# Final and binding expert determination and the discretion to stay proceedings

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*The growing use of expert determination to resolve questions of contractual rights, obligations and grievances highlights the finality of the expert's decision and on what grounds it may be attacked or enforced. Practitioners must be aware of the limited review of an expert's decision available to a disgruntled party. As with arbitration, de facto enforcement of the agreement to abide by expert determination and the determination itself can be obtained by a stay of court proceedings. These issues were examined in the recent NSW Supreme Court decision in* Ipoh v TPS Property No 2 *[2004] NSWSC 289. By examining apparently conflicting authorities in the area, principles on which the exercise of the court's discretion should be based are identified.*

The recent New South Wales Supreme Court decision in *Ipoh v TPS Property No 2* [2004] NSWSC 289 concerned an application seeking to stay or strike out the statement of claim on the basis that the subject matter of the claims had been the subject of binding expert determination. It highlights the importance of understanding the method of dispute resolution employed in an agreement at the time the agreement was executed by the parties. It confirms that the usual phrase in an expert determination clause – that the decision of the expert be "final and binding" on the parties – means exactly that.

The decision also examines the power of the court to stay court proceedings to provide for de facto enforcement of an expert determination clause or a decision resulting from that process having been conducted. The judgment confirms that once an expert decision has been made, the only grounds on which court proceedings may thereafter be commenced for judicial review of that decision are on the limited grounds of error or mistake of law.

## FACTS IN IPOH v TPS

*Ipoh v TPS* entered into an initial development agreement that provided (at [14]):

> A party may not begin legal proceedings in connection with a dispute under this Agreement (excluding urgent applications for interlocutory injunctions) unless that dispute has first been decided by a person appointed under this clause …
>
> (h) The determination of the expert:

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(i) Must be in writing;

(ii) Will be final and binding.

A contractual claim for defective work had been submitted to the expert. The expert had delivered a decision rejecting that claim. Ipoh, the complainant, then commenced proceedings in the Supreme Court in respect of that same contractual claim in reliance on the same facts and, further, an action for negligence based on the same facts.

## FINAL AND BINDING: IT MEANS WHAT IT SAYS

The court adopted the authority stated in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 as confirmed in *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSWSC 405 that a determination must be made in accordance with the contract and may be set aside if it is not. The decision may also be set aside if it is vitiated by factors such as mistake, misrepresentation, incapacity, fraud or collusion.

The court noted that the two significant aspects of the expert determination clause in the development agreement were:

(a) a prohibition against the institution of legal proceedings in connection with the dispute; and

(b) a provision that the outcome of the expert determination "will be final and binding".

Ipoh submitted that the expert determination clause contained an implied permission to commence proceedings once the process of the expert determination, in accordance with the steps set out in that clause, had been concluded. However, if the words "final and binding" were read at face value, then no such implicit commission could be construed to be in that clause. The court rejected this submission (at [54]):

> There is a fundamental inconsistency between the proposition that an expert determination of a dispute between the parties is final and binding on those parties, and the proposition that such an expert determination is final and binding only if the parties accept it (or if neither of them wishes to challenge it). The submission for Ipoh not only requires that words be read into clause 21.2; it subverts, in a fundamental way, the clear meaning of the existing words.

The court held that while there was an express prohibition on the institution of legal proceedings in connection with the dispute referred to expert determination, the silence in the clause as to whether proceedings could be commenced after that determination had concluded did not mean that the parties were thereby free to commence legal proceedings on the conclusion of the expert determination. In doing so it was held that the presence of the words "final and binding" meant precisely the opposite. The court further stated:[1]

> It would be an extraordinary outcome if a party, having frustrated the operation of clause 21.1 (so that the "first stage" barred commencement of proceedings by that party), became thereafter able to commence proceedings, notwithstanding its default, because the other party, in order to obtain a resolution of the dispute, had taken the only course available to it, namely referring the dispute to expert

[1] *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* at [61].

> determination. In most circumstances ... the party in breach would obtain a benefit from the breach – namely the right to commence litigation – that was otherwise denied to it. If, however, the words "final and binding" mean what they say then this could not arise.

The court then concluded (at [63]):

> Where there has been an expert determination under clause 2.1.2, and where that expert determination is not assailed on the ground that it does not accord with the contract, or on grounds of fraud, collusion, misrepresentation etc, then that expert determination is, as the clause says, final and binding. I conclude further that it is only proceedings to enforce that determination, or be set aside on grounds of the kind that I have mentioned, that may thereafter be commenced.

