SUPREME COURT OF QUEENSLAND

CITATION:	*Discovery Beach Project P/L v Northbuild Construction P/L* [2005] QSC 322
PARTIES:	**DISCOVERY BEACH PROJECT PTY LTD** ACN 100 500 981 (applicant) **v** **NORTHBUILD CONSTRUCTION PTY LTD** ACN 011 063 764 (respondent)
FILE NO/S:	BS 7831 of 2005 BS 7832 of 2005 BS 7834 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	4 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2005
JUDGE:	de Jersey CJ
ORDERS:	**1. The arbitrator's award of 19 August 2005, determining that he had jurisdiction to hear and determine variation requests 71 as amended, and 75, is set aside** **2. The arbitrator's award dated 28 August 2005, determining that he had jurisdiction to hear and determine variation order 97, is set aside** **3. Costs reserved, with liberty to apply**
CATCHWORDS:	ARBITRATION – THE AWARD – APPEAL OR JUDICIAL REVIEW – GROUNDS FOR REMITTING OR SETTING ASIDE – WANT OF JURISDICTION AND EXCESS OF AUTHORITY – where a provision of the building contract between the parties provided for referral of disputes to arbitration – where the parties entered separate agreements, referring certain matters to experts for determination – where agreements were each conditional upon the consent of a financier, which was not expressly forthcoming – where nevertheless, the parties had proceeded consistently with the subsistence of the agreements – where, while the experts were seized of those matters, the

respondent, purportedly acting under the building contract, referred them to arbitration – where the arbitrator made an award, determining that he had jurisdiction – whether the agreements referring issues for expert determination were subject to a condition precedent which was not fulfilled – whether the arbitrator made the award without jurisdiction – whether the award amounted to misconduct on the part of an arbitrator – whether to justify setting aside an award, the error of law relied on must appear ex facie

ARBITRATION – THE AWARD – APPEAL OR JUDICIAL REVIEW – PROCEDURE – APPEALS AND LEAVE TO APPEAL – LEAVE TO APPEAL FROM DECISION OF ARBITRATOR – QUESTION OR ERROR OF LAW – whether, alternatively, the court should grant the applicant leave to appeal against the arbitrator's determinations

Commercial Arbitration Act 1990 (Qld), s 8, s 38, s 43

Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153
Consolidated Constructions Pty Ltd v Saipem Australia Pty Ltd (1999) 15 BCL 64
Hodgkinson v Fernie (1857) 3 CBNS 189
Kennedy-Taylor (Qld) Pty Ltd v Civil and Civic Pty Ltd, unreported, Court of Appeal, Qld, No 17 of 1994, 2 November 1994
Kent v Elstob (1802) 3 East 18
Re Scibilia & Lejo Holdings Pty Ltd Arbitration (1985) 1 Qd R 94

COUNSEL: P H Morrison QC, with P Hastie, for the applicant
P Dunning for the respondent

SOLICITORS: Minter Ellison for the applicant
Ebsworth & Ebsworth for the respondent

Introduction

[1] On 23 May 2003, the applicant ("Discovery Beach") and the respondent ("Northbuild") entered into a building contract in relation to the Surfair Resort redevelopment at Marcoola. In the course of the project, disputes arose. The contract contained a mechanism for the resolution of disputes. That mechanism provided for arbitration, or determination by an expert.

[2] This proceeding concerns two variation requests, numbered VR71 (amended) and VR75, which related to a prolongation claim; and one variation order, VO97, which concerned the provisional sum with respect to the work on the beach houses.

[3] The applicant contends that the variation requests were, by agreement separate from the building contract, committed to experts. While the experts were seized of those matters, the respondent – purportedly acting under the building contract – referred

them to arbitration, and an arbitrator was appointed. The applicant challenged the arbitrator's jurisdiction. On 19 August 2005, the arbitrator ruled that he had jurisdiction in respect of them.

