Supreme Court of New South Wales - Court of Appeal

Australian Vintage Limited v Belvino Investments No 2 Pty Ltd [2015] NSWCA 275 (11 September 2015)

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Court of Appeal
Supreme Court
New South Wales

Case Name:	Australian Vintage Limited v Belvino Investments No 2 Pty Ltd
Medium Neutral Citation:	[2015] NSWCA 275
Hearing Date(s):	24 June 2015
Date of Orders:	11 September 2015
Decision Date:	11 September 2015
Before:	Bathurst CJ at [1]; Beazley P at [92]; McColl JA at [93]
Decision:	Appeal allowed. Orders 1-3 made by the primary judge on 11 March 2015 be set aside. Order that the matter be remitted to the second respondent for determination in accordance with these reasons. Order the first respondent to pay the appellant's costs of the appeal and, subject to Order 4 made by the primary judge, the costs of the proceedings below. The respondent to have a certificate under the Suitors' Fund Act 1951 (NSW) if eligible.
Catchwords:	CONTRACT – construction – construction of clause stating formula to be applied by expert in dispute resolution under commercial lease of vineyard APPEAL – civil – expert determination under dispute resolution clause – whether expert's determination open to review by Court on the basis that the expert misconstrued the formula to be applied by him in making the determination
Legislation Cited:	Suitors' Fund Act 1951 (NSW)
Cases Cited:	AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd [2006] VSCA 173 Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; 129 CLR 99 Belvino Investments (No 2) Pty Ltd v Australian Vintage Ltd

	[2014] NSWSC 978 Downer Engineering Power Pty Ltd v P & H Minepro Australasia Pty Ltd [2007] NSWCA 318 Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; 251 CLR 640 Holt v Cox [1997] NSWSC 144; (1997) 23 ACSR 590 Jones v Sherwood Computer Services plc (1992) 1 WLR 277 Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314 Mercury Communications Ltd v Director General of Telecommunications [1994] CLC 1125 Mercury Communications Ltd v Director-General of Telecommunications [1995] UKHL 12; (1996) 1 WLR 48 Onesteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd [2013] NSWCA 27; 85 NSWLR 1 Shoalhaven City Council v Firedam Civil Engineering Pty Ltd [2011] HCA 38; 244 CLR 305 WMC Resources Ltd v Leighton Contractors Pty Ltd [1999] WASCA 10; 20 WAR 489
Category:	Principal judgment
Parties:	Australian Vintage Limited (Appellant) Belvino Investments No. 2 Pty Limited (as trustee of the McGuigan Simeon Trust) (First Respondent) Peter Scholefield (Second Respondent) Scholefield Robinson Horticultural Services Pty Ltd (Third Respondent)
Representation:	Counsel: DF Jackson QC / SA Goodman (Appellant) RA Dick SC / DJ Barnett (First Respondent) Solicitors: HWL Ebsworth Lawyers (Appellant) Corrs Chambers Westgarth (First Respondent) Swaab Attorneys (Second and Third Respondents)
File Number(s):	2015/77725
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity Division
Citation:	[2015] NSWSC 168
Date of Decision:	05 March 2015
Before:	Rein J
File Number(s):	2014/309502

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant (the lessee) was the lessee under a lease with the first respondent (the lessor) for the development and operation of a vineyard. Clause 4.26(b) of the lease made provision for circumstances where the productivity of the premises was affected by a natural disaster. The clause had two limbs. The first involved consideration of whether production had been reduced by more than 50% of average production

capacity, as defined in the lease. The second involved consideration of whether production capacity had been so reduced. If these limbs were satisfied, cll 4.26(h) to (j) applied. If the lessor and lessee could not agree on certain matters regarding circumstances where productivity was affected by a natural disaster, either party could refer the matter to an expert under cl 4.26(d). Under cl 4.26(f), the expert could issue a final determination as to the calculation of the reduction of production or production capacity, whether the reduction was due to a natural disaster and the remedial work necessary to restore production capacity.

In October 2013, a severe frost occurred in the area in which the vineyard was situated, causing a substantial diminution in the production of grapes for the 2014 vintage year. As a consequence, the lessee invoked cl 4.26, asserting that the volume of grapes capable of being produced in the vineyard had been reduced by more than 50% of average production capacity. In June 2014, the issue was referred to the expert, the second respondent, under cl 4.26(d).

In October 2014, the expert issued a determination that although a natural disaster had occurred, any resulting reduction of production or production capacity was less than 50% of average production capacity. The expert determination was made on the basis that, as to the first limb of cl 4.26(b), 2014 production had to be compared with average production capacity. In relation to the second limb, the expert compared prefrost production capacity for 2014 with average production capacity.

The lessee brought proceedings in the Supreme Court seeking to have the expert determination set aside and declarations as to the correct construction of cll 4.26(b) and (f). The primary judge dismissed the summons on the basis that the expert determination was not reviewable and the expert's determination was correct, although he reached his conclusion in a different fashion to the expert. The lessee appealed against both of these conclusions.

The Court held (Bathurst CJ, Beazley P and McColl JA agreeing), allowing the appeal and remitting the matter to the expert for determination in accordance with the Court's reasons:

Issue 1: The correct construction of cll 4.26(b) and (f)

> (1) On the basis of the words used by the parties, considered in the context of the lease as a whole, and the purpose and object of cl 4.26, as it appeared from the lease, if reduction of production capacity was in issue, cl 4.26 required a comparison of pre-disaster production capacity for that year. If the difference exceeded 50% of average production capacity, then cll 4.26(h) to (j) applied. Thus, the expert and primary judge were in error in their construction of cl 4.26: [88], [90] (Bathurst CJ); [92] (Beazley P); [93] (McColl JA).

Issue 2: Was the expert's determination reviewable

> (2) Whether the expert's determination was reviewable depended on whether the determination was made in accordance with the contract, i.e., whether or not the expert carried out the task which he or she was contractually required to undertake. If the expert in fact carried out that task, the fact that he or she made errors or took irrelevant matters into account would not render the determination challengeable. If the expert did not perform the task, but rather performed some different task, or carried out the task in a way not within the contractual contemplation of the parties, objectively ascertained, then the determination would be liable to be set aside: [74]-[75] (Bathurst CJ); [92] (Beazley P); [93] (McColl JA).

Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314; *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173; *Holt v Cox* [1997] NSWSC 144; (1997) 23 ACSR 590; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38; 244 CLR 305

> (3) Questions of mixed fact and law and pure questions of law can be left for the determination of an expert. While it is a matter of contractual construction in each case, parties are more likely to have left to an expert matters involving discretion or opinion, rather than matters of objective fact: [76] (Bathurst CJ); [92] (Beazley P); [93] (McColl JA).

Downer Engineering Power Pty Ltd v P & H Minepro Australasia Pty Ltd [2007] NSWCA 318; *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173; *WMC Resources Ltd v Leighton Contractors Pty Ltd* [1999] WASCA 10; 20 WAR 489

(4) The fact that an expert determination is said to be final and binding makes little difference to whether the determination is reviewable. To the extent that the decision is made in accordance with the terms of the contract, it will be final and binding. To the extent that it is not, it will be subject to review: [85] (Bathurst CJ); [92] (Beazley P); [93] (McColl JA).

AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd [2006] VSCA 173

(5) In making an assessment under cl 4.26(f), the expert was required to determine the manner in which the formula in cl 4.26(f) operated. However, the contract did not reveal an intention that the parties would be bound if the expert misapplied this formula. Thus, the decision-making authority of the expert did not extend to determining the construction in the formula so as to leave his or her decision on this issue unreviewable. The fact that the decision was said to be final and binding did not compel a contrary conclusion. Therefore, the primary judge erred in concluding that the expert's determination on the construction of the formula was incapable of review: [80]-[83], [85], [87] (Bathurst CJ); [92] (Beazley P); [93] (McColl JA).

Mercury Communications Ltd v Director General of Telecommunications [1994] CLC 1125; *Mercury Communications Ltd v Director-General of Telecommunications* [1995] UKHL 12; (1996) 1 WLR 48

JUDGMENT

1. **BATHURST CJ:** This is an appeal from orders made by a judge of the Equity Division, dismissing a summons brought by the appellant (the lessee) challenging an expert determination by the second respondent (the expert), as agent for the third respondent. The expert determination was made pursuant to cl 4.26 of a lease between the first respondent (the lessor) as lessor and lessee, in respect of a vineyard known as Del Rios Vineyard in Victoria (the premises). Although nothing turns on this, it should be noted that each of the lessor and the lessee are successors in title to the original lessor and lessee.

The lease

2. The lease in question was dated 27 June 2003 and was for an initial term of 13 years with an option to renew for three further terms of 5 years (cl 4.13). The Court was informed at the hearing that the term of the lease had been extended to 2023. However, nothing turned on this for the purpose of these proceedings.
3. The permitted use of the premises was the development and operation of a vineyard. Clause 2.3(a) of the lease provided that the lessee could not use the premises for any purpose other than the permitted use.
4. Clause 2.3(b) imposed various covenants in relation to the maintenance of the premises. In particular, cl 2.3(b)(xi) imposed the following obligation on the lessee:

   "(xi) Reduction in Production
   promptly advise the Lessor if the amount of grapes produced or capable of being produced from all vines on the Premises in respect of any one vintage is reduced by more than 50% of the amount of grapes produced from the previous vintage."

5. Clause 4.26, the subject of the proceedings in the present case, made provision for circumstances where the productivity of the premises was affected by a natural disaster. So far as relevant, it provided as follows:

   "4.26 Disaster
   (a) This clause only has application after the 5th anniversary of the commencement date of this Lease.
   (b) If, in the Lessee's opinion, the amount of grapes produced (*Production*) or capable of being produced (*Production Capacity*) for all vines on the Premises in respect of any one vintage is reduced by more than 50% of Average Production Capacity for that vintage year due to a Natural Disaster, the Lessee may immediately notify the Lessor in writing (*Lessee's Notice*) that it wishes this clause to apply and, if it gives that notice, the Lessee will promptly provide the Lessor with all reasonable cooperation, information (including information about the Lessee's viticultural and work practices) and access to the Premises and the Lessee's records to enable

the Lessor to determine whether the reduction in Production or Production Capacity was due to a Natural Disaster.
(c) The Lessor and the Lessee must then promptly meet and endeavour to negotiate and agree on the following matters:

> (i) whether Production or Production Capacity has been reduced by more than 50% of Average Production Capacity;
> (ii) whether the reduction in Production or Production Capacity was due to a Natural Disaster; and/or
> (iii) the remedial works required to restore Production Capacity to at least 50% of Average Production Capacity within 3 years of the Lessee's Notice and at least 75% of Average Production Capacity within 5 years of the Lessee's Notice including the approximate time frames within which the remedial works should be carried out.

(d) If the parties are unable to agree on any of the matters referred to in subclause (c) within 30 days of the Lessee's Notice, either party may refer the dispute to the Expert (being the same Expert referred to in clause 4.25).
(e) The Lessor may refer the matter to the Expert immediately after it receives the Lessee's Notice without having to first inspect the Premises or enter into any discussions with the Lessee or wait 30 days.
(f) The parties must promptly and in good faith use their best endeavours to cooperate with the Expert, provide all reasonable information (including information about the Lessee's viticultural and work practices) and generally provide all reasonable assistance to the Expert (including access to the Premises and to records) to enable the Expert to determine:

> (i) whether Production or Production Capacity has been reduced by more than 50% of Average Production Capacity;
> (ii) whether the reduction in Production or Production Capacity was due to a Natural Disaster;
> (iii) what remedial works would restore Production Capacity to at least 50% of Average Production Capacity within 3 years of the Lessee's Notice and at least 75% of Average Production Capacity within 5 years of the Lessee's Notice (*Remedial Works*) including the approximate time frames within which the Remedial Works should be carried out.

(g) The Expert must make and deliver his written determination to the parties within 45 days of his appointment which shall be final and binding on the parties. The Expert is deemed to act as an expert and not an arbitrator. His costs shall be shared equally by the parties.
(h) If the reduction in Production or Production Capacity was due to a Natural Disaster as determined by the Expert or as agreed under subclause (c) the Lessee can elect by notice to the Lessor within 2 months of the Expert's determination or agreement between the parties under subclause (c):

> (i) to diligently and promptly and otherwise substantially within the time frames determined by the Expert carry out the Remedial Works as if the Remedial Works were an Upgrade. If the Lessee elects this option, the provisions of clause 4.18 will apply in relation to the Remedial Works. For example, the Lessor will pay Upgrade Consideration to the Lessee in respect of the Remedial Works subject to an agreed maximum cost and the presentation of invoices, statements and, the Lessor may request an audit and/or inspection in respect of the Remedial Works and the Lessee will pay Upgrade Consideration Rent in respect of the Remedial Works and for the purposes of this Lease and any other agreement between the Lessor and the Lessee, the payment of such costs will be deemed to be Upgrade Consideration payments and the provisions of clause 4.18 shall apply accordingly;
> (ii) to terminate this Lease by written notice of termination (specifying the date of termination) to the Lessor PROVIDED THAT the Lessee has complied with all of its obligations under this clause 4.26.

(i) The Lessee may also terminate this Lease under subclause (h)(ii) if the Expert determines that no remedial works would restore Production Capacity to at least 50% of Average

Production Capacity within 3 years of the Lessee's Notice and at least 75% of Average Production Capacity within 5 years of the Lessee's Notice.
(j) If the Lessee terminates this Lease under subclause (h)(ii) or subclause (i):
(i) if the Facility has been repaid and the Mortgage and the Charge discharged the Lessee must pay the Lessor in one lump sim within 60 days of the date of termination, the lesser of:
(A) an amount representing 36 months rental calculated at the annual rent (including the Upgrade Consideration Rent) which was payable at the time of the giving of the Lessee's Notice, reduced by the rent paid by the Lessee to the Lessor in the period between the giving of the Lessee's Notice and the date of termination and by the amount (if any) payable to the Lessee pursuant to clause 3.3(a)(ii); and
(B) an amount equal to the rent (including the Upgrade Consideration Rent) payable at the time of the giving of the Lessee's Notice for the unexpired term of the Lease;
(ii) (for the avoidance of doubt) if the Facility has not been repaid the Lessee will pay the Leasor whatever amount (if any) the Lessee is required to pay the Lessor pursuant to clause 4.3 as a result of the termination of this Lease, on and subject to the terms of that clause; and
(iii) the Lessee may exercise the option to purchase the Premises granted by the Lessor to the Lessee under clause 5 (*Option*) within the period of 2 months from the date of termination under subclause (h)(ii) or subclause (i) or the purchase price determined in accordance with the terms of the Option and, if the Lessee exercises the Option it will have no liability to make the payment referred to in clause 4.26(j)(i) or, for the avoidance of doubt, clause 4.26(j)(ii).
...
(l) For the purposes of this clause, Natural Disaster means:

(i) fire, storm or tempest;
(ii) earthquake;
(iii) flood;
(iv) other Act of God;
(v) insects and/or disease which was not reasonably capable of being prevented by the Lessee;
(vi) resumption of the Premises or any part thereof by a Government authority;
(vii) diminution in the quantity or quality of the water available to the Lessee for irrigation; and
(viii) any other similar event or circumstance beyond the reasonable control of the Lessee.