Ipoh does not appear to have argued that the phrase "final and binding" ousted the jurisdiction of the court, no doubt in view of the clear observations in *Fletcher Construction Australia Ltd v MPN Group Pty Ltd* (unreported, NSW Sup Ct, Rolfe J, 14 July 1997) that the effect of this wording is to make the decision of the expert final and binding, provided the matters referred to the expert are ones which the agreement contemplates. The expert's decision is, however, susceptible of an attack in a court if there is a failure to comply with the contract or there is some vitiating factor relevant to the decision.[2]

The decision has two consequences on this point. First, it confirms the court's intention to enforce expert determination clauses by preventing a disgruntled party from re-litigating its case when an expert has made a valid determination. Second, it reminds those advising businesspeople of the limited scope for review of an expert's decision as opposed to an arbitrator's award. This is a double-edged sword and clients must be made aware of this when different dispute resolution clauses are being considered.

## STAY OF COURT PROCEEDINGS COMMENCED IN BREACH OF THE EXPERT CLAUSE

### Basis of court's jurisdiction

The court's power to order a stay of proceedings is derived from its inherent jurisdiction to prevent abuse of its process.[3] For a party to proceed with litigation in the face of an enforceable agreement, to follow a dispute resolution procedure may be an instance of abuse of process in accordance with the principle stated in *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114 at 126 per MacKinnon LJ, with reference to an exclusive jurisdiction clause:

> the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined.[4]

[2] Cf observations in *Baulderstone Hornibrook Engineering v Kayah Holdings* (1998) 14 BCL 277.
[3] *New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503; [2002] NSWSC 178 at [30].
[4] Cited with approval in *Hooper Bailie Associated v Natcom Group* (1992) 28 NSWLR 194 and *NSW v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503; [2002] NSWSC 178.

## Conflicting authority as to jurisdiction of the courts

There is conflict between older and modern authority in Australia as to whether the court's inherent jurisdiction can be exercised to stay proceedings brought in breach of an arbitration agreement. Previously the courts considered that there was no jurisdiction to order a stay, apart from the conference of such jurisdiction by statute. In *Anderson v G H Michell & Sons Ltd* (1941) 65 CLR 543 (at 548), a unanimous High Court held that, apart from statute, Australian courts can enforce an agreement to refer disputes to arbitration only by an action for damages against the party who refused to carry it out.[5]

## The position today

The first step away from this line of authority was the rejection in *Racecourse Betting Control Board v Secretary of Air* of the notion that the power to stay proceedings brought in breach of an arbitration clause derived solely from the arbitration statutes.[6] This issue is now resolved, following the Supreme Court decisions in *Badgin Nominees v Oneida* [1998] VSC 188, *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [43][7] and *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587. The court has the inherent jurisdiction to stay proceedings brought before it in breach of an agreed contractual process that expert determination would be used to resolve disputes,[8] provided the procedures are sufficiently detailed to be meaningfully enforced.[9]

## Starting point: No ouster of jurisdiction

Pending or commenced proceedings do not oust the jurisdiction of an inferior tribunal,[10] including an expert pursuant to a referral clause.

The expert determination clause and the court proceedings must generally concern the same issues and the same parties.[11] It is axiomatic that the disputes,

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[5] See also Angyal R, "Enforceability of alternative dispute resolution clauses" (1991) ADRJ 32; *Murphy v Benson* (1943) 42 SR (NSW) 66; *Adelaide Steamship Industries Pty Ltd v The Commonwealth of Australia* (1974) 8 SASR 425 at 439. Angyal notes that this is the reason that statutes such as the *Commercial Arbitration Act 1984* (NSW) expressly empower the court to grant a stay of proceedings where there is an agreement to arbitrate (ss 53(1) and 55(1)) and expressly abrogate the right to sue for damages for breach of an arbitration clause (s 53(3)).

[6] Referred to by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.

[7] Where the court stated that this position was clear after the judgment in *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188.

[8] *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587 at [41]; *New South Wales v Banabelle Electrical Pty Limited* (2002) 54 NSWLR 503 at [29] to [31]; *Badgin Nominees Pty Ltd v Oneida Ltd* at [36] to [44] per Gillard J, citing *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334; *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134 at [14].