[4] The respondent also referred the variation order to arbitration. The applicant in fact withdrew the variation order on 28 July 2005. The applicant contends that the subject matter of that variation order had also been committed, by separate agreement, to expert determination. On 28 August 2005, the arbitrator ruled that he had jurisdiction in respect of that matter as well.

[5] The applicant applies under s 43 of the *Commercial Arbitration Act* 1990 (Qld) ("the Act") for orders setting aside those rulings, which amount to awards. Section 42(1)(a) empowers the court to set aside an award "where there has been misconduct on the part of an arbitrator". The concept of "misconduct" embraces error of law on the face of the award: *Kennedy-Taylor (Qld) Pty Ltd v Civil and Civic Pty Ltd*, (unreported, Court of Appeal, Qld, No 17 of 1994, 2 November 1994, p 7); *Kent v Elstob* (1802) 3 East 18; *Hodgkinson v Fernie* (1857) 3 CBNS 189; *Re Scibilia and Lejo Holdings Pty Ltd Arbitration* (1985) 1 Qd R 94, 98. It also embraces mistaking the scope of the arbitrator's authority, or dealing with matters not properly referred – in effect, making a decision without jurisdiction (cf. *Consolidated Constructions Pty Ltd v Saipem Australia Pty Ltd* (1999) 15 BCL 64). (The definition of "misconduct" in s 4 of the Act is inclusory.)

[6] Alternatively, the applicant seeks leave to appeal against the awards, pursuant to s 8 of the Act.

The contract provisions

[7] The provisions in the building contract for the resolution of disputes are as follows:

"13.1 NOTICE OF DISPUTE

13.1.1	If a dispute arises then either party may give the other written notice of Dispute which adequately identifies and provides details of it.
13.1.2	Notwithstanding the existence of a Dispute, the parties must continue to perform this Agreement.

13.2 CONFERENCE

13.2.1	Within 14 days after receiving a notice of Dispute, the parties must confer at least once to resolve the Dispute or to agree on methods of doing so. At each such conference each party must be represented by a person having authority to agree to such resolution or methods. All aspects of such conferences except the fact of occurrence will be privileged.

13.2.2 If a Dispute has not been resolved within twenty-eight (28) days of service of a notice of Dispute then it will be referred to arbitration unless the party giving the notice of Dispute:

.1 informs the other party in writing within that twenty-eight (28) days that it elects to have the dispute determined by expert determination; and

.2 delivers notification to the organisation pursuant to section 13.4.1, with a copy of that notice to be delivered to the other party at the same time as providing the other party with the notice under section 13.2.1.

13.3 ARBITRATION

Arbitration will be effected by an arbitrator nominated by the President or Chief Executive Officer of the organisation specified in Item 1 of Schedule 26.

13.4 EXPERT DETERMINATION

13.4.1 Expert determination will be -

.1 effected by an expert nominated by the President or Chief Executive Officer of the organisation in Item 1 of Schedule 26; and

.2 in accordance with the rules in Item 2 of Schedule 26 in accordance with the process in Schedule 26."

Item 1 of Schedule 26 states:

"Expert to be nominated by **Queensland Law Society**
(If no organisation stated, the President or Chief Executive Officer of the State of Territory Chapter of the Institute of Arbitrators or Mediators Australia in which the Works are to be carried out.)"

Agreement to refer to experts

[8] But as I have said, the applicant's contention is that by agreement between the parties, independently of the building contract, the issues involved in VR71 and VR75, as well as those involved in VO97, were referred to experts for determination.

[9] By letter to Northbuild dated 19 August 2004, Discovery Beach recorded the terms of an agreement which had been reached on 13 August 2004, covering many aspects of the future progress of the project, including payment. Paragraph 6.1 referred to payments by Discovery Beach as "subject to adjustment when the proper amount for each category of works is resolved either by agreement, expert determination or

litigation". (In relation to a particular submission made, I would not consider "litigation", as there used, to include arbitration.) Under para 6.3, the provisional sum for the South East Beach House fit out – subject matter of VO90, to which I will come – was to be agreed "or determined by expert determination". See also paras 8 and 10.