(m) For the purposes of this clause, Average Production Capacity means the average yield produced from the vines growing on the Premises for the 2 vintages preceding the Natural Disaster which destroyed or affected the vines growing on the Premises."

6. It should be noted that cl 4.26(b) had two limbs. The first involved consideration of whether production had been reduced by more than 50% of average production capacity, as defined in the lease (average production capacity). The second involved a consideration of whether production capacity had been so reduced.
7. It is not necessary to set out the provisions in detail, but the facility, charge and mortgage referred to in cl 4.26(j) related to the facility granted to the lessor to enable it to purchase the premises and the mortgage and charge granted to secure that facility.

Background

8. In October 2013, a severe frost occurred in the area in which the premises was situated, causing a substantial diminution in the production of grapes for the 2014 vintage year. As a consequence, the lessee invoked cl 4.26 of the lease. By email to the lessor dated 8 January 2013, the lessee asserted that the volume of grapes capable of being produced in the vineyard had been reduced by more than 50% of average production capacity. It asserted that the difference between the current estimated actual yield for the 2014 vintage (16,194 tonnes) and the prefrost production capacity for the 2014 vintage (31,865 tonnes) was 15,671 tonnes, more than 50% of the average production capacity of 21,236 tonnes.
9. Following a request from the lessor for formal notice under cl 4.26, the lessee, by letter of 30 January 2014, essentially repeated the claims it had made in the email, but expanded somewhat on the method of calculation of the tonnages referred to.

10. On 16 June 2014, the issue was referred to the expert under cl 4.26(d).

The expert determination

11. On 2 August 2014, the expert issued an interim determination. On 7 October 2014, he issued a final determination which incorporated the interim determination.
12. The expert determined that although a natural disaster had occurred, any resulting reduction of production or production capacity was less than 50% of average production capacity. His conclusion was expressed in the following terms:

    "**2014 Production vs Average Production Capacity**
    30. The 2014 Production was 15,260.62t and the Average Production Capacity for 2012 and 2013 was 21,236t. Thus, by arithmetic, the 2014 Production was 71.86% of the Average Production Capacity, or a production reduction of 28.14%. This is substantially less than the 50% reduction specified in the lease.
    2014 Production Capacity vs Average Production Capacity.
    31. The 2014 Production Capacity was 31,865t and the Average Production Capacity for 2012 and 2013 was 21,236t. Thus, by arithmetic, the 2014 Production Capacity was 150.1% of the Average Production Capacity which is an increase of 50.1% over the Average Production Capacity.
    32. Therefore there was not a reduction, but rather a 50.1% increase in the Production Capacity for 2014 compared with Average Production Capacity."

13. In a table forming part of the report, the expert rejected the calculations proffered by the lessee. According to the report, the lessee had submitted that the benchmark for assessing the reduction in production capacity due to frost was 50% of average production capacity, namely, 10,617.75 tonnes, which had to be compared with the reduction in actual production from the prefrost production capacity. This reduction (being the difference between 31,864.6 tonnes and 15,260.11 tonnes) was in an amount of 16,604.49 tonnes, which was greater than 50% of average production capacity. It followed from these conclusions that cl 4.26(h) to (j) had no application.
14. It can be seen from the rejection of the lessee's submission that the area of dispute between the parties, at least on this issue, was the equation to be used in determining whether or not cl 4.26(h) to (j) applied, as distinct from the particular integers which went into the equation. However, as noted below, the lessor contended on the appeal that no postfrost production capacity figure had been supplied to the expert to enable a comparison between pre and postfrost production capacity to be undertaken.
15. The expert determination appears to have been carried out on the following basis. In dealing with what he described as "2014 Production vs Average Production Capacity", the expert compared 2014 production with average production capacity. As this comparison showed a reduction of 28.14%, the expert found that the first limb of cl 4.26(b) did not apply.
16. In relation to the second limb, the expert compared prefrost production capacity for 2014 with average production capacity. The comparison showed no reduction in production capacity, but rather an increase.
17. By contrast, the lessee's approach to the second limb of cl 4.26(b) involved comparing prefrost capacity with actual production in that year. This showed a reduction of 16,609.49 tonnes, which was greater than 50% of average production capacity.
18. In these circumstances, the lessee brought proceedings in the Equity Division, seeking to have the expert determination set aside and declarations as to the correct construction of cl 4.26(b) and (f).

The reasoning of the primary judge

19. The primary judge dismissed the summons. First, he held that the expert determination was not reviewable. Second, he held that the determination was correct, although he reached his conclusion that the relevant threshold was not reached in a somewhat different fashion to the expert.
20. The primary judge noted that both parties had agreed that the correct approach to the question of whether the expert determination could be reviewed was whether the determination was made in accordance with the terms of the contract: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 (*Legal & General Life*) at 336. The primary judge also placed reliance on the decision of this Court in *Downer Engineering Power Pty Ltd v P & H Minepro Australasia Pty Ltd* [2007] NSWCA 318 (*Downer Engineering*), in which Hoeben J, with whom Giles JA concurred,

noted (at [79]) that there was "ample authority for ... questions of mixed fact and law to be referred, to third party experts". In that case, Basten JA also commented (at [17]) that it was "well-established that the effect of a determination by a valuer depends upon the construction of the contract pursuant to which the referral takes place" and (at [18]) that the dispute "was within the contemplation of the parties as one which could properly be referred to the valuer". The primary judge stated that these remarks supported the conclusion that, in the present case, the determination was not subject to review.

21. The primary judge noted that before the expert was appointed, it was obvious to both the lessor and the lessee that they differed as to the interpretation of cl 4.26. He pointed to the fact that prior to their submission to the expert, the lessee had brought proceedings seeking declarations as to the true construction of the clause. These proceedings were stayed by White J. However, it should be noted that in those proceedings, White J pointed out that if the lessee's construction was correct, it was at least arguable that the determination would not be binding, having not been made in accordance with the terms of the lease: *Belvino Investments (No 2) Pty Ltd v Australian Vintage Ltd* [2014] NSWSC 978 at [54].
22. The primary judge placed particular reliance on the decision of the English Court of Appeal in *Jones v Sherwood Computer Services plc* (1992) 1 WLR 277 and, in particular, on the following passage from the judgment of Dillon LJ (at 287):