[9] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; [1999] NSWSC 996 at [44]; *Computershare Ltd v Perpetual Registrars Ltd* (2000) 1 VR 626.

[10] *Boyd v Halstead; Ex parte Halstead* [1985] 2 Qd R 249 at 253; *Concrete Developments Pty Ltd v Queensland Housing Commission* [1961] Qd R 356.

[11] See, eg *Sterling Pharmaceuticals Pty Ltd v The Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287.

which are the subject of the proceedings sought to be stayed, must be within the scope of the contractual provision[12] and the process sufficiently certain.[13]

## Exercise of the court's discretion

A court order for stay of proceedings, having the effect of indirectly enforcing of a dispute resolution clause, should not be made unless it can be done in accordance with fairness.[14] The party contesting the stay application bears the practical burden of persuading the court that it should not be held to an apparent agreement to settle its dispute with the other contracting party by the agreed dispute resolution process. The court will have regard to the terms of the agreement (both the expert determination clause and the agreement as a whole), the subject matter of the agreement, the nature of the dispute and issues relevant to the resolution of that dispute.[15]

## Primary principle

*Huddart Parker Limited v The Ship Mill Hill* (1950) 81 CLR 502 at 508-509 explains the principles which should guide a court in an application to stay a court proceeding due to an arbitration agreement.

> But the courts begin with the fact that there is a special contract between the parties to refer, and therefore ... consider the circumstances of a case with a strong bias in favour of maintaining the special bargain.

This principle has been held to apply equally to an application for a stay where the parties have agreed to other dispute resolution procedures including expert determination.[16]

There are conflicting decisions concerning the manner in which that discretion has been exercised, which appear to have resulted in two lines of authority. The first provides for greater weight to be given to the perceived inappropriateness of the expert determination process to properly resolve the

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[12] *Morrow v chinadotcom* [2001] NSWSC 209 per Young J; *Fletcher Constructions Australia Ltd v MPN Group Pty Ltd* (unreported, NSW Sup Ct, Rolfe J, 14 July 1997). Where the dispute does not, or, alternatively, does not *as to its entirety* fall within the scope of the expert determination clause, a stay has been refused on lack of jurisdiction on the part of the expert: *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134 at [37].

[13] *Hooper Bailie Associated Limited v Natcon Group Pty Ltd* (1992) 28 NSWLR 194.

[14] See *AWA Ltd v Daniels* (unreported, NSW Sup Ct, 24 February 1992) at [5]; cited with approval by Einstein J in *Aiton Australia Pty Ltd v Transfield* (1999) 153 FLR 236; [1999] NSWSC 996 at [166]. The applicant must demonstrate that he or she is ready and willing to do everything necessary for the proper conduct of the expert determination: *Adelaide Steamship Industries Pty Ltd v Commonwealth* (1974) 8 SASR 425. The applicant must satisfy the court not only that he or she is, but also that he or she was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the expert determination. The applicant must file an affidavit to this effect in support of the application for a stay, and unless the court is satisfied on the point the application to stay must be dismissed: *West Constructions Pty Ltd v Brucek* (1969) 14 FLR 337 at 342, cited with approval in *Adelaide Steamship Industries Pty Ltd v Commonwealth*.

[15] *Bradken Resources Pty Ltd v ANI Corporation Pty Ltd* [2002] NSWSC 463.

[16] *Badgin Nominees v Oneida* [1998] VSC 188 at [33] to [44]; *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 at 715; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; [1999] NSWSC 996 at [167] ; *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587 at [42]; *Morrow v chinadotcom* [2001] NSWSC 209 ; *Karenlee Nominees v Gollin & Co* (1983) 1 VR 657 at 669; *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134.

dispute. The second affords greater weight to the parties' agreement in the exercise of the discretion. As yet, there is no decision at Court of Appeal level in Australia concerning the approach by the court in respect of an application for a stay in such circumstances.

However in *Ipoh v TPS Property*, the court accepted as correct the submission that while the court starts with a presumption that the parties should be held to their contract (and without limiting the generality of the court's discretion), a stay of proceedings may be refused:

(a) where the dispute involves the determination of complex legal issues; or

(b) where the stay might result in multiplicity of proceedings.

