The Law Relating To Expert Determination

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INTRODUCTION

This article considers some of the legal issues relevant to the process of expert determination, which arose in the context of the construction, some years ago, of the Ritz-Carlton Hotel at Double Bay. The disputes between the Builder and the Proprietor on that project led to an expert determination procedure and the commencement of a number of sets of proceedings in the New South Wales Supreme Court. Readers may be familiar with the decision of *Triarno Pty Limited v Triden Contractors Limited* (Supreme Court of New South Wales, Cole J, 22 July 1992), but that case tells only part of the story. This article looks at some of the wider circumstances surrounding the construction of the Ritz-Carlton Hotel.

The Project

During August 1989, Triden Contractors Limited ("the Builder") and Triarno Pty Limited ("the Owner"), entered into an agreement whereby the Builder agreed to design, execute and complete a Ritz-Carlton standard hotel and retail development at Double Bay. The Builder ran into financial difficulties and by agreement the Builder's contract was terminated and, subject to it completing some work, it was to leave the site.

A Deed was entered into between the parties by the terms of which the Builder had to complete the shell of the building. The remaining works were to be carried out by a specially formed company.

The Deed contained an "*expert determination*" provision in Clause 25.

Clause 25 - Dispute Resolution

By the terms of Clause 24 of the Deed, the Builder was required to provide a guarantee. By Clause 25, that guarantee was to be released to the Builder unless the Owner had made a claim against the Builder. Clause 25 also provided that the Owner would not be entitled to any amount of its claim in dispute until it received a determination from an independent expert agreed upon by the parties or failing agreement, appointed by the Chairperson of the Institute of Arbitrators and Mediators Australia, NSW Chapter, whose decision would be final and binding.

The Deed did not contain express provisions on the procedures to be followed in the expert determination.

The Disputes

Certain disputes arose between the parties. The Owner made a number of claims against the Builder relating mainly to defective and non-complying work.

The Builder also made a number of claims against the Owner relating to unpaid monies for work done.

The Owner sought to institute the expert determination process. The parties agreed on the appointment of two experts. Preliminary conferences were arranged with the agreed independent experts, but the parties could not agree on the appropriate procedures to be followed in relation to the independent expert process.

The Owner's View

The Owner thought the expert determination ought to proceed by way of an exchange of documents and a relatively short hearing (or meeting) before the experts. The Owner contended that the experts would not be required to apply the rules of natural justice and were not required to provide reasons for any expert determination.

The Builder's View

The Builder, on the other hand, considered it crucial to its understanding of the Owner's allegations that it be able to test the evidence put before the experts by the Owner. The Builder had ceased major involvement upon the building site and the Owner's claims related, at least in part, to events subsequent to that date. The Builder did not have knowledge of the circumstances giving rise to many of the Owner's claims such as defective work which had since been covered up. The Builder wanted to be able to cross-examine any relevant witnesses.

Triden Contractors Limited v Triarno Pty Limited (Supreme Court No. 55043 of 1992)

The expert determination procedure stalled. The Builder decided to pursue its claims in the Supreme Court Construction List and was able to do so speedily which provided the Builder with a tactical advantage. The expert determination under Clause 25 only spoke about the

Owner's claims, and did not say how the Builder could pursue its claims.

In the Supreme Court proceedings instituted by the Builder, the Owner pleaded its own claims (still to be dealt with in the expert determination procedure) as a defence, by way of set-off, to the Builder's claims. The Owner sought to have the Supreme Court proceedings delayed pending determination by the experts. Cole J (having been made aware of the delays in the expert determination procedure) was not prepared to delay the Supreme Court action. The dispute was duly referred out to a referee under Part 72 of the Supreme Court Rules.

Within a matter of a few months, the Builder had obtained judgment in its favour. Because the Owner's claims were still to be determined, the Builder agreed to stay judgment for a few months. The parties were aware that the stay would not be granted indefinitely. The Owner needed to press ahead with the expert determination procedure.

During the course of the Supreme Court proceedings, the expert determination procedure did not advance. The Owner needed to prosecute the expert determination as quickly as possible; but the parties had still not agreed on the proper procedure for the expert determination.

Triarno Pty Limited v Triden Contractors Limited (Supreme Court No. 55062 of 1992)

In July 1992 the Owner commenced proceedings in the Supreme Court Construction List seeking declarations relating to the appropriate procedures to be followed in the expert determination process.

The Owner sought:

1. a declaration on the rules and procedures to be followed, including a declaration that the experts were not required to apply the rules of natural justice and were not required to provide their reasons; any expert determination would be final and binding; and the parties were required to share the costs of the expert determination; and
2. an order that the Builder submit to and co-operate with any expert determination.