[10] On 18 August 2004, after the agreement of 13 August, Northbuild's solicitors wrote to the solicitors for Discovery Beach. As that letter shows, Messrs Orange and Callaghan had by then been appointed as experts to determine "the range of issues presently in dispute". The proposal was they deal with the issues in the schedule to the letter, which included "Prolongation claim VR71" and "VR65 South Tower Beach Houses Provisional Sum Adjustment" (part of what became VO90). Then the letter proposed that "issues relating solely to the calculation of time be dealt with separately by Mr Lee" (another expert).

[11] In their response of 25 August 2004, Discovery Beach's solicitors generally accepted that proposal, subject to some matters of detail not of present significance. Specifically, they agreed to the appointment of Mr Lee in relation to extension of time claims.

[12] Northbuild's solicitors, on 24 August 2004, wrote to Messrs Orange and Callaghan informing them the parties had agreed to the referral of "any disputes relating to time and prolongation" to Mr Lee, saying: "you ought exclude these matters from your consideration". Those solicitors wrote, again making that point, on 3 September 2004 (Exhibit 1).

[13] Then on 30 September 2004, Northbuild wrote to Discovery Beach recording further matters agreed the day before. Among other things, that agreement related to completion of the North East Beach House work (VO90) and payment for that. The amount payable, the letter said, "will be referred to the experts forthwith for determination" (para 4(a)(ii)). Messrs Orange and Callaghan were those experts. See also para 4(c) and (d).

[14] The end position is that both prolongation issues, and adjustment of the provisional sum issue, were by agreement referred for expert determination; and in a "self-executing" way, in that no further step had to be taken to ensure the determination was committed in that way.

[15] As confirmed by the solicitors for Northbuild in their letter of 18 August 2004, it was agreed that the "existing experts" deal with the matters listed in a schedule, which included "South Tower Beach Houses Provisional Sum Adjustment" (part of what became VO90), and "Prolongation claim VR71". The parties agreed, however, that issues relating solely to the calculation of time be dealt with by another expert, Mr Lee.

[16] The parties could choose not to utilize the procedure set up by cl 13 of the building contract, and agree to a different process for the determination of matters in issue between them. That is what they did, in relation to the issues covered by the agreements reached in August and September 2004. Of their own force, those agreements resulted in the referral of the subject matter to experts. It was not

necessary that the parties follow the (inapplicable) notification requirements of cl 13.

Non-fulfilment of "condition precedent"

[17] There was a contention, however, that the agreement which extended to referring issues for expert determination in that way was subject to a condition precedent which was not fulfilled. The agreements confirmed by the letters of 19 August 2004 and 30 September 2004 were each conditional upon the consent of the financier Capital Finance Australia Ltd ("CFAL"). That consent was not expressly forthcoming in respect of the latter agreement, which related particularly to what became the subject matter of VO90. But that is without consequence, because the parties proceeded consistently with the subsistence of the agreement. For example, Northbuild's amended VR71 lodged on 14 February 2005 refers to the agreements of 19 August 2004 and 30 September 2004 as subsisting (p 12). Further, Mr Lee proceeded substantially with the exercise committed to him pursuant to those agreements, to the point in January 2005 of making an interim determination.

[18] Mr Morrison QC, who appeared for the applicant, submitted that the condition is properly characterized, in any event, as a condition subsequent, waived by Northbuild in proceeding under its terms with the construction, and in seeking subsequently to enforce the August and September agreements (cf. Northbuild's letters to Discovery Beach of 3 December 2004 and 5 January 2005). (Northbuild had regarded the need for CFAL consent as "a mere formality" – see its solicitors' letter of 25 October 2004.)

