INTEGRATED TRAINING AND SERVICES SDN BHD v. KERAJAAN MALAYSIA & ORS

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
NALLINI PATHMANATHAN FCJ
ZALEHA YUSOF FCJ
[APPEAL NO: 01(f)-29-09-2020(W)]
28 MARCH 2022

Abstract – *Once parties have agreed to a mutually-appointed expert, they are bound by the expert's determination. Generally, the court will not intervene in a matter which is within the jurisdiction of the expert, save in narrow circumstances where vitiating factors, such as fraud, collusion or bias could be shown.*

CONTRACT: *Agreement – Breach – Parties entered into contract for flight training courses – Breach of contract gave rise to determination of damages – Contract contained expert determination clause – Parties agreed to mutually-appointed expert to determine expenses or damages as means of independent valuation – Whether parties bound by expert's determination – Whether court could depart from what has been agreed by parties – Whether there were vitiating factors to warrant intervention by court*

The appellant, a company operating a flight academy, conducted flight training and simulator and aircraft rental. The appellant and the first respondent entered into agreements which, *inter alia*, required the appellant to provide and carry out flight training courses for the respondents' trainees and the respondents were to send a certain number of trainees to attend the appellant's training courses. However, the respondents failed to send the required number of trainees as agreed, resulting in the appellant being forced to end the training courses early as it could not afford to bear the cost due to insufficient numbers. This prompted the appellant to commence a claim premised on breach of contract against the respondents at the High Court. The High Court held in favour of the appellant and allowed in part the appellant's claim for special damages. On appeal, the Court of Appeal, while in agreement with the High Court that the respondents were liable for breach of contract, set aside the amount of damages and remitted the matter to the High Court for assessment of damages before the Registrar, in accordance with cl. 27.4 of the contract ('2015 order'). Pursuant to the 2015 order, the parties agreed for a chartered accountant to be appointed as an independent auditor. A report was prepared by the chartered accountant and produced before the Deputy Registrar of the High Court, where damages were assessed in the sum of RM21,735,613.50. The Deputy Registrar accepted the report

and awarded damages to be paid to the appellant in that sum. Aggrieved, the respondents appealed to the judge in chambers and the appeal was allowed; the parties were directed to appoint a new auditor to assess the damages payable. Dissatisfied, the appellant appealed to the Court of Appeal, which affirmed the decision of the High Court and dismissed the appellant's appeal. Hence, the present appeal.

Held (allowing appeal)
Per Zaleha Yusof FCJ delivering the judgment of the court:

(1) The 2015 order was clear and straightforward; the case was ordered to be remitted to the High Court for assessment of damages before the Registrar of the High Court and the assessment had to be in line with cl. 27.4 of the contract entered into by the parties. Clause 27.4 required the parties to mutually appoint an independent auditor to determine the amount due and payable. Hence, when the 2015 order was read with cl. 27.4, it required the Registrar to assess the damages in accordance with the determination made by the independent auditor. Clause 27.4 was not uncommon and was known as the 'expert determination clause'. The expert determination clause in the parties' contract may specify the procedure to be followed but, where the contract does not specify the procedure, the procedure will be decided by the expert. (paras 18-21)

(2) The respondents' main grievance was that they were not given a chance to cross-examine the expert. However, evidence showed otherwise. The Senior Federal Counsel ('SFC') had the opportunity to question the expert during clarification and, in fact, at one of the meetings, the SFC said that she left it to the expert to determine the amount. If the respondents were serious about cross-examining the expert, they should have taken steps under O. 37 r. 4 of the Rules of Court 2012 to apply to the court to cross-examine the expert. This was not done. The respondents urged the court to make an order for the respondents to be allowed to cross-examine the expert. The 2018 order was for a new auditor to be appointed. The respondents did not file an appeal against this decision. The present appeal was filed by the appellant. How could the court then be urged to make such an order to cross-examine the expert. (para 27)

(3) There was no vitiating factor shown in this appeal. The respondents did not allege that the expert was not honest in preparing the report. Even if it was true that the expert had taken into consideration irrelevant documents in preparing his report, that was not a vitiating factor or a ground to unravel the agreement. The mere fact that the respondents were not happy with the methodology used by the expert could not be a reason to set aside the expert's determination. The respondents had also not adduced any evidence to show that the expert had transcended

A the limits of his engagement. Clause 27.4 did not provide the procedure to be followed by the expert. There were no terms of reference given to the expert. Hence, under the law, the expert was free to determine the procedure. (paras 28-30)

