Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title No 1256 [2006] SGHC 245

Case Number : Suit 1209/2003

Decision Date : 29 December 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : T S Oon (T S Oon & Bazul) for the plaintiff; Tan Chee Kiong (Seah Ong & Partners) for the defendant

Parties : Geowin Construction Pte Ltd (in liquidation) — Management Corporation Strata Title No 1256

Civil Procedure – Experts – Setting aside expert's decision – Parties agreeing to submit claims against each other for assessment by expert – Parties agreeing expert's assessment to be final and no appeal to lie against it – Whether court may intervene to set aside expert's decision where no fraud or collusion involved

29 December 2006

V K Rajah J

1 The plaintiff was the main contractor engaged by the defendant to carry out addition and alteration works to Nadia Mansion ("the works"). The plaintiff asserts that it has completed the works while the defendant disagrees claiming that on the contrary, various portions of the works were either incomplete and/or defective.

2 Unable to resolve their differences, the defendant subsequently made a successful demand on a performance bond provided by the plaintiff as security for its contractual obligations. The plaintiff in turn promptly disputed the defendant's right to do so and maintains on the contrary that it is the defendant that owes it money.

3 Eventually the plaintiff commenced proceedings to recover the amount allegedly due to it. However just prior to the commencement of the trial the parties entered into a compromise which was later embodied in a Settlement Agreement dated 11 January 2006 ("SA").

4 The terms of the SA provided:

> 1) *An independent Expert shall be appointed to* ***assess*** *the sums due for work done under the contract and for variation works carried out by the Plaintiffs and for claims for defects and outstanding works (including any allowance for the costs of rectification, and expenses incurred or to be incurred) and for liquidated damages by the Defendants. The procedure of the Reference, the manner in which parties may make representations and any investigations and surveys required shall be in the sole discretion of the Expert.* …
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> …
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> 5) The Expert shall be appointed as an expert and his decision as to the final account and the sums due is *final and no appeal* shall lie against such decision.
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> [emphasis added]

5 Pursuant to the terms of the SA, it was envisaged that the court had no further role to play in the dispute save for the assessment of costs. An expert, Ms Kee Bee Kheng ("the Expert"), was appointed in accordance with the terms of the SA. In her Report dated 23 February 2006 ("the Award"), the Expert assessed that:

(a) the value of the work completed by the plaintiff should be fixed at $986,663.03;

(b) no liquidated damages were due to the defendant; and

(c) as a positive balance accrued to the plaintiff, the defendant ought to return the amount paid by the plaintiff through the call on the performance bond as well as the sum of $146,462.22.

6 The defendant was dissatisfied with the Expert's decision and filed an application to set aside the Award on 8 May 2006. The defendant's grievances can be summarised within a brief compass. First, it alleges that the Expert had made assumptions of fact, thereby failing to properly make an "assessment". Secondly, it asserts that the Expert made "manifest" errors and has accordingly failed to "assess" the plaintiff's work. Thirdly, it contends that the Expert failed to use reasonable skill to discharge her responsibilities. I dismissed the defendant's application and as it has appealed against my decision, I now set out the reasons for my decision.

Differences between an arbitrator and an expert

7 I had in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR 634 ("*Evergreat*") at [27] to [29] reviewed the legal principles to be applied in defining an expert's role and responsibilities:

> 27 … The starting point for the modern statement on the law relating to experts is to be found in *Campbell v Edwards* [1976] 1 WLR 403, where Lord Denning MR opined at 407:
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> > It is simply the law of contract. If two persons agree that the price of property should be fixed by [an expert] on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. *Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it*. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything. [emphasis added]
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> 28 In *Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co* [1978] 1 Lloyd's Rep 175 Lawton LJ said at 181:
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> > They [the auditors] were to be experts. ***Now experts can be wrong; they can be muddle-headed; and, unfortunately, on occasions they can give their opinions negligently. Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening. What is not acceptable is the risk of the expert being dishonest or corrupt.***
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> 29 In the absence of fraud or any corrupt colouring of the IA's determination, there is neither liberty nor latitude to interfere with or rewrite the parties' solemn and considered contractual bargain, see [5]. It is quite inappropriate for a court to substitute its own view on the merits when the parties have already agreed to rely on the expertise of an expert for a final and irrevocable determination…
>
> [emphasis added in bold italics]

And at [34] to [37]:

> 34 Both arbitration and expert awards, however, have the same fundamental and common foundation – contract law. The law upholds and recognises such agreements and the consequential awards because of the sanctity it accords to contractual arrangements. I can do no better than to echo the observations of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 353:
>
> > [T]hose who make agreements for the resolution of disputes must show good reasons for departing from them, …
>
> An expert's decision can be set aside on the basis of fraud or partiality. Beyond that it is probably correct to say that only a breach of an expert's terms of appointment would suffice to set aside his decision. Errors of fact or law will not vitiate an award if the expert acts within his contractual mandate. In contrast, there is a statutory mechanism albeit a very limited one for the review of both domestic and international arbitration awards.
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> 35 At the end of the day, the modern distinction between an expert and arbitrator does not lie purely in whether the office holder is performing a judicial, quasi-judicial or purely discretionary function. The essential difference is in the duties and/or functions the terms of appointment impose on an appointee. The labelling of an appointment as "arbitrator" or "expert" is not in itself always conclusive. It is the precise contractual arrangement and the ensuing obligations of the office holder that is, in the final analysis, paramount. Is he obliged to act solely on the evidence before him and the submissions made to him or does he have a discretion to adopt an inquisitorial function? Does he have complete discretion over the applicable rules of procedure? ***If he has the sole discretion to arrive at his determination without being hamstrung by procedural and evidential intricacies or niceties, it is most unlikely that the court will view the proceedings to be arbitration proceedings. An expert is permitted to inject into the process his personal expertise and to make his own inquiries without any obligation to seek the parties' views or consult them. An expert is also not obliged to make a decision on the basis of the evidence presented to him. He can act on his subjective opinion; that is the acid test***.
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> 36 There are two fundamental aspects or facets of natural justice that generally apply to dispute resolution. The first is that a decision maker should be disinterested in the outcome. The second is due process; both parties have the right to be heard on all the issues that are to be determined. This second facet of natural justice does not apply to an expert's determination. This is the single most significant distinction between expert determination and litigation/arbitration.
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> 37 I should further add that there is nothing wrong or contrary to public policy in allowing an expert to resolve all disputes in a matter; regardless of whether such issues are legal or factual. An expert's role need not be confined to giving opinions on matters that are not in dispute. While experts have historically acted mainly in valuations and "look and sniff" evaluations, the sphere has now evolved to include other areas of dispute resolution. Granting that references to experts are commonly found in construction documents, there is no reason as a matter of policy why parties cannot by contract extend this practice to other disputes. This is part of a wider trend for an expeditious, economical and user-friendly alternative to litigation and arbitration. ***Expert determination is particularly suitable for resolving technical issues and/or disputes. The court's jurisdiction is not completely excluded or ousted by such an arrangement. Its jurisdiction to police the contract to ensure that the expert has not exceeded his remit continues to prevail***. Like the ubiquitous "conclusive evidence" clauses, "expert" clauses will be

upheld on the basis that they are *contractual* arrangements; see *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR 345 at [19] where it was stated:

> The real foundation for the legal efficacy of such a clause is contract. It can be cogently argued that if parties expressly agree on the modalities for determining a matter, such an agreement should be upheld in the absence of any relevant public policy considerations. Indeed, this is the very basis on which the court recognises and gives effect to arbitration agreements, conclusive certificates of engineers and architects found in construction contracts and experts' decisions, amongst others.

[emphasis added in bold italics]

I must emphasise that it is common ground in these proceedings that the Expert has been appointed as an expert and not as an arbitrator.

Challenging an expert's award

8 In *Evergreat* ([7] *supra*), I also stated at [41] to [42]:

> 41 The crux of the matter is that if the parties agree to appoint an expert to resolve a dispute, his report or award cannot be challenged unless the expert has departed from his instructions in some material respect. In *Shell UK Ltd v Enterprise Oil plc* [1999] 2 Lloyd's Rep 456 at [98], Lloyd J declared:
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> > I should also say that, if the expert has committed a material breach of instructions, then as a matter of law the relevant act is not binding on any of the parties, leaving aside of course the effect of their subsequent acts. It is not a point on which the Court has a discretion whether or not to allow the expert's act to stand. I do not consider that Mr. Justice Lightman intended to suggest that there was such a discretion when summarizing the law in *British Shipbuilders v. VSEL Consortium plc,* [1997] 1 Lloyd's Rep 106 at p.109, even though he said that the Court "may" set the decision aside. That he did not mean to indicate that it was a discretionary issue appears in any event from the next following sentence. The relevant passage is this:
> >
> > > If the expert in … his determination fails to comply with any conditions which the agreement requires him to comply with in making his determination, the Court may intervene and set his decision aside. Such a determination by the expert as a matter of construction of the agreement is not a determination which the parties agreed should affect the rights and duties of the parties and the court will say so.
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> 42 In *Commonwealth of Australia v Wawbe Pty Ltd* (BC 9805379, Lexis) Gillard J, correctly, in my view, observed:
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> > *In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract*? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. ***The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract***.

