THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 238

Record No. 2016/363

Peart J.
Hogan J.
Whelan J.

BETWEEN/

DUNNES STORES

PLAINTIFF/

RESPONDENT

- AND -

PAUL MCCANN, STEPHEN TENNANT AND POINT VILLAGE DEVELOPMENT LIMITED

DEFENDANTS/

APPELLANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 23rd day of July 2018

1. The standard mechanism for the resolution of business disputes has traditionally been through the court system. This process is, however, often lengthy, complex and expensive. It is no surprise, therefore, that alternative methods of dispute resolution have been explored over the decades, not least by the parties to a commercial dispute. The arbitration system is perhaps the most obvious example of this, but it is not the only one.

2. Another alternative is the system of determination by expert. As a leading British arbitrator, Professor John Uff Q.C., stated in a Foreword to Kendall's, *Expert Determination* (London, 1996):

> "Expert determination has existed in the shadows for well over two centuries, rubbing shoulders uneasily with the law of arbitration and certification. Like some forms of commodity arbitration it seems to owe its survival to the simple fact that it works and is found commercially useful – A and B agree to abide by the decision of C. The system is infinitely flexible, there need not be a dispute, no writing is necessary and any form of procedure can be adopted."

3. Determination by expert can thus be regarded as a "simple, informal, cost-effective, confidential and final form of dispute resolution": see Brown and Marriott, *ADR Principles and Practice* (London, 3rd ed.) at 141. The circumstances, moreover, by which such an adjudication by an expert can be challenged are very limited, so that in practice "only fraud or excess of jurisdiction will cause the expert's decision to be set aside": see Brown and Marriott, *op. cit.*, at 144.

4. While adjudication by expert is quite common in the context of commercial adjudication in this jurisdiction – and, indeed, has been common for some time - what is, perhaps, surprising is that this would appear to be the first occasion in which the scope of this jurisdiction has been explored in any reserved judgment by any Irish appellate court. It is perhaps idle to consider why this is so, but it possibly reflects a traditional understanding as to the finality of the slightly rough and ready character of the adjudication by expert jurisdiction and the general futility of any legal challenge to the outcome of any such adjudication. That general understanding is, however, plainly not shared by the plaintiff to these proceedings, Dunnes Stores ("Dunnes"), as it has challenged the jurisdiction of the duly appointed expert independent architect in these proceedings even before that expert has proceeded to any adjudication in the matter.

The background to the proceedings: in outline

5. The issue arises in this way. In a reserved decision dated the 14th July 2016 the High Court (Binchy J.) dismissed the application of the defendants/ appellants ("Point Village") for an order staying the present proceedings on the grounds that the matters in dispute in this action are the subject of an alternative dispute resolution clause and are currently under the consideration of an expert independent architect. In the High Court Point Village contended that, as a consequence, Dunnes are not entitled to take any step in the proceedings pending the completion of the expert determination process.

6. The relief claimed by Dunnes in these proceedings includes a declaration that in constructing a development known as Point Square, Dublin, Point Village did not comply with its obligations under clause 7.7.2 of a development agreement entered into between the parties on the 27th February 2008 regarding the quality and standing of the development. Dunnes also sought a determination from the High Court as to how that clause should be interpreted. It further sought a declaration that "clause 7.7.2 of the development agreement … [is] to be interpreted, applied and implemented in accordance with the factual matrix as of the date of execution of the development agreement."

7. Point Village countered this argument by submitting that Dunnes had no entitlement to seek this relief from the court as an independent expert had already been appointed to determine "whether the Point Square has been completed in accordance with the development agreement." It is common case between the parties that clause 15.1 of the development agreement requires the independent architect, acting as expert, to determine this dispute and that "his decision shall be final and binding on the parties hereto."

8. As the sole arbiter of the parties' dispute, Point Village submitted that the independent architect was authorised to adjudicate on all issues which require to be decided in order to determine the dispute, including the interpretation of relevant contractual obligations

and clauses. In response, Dunnes asserted that there was a dispute on a point of law between the parties as to how clause 7.7.2 of the development agreement was to be interpreted. It was said that the independent architect was not competent to resolve this dispute, so that the dispute was accordingly one which could only be resolved by the High Court and, on appeal, by this Court.