B **(4)** There were merits in the appeal. The 2018 order of the Court of Appeal and the High Court order were set aside. (para 33)

Bahasa Melayu *Headnotes*

Perayu, sebuah syarikat yang mengendalikan akademi penerbangan, menjalankan latihan dan simulasi penerbangan dan sewaan pesawat. Perayu C dan responden pertama memeterai perjanjian-perjanjian yang, antara lain, mengkehendaki agar perayu menyediakan dan melaksanakan kursus-kursus latihan penerbangan untuk pelatih-pelatih responden-responden dan responden-responden pula perlu menghantar sejumlah pelatih untuk menghadiri kursus-kursus latihan perayu. Walau bagaimanapun, responden-D responden gagal menghantar jumlah pelatih yang dikehendaki, seperti yang disetujui, mengakibatkan perayu terpaksa menamatkan kursus-kursus latihan tersebut awal kerana tidak mampu menanggung kos akibat kekurangan jumlah. Ini mendorong perayu memulakan satu tuntutan berasaskan pelanggaran kontrak terhadap responden-responden di Mahkamah Tinggi. E Mahkamah Tinggi memutuskan berpihak pada perayu dan membenarkan sebahagian tuntutan perayu-perayu untuk ganti rugi khas. Ekoran rayuan, Mahkamah Rayuan, walaupun bersetuju dengan Mahkamah Tinggi bahawa responden-responden bertanggungan atas pelanggaran kontrak, mengetepikan jumlah ganti rugi dan mengembalikan hal perkara tersebut ke Mahkamah Tinggi untuk taksiran ganti rugi oleh Pendaftar, selaras dengan F kl. 27.4 kontrak ('perintah 2015'). Berikutan perintah 2015, pihak-pihak bersetuju agar seorang akauntan berkanun dilantik sebagai juruaudit bebas. Satu laporan disediakan oleh akauntan berkanun tersebut, yang mentaksir ganti rugi sebagai berjumlah RM21,735,613.50, lalu dikemukakan pada Timbalan Pendaftar Mahkamah Tinggi. Timbalan Pendaftar menerima G laporan tersebut dan mengawardkan ganti rugi seperti jumlah yang dinyatakan perlu dibayar pada perayu. Terkilan, responden-responden merayu pada hakim dalam kamar dan rayuan ini dibenarkan; pihak-pihak diperintahkan melantik juruaudit baharu untuk mentaksir ganti rugi yang perlu dibayar. Tidak berpuas hati, perayu merayu ke Mahkamah Rayuan, H yang seterusnya mengesahkan keputusan Mahkamah Tinggi dan menolak rayuan perayu. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Zaleha Yusof HMP menyampaikan penghakiman mahkamah:

I **(1)** Perintah 2015 jelas dan mudah; kes tersebut diperintahkan agar dikembalikan ke Mahkamah Tinggi untuk taksiran ganti rugi oleh Pendaftar Mahkamah Tinggi dan taksiran tersebut haruslah selaras dengan kl. 27.4 kontrak yang dimeterai oleh pihak-pihak. Klausa 27.4

mensyaratkan agar pihak-pihak bersama-sama melantik seorang juruaudit bebas untuk menentukan jumlah yang terhutang dan perlu dibayar. Oleh itu, apabila dibaca bersekali dengan kl. 27.4, perintah 2015 mengkehendaki agar Pendaftar mentaksir ganti rugi selaras dengan penentuan oleh juruaudit bebas. Klausa 27.4 bukan luar biasa dan dikenali sebagai klausa penentuan oleh pakar. Klausa penentuan oleh pakar dalam kontrak pihak-pihak boleh menggariskan tatacara yang harus dipatuhi namun, jika kontrak tidak menyatakan tatacara tersebut, tatacara akan diputuskan oleh pakar.

(2) Kilanan utama responden-responden adalah bahawa mereka tidak diberi peluang menyoal balas pakar. Walau bagaimanapun, keterangan mendedahkan sebaliknya. Peguam Kanan Persekutuan ('PKP') berpeluang menyoal pakar ketika penjelasan bahkan, dalam salah satu mesyuarat, PKP menyebut bahawa dia menyerahkan pada pakar untuk menentukan jumlahnya. Sekiranya responden-responden serius tentang soal balas pakar, mereka sepatutnya mengambil langkah bawah A. 37 k. 4 Kaedah-kaedah Mahkamah 2012 untuk memohon pada mahkamah untuk menyoal balas saksi. Ini tidak mereka lakukan. Responden-responden kini menggesa mahkamah mengeluarkan perintah agar responden-responden dibenarkan menyoal balas pakar. Perintah 2018 adalah bersangkutan pelantikan juruaudit baharu. Responden-responden tidak memfailkan rayuan terhadap keputusan tersebut. Rayuan ini difailkan oleh perayu. Bagaimana mungkin mahkamah digesa mengeluarkan perintah sedemikian untuk menyoal balas saksi.