[19] It is not necessary to resolve the question whether the requirement for CFAL consent should be characterized as a condition subsequent, as a condition precedent, or in any particular way. That is because the parties plainly proceeded on the basis the agreements of both August and September 2004 were on foot. Either fulfilment of the condition was waived, or the parties by their conduct affirmed their persisting contractual relationship, as defined by those agreements, notwithstanding the absence of the financier's formal consent to the latter. See, generally, *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 176-9.

Characterization of amended VR71 and VR75

[20] On 14 February 2005 Northbuild lodged an amended VR71. That followed and was consequent upon the interim expert determination by Mr Lee published on 14 January 2005. Northbuild said it "reserve[d] … rights to amend the claim when Mr Lee makes his [final] determination".

[21] Mr Dunning, who appeared for the respondent, submitted that the amended claim was really a fresh, distinct claim. It was separately identifiable, it is true, but I accept it was simply an update of the original, albeit in a substantially increased amount. It remained the prolongation claim, such as the parties had referred for expert determination.

[22] Two days later, Northbuild lodged VR75, a claim for the payment of additional costs and expenses incurred by subcontractors and suppliers. Mr Dunning again styled this "a separate variation requirement in relation to particular claims that had

never previously been the subject of a variation requirement". But this also was part of the prolongation claim which had been referred for expert determination. Northbuild reserved the right to amend that claim also, following publication of Mr Lee's final determination.

[23] Inconsistently, on 23 February 2005, Discovery Beach gave notice of dispute under cl 13.1 of the contract in relation to each of those claims, VR71 and VR75, foreshadowing, absent agreement, referral for expert determination. In the letter referring to VR71, however, Discovery Beach did speak of referring it "to the extent that the subject matter of this dispute has not previously been referred to expert determination". Discovery Beach's present contention is that determination of the dispute had already been committed to experts, a course possible notwithstanding the provision in cl 6 of the contract relating to the processing of variations: the treatment of this issue had been specially provided for by the agreements of August and September 2004.

Reference to arbitration

[24] On 23 February 2005, Northbuild gave notice of dispute under cl 13.1, foreshadowing arbitration. On 15 April 2005, Northbuild's solicitors sought the appointment of an arbitrator. The solicitors for Discovery Beach objected, on the basis the subject matter of VR71 and VR75 was, by agreement, to be determined by experts: that awaited Mr Lee's final determination on the matter of delay. The arbitrator Mr Fisher was nevertheless appointed.

[25] In a letter dated 28 July 2005 to Mr Ryan (who had in the meantime replaced Mr Orange) and Mr Callaghan, the solicitors for Northbuild stated their client's wish to have all matters of dispute determined in the one forum, by an arbitrator.

[26] The parties then ventilated the question whether Mr Fisher had jurisdiction to determine VR71 and VR75. The solicitors made submissions to the arbitrator by letter. On 19 August 2005, the arbitrator made his award, determining that he had jurisdiction.

Error of law

[27] The arbitrator found that "subject to any binding contract agreed between the parties", Northbuild had validly referred the matters to arbitration. He thereby properly acknowledged the parties' entitlement to agree on an alternate regime. The arbitrator concluded however there was no "agreement for the automatic or unilateral referral" of these disputes for expert determination.

[28] That ruling ignored the circumstances previously set out in this judgment under the heading "Agreement to refer to experts" (paras [8] to [16]).

[29] The letter of 18 August 2004 from the solicitors for Northbuild recorded the parties' agreement to commit "the prolongation claim" for expert determination. See para 2, and the schedule, which refers to "Prolongation claim VR71". That claim was fed in, as it were, to the then current facility for expert determination, endorsed under the agreements reached on 13 August 2004 and 29 September 2004. On 24 August

2004, those solicitors advised Messrs Orange and Callaghan the parties had agreed to refer "any disputes relating to time and prolongation" to Mr Lee.

[30] I have already said that the amended VR71 should be regarded as falling within the scope of the parties' agreement for expert determination. Likewise, VR75, itself part of the prolongation claim, falls within the scope of the reference effected on 18 August 2004.

