IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-007509
[2013] NZHC 2678

BETWEEN	LIGHTER QUAY RESIDENTS' SOCIETY INC First Plaintiff
	BODY CORPORATE 326496 (NORTH AT LIGHTER QUAY) Second Plaintiff
	BODY CORPORATE 343562 (STRATIS AT LIGHTER QUAY) Third Plaintiff
	BODY CORPORATE 358939 (HALSEY AT LIGHTER QUAY) Fourth Plaintiff
AND	WATERFRONT PROPERTIES (2009) LIMITED First Defendant
	BRUCE GRAY QC Second Defendant

Hearing:	29-30 July 2013
Appearances:	M P Reed QC and P A Morton for Plaintiffs P G Skelton QC and M H Tushingham for First Defendant
Judgment:	15 October 2013

JUDGMENT OF ELLIS J

This judgment was delivered by Justice Ellis
on 15 October 2013 at 3.00 pm
pursuant to R 11.5 of the High Court Rules.

Registrar / Deputy Registrar

Date……

Introduction

[1] Each of the plaintiffs has a contract with the first defendant. The agreements govern the provision of management services by the first defendant in relation to the Lighter Quay unit titled complex in downtown Auckland. During June and July 2011, each of the plaintiffs purported to terminate their respective contracts on the grounds of alleged gross misconduct.[1]

[2] The present proceedings involve (inter alia) claims by the plaintiffs against the first defendant for:

(a) a declaration that the termination of the agreements by the plaintiffs was lawful;

(b) breach of the management contracts;

(c) breach of fiduciary duty in relation to the performance of the contracts; and

(d) cancellation of the contracts pursuant to s 140 of the Unit Titles Act 2010 (the UTA).

[3] The complicating factor is that the dispute resolution clauses contained in each of the management agreements provide that that disputes "in connection with" the contracts are to be referred to an expert for determination.[2] That is what, in fact, has already occurred and, on 22 June 2012, the second defendant, Mr Gray QC, delivered an interim determination in which he held that the plaintiffs' purported termination of the agreements amounted to a wrongful repudiation. There are further matters in dispute between the parties that have been referred to Mr Gray but which await determination.

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1 Gross misconduct and gross negligence are express grounds for termination under the agreements.

2 The ambit of the clauses and whether or not they are obligatory is central to the matters canvassed in this judgment.

[4] In general terms, the first defendant seeks to strike out or stay all of the plaintiffs' claims in this Court (apart from part of the claim under s 140 of the UTA) on the grounds either that the matter in dispute has already been determined by Mr Gray or that the claims are barred by the privative dispute resolution clauses in the agreements.

[5] Conversely, the plaintiffs seek to stay the remainder of the disputes that are presently before Mr Gray and say that they are entitled instead to litigate those matters through these proceedings. They also seek to have Mr Gray's interim determination invalidated and to have Mr Gray disqualified from further acting as an expert in relation to the disputes.

[6] This judgment deals with the stay and strike out matters.

[7] Mr Gray has filed an appearance reserving rights. He did not participate in the hearing.

Background

[8] The Lighter Quay complex at Halsey Street, Auckland, comprises four unit plans, each with its own Body Corporate, proprietors and common property, together with some common facilities and a water space area.

[9] The four Bodies Corporate responsible for the complex are known as:

(a) North at Lighter Quay (Body Corporate 326496);

(b) Stratis at Lighter Quay (Body Corporate 343562);

(c) Halsey Apartments and Pavilions (Body Corporate 358939); and

(d) Westin (Body Corporate 384911).

[10] North, Stratis and Halsey, together with the Lighter Quay Residents' Society Incorporated (LQRS), are the plaintiffs in this proceeding. LQRS manages the common facilities shared by the Bodies Corporate, and all members of the Bodies

Corporate must also be members of it. Otherwise, the Bodies Corporate are responsible for the care and upkeep of their respective properties.

[11] The fourth Body Corporate, Westin, is not a party to the present disputes.

[12] There are 421 units, 230 of which are comprised in the North, Stratis and Halsey unit plans.

[13] The Lighter Quay complex was developed by various entities associated with a Mr Nigel McKenna and the Melview Group of Companies.

[14] Between 2003 and 2005 Lighter Quay Management Services Limited (itself a Melview company) entered into the management agreements with LQRS, North, Stratis and Halsey. Each agreement has a term of ten years, with a further ten year right of renewal, at the option of the manager. Effectively, therefore, they have a term of 20 years each.

[15] The management agreements were each prepared by the developer at a time when the developer remained in control of the Bodies Corporate and LQRS. Accordingly, they were effectively negotiated by the developer with itself. This is reflected (for example) in the fact that the person who signed the management agreement on behalf of LQRS also signed it on behalf of Lighter Quay Management Services Limited. Similarly, the Stratis management agreement was signed by the Body Corporate's then sole proprietor, Melview Halsey Limited. The Halsey management agreement was also signed by Melview Halsey Limited. The secretary is the same director who signed the LQRS agreement for both parties.[3] It is unsurprising, and not really in dispute, that each of the contracts is drafted strongly in the manager's favour.

[16] The agreements each permit assignment by the manager to a third party and that is what occurred in August 2009, when Lighter Quay Management Services Limited assigned the contracts to the first defendant, Waterfront Properties (2009) Ltd (Waterfront). The plaintiffs consented to that assignment. But in July 2011,

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[3] It is unclear who the Body Corporate secretary was who signed the North management agreement on behalf of the Body Corporate.

Waterfront purported further to assign the contracts to Beswick Holdings Ltd (Beswick). The validity of that assignment is presently in dispute.

[17] On 8 June 2011 LQRS gave Waterfront notice of termination of its management agreement. On 5 July 2011, North gave notice of termination. On 21 July 2011 termination notices were given by Stratis and Halsey. As I have said, the ground for termination relied upon by the Bodies Corporate and LQRS included the alleged gross misconduct and/or gross negligence by Waterfront in the performance of its contractual duties.

The management agreements

[18] In general terms, the agreements govern the provision of a variety of services by the management company to the plaintiffs. They provide that the relationship between the plaintiffs and the manager shall be that of principal and agent. Notably, the agreements require the manager only to use "all reasonable endeavours" to provide the stipulated services.

[19] The agreements each contain materially identical dispute resolution clauses. By way of example, cl 15 in the LQRS agreement states:[4]

> 15 DISPUTE RESOLUTION
>
> 15.1 If a dispute arises between the parties in connection with this agreement then that dispute must be dealt with in accordance with this clause.
>
> 15.2 If:
>
> 15.2.1 a party has given to the other party notice of a dispute in connection with this agreement; and
>
> 15.2.2 the parties are unable in good faith to settle the dispute within 14 days after notice under subclause 15.2.1 has been received by the other party,
>
> then the dispute may be submitted by either party to such person as may be nominated by the president or vice president for the time being of the Auckland District Law Society. The person nominated is to act as an expert and not as an arbitrator.