It is respectfully submitted that the review of the following authorities shows that:

1. The first of these professed grounds for refusing a stay is not based on sound principle and is inconsistent with other Supreme Court decisions at the same level.
2. The second ground stated is correct and consistent with relevant authority at the same level.

## Inappropriateness of expert determination to the dispute

In *Baulderstone Hornibrook Engineering v Kayah Holdings* (unreported, WA Sup Ct, Heenan J, 2 December 1997); a stay was sought of proceedings commenced in breach of a clause requiring all disputes arising out of the contract to be determined by an accounting expert. The disputes that arose were legally and factually complex. The amount of claims was also substantial. The court refused to order the stay, stating:

> Satisfactory determination of those matters by a referee who is required to act as an expert and not as an arbitrator is impossible; by its very nature the task is one for an arbitrator and not an expert.

The court held that the relevant clause was against public policy on two grounds:

(a) that it purported to oust the jurisdiction of the courts;[17]

(b) that it "prescribed a procedure which is entirely unsuitable to the resolution of disputes which may arise out of the contract" and was therefore void.

There appears to be some agreement by journal authors that the court was correct in labelling the procedure unsuitable to the facts of the case.[18] However, it is submitted that a clause which requires a dispute to be referred to what may be considered an unsuitable tribunal is not, of itself, sufficient to make the clause

[17] This ground is directly inconsistent with decisions of the Supreme Courts of Victoria and New South Wales in *Badgin Nominees v Oneida* and *Fletcher Constructions v MPN Group*, discussed further below.

[18] See Hunt, "The law relating to expert determination" (February 2002) 18 BCL 2.

 

contrary to public policy.[19] It is however, if clearly made out, a good ground for refusing to stay proceedings where the expert determination process or the person appointed as expert may clearly be unable to properly and finally determine the issues in dispute between the parties.

Whether the expert determination process would finally resolve the disputes between the parties was the primary consideration identified in *Bradken Resources Pty Ltd v ANI Corporation Pty Ltd* [2002] NSWSC 463, as a result of which the court determined that the proceedings should not be stayed. The court observed that its discretion should be exercised having regard to:

(a) the agreement of the parties;

(b) the nature of the dispute;

(c) the issues relevant to the resolution of that dispute.

The nominated expert was an accountant. Allegations of fraud, thereby causing the credibility of witnesses to be a central issue, were made. In determining these allegations, the expert would have had to first construe the relevant parts of the contract and the effect of documents purportedly issued pursuant to the contract. The court stated:

> Although the parties contracted on the basis that disputes in relation to invoices would be adjudicated upon by an expert where, as in the present case, the transaction is challenged as a sham and questions may arise as to the integrity of the action of officers of one party and of officers of a third party, in my opinion, the difficulties should be resolved in the Court.
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> Although the parties agreed that the relevant differences could be settled by an expert referee, and may possibly have contemplated that the integrity of officers of ANI may be in issue, I doubt whether it was contemplated that the expert would be asked to examine the integrity of the acts of third parties. In determining that the court process is the appropriate mechanism for resolution of the dispute, *I am conscious of the fact that it is most likely that the efforts of the expert would not lead to any final disposition of the matter*.
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> (Emphasis added.)

Underlying this observation is the view that the issues for determination were beyond the expert's capabilities, notwithstanding the "special contract" between the parties. This ground is prone to inconsistent application, being dependent on the court's perception of the process agreed to by the parties.[20] Further, in *Heart Research Institute v Psiron Ltd* [2002] NSWSC 646 at [24] and [25] the court was prepared to extend the matters which may be considered by expert determination to issues of liability and quantum, while the argument that the role of an expert under such agreements should be limited to those usually

[19] A view shared by other learned authors. See Bellemore A, "Is expert determination always appropriate?" (2003) 19 BCL 84; Kennedy-Grant, Master Tomas, High Court of New Zealand, "Expert determination and the enforceability of ADR" (June 2000) NZLJ 223.

[20] The grounds relied on in this instance are similar to those on which a stay was refused in *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540, where the court refused to stay proceedings brought in breach of an agreement that all disputes arising out of an agreement were to be referred for determination to a senior executive in the soft drinks industry. The executive had no training or expertise in determining legal and factual disputes, nor did the relevant body have in place any structure (rules or procedures) to govern the process.

dealt with by experts, for example, questions of value, questions of the work to be done prior to practical completion, quality of work and, presumably, extensions of time was also rejected. The courts should therefore be slow to rely on this ground as the principle reasons for refusing a stay.