[31] It is true that the schedule to the letter of 18 August 2004 referred only to the then designation of the prolongation claim, VR71. That reflected the "prolongation claim" as then understood. If asked, however, the parties would have embraced within that reference any amended version of VR71, and also the follow on claim, VR75 relating to sub-contractors and suppliers. That was another foreseeable expression of the prolongation claim. The parties should, in other words, be regarded as having committed for expert determination the prolongation claim comprehensively. Consistently there is the reference in Northbuild's solicitor's letter of 24 August 2004 to Messrs Orange and Callaghan, to the parties' agreement to commit "any disputes relating to time and prolongation" to Mr Lee. There is also para 2 of the letter of 18 August 2004, from the solicitors for Northbuild, referring to Mr Lee dealing with "the issues relating solely to the calculation of time". It would be surprising had the parties intended to commit part of the prolongation claim for determination under one regime, while contemplating that the balance might be determined under a different regime.

[32] The arbitrator erred in concluding the parties had not effected the referral of these issues for expert determination, by means of the agreements reached in August and September 2004, leading to his determination, erroneous in law, that he had jurisdiction to determine these disputes. That error amounted to technical misconduct. The court should set aside the arbitrator's award of 19 August 2005 determining that he had jurisdiction to hear and determine variation requests 71 (as amended) and 75.

[33] Mr Dunning pointed out that courts traditionally show deference to arbitration agreements. That is so, but in this case there was an operative concurrent, or competing agreement. Where parties separately bind themselves to and have engaged another regime to govern the determination of particular disputes, that must be respected.

[34] Acknowledging the parties' agreement that dispute resolution proceed in a particular way, then if, as I say, they have engaged that different mechanism, it would be wrong to adopt a pedantic interpretation with the result of limiting the matters subject to that particular regime. Accordingly, in the present situation, where they have agreed that the, in the sense of any, prolongation claim be subject comprehensively to expert determination, it would not be right to limit that to only the prolongation claim as formulated and presented by a particular stage.

[35] Mr Dunning submitted that the reference of these issues to expert determination was not attended by a degree of formality one would expect, comparably for example with a reference to arbitration (cf. *Kudeweh v T & J Kelleher Builders Pty Ltd* [1990] VR 701, 711, 714). The answer to that submission is that the parties, by their agreement, chose to proceed as they did in relation to the determination of

these issues, and that was their entitlement. Mr Dunning also raised whether the expert was clearly seized of the matters committed to him. There seems no doubt he was. See, for example, Mr Lee's letter to the solicitors for Northbuild, dated 17 November 2004.

VO90 and VO97

[36] I have referred already to the means by which the issues over the beach houses provisional sum were referred for expert determination. Northbuild's solicitors, by letter of 8 October 2004, acknowledged that those issues were subject to expert determination, querying only its timing.

[37] On 3 November 2004, Discovery Beach advised Northbuild of what it considered to be the amount of the relevant reduction, but confirming that the issue was to be determined by the experts. On 22 November 2004, Discovery Beach's agent Global Management Corporation (Qld) Pty Ltd issued VO90, providing for an adjustment by the amount of $933,664. On 3 December 2004, Northbuild wrote to Discovery Beach submitting that the issue of VO90 amounted to a breach of the August and September agreements and the building contract. On 13 December 2004, Northbuild invited Discovery Beach to withdraw VO90. Discovery Beach did so. On the advice of its quantity surveyor, Discovery Beach brought that about by issuing VO97, which "deleted VO90".

[38] On 21 March 2005, Northbuild gave notice of dispute over the issue of VO97, in the course of which it inaccurately suggested VO97 operated to "delete works from the contract". (All VO97 did was restore the position obtaining before the issue of VO90.) On 29 April 2005, Northbuild referred that dispute to arbitration, and Mr Fisher was again appointed as arbitrator.