The decision of the High Court

9. In his judgment Binchy J. accepted (at para. 49 of his judgment) the argument advanced by Dunnes that a dispute between the parties regarding the interpretation of the clause 7.7.2 of the development agreement existed and that the independent architect had been "given no guidance as to the factors which he might take into account in arriving at any determination of the issues referred to him…" (I propose presently to set out the terms of this key clause).

10. Binchy J. accordingly characterised this dispute (at paras. 53-54) as a legal issue which the independent architect was precluded from resolving: "the interpretation of an agreement is a matter of pure law, and involves a consideration of what the parties meant by the terms in dispute…" As a consequence Binchy J. ultimately held that:

> "… I do not consider it within the expert's mandate to determine what the parties intended by clause 7.7.2 of the settlement agreement, I believe that the plaintiff is within their rights in bringing these proceedings."

11. For this reason, the application to stay the proceedings was dismissed. Before proceeding further, it is, however, necessary to delve somewhat deeper into the factual background.

The background to the proceedings: in detail

12. The first and second defendants, Paul McCann and Stephen Tennant, are accountants who were appointed by the National Asset Management Agency ("NAMA") as statutory receivers over the assets of Point Village pursuant to deeds of appointment dated respectively the 17th April 2013, 18th April 2013, and 27th May 2013. At the time of their appointment, Point Village was engaged in a dispute with Dunnes regarding a claim that Dunnes was obliged to pay it the sum of €3m. under a development agreement as varied by the terms of a subsequent settlement.

13. The original development agreement was entered into on the 27th February 2008 between Point Village, Dunnes and Henry A. Crosbie. This agreement concerned building works which were to be carried out at a site known as Point Village, North Wall Quay, Dublin 1. Under Clause 4 of the development agreement, Point Village agreed to procure for Dunnes that certain key building and development work would be designed, carried out and completed in accordance with the obligations set out in the development agreement. It was envisaged that Dunnes would pay Point Village the sum of €46m., which sum was payable in stages having regard to the provisions of clause 9.1 of the agreement.

14. The underlying dispute between the parties concerns the completion of that part of the site which is known as Point Square. As it happens, the development agreement was the subject of litigation between the parties. This litigation was in turn compromised, so that certain of its terms were amended by the terms of settlement dated the 27th July 2010, and also by supplemental terms of settlement dated the 1st November 2010.

15. The terms of these settlements reduced the contract sum payable by Dunnes from €46m. to €31m., which sum was to be paid into a nominated account. The original clause 9.5 of the development agreement was effectively replaced by clause 11 of the terms of settlement which provided for the release of the monies from the nominated account in four separate stages.

16. Clause 11(d) of the terms of settlement then dealt with monies that were to be released once the Point Square had been certified as completed in accordance with the terms of the development agreement:

> "The sum of €3,000,000.00 (plus accrued interest to date) shall be released within five working days of receipt by Dunnes of a certificate by PVDL's architect (or in the event of a dispute, the independent architect within the meaning of the development agreement) confirming that the Point Square has been completed in accordance with the development agreement."

17. On the 15th March 2013, the defendants' architect, Scott Tallon Walker, produced a certificate pursuant to clause 11(d) of the terms of settlement which certified that "the Point Square has been completed in accordance with the development agreement." This certificate was sent to Dunnes, together with a letter from Point Village's solicitors dated the 19th March 2013, demanding that the sum of €3m. be released from the nominated account.

18. Dunnes did not release the €3m. from the nominated account as requested. Its solicitors instead wrote to Point Village's solicitors by letter of the 28th March 2013 and stated that Dunnes refused to consent to the release of its monies because "no supporting documentation or verification whatsoever has been supplied to either our client or to Dunnes' representatives…to vouch the contents of the certificate or to provide evidence that Point Square has been completed…" I would simply observe in passing at this point that clause 11(d) did not, as such, require the production of any such "documentation or verification."

19. There then followed further correspondence between the parties, culminating in the issuing of a fresh certificate on the 11th August 2014 under clause 11(d) of the terms of settlement. This certificate was also provided to Dunnes along with a covering letter which demanded payment of the sum of €3m. Dunnes responded to this demand by essentially disputing the validity of the certificate of the 11th August 2014. Clause 11(d) of the terms of settlement had, however, provided that where a dispute under that clause arose, the dispute was to be determined by an independent architect.