[4] In the agreements with the Bodies Corporate the dispute resolution clause is cl 16. For convenience, however, the clauses will be referred to collectively as cl 15 in this judgment.

15.3 Both parties are entitled to make written submissions to the expert so appointed upon the matter the subject of the dispute.

15.4 The expert's decision is final and binding upon the parties and the cost of the expert's decision will be borne by the parties in such shares as the expert may determine.

[20] Also relevant, however, is cl 28 which is headed "Governing Law".[5] Sub-clauses 1 and 2 provide that:

> This agreement and the transactions contemplated by this agreement are governed by the laws of New Zealand.
>
> Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New Zealand and courts of appeal from them for determining any dispute concerning this agreement or the transactions contemplated by this agreement. Each party waives any right it has to object to an action then brought in those courts including, but not limited to, claiming that the action has been brought in an inconvenient forum or that those courts do not have jurisdiction.[6]

The present dispute

[21] Following the purported termination of the agreements, on 2 September 2011 Waterfront and Beswick served notices of dispute on LQRS, North, Stratis and Halsey. Included in the disputes identified in the notices was whether the plaintiffs have lawfully cancelled (or, alternatively, wrongfully repudiated) the agreements, whether or not Waterfront had lawfully assigned the agreements to Beswick, and a number of consequential matters.

[22] On 24 November 2011 the President of the New Zealand Law Society appointed Mr Gray as the expert under the relevant disputes resolution clauses. On 7 December 2011 Mr Gray convened a directions conference and then issued a minute recording (inter alia) that:

> 6. The parties ... addressed whether their clients will be best served by an Expert Determination process provided for in the various Management Agreements or may instead wish to vary those Agreements by entering into a more detailed agreement either for Expert determination or for Arbitration.

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5 In the agreements with the Bodies Corporate the governing law clause is cl 29. For convenience, however, the clauses will be referred to collectively as cl 28 in this judgment.

6 Clause 28.3 relates to service of documents.

7. The parties had not yet provided each other with details of their claims, defences and counterclaims. Both Mr Sills and Mr Skelton preferred to leave for consideration the precise form of dispute resolution process until the scope of factual and legal issues which need to be resolved has been clarified.

...

Mr Skelton and Mr Sills will meet in the last week in January to discuss the scope of factual and legal issues to be resolved and the process by which that resolution should occur. Whether or not oral evidence is necessary, Counsel believe the parties would prefer there to be a hearing.

[23] Mr Gray timetabled the "provision" of the statements of claim, defence and counterclaim and scheduled a further conference which was to address (inter alia) whether there would be a more detailed agreement governing the dispute resolution process and the mode of hearing.

[24] Waterfront then issued its statements of claim and LQRS and the Bodies Corporate issued statements of defence and counterclaims. The validity of the cancellation of the agreements and, accordingly, the grounds upon which the Bodies Corporate relied for the cancellations, were squarely put in issue. By way of example only, the statement of defence filed by Stratis said:

20. ... it had valid grounds for termination which included:

(a) Gross misconduct, including:

(i) The fabrication of invoices to justify costs charged Lighter Quay Residents' Society;

(ii) The deliberate overcharging for cleaning services;

(iii) lack of performance:

No manager in New Zealand;

Failure to respond to queries from the Respondent;

Failure to undertake tasks when requested by the Respondent.

(b) The charging to the Respondent of the costs of engaging contractors to perform services specified in item 1(a) of Schedule 1 of the Stratis management agreement;

(c) The first applicant charging the Respondent amounts in respect of the carrying out of certain of the first applicant's

contractual obligation under the Stratis management agreement;

(d) Negligence in leaving the Stratis building without fire protection for 24 hours which could have resulted in closure of the building by the New Zealand Fire Service;

(e) Purporting to sell Stratis' common area to a Stratis Body Corporate owner for personal use; and

(f) Failure to pay Lighter Quay Residents' Society the amounts due and owing following the expert determination dated 9 April 2011.

[25] A further conference took place on 16 February 2012. Mr Gray's minute of that conference recorded that:

> 2. The parties are agreed that they have not varied the Dispute Resolution procedure set out in the Management Agreements.

[26] The minute also notes the parties' agreement that statements of evidence (including statements in reply) would be exchanged and that a proposal that the termination dispute be determined as a preliminary issue had been raised by Mr Gray for consideration. The parties subsequently agreed to that proposal and, on 1 March 2012, Mr Gray wrote to counsel to confirm that the preliminary issue for determination was whether the management agreements had been lawfully terminated or wrongfully repudiated.

[27] On 14 March 2012 counsel for the plaintiffs wrote to Mr Gray advising that they intended to make two of their key witnesses, Messrs Woodham and Woodworth, available at the hearing to answer any questions put to them by Mr Gray. On 15 March 2012 counsel for Waterfront and Beswick advised that they opposed the proposal that witnesses be available for questioning. In doing so, Mr Skelton noted that:

> The Expert Determination procedure in the Management Agreements does not provide for witnesses to be questioned or to provide oral evidence. The parties are only entitled to make written submissions.
>
> My proposal that there be a hearing to enable counsel to present submissions in reply and to be available to be questioned by you on issues arising in submissions, was not an express or implied agreement to depart from the contractual procedure which contemplates the dispute being resolved "on the papers".

[28] On 19 March 2012 Mr Gray wrote to counsel advising as follows:

> I do not know the capacity in which Messrs Woodham and Woodworth are giving evidence. I am not aware of there being any basis for excluding them from the meeting at which the parties make submissions. No doubt they may assist Mr Sills to respond to any questions which may arise.
>
> I can understand that Mr Skelton is reluctant to agree that some witnesses can give oral evidence, while others give evidence by written statements. I can also understand that, on grounds of efficiency, the expert determination process not be converted into an arbitration with formal evidence.
>
> As well it would not be helpful for either party to be taken by surprise by evidence being given which had not been foreshadowed so that there was a risk of a need for adjournment to enable preparation of a response.
>
> In the circumstances I propose that either party be permitted to have in attendance any person who has given a written statement of evidence. If a party wishes to have a witness supplement written evidence by making oral statements, the matter can be addressed at the time.

[29] On 20 March 2012 Mr Skelton wrote to Mr Gray stating (inter alia):

> The applicants remain opposed to any party giving further evidence (or being questioned on their written statements) at the hearing because by that date the parties' written closing submissions will have been exchanged.
>
> ...
>
> The applicants' objection to the questioning or cross-examination of witnesses is being taken because the agreed expert determination procedure in the various management agreements is not an arbitration process and does not provide for the questioning of witnesses.