[39] The solicitors for Discovery Beach submitted that the arbitrator lacked jurisdiction because the issue had already been committed for expert determination. Discovery Beach offered in any event to withdraw VO97. The arbitrator ruled that in that case, he would exclude VO97 from the arbitration otherwise on foot in relation to VR71 and VR75. On 28 July 2005, Discovery Beach confirmed to Northbuild that it withdrew both VO90 and VO97. The solicitors for Northbuild asserted to the arbitrator that that "does not necessarily resolve the dispute". The arbitrator ruled he had jurisdiction, by his award published on 28 August 2005. The basis was that it was not established that the issue had been committed to expert determination.

[40] In their submissions of 11 August 2005, the solicitors for Discovery Beach had taken the arbitrator through the process by which the issues relating to the provisional sum and the value of the fit out works for the North and South East Beach Houses had been effectively referred for expert determination. They had referred in particular to the agreement of 30 September 2004. In their responding submissions, the solicitors for Northbuild contended that the absence of CFAL consent to that agreement meant it had not become operative.

[41] In his ruling of 28 August 2005, the arbitrator appears to have held that the agreement did not become operative because of non-fulfilment of a condition precedent.

[42] For reasons already expressed, that result favoured by the arbitrator was contrary to the subsequent conduct of the parties, which were clearly proceeding on the basis the agreement was on foot. As examples in addition to those already advanced (para [17] above), in a letter of 8 October 2004, Northbuild said: "we acknowledge that the matter is to be referred to expert determination"; and in a letter of 3 December 2004, Northbuild said: "Northbuild is keen to complete the North East Beach Houses under the terms of the September Agreement."

[43] The arbitrator had invited a submission from Discovery Beach in response to the Northbuild submission, and Discovery Beach had chosen simply to rely on submissions already presented. It seems the arbitrator likely drew from that an implied concession that the Northbuild submission should be upheld, although that is not entirely clear. In any case, it is not necessary to explore that aspect further, because of what I consider to be the arbitrator's error as to the significance of the absence of CFAL consent.

[44] The arbitrator erred in law in concluding that he had jurisdiction to deal with the issues raised in VO97. All of those issues had, for reasons already expressed, been committed for expert determination by quite separate operative agreement of the parties. Additionally, with the withdrawal of VO97 (and VO90), there was simply no live issue which could concern the arbitrator.

[45] Mr Morrison demonstrated by reference to Exhibit 2 that the end result of the withdrawal of those variation orders was in no way prejudicial to the financial interests of Northbuild. The question of the adjustment of the provisional sum simply remained outstanding, to be determined by the experts.

[46] The arbitrator's award dated 28 August 2005, determining that he had jurisdiction to hear and determine VO97, should be set aside.

Error on the face of the awards

[47] By wrongly assuming jurisdiction, the arbitrator erred in law. These precedent steps also involved error in law: misconstruction of the agreement between the parties, as to what claims were covered; and concluding that the agreement had not come into effect because of non-fulfilment of what the arbitrator styled a condition precedent.

[48] I have not had to address, in a conclusive way, the question whether, to justify setting aside an award, the error of law relied on must appear ex facie. Mr Morrison mounted an argument that to constitute "misconduct" justifying setting aside an award, as opposed to removing an arbitrator, it need not. The submission focused on the express reference to "error of law on the face of the award" in s 38 of the Act. His submission was that the error which I have found occurred, is apparent, emerging from a consideration of the issues and materials before the arbitrator, apparent from his published awards, with the materials they incorporate.

[49] He submitted, as to VO97, that the arbitrator wrongly, on the face of his award of 28 August 2005, relied on non-fulfilment of a condition precedent in respect of the 30 September agreement; and as to VR71 and 75, that in his determination of 19 August 2005, the arbitrator erred in law in his expressed conclusion there was no binding agreement for the referral to expert determination other than within the

building contract, and in not regarding the amended VR71 and VR75 as part of the overall prolongation claim committed for that expert determination.