    "The present case is quite different, however, as Coopers have done precisely what they were asked to do. They were asked to consider only the points on which Peats and Deloittes were not in agreement, to decide whether the two classes of disputed transactions were or were not to be included in the total of 'sales' as defined in appendix I, and to determine the amount of sales accordingly; that is what they have done. Under paragraph 7 of appendix I, a decision of the accountants under paragraph 3, if the accountants are in agreement, is to be as conclusive, final and binding as the decision of the expert if the accountants disagree with each other. But the argument for the plaintiffs has, as it seems to me, to go the length of asserting that if Deloittes had agreed with Peats that the disputed transactions were to be excluded from the total amount of sales and had consequently agreed on Peats' figures as the total amount of sales, the plaintiffs could still have applied to the court to determine the true (in the court's view) amount of the sales and to hold the (ex hypothesi) joint view of the accountants not binding. I do not believe that that is the law.
    Any number of issues could arise under the various sub-paragraphs of paragraph 2 of appendix 1 as to the application of the wording of those sub-paragraphs to particular facts. All these issues are capable of being described as issues of law or mixed fact and law, in that they all involve issues as to the true meaning or application of wording in paragraph 2. I cannot read the categorical wording of paragraph 7 as meaning that the determination of the accountants or of the expert shall be conclusive, final and binding for all purposes 'unless it involves a determination of an issue of law or mixed fact and law in which case it shall only be binding if the court agrees with it'."

23. The primary judge stated that that case was "authority for the proposition that any question of construction of the clause under which the expert is to operate is as much part of the task of the expert as the determination of facts and the calculation of figures and not open to review by a Court"
24. The primary judge also referred to the decision of the House of Lords in *Mercury Communications Ltd v Director-General of Telecommunications* [1995] UKHL 12; (1996) 1 WLR 48 (*Mercury Communications*). In that case, the appellant instituted proceedings seeking declarations as to the construction of certain phrases in an agreement by which the respondent was entitled to impose certain terms in telecommunication interconnection agreements. A majority of the Court of Appeal held that the proceedings should be struck out as there was no justiciable issue. The House of Lords allowed an appeal from that decision.
25. The primary judge referred to the following passage from the speech of Lord Slynn in *Mercury Communications*, with whom the other Law Lords agreed (at 58-59):

    "If the Director misinterprets these phrases ['fully allocated costs' and 'relevant overheads'] and makes a determination on the basis of an incorrect interpretation, he does not do what he was asked to do. If he interprets the words correctly then the application of those words to the facts may in the absence of fraud be beyond challenge. In my view when the parties agreed in clause 29.5 that the Director's determination should be limited to such matters as the Director would have power to determine under condition 13 of the B.T. [British Telecommunications] licence

and that the principles to be applied by him should be 'those set out in those conditions', they intended him to deal with such matters and such principles as correctly interpreted. They did not intend him simply to apply such meaning as he himself thought they should bear. His interpretation could therefore be reviewed by the court. There is no provision expressly or impliedly that these matters were remitted exclusively to the Director, even though in order to carry out his task he must be obliged to interpret them in the first place for himself. Nor is there any provision excluding altogether the intervention of the court. On the contrary clause 29.5 contemplates that the determination shall be implemented 'not being the subject of any appeal or proceedings'. In my opinion, subject to the other points raised, the issues of construction are ones which are not removed from the court's jurisdiction by the agreement of the parties."

26. The primary judge acknowledged that, read in isolation, that paragraph supported the lessee's contention. However, he concluded that as the clause in *Mercury* did not have a final and binding quality and was not characterised as an expert determination, it did not in fact assist the lessee in the present case. He also noted that the House of Lords did not criticise *Jones v Sherwood Computer Services plc*, so the decision did not undermine the proposition he drew from that case. The primary judge emphasised that cl 4.26(g) of the lease provided, in unqualified terms, that the expert determination was final and binding. He expressed his conclusions in the following terms:

"[51] I accept that an expert may so misunderstand the task which the parties have retained him to perform that what he has done does not meet the requirements of the contract but where the parties have entrusted to an expert a determination which requires him to ascertain facts and figures and also to decide as between competing constructions of the meaning of the clause under which he is to operate I do not think that it can be said that the determination was not made in accordance with the terms of the contract. The 'final and binding' clause is not qualified and does not say, for example, 'subject to a right of appeal on a question of law'. [52] As a matter of objective construction of clause 4.26 I conclude that the parties intended to leave to the expert all questions of interpretation of the clause that were pertinent including deciding between any contending views advanced by the parties in support of one or other figures for lost tonnage (and the categorisation of the reasons for that loss in deciding the question of Natural Disaster). The parties must have contemplated that the expert would have to make a judgment about how the clause was to operate either by choosing between the competing interpretations advanced by the parties or even rejecting both and adopting another interpretation for which, in his opinion, the clause called. The construction of the clause is not an objective fact such as which property or which vineyard was under consideration. The interpretation of the clause and its application are, to use the phraseology of Nettle JA in **AGL**, matters involving the expert's 'discretion, judgment and opinion' and very much within 'the realm of contractual contemplation'. It involved the expert's 'skill and judgment' per McHugh JA in **Legal & General** even though he is not legally trained as the parties were well aware, and it was 'within the contemplation of the parties' as a matter which was referred to the expert: per Basten JA in **Downer**."

27. The primary judge also concluded that the expert did not fall into error. He expressed his conclusion in the following terms:

"[67] I am not persuaded that the expert fell into error and for the following reasons:
(1) I think that on a natural reading of the clause it is offering to AVL two different bases for a claim to bring the lease to an end:

> (a) The first is that the actual tonnage of grapes produced in a year is reduced as a result of a Natural Disaster (option 1)
> (b) The second is that the tonnage of grapes that the vineyard is capable of producing is reduced as a result of a Natural Disaster (option 2)

(2) In the case of option 1 the reduction that must be demonstrated is a reduction of the average two year tonnage yield to the actual production which reduction must be greater than 50% of the average two year yield.
(3) In the case of option 2 the reduction that must be demonstrated is a reduction of the tonnage of grapes which the vineyard is capable of producing from the average two year yield which reduction must be greater than 50% of the average two year yield.