[30] On 23 March 2012 Mr Sills wrote to Mr Gray advising that the respondents agreed with his proposal regarding the attendance by witnesses. Mr Sills said:

> The issue of whether they give evidence can be addressed at the hearing.

[31] The hearing then took place. Messrs Woodham and Woodworth were present but they were not questioned by Mr Gray. The possibility of cross-examination of them or anyone else was not raised either by the parties or Mr Gray.

[32] Mr Gray issued his preliminary determination on 22 June 2012. In reaching his conclusion that the agreements had not been validly terminated he said:

> 18. The hearing proceeded on the basis of the sworn statements. No witness gave oral evidence, and no witness was cross-examined.

This means I have a series of sworn assertions, some of which conflict with each other, but have had no opportunity to evaluate witnesses. *As will be seen, this has meant that some conflicts of evidence are not able to be resolved.*

...

24. The essence of this part of the dispute is that the Society and the Bodies Corporate say the particulars they have pleaded are evidenced by the witness statements they have filed, and amount to gross misconduct or gross negligence so that the agreements have validly been terminated. Waterfront and Beswick say the evidence is disputed, and is unclear. They also say that even if proved, the allegations do not amount to gross negligence or gross misconduct and so there have been no grounds for valid termination.

...

77. I interpret gross misconduct to refer to intentional conduct such as fraud or deceit. Both submissions in evidence given by the Society and the Bodies Corporate argue that there has been intentional misconduct of this type.

...

81. The onus of proving fraud or deceit is the civil onus of balance of probabilities. Cogent evidence is required.

82. It is very difficult to be in a position to find intentional misconduct without having an opportunity to hear oral evidence and assess the witnesses who gave that evidence.

...

85. In the circumstances the evidence available does not reach the level of cogency required for me to find that it has been the kind of intentional misconduct which has reached the level characterised by the agreements as "gross".

...

96. I do not believe the evidence goes this far. If evidence given by witnesses for the Society and the Bodies Corporate were unchallenged, or if I had been given an opportunity to hear witnesses give evidence orally, it may have been possible for me to find that there was no possible explanation for the financial management failures alleged, and that the failures amounted to gross negligence.

...

102. Also as with allegations of financial mismanagement, *I am unable to resolve conflicting evidence* about the scale of deficiency, or the causes for it. In the absence of an ability to do this, the evidence does not persuade me that any negligence is "gross" because it is

> accompanied by the degree of foreseeability of harm or indifference to harm which the cases require.

(emphasis added)

[33] On receipt of this decision, the plaintiffs asked Mr Gray to recall it, on the grounds that he had the power to determine his own procedure and that, once the conflicts in the evidence had become apparent to him, he should have exercised that power to require the cross-examination of witnesses. In their application the plaintiffs said:

> 15. Absent the expert having the power to determine procedure, all a party needs to do to prevent a determination being made against it in a matter which involves complex factual issues (as in this case) is to put out disputed evidence, and refuse to allow an oral hearing.
>
> 16. Unless the expert in this case has the power to determine procedure, then the dispute resolution clauses prescribe a procedure which is entirely unsuited to resolution of the dispute that has arisen …

[34] Inevitably, the application for recall was opposed by Waterfront and Beswick, on the grounds both that Mr Gray had no power to recall his determination and nor did he have the power to determine his own procedure. The first defendant's position has thus consistently been that Mr Gray was unable to permit either the leading of oral evidence-in-chief or cross-examination, without the agreement of the parties.

[35] On 25 September 2012 Mr Gray declined the recall application. In his decision (at [14]), he recorded that:

> An expert may determine his or own procedure. As the judgment of Muir JA in the *Northbuild* case makes clear [at 100], experts may permit cross-examination.

[36] But Mr Gray concluded that he did not have the power to recall his determination essentially because it did not require sealing in order to be final and conclusive between the parties and the High Court Rules governing recall of judicial decisions could not, therefore, be easily applied. He nonetheless went on to consider, and reject, the substantive merits of the recall application.

[37] Mr Gray noted the failure of the parties to agree on any more detailed process involving "oral testimony and cross-examination". He also observed that at the hearing on 5 May 2012 "no parties sought to have witnesses give oral testimony or be cross-examined". And at [33] he said:

> 33. In any event, the claims made by the Bodies Corporate that they were entitled to terminate for gross misconduct have been resolved on the basis of the evidence available. At paragraph 96 of my determination I explained that had evidence been given differently, then it may have been possible for me to reach a different conclusion.
>
> …
>
> 34. My determination speaks for itself. See paragraphs [85], [96] and [102].

[38] The plaintiffs filed these proceedings shortly afterwards.

The plaintiffs' claims

First cause of action

[39] The first cause of action is brought against both the first and second defendants and is entitled "breach of contract". The plaintiffs allege that Mr Gray had a contractual duty to determine the dispute that had been submitted to him and failed to do so. It is also alleged that Mr Gray had the power to determine his own procedure, including the power to permit cross-examination irrespective of any objection by the parties. Thus, it is said, Mr Gray misdirected himself as to the procedure to be followed and, in the result, "failed to determine the preliminary issues submitted to him by the parties".

[40] The relief sought is (inter alia) a declaration that the preliminary determination is not binding.

Second cause of action

[41] The second cause of action is brought against the first defendant only. It alleges myriad breaches of the management agreements. The relief sought is a declaration that the plaintiffs have validly determined those agreements.

[42] There is no dispute that the subject matter of this claim (including the remedy sought) is essentially identical to the subject matter of Mr Gray's determination.

Third cause of action

[43] The third cause of action is pleaded in the alternative to the second. The claim is that if the plaintiffs have *not* validly determined the management agreements then the first defendant is nonetheless in breach of those agreements. An inquiry into damages is sought.

[44] Again, it is not in dispute that there is considerable, if not total, overlap between the nature and subject matter of this claim and the nature and subject matter of the remaining dispute before Mr Gray.

Fourth cause of action

[45] The fourth cause of action alleges that as the plaintiffs' agent, the first defendant owed each of the plaintiffs fiduciary obligations to act in good faith, in their interests and to use its powers for a proper purpose. The factual allegations said to constitute breach of the fiduciary duty owed are the same as the factual allegations said to constitute breach of contract under the second and third causes of action. An inquiry into damages is again sought.