The Owner also sought an order that the procedure should be conducted in accordance with a proposed set of terms and conditions.

Cole J decided that the Court had no jurisdiction to determine the procedures to be followed in an expert determination and declined to make any orders with respect to the procedures to be followed. The appropriate procedures were left in the hands of the experts.[1]

The Builder was faced with the difficulty of ensuring that it got a proper hearing in whatever procedure was to be followed.

The Builder then commenced proceedings in the Court of Appeal appealing against Cole J's decision, asserting that the expert determination process was, in fact, an arbitration to which the *Commercial Arbitration Act* applied (see e.g. *Isca Constructions Co. Pty Limited v Grafton City Council* (1962) 8 LGRA 876) and that His Honour should have held that the process be governed by the *Commercial Arbitration Act*.[2]

The Builder took other steps to protect its position and informed the Owner that it would decline to give any release and indemnity to the independent experts in relation to the expert determination process. Clause 25 made no provision for a release and indemnity in favour of the experts. In the absence of a release and indemnity an expert may be liable for his or her determination.[3]

Not surprisingly, the experts indicated to the parties that they were not prepared to proceed with the determination process in circumstances where there was a potential liability on their part.

Because of the experts' decision not to proceed, there was yet another apparent impasse. The Owner again sought the intervention of the Court.

Triarno Pty Limited v Triden Contractors Limited (Supreme Court No. 55088 of 1992)

By its own summons the Owner sought orders including the following orders:

1. A declaration that there was an implied term in the Deed, that the Owner and the Builder release and indemnify the independent experts appointed pursuant to Clause 25 of the Deed from and against any claims for negligence, bias or other misconduct other than actual fraud.
2. An order that the Builder release the independent experts appointed pursuant to the Deed in terms of the declaration sought in paragraph 1 above.
3. An order that the Builder co-operate with the independent experts and expert determination to the extent required to allow the expert determination to proceed.
4. An order that the Builder be restrained from frustrating or otherwise obstructing the independent experts in the conduct of any expert determination, or from otherwise frustrating or hindering any expert determination pursuant to Clause 25 of the Deed.
5. A declaration that if the independent experts appointed pursuant to Clause 25 of the Deed are indemnified by the Owner only, a determination by them would be final and binding as between the Owner and the Builder.

By these new proceedings the Owner sought to imply a term in the expert determination process that the parties must release and indemnify the independent experts from and against any claims against them. The matter did not proceed to judgment; but it was unlikely that the Court would have implied the term as it would not have appeared to satisfy the relevant tests set out in the *Codelfa*

Constructions Pty Limited v State Rail Authority (1982) 149 CLR 337.

Arguably, the Owner would have been better served by relying upon a term of which would have been more readily implied - i.e. that the Builder was obliged to do all things necessary on its part to be done to give effect to the agreement for expert determination (see *Mackay v Dick* (1881) 6 App. Cas 251). The Owner could then seek to argue that the failure to give the release and indemnity constituted a breach of that implied term.

But any argument was purely academic because the Builder then took another step which was aimed to protect its position no matter which way the Owner went. Enquiries were made of various "*experts*" with a view to ascertaining whether any expert would have been prepared to proceed with the expert determination process without the protection of a release and indemnity. Such an expert was found, and an affidavit, sworn by that expert, was duly filed and served.

The term which the Owner sought to imply, would not be implied, if it was *not necessary* (one of the tests in *Codelfa*) to imply it - i.e. the procedure could be effected albeit by an expert not originally contemplated by the parties. Furthermore, the Builder could not be said to have prevented the process as it had, itself, put up an expert willing to deal with the claims without the need for a release and indemnity.

The End

And so it was that the Builder had its judgment from the Court. The Owner had been unable effectively to prosecute its claims through the expert determination process. Any expert determination which could be obtained was still some way down the track, and it was unlikely to proceed as the Owner had first anticipated.

The Builder was by this time entering into arrangements with its creditors.

The disputes between the parties were ultimately settled.

Conclusions

The disputes which arose between the Owner and the Builder in the Ritz-Carlton project highlight a number of important issues relating to dispute resolution procedures:

1. Contrary to popular belief, an expert determination process will not **always** be faster than litigation. In the *Ritz-Carlton* case, the Builder obtained a judgment in the Supreme Court Construction List before the Owner's expert determination procedure even "*got off the ground*".
2. Dispute resolution clauses need to be drafted carefully - having regard to the likely nature of the disputes and, where possible, dealing with the procedures to be followed.
3. Where an expert determination procedure is involved, the Court will generally not intervene to determine the procedures to be followed.
4. In appropriate circumstances what might be seen as an "*expert determination procedure*" may be subject to the operation of the *Commercial Arbitration Act*.
5. Unlike arbitrators, experts involved in an expert determination process do not have protection from liability in relation to the conduct of their determination. Where appropriate, a release and indemnity should be included in the initial agreement for expert determination (i.e. set out in the construction contract). Despite this, it is not uncommon to find expert determination clauses in building and engineering contracts, where no release and indemnity is given to the expert.
6. Different dispute resolution processes are suitable in different circumstances and can have important tactical consequences. The *Ritz-Carlton* case was largely "*won and lost*" in the context of the tactical battle, rather than by reason of the merits of the substantive disputes.

