

### WHEN IS AN EXPERT DETERMINATION PROCESS NOT AN ARBITRATION?

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This article reviews the Queensland Supreme Court's decision in *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* in relation to issues arising from an expert determination process.

#### HOW DOES IT AFFECT YOU?

Construction contracts often contain dispute resolution clauses that provide for expert determination as an alternative or precursor to litigation or arbitration. The purpose of these clauses is to allow parties to resolve disputes in ways that avoid the formality and cost of arbitration or litigation.

This case examines the circumstances in which an expert's conduct might cause an expert determination to become an arbitration, and indicates that the process of expert determination does not necessarily preclude experts from cross-examining witnesses. The case indicates that appropriate drafting of dispute resolution clauses can help preserve the benefits of expert determinations by helping to prevent these determinations being characterised as arbitrations.

#### FACTS

*Northbuild Construction Pty Ltd* (*Northbuild*) and *Discovery Beach Project Pty Ltd* (*Discovery*) entered into a contract (the contract) under which *Northbuild* would carry out construction work. Under the contract, *Northbuild* referred several disputed matters, some of which involved questions of fact, law and quantum, for expert determination.

Section 13 of the contract provided that if a dispute was not resolved in a certain period of time, the dispute would be referred to arbitration, unless the party that lodged the notice of dispute elected to have the

dispute determined by expert determination. Section 13 also provided that, except to the extent that the process for expert determination under the contract provided otherwise, 'the expert will not act as an arbitrator'.

Schedule 26 of the contract set out the 'Rules for Expert Determination'. Rule 2 of Schedule 26 stated that '[t]he Expert ... may require from either party further information as the Expert sees fit'.

The contract stated that:

- '[t]he Expert is not bound by the Rules of Evidence and may make the Expert's determination on the basis of information received or the Expert's own expertise'; and
- '[u]nless otherwise stated this Process may be modified only by agreement of the parties and the Expert'.

The experts and the parties agreed that the experts should determine at least some of the matters that involved questions of fact, law and quantum. The experts and the parties also agreed, that, insofar as the experts required oral evidence from witnesses on various matters involving questions of fact and law, the parties would accept the decision of the experts as to whether witnesses would be cross-examined by the opposing party.

The experts made a direction allowing cross-examination of witnesses by the opposing party (the cross-examination direction).

*Northbuild* argued that, in making the cross-examination direction, the experts were acting as arbitrators as opposed to experts, or that, were the cross-examination direction to be implemented, the experts would be acting as arbitrators.

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## DECISION OF THE QUEENSLAND SUPREME COURT

In *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2007] QSC 206, Justice Mullins examined the nature of arbitration and expert determination before answering two questions:

- did the experts have the power to direct that witnesses be cross-examined?; and
- did the cross-examination direction change the process from an expert determination to an arbitration?

## THE NATURE OF ARBITRATION AND EXPERT DETERMINATION

Justice Mullins observed that it is easier to identify what is an arbitration than what is an expert determination because arbitrations are generally established by written agreements that satisfy the requirements of statutes that regulate arbitrations, whereas expert determinations, not being regulated by statute, are governed by the terms of the contract between the parties and the expert.

Her Honour found that the indicia of arbitrations are:

- there is a dispute;
- the dispute has been remitted by the parties to a person for resolution in a manner that requires the exercise of a judicial function;
- where appropriate, the parties must have had the opportunity to present evidence and submissions; and
- the parties have agreed to accept the decision of the person to whom they have remitted the dispute.

Justice Mullins emphasised that arbitration requires that a

decision maker act judicially. She noted that, while experts are not bound to act judicially, experts may act judicially if doing so is not precluded by the terms of the agreement under which they are retained.

Her Honour also noted that:

- the existence of a dispute is not necessarily a decisive factor in determining whether an arbitration exists because it is 'possible for parties to become involved in a dispute...which they agree to submit for appraisal without intending that an arbitration should follow';

- recent authority suggests that, where, in building and commercial contracts, an agreement between the parties and an expert does not make express provision for such matters as the procedures to be followed by the expert in reaching determinations, or the rights or obligations of the parties in relation to the expert's determinations, courts will be slow to declare these agreements void with respect to these matters;

- the label which parties apply to a dispute resolution process does not necessarily determine whether the process is an arbitration or an expert determination; and

- there is no restriction on the nature of the disputes that parties can agree will be the subject of expert determination; for example, questions of law may be referred to an expert.

## DID THE EXPERTS HAVE THE POWER TO DIRECT THAT WITNESSES BE CROSS-EXAMINED?

Justice Mullins found that the experts had the power to direct that witnesses be cross-examined.

Her Honour held that Rule 2 gave the experts power to question witnesses and that it was difficult to see why such questioning would not extend to questions put forward by the other party for the experts to consider asking the witnesses. Northbuild argued that the word 'information' in Rule 2 did not include evidence tested by cross-examination. Her Honour rejected this argument and construed the words of Rule 2 according to their natural meaning, which her Honour said were 'about the requiring or receiving of information'.

Her Honour held, that apart from Rule 2, which gave the experts a power to test evidence to some extent, the agreement of the parties to accept the decision of the experts as to whether witnesses would be cross-examined in respect of oral evidence, together with the subsequent cross-examination direction, meant that the parties had granted, to the experts, the power to cross examine witnesses.

#### **DID THE CROSS-EXAMINATION DIRECTION CHANGE THE PROCESS FROM AN EXPERT DETERMINATION TO AN ARBITRATION?**

Justice Mullins found that the cross-examination direction did not change the reference to the experts from an expert determination to an arbitration. Her Honour based this finding on the construction of section 13 and a consideration of the powers granted to the experts under the contract.

Justice Mullins indicated that nothing in section 13 precluded, from resolution by expert determination, disputes that raised questions about the credit of witnesses. Her Honour stated that section 13 contemplated

that disputes arising under the contract may be suitable for both arbitration or expert determination, and that section 13 did not limit the nature of the disputes that could be determined by expert determination.

Her Honour noted that the process proposed by the experts, whereby they would determine several legal issues regarding the contract before they provided any expert determinations, resembled an arbitral process. She indicated that this resemblance did not mean that the experts would be acting as arbitrators because this proposed process came about as the result of the implementation of the powers granted to the experts under the contract.

Her Honour indicated that the fact that the experts sought to cross-examine witnesses did not mean that the experts would be acting as arbitrators because the experts, while having the discretion to allow the cross-examination of witnesses, were not obliged to do so. Her Honour emphasised that the process of expert determination does not necessarily preclude experts from cross-examining witnesses.

#### **PRACTICAL CONSIDERATIONS**

The implication of this decision is that despite witness cross-examination being commonly associated with arbitration and litigation, the process of expert determination can include witness cross-examination if the contract between the parties and the expert so allows.

Given that expert determinations are a creature of contract, parties that do not wish witnesses to be cross-examined as part of an expert determination should ensure that dispute resolution clauses are drafted accordingly.

When drafting dispute resolution clauses, parties should carefully

consider the powers they wish to grant an expert to ensure that these clauses are not found to be uncertain and to provide the expert with the powers the parties want the expert to have.

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