[emphasis added in bold italics]

The present application

9 After I drew defence counsel's attention to my decision in *Evergreat*, the shape of the defendant's attack on the Award took on an altogether different dimension. The thrust of defence counsel's complaint from that point on was that the Expert had breached her contractual obligations by failing to make a *proper* assessment. The plaintiff on the other hand contended that such an approach was no more than a thinly veiled attempt to reopen the "merits and methodology" of the Award.

10 It appears to me that the defendant's real complaint resides not in the fact that the Expert has acted outside the terms of the SA but rather in how she had actually resolved the differences between the parties. The defendant alleges that "she had assumed the works were done … without making any determination at all" and that "it would be a breach/departure from the terms to give a sum without any assessment of work done or variation work".

11 Such misgivings on the defendant's part towards the Expert are both unwarranted and misconceived. The Expert had discharged her responsibilities in a diligent and thorough manner. She was fully apprised of and conscious of the respective contentions of the parties. Indeed, she appears to have carefully considered both the contentions of the parties as well as the defendant's surveyor's three earlier reports in the Award. She had made several site inspections, arranging for the taking of measurements as well as for a flooding test. It is amply evident from the Award that she had applied her not inconsiderable experience and expertise in arriving at her decision.

12 The terms of reference required the Expert to "assess" the sums due without being fettered by any particular methodology as to how she should make her final assessment. The parties had agreed that both the procedure as well as the precise inquiries deemed necessary or appropriate would be left entirely within her "sole discretion". To better understand the import and purport of the defendant's complaint it would be helpful to restate the terms of the SA. The Expert's contractual obligation essentially required that she "assess" both what was due for work done by the plaintiff as well as the claims for defects, outstanding works and liquidated damages raised by the defendant. The terms of reference did not require that the Expert render a "speaking" or "reasoned" award. I considered and articulated my opinion on this very issue in *Evergreat* ([7] *supra*) at [45]:

> 45 ***In my view, if the parties in appointing an expert fail to stipulate or mandate in the terms of reference for a "speaking" or "reasoned" award the court itself cannot, and indeed should not, insist on this. To require reasons to be given apropos such an award would be tantamount to rewriting the bargain.*** By the same token, it would be akin to imposing a new obligation on an expert who has undertaken the appointment on the basis that the invariable practice is not to give reasons unless the terms of reference require it. ***The notion and objective of providing reasons is inextricably linked to the notion and possibility of review by another body. One must bear in mind however that when an expert's award is made as opposed to an arbitrator's award, there is no legal review process prescribed by law. Parties, who appoint an expert, must acknowledge and accept the risk that though an expert might and can err, they consciously and sanguinely accept that risk in lieu of the expense, uncertainty and perhaps delay that court and/or arbitration proceedings may occasion.*** The position would be, of course, quite different if there was an express term in the remit that required a reasoned or speaking award. A court would then enforce such a term as an integral part of the contract. See *Expert Determination* ([33] *supra*) at para 16.7.12:

> Experts prefer to issue non-speaking decisions; i.e. those not disclosing their reasons. This stems from the fact that the less an expert discloses, the less anyone can find fault with it. The provision of reasons increases an expert's vulnerability to claims because details of the workings and calculations may be the very evidence that would otherwise be lacking. *An expert cannot be compelled to give reasons for the decision unless it is part of the remit. It is a matter determined by the terms of the expert's contract*. Some experts accept appointments only on the basis that they will not be giving reasons. It is common in rent review for reasons to be given only if the parties pay the expert higher fees. [emphasis added]

[emphasis added in bold italics]

13 The Expert in this case while not obliged to give reasons for the Award has with commendable clarity given a conspectus as to how she had discharged her responsibilities. Her sole obligation was to avail the parties of her expertise in assessing the final account. She was not under any obligation to explain each and every one of her findings, views and/or assumptions. The word "assess" is defined in the *Oxford English Dictionary* (Clarendon Press, Oxford, 2nd Edition, Vol 1, 1989) at p 709 as meaning "to settle, determine or fix the amount … to be paid by a person …" or "to evaluate … to gauge or judge". Such a responsibility the Expert has more than amply discharged.