LEGAL NOTES

1. JUDICIAL INTERVENTION

1.1 Challenging the Expert Determination Process

The procedure to be adopted in an expert determination is essentially a matter to be agreed between the parties. Where the parties do not agree the expert may direct the relevant procedures.

While it will not always be possible to set procedures which will suit all of the kinds of dispute which might arise, a failure to set appropriate procedures may cause real problems. That is what happened in *Triarno Pty Limited v Triden Contractors Limited.*

In that case Cole J stated:

"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. The Court has power in an arbitration subject to the Commercial Arbitration Act 1984 to make interlocutory orders in relation to arbitration proceedings (Section 47). However the contemplated proceedings are for a determination by an expert, and are not intended to be an arbitration. That seems clear from the provisions of Clause 25 and the draft agreement advanced either by the experts or Triarno. The difference in function between an independent expert and an arbitrator is well recognised. See for instance Hudsons Building Contracts 3rd Ed., Volume 1, page 707-717 and cases there collected; In Re: Carus-Wilson and Greene 1887 18 QBD 7 at 9; Legal and General Life of Australia Limited v A Hudson Pty Limited 1985 1 NSWLR 314 at 336 per McHugh JA as he then was).

If the parties have not by their deed agreed the procedures 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."

It must be recognised that, while the Court will not determine procedures to be followed where the process is properly an expert determination, if the dispute resolution procedure is in fact an arbitration rather than an expert determination, the Court does have power to intervene. As to when a procedure is considered an arbitration rather than an expert determination, see the discussion below.

Importantly, parties must understand that, unless they have themselves agreed matters of procedure, an expert determination will proceed largely as the expert sees fit. Generally speaking, the expert will not have to apply the rules of natural justice; neither will he or she have to provide reasons for the determination. The matter can proceed without any cross-examination or even the calling of any witnesses. Indeed, there may be no hearing or meeting whatsoever.

In *Fletcher Constructions Aust Ltd v MPN Group Pty Ltd* (unreported, NSW Sup Ct, 14 July 1997), Rolfe J held that an expert determination clause was not void for vagueness because it made no provision about procedural matters such as whether the parties could be legally represented, whether the parties could be compelled to provide documents, who should bear the costs etc. Neither was the clause unenforceable for ousting the jurisdiction of the Court.

1.2 Challenging the Determination

Parties to an expert determination cannot "*appeal*" from, or challenge, the determination, except where the expert has acted beyond the terms of the appointment. A party to an expert determination will not be able to challenge a determination on the basis that the expert decided the matter wrongly, whether according to the law or the facts. An aggrieved party may be able to sue the expert (see discussion below), but the party will generally be unable to challenge the decision itself.

The question of whether an expert's decision can be challenged was recently considered in the New South Wales Supreme Court decision of *Fermentation Industries (Aust) Pty Limited and Anor v Burns Philip & Co Limited* (unreported decision of Rolfe J, 1998). In that decision the Court held that the expert's decision was amenable to correction on the basis that the expert proposed to act outside the terms of the agreement appointing him. Rolfe J cited the decision of McHugh JA in *Legal and General Life of Australia Ltd v A Hudson Pty Limited* (1985) 1 NSWLR 314. In that case, the Court of Appeal was considering a rent review clause, where the rent review was being carried out by a qualified valuer. His Honour stated:

"*In my opinion the question whether a valuation is binding upon the parties depends in the first instance upon the terms of the contract, express or implied. This was pointed out by Sir David Cairns in the Court of Appeal in Baber v Renwood Manufacturing Co Ltd (at 181). A valuation obtained by fraud or collusion can usually be disregarded even in an action at law. For in a case of fraud or collusion the correct conclusion to be drawn will almost certainly be that there has been no valuation in accordance with the terms of the contract. As Sir David Cairns pointed out, it is easy to imply a term that a valuation must be made honestly and impartially. It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of a valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is "final and binding on the parties". By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision. ... While a mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties but a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of the contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should not have taken into account.* ***The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract.***" (Emphasis added)

As stated above, there is no general requirement that an expert provide reasons for his or her decision. Clearly, a decision of an expert will be less susceptible to attack where reasons for the decision have not been given.

