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Expert Determination, Myth or Magic?

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Introduction

The more I learn, the more I realise how little I know.

Those who confidently proclaim to know the most usually know the least.

I admit to an element of confusion about expert determination. The more I look into it the more I see opportunity for misunderstanding and the need for increased knowledge of critical issues to enhance success. Expert determination is somewhat of a mystery and is highly misunderstood, probably because it can be applied in such diverse ways. Both lawyers and experts struggle with the concept.

I will not attempt to provide an update on the current law of expert determination. Not only is that a huge subject in itself, there are others more qualified to address that subject. My objective is to bring some more clarity to the process of expert determination and to challenge existing thinking. Expert determination has application in most sectors where disputes arise but this paper considers disputes in the building industry context because that is both my area of expertise and a dispute rich environment.

Why

New Zealand has a situation where disputes involving many billions of dollars are arising in a very short period of time. If we only look at the building industry, my own area of work, the Price Waterhouse Coopers report "Weathertightness - estimating the cost" commissioned by government quantifies building remediation costs at $11.3 Billion. This does not consider the background noise of normal commercial disputes. Without debating the strength of that estimate it should at least be regarded as a planning guide and warning. The resolution or determination of disputes about failed buildings will increase the demands on all dispute resolution processes, perhaps like never before experienced in New Zealand and that is only one sector in the economy.

Regrettably, we see all too often a circumstance where a lawyer stands victorious, glowing in the victory of their claim, but they are oblivious to the fact that they are the only winner. We see the cases where the parties are so drained by the legal process that the victor in the end has insufficient money and insufficient spirit remaining to fix the building to the requisite standard. They are so keen to end the entire dark chapter in their life that they will take any shortcut, any poorly considered process to repair their building, and then the building too is the loser, for it fails again. Indeed, repeat failure of remediated buildings is a serious problem and it does not arise merely because of the negligence of building industry practitioners, but also on occasions because of dispute resolution process that could not meet the needs of owners.

Litigation is the best process to determine some disputes but too expensive and time consuming to satisfactorily determine all of the building disputes that currently exist and that will arise in the next decade. I do not claim for a moment that expert determination is the solution, but it is another tool to have in the dispute resolution toolbox and it will be the best tool available for some disputes.

Definition

The problems all begin with definition. I have not yet seen a definition that brings sufficient clarity for my mind.

I have always thought of the word *determination* as meaning the full and final ending of a dispute that is binding upon the parties. Indeed, if the parties want a non-binding expert determination then it should be called an expert opinion, but I frequently see the terms *non-binding* and *determination* in the same sentence.

I like to adopt Sir Lawrence Street's distinction between determination and resolution. He says that only the parties to a dispute can resolve their differences. The best anyone else can achieve is to *determine* the dispute. Resolution may offer some hope of reconciliation and healing. Determination will usually bring little joy to either party. Determination in this context is to settle a dispute by authoritive decision of a person appointed by the parties.

On the occasions in which I have been approached to conduct an expert determination, the parties have wanted a full and final determination that is binding upon them. They wanted me to determine all of the matters in dispute between them. They wanted an end to the pain they were going through; they just wanted it to be over. They were seeking *determination* not *opinion*, although sometimes parties may be best served with opinion rather than determination, if they understand the relative merits.

It all starts out with good ideals. The client requests tend to follow a similar theme.

> *"The parties have been in dispute for over 18 months, legal costs are getting to be greater than the dispute is worth, but there is no resolution in sight. We want you to investigate the matter and tell us what the solution is. The parties agree to be bound by your findings."*

The parties are always looking for an efficient and cost effective way of resolving a dispute. This is reflected in the rules of expert determination published by the Institute of Arbitrators and Mediators Australia (IAMA). Rule 5.3 states;

> *The expert shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious cost effective and fair means of determining the dispute.*

The term "expert" should also not be taken for granted. While it may seem obvious that an expert is someone with a high level of knowledge in a particular subject I take the view that that is not sufficient in this context. Accountants, agricultural consultants, building surveyors and engineers of all types will have varying levels of skill in their own discipline but may have no knowledge of the laws of dispute resolution and specifically the law of expert determination. To expect an expert with no particular knowledge or experience in dispute resolution to effectively conduct an expert determination is unrealistic. They may even have difficulty providing a useful expert opinion if they are unable to write in a manner conducive to enforcement or resolution.