## Discretionary remedies

Whether the expert determination process is capable of producing a result which is both useful and meaningful in the circumstances of each case is an important factor in the exercise of the court's discretion to stay proceedings brought in breach of such a clause.[21] While the fact that a particular dispute is seen by the complaining party as warranting discretionary remedies may favour judicial determination rather than a stay, this is not conclusive.[22] The powers of an expert to grant such relief as is appropriate if the claim is made out are potentially broad. In this way an answer may be provided, depending on the proper construction of each expert referral clause, to the concern expressed in *Bradken Resources* that the expert determination process may not resolve all disputes between the parties.

In *Government Insurance Office of NSW v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 and *IBM Australia Ltd v National Distribution Services Pty Ltd* (1991) 22 NSWLR 466 it was held that an arbitration clause may confer on an arbitrator the power to dispense remedies of a kind which a statute puts in the hands of the courts.[23] Those decisions turned wholly on what Mason J described in the former as "the real question", namely:

> whether there is to be implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter.

That is also "the real question" in relation to expert determination. It is quite conceivable that parties will refer to an expert the question whether, for example, a court would make an order pursuant to the *Trade Practices Act* declaring their contract void, and that they will agree to abide by the expert's decision on that question as if it were an order made by a court under those sections. The power may be conferred to provide other statutory remedies also. If such an agreement

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[21] *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587. Where urgent interlocutory relief is sought by one party, it is unlikely that the court will allow another party to shelter behind a dispute resolution process so as to frustrate the party obtaining that urgent relief. Such considerations will inform the court's exercise of its discretion to grant a stay or adjournment as appropriate: *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; [1999] NSWSC 996 at [31], citing *Townsend v Coyne* (unreported, NSW Sup Ct, Young J, 26 April 1995).

[22] *Petersville Ltd v Peters (WA) Ltd* [1997] ATPR 41-566; *Savcor Pty Ltd v New South Wales* at [44]. The court in *Savcor v NSW* relied on the multiplicity of proceedings and the discretionary remedies sought in refusing the stay, concluding (at [49]): "This undesirable multiplicity of enquiries – even beyond the multiplicity already involved in the two-tiered dispute resolution process in the head contract – is enough, in my view to justify refusing the stay the first defendant seeks, particularly where, as here, the remedies sought by the plaintiff against the first defendant are in part discretionary. Although an expert or an arbitrator may make the necessary discretionary judgments, it is probably better that a court do so where the multiplicity considerations point clearly in that direction in any event."

[23] The awarding of interest in accordance with the *Supreme Court Act* and remedies which the *Trade Practices Act* allows a court to give, respectively.

 

may be made expressly, it may also arise by implication if the terms of the referral clause so warrant.[24] While there do not yet appear to be any expert decisions that have come before the court where the expert has made such an order, the legal basis for such orders to be made by an expert is clear. The conferral of jurisdiction to grant such relief should be expressly made. In doing so, the parties must be mindful that the expert is not required to approach the determination of such issues in a judicial manner as the court is and the parties may well find that relief order by an expert without the application of the adversarial process. Complaints of justice not being done between the parties would be quick to arise.

## Primacy of the parties' agreement

The second discernible line of authority provides for exercise of the court's discretion to grant a stay of court proceedings requiring participation in an expert determination process, consistent with the "special bargain" between the parties as identified in *Huddart Parker Limited v The Ship Mill Hill*. There are three main Supreme Court decisions:

(a) *Badgin Nominees Pty Ltd v Oneida Limited* [1998] VSC 188;

(b) *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*; (unreported, NSW Sup Ct, Rolfe J, 14 July 1997);

(c) *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587.[25]

In *Badgin Nominees* the plaintiff conducted the business of manufacturing cutlery, whose business was sold to the defendant for a sale price subject to the valuation of the stock. The agreement expressly stated that the dispute in question (that of stock valuation, which required questions of legal construction to be determined) was to be decided by an expert and his "determination in writing ... will be conclusive and binding on the parties", without providing any rules concerning procedure, evidence, obtaining legal advice by the expert or complying with the rules of natural justice.