(4) I note that apart from the need to read the words 'in that vintage' between 'whether' and 'Production' in f(i) and (ii), an insertion on which both parties are agreed, neither party contended that any words should be read into clause 4.26(f).
(5) If the words 'reduced by more than 50% of Average Production capacity' do not contain both the comparator and the extent of reduction required but rather just provide the figure for the extent of reduction required the clause does not expressly provide from what Production and Production Capacity must be reduced. Neither party contended that the clause was void for uncertainty.
(6) I do not accept AVL's contention that the Production Capacity which is referred to in (f)(i) is the pre frost Production Capacity. I think it is more likely that the lessee was by the clause given an opportunity to measure post frost Production Capacity and to use that as one of the two comparables ie option 2. AVL chose to use a pre frost figure which was high and seeks to have that compared to the actual production for the affected year. The clause does not expressly call for that comparison and if no other words are to be read in to the clause I do not think that the clause as it stands can be read as requiring a comparison between 'Production Capacity' and 'Production'.
(7) In my view, AVL having put forward a figure for Production Capacity prior to the frost, presumably because it, or those advising it, thought that would produce a higher differential, and which had the opposite effect when utilised in the clause to that for which they had hoped, does not provide any support for the construction for which AVL contends. Once it is appreciated that the clause called for a comparison between post frost Production or Production Capacity on the one hand and the two year average yield on the other, it can be seen that provision to the expert by AVL of a figure for pre frost Production Capacity has produced what AVL claims is an odd result. The expert may have fallen into error in accepting AVL's pre frost Production Capacity as one of the two comparators under option 2 but AVL does not attack his determination for that reason and nor does Belvino. Mr Scholefield has however in my view correctly identified that he needed to compare Production Capacity (as determined) with the two year average yield, so if he did fall into error in accepting the pre frost Production Capacity figure advanced by AVL it is not a relevant error or one which AVL can (or does) rely.
(8) As a matter of logic I can accept that one measure of loss might be the difference between Production Capacity prior to the frost in comparison to Production Capacity after the frost but that is not what the clause says and AVL did not in any event provide the expert with a figure for post frost Production capacity.
(9) I see an important element in the operation of clause 4.26 as being to ensure that the average two year yield (ie using the two previous vintages) was the yardstick. It may have been a less generous test than a comparison between actual Production and pre frost Production Capacity but that is what the parties agreed on.
(10) I accept Belvino's contention that subclause 4.26(c)(iii) and 4.26(i) emphasise that the parties were treating the two year yield (ie Average Production Capacity) as the key benchmark reinforcing the correctness of the interpretation of clause 4.26(f) which the expert adopted. Subclause 2.3(b)(xi) uses a different measure for the requirement of notice to be given but it also focuses on actual production (the year before) not Production Capacity.
(11) I would add that one of AVL's contentions is that the expert wrongly used as his benchmark the Average Production Capacity rather than 50% of the Average Production Capacity. Ironically, if the expert had used 50% of the Average Production Capacity as the benchmark there would have been no reduction at all since Production, at 15,260 tonnes, was greater than 50% of Average Production Capacity (see page 36 of Plaintiff's submissions Tab 10 Exh A). I think that the expert was treating the clause as containing both the comparator and the measure of the reduction.
(12) I do not accept that the expert was not comparing the post frost situation with a pre frost situation (see plaintiff's submissions para 40). He was comparing post frost yield to pre frost yield but was required, for the pre frost situation, to use the two year average yield.
(13) I do not accept that by comparing Production Capacity to the two year average yield the expert was treating the words 'reduced by more than 50% of Average Production Capacity' as something different to what was stated. To be entitled to rely on the clause AVL had to establish that Production Capacity was reduced- if it chose a figure that involved no reduction (as it did) the clause could not operate in its favour. I do not accept that ***Energy World Corp Pty Ltd v Maurice Hayes & Associates Pty Ltd*** [2007] FCAFC 34; (2007) 239 ALR 457 has any relevance here.

(14) As Belvino's submissions point out the construction that AVL put forward for comparing Production Capacity with Production does not work if Production was chosen ie for both the 'before' and 'after' scenario. There is nothing to which actual Production can be compared hence AVL is driven to assert that actual production also should be compared to Production Capacity.
(15) Mr Hutley contended that as the crop came closer to harvest Production Capacity and actual production became virtually the same. I can accept that but I do not accept that this permits clause 4.26 to be read as requiring a comparison between actual production and Production Capacity, moving the calculation away from an agreed benchmark of the two year average yield. One reason for the parties to have included Production Capacity was in recognition that vines may be well off from harvest at the time of the disaster and to permit the impact to be assessed without awaiting the harvest for that year. AVL did not provide a figure for post frost Production Capacity and the inference was that post frost Production Capacity and actual production were the same.
(16) Belvino in its submissions claims that the expert determined that there was no permanent damage to the vines (see defendant's submissions [41]-[48] and see plaintiff's submissions in reply [31]-[33])- I accept Mr Hutley's point that the expert was required to determine whether there has been a reduction in Production Capacity for a particular vintage. I do not see how this assists AVL however. The expert accepted AVL's own proposed figure for Production Capacity. He was, having accepted that figure, required to compare it to the two year average yield which is what he did.
(17) In summary then, I think Mr Scholefield has taken the correct approach to clause 4.26(f)."

28. Like the expert, the primary judge construed the first limb of cl 4.26(b) as requiring a consideration of the difference between average production capacity and actual production for the vintage year in question. He concluded that the reduction derived as a result of that calculation was less than 50% of average production capacity, so the first limb did not trigger the operation of cll 4.26(h) to (j).
29. The primary judge adopted a somewhat different approach to the expert in respect of what he described as option 2. In par [67](7) of his judgment, cited above, he indicated that the clause called for a comparison of postfrost production capacity and average production capacity. Although he stated that no postfrost production capacity figure had been provided, he used the figure which was agreed upon as postfrost production, 15,260 tonnes, as a proxy for postfrost production capacity. He stated that the difference between average production capacity, 21,236 tonnes, and that amount, namely, 5,976 tonnes, was less than 10,618 tonnes, being 50% of average production capacity.

A preliminary issue

30. As can be seen from par [67](6), [67](7) and [67](15) of the judgment of the primary judge, the primary judge concluded that the lessee did not provide the expert with a post-natural disaster production capacity figure. The lessor submitted that no reliance was placed by the lessee on post-disaster production capacity before the expert. However, senior counsel for the lessor accepted that it was relied on by the lessee in the Court below using actual production as a proxy for production capacity. The lessee, by contrast, contended that post-natural disaster production capacity was relied on before the expert.
31. It is not necessary to determine which of these contentions is correct. If the primary judge was correct on either or both of the issues dealt with by him then the appeal will be unsuccessful. If, on the other hand, it is concluded that the decision of the expert is reviewable and the primary judge was in error in concluding that the expert's determination was correct, then the matter can be remitted to the expert to be determined in accordance with the reasons of the Court. Ultimately, the parties seem to accept that this approach is appropriate.

The correct construction of cl 4.26(b) and (f)

The parties' submissions

32. The lessee submitted that what was required by those clauses was first, a calculation of the extent to which there had been a reduction in production or production capacity due to the natural disaster. It submitted that once that reduction was ascertained, it was necessary to compare the reduction to the figure of 50% of average production capacity. If the comparison demonstrated that the reduction was greater than 50% of average production capacity, the threshold for the operation of the subsequent

provisions of cl 4.26 was satisfied.