(3) Tiada faktor-faktor yang melemahkan yang ditunjukkan dalam rayuan ini. Responden-responden tidak mendakwa bahawa pakar tidak jujur dalam menyediakan laporan. Jika pun benar pakar telah mengambil kira dokumen-dokumen yang tidak relevan dalam menyediakan laporannya, ini bukan faktor yang melemahkan atau alasan untuk menguraikan perjanjian tersebut. Sekadar fakta bahawa responden-responden tidak suka dengan perkaedahan yang digunakan oleh pakar tidak boleh dijadikan alasan mengetepikan penentuan oleh pakar. Responden-responden juga tidak mengemukakan apa-apa keterangan demi menunjukkan bahawa pakar menjangkaui batas-batas pelantikannya. Klausa 27.4 tidak memperuntukkan tatacara yang harus dituruti oleh pakar. Tiada terma-terma rujukan yang diberi pada pakar. Oleh itu, bawah undang-undang, pakar bebas menentukan tatacara.

(4) Rayuan ini bermerit. Perintah 2018 oleh Mahkamah Rayuan dan perintah Mahkamah Tinggi diketepikan.

Case(s) referred to:

Barclays Bank plc v. Nylon Capital LLP (2011) EWCA Civ 826 ***(refd)***
Campbell v. Edwards (1976) 1 All ER 785 ***(refd)***
Catajaya Sdn Bhd v. Shoppoint Sdn Bhd & Ors [2021] 3 CLJ 159 FC ***(refd)***
CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor [2019] 2 CLJ 1 FC ***(refd)***

A *Folin & Brothers Sdn Bhd & Ors v. Folin Food Processing Sdn Bhd & Ors [2011] 8 CLJ 141 CA* ***(refd)***

Geowin Construction PTE Ltd (In Liquidation) v. Management Corporation Strata Title No. 1256 [2007] I SLR 1004 ***(refd)***

The Heart Research Institute Limited & Anor v. Psiron Limited (2002) NSWSC 646 ***(refd)***

Zen Courts Sdn Bhd v. Bukit Jalil Development Sdn Bhd & Ors [2017] 2 CLJ 32 FC ***(refd)***

B **Legislation referred to:**

Contracts Act 1950, s. 74

Rules of Court 2012, O. 37 r. 1

For the appellants - Malik Imtiaz, Afifi Ahmad & Wong Ming Yen; M/s Tuan Azrul Afifi & Azuan

C *For the respondents - Habibah Haron & Narian Hasanah Othman; SFCs*

[Editor's note: For the Court of Appeal judgment, please see Integrated Training And Services Sdn Bhd lwn. Kerajaan Malaysia & Yang Lain [2020] 6 CLJ 605 (overruled); For the High Court judgment, please see [2014] 1 LNS 1693 (overruled).]

D *Reported by Najib Tamby*

JUDGMENT

Zaleha Yusof FCJ:

E **Background Facts**

[1] This appeal arose from an assessment of damages proceeding, the decision of which entails a question as to whether a court may lawfully depart from what has been agreed by the parties in their contract to have a mutually appointed expert to determine expenses or damages as a mean of
F an independent valuation.

[2] The appellant is a company operating a flight academy which conducts flight training, flight simulator training and aircraft rental.

[3] At the request of the respondents, the appellant and the first
G respondent entered into two agreements which, *inter alia*, required the appellant to provide and carry out flight training courses for the respondents' trainees and the respondents were to send a certain number of trainees to attend the appellant's training courses by batches. The respondents failed to send the required number of trainees as agreed. As a result, the appellant was
H forced to end the training courses early as it could not afford to bear the cost due to the insufficient numbers.

