Recent Cases

Expert Determination Clauses and Their Validity

Fletcher Construction Australia Limited v MPN Group Pty Limited, unreported, NSW Supreme Court, Rolfe J, 14 July 1997.

In *Fletcher Construction Australia Limited v MPN Group Pty Limited*, Justice Rolfe of the NSW Supreme Court was requested to consider a dispute determination clause in a Design Consultancy Agreement which provided that a decision of an "*expert*" shall be "*final and binding*" and "*conclusive*".

The dispute determination clause was challenged on the basis that it was an attempt to oust the jurisdiction of the court, was uncertain, and was said to be invalid. His Honour held that the clause was not invalid.

THE CIRCUMSTANCES

A building contractor ("the Proprietor") and a structural engineer ("the Engineer") had entered into an agreement ("the Agreement") for the provision by the Engineer of design services in connection with the construction of a high rise residential apartment building.

The Agreement provided that in the event of a dispute between the parties, arising out of the performance of the Agreement, the dispute was to be determined by the dispute determination provisions of the Agreement. Clause 6.1 ("the Clause") of the Agreement provided:

> "***6.1 Expert Determination***
> *If the Proprietor and the Engineer are in dispute regarding any matter arising from the performance, or as to the meaning of the Agreement, then either party shall by notice in writing served on the other require that such a dispute be resolved by the determination of any independent third party acceptable to both parties. If the parties cannot agree on an independent third party within seven days of the date of service of the notice then either shall request the President for the time being of The Project Manager's Forum of Australia to nominate the third party. The third party who has been agreed upon or appointed shall act as an expert and not as an arbitrator and that party's decision shall be final and binding upon the Proprietor and the Engineer.*"

A dispute arose between the Proprietor and the Engineer regarding the performance of the design services by the Engineer. The Proprietor served a notice of dispute stating that the Proprietor required the dispute to be submitted to an expert for determination in accordance with the Agreement.

The Engineer argued that the Clause was not enforceable and that it would not consider itself bound by any decision of an expert. The Proprietor filed a summons in the NSW Supreme Court seeking a declaration that the Clause was valid and enforceable.

THE PROCEEDINGS

The Engineer's submissions relied upon essentially two arguments:

1. the Clause, stating that the decision of the expert was "*final and binding*", was a "*bare faced attempt to oust the jurisdiction of the court*" and was consequently contrary to public policy and void; and
2. the Clause was void for uncertainty as it provided no "*machinery*" to determine with sufficient certainty the procedures to be adopted by the expert in determining the dispute.

Public policy - ousting the jurisdiction of the court

His Honour agreed that a Clause that was "*a bare faced attempt to oust the jurisdiction of the court*" (*South Australian Railways Commissioner v Eagen* (1972-1973) 130 CLR 506) would be contrary to public policy and void.

However, Rolfe J relied heavily upon an earlier decision of the High Court in *Dobbs v National Bank of Australasia Limited* (1935) 53 CLR 643, and noted that the majority of the High Court in that case had said that:

> "*A clear distinction has always been maintained between negative restrictions upon the rights to invoke the jurisdiction of the courts and positive provisions giving efficacy to the award of an arbitrator when made* ***or to some analogous definition or ascertainment or private rights upon which otherwise the courts might have been required to adjudicate****. It has never been the policy of the law to discourage the latter. The former has always been invalid. No contractual provision which attempts to disable a party from resorting to the courts of law was ever recognised as valid.*"

and:

> "***Parties may contract with the intention of***

affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person."

Rolfe J considering these passages (his emphasis) thought that the parties may agree that someone other than the court may determine disputes between them. They cannot oust the jurisdiction of the court, but because of their agreement they can limit the matters for consideration by the court to the question of whether the agreed decider has acted within the agreement between the parties.

Rolfe J held that in his opinion, Clause 6.1 did not purport to oust the jurisdiction of the court. It was an agreement between the parties that the specified disputes shall be determined by an expert. There was nothing unusual about such a provision and parties are held to their bargain if they agree to such a clause. Nor is there anything unusual about the Clause providing that the expert's decision shall be " *final and binding*" or "*conclusive*", and provisions such as that do not oust the jurisdiction of the court. The effect of the Clause is to make the decision of the expert final and binding provided the matters referred to him are ones which the Agreement contemplates. The expert's decision is, however, susceptible to attack in a court if there is a failure to comply with the Contract or if there is some vitiating factors relevant to the decision.

Uncertainty

The Engineer submitted that the Clause was unlike other expert clauses as it contained no machinery provisions other than those allowing for the appointment of the expert. The Engineer argued that as the Clause failed to deal with issues the likes of which include, rules of evidence, representation of the parties, discovery and inspection, confidentiality and costs, it was, therefore, void for uncertainty.

Rolfe J said that unrestricted by authority he would have concluded that the procedures to be adopted by the expert would be procedures agreed by the parties and the expert or, in the absence of agreement between the parties, formulated by the expert having regard to the circumstances of the case.

Rolfe J then referred to a decision of Cole J in the NSW Supreme Court, *Triarno Pty Limited v Triden Proprietors Limited* (1992) BCL 305. In *Triarno*, Cole J considered an expert determination clause that made no express provision for the procedures to be followed by the expert in reaching a decision or for any rights or obligations upon the parties in relation to the expert's determination. Cole J said that:

> "*Whilst recognising that there may be utility in the court determining procedures to be followed in an expert determination, in my opinion the court has no jurisdiction to do so.*"

and:

> "*If the parties have not by their deed agreed the procedure to be followed upon an expert determination, that is not a void the court can fill. There is no reason to imply a term that the court will determine procedures. It is a matter for either agreement between the parties, or determination by the independent experts as to the procedures to be followed.*"

Cole J then considered the question as to how the costs of the expert determination should be paid and concluded that there was an implied term that each party was to pay one half of the costs of the independent expert.

Rolfe J supported Cole J's judgment in *Triarno* that the decision was authority for the proposition that in the absence of agreement as to procedures, they are to be decided by the expert. There was, therefore, no uncertainty of the type which the Engineer argued.

In addition, there is nothing in the terms of the Agreement which either suggests or necessarily implies that a determination by the independent expert, which is favourable to one party or the other, should result in the unsuccessful party paying the costs of the independent expert. Nor, in Rolfe J's opinion, is there any express or implied power in the independent expert conferred by the Agreement to make an order for costs.

SUMMARY

It now seems clear, at least in the context of construction contracts in New South Wales, that an expert determination clause will not be found to be invalid solely because:

- it provides that the decision of the expert is "*final and binding*", or "*conclusive*" as it is open to the parties to agree that someone, other than the court, may determine disputes between them without ousting the jurisdiction of the court;
- it does not state the specific procedures to be followed by the expert in reaching a determination. This is a matter for agreement between the parties, or determination by the expert.

- Patrick George and John Gallagher, Minter Ellison, Lawyers, Sydney.

Footnote:

Interestingly, on the issue of the expert devising procedures to fill in a gap in the parties' agreement regarding the manner in which the process was to be conducted Rolfe J commented on the need for natural justice:

> "... *In devising procedures the expert is no doubt obliged to ensure that he or she affords natural justice to both parties ...*"

- J. T.