20. Clause 15.1 of the development agreement had provided for the appointment of an independent architect acting as expert:

> "Where in this agreement it is stated that a dispute or difference shall be determined by expert determination to either the independent architect or the independent surveyor in accordance with this Clause 15, then, either party may forthwith give a notice in writing to the other of such dispute or difference and the same shall thereupon be referred to such a person agreed upon between the parties or failing such agreement within five working days after either party has given to the other a written request to concur in the appointment to a person to be appointed in the case the independent architect by the President of the Royal Institute of the Architects of Ireland, and in the case of the independent surveyor by the President or other Chief Acting Officer for the time being of the Society of the Chartered Surveyors in Ireland, *which appointee in both cases shall act as an expert and not as an arbitrator and whose decision shall be final and binding on the parties hereto"*. [emphasis supplied].

21. This provision was invoked by Point Village by letter dated the 12th September 2014. Dunnes were then requested to agree within

five working days to the appointment of an independent architect "to determine whether Point Square has been completed in accordance with the development agreement." Dunnes did not, however, signify its agreement to this and Point Village accordingly applied to the President of the Royal Institute of Architects to appoint an independent architect as expert. By letter of the 21st October 2014, Mr. Anthony Reddy wrote to the parties to confirm that he had been nominated by the President of the RIAI "to determine whether the Point Square has been completed in accordance with the development agreement."

22. Both parties made formal submissions to Mr. Reddy. In their first submission of the 23rd October 2014, Point Village set out its position that the Point Square had been completed in accordance with the development agreement and argued that they had complied with the requirements of, *inter alia*, clause 7.7.2 of the development agreement which provided that:

> "The design and specification for Point Square shall be to a first class standard appropriate to a prestigious shopping centre commensurate with the newly re-developed Eyre Square in Galway and Grand Canal Square, Dublin and the Civic Plaza, Dundrum Town Centre."

23. In their first submission of the 28th October 2014, Dunnes disputed this contention and stated that:

> "the certificate [under clause 11(d) of the Terms of Settlement] needs to be confirmation that *all* works have been completed so that the design and specification for Point Square is of a first class standard appropriate to a prestigious shopping centre…" [emphasis in the original].

24. On 30th October 2014 Point Village reiterated its position by stating that the issue for adjudication was whether:

> "Whether Point Square is complete in accordance with the terms of the Development Agreement must be adjudicated by reference to the descriptions and specifications set out in Schedule 1, Parts 2 & 3, and Clause 7.7.2 of the Development Agreement and the current physical condition of the Point Square."

25. Dunnes also made clear in a letter dated the 4th November 2014 that it accepted that any determination as to whether clause 7.7.2 of the development agreement had been complied with was a matter to be decided by the independent architect as expert:

> "You are to determine if Point Square has been completed in accordance with clause 7.7.2 of the development agreement because that is the contractual obligation."

26. This letter was supported by a report dated the 31st October 2014 from DMOD Architects ("DMOD") which set out Dunnes' case to the independent architect that the Point Square had not been completed in accordance with the requirements of the development agreement. Under the heading "introduction", DMOD summarised their position:

> "The design and specification of Point Square shall be to first class standard appropriate to a prestigious shopping centre commensurate with the newly redeveloped Eyre Square in Galway and Grand Canal Square, Dublin and the Civic Plaza at Dundrum Town Centre. These provisions are set out clause 7.7.1 and 7.7.2 respectively of the Development Agreement. We have been instructed to prepare this report to express our opinion as to whether or not Point Square as constructed satisfies the contractual obligation of being to a first class standard appropriate to a prestigious shopping centre, and commensurate with the newly redeveloped Eyre Square in Galway and Grand Canal Square, Dublin and the Civic Plaza at Dundrum Town Centre. For the reasons set out below it is our opinion that Point Square, as currently laid out, bears no resemblance either in urban design terms or in the quality of overall specification to that which the developer was contractually obliged to provide pursuant to the provisions clause 7.7.1 and 7.7.2."

27. Pausing at this point, it is hard to see this submission as anything other than Dunnes' clearly stated submission to the independent architect that he ought not to conclude that the Point Square had been completed in accordance with the development agreement because it did not meet the standards provided for in clauses 7.7.1 and 7.7.2 of the development agreement, *i.e.,* that of a first class shopping centre commensurate with developments at Dundrum and Grand Canal Square in Dublin and Eyre Square in Galway.