The court held that the applicable principles to guide the court in an application to stay a court proceeding, because of an arbitration agreement in *Huddart Parker Limited v The Ship Mill Hill*, apply equally to an application for a stay where the parties have agreed to a dispute resolution procedure involving an expert. The guiding principle is "that parties who have made a contract shall keep it". More recently it has been stated that "the Court starts with the proposition that the parties should be held to their agreement".[26]

The court in *Badgin Nominees* had regard to evidence that showed that the terms of the contract were negotiated over a period of two months, with

[24] *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587 at [31] to [39].

[25] The UK decision of *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540 was concerned solely with a valuation (albeit which required the construction of provisions in the contract) and was distinguished on its facts by the court in *Badgin Nominees Pty Ltd v Oneida Limited* [1998] VSC 188. In *Cott UK Ltd v FE Barber Ltd*, a stay was refused when the issues to be determined were more legally and factually complex than in *Badgin* (and in circumstances similar to those found in *Baulderstone v Kayah* (1998) 14 BCL 277 and *Bradken Resources Pty Ltd v ANI Corporation Pty Ltd* [2002] NSWSC 463).

[26] *Strategic Publishing Group Pty Limited v John Fairfax Publications Pty Limited* [2003] NSWSC 1134 at [14].

solicitors' assistance. On this evidence it was considered "not difficult to infer that the parties appreciate the difference between arbitration and expert determination." The court found that the parties put in place what they intended was to be an inexpensive and speedy dispute resolution procedure conducted by an expert valuer. This conclusion was supported by the requirement that each party was to pay the costs of the valuation in equal proportions. It was also pertinent to observe that the parties provided two different procedures to accommodate different types of disputes (as to price and any other dispute under the contract), in contrast to the one expert and procedure for all disputes found in *Baulderstone v Kayah* and *Bradken Resources*.

## Complexity of the dispute

The complexity of the legal and factual disputes before the expert is not, of itself, a sufficient reason to refuse to grant a stay. In *Fletcher Construction v MPN Group* the court, while agreeing that the issues raised were complex, observed that:

> In any event the mere fact that there was a degree of complexity involved does not mean that the chosen procedure should be abandoned.

This observation, that lesser weight be given to the complexity of the issues in dispute in exercising the discretion, was approved in *Badgin Nominees v Oneida*. In *Badgin* the court noted, consistent with the decision in *Baulderstone Hornibrook* and *Bradken Resources*, that:

> Where there are a number of issues involving questions of law and fact it may be that the Court should not grant a stay especially if the issues are the type of issues which are not suitable for determination in an informal dispute resolution procedure.

The court did not agree, however, that this was the primary factor, stating that "in considering the question of discretion, the fact that the parties agreed that the procedure should not be overlooked".

In *Savcor Pty Ltd v State of New South Wales* the court observed:

> Determination of the dispute between the plaintiff and the first defendant will therefore involve a decision as to the content and quality of the representations made by the first defendant and its representatives in the process of contract negotiation and formation and a decision on the legal questions whether the head contract is void for mistake and, in the alternative, whether an order should be made declaring it void. Are these decisions which it is appropriate to leave to the process of expect (sic) determination provided for in the head contract?

However, the court did not refuse to refer the matter to an expert for these reasons.[27]

The decisions in *Badgin Nominees, Fletcher Constructions v MPN* and *Savcor Pty Ltd v New South Wales* confirm that apparent difficulties to be grappled with by the expert in the interpretation of the agreement and other complex issues will not alone provide a sufficient ground for refusing to stay an action. Simply because the task given to the expert is difficult, does not mean

[27] *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587, Barrett J stated at [31], [40] and [48].

 

that it is impossible. The governing consideration is that the parties have expressly agreed that an expert is to undertake the task – not the court.[28]

## Other factors affecting exercise of court's discretion

Where there are parties to the proceedings that are not party to the expert clause, the court will be less likely to stay the proceedings as to order otherwise would result in multiple proceedings.[29] Where found to exist, this has been a powerful factor in the exercise of the discretion not to compel adherence to the extracurial procedure.[30] The duplication of effort in relation to disputes between the parties will result if the stay is granted and is not sufficient to warrant a stay.[31]

Strict compliance with a dispute resolution procedure by a party invoking the process (subject to where agreement of the other party is required) is generally an essential precondition to being entitled to relief by way of enforcing the other party to comply with the procedure.[32]

## Exercise of the discretion in Ipoh v TPS

Ipoh had commenced a claim for negligence in the Supreme Court on the same facts as the contractual claim for defective work. The court held that this was, in truth, the dispute that had already been referred to expert determination. The court stated that the substance of that defect claim, which was also the subject of the contractual claim, had been referred for expert determination and that a determination of that claim had been produced. It was not open to Ipoh to reserve an alternative claim in tort based upon the very same circumstances. This was the dispute that was referred to the expert and which was determined by the expert, no matter how it was formulated as a cause of action.