To achieve clarity on the terms of appointment, define the scope of matters in dispute, understand the limits of jurisdiction, understand the rules of evidence and to be current with the law of expert determination is no small matter. One cannot rely upon the parties' legal representatives to fill in some of those blanks as will be demonstrated later in this paper.

At this point it is important to distinguish between expert determination and arbitration. The IAMA rules specifically provide that:

2. *The parties agree that;*

   a. *The Expert is not an arbitrator of the matter in dispute and is deemed not to be acting in an arbitral capacity.*

   b. *The process is not an arbitration within the meaning of any statute.*

The distinction is affirmed in the various decided cases that are referenced later in this paper. This distinction requires considerable understanding and I will not elaborate on this except to say that arbitration is judicial in nature where conflicting evidence and submissions are weighed up and a decision is made largely on the basis of the information provided. The expert determination is more of a decision based largely on the investigation and knowledge of a selected individual.

I would define expert determination as follows:

> *"The ending of all or part of a dispute by an authoritative decision that is final and binding upon the parties provided by a person with specific knowledge in both the subject matter of the dispute and the law of dispute resolution. The process is not an arbitration and should be conducted under either proprietary rules or rules specifically prepared for and agreed by the parties"*

This must be contrasted with expert opinion that I would define as follows:

> *"A conclusive answer to a matter in dispute provided by a person with specific knowledge in the subject matter, that is not final or binding upon the parties, but that is persuasive in the further resolution process chosen."*

As I have studied the range of circumstances that can arise where people are seeking either expert determination or opinion I can see that it is often necessary to limit an expert determination to only address some of the issues in dispute. This effectively places a fence around a part of the dispute allowing the balance to be determined by another process. The key to the success of the whole process is to recognise the reasonable limits of expert determination and to assess when either opinion or determination is appropriate.

Adoption to date

There are some well established methods of expert determination or expert opinion in common use.

The Building Act 2004 provides for the Chief Executive to determine certain matters as defined by section 177. The Department of Building and Housing (DBH) website refers to determinations as "binding". A closer look identifies a more considered view of "binding".

- The Chief Executive may engage experts to assist with reaching a determination but must not obtain opinions that are not provided to the parties for comment.
- Section 182 provides that a person shall not commence proceedings in the District or High Court if the matter can be subject to determination.

- The Chief Executive must follow the rules of natural justice and must only determine matters that are within his jurisdiction. A determination may determine whether a building complies with the building code but may not determine whether a party was negligent in issuing a code compliance certificate.

Therefore whether a determination is binding will be influenced by whether:

(a) the determination only determines matters defined by section 177;

(b) the Chief Executive exceeded their jurisdiction;

(c) the procedures prescribed in the Act have been followed;

(d) the rules of natural justice have been observed.

There is no barrier to a party making appeal to the Courts but the Court would find a validly conducted determination highly persuasive and have few (if any) grounds to reach another finding. This is an effective model of expert determination. It is effectively binding but the process has very limited scope.

NZS 3910:2003 Conditions of Contract for Building and Civil Engineering Construction contain a provision at clause 13.2.3 for expert opinion.

> *13.2.3 The Engineer and the Contractor may with the consent of the Principal jointly submit the dispute or any question arising in connection with it to an agreed expert, with a request to make a recommendation to assist them to resolve the matter. The Principal and the Contract shall each pay one half of the cost of the agreed expert.*

Findings of the expert are neither final nor binding on the parties. This is expert opinion. The Engineer to the contract comes close to fulfilling the role of expert determination in the event of dispute. The role of the Engineer is defined under 6.2 .1

> *6.2.1 The dual role of the engineer in the administration of the contract is;*
>
> *a As expert adviser to and representative of the Principal, giving directions to the Contractor on behalf of the Principal and issuing payment certificates on behalf of the Principal at due times; and*
>
> *b Independently of either contracting party, fairly and impartially to make the decisions entrusted to him or her under the Contract Documents, to value the work and to issue certificates.*

In the event of a dispute the Engineer is required to give " a formal decision" under 13.2 .4. The last sentence of which states; *The engineer's formal decision shall, subject to 13.3 and 13.4 or any adjudication proceedings be final and binding.* Sections 13.3 and 13.4 are about submission of the dispute to mediation or arbitration and therefore the Engineer's decision is final but not permanently binding. The parties are bound to comply with the Engineer's

decision in the interim but the matter can be resolved or determined by another following process.