28. On the 5th November 2014, Scott Tallon Walker set out the case that Point Village had complied with all of the provisions of the development agreement and not just simply clause 7.7.2. So far as clause 7.7.2 was concerned, Scott Tallon Walker made the following submission as to how the independent architect should compare Point Square with the other developments mentioned in that provision:

> "The intention of this clause was to determine the quality and type of materials to be used these being natural stone, good quality lighting and soft landscaping, benches bollards and urban furniture. Notwithstanding that, these are four entirely different spaces with different design criteria. Attempting to compare the designs of these spaces with the design of Point Square is completely subjective and impossible to determine post fact."

29. It is this submission, however, which has triggered the present dispute because at that point Dunnes argued that the independent expert is not competent to rule upon this question. This point was encapsulated in the first affidavit of Tom Sheridan (the company secretary of Dunnes) of the 16th January 2015 where he stated that the Scott Tallon Walker submission sought "to place an interpretation and/or construction on Clause 7.7.2 of the Development Agreement that fails to accord with the true and proper meaning of that provision as agreed between the parties to the Development Agreement." At paragraph 32 of his affidavit, Mr. Sheridan characterised this aspect of the dispute between the parties as "a dispute as to the true construction and interpretation of Clause 7.7.2 of the Development Agreement."

30. This dispute had, in any event, been pre-figured by correspondence exchanged between the respective solicitors for the parties. In a letter dated the 6th November 2014, Dunnes' solicitors provided the independent architect with a schedule which set out the factors to which DMOD considered that he should have regard in determining whether the Point Square as constructed in fact complied with the requirements clause 7.7.2 of the development agreement. For my part, I struggle to discern the difference between the arguments advanced in this correspondence with the criteria previously articulated by Scott Tallon Walker in their letter of the 5th November 2014. In essence, the question was one which – one might think - was admirably suitable for resolution by an independent architect acting as expert, namely, whether the design and specification for Point Square was of first class standard, which assessment was to be judged by reference to certain contemporary yardsticks.

31. In their letter of the 6th November 2014, Dunnes' solicitors informed the independent architect that they had requested that Point Village agree that it was for the court and not the independent architect to rule on the interpretation of clause 7.7.2:

> "In the circumstances we shall be writing to McCann FitzGerald [solicitors for Point Village] inviting them to agree to defer the determination of whether or not Point Square has actually been completed (in respect of which clause 11(d) of the Terms of Settlement provided that where there is a dispute the provisions of clause 15 of the Development Agreement are to apply) until such time as the court has ruled on the correct interpretation of the contractual obligation of the developer in relation to Point Square."

32. Not surprisingly, Point Village's solicitors could not bring themselves to agree that this was correct, as they promptly responded by saying:

> "How could an Independent Architect determine the validity of a certificate issued by [Point Village's] architect confirming that the Point Square has been completed in accordance with the Development Agreement, without referring to the clauses of the agreement that deal with the Point Square? The relevant clauses of the Development Agreement (Clause 4.13, clause 7.7.2, schedule 1, part 2 and schedule 1, part 3) are set out in the STW report dated 5 November 2014. Notwithstanding that Clause 11(d) amounts to a contractual agreement that these clauses be assessed by the Independent Architect, it also makes sense that this would be the case, as these clauses do not involve complex legal principles, rather, they refer to specifications and designs associated with construction, falling within the expertise of an architect and not a member of the judiciary."

33. Point Village's solicitors wrote a further letter on the 26th November 2014 to point out that this now amounted to a breach of the contractual bargain:

> "the parties expressly contracted for the dispute which has arisen between the parties to be determined by an independent expert. Mr. Reddy has been validly appointed by the RIAI to fulfil that function. Accordingly, it is not open to Dunnes to unilaterally circumvent a procedure that they contractually bargained for and to remit that matter to the Court."

The present proceedings

34. The present proceedings were nevertheless issued by Dunnes on the 27th November 2014. The principal relief sought was, first, a declaration that the Point Square does not comply with the defendants' obligations under clause 7.7.2 of the development agreement; and, second, a declaration that clause 7.7.2 of the development agreement and the design and specification and requirements therein "are to be interpreted, applied and implemented in accordance with the factual matrix as of the date of execution of the development agreement…".