[4] Subsequently, the appellant sued the respondents at the High Court for breach of contract. The High Court found for the appellant and allowed the appellant's claim for special damages in part. On appeal, the Court of
I Appeal, on 12 May 2015, found that the High Court was correct in finding the respondents liable for breach of contract. However, the Court of Appeal

set aside the amount of damages and remitted the matter to the High Court for assessment of damages before the Registrar in accordance with cl. 27.4 of the contract. The exact wordings of the relevant paragraph of the said order dated 12 May 2015 (2015 order), *inter alia*, are as follows:

> (c) Berkenaan item (1) dalam Penyataan Tuntutan Plaintiff; perintah mahkamah atas kuantum diketepikan dan digantikan dengan Perintah **bahawa kes diremit ke Mahkamah Tinggi untuk taksiran ganti rugi di hadapan Pendaftar Mahkamah Tinggi selaras dengan Klausa 27.4 Kontrak**; ... (emphasis added)

[5] Pursuant to the order, parties agreed for a chartered accountant Messrs Salihin to be appointed as an independent auditor. A report was prepared by Messrs Salihin and produced before the Deputy Registrar of the High Court wherein damages was assessed in the sum of RM21,735,613.50. The Deputy Registrar accepted the report and awarded damages to be paid to the appellant in that sum.

[6] Aggrieved, the respondents appealed to the judge in chambers, the learned Judicial Commissioner (JC), and the learned JC allowed their appeal and directed that the parties appoint a new auditor to assess the damages payable in accordance with cl. 27.4. The learned JC was of the view that the said cl. 27.4 did not state that the report of the expert must be accepted as final and conclusive. The learned JC opined that it was important for the expert to give a clear explanation in open court as the respondents did not agree with the report.

[7] Dissatisfied with the learned JC's decision, the appellant appealed to the Court of Appeal. The Court of Appeal, on 13 March 2018, affirmed the decision of the High Court and dismissed the appellant's appeal (2018 order). The Court of Appeal was of the view that s. 74 of the Contracts Act 1950 requires the expert to justify this report to ensure that it was fair and transparent.

[8] On 15 September 2002, this court granted the appellant's application for leave to appeal on the following questions of law:

> [8.1] Whether s. 74 Contracts Act 1950 applies to where parties to a contract have agreed to be bound by the determination of a mutually appointed expert as to the amount due and payable under a contract by reason of a breach or other specified event ("Question 1").
>
> [8.2] Whether in the absence of any vitiating factors recognised in law, a report of the said mutually appointed expert determining such amount would be sufficient basis in law and fact for an award of damages in proceedings for the assessment of such amount ("Question 2").
>
> [8.3] Whether such a report is only to be rejected where it is established that the report is unreliable within the meaning of the decision of the Privy Council in Lee Kee *Choong v. Empat Nombor Ekor (NS) Sdn. Bhd. & Ors* [1976] 1 LNS 55; [1976] 2 MLJ 93 (PC) ("Question 3").

The Appellant's Submission

[9] Dato Malik Imtiaz, learned counsel for the appellant, submitted that when parties to a contract have agreed to be bound by the assessment of a mutually appointed expert, they are not entitled to reject the conclusions arrived at by the expert save in very limited circumstances. In this appeal, the contracts entered into by the parties contained cl. 27.4, which is an expert determination clause wherein parties have agreed to appoint an independent auditor to determine the amount payable in the circumstances contemplated by the clause. Therefore, learned counsel for the appellant contended that the determination of the auditor is final and parties are bound by it; unless there are vitiating factors such as fraud, collusion and partiality or against public policy.

[10] There was, however, no evidence of any vitiating factors. Although the respondents during a case management said they wanted to cross-examine the expert, no such application was made to court under O. 37 r. 1 of the Rules of Court 2012. In fact, when the matter went for clarification before the Registrar on 16 July 2016, Senior Federal Counsel for the respondents was fully involved in the proceeding; and even said that she left it to Encik Salihin, the expert. At no time during clarification did the respondent raise fraud, bias, *etc.* They agreed that the question of expertise be left with the expert, but they were not happy with the methodology adopted by the expert.

[11] Learned counsel for the appellant averred that since cl. 27.4 does not specify the methods to be taken, it is up to the expert to decide. The expert had considered all relevant matters before arriving at the figure in accordance with the contract and in line with the Court of Appeal's order.

[12] Learned counsel for the appellant also brought to this court's attention an attempt by the respondent to include s. 74 of the Contracts Act 1950 in the draft order but was refused by the Registrar of the Court of Appeal. This act was an attempt to rewrite the order of the Court of Appeal which states "selaras dengan kl. 27.4 Kontrak".