33. The lessee accepted that, in the present case, the first limb of the formula could not operate on that construction, as the natural disaster had occurred before production. It submitted that it could apply, for example, when the crops had been damaged after harvest by fire or flood. It was implicit in this submission that, contrary to the opinion of the expert, "production" did not refer to "total production, harvest and delivery to a winery of all grapes from the vineyard in any one vintage".
34. The lessee submitted that the construction for which it contended was to be preferred as it involved a direct measurement of the reduction in production or production capacity caused by the natural disaster. It submitted that the construction relied on by the primary judge as to the second limb of the clause ignored the necessary causal connection.
35. It also pointed out that average production capacity was a different concept to production or production capacity and thus not an appropriate starting point from which to measure the reduction.
36. The lessee also submitted that the construction placed on the provision by the primary judge did not take into account the requirement in the clause that what was to be considered was the reduction in respect of "any one vintage". Senior counsel for the lessee submitted that unless a comparison was done in the manner he contended for, the expression "reduction for that vintage year" would be devoid of meaning.
37. Senior counsel for the lessee accepted that, in the circumstances of the present case, the application of the second limb of cl 4.26(b) in the way contended for would produce a reduction of greater than 50% of average production capacity, although production capacity itself would remain greater than that figure. He accepted that this result meant that cll 4.26(c)(iii), 4.26(f)(iii) and 4.26(h)(i) could have no application. He submitted that, notwithstanding, the lessee had the option in those circumstances to do nothing or elect to exercise the option to terminate contained in cl 4.26(h)(ii) and, as a consequence, to elect whether or not to purchase the property, as provided for in cl 4.26(j)(iii) of the lease.
38. Senior counsel for the lessee also submitted that cl 2(b)(xi) performed a different function from cl 4.26, submitting that the separate and ongoing function required by that subclause was not related to the occurrence of a natural disaster, the issue with which cl 4.26 was dealing.
39. The lessor submitted that the conclusion of the trial judge was consistent with the meaning of the words "has been reduced by more than 50% of average production capacity". Senior counsel for the lessor submitted that the minuend was average production capacity and the application of the clause did not involve a separate exercise of determining the difference between postfrost production capacity and prefrost production capacity and then comparing the difference with 50% of average production capacity. Put in non-mathematical terms, the lessor contended that the clause simply required a consideration of whether postfrost production capacity was less than 50% of average production capacity.
40. Senior counsel for the lessor submitted that, in that context, cl 4.26(f)(i) required what he described as a "one-stage approach", namely, to determine whether production capacity had been reduced by reference to average production capacity. He submitted, placing particular reliance on cl 4.26(f)(iii), that the fundamental concern of the clause was to measure the effect that the disaster had on production compared with previous years.
41. The lessor submitted that the construction for which it contended was more consistent with the balance of cl 4.26, which recognised a reduction of 50% of average production capacity as the threshold for the operation of subcll 4.26(c)(iii), (f)(iii), (h) and (i). The lessor submitted that those paragraphs presupposed that for the right to terminate to be enlivened, there must have been a reduction of more than 50% of average production capacity. Senior counsel for the lessor submitted that the election contemplated by cl 4.26(h) would always arise when the approach it contended for led to a reduction of greater than 50% of average production capacity. He pointed out that on the lessee's construction, there would be no room for the election in circumstances such as those that existed in the present case.
42. The lessor submitted that cl 4.26(f)(i) should be construed to work equally for production and production capacity. Adopting the expert's definition of production, namely, the actual yield as harvested and delivered to a winery, it submitted that there could never be a situation where, on the lessee's construction, natural disaster could reduce production. It submitted that a fire post-harvest, an example given by the lessee as a circumstance where the first limb of the clause could operate, would not be a natural disaster as it would not affect the vines growing on the premises.
43. The lessor also sought to draw support from cl 2.3(b)(xi). It submitted that cl 4.26 should be construed consistently with that clause, the only difference being the circumstances required for cl 4.26 to operate. It submitted that the Court would not give the same formulation a different meaning in different parts of the lease unless required to do so by clear language.

44. The lessor also submitted that the lessee's construction was contrary to the commercial purpose of the clause. It submitted that the clause was designed to deal with circumstances where, as a result of a natural disaster, production capacity fell below 50% of, what it described as, "the historical average". It submitted that the lessee's construction would effectively permit the lessee to terminate the lease where, notwithstanding the disaster, production capacity remained significantly above the historical average. It also submitted that the lessee's construction led to what it described as an unusual result, namely, that the better the vineyard is performing, the easier it would be to terminate.
45. The lessor submitted that, by contrast, its construction meant that there was a direct relationship between productivity, relative to average production capacity, and the required impact of the natural disaster. It submitted that on its construction, "The greater the relative productivity, the greater the required impact of the Natural Disaster". Senior counsel for the lessor pointed to the fact that cl 4.26 only operated after the first five years of the lease. He said that it could be inferred from that that by that time, the vineyard would have been developed to a certain stage and the ebb and flow of seasons would be known, such that 50% of average production capacity would be an appropriate benchmark against which to measure postfrost production capacity.

Consideration

46. In dealing with the question of construction, it is appropriate to focus first on the words used by the parties, having regard to the fact that they must be considered in the context of the lease as a whole and having regard to the purpose and object of cl 4.26 as it appeared from the lease. Neither party suggested that there were any surrounding circumstances known to them which would assist in the construction of this clause.
47. Clause 4.26(b) requires consideration of the reduction in production or production capacity in respect of one vintage due to a natural disaster. The relevant level of reduction for the balance of cl 4.26 to operate is 50% of average production capacity for that vintage year. That is defined by reference to production for the preceding two vintages, not production capacity.
48. Clause 4.26(c)(i) and cl 4.26(f)(i) do not refer to production or production capacity being in respect of any one vintage year. However, it was not suggested by either party that these subclauses operate in a different fashion to cl 4.26(b). It would be anomalous if they did so.
49. Clause 4.26(b), on its face, looks to the effect of a natural disaster on production or production capacity in the vintage year in question. Read literally, it is only once the amount of that reduction is ascertained that the comparison with 50% of average production capacity is to be carried out.
50. By contrast, the expert's determination of the first limb of the clause involved a direct comparison between 2014 production and average production capacity (see par [12] above). The primary judge effectively adopted the same construction in respect of the first limb.
51. The expert's interpretation of the clause simply involves comparing production in a given year with average production capacity and then applying the balance of the clause if production is less than 50% of average production capacity. The difficulty with this approach is that it does not calculate reductions in grapes produced in one vintage year prior to comparing the reduction with average production capacity. Rather, it simply compares grapes produced in that year with average production capacity.
52. In respect of the second limb of cl 4.26(b), the approach of the expert and the primary judge differed somewhat, but neither considered the question of whether there had been a reduction in production capacity in the vintage year in question. Rather, their approaches compared production capacity in the relevant vintage year with average production capacity. In the case of the expert, he compared prefrost production capacity with average production capacity, while the primary judge compared postfrost production capacity with average production capacity. Both approaches ignored the reduction in production capacity in the vintage year in question resulting from the natural disaster.
53. As I indicated, the lessor pointed to a number of contextual matters which it said supported the primary judge's construction. The first was that, on the lessee's construction, the first limb could not operate as there could never be a situation where the comparison required by that construction was capable of being made. As I indicated above, that submission relied on the expert's definition of production, namely, that production would only be completed when the yield was harvested and delivered to a winery. It does not seem to me that actual delivery was part of production and, in the circumstances, that the example given by the lessee, namely, crops destroyed after harvest, was an example where the first limb could operate.
54. In this context, the lessor also relied on cl 4.26(m), which, for the purpose of the definition of average production capacity, describes a natural disaster as one "which destroyed or affected the vines growing

on the Premises". However, the quoted words do not form part of the definition of natural disaster and the relevant test for the operation of the formula was the amount of grapes produced.