Therefore NZS3910 has elements of both expert opinion and expert determination but it is tightly contained within a framework providing clear guidance on scope and limitation.

I am sure that there are many similar examples of both expert opinion and something resembling expert determination tucked away in diverse industries or built into documents defining rules and conduct of organisations. This type of dispute resolution mechanism should be distinguished from circumstances where parties seek resolution to a dispute outside of the constraint of a governing document. In that regard expert determination seems to be alive and well in Australia and the United Kingdom but it is just not happening to any significant extent in New Zealand.

There was a flurry of writing about expert determination for the joint AMINZ/IAMA conference of 2000 in Auckland but as far as I can tell there has been very little attention paid since that time. This apparent lack of attention could be attributed to the introduction of other new tools in recent years including adjudication under the Construction Contracts Act (CCA) and mediation and adjudication under the Weathertight Homes Resolution Services Act 2006.

CCA adjudication could be regarded by many as the same as expert determination and is without doubt filling a need but should not be regarded as a complete substitute for expert determination for many reasons. For example, the disputes that are discussed below would not have fallen within the jurisdiction of the CCA.

I will begin by considering two scenarios, each at extremes of the expert determination spectrum, then I will move on to considering whether there is a place for a more defined expert determination process within the current dispute environment.

Scenario 1

A dispute arose between a home owner and a builder over a house renovation. Part of the works were defective and agreement could not be reached regarding who was responsible. I was contacted with a request to conduct an expert determination. Having only received the initial enquiry I did not know enough about the dispute to be able to make an assessment of the best process to apply. I did not have available an established set of rules for expert determination and was not about to take the time or risk of hastily writing my own rules. I was comfortable working under the Arbitration Act 1996 and preferred to conduct a fast track arbitration. In any event, I thought, there is a fine line between a fast track arbitration and an expert determination and the parties were not bothered what the process was called so long as they got finality. The parties signed an appointment of arbitrator and submission to arbitration.

- I conducted a preliminary meeting with the parties present to agree the process. I used a pro forma schedule for fast track arbitration to check off all of the optional provisions of the Arbitration Act.
- I was provided with applicable contract documents and brief letters of submission from each party.
- The parties did not want a hearing and no evidence was provided.

- I conducted an investigation and wrote a report about my findings. I then wrote an arbitral award and included the report as part of the award.

Was this an arbitration, or was it an expert determination? Although this was dressed up as an arbitration and conducted by agreement under the Arbitration Act 1996 the conduct was really expert determination in nature. The dispute was suited to expert determination for several reasons

- There was only one issue in dispute.
- The matter in dispute was capable of resolution by one expert. There were no legal issues.
- The quantum dispute was less than $100,000.
- The parties wanted a fast and cost-effective solution. Neither of the parties wanted to engage legal advisers or experts.
- The parties sought to appoint a person to conduct their own investigation and reach their own conclusions based on their own expert knowledge.

Factors that would tip this in favour of being an arbitration would be if the process was is in the nature of a judicial enquiry, where parties give evidence and make submissions and the arbitrator decides between two opposing views. An arbitrator may use their own knowledge to understand the subject matter and draw relevant facts from the evidence presented but would not be expected to fully conduct their own investigation.

There was no harm in conducting this as an arbitration. The parties were happy, the process was quick and the outcome was final, binding and enforceable. The determination cost less than 5% of the value of dispute. However we should have a prescribed expert determination process readily available to cater for parties making this type of request and to help experts to get it right. This is the potential magic of expert determination, fast, technically accurate, final, binding, enforceable and low cost.

However the myth lies eerily beneath the surface. What if the expert provides the wrong technical solution and the problem only resurfaces at a later date or the solution gets the claimant into some kind of unanticipated regulatory trouble? Potentially the claimant could find themselves in a position that is worse than the original problem because this time they have may have less recourse for remedy. I will park that issue for now and revisit it later.

