Expert Determination: Issues of Law - Letter to the Editor

Dear Editor,

Mr Davenport made assertions in Issue #34 of the Newsletter which I believe must not be permitted to go unchallenged. The assertions to which I refer are:

> "The provisions (in the NSW Government's precedents for alternative dispute resolution clauses) which purport to make decisions of the expert final and binding are ineffective. They cannot prevent the Contractor from having the Contractor's legal rights adjudicated upon by the courts even though they have been the subject of a decision by the expert ...
>
> There is nothing to stop the Contractor commencing an action in a court for damages for the same breach of contract upon which the expert makes a decision. The Principal may try to have the action struck out. Alternatively, the Principal may try to raise the decision of the expert as a defence to the claim. Either course is most unlikely to be successful."

With respect, those assertions and the reasons advanced by Mr Davenport to support them overstate the position. It is submitted the effectiveness today of a clause provididng for a final and binding determination of a legal issue by an expert is yet to be determined. Clearly, there is authority that the courts will not enforce a clause merely making final and binding a determination of a legal issue by an expert. The reason given by the courts is that it is contrary to public policy to oust thejurisdiction of the courts on issues of law. However, as the High Court of Australia has recognised, the concepts of public policy are not fixed but change according to developmetns in society (*Stevens v Keogh* (1946) 72 CLR 1 at 28).

It is submitted that the courts in Australia may well find that public policy considerations in relation to expert determinations have changed in recent years at least for commercial contracts. Both the federal government and the government of New South Wales have in recent years publicly encouraged disputants to consider dispute resolution procedures other than judicial and arbitral proceedings. By advocating such alternatives, those governmentsd seek to reduce court delays and the expense to disputants of dispute resolution. Those developments have only reflected the change in attitude since the late 1980's of sections of the construction industry to dispute resolution. Major public initiatives in the industry have included:

(a) publication in 1988 of the joint report of the representatives of the Australian Federation of Construction Contractors, the Australian Institute of Quantity Surveyors and the Federal and State Government Construction Authorities entitled "Strategies for the Reduction of Claims and Disputes int eh Construction Industry - A Research Report";

(b) publication in 1990 of a report by the NPWC/NBcc Joint Working party entitled "No Dispute: Strategies for Improvement in the Australian Building and Construction Industry".

Those developments were reflected in the publication in 1993 of the report of the Standing Committee on Legal and Constitutional Affairs entitled "The Cost of Justice: Foundations for Reform".

The courts may well respond positively to these developments and accordingly enforce an agreement to refer to final and binding determination by an expert a dispute concerning a legal issue. There is recent authority which suggests that the courts in Australia are ready to take the step.

In *Public Authorities Superannuation Board v Southern Internation Developments Corporation Pty Ltd*, an unreported judgment of Smart J of 19 October 1987, his Honour upheld an agreement which referred issues of liability (i.e. a legal issue) and quantum to an expert for a final and binding determination. In doing so His Honour specifically rejected the arguments that the role of an expert under the agreement should be limited to those "u sually 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" and that "it was inappropriate for aperson so acting to determine substantive andisputed questions of liability" (p7). His Honour further stated:

> "The parties are entitled to agree to refer their disputes to a third party for decision ... as an expert even if this may give rise to (the expert having to decide difficult legal issues). They are also entitled to agree his decision will be final and binding. There are many reasons why they may take such a course. They may prefer to have a relatively informal process which they may think is likely to be cheaper and quicker and the decision of an independent consultant who is likely to be familiar with the problems. They have the right to sue an expert if he is negligent. They may have been content with this. It is not for the court to re-write

their contract" (p10).

In *Triano Pty Limited v Triden Contractors Limited*, an unreported judgment of Cole J of 22 July 1992, his Honour dealt with a reference to a legally experienced expert and an expert in building matters. The disputes were all concerned with liability. Further, the agreement provided that the decision of the expert would be final and binding. His Honour granted a declaration that the determination of the joint experts pursuant to that agreement would be final and binding.

Similarly, two cases on rent reviews have recognised that legal issues might properly be dealt with by a valuer. In *Thomas Cook Limited v Commonwealth Bank of Australia* (1986) ANZ ConvR 598, Foster J of the Commercial Division of the Supreme Court of New South Wales recognised the issue of liability might properly be referred to a valuer for a final and binding determination. In *Horwitz Grahame Books Pty Ltd v Mid-City Centre Pty Ltd* (1991) ANZ ConvR 139, Bryson J held that a determination of a valuer was final and binding even though it was based on an erroneous legal advice as to the construction of the rent review clause.

None of those judgments refer to the traditional isue of ouster of the court's jurisdiction. To that extent the judgments are no conclusive. However, it is submitted they do illustrate that the position is not as clear cut as Mr Davenport suggests.

Further, even if the court upheld the ouster of jurisdiction argument, it may not defeat an agreement containing a clause providing for a final and binding determination by an expert of a legal issue. First, it is submitted the judgment of Rogers CJ Comm. Div. in *Hong Kong Bank of Australia Ltd v Larobi Pty Limited* (1991) 23 NSWLR 593 is recent authority in support of the proposition that an agreement does not constitute an ouster of the jurisdiction of the court where it merely makes obtaining a final and binding determination of an expert a condition precedent to the commencement of judicial proceedings.

Secondly, it is submitted the courts will hold the parties to their agreement where they implement it and pursuant to it a final and binding expert determination of a legal issue is made even though the agreement does not make the determination a condition precedent to commencement of court proceedings (see *Dobbs v National Bank of Australia Ltd* (1953) 53 CLR 643 at 651-654). A court will not permit a party dissatisfied with the determination made pursuant to such an agreement to renounce the agreement.

It is submitted therefore that final and binding determination of legal isues by an expert should not be eliminated from the range of dispute resolution procedures.

Yours faithfully

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