55. In considering this aspect of the matter, it must also be borne in mind that the construction preferred by the primary judge left the second limb of the clause with very little work to do. This is because post-disaster production capacity, as a matter of logic, must be greater than or at least equal to actual production. Thus, if the difference between actual production and average production capacity does not exceed the 50% threshold, it is self-evident that the difference between production capacity and average production capacity would not do so. Thus, on either interpretation of the clause, one or other limb will have a very limited operation.
56. The lessor also pointed to what it described as the anomalous result produced by the lessee's construction. It pointed out that, in the present case, the option to terminate would arise, although production in fact would remain above 50% of average production capacity. However, the so-called anomaly arose from the fact that what was required to be ascertained was a reduction in production capacity, which was to be compared to a number, which, although described as average production capacity, was in fact based on actual production for the two previous years. Such a comparison is always capable of producing a result, as in the present case, when production capacity, which may or may not be greater than actual production capacity for the previous years, is significantly greater than actual production for those years.
57. It may be that the parties did not consider that this anomaly would arise, on the basis there would be little difference between actual production and production capacity for any year. The expert stated that in fact, that had been the case in respect of the preceding three vintages. The expert made the following comments on this issue:

> "28. **Production Capacity:** This refers to the potential capacity in a vintage based on quantitative estimates of the potential crop at vintage. Crop estimates can be based on a number of components of vine production including bud fruitfulness, budburst and resultant shoot numbers, bunch numbers per shoot and vine, berry numbers per bunch, berry size and resultant bunch weight. All vineyards are required to provide the winery purchasing their grapes with reliable estimates of the likely production ahead of vintage to allow wineries to plan and schedule their harvest intake and winemaking logistics. AVL estimated the potential crop in the vineyard at pruning time using bud numbers and bud fruitfulness, at pre-flowering to estimate bunch number per vine and at lag-phase to estimate bunch weight and number. The pre-flowering crop estimate for 2014 prior to the frost was 31,865t. (Document AVL12, Folder 1 and AVL letter to Belvino, 30 January 2014)
> ...
> 54. **Production Capacity:** Belvino and their Expert, Retallack Viticulture question the interpretation of Production Capacity and the method used to determine Production Capacity by AVL. Early season (pre-flowering) estimates of potential production are an established part of crop forecasting used by growers and wineries in the industry. This estimate is based on counts of inflorescences and average bunch weights on defined units in a vineyard and relating the numbers to the whole vineyard.
> 55. In para 2.26 of their submission of 1 August, Belvino proposes a more accurate way of determining Production Capacity when an event like frost occurs to ascertain the loss. However, the existing method used by AVL to estimate early season production has provided results for the previous three vintages that show that the relationship between the estimate of early Production Capacity and the Production at vintage is reasonably close given the inherent variability in biological and environmental systems."

Although this material, being post-contractual, cannot be used to assist in construing the contract, it does indicate that a substantial difference between production and production capacity may not have been anticipated.

58. The fact that the clause was operating in circumstances where there was a significant increase in prefrost production capacity, compared to average production capacity, does not mean that the construction urged by the lessor should apply and any reduction in capacity for the vintage year be ignored. It of course remains for the expert to reach a view on postfrost production capacity.
59. It is also correct, as the lessor pointed out, that the effect of the lessee's construction in the present case is to render cl 4.26(f)(iii) and (h)(i) inoperative, while leaving the option to terminate available. However, this was because of the significant increase in prefrost production capacity over average production capacity in the circumstances of the present case, rather than what might be described as a

capricious operation of the clause.

60. Further, I do not think that the position is affected by cl 2(b)(xi). That clause, which forms one of a set of provisions dealing with the maintenance of the vineyard, deals with reduction in production or production capacity between vintages. By contrast, cl 4.26(b) refers to a reduction in any one vintage year due to a natural disaster.
61. It follows, in my opinion, that the construction contended for by the lessee is correct. It accords with the literal meaning of the clause, which looks to reductions in production or production capacity in a vintage year due to a natural disaster. Although the parties may not have anticipated the particular circumstances in which the clause was required to operate in the present case, it does not follow that the interpretation is inconsistent with the commercial object of the provision, namely, to protect the lessee from a fall in production or production capacity due to a natural disaster. The construction does not produce commercial nonsense and is not arbitrary or capricious: *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; 251 CLR 640 at [35]; *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; 129 CLR 99 at 109.

Was the expert's determination reviewable

62. The question remains as to whether the expert's determination was capable of review.

The parties' submissions

63. Each party accepted that the relevant test was that the expert's determination would only be set aside if it was not done in accordance with the terms of the contract: *Legal & General Life* at 336. The parties also seemed to accept that if, as a matter of construction, the expert's mandate extended to determining the true construction of the contract, the decision would not be reviewable.
64. It was also common ground between the parties that the question was to be determined by ordinary principles concerning the construction of contracts, requiring consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or object to be secured by the contract, so as to avoid it making commercial nonsense or working commercial inconvenience: *Electricity Generation Corporation v Woodside Energy Ltd* at [35] and the cases there cited.
65. The lessee submitted that in considering the issue of what the parties agreed to entrust to an expert, a distinction is sometimes drawn between objective and subjective matters. It submitted, referring to *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 (*AGL Victoria*) at [53], that it was "easier to suppose that parties to a contract contemplate that the expert's determination on subjective matters is beyond the realm of review", as distinct from a determination of objective matters. In that context, the lessee submitted that the parties agreed to a determination in accordance with the true meaning of the clause.
66. Senior counsel for the lessee submitted that the correct construction of a contractual provision was an objective matter. He submitted that the primary judge was in error when he stated that the construction of the clause was not an objective fact, submitting that it was not for the expert to determine the relevant contractual criteria without the possibility of correction.
67. Senior counsel for the lessee also submitted that the primary judge erred in his conclusion that *Jones v Sherwood Computer Services plc* was authority for the proposition that any question of construction of the clause under which the expert was to operate was as much part of the task of the expert as the determination of facts or calculations of figures. He submitted that, to the extent that that case was authority for that proposition, it was contrary to the dissenting opinion of Hoffmann LJ in *Mercury Communications Ltd v Director General of Telecommunications* [1994] CLC 1125 (*Mercury Communications CoA Judgment*) at 1140, whose conclusion was upheld on appeal: *Mercury Communications*.
68. The lessee, in its written submissions, and senior counsel for the lessee, criticised the reliance by the primary judge on the fact that cl 4.26(g) provided that the expert's determination was final and binding. The lessee pointed to the statement by Nettle JA (as his Honour then was) in *AGL Victoria* at [76] that such a clause makes very little difference to the question of whether the determination is reviewable for error.
69. In this context, the lessee submitted that the clause, as a matter of construction, did not empower the expert to determine the meaning of the contractual terms in question, such that his decision on the question was not reviewable. It pointed to the fact that the expert was an expert in viticulture and it was unlikely that a reasonable business person would have intended such a person to determine a question of contractual construction without resort to the court.

70. The lessor submitted that understanding the structure and language of clause 4.26 was critical to answering the question. It pointed out that the mechanism of cl 4.26 was enlivened by the lessee forming the opinion in cl 4.26(b). It pointed out that cl 4.26(c) then required the lessor and the lessee to meet and negotiate and, if there was disagreement, to refer the dispute to the expert. Senior counsel for the lessor submitted that the role of the expert was to determine the dispute between the parties, which may involve a question of how the relevant contractual provisions would operate.
71. Senior counsel for the lessor submitted that although a provision that the expert's decision was final and binding was not determinative of whether a decision was reviewable, it was a relevant factor to take into account, particularly in cases such as the present where the dispute could involve a question of construction of the contract.
72. Senior counsel for the lessor submitted that the primary judge was correct in his reliance on *Jones v Sherwood Computer Services plc*. He referred to the passage from the judgment of Dillon LJ, which I have set out above, and submitted that the primary judge correctly applied that approach. He noted that *Jones v Sherwood Computer Services plc* was cited by the House of Lords in *Mercury Communications* without disapproval.
73. The lessor also submitted there were good commercial reasons as to why the decision might have been entrusted to an expert viticulturist, including cost, expedition and finality.