35. Point Village then issued a motion seeking an order staying the proceedings on the grounds – it was contended – that Dunnes has no entitlement to seek these reliefs from the High Court. In effect, Point Village contend that this is the very issue or issues which have been committed for adjudication by the independent architect acting as expert. It may be observed, in any event, that the independent expert, Mr. Reddy, has taken no steps in the matter beyond inviting submissions from the parties. The parties have in effect agreed that the adjudication would be stayed pending the outcome of the proceedings.

36. Although in the form expressed to be an application for a stay, Point Village's application is in substance one which seeks to have the proceedings struck out pursuant to the inherent jurisdiction of the Court as disclosing no sustainable cause of action. I propose accordingly to treat this application on this basis.

Giving effect to the contractual bargain between the parties

37. The starting point in any consideration of this issue is that the courts will generally hold the parties to the terms of their contractual bargain. This is especially true in the context of the resolution of a commercial dispute between commercial equals, all of whom have been fully advised and are (presumably) aware of the implications of their actions. Different considerations might, admittedly, come into play where the agreement had been reached where there was a manifest inequality of bargaining between the parties or where the agreement involved a consumer. As Lord Mustill put it *Channel Tunnel Group Limited v Balfour Beatty Construction Ltd.* [1993] A.C. 334, 352:

> "This is not the case of a jurisdiction clause, purporting to exclude an ordinary citizen from his access to a court and featuring inconspicuously in a standard printed form of contract."

38. Nothing of the kind arises here: this is rather a case where major commercial entities expressly agreed to independent adjudication by expert, conscious – it must be assumed – of what I have already described as the rough and ready nature of that jurisdiction, designed as it is to achieve a speedy and final resolution of a complex and troubling dispute.

39. It is true, of course, that there may be instances where the courts *might* be prepared to step in and set aside such an award. Fraud is an obvious exception, since it must be assumed that the parties could not be expected to be bound by an adjudication which was tainted in this way. Something akin to manifest error in the interpretation of the scope of his or her jurisdiction by the expert might be another exception, since in those circumstances the expert would *ex hypothesi* have mis-interpreted i the scope of his or her jurisdiction in a significant and material fashion, so that in these circumstances it was clear that there had been a breach of the contractual bargain. But short of this it would be difficult to envisage circumstances where the court could or should intervene.

40. There is, in any event, clear U.K. authority for the proposition that where the parties have agreed to adjudication by expert, that expert is authorised, and is indeed obliged, to decide all issues which require to be decided in order to determine the dispute between the parties. This authority includes the right to consider questions of law and to interpret the meaning of contractual clauses.

41. Any number of contemporary British decisions to this effect could be cited for this purpose. Thus, for example, in *Norwich Union Life Insurance Society v P&O Property Holdings Limited* [1993] 1 E.G.L.R. 334 the court accepted that an expert was entitled to interpret the meaning of the building agreement in question "in determining whether the development has been completed in accordance with the design documents" and the plaintiff was not entitled to ask the court to adjudicate on the issue. Nicholls V.C. held ([1993] 1 E.G.L.R. 164, 169):

> "The function of the expert is to make the decision and that is not the function of the court where the decision has been entrusted to the expert. It is otherwise if both parties agree - as they often do - to get a ruling from the court to determine the basis on which an expert is to proceed, and if it is practical to assist the court will do so. But here there is no such agreement."

42. In his judgment in *Nikko Hotels (UK) Limited v MEPC plc* [1991] 2 E.G. 86, 108, Knox J. held that an independent expert who was appointed to determine a dispute was authorised to determine the construction of contractual terms where it was necessary to apply those terms in order to determine the dispute:

> "The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him."