Fifth cause of action

[46] The fifth cause of action is based on s 140 of the UTA, which provides:

> **140 Compensation for, or termination of, service contracts**
>
> (1) This section applies to a service contract—
>
> (a) to which the body corporate of a unit title development is a party; and
>
> (b) that was entered into before the date that the control period ended in relation to the unit title development concerned.
>
> (2) The appropriate decision-maker may, on the application of the body corporate, require a person, or, as the case may be, persons, described in subsection (3) to pay compensation to the body corporate if it appears to the appropriate decision-maker that the body corporate has suffered loss or

damage because that person has, or, as the case may be, those persons have, failed to comply with section 139.

(3) The persons referred to in subsection (2) are –

(a) the original owner:

(b) an associate of the original owner who was a member of the body corporate during the control period.

(4) An application under subsection (2) must be made within 3 years after that date that the control period ended.

(5) The appropriate decision-maker may, on an application made by the body corporate, make an order terminating the service contract if it appears to the appropriate decision-maker that the contract is harsh or unconscionable.

[47] The plaintiffs allege that, both the terms of the management agreements themselves and the performance by the first defendant of those agreements, mean that the agreements are harsh and unconscionable and should be terminated "ab initio" under this provision. Compensation under subs (2) is also sought.

Sixth cause of action

[48] This cause of action relates to a previous expert determination undertaken by by Mr Mills QC, the consequence of which, according to the plaintiffs, is that the first defendant owes them $312,489.68 plus interest. The first defendant disputes that this is the amount owing and has previously been successful in having a statutory demand for that amount set aside. Although, in his determination, Mr Mills recorded that he was available to deal with any further disputes about quantum, the parties agreed that that issue could, instead, be dealt with by Mr Gray as part of "phase two" of the more recent expert determination process.

Expert determinations: relevant law

[49] Before turning to consider the applications to strike out and for stay it is useful to consider what the law says about the nature of an expert determination process generally and in relation to certain specific matters that arise in the present case.

[50] A quantity of judicial ink has been consumed in articulating the differences between an arbitration and an expert determination. The distinction can be both important (not least because there is legislation that governs the former process, but not the latter) and instructive. Both parties referred in that respect to the decision in *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* (relied on by Mr Gray in his recall decision) in which (at [118]) the Court listed the points of difference as follows:[7]

> **Characteristics of an arbitration**
>
> - It is an inquiry in the nature of a judicial inquiry:
> - The parties have the right to be heard if they so desire:
> - Evidence is taken only in the presence of the parties:
> - The parties have the right to give evidence:
> - Each party is entitled to test by cross-examination or by other appropriate means the opposing case and to answer the opposing case:
> - The process must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both sides:
> - The proceedings are adversarial not inquisitorial:
> - The appointment to resolve a dispute is given to specific individuals rather than a firm:
> - The primary function is to hear and resolve opposing contentions:
> - Arbitrators are expected to be trained fact finders who can adjudicate disputed facts:
> - Arbitrators are generally immune from suit:
> - An arbitrator is obliged to act wholly or in part on the evidence and submissions made by the parties:
>
> **Characteristics of expert determination**
>
> - Whilst there may be a dispute in existence rather than just a determination to avoid a dispute, there but will ordinarily be a dispute of a kind which can be determined in an informal way by reference to the specific technical knowledge or learning of the expert:

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7 *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160.

- Experts are not required to take evidence in the presence of the parties:

- The determination is inquisitorial not adversarial:

- The manner in which the experts may elicit information [is] inconsistent with any assumption that evidence is to be taken on oath:

- The appointee is directed to make an appraisal in money terms of property value or loss or damage or the like by the use of some special knowledge or skill possessed by him or her:

- An expert is not required to hear the parties:

- It has the advantage of being expeditious and economical. This is so because an expert determination is informal and experts apply their own store of knowledge and expertise to their observation of the facts, which are of a kind with which they are familiar:

- Unless expressly obliged to do so, they do not have to comply with requirements of procedural fairness and natural justice:

- Experts, unlike arbitrators, can undertake their own investigations, without disclosing them to the parties and generally can determine the question before them according to their own experience without being constrained by the contentions of competing parties:

- Experts are entitled to act solely on their own expert opinion:

[51] Relevantly, the Court went on:

> [119] There is an overlap between the role that may be undertaken by an expert and the role that may be undertaken by an arbitrator. *What is significant in this case is the limits which the parties have set on the experts by their contract: that the experts may not act as arbitrators. If they do, then they are acting beyond the powers that the parties have contractually agreed should be conferred on them.* It does not matter that it is called an expert determination if it has in fact become an arbitration [cases and citations omitted]:
>
> > "*... the problem in such a case as the present one is not whether the parties intended arbitration or valuation, but whether there is a subject matter of arbitration, that is, a subject matter in the nature of a judicial inquiry*."
>
> *Similarly, in this case it can be said the problem is not whether the parties intended expert determination. It is clear that they did. The question is whether what that has become can any longer be described as an expert determination. If it no longer can be so described, the "expert determination" would be ultra vires and liable to be set aside. It would, in short, be unenforceable.*
>
> ...

> [122] *Where the experts have committed themselves to acting judicially then they are acting as arbitrators quintessentially act. If they adjudicate on the case put forward by the parties rather than acting as independent experts relying on their own skill and judgment then it appears likely that they have crossed the impermissible line and strayed outside their contractual limits.* Calling someone an expert who is in fact acting as an arbitrator does not avoid the operation of the Act. It is not what the decision maker is called but rather the nature of the process and the way the decision makers have bound themselves to act that is finally determinative of the issue.
>
> (emphasis added)

[52] It is appropriate to record at this point that neither side in the present case has yet sought expressly to contend that Mr Gray was, or became, a de facto arbitrator. In my view it remains arguable that there would be grounds for suggesting that the line between an expert determination and adjudication may well have been crossed. The following matters would appear to me to be relevant to that inquiry:

(a) the contractual requirement in the agreements that the "expert" be a lawyer;[8]

(b) the subject matter of the instant dispute (and the particular procedural and evidential issues that arose as a consequence);

(c) the exchange of formal pleadings;

(d) the exchange of affidavit evidence;

(e) the filing of written submissions;[9] and

(f) the holding of an oral hearing;

(g) The content of the determination itself, the outcome of which turned on the evidential burden applicable in adversarial proceedings.

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8 The practice of appointing lawyers as "experts" appears to be a burgeoning one and has led to an unhelpful blurring of traditional distinctions between arbitrations and expert determinations. But in *David Wilson Homes Ltd v Survey Services ltd (in liquidation)* [2001] 1 All ER (Comm) 449 the Court of Appeal held that the fact that the agreement in question provided for a Queen's Counsel to be appointed to resolve disputes meant that the parties intended that any such inquiry was to be a judicial one, i.e. an arbitration rather than an expert determination.