Further cases:

Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd (1993) 32 NSWLR 583; *Holt & Ors v Cox* (1994-1995) 15 ACSR 330 and on appeal (1997) 23 ACSR.

2. EXPERT DETERMINATION VERSUS ARBITRATION

There may be situations where a question arises as to whether a particular dispute resolution procedure is either an expert determination or an arbitration attracting the operation of the *Commercial Arbitration Act*. There is no simple answer to this question. As Debelle J said in *IOOF Aust Trustee v Seas Sapfor Forests* (unreported, SA Supreme Court, 3 November 1995):

> *"There is no formula of universal application which will determine whether the decision-maker is an arbitrator and each case must be decided on its own facts: Arenson v Casson Beckman Rutley & Co [1997] AC 405 per Lord Wheatley at 427. Nevertheless, there are some indicia which provide assistance."*

There is some debate between commentators as to whether one should look generally to the nature of the process to be undertaken or whether one should look at the function to be performed (i.e. the sorts of disputes to be decided and the nature of the determination to be made). It is the writer's view is that it is the nature of the process to be undertaken which raises the important matters for consideration.

Marcus Jacobs in *Commercial Arbitration, Law and Practice*, discusses the relevant issues in some detail (see paragraphs [12.50] to [12.195]). Mr Jacobs cites a decision of the Canadian Supreme Court, *Sports Maska Inc v Zitter* [1988] 1 SCR 564. That decision reviewed Canadian, United States, English and French law. The Court stated:

> *"One of the principal aspects that emerges from an analysis of the Code of Civil Procedure, academic opinion and the case law is the similarity that must exist between arbitration and the judicial process. The greater the similarity, the greater the likelihood that the reference to a third party will be characterised as arbitration. The facts that the parties have a right to be heard, to argue, to present testimonial or documentary evidence, that lawyers are present at the hearing and that the third party delivers an arbitration award with reasons establish a closer likeness to the adversarial process than the expert opinion and tend to establish that the parties meant to submit to arbitration, but contrary to what was argued by the respondents, that criterion is not exclusive to arbitration.*
>
> *The function assigned to the third party is indicative of the status conferred on him by the parties. If the third party has to decide between opposing arguments presented by the parties on a given point, we are much closer to arbitration. If however, the parties call on a third party solely to supply a necessary component of the contract, it is less certain that they intended to submit the present dispute to the third party, but rather tried to ensure that such a dispute did not arise, unless there are other criteria to the contrary. In the same vein, is the third party called on to make a decision in the light of his personal knowledge or must he choose among the various positions put forward by the parties concerned? In the first case, the situation will probably be one of an expert opinion, while in the second it will probably be an arbitration."*

From a practical point of view, it must be remembered that the procedures which are adopted may mean that an expert determination is effectively turned into an arbitration.

The fact that the parties have called a particular procedure an "*arbitration*" or an "*expert determination*", while persuasive in determining the intention of the parties, will not necessarily be determinative of the issue (see e.g. *Edmund Barton Chambers (Level 44) Co-op Ltd v Mutual Life & Citizens' Assurance Co Ltd* [1984] NSW Conv R 55-177; *IOOF Aust Trustees v Seas Sapfor Forests*, supra).

3. LIABILITY OF THE EXPERT

An expert acting in the context of an expert determination is not carrying out an arbitral or quasi-arbitral function and does not have the protection from liability which is provided by the provisions of the *Commercial Arbitration Act* (see section 51 of the NSW *Act*) or provided by operation of the common law (see *Sutcliffe v Thackrah* [1974] AC 727).

In the absence of an appropriate release and indemnity, an expert may be liable to the parties (and perhaps third parties) in both contract and tort.

An expert may be subject to a claim if he or she:

a) fails to act in accordance with the terms of the appointment;
b) fails to exercise the standard of care and diligence expected of an expert in his or her position;
c) fails to act in a timely fashion.

An expert is required to approach his or her task independently (see e.g. *Dunbar & Son (Pty) Ltd v South African Railways* 1943 AD 22).

It is obviously advisable from any expert's point of view that a release and indemnity be provided by the parties to the dispute. It is also advisable for the parties to include such a release and indemnity in the dispute resolution provision. A failure to do so may mean that an expert cannot be obtained to determine the dispute and the whole process may break down. That is what ultimately happened in the *Ritz-Carlton* matter.

Footnotes

1. See attached Legal Notes, Part 1.
2. See attached Legal Notes, Part 2.
3. See attached Legal Notes, Part 3. ❑