given an effective exercise of the option, both parties were under an obligation to request him to nominate an arbitrator, if such a request was reasonably necessary to procure the nomination."[11] (footnotes omitted)

[38] *Booker Industries* is authority that when the process of nomination of an expert is reached, there is an obligation to do all that is reasonable to bring the appointment about. A similar analysis to the one that operated in *1144 Nepean Highway* supported the implied term found in *Booker Industries*.

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9 [2012] QSC 236, [53]-[55].
10 (1982) 149 CLR 600.
11 (1982) 149 CLR 600, 605-606.

[39] In *Watpac Construction*, a building contract provided for a party claiming that a dispute had arisen to give a notice of dispute and for the parties to confer to seek to resolve the dispute in good faith. If not resolved, the dispute was to be referred to an independent expert for determination. If the parties were unable to agree upon an expert within seven days, the expert was to be appointed by the President of the Institute of Arbitrators and Mediators. The President nominated an expert. There were negotiations over the terms of the agreement to be made between the expert and the parties. One of the parties refused to sign the agreement proffered by the expert. It was held that "[i]t is now accepted that where parties have agreed to appoint an expert but have not agreed on the terms of appointment, they should be taken to have agreed to appoint the expert on the terms that are reasonable", relying on *1144 Nepean Highway.*[12]

[40] I would add a reference to *Belvino Investments No 2 Pty Ltd v Australian Vintage Ltd*,[13] where a similar question was considered.

[41] In the present case, if Redpath does not agree to the appointment of Mr Easton by selecting him by agreement, the contractual deadlock breaking mechanism of a nomination by the President under cl 56.6(c) would come into play. Redpath's failure to select Mr Easton by agreement on the terms of engagement that he offers will not cause the contractual provision for the appointment of an expert to fail.

[42] As a further alternative, Anglo submits that Redpath could only elect to avoid the 14 April contract for failure of the availability condition if Redpath acted reasonably in doing so. In support of that submission Anglo relies on *Renard Constructions (ME) Pty Ltd v Minister for Public Works*,[14] *Commonwealth v Amann Aviation Pty Ltd*[15] and *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd*.[16]

[43] However, there is no universal proposition of law that a contingent condition of a similar kind to the availability condition requires a party entitled to the benefit of the condition to act reasonably. Where a contingent condition turns on the satisfaction of a party, a question may arise whether the satisfaction turns on a standard of reasonableness or good faith only. For example, *Meehan v Jones*[17] considered whether a contingent condition that a contract for the sale of land was subject to finance satisfactory to the purchaser failed if the purchaser, acting in good faith, was not satisfied or whether the purchaser's dissatisfaction must also be reasonable in an objective sense. It was not necessary to decide the question in that case, but at least two of the four members of the court considered that there was no requirement to act reasonably.

[44] *Renard Constructions* concerned a contractual power of a principal under a building contract to take the works out of the hands of the contractor if the contractor failed to show cause why the principal should not do so after an agreed event of default had occurred. Two members of the court held that the principal's power to take over the works if the principal was not satisfied that the contractor had shown cause was subject to an implied contractual obligation to decide whether the builder had shown

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12 [2015] NSWSC 780, [59].
13 [2014] NSWSC 978, [58]-[66].
14 (1992) 26 NSWLR 234.
15 (1991) 174 CLR 64, 96 and 146.
16 (1972) 128 CLR 529, 546 and 552.
17 (1982) 149 CLR 571, 578-581, 590-591, 597 and 598.

cause reasonably.[18] But the third member of the court disagreed, holding that the primary judge had been right to reject that reasonableness could be imported as a limitation on the exercise of the power.[19]

[45] Subsequent cases have considered *Renard Constructions* and whether it supports the implication of a general duty or obligation of good faith and reasonableness in the performance of contracts.[20] It is not necessary to essay those developments here. It is enough to mention that "whilst the cases in [the New South Wales Court of Appeal] have tended to equate or incorporate reasonableness with or into fair dealing and good faith, that is not without its controversy".[21]

[46] If any of Anglo's alternative bases for an implied term or obligation that Redpath was required to act reasonably before avoiding the 14 April contract on the ground of failure of the availability condition is accepted, the sole question of fact is whether Redpath's refusal to go on with Mr Easton's appointment was unreasonable.

Anglo's secondary case theory

[47] Anglo's secondary case theory begins with the alternative assumption that the 14 April acceptance did not make a binding contract to appoint Mr Easton as an expert by selecting him by agreement under cl 56.6 because the availability condition was a condition precedent to formation of the contract.

[48] Nevertheless, Anglo submits that a contract to appoint him came into existence because the availability condition, properly construed, was satisfied by Mr Easton being reasonably available.

