

Expert Determination Clause - Court's Power To Invalidate

Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd,
Supreme Court of Western Australia, Heenan J, 2 December 1997.