43. A final example is supplied by the judgment of the English Court of Appeal in *Premier Telecom Communications Group Limited v Webb* [2014] EWCA Civ. 994. In that case the plaintiff contended that an expert who had been appointed to value the shares held by a minority shareholder had no authority to determine questions of law or of construction of legal terms. This argument was rejected by Moore-Bick L.J.:

> "I am unable to accept that submission, which in my view states the position far too broadly. Questions of law pervade many of the issues that are likely to arise on a valuation of this kind and it is inherently unlikely that the parties intended that on none of them should the valuer's view be binding. Parties who refer a matter to an expert for decision usually do so in order to obtain a quick and relatively inexpensive decision of a binding nature on a matter that calls for informed judgment. Often that involves the application of principles and expressions that are familiar and well understood in the particular field of endeavour, whatever that may be. In such cases it would be surprising if they had intended the expert's decision to be of no effect if it could be shown that he had made a mistake in the application of some well recognised principle. Parties who refer a dispute to an expert must be taken to have recognised that mistakes may be made, both of fact and law, but they are prepared to take that risk because they place a high degree of confidence in their chosen expert."

44. As I have already hinted elsewhere in this judgment, the entire object of adjudication by expert is to achieve a speedy and final resolution of the dispute, even if the ultimate conclusions and the reasoning contained in the expert's adjudication is not always perfect or completely justified on the evidence. But there are compelling policy reasons which warrant the courts respecting the choice of the parties to submit to adjudication by expert in commercial disputes of this nature. Accordingly, such respect means that the courts must – and will – accept a ruling from the duly nominated expert who is appointed with exclusive authority to determine a particular dispute. It also means a judicial acceptance that the expert should, in principle, at least, have full authority to determine all issues which require to be decided in order to determine the dispute, including questions of law and the interpretation of contractual terms.

45. The policy interest in endorsing the use of alternative dispute resolution clauses in order to provide litigants with a means of resolving their dispute which is cheaper and more efficient than ordinary litigation would naturally be undermined if a party to an alternative dispute resolution clause could at any time halt the alternative dispute procedure in question by initiating court proceedings in order to seek a judicial determination of any particular legal issue. The very facts of this case in their own way highlight the dangers inherent in the adoption of any other judicial approach.

46. In the present case clause 15.3 of the development agreement requires that the independent architect give his decision within twenty working days of his appointment. Although Mr. Reddy was appointed on the 16th October 2014, the effect of this litigation has been entirely to frustrate the underlying objective of the parties. For my part, I think that the dispute on which Dunnes seeks the court's determination falls squarely within the ambit of the dispute which was referred to the adjudication of the independent architect as expert and I cannot avoid reaching the conclusion that their contention to the contrary is essentially contrived and – I feel bound to say – specious.

47. I do not, of course, exclude the possibility that Mr. Reddy will fundamentally mis-understood the terms of the agreement or the brief which he has been assigned by the parties. But it is worth recalling that, as yet, at least Mr. Reddy has essentially done nothing beyond asking for submissions from the parties. The claim advanced by Dunnes essentially asks the courts to assume on some ex ante basis that Mr. Reddy will stray from the terms of the agreement unless he is subject to stringent judicial control. There is, of course, absolutely no basis at all for any such assumption. In fact, the task assigned to Mr. Reddy – essentially whether design and specification for Point Square has been to the first class standard appropriate to a prestigious shopping centre commensurate with the re-developed Eyre Square in Galway and Grand Canal Square, Dublin and the Civic Plaza, Dundrum Town Centre – is, judged certainly from a legal perspective, a relatively straight forward one, although I do not doubt but that judged from the vantage point of an architect or engineer, the factual assessment of this matter may be somewhat more complex.

Conclusions

48. In these circumstances, it is plain that the present claim as advanced by Dunnes is entirely without merit. It amounts to an attempt to frustrate and repudiate a commercial agreement negotiated at arms' length to which they had freely agreed. One is tempted to ask why they agreed to the resolution of this dispute in this fashion in the first place if they were also prepared at the very first opportunity to commence these proceedings on what, with respect, were such slender and frivolous grounds.

49. In my view, the proceedings should not simply be stayed, but rather struck out pursuant to the courts' own inherent jurisdiction as an abuse of process. I have no hesitation in describing these proceedings as abusive, because not only had the proceedings no realistic prospect of success, but the effect of the unconscionable delays generated by the litigation has also been wholly to undermine the efficacy of the underlying agreement itself, namely, the idea of a speedy and final adjudication by an expert.

50. It may be of assistance if, for future guidance, I were to express the view that, absent special circumstances, the High Court should stand ready at the earliest opportunity to strike out as abusive attempts of this nature to frustrate and undermine commercial agreements providing for adjudication by expert in the event that any future similar litigation of this kind should manifest itself. I would accordingly allow the appeal.