[49] On this hypothesis, the sole question of fact is whether the availability condition was satisfied because Mr Easton was reasonably available.

Redpath's defences

[50] Redpath submits that the alleged offer and acceptance did not constitute a concluded agreement or contract to appoint Mr Easton. First, it submits that the terms of the 14 April acceptance did not evince an intention to be immediately bound. Second, it submits that the context supports that no contract was concluded, because the envisaged contract constituting selection of Mr Easton by agreement was one to which he would be a party, yet at 14 April 2016 no offer had been made to or by him of the terms for his engagement to resolve the dispute. As well, the parties did not

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18 (1993) 26 NSWLR 234, 259 and 279-280.

19 (1993) 26 NSWLR 234, 275.

20 For example, *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 255 IR 309, [39]-[49]; *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 272-273 [287]-[288]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, [11]-[15]; *United Group Rail Services Ltd v Rail Corp New South Wales* (2009) 74 NSWLR 618, 634-635 [57]-[61] and 637-639 [70]-[74]; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 63 [40]; *Burger King Corporation v Hungry Jacks Pty Ltd* (2001) 69 NSWLR 558, 566-568 [145]-[160] and 570 [169]-[173]; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 369; *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91, 92-93, 101 and 104.

21 *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, [15].

know whether he was available or whether he had a duty or interest that might disqualify him from acting.

[51] Alternatively, Redpath submits that if there was a contract to appoint Mr Easton subject to the availability condition, Redpath was not required to act reasonably in deciding whether to avoid the 14 April contract for failure of the condition.

[52] As a further alternative, Redpath submits that it did not act unreasonably in rejecting Mr Easton as the expert to be selected by agreement because of his unavailability as he advised on 12 September 2016.

Questions that should be decided

[53] If, as a matter of fact, Redpath did not act unreasonably in refusing to go on with Mr Easton's appointment, Anglo's application must fail. The same is true if the 14 April contract fails because there was no intention to conclude a contract. In either of those circumstances, it would be unnecessary to consider in any detail a number of the strands of legal argument or reasoning deployed by Anglo to support the alleged obligation to act reasonably.

[54] In my view, it is appropriate in this case to first consider the factual question whether Redpath did not act unreasonably in refusing to go on with Mr Easton's appointment. Given that there is some inconsistency in the relevant case law, it would be better to wait for a case that necessarily requires a decision of the relevant legal questions before exploring them further.

Did Redpath unreasonably refuse to accept that Mr Easton was available?

[55] It is not to be overlooked that Anglo's charge is that Redpath's conduct was unreasonable because Redpath insisted that the expert determination not be conducted by an expert who could not commence and programme to conclude the process before a date that was 9.5 months hence at the time of Redpath's refusal to continue with the appointment of Mr Easton. There is at least a touch of irony in the idea that a court would hold that it is unreasonable for a party to a formal dispute resolution process to seek expedition in putting the process into effect. Nowadays courts strive to achieve resolution of litigation under modern rules of court that insist on fidelity to the aspirations of avoiding undue delay, expense and technicality.[22]

[56] When Redpath stated that it agreed in principle to Mr Easton's appointment, it expressly made that agreement subject to his availability. The accompanying draft email to Mr Easton asked whether he had capacity to deal with the resolution of the disputes and as to his availability in the next four to six months. There is no reason, objectively speaking, to doubt that was what Redpath was concerned about in relation to Mr Easton's availability.

[57] There were several months of slippage between Redpath's 14 April acceptance and 8 September 2016, when the 16 May email to Mr Easton jointly signed by the parties was sent, inquiring as to his availability and willingness to be appointed as the expert. Nevertheless, on the question of his availability, the parties jointly asked as to "your availability over the next four to six months and whether you have capacity to determine these disputes."

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22 *Uniform Civil Procedure Rules* 1999 (Qld), r 5.

[58] The effect of Mr Easton's response was that he had no availability over the requested time period. He said he had no real availability to commence the expert determination until June 2017.

[59] Anglo has sought to soften the stated period of Mr Easton's unavailability by two points. First, it submits that Mr Easton later said that he will have two weeks in April 2017. But that does not assist if, on 16 September 2016, Redpath was entitled to avoid the 14 April contract because, acting not unreasonably, it was not satisfied as to Mr Easton's availability. If the 14 April contract was avoided then, it does not matter that Mr Easton's availability improved later on.

[60] Second, Anglo submits that the "pre-hearing" processes now will take until approximately April 2017, in any event. Perhaps they will, but that was not necessarily so on 16 September 2016 when Redpath refused to continue with Mr Easton's appointment and thereby avoided the 14 April contract.