Consideration

74. The parties accepted that the question depended upon whether the determination was made in accordance with the contract: *Legal & General Life* at 336. As Nettle JA pointed out in *AGL Victoria* at [44], in one sense, this test is conclusionary. The question of whether the determination is open to review rather depends on whether or not the expert has carried out the task which he or she was contractually required to undertake: *AGL Victoria* at [51]; *Holt v Cox* [1997] NSWSC 144; (1997) 23 ACSR 590 at 596-597; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38; 244 CLR 305 at [26]- [27]. If the expert in fact carried out that task, the fact that he made errors or took irrelevant matters into account would not render the determination challengeable.
75. On the other hand, if the expert had not performed the task contractually conferred on him or her, but rather performed some different task, or carried out his or her task in a way not within the contractual contemplation of the parties, objectively ascertained, then the determination will be liable to be set aside.
76. That is not to say that questions of mixed fact and law, or for that matter, pure questions of law, could not be left for the determination of the expert: *Downer Engineering* at [79]. Whilst it is a matter of contractual construction in each case, it has been stated in a number of cases that parties are more likely to have left to an expert matters involving discretion or opinion, rather than matters of objective fact: *AGL Victoria* at [53]; *WMC Resources Ltd v Leighton Contractors Pty Ltd* [1999] WASCA 10; 20 WAR 489 at 494-497.
77. There will be cases, such as the present case, where the expert, for the purpose of performing his or her task, will be required to consider objective matters, including the construction of a contract. As was pointed out by Allsop P (as his Honour then was) in *Onesteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd* [2013] NSWCA 27; 85 NSWLR 1 at [61], the objective analysis required by the process of contractual construction can only produce one meaning.
78. It is correct, as Allsop P pointed out in the passage referred to above, that the fact that there is one true meaning does not detract from what his Honour described as "the pervasive reality that a contract will often have potentially more than one meaning ... and that reasonable minds often differ about what is the true meaning". That does not mean that the ascertainment of that meaning was necessarily left to the expert, such that the expert's determination was immune from review by the Court. The position was explained by Hoffmann LJ in his dissenting judgment in the Court of Appeal in the *Mercury Communications CoA Judgment* in the following terms (at 1140):

> "So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision-maker has gone outside the limits of his decision-making authority.
> One must be careful about what is meant by 'the decision-making authority'. By 'decision-making authority' I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those

> principles and this may mean having, in a trivial sense, to 'decide' what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criterion. The distinction is clearly made by Lord Mustill in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 at p. 32."

(See also the speech of Lord Slynn on appeal in that case, which I have cited in par [25] above).

79. In the present case, cl 4.26(b) required the lessee to form an opinion as to whether production or production capacity had been reduced by more than the threshold amount and whether it was due to a natural disaster. Clause 4.26(c) required the parties to meet to agree on these issues and the remedial work required to restore production capacity to the threshold. In the absence of an agreement, the matter could be referred to the expert, defined in cl 4.25 as a person who was a principal or consultant of the third respondent. Such an expert was mandated by cl 4.25 to give a report on the state of the property, including the health and condition of vines and the state of repair of trellises. Such a person, self-evidently, would be in a position to consider the effect of a natural disaster on production or production capacity.
80. Under cl 4.26(f), the expert was required to deal with three specific matters. The first required an assessment of pre and post-disaster production and production capacity and whether there had been a reduction by more than 50% of average production capacity. It involved a calculation of the integers to be put into the formula.
81. It is correct that the expert also needed to make a decision as to the manner in which the formula operated. However, that did not mean that the parties agreed to be bound by the expert's determination of that issue. The question is whether the parties agreed to be bound by the expert's determination, both on the construction of the formula provided for in cl 4.26(b), as well as the quantification of lost production or production capacity and the determination of whether it was caused by a natural disaster, or whether the parties only intended to be bound in respect of the determination of the latter two matters.
82. It is correct, as the lessor pointed out, that the reference to the expert came as a result of the parties being unable to resolve a dispute, which included a dispute as to the interpretation of the formula. However, notwithstanding that fact, in my opinion, the decision-making authority of the expert (to adopt the words of Hoffmann LJ) would not extend to determining the construction in the formula such as to leave his or her decision on this issue unreviewable.
83. Although it is correct that the dispute between the parties could include matters of contractual construction, the contract provided that the expert's determination was to relate to the three matters in cl 4.26(f). These matters seem to me to involve, first, a calculation of production, production capacity and average production capacity and the calculation of any reduction. Although the expert had to apply the formula, it does not seem to me that the contract revealed an intention that the parties would be bound if he or she misapplied it.
84. The three matters for determination, namely, calculation of production or production capacity, whether the reduction was due to a natural disaster and the remedial work required to restore production capacity, were all matters of judgment and were peculiarly within the qualification of the expert, particularly having regard to his or her functions under cl 4.25. By contrast, the construction of the formula was an objective matter outside of the expertise of such a person. It seems to me that, in these circumstances, it would be unlikely that the parties intended to bind themselves to the expert's determination on that issue. It does not seem to me that questions of costs, finality and expedition compel a contrary conclusion.
85. Nor do I think that the fact that the decision is said to be final and binding compels a contrary conclusion. I respectfully agree with the statement by Nettle JA in *AGL Victoria* at [76] that such a clause makes very little difference to the question. To the extent that the decision was made in accordance with the terms of the contract, it will be final and binding. To the extent that it is not, it will be subject to review.
86. As I indicated, the primary judge considered that *Jones v Sherwood Computer Services plc* was

authority for the proposition that any question of construction of the clause was as much the task of the expert as the determination of facts and calculation of figures. With respect to his Honour, I cannot agree that that case is authority for such a wide proposition. Immediately before the passage cited by the primary judge, Dillon LJ stated that "on principle, the first step must be to see what the parties have agreed to remit to the expert" and that the decision would not be binding if the expert had not done what he or she was appointed to do: *Jones v Sherwood Computer Services plc* at 287.

87. In these circumstances, in my opinion, the primary judge erred in concluding that the expert's determination on the construction of the formula was incapable of review.

Conclusion

88. The expert and the primary judge were in error in their construction of cl 4.26. When reduction of production capacity is in issue, the clause requires a comparison of pre-disaster production capacity for the vintage year in question and post-disaster production capacity for that year. If the difference exceeds 50% of average production capacity, then cl 4.26(h) to (j) apply.
89. Further, the expert's determination was not made in accordance with the contract and is reviewable.
90. As I indicated, the expert has not calculated post-disaster production capacity. In these circumstances, the matter should be remitted to the expert to make a determination in accordance with these reasons.
91. I would make the following orders:

    (1) Appeal allowed.

    (2) Orders 1-3 made by the primary judge on 11 March 2015 be set aside.

    (3) Order that the matter be remitted to the second respondent for determination in accordance with these reasons.

    (4) Order the first respondent to pay the appellant's costs of the appeal and, subject to Order 4 made by the primary judge, the costs of the proceedings below.

    (5) The respondent to have a certificate under the *Suitors' Fund Act 1951* (NSW) if eligible.

92. **BEAZLEY P**: I have had the advantage of reading in draft the reasons of the Chief Justice. I agree with his Honour's reasons and with the orders he proposes.
93. **McCOLL JA**: I agree with Bathurst CJ's reasons and the orders his Honour proposes.

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