14 As an argument of last resort, the defendant asserts that the various assumptions made by the Expert can be broadly classified as either "considered" assumptions or "mere" assumptions. It contends that a "considered" assumption is made by employing expertise whereas a "mere" assumption is one made without any apparent basis. The defendant contends that mere assumptions made by an expert are susceptible to challenge on the basis that they could amount to a *manifest error*. It appears to me that such a distinction if accepted must in turn inexorably entail a train of inquiry into the entire process employed by the expert in the determination. What has been considered? What weight has been attached to the various competing considerations? How has the evidence been assessed? Why has reliance been placed on certain assumptions? In effect the defendant is asserting not only that the Expert must account for and explain how she reached her conclusions but also that any premise for an assumption that might appear incorrect is susceptible to a challenge under the rubric of "manifest error".

Manifest Error

15 In asserting that the existence of a "manifest error" is a legitimate basis for judicial intervention into an expert's decision, the defendant heavily leans on dicta by the Court of Appeal in *Riduan bin Yusof v Khng Thia Huat and Another* [2005] 2 SLR 188 at [35]:

> 35 We are mindful that an appellant must show a "manifest error" in order to challenge the findings of a nominated valuer. In *Tan Yeow Khoon v Tan Yeow Tat* [2003] 3 SLR 486 (affirmed on appeal), Choo Han Teck J held at [12]:
>
> > [W]here the parties had agreed to accept a price that their nominated valuer had determined so that litigation could thereby be avoided, they were bound by that valuation even if the valuer was wrong. The only possible exception is where there is a *manifest error* that justly requires judicial intervention. [emphasis added]

16 However, Choo J's reference to *manifest error* as the only possible exception justifying judicial intervention into an expert's decision does not constitute any part of the judicial lexicon embraced by other common law courts in a similar context . The term "manifest error" is usually expressly

incorporated in conclusive evidence clauses to allow challenges to be made when there are plain and obvious errors in what the certificate purports to represent. It is therefore necessary to examine the context in which Choo J adverted to the term "manifest error" in *Tan Yeow Khoon v Tan Yeow Tat* [2003] 3 SLR 486. The relevant paragraph in his judgment at [12] reads as follows:

> *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 and *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175, are inapplicable on the facts of the present case in the manner that Mr Chew so bravely put them forward. *I do not disagree with the fundamental principle enunciated in these two cases, and which was in fact an affirmation of Campbell v Edwards [1976] 1 Lloyd's Rep 522. In the latter case, the court was of the view that where the parties had agreed to accept a price that their nominated valuer had determined so that litigation could thereby be avoided, they were bound by that valuation even if the valuer was wrong. The only possible exception is where there is a manifest error that justly requires judicial intervention. There is no such error in the present case*.
>
> [emphasis added]

It is apparent from the context in which Choo J referred to the term that "manifest error" appears to be no more than a convenient shorthand reference to a patent error on the "face" of the award or decision. It was clearly never Choo J's intention either to depart from or extrapolate the legal stance adopted in *Campbell v Edwards* [1976] 1 WLR 403. The term *manifest error* in my view should not be accorded any particular significance as representing an inclination or desire by the courts in Singapore to intervene with greater alacrity to correct decisions made by an expert.

17 The courts in England and Australia have consistently taken the view that in such situations, even if an expert is wrong or muddle-headed the parties cannot complain (see [7]). The real reason for this stance is that the parties have contractually agreed to accept the decision of the expert – *a fortiori* if it is expressly provided that the decision of the expert is to be 'final'. The courts have however reserved the right to 'correct' an expert's decision in a speaking award if it can be shown to be the result of an error on the face of the award. Lord Denning MR in *Campbell v Edwards* [1976] 1 WLR 403 at 407 made the following incisive observations:

> It may be that if a valuer gives a speaking valuation – if he gives his reasons or his calculations – and you can show *on the face of them* that they are wrong it might be upset. But this is not such a case. Chestertons simply gave the figure. Having given it honestly, it is binding on the parties. *It is no good for either party to say that it is incorrect*. [emphasis added]

In *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* [1985] 1 NSWLR 314, after a painstaking review of the relevant authorities, McHugh JA noted at 335:

> In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied. … *It will be difficult, and usually impossible*, *however, to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable*. The terms of the contract usually provide, as the lease in the present case, does, that the decision of the valuer is "final and binding on the parties". By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. … But as between the parties to the main agreement the valuation can stand even though it was made negligently. While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certification of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the

premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. *Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract*.