Here the parties had a simple and understandable request but the opportunity for the process to go off the rails is high. Established rules to guide both parties and experts would improve opportunities for success.

This must be contrasted with scenario 2 as follows:

Scenario 2

A dispute arose between an owner and builder regarding the construction of a relatively complex dwelling that was to be used as an accommodation facility. High Court proceedings were issued. After two years a settlement conference was held and this was unsuccessful.

Both parties had experts appointed and the defects in dispute were defined. However there was a range of defects providing quite a complex matrix of issues.

Proceedings were initially issued in the District Court and then elevated to the High Court. The parties contemplated suspending High Court proceedings in favour of a process of expert determination. The parties had been concerned about high legal costs that had been incurred in relation to the value of the dispute.

I was approached by the lawyer for one of the parties who provided a four page brief. In summary the tasks that they sought from the expert included the following:

- Assess the building defects identified by the parties.
- Assess the necessary remedial works to remedy same.
- Assess and apportion liability between the parties and/or their agents in respect of the building defects, the necessary remedial works, and responsibility for the payment in respect of remedial works.
- Monitor the remediation process.
- Certify the remedial work carried out.
- Mediate and/or adjudicate in respect of any dispute arising in respect of the above.

This began to look like a minefield; there were notions of expert determination and arbitration. I began dissecting the instruction.

"Assess the building defects…".

This is the work of an expert except the parties wanted the expert to be limited to only the defects identified by the experts already engaged by each party. By seeking to limit the scope of the expert brings the task back into a judicial function. To decide between two existing experts is judicial in nature. By seeking to limit the scope of the expert in this manner they were seeking an arbitration not expert determination.

"Assess the necessary remedial works…".

This would be the work of an expert if the parties were not seeking to limit the scope of the expert to the findings of existing experts.

"Assess and apportion liability between the parties and/or their agents … and responsibility for the payment in respect of remedial works".

This involves skills outside the field of expertise of an expert. This is a function of an arbitrator.

"Monitor the remediation process".

This is potentially the work of an expert however this is an area of great risk. There needs to be definition about who is responsible for the correct execution of the contract and what are the various responsibilities of the parties.

If the expert is being limited to the scope agreed by other experts then they are not acting in the capacity of expert. They may be thrust into the position of Engineer to the contract but that is an expert role in terms of the contract, not the dispute resolution process. Increasingly we see blending of roles and responsibilities. It is not appropriate to run a building contract as an adjunct to a legal process just as a legal process cannot be run as an adjunct to a

building process. Monitoring of building works is a complex process that cannot be successfully conducted on this basis.

Certify the remedial work carried out.

Ouch! Define certify! This opens up great scope for confusion between the role of expert and arbitrator.

Mediate and/or adjudicate in respect of any dispute arising in respect of the above.

Putting aside the difference between mediation and arbitration this is clearly a dispute resolution function rather than an expert function.

This is a common type of request for an expert determination but it cannot be fulfilled as requested. The parties were seeking an unworkable combination of expert and arbitrator. The legal advisers to the parties did not have a working knowledge of the law of expert determination and could not agree on the scope of the appointment. If this was not very carefully set up and executed then this was destined to be an expensive additional step in another judicial process and fail to serve the original purpose sought by owners.

Interestingly the legal advisers were not willing to work through their conflicting requests. They were not about to have their proposed process questioned by someone who was not a lawyer! They were impatient to end the dispute but their impatience threatened to prolong it.

The Challenges

One of the particular difficulties with expert determination is the very large number of differing circumstances that can exist that will have a significant influence on both the process and the outcome. The following table lists some of the variations;

Unrepresented parties	Represented parties
No experts	Existing expert reports
Single issue	Multiple issues
Less than $200,000	More than $200,000
Technical issues within a single discipline	Technical issues spanning several disciplines
No legal issues	Technical and legal issues
Unsophisticated parties	Parties highly skilled in commercial and legal issues
Parties seek final and binding	Parties seek binding but not final
Choose expert in technical issues only	Choose expert in technical issues plus qualifications and experience in dispute resolution
Part of a dispute	All of a dispute
Home owner vs supplier / contractor	Corporate vs corporate

From a public policy point of view there must be merit in having cost effective dispute resolution methods available to solve homeowner disputes as much as corporate disputes. It is difficult for one set of generic rules to cater for such diversity of circumstances.