9 The fact that this step is contemplated by cl 15 appears to me to be of no consequence in the present context.

[53] If the line has been crossed, then the dicta in *Northbuild* would suggest that the determination is ultra vires and invalid.[10]

[54] There are a number of other legal issues that commonly arise in relation to expert determinations. In particular, the issues of jurisdiction, mandate and the nature and extent of the courts' oversight role have recently been discussed in some detail by the English Court of Appeal in *Barclays Bank PLC v Nylon Capital LLP*.[11] That decision (which reviews, and arguably differs from, some of the cases referred to me by counsel) was not drawn to my attention at the hearing, but bears closer consideration. It, too, involved an application for a stay of Court proceedings pending the completion of the expert determination.

[55] In the *Barclays* case the relevant contract contained (as here) both:[12]

(a) an expert determination clause which provided:

(i) that the appointee was to act as an expert and not an arbitrator; and

(ii) that the expert shall determine all matters in dispute including "any dispute concerning the interpretation of any provision of this Agreement or his jurisdiction to determine the dispute"; and

(iii) that his decision was to be final and binding on the parties;

and

(b) a "Governing law" clause which provided:

(i) that the rights of the parties were to be governed by and construed in accordance with English law; and

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10 But compare the approach in *Re Dickinson* [1992] 2 NZLR 43 (CA) where the New Zealand Court of Appeal simply held that the expert determination in question had become an arbitration, and so the Arbitration Act (1908) applied to it.

11 *Barclays Bank PLC v Nylon Capital LLP* [2012] 1 All ER (Comm) 912, [2011] EWCA Civ 826.

12 In the *Barclays* agreement each was a sub-clause of the same clause.

(ii) that the parties agreed to "submit to the exclusive jurisdiction of the English Courts".

[56] In *Barclays* the Court confirmed, firstly, that it was ultimately for the courts to decide whether or not the expert had jurisdiction to determine a particular dispute, regardless of whether the contract provided that the expert himself could do so. Moreover, it was held that the Court could determine the ambit of the expert's jurisdiction *prior* to any decision by the expert himself in that respect.

[57] Next, however, the Court of Appeal said that, when considering the extent of jurisdiction conferred by expert determination clauses, the courts should *not* adopt the "liberal" interpretive approach applied to arbitration clauses which, for example, has manifested itself in a refusal to draw fine distinctions between words such as "arising under" or "in relation to".[13] Thomas LJ (who delivered the leading judgment in *Barclays*) said at [27] and [28]:

> ... although parties must adhere to the agreement which they have made, I do not consider that the approach to an expert determination clause should be the same as that which must now be taken to an arbitration clause. The rationale for the approach in *Fiona Trust* is that parties should normally be taken, as sensible businessmen, to have chosen one forum for the resolution of their disputes. As arbitration will usually be an alternative to a court for the resolution of all the disputes between the parties, it would not accord with the presumed intention of sensible businessmen to draw fine distinctions between similar phrases to allow a part of the dispute to be outside the arbitration and allocated to the court.
>
> In contradistinction expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court (or if there is an arbitration clause by arbitrators). The rationale of *Fiona Trust* does not therefore apply, as the parties have agreed to two types of dispute resolution procedure for disputes which might arise under the agreement. The LLP agreement illustrates this: the parties agreed by Clause 26.2 to submit to the exclusive jurisdiction of the English courts, but reserved specific disputes under Clause 26.1 to the expert. They carved out of the exclusive jurisdiction of the English courts, to which they had submitted all disputes between the parties, a limited class of dispute. Therefore, quite unlike the position under agreements with arbitration clauses (as exemplified by *Fiona Trust*), the parties have chosen two alternative forms of dispute resolution. There is, therefore, no presumption in favour of giving a wide and generous interpretation to the jurisdiction of the expert conferred by the expert determination clause as the reasoning in *Fiona Trust* is inapplicable. The simple question is whether the

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[13] *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951 at [11] and [12].

> dispute which has arisen between the parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. It is a question of construction with no presumption either way.

[58] Accordingly, it seems to me that some of the rather tortuous attempts by the English courts, in particular, to give meaning and content to jurisdiction clauses contained in arbitration agreements do not need to be considered here.[14]

[59] Thomas LJ then goes on to consider what is termed the "mandate" issue. That issue has arisen where (as is usually the case) an expert determination clause provides that any determination by the expert shall be "final and binding" upon the parties. The Courts have traditionally held that these words mean that there are only limited grounds for curial intervention after the fact, even in the face of a clear error in the determination. More particularly, the earlier decisions state that the courts may intervene only where the expert has "failed to do what he was appointed to do". That "mandate" issue underlies the plaintiffs' first cause of action in the present case and the decisions that address it therefore assumed some significance in argument before me. So what the Court in *Barclays* had to say about them is not merely of academic interest.

[60] After reviewing these authorities and considering (and expressing a preference for) Hoffmann LJ's dissenting judgment in *Mercury Communications Ltd v the Director General of Telecommunications*,[15] Thomas LJ said (at [35]):

> The decisions in *Nikko*, *Sherwood* and *Norwich Union* all involved mixed issues of fact and law. *In the present case it is not necessary to decide whether, if an issue of the kind described is determined by the expert and is solely one of law, a wrong determination of law may have the consequence that the expert is not determining the issue in accordance with the mandate given to him.* That is because Clause 26.1 is a wide clause that allows issues of interpretation to be left to the expert and, more importantly and, as I shall explain, there is no issue yet within the jurisdiction of the expert. *However I consider that the cases to which reference has been made do not decide that,*

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[14] The issue with which the Courts have grappled in those cases is that referred to by Thomas LJ in *Barclays* (at [27]), namely that a jurisdiction clause is fundamentally inconsistent with an arbitration clause. See for example *Paul Smith v H & S International Holding Inc* [1991] 2 Lloyd's Law Rep 127; *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1991] 1 Lloyd's Rep 72; *Axa RE v Ace Global Markets Ltd* [2006] EWHC 216.

[15] *Mercury Communications Ltd v the Director General of Telecommunications* [1994] CLC 1125 (CA). The majority decision in the Court of Appeal was overturned by the House of Lords in [1996] 1 WLR 48, but without expressly affirming Hoffmann LJ's dissent on this issue.