[emphasis added]

18 In *Holt and Another v Cox* [1997] 23 A.C.S.R. 590 the New South Wales Court of Appeal determined that a factual error or consideration of matters which should not have been taken into account would not be relevant if the valuation was in accordance with the terms of the parties' contract. Mason P in summarising the legal position made the following very pertinent observations at 596 to 597:

As McHugh JA develops in more detail in his judgment in *Legal & General*, these and other recent authorities depart from earlier statements of the law in that they recognise it is insufficient for a dissatisfied party to point to some mistake in the reasoning process exposed by the expert valuer. At least as a matter of common law, a valuation will stand if it satisfies the description given in the contract between the parties. The readiness in the courts to provide greater latitude for experts to choose between different valuation methods and, within limits, to make errors in assessing facts or taking matters into consideration or declining to take matters into consideration, is influenced by the recognition in; *Arenson v Arenson* [1977] AC 405 and *Sutcliffe v Thackrah* [1974] AC 727 that the expert who negligently determines a valuation will be held liable in damages to the party suffering loss in consequence of the expert's negligence.

… *It appears to me that the trend in recent years has also been influenced by a recognition that courts have no greater expertise than expert valuers; and that where parties have chosen voluntarily to commit the determination of valuation to an expert, judicial restraint is an appropriate response.* Nevertheless, it is recognised that there are limits to the types of error which will be overlooked in the courts, even in the most robust statements of the modern position. As Sir Frederick Jordan once reminded us, "there are mistakes and mistakes": *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420. Especially where, as here, the valuer exposes his or her reasoning process, then the ultimate issue for judicial determination remains that of deciding whether the valuation was in accordance with the parties' contract.

…

I have already mentioned Sir Frederick Jordan's apophthegm about "mistakes and mistakes". It was uttered in a mandamus case. I*t seems to me that administrative law provides a useful analogy in the present context. There, the decision maker has an area within which he or she may make mistakes, even mistakes of relevance or law, without failure to exercise the jurisdiction conferred, or exposing the decision to quashing. It is only those mistakes which involve a failure to address something which the statute requires to be taken into account that will expose the decision to judicial review on jurisdictional grounds*: *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 385 (Deane J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*

(1986) 162 CLR 24 at 39; 66 ALR 299. The criteria of discrimination between "mistakes and mistakes" are not determinable in advance: cf *R v Australian Broadcasting Tribunal*; *Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49 27 ALR 321.

(emphasis added)

19 If the parties agree that an expert's decision is final a court should not inquire (in the absence of a charge of fraud or collusion):

(a) how a decision has been reached;

(b) into the basis for the decision; or

(c) whether the decision was indeed correct.

To do so would be entirely contrary to the parties' contractual intentions to be bound by an expert's decision – particularly if the agreement itself expressly stipulates that the decision of the expert is final. I respectfully concur with Lord Denning MR's view in *Campbell v Edwards* [1976] 1 WLR 403 that the only errors that can be corrected by the court are those that appear on the *'face'* of the award or report (see [17]). In the context of a speaking award the court should not stray beyond the actual report or award in considering how or why the decision was reached. The underlying evidence ought not to be re-examined or referred to as this would be tantamount to an appellate hearing and to that extent contrary to what the parties had solemnly agreed to. The right of review should be confined to correcting apparent mistakes that appear on the face of the report or award (e.g. apparent mathematical miscalculations) and to determining whether the expert has complied with his terms of appointment. If an expert answers the right question in the wrong way his decision will nevertheless be binding; see the decision of Knox J in *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103 at p 108B.

20 The defendant's complaints in the application are in essence no more than a back-door attempt to reopen the very prohibition stipulated by the SA to wit that the Award "is final and no appeal shall lie against such decision". As pointed out earlier (see [7]) even assuming *arguendo* that the Expert was mistaken or has made an error, the proper remedy for the defendant is to bring an action against the Expert for negligence. However there has not been and indeed there cannot be any suggestion that the Expert has acted corruptly. The defendant must therefore be held to the bargain it made under the SA and should not be allowed a further opportunity to review or rehash the purported merits of the matter.

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