Liability

In arbitration the potential for negligence of the arbitrator exists but is more limited than in the case of expert determination which by definition is highly fertile ground for errors, omissions or inappropriate conduct. All expert determination rules assert that the expert shall not be liable to the parties for acts or omissions (possibly except fraud). Therefore if in the case of an expert determination the decision causes the parties a later problem then the parties may find that they have no viable recourse to seek recovery for their secondary problem. This is a particular problem in the building industry where secondary failure is common.

Further disputes can partly be mitigated by the skill of the expert. Expressing determinations in general rather than detailed terms is important. Avoiding a process of monitoring the outcome or certifying correct completion may be essential. Alternatively if the appointment is for the purpose of certification, defining the limits of jurisdiction will be essential. Establishing the appointment correctly is vital so that parties get what they need as that is often different to what they ask for when making the first request for service.

Establishment

If the agreed rules of appointment are poorly considered the process is headed for the rocks from the beginning. However drafting functional dispute resolution clauses or agreeing the rules of engagement either require an expert with high legal knowledge or a lawyer thoroughly conversant with the law of expert determination.

Opinion or determination

Parties are often attracted to the concept of a final and binding expert determination because of the imagined cost and time savings. Almost all of the difficult issues with expert determination can be resolved by the parties seeking an expert opinion only. To accept expert opinion they need to be able to balance the potential risk and reward of opinion verses determination. Parties are often not that well-informed.

Challenge

Expert determination gone wrong only adds another layer of cost and delay in the determination of a dispute. When an expert determination is appealed to the courts then there is the possibility that the rich tapestry of law will be enhanced. However that will probably deliver the opposite of what the parties sought in the beginning. They probably sought a fast and cost effective outcome not the delay and cost of a challenge.

Experts and the Courts

In the course of writing this paper several people have asked whether experts should be appointed to sit with judges to assist with the resolution of technically complex disputes. The District and High Court rules already make provision for the appointment of experts to assist the Court and so the real issue as far as I can see is more a matter of why this does not happen more frequently. It might be helpful for AMINZ to facilitate a survey of the judiciary to determine their views on the subject because ultimately it is the judge's opinion of the value of expert assistance that counts. However I would speculate that the main reasons that court-appointed experts are relatively rare probably rests on the following factors;

- In New Zealand we have a relatively shallow pool of experts on any subject. Finding an appropriate expert who is available and not conflicted may be difficult.
- The world is changing and becoming more complex and specialised. New fields of specialised expertise are developing all of the time. Finding and then matching the appropriate expertise to the subject matter of a dispute is becoming increasingly difficult. If a specialist expert is chosen to help assess the evidence of generalist experts then this would be more useful than having a generalist appointed to help assess the evidence of specialists.
- For the Court to make an appropriate selection would require the input of parties and seeking consensus of parties who are in dispute because they could not reach consensus is problematic.
- It is not sufficient simply to be an expert in a specialist field. To be able to assist the Court effectively would require the expert to have a high level of dispute resolution understanding and this further reduces the pool of appropriately qualified experts.

Does decided law help?

From reference to Green and Hunt, Kennedy-Grant, Dean and some of my own reading, I have compiled the following broad summary of the current law of expert determination.

Pickens v Templeton [1994] NZLR 718

This is somewhat surpassed by the introduction of the Arbitration Act 1996 but considered the issue of immunity and the function of arbitrator verses valuer. Immunity is closely related to the nature of the functions performed, whether they are judicial in nature or applying expertise in a particular field.

Forestry Corp of NZ Ltd (in rec) v A-G [2003] 3 NZLR 328
Methanex Motunui Ltd v Spellman [2004] 1 NZLR 95 Fisher J.
Greymouth Petroleum Acquisition Co Ltd v Petroleum Resources Ltd 22/12/03, Heath J, HC Auckland CIV-2003-404-6984

Consider the factors that influence whether a process is an expert determination or an arbitration.