[61] In my view, there is no question that the reasonableness of Redpath's conduct must be judged as at 16 September 2016 and without the benefit of any hindsight.

[62] Anglo relies on the contextual fact that cl 56 provided that the expert determination should proceed in accordance with the Institute of Arbitrators and Mediators Australia Expert Determination Rules. Those rules provide for the holding of a preliminary conference, and provide in Schedule B for the provision of a written statement by the claimant supported by documentary evidence, a similar response by the other party and a reply by the claimant. As Redpath proposed on 3 August 2016 and Anglo agreed on 5 August 2016, that process was to be extended to occur over a 15 week period.

[63] Anglo submits that the periods of delay, between the issue of the notices of dispute in June and July 2015 and Redpath's 14 April acceptance and through to 8 September 2016 when the parties sent the 16 May email to Mr Easton requesting his availability and willingness to act as the expert, make it "astonishing that Redpath contended in September 2016 that it was concerned about the delay in the commencement of the expert process".

[64] As previously stated, Anglo does not contend that Redpath's position on 16 September in refusing to continue with Mr Easton's appointment was capricious or arbitrary. In any event, I fail to understand the source of Anglo's astonishment. At the time of the 14 April acceptance, Redpath communicated in writing its interest in the expert determination being undertaken by someone who had availability to do so over an ensuing four to six month period by the terms of the draft email to Mr Easton. At no time did Redpath say anything to contradict that position. Anglo concurred in that approach by its responses as to the terms of the draft email to Mr Easton and by the form of the 16 May email signed by it as well as by Redpath.

[65] In truth, when on 12 September 2016 Mr Easton stated in effect that he could not be available over the requested time frame of four to six months, Redpath did not change its previously communicated position. Anglo did. On 14 September 2016, its lawyers wrote that it was content for the expert determination process to commence in late June 2017 when Mr Easton was available, suggesting that would allow the parties to focus in the intervening period on the other disputes between them. Redpath's response by its lawyers on 16 September was that it was not agreeable to delaying the

commencement of the expert determination and it proposed another expert that they had previously nominated.

[66] Anglo relies on the complex nature of the disputes as supporting its argument that Redpath's refusal to agree to Mr Easton's availability from June 2017 was unreasonable. But it does not put in evidence or submit that a period of four to six months was too short to be able to resolve the disputes. And as Redpath pointed out, the extent of the disputes to be resolved by the expert determination was settled and agreed before the parties joined in asking Mr Easton as to his availability over the ensuing four to six month period. That was a period to resolve the disputes, not a period after which the expert determination would be commenced.

[67] In my view, there is nothing in those facts or in any other fact raised by Anglo to justify the conclusion that Redpath acted unreasonably on 16 September 2016 in rejecting Mr Easton as the expert to determine the disputes because he was not available soon enough.

[68] Both parties sought to inject additional considerations into the determination of this question of fact. In my view, they were not relevant or of assistance, either because they occurred after the relevant date or because they do not affect the reasonableness of Redpath's refusal to continue with the appointment of Mr Easton because it was seeking to select by agreement an expert who had availability over the ensuing four to six month period.

Conclusion

[69] It follows that Anglo's application must fail. It is unnecessary to consider any other question. Redpath's cross-application (which was filed first) seeks a declaration that there is no agreement selecting Mr Easton as the expert. That declaration should be made.

Cross application that the parties have failed to agree

[70] Redpath's cross application also seeks a declaration that the parties have failed to agree on an expert within the meaning of cl 56.6, so that either of them might ask the President to nominate a person as the expert (which nomination will bind them).

[71] Redpath relies on the history prior to the attempt to appoint Mr Easton, the failed attempt to select Easton by agreement, and Anglo's failure to engage with Redpath since 16 September 2016, over the possible selection by agreement of three other candidates, even on the basis that is without prejudice to Anglo's right to obtain a decision upon the enforceability of Mr Easton's appointment.

[72] Anglo seeks an adjournment of this part of Redpath's cross application for two weeks, so that the parties may have another opportunity to select an expert by agreement. It submits that the absence of agreement since 16 September 2016 has been the product of its wish to obtain either Redpath's acceptance or a decision of the court that the parties had selected Mr Easton by agreement in a binding way, but that does not constitute a final failure to agree upon the selection of an expert.

[73] In my view, at first blush there is at least a reasonable evidentiary basis for concluding that the parties have failed to agree within the meaning of cl 56.6. However, Anglo's submission is not completely untenable and an adjournment for the relatively short

period of a few weeks will give the parties a further opportunity to choose the expert for themselves by agreement rather than have the person to be appointed selected for them by the President.

[74] Accordingly, I will order that Redpath's cross-application is adjourned until 13 February 2017. I will hear any submissions as to costs on that day as well.