[50] It is not necessary to express final conclusions about the precise extent to which an arbitrator's reasons need themselves expose how he fell into error, though on the traditional approach, to warrant setting aside, my view is they should at least in broad terms expose that error. I note that Mr Dunning did not submit that were I satisfied error of law occurred, as contended for by Mr Morrison, that error was not apparent on the face of the award in any particular respect – that is, that this or that particular error was not susceptible of demonstration. There were no detailed submissions of that character.

[51] That aside, this judgment need not depend on establishing ex facie error. That is because the result of the arbitrator's approach is that he has taken on jurisdiction over issues not properly committed to him, in that the parties had effectually, and patently, reserved them for determination in another arena. That amounted to "misconduct", in the technical sense, sufficient to warrant setting aside the awards, and justifying the exercise of any residual discretion in the court to do so.

Arbitrator's right to determine jurisdiction

[52] There was no submission made to me that it fell within the arbitrator's "jurisdiction" to determine, wrongly, that he had jurisdiction, and that the applications therefore should fail. For the respondent, the matter was presented, at least substantially, on the basis that the arbitrator's conclusions that he had jurisdiction were justified by the evidence before him and me. I consider they plainly were not, and it sufficies, to dispose of the applications, to characterize the arbitrator's assumption of jurisdiction nevertheless, as an instance of "misconduct", in the technical sense, warranting setting aside the awards.

The significance of the parties' agreement

[53] It is understandable why submissions of that technical character were not actively pursued in this unusual case. I am referring to submissions as to the need to establish ex facie error, and as to an arbitrator's "entitlement" in law to make a wrong determination on jurisdiction. This is not the case sometimes encountered where the question is simply whether a dispute has been effectually referred for arbitration.

[54] This case is distinctive in two important respects: first, it turns on the unavailability of the (arbitration) referring mechanism itself, where the parties have, as it was put during argument, "contracted out" of the building contract mechanism; and second, the determination of the disputes was, by the time of the purported reference to arbitration, already well under way: all relevant issues had been referred to the experts, and Mr Lee was substantially advanced in his treatment of the delay aspects of the prolongation claim. These unusual features combine to bespeak serious error on the part of an arbitrator then claiming to have jurisdiction to deal with those very issues.

[55] The ultimate determinant in a matter like this is the parties' contractual intention. Here that intention is plain: that these matters be determined by experts, not an

arbitrator. The case is distinctive and unusual, and not one where the technical principles sometimes applied to protect and respect arbitrations have application.

Leave to appeal

[56] There is consequently no need to deal with the issue of leave to appeal, which I acknowledge was, while raised, not the subject of detailed submissions. I should say that my preliminary inclination, subject to any detailed submissions, would have been to grant leave to appeal against the arbitrator's determinations, under s 38(4)(b). That is because there is what seems, to my mind, to be compelling evidence the arbitrator erred in law (s 38(5)(b)(ii)); the determination of the question whether the arbitrator has jurisdiction in these matters could substantially affect the rights of the parties – in a practical sense, especially, because the expert determination was substantially advanced by the time of the purported referrals to arbitration (s 38(5)(a)); and a determination upon the right of an arbitrator to assume jurisdiction in this sort of case, notwithstanding the clarity of the parties' separately agreed reference of the issues for expert determination, may add substantially to the certainty of commercial law in the field of construction contracts (s 38(5)(b)(ii)). In short, when parties clearly bind themselves to an alternate regime as here, it would be helpful and constructive for the court to affirm they have placed the jurisdiction beyond an arbitrator's reach, notwithstanding the subsequent change of mind of one of them.

Orders

[57] There will be orders:

1. that the arbitrator's award of 19 August 2005, determining that he had jurisdiction to hear and determine variation requests 71 as amended, and 75, is set aside;
2. that the arbitrator's award dated 28 August 2005, determining that he had jurisdiction to hear and determine variation order 97, is set aside;
3. at this stage, costs reserved, with liberty to apply.