> *where a pure issue of law of the type I have described arises in the course of a determination by an expert acting under the usual form of clause, a wrong determination by the expert of that issue cannot be challenged in the courts in circumstances where the interpretation adopted by the expert has the consequence that he is not determining the matter in accordance with the mandate given to him.* That remains to be decided applying the approach set out in *Jones* as elucidated by Hoffmann LJ in *Mercury Communications.* Since preparing the draft, I have had the advantage of reading the observations of the Master of the Rolls at paragraphs 63 to 72. I see force in his observations but the issue needs detailed examination when it arises. I would prefer to express no concluded view.
>
> (emphasis added)

[61] The passages from the judgment of the Master of the Rolls, Lord Neuberger, to which Thomas LJ here referred, includes the following (at [63] - [65]):

> ... There is, in my view, a powerful argument for saying that, depending, of course, on the terms of the particular contract in question, a valuation by an expert, even whose valuation is agreed to be "final and binding", can be challenged in court if it can be shown to have been arrived at on the basis of a mistake of law.
>
> The analysis of Dillon LJ in *Jones v Sherwood* ... is unexceptionable as far as it goes, but it can be said to raise almost as many questions as it answers. If the expert "valued the wrong number of shares", it is scarcely controversial to suggest that his decision could not stand if it was challenged in court (unless, perhaps, the parties' agreement had, bizarrely, plainly excluded such a mistake from being challenged). But what if the expert had valued the right number of shares on the wrong basis (e.g. because of his misinterpretation of the company's articles of association, he had valued the shares on the assumption that they could not be transferred without the concurrence of the board, whereas they could, in fact, be freely transferred)? It seems to me that in such a case, it could be said to be an open question whether the test propounded by Dillon LJ, namely that the valuation will be binding unless "the expert had not done what he was appointed to do", is satisfied.
>
> Of course, it is very dangerous to generalise, as the extent of the expert's mandate in any case must depend on the words of the particular contractual provision and the documentary, factual and commercial matrix of that provision. Nonetheless, in the absence of any other direction or indication, it seems to me that a contractual provision which simply required an expert to value specified shares in a company may well not mean that his determination was immune from attack if it could be shown that, as a matter of law, he had valued the shares on the wrong basis. His contractually agreed instructions could, (I emphasise again) in the absence of a provision or indication to the contrary, be said to be to value the shares in accordance with the legal rights and obligations they carry with them. To value shares on the assumption that they could not be freely sold, when, as a matter of law, they could be, would not, it can be said with force, result in a valuation of the shares according to the contractual arrangement between the parties.

[62] And then, at [69], Lord Neuberger concluded:

> Accordingly, it seems to me that, where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose argument on the issue is rejected. As Hoffmann LJ said in *Mercury* ... "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", and, it seems to me to follow that the court can review, and, if appropriate, set aside or amend his decision. While certainty and clarity are highly desirable, it is, regrettably, inappropriate to consider that issue further in this case.

[63] So, it seems to me that the following three points of relevance therefore emerge from the decision in *Barclays*:

(a) Expert determination clauses may be narrowly construed, particularly where the agreement contains a potentially competing jurisdiction clause.

(b) The Court is in all cases the final arbiter of an expert's jurisdiction, and may determine that issue prior to the commencement of the expert's own process.

(c) Legal error by an expert may (depending on the terms of the particular agreement and the subject matter of the dispute) mean that he has acted beyond his mandate, notwithstanding that the agreement provides that his determination is to be final and binding.

[64] Against this background I now turn to consider the particular issues arising in the present case.

Jurisdiction

[65] Before turning specifically to consider the applications for strike out and stay, it seems to me that the prior and most fundamental issue is whether or not this Court has jurisdiction to hear some or all of the plaintiffs' claims. If the Court's jurisdiction has been clearly excluded by the terms of the management agreements

then, by definition, the claims cannot be advanced and must be dismissed.[16] Conversely, if the Court's jurisdiction is, or is arguably, not excluded, then a number of the grounds advanced in support of the application to strike out the claims almost inevitably fail.

[66] There is no dispute that the Court has jurisdiction in relation to the first cause of action, which is concerned with whether Mr Gray has exceeded his mandate. Nor is there a dispute about the Court's jurisdiction in relation to the fifth, UTA, cause of action. Rather, the issue of whether the Court's jurisdiction is excluded by the terms of the management agreements arises in relation to the second, third, fourth and sixth causes of action. More particularly, the question is whether the proper interpretation of those agreements means that those four claims can *only* be determined by an expert.

[67] The relationship between, and interpretation of, cl 15 and cl 28 is, in my view, central to this issue.

[68] An application of the reasoning in *Barclays* would lead to the conclusion that the co-existence of these two clauses indicates that the parties contemplated two types of dispute resolution process. That conclusion is supported by the different wording used in cl 15 and cl 28.2 and (arguably at least) by the permissive word "may" in cl 15.2.[17] More significantly, however, unless cl 28.2 is interpreted as giving the Court jurisdiction over *some* disputes then cl 28.1 would render it otiose.[18] The issue therefore becomes where the line between the two clauses is to be drawn.

[69] The dicta from *Barclays* I have quoted above invite, or at least permit, nice distinctions to be drawn between the seemingly similar wording used in cl 15 and in cl 28. For convenience, I set out again the relevant wording of the each of the clauses:

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[16] There can be no doubt that the jurisdictional issue formed part of the first defendant's application to strike out. But for the distinction (and overlap) between dismissal for want of jurisdiction and striking out for no tenable cause of action, see *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2013] 1 NZLR 804 (SC).

[17] Although in the absence of cl 28 "may" would probably more likely be read as meaning "may (if the party wishes to pursue the dispute) be submitted to ... an expert".

[18] I am referring here to the cases noted in footnote 14 above. None of the jurisdiction clauses in those cases were in quite the same terms as cl 28.2.

(a) cl 15 refers to *a dispute that arises between the parties in connection with the agreement*;

(b) cl 28 refers to *any dispute concerning this agreement or the transactions contemplated by this agreement*.

[70] The first point that may be noted is that cl 28 specifically refers not only to the agreement itself but to "transactions contemplated by" the agreement. At its broadest, the word "transactions" might conceivably refer to any interaction between the parties pursuant to the contract and thus would encompass performance. More likely, I suspect, is that it refers to specific further agreements that may be reached pursuant to the management agreement. I have already referred to cl 10 which permits the manager both to subcontract and to assign the agreement to a third party. There is also cl 9 which provides that further agreements may be reached between owners and the manager about the provision of additional services. Such further agreements appear to me indisputably to be "transactions contemplated by" the agreement.

[71] The second point is that cl 28 seems more directly focussed on disputes directly *about* (or "concerning") the agreement than cl 15, where the words "in connection with" suggests a more remote or tenuous relationship with the contract itself. A dispute about the interpretation of the agreement, for example, appears to me to fall more readily within cl 28 than cl 15.[19] But under which clause would fall a dispute about whether the agreement has been breached or validly terminated is less clear-cut. Considered in the abstract, at least, such a dispute seems to be in no-man's land.

