

Determination by Independent Expert - Application of Commercial Arbitration Act - Expert to Determine Procedures.

Triarno Pty Ltd v Triden Contractors Limited, unreported, Supreme Court of New South Wales, Cole J, 22 July 1992

In this recent decision, Mr Justice Cole considered the powers of the Supreme Court of New South Wales to determine procedures governing expert determinations.

Triden Contractors Limited ("Triden") entered into a Deed dated 15 March 1991 ("the Deed") with Triarno Pty Ltd ("Triarno") terminating a building contract between the two parties for the construction of a hotel and retail development at Double Bay in Sydney. The Deed dealt with certain matters arising out of the termination.

Clause 24 of the Deed required in effect the provision by Triden of a bank guarantee for \$500,000. That guarantee was to be released to Triden on 28 February 1992 unless Triarno had made a claim against Triden under the terms of the Deed by that date. Triarno made such a claim against Triden. Clause 25 of the Deed provided:-

"If Triden and Triarno are unable to agree as to the value of any claim made by Triarno, Triarno shall be entitled to immediate payment from the bank guarantee for \$500,000 of the amount not in dispute (if any) but shall not be entitled to any amount of its claim in dispute until it receives a determination from an independent expert agreed upon by the parties or failing agreement, appointed by the Chairperson of the Institute of Arbitrators Australia, NSW Chapter, whose decision shall be final and binding. Upon receipt by Triarno's solicitor of a copy of the independent expert's determination, Triarno shall be entitled to be paid from the bank guarantee for \$500,000 any additional amount to which it is entitled. If the amount determined by the independent expert exceeds the amount available under the bank guarantee for \$500,000, Triden shall pay Triarno immediately any such difference. If the determination by the independent expert does not give rise to an entitlement on Triarno's part to be paid the amount of such bank guarantee whether in whole or in part Triarno shall, but not before February 28, 1992 forthwith direct the independent solicitor to release such bank guarantee to Triden, subject to any rights of Triarno pursuant to this deed."

The Deed made no express provision for payment of the independent expert, for the procedures to be followed by the independent expert in reaching his determination, or for any other rights or obligations upon Triarno or Triden in relation to such expert's determination.

The parties were unable to agree on the value of Triarno's claim. The parties agreed that the independent

expert should in fact be two persons but did not reach agreement with each other or with the independent experts concerning the procedures, the form or the cost of the independent experts' determination.

Subsequent to execution of the Deed, Triden ceased major involvement upon the building site. Triarno's claims arose, at least in part, in relation to events subsequent to this date. Triden asserted that it did not have knowledge of the circumstances giving rise to many of the claims of Triarno and therefore wished there to be a procedure whereby Triarno first disclosed to Triden and the experts the evidence which it wished to advance in support of its claims, with Triden then being given the opportunity to cross-examine any witness and to place additional evidence in rebuttal. The parties were unable to agree on procedures for the expert determination in this regard and other matters (including liability for costs of the experts). Triarno ultimately commenced proceedings, seeking:-

"A declaration as to the rules and procedures for the conduct of an expert determination pursuant to Clause 25 of [the Deed] including declaration that:-

- (a) any independent experts appointed pursuant to Clause 25 of the Deed:-
 - (i) are not required to apply the rules of natural justice;
 - (ii) are not required to provide their reasons for any expert determination;
- ...
- (c) the parties to the expert determination pursuant to Clause 25 of the Deed are required to share equally the costs of the expert determination excluding their respective legal costs, subject to any determination as to costs (including legal costs) by the independent experts."

Cole J said there may be utility in the Court determining procedures to be followed in an expert determination but held that the Court had no jurisdiction to do so. The Court had power in an arbitration subject to the Commercial Arbitration Act 1984 to make interlocutory orders in relation to arbitration proceedings (section 47). However, Cole J considered that the proceedings contemplated were for determination by an expert, and were not intended to be an arbitration. Cole J considered that if the parties had not by their deed agreed to the procedures to be followed upon an expert determination, that was not a void the Court

could fill. Cole J refused to imply a term that the Court would determine procedures and considered it was a matter for either agreement between the parties or determination by the independent experts as to the procedures to be followed.

Triarno also sought an order directing Triden to submit to and co-operate with an expert determination pursuant to clause 25 of the Deed. Cole J did not think the Court had any power to make such an order. Cole J held it is a matter for each party to determine what role, if any, it will take in relation to the expert determination, if the experts determine that there is a role for either party to take apart from notification of the disputes to be determined.

Cole J also considered the question of the parties' liability for the cost of the independent experts. This was

a question not explicitly dealt with by the Deed. Cole J found there was an implied term that each party pay equally the costs of the independent experts for the reason that each party benefits by the implementation of the mechanism contained in clause 25 of the Deed to resolve disagreements between them. Cole J found that other clauses in the Deed exhibited an intention by the parties that the costs of independent mechanisms necessary for the operation of the Deed were to be equally shared.

Further, each party was to bear its own costs in the expert determination, whatever the outcome. Cole J found there was no express or implied power in the independent experts conferred by the Deed to make an order for costs.

It is understood that a notice of appeal has been filed from this decision.

- **Frank Cahill and Amrit MacIntyre,
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Development in Public Recreation Areas

Coffs Harbour Environment Centre v Coffs Harbour City Council, unreported, NSW Court of Appeal, JJA Clarke & Sheller, AJA Hope, 6 December 1991.

Facts

Section 24 of the Crown Lands Consolidation Act 1913 (NSW) provides for Crown Land to be dedicated for public recreation. The Coffs Harbour City Council attempted to build a sewage outfall on land dedicated under section 24. During the period of construction a number of areas of land would have been fenced off from the public. After completion, a number of iron grids would have remained. Such land was also zoned 6(a), in which development, if not expressly permitted, was prohibited unless generally consistent with the objectives of the zone, viz, for a use associated with recreation.

Importance

The Court of Appeal reversed a decision of Bannon J in the NSW Land and Environment Court, which had upheld the Council's decision to build the outfall, and held that the land to be used for public recreation and enjoyment must be open to the public generally as a right. The Court held that a local council or other relevant authority is entitled to impose regulatory and restrictive conditions upon an area of land which has been set aside for public recreation only if the restrictions are ancillary to an improvement which promotes the use and enjoyment of the land as a public recreation area.

It was held that the sewage works could not be regarded as promoting, or as ancillary to, the use of the headland for public recreation. This decision is of importance to councils because many areas zoned Open Space,

or with similar limitations, have utility installations and public buildings erected thereon. This decision casts doubt on the lawfulness of such development.

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