[13] To support his oral argument before us, learned counsel for the appellant had referred to various authorities; *inter alia*, *Kendall On Expert Determination*, 5th edn, Sweet & Maxwell South Asian Edition, 2018; *Geowin Construction PTE Ltd (In Liquidation) v. Management Corporation Strata Title No. 1256* [2007] I SLR 1004; *Zen Courts Sdn Bhd v. Bukit Jalil Development Sdn Bhd & Ors* [2017] 2 CLJ 32 and *Folin & Brothers Sdn Bhd & Ors v. Folin Food Processing Sdn Bhd & Ors* [2011] 8 CLJ 141.

[14] In his submission, learned counsel for the appellant argued that question 1 be answered in the negative while questions 2 and 3 to be answered in the affirmative.

Respondents' Submission

[15] Puan Habibah, learned Senior Federal Counsel (SFC), in her submission, admitted that the respondents agreed with the auditor's appointment, but the respondents did not agree on how the amount was derived by the auditor. She averred that the respondent had informed the Registrar during a case management that they wished to cross-examine the auditor, but the Registrar proceeded with the clarification on the next date.

[16] She contended that the auditor's determination can still be challenged as the said cl. 27.4 does not state "final and conclusive". She further submitted that *Geowin* (*supra*) could be distinguished as in *Geowin* (*supra)* there was a finality clause.

[17] She further submitted that the auditor had failed to follow the principle of assessment and that the vitiating factor was present as the auditor had considered irrelevant document and this caused miscarriage of justice. She admitted there were no terms of reference (TOR) given to the auditor upon his appointment and that she had no authority or case law to support her argument. She repeated that the respondents just wanted to cross-examine the auditor and urged this court to make a new order to the effect.

Our Decision

[18] We were of the view that the 2015 order was clear and straightforward that the case was ordered to be remitted to the High Court for assessment of damages before the Registrar of the High Court and the assessment had to be in line with cl. 27.4 of the contracts entered into by the parties. To better understand its context, the said cl. 27.4 is reproduced below:

> 27.4 In the event that this Contract is terminated under any provision of cl. 27.3, the Government shall pay the Contractor upon demand **the amount of which to be determined by an independent auditor to be appointed mutually by both Parties in respect of all sums and expenses properly and necessarily incurred by the Contractor** in accenting it to obligation under this Contract up to and including the date of termination of this Contract.
>
> (emphasis added)

[19] Clause 27.4 requires the parties in this contract to mutually appoint an independent auditor to determine the amount due and payable to the contractor. Hence, when the 2015 order is read with cl. 27.4, it requires the Registrar to assess the damages in accordance with the determination made by the said independent auditor.

[20] Clause 27.4 is not uncommon. It is called "expert determination clause". The Supreme Court of New South Wales in *The Heart Research Institute Limited & Anor v. Psiron Limited* (2002) NSWSC 646 explained that expert determination is a process where an independent expert decides an

issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the expert. Expert determination provides an informal, speedy and effective way of resolving disputes particularly disputes which are of a specific technical character or specialised kind. So, the purpose of having such a clause in a contract is to assist parties in resolving disputes without delay and expenses of going to court or arbitration as by contract, the parties agree to be bound by the decision of the expert.

[21] The expert determination clause in the parties' contract may specify the procedure to be followed, but where the contract does not specify the procedure, the procedure will be decided by the expert. See *Kendell on Expert Determination* (*supra*).

[22] In *Campbell v. Edwards* (1976) 1 All ER 785 it was held, *inter alia*, where two parties had agreed that the price of the property was to be fixed by a valuer on whom they should agree and the valuer gave his valuation honestly and in good faith in a non-speaking report, *ie*, one that did not give reasons or calculations, the valuation could not be set aside by either party on the ground that the valuer had made a mistake, for, in the absence of fraud or collusion, the valuation was binding on the parties by contract. Lord Denning MR at p. 788 had stated the following:

> ... It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be different. Fraud or collusion unravels everything.

[23] In *Campbell v. Edwards (supra)* there was a challenge to a surveyor's decision on the surrender value of the lease. The surveyor was appointed by the parties under the lease pursuant to a letter which read: "It has been agreed between the parties to instruct yourselves to assess the proper price for the surrender in accordance with the provisions of the lease". The tenant subsequently discovered that the valuation by the surveyor should have been much lower. The English Court of Appeal dismissed the tenant's appeal and held that parties were bound by the honest valuation fixed by the agreed appointed valuer.