A process that is in the nature of a judicial enquiry, where parties give evidence and make submissions, would be regarded as an arbitration. References to the 1996 Act or use of the word arbitration tend to favour the establishment of an arbitration.

A process of investigation where parties have not specifically sought an arbitration is more likely to be regarded as an expert determination.

A reference to appoint an expert to resolve a dispute is not an agreement to arbitrate.

Methanex Motunui Ltd v Spellman [2004] 1 NZLR 454 (CA)

Parties can agree to modify observance of natural justice but cannot contract out completely.

Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (1998) 14 BCL 277 (WASC)

The agreed procedure was found to be void and unenforceable because the referee was acting as an expert in a process that was essentially judicial in nature. If a referee is required to act as an expert rather than an arbitrator then it is not possible to satisfactorily address matters of both fact and law. The procedure was found to amount to an ouster of the jurisdiction of the court.

Minster Trust Ltd v Traps Tractors Ltd [1954] 1 WLR 963, at p973
Mayor, Councillors & Burgesses of the Borough of Stratford v J H Ashman (Np) Ltd [1960] NZLR 503 (CA);
W Williamson Construction Co Ltd v A-G 7/6/89, Fisher J, HC Auckland CP153/88;

Tests have evolved to determine whether a process is certification or arbitration.

Con Dev Construction Ltd v Financial Shelves No 49 Ltd 22/12/97, Master Venning, HC Christchurch CP179/97.

Appointment of and the subsequent decision of an Engineer to the contract under NZS3910:1987 is prerequisite to holding an arbitration.

Sutcliffe v Thackrah [1974] AC 727 (HL)

An architect issuing a certificate is not acting as an arbitrator and is not protected by judicial or arbitral immunity.

Glaister v Amalgamated Dairies Ltd [2003] 1 NZLR, Heath J.
Fermentation Industries (Aust) Pty Ltd v Burns Philip & Co Ltd
Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Ltd (1993) 32 NSWLR 583

Courts are reluctant to interfere with expert findings on specialist subjects but will intervene if the expert has not acted in accordance with the terms of appointment.

Fletcher Construction (Australia) Ltd v MTN Group Pty Ltd

Considered whether the agreement amounted to an ouster of the jurisdiction of the court.

This summary is not as complete or comprehensive as it could be but should at least be useful to those contemplating conducting expert determination.

The above listed cases that involved an expert determination could be regarded as a failure of the process. The parties started out seeking a fast and cost-effective method of solving their dispute and ended up with additional litigation cost and further delay. The parties got the opposite of what they were seeking. Availability of rules and guidance to both lawyers and experts would enhance the prospect of success.

Finding the magic

There is magic available in expert determination but it can be elusive. For expert determination to gain traction as a more mainstream dispute resolution method there needs to be more practitioners and more successful outcomes that will attract people to the process. I suggest that the following steps will be necessary.

1. A set of rules for expert determination should be written and promoted by AMINZ.

2. There should be several variations of the rules that cater for the diversity of disputes.

3. A comprehensive guidance document to discuss process selection, limitations and inform of complexities.

4. A seminar series to demystify the process and explain how and why expert determination can be used.

5. Establishment of a panel of experts who can be held out as having sufficient dispute resolution knowledge to conduct either expert opinion or expert determinations in a reliable manner. The concept of this panel is not intended to evaluate their specialist expertise but only the understanding of the law of expert determination and dispute resolution.

Conclusion

Expert opinion is ubiquitous and it is hard to get into any trouble with the process properly conducted.

Expert determination, in it's pure form is rare and must be executed with skill and understanding of current law if the parties are to receive an expeditious, cost effective, and final outcome.

The model of expert determination promulgated by the Building Act seems to have been quite successful but it is authorised by legislation, controlled by specific rules and has strictly limited scope.

The risk of obtaining the opposite of what is sought is high and will remain high until the process has developed and matured in New Zealand.

As the situation currently exists in New Zealand expert determination is largely a myth but there is magic to be found if the hazards are avoided.

A set of officially accepted rules combined with a program of education and promotion will be necessary for expert determination to come in to more widespread use.

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