[72] But to the extent the dividing line between cl 15 and cl 28 remains incapable of general or abstract definition, their respective ambits may, perhaps, more precisely be tested by reference to a particular dispute. Thus in the present instance, for example, the very fact that the dispute involves an allegation of gross misconduct by one of the parties may inform which of the clauses properly applies. If it can be said that the dispute turns on the interpretation of the contract then that perhaps favours

[19] Although given that the expert is, himself, required to be a lawyer the point of making such a distinction is a little mystifying.

the Court's jurisdiction. Moreover, it might be argued that if (as I think is the case here) the subject matter of the dispute is ill suited to the *process* of expert determination then that militates against interpreting cl 15 as applying to it.[20] Equally, it might be said, the suitability of the dispute for resolution by the Court favours the application of cl 28.[21]

[73] Although the relationship between cl 15 and cl 28 was the focus of some argument before me, the issue was not addressed squarely in jurisdictional terms. Nor, as I have said, did counsel cite or discuss the decision in *Barclays*, which I have found helpful. For these reasons I am not prepared to determine the jurisdictional issue definitively in this judgment. It seems to me that all I need to conclude for strike out purposes is that the court at least arguably has jurisdiction over the subject matter of the second, third, fourth and sixth causes of action. And although I accept that the matter is not straightforward, I have little hesitation in reaching that conclusion. In my view there is no clear and fundamental jurisdictional bar to permitting the claims to remain on foot. It does not necessarily follow, however, that they should not be struck out for other reasons. That is the question to which I now turn.

Should the claims be struck out?

[74] I do not propose to rehearse the standard strike out authorities here. I note only that the procedural history that I have set out at some length above is not in dispute. It therefore forms the factual basis upon which the legal tenability (or not) of the various causes of action is to be determined. I particularly bear in mind, however, the dicta of Elias CJ and Anderson J in *Couch v Attorney-General* that:[22]

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.

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20 Absent the present issue of contractual interpretation the inaptness of an expert determination procedure would not by itself permit the Court to ignore what the parties had agreed: see *Barclays Bank PLC v Nylon Capital LLP*, above n 11, at [36] – [38].

21 To the extent there is ambiguity about the exclusionary reach of cl 15 and its intersection with cl 28, it might also be possible to argue that it should be interpreted contra proferentem, against the first defendant, and in favour of the Courts' jurisdiction.

22 *Couch v Attorney-General* [2008] 3 NZLR 725 (SC) at [33].

First cause of action

[75] The first defendant applies to strike out the first cause of action (challenging the validity of Mr Gray's interim determination) on the grounds that:

(a) the determination is final and binding upon the parties by virtue of cl 15.4;

(b) counsel for the plaintiffs did not apply to cross-examine at the hearing or to lead supplementary oral evidence;

(c) there was no duty to act fairly because the procedure agreed required the disputes to be determined on the basis of written submissions;

(d) even if the plaintiffs did have a right to lead oral evidence and cross-examine witnesses (which is denied) they waived their right to do so and/or are estopped from seeking the relief sought; and

(e) the plaintiffs are attempting to re-litigate a matter that has already been decided against them and the first cause of action is therefore an abuse of process.

[76] These issues are not jurisdictional in nature. Rather, they raise the question of Mr Gray's terms of reference. Put another way, could his determination be invalidated, notwithstanding that it is said to be final and binding, because he exceeded, or did not comply with, his "mandate".

[77] First, on the authority of the passage from *Northbuild* that I have quoted (at [51]) above, the closer the expert determination process came to an arbitral process, the greater the risk of it being rendered ultra vires and invalid. I have already recorded my view that the dividing line may well have been crossed here. If a determination is invalid it cannot, by definition, be "final and binding".

[78] Secondly, if the approach in *Northbuild* is wrong or does not apply there is New Zealand authority that suggests that in a case where an expert determination

process has transmogrified into a de facto arbitration, then the Arbitration Act 1996 would apply.[23] That possibility and its implications were not raised or explored before me. But it seems to me that there is, again, room for argument that, in that event, the determination might well not be final and binding because the plaintiffs could have some form of recourse to this Court under the Schedules to that Act.

[79] And thirdly, there is the point that unless Mr Gray was able to (and did) determine his own procedure and require cross-examination it was not possible, and would never have been possible, to determine whether the management agreements had validly been terminated. That is because the grounds of termination, namely alleged gross misconduct on the part of the first defendant, are inherently contestable. It seems to me that even before the process had begun there was never any prospect that there would not have been a significant factual dispute; the existence (or not) of gross misconduct would inevitably be the subject of conflicting evidence which was incapable of resolution without a truly adversarial process.[24]

[80] In my view, the difficulty in this respect is (arguably) more than just a matter of the expert determination procedure being inapt or unsuitable in the circumstances. It might be said that the nature of the procedure meant that the expert was incapable of determining the matter before him; again, on that analysis, there would be no determination that was "final and binding". Indeed, it seems to me that Mr Gray himself recognised this at [18] and [102] of his determination when he says that he was "unable to resolve" (important) aspects of the dispute.[25]

[81] And in terms of waiver, it is true that the plaintiffs did not make any application to cross-examine during the hearing. But the process had arguably misfired well before then. The reality was that because nobody had confronted the procedural difficulty earlier, the first defendant's witnesses were not available at the

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[23] See in particular *Re Dickinson* (above at note 10) in which the expert was found to be acting as an arbitrator. But cf *Forestry Corporation of New Zealand Ltd (In Receivership) v Attorney-General* [2003] 3 NZLR 328 (HC) (where the Court declined to hold that the expert was an arbitrator). *Dickinson* was, however, decided during the currency of the Arbitration Act 1908. I am not in a position to express a view on whether the enactment of the Arbitration Act 1996 might make a difference to the result.

[24] The procedural history I have set out above suggests that this difficulty was recognised by Mr Gray at the outset but that he felt unable to address it without the consent of the parties.

[25] In my view those statements capture what has occurred more accurately that the statements elsewhere that the matter was resolved "on the basis of the evidence available".

hearing to be cross-examined even had an application been made. Indeed, as I understand it, they were overseas. Moreover it seems clear that it was never accepted by the first defendant, and may also not have been accepted by Mr Gray at the time of the hearing, that an expert has any power to order cross-examination absent agreement. An application would no doubt have been perceived as futile. And lastly, if Mr Gray did consider that he had the requisite power, it was arguably his responsibility, not the parties', ultimately to ensure that he had the necessary processes in place and the evidence required in order to do what he was appointed to do, namely to "determine" the issue before him.

[82] In these circumstances I do not consider that any issue of waiver can fairly be said to arise.