[24] The decision of *Campbell v. Edwards (supra*) was followed by Singapore High Court in *Geowin Construction (supra*). It was, *inter alia*, held that:

> If two persons agreed for a valuation to be made by an expert, even if that expert made a mistake, the parties were still bound by the decision of the expert so long as this was given honestly and in good faith. An expert's decision could be set aside on the basis of fraud or partially. Beyond that, it was probably correct to say that only a breach of an

expert's term of appointment would suggest to set aside his decision. Errors of fact or law would not vitiate an award of the expert acted within his contractual mandate.

[25] The decision of *Campbell v. Edwards (supra*) had also been referred to with approval by our Court of Appeal in *Folin*'s case *(supra*) and *Zen Courts Sdn Bhd (supra*).

[26] Coming back to the appeal before us, there was no denial on the part of the respondents that they had agreed to the appointment of the independent auditor to assess the amount due and payable to the appellant. This agreement to refer the matter for expert determination is a contract that can be enforced according to their terms. In any written agreement, there must be strict adherence to the agreed terms of the agreement by the parties. See the decision of this court in *Catajaya Sdn Bhd v. Shoppoint Sdn Bhd & Ors* [2021] 3 CLJ 159; [2020] 1 LNS 2037. Parties are free to enter into contract; hence, they are bound by it. This principle had been reiterated by this court in *CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor* [2019] 2 CLJ 1 as follows:

> [26] We agree with the defendant that parties are bound by the terms of the contract which they entered into and that it is the court's duty to give effect to the clear and plain meaning of the words in the said clause. That is quite trite.
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> **[27] The law recognises the principles of freedom of contract. Parties to a contract are free to determine for themselves what their obligations are**. As Sir George Jessel MR said in *Printing and Numerical Registering Company v. Sampson* (1875) LR 19 Eq 462 at 465:
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> > ... men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract".
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> (emphasis added)

[27] The respondents' main grievance was that they were not given a chance to cross-examine the expert. But the evidence showed otherwise. The SFC had the opportunity to question the expert during clarification and in fact at one of the meetings held on 11 April 2016 the SFC had said that she left it to the expert to determine the amount (serahkan kepada Encik Salihin untuk tentukan jumlah). If the respondents were serious about cross-examining the expert, they should have taken steps under O. 37 r. 4 of the Rules of Court 2012 to apply to the court to cross-examine the expert. This was not done. Now before us, the learned SFC urged this court to make an order for the respondents be allowed to cross-examine the expert. With due respect to learned SFC, the 2018 order was for a new auditor to be appointed.

A The respondent did not file an appeal against this decision. The appeal before us was by the appellant. So, how could this court be urged to make such an order to cross-examine the expert? When asked by this court, learned SFC again admitted that she had no authority or case law to support her argument.

B **[28]** The law is trite. Once parties have agreed to the mutually appointed expert, parties are bound by the expert's determination. The court will not generally intervene in a matter which is within the jurisdiction of the expert save in the narrow circumstances where vitiating factors such as fraud, collusion or partially/bias can be shown. See also the English Court of Appeal in *Barclays Bank plc v. Nylon Capital LLP* (2011) EWCA Civ 826. We C found there was no vitiating factor shown in this appeal. The respondents did not allege that the expert was not honest in preparing the report. Even if it was true that the expert had taken into consideration irrelevant documents in preparing his report, that is not a vitiating factor or a ground to unravel the agreement as shown by previous authorities such as *Campbell v. Edwards* D *(supra*).

[29] The mere fact that the respondents were not happy with the methodology used by the expert cannot be a reason to set aside the expert's determination. The respondents had also not adduced any evidence to show that the expert had transcended the limits of his engagement.

E **[30]** Clause 27.4 does not provide the procedures to be followed by the expert. There was also no TOR given to the expert. Hence, under the law, the expert is free to determine the procedures.

[31] Further, it was our opinion, even the appointment of a new auditor as F ordered in the 2018 order will not guarantee that the respondents will be happy with the methodology taken by the new auditor. There will not be an end to this.

Conclusion

G **[32]** Based on the above, we found merits in this appeal. However, we were of the view, it was not necessary for this court to answer the questions posed.

[33] We, therefore, allowed the appeal. The 2018 order of the Court of Appeal and the High Court order dated 16 June 2017 were set aside. We reinstated the award by the Registrar delivered on 2 September 2016 with H costs of RM60,000 here and below to the appellant subject to allocator.

I