This finding was based on an express prohibition in the dispute resolution clause against commencing legal proceedings "in connection with a dispute" that has been the subject of expert determination. In instances where the expert determination clause contains such an express prohibition (most are silent), then a party will be prevented from commencing proceedings, albeit on a different legal basis, to that claimed in the expert determination. Whether the same would apply in expert determination – which does not contain an express prohibition on the commencement of legal proceedings in connection with the dispute referred to the expert – is questionable. Importantly, the court held that the rights and obligations that were considered in the contractual context for the purpose of expert determination were now advanced, based on exactly the same facts as the

[28] *Badgin Nominees Pty Ltd v Oneida Limited* [1998] VSC 188 at [48] to [60], citing as authority *Karenlee Nominees v Gollin & Co* (1983) 1 VR 657 at 669 and *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* (1984) VR 16 at 23, both decisions of the Full Supreme Court of Victoria.

[29] *Morrow v chinadotcom* [2001] NSWSC 209.

[30] *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587 at [47]; *Thomas v Star Maid International Pty Ltd* [1999] FCA 911; *Moussa v Eski Export Pty Ltd* [2000] FCA 1670; *Tasmanian Pulp & Forest Holdings Ltd v Woodhall Ltd* [1971] Tas SR 330 (Full Court); *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* [1998] VSC 103.

[31] *Savcor Pty Ltd v NSW* at [45], citing *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.

[32] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; [1999] NSWSC 996 at [172].

claim in tort.[33] On that basis, the court held that these claims should be struck out or permanently stayed.

The likely jurisdiction of an expert to grant relief similar to that available under the *Trade Practices Act* (as noted above) is relevant to the granting of a stay, particularly given it is now common for contractual claims to be accompanied by a claim for breach of the *Trade Practices Act* based on the same facts. Both "arise out of" the contract and would therefore usually fall within the scope of the referral clause. There would be no potential "splitting" of the action by enforcing the referral of that dispute to the expert.

### Scope and extent of the stay

The court also addressed the question of whether any stay granted should be temporary or permanent. The nature of the stay sought must be considered in each case by the applicant.[34] In this instance the court concluded that the result of a temporary stay would effectively be to permit these proceedings to continue as valid if the expert determination process didn't produce a resolution. This would give the plaintiff a substantial tactical benefit through the premature commencement of those court proceedings in breach of the expert determination clause. For this reason, the court held that the stay should be permanent. Anything less than a permanent stay would fail to protect the contractual right if either party seeks to enforce by requiring the expert determination process to be complied with.[35]

## CONCLUSION

The decision in *Ipoh v TPS Property* confirms the courts expressed intention of holding parties to their "special bargain" in expert determination clauses that are sufficiently certain. A distinct line of authority is now emerging on this point both as to the applicable principles and the exercise of the court's discretion in applying those principles. A disgruntled party seeking to re-litigate the issue determined by the expert will likely be met with a successful application for a stay of proceedings. Experts and parties have reasonable certainty that the process and decision cannot be subverted by one party. However, given the limited grounds on which an expert's decision can be attacked, solicitors must ensure the parties are fully appraised of the advantages and disadvantages of expert determination in selecting this process.

[33] *Aiton Australia Pty Ltd v Transfield Pty Ltd* at [71].
[34] Eg in *Computershare Ltd v Perpetual Registrars* (2000) 1 VR 626 the court considered it relevant that the disagreement revolved around whether or not the procedures in the dispute resolution clause, including mediation and expert determination, had been exhausted. The terms of the stay, when granted, were therefore temporary and limited to requiring the parties to exhaust their contractual means before being permitted to resort to the court.
[35] *Computershare Ltd v Perpetual Registrars* at [80].

 