[83] I do not propose to consider the matters referred to in [75](a) and (c) above in any detail. I do not perceive the first cause of action to be directly concerned with natural justice issues and the plaintiffs' position was not advanced on that basis before me. And it seems to me that the abuse of process/relitigation argument is inherently circular in the present context. An accusation of relitigation presupposes a prior determination that is final and binding. I have already set out above the reasons I consider it to be arguable that no such determination exists here.

[84] The application to strike out the first cause of action must fail accordingly.

Second cause of action

[85] The application to strike out this aspect of the claim is made on the grounds that it is an abuse of process because the issue raised (namely whether the management agreements have been validly terminated) has already been determined by Mr Gray. The first defendant says that the plaintiffs are therefore estopped from re-litigating that matter.

[86] But I have answered that contention above. There can only be re-litigation if there has been a prior, valid, determination. If there is not, then in my view it cannot at this stage be said that this Court has no jurisdiction in relation to that issue.

Third cause of action

[87] The first defendant says that the third cause of action is also an abuse of process because the breaches of the agreements alleged to have been committed by the first defendant form part of the wider dispute that is presently before Mr Gray. It is not in dispute that "phase two" of the expert determination process would involve inquiry into these matters.

[88] I have already recorded my view that the Court does arguably have jurisdiction in relation to the "phase two" matters. Moreover I consider that the potential difficulty with these matters proceeding before Mr Gray (difficulty of the sort noted at [79] and [80] above) is particularly acute here. Unless Mr Gray is correct that an expert has the power to determine his own procedure (in the absence of agreement) and unless he then exercises that power to permit a full adversarial process (which immediately would give rise to problems of a different kind)[26] then phase two will inevitably become mired in the same procedural bog as phase one. As I have noted earlier this prospect, in itself, points in favour of the Court having, and ultimately exercising, jurisdiction.

[89] For all these reasons I do not consider that it can fairly be said that there would clearly be an abuse of process if the matter were to proceed.

Fourth cause of action

[90] In its application to strike out, the first defendant said that this cause of action was not reasonably arguable because its rights, duties and obligations are founded exclusively upon the express or implied terms of the management agreements. The first defendant could not, therefore, owe any fiduciary duty to the plaintiffs.

[91] At the hearing before me, however, Mr Skelton accepted that the stipulation in the management agreements that the first defendant is the plaintiffs' agent could be sufficient foundation for the fiduciary duty claimed. He nonetheless maintained his position that the fourth cause of action is an abuse of process because it is an attempt to litigate (or re-litigate) matters that have already been submitted to the

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[26] Of the sort referred to in [78] above.

expert. As I have said, it is accepted that the factual allegations that are the foundation for the breach of fiduciary duty are similar, if not identical, to the factual allegations made by the plaintiffs in the context of the breach of contract claim that has been referred to the expert.

[92] But given the first defendant's quite proper concession of the agency point, there is no basis advanced for striking out the fourth cause of action that is additional or separate from those which have been advanced, and rejected, in relation to the third. Moreover it is arguable that a claim for breach of fiduciary duty is more remotely "connected" or "concerned" with the agreements themselves (notwithstanding that the agency relationship is stipulated in the agreements). Perhaps it might be said that such a claim falls within the jurisdiction of the Court in the usual way.

[93] The fourth cause of action is also therefore to remain.

Fifth cause of action

[94] The first defendant does not seek to strike out the claim that the agreements should be terminated under s 140 if the UTA in its entirety. Rather, the claim is said to be untenable only to the extent that:

(a) damages are sought, because s 229 of the UTA precludes such a claim in relation to service agreements entered into before the commencement of the UTA; and

(b) termination of the service agreements *ab initio* is sought; and

(c) allegations of non-performance or negligent performance are relied upon to found the unconscionability claim which (the first defendant says) must be determined only by reference to the terms of the contracts themselves.

[95] I am satisfied that the first defendant's submissions in relation to aspects of the fifth cause of action are well founded. Section 229 of the UTA clearly precludes

a damages claim in this case and that aspect of the pleading must be struck out.[27] Nor do I think that, in the absence of any clear words to that effect, there is any tenable argument that s 140 could operate to terminate the management agreements retrospectively. The consequences of it doing so would be both uncertain and far-reaching; the reality is that the parties have regarded the agreements as operational for the last 10 years, and have acted accordingly. So the words "ab initio", should in my view, also be struck out.

[96] I consider that the first defendant's position on the (ir)relevance of performance issues to a s 140 inquiry also has some merit. That said, however, it is conceivable that certain instances of performance or non-performance may have some bearing on the unconscionability question. For example, if (as is alleged) the first defendant is permitted by a contract, the very purpose of which is to govern the delivery of services by it to the plaintiffs, not in fact, to deliver those services (for example by virtue of the clause which requires the first defendant only to use its "best endeavours" to provide those services) then that might be relevant under s 140.

[97] The current pleading, however, goes far beyond that. The vast majority of performance grievances alleged would be of little, if any, assistance in or relevance to the unconscionability inquiry. Substantial repleading is, in my view, required.

Sixth cause of action

[98] Again, it is not disputed that the same issues have been raised by the plaintiffs in that part of the dispute that remains pending before Mr Gray. The application to strike out the sixth cause of action is therefore based on the contention that it is an abuse of process because that issue has already been referred to Mr Gray for determination and so the plaintiffs are estopped from seeking to recover those sums in this Court.

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[27] Section 229 is entitled "Review of service contracts" and simply provides:

> In respect of a contract entered into by a body corporate before the date on which this Act came into force, –
> (a) section 140(2) does not apply:
> (b) section 140(5) applies.

[99] In my view the most obvious course would be for Mr Mills, rather than Mr Gray, to determine the matters that remain outstanding in relation to his earlier determination. But essentially for the reasons I have already given I am not prepared to strike out this cause of action, either. I am not prepared to hold that this Court does not have jurisdiction to hear and determine those matters, and the reality is that (in light of my decision) the remainder of the disputes between the parties will remain here for the time being, at least, in any event.

Conclusion

[100] With the limited exceptions I have noted at [95] – [97] above, the application to strike out the plaintiffs' claims fails, for the reasons I have given.

[101] It seems to me that the necessary concomitant to this conclusion is that the disputes still pending before Mr Gray should be stayed. Dual or parallel processes are plainly undesirable and should not be contemplated.

[102] Although the first defendant has had a small measure of success in relation to the fifth cause of action, the much more significant event from which costs should follow is, in my view, the plaintiffs' defence of the majority of the application to strike out. The plaintiffs are therefore entitled to their costs on a 2B basis. Memoranda may be submitted if agreement cannot be reached.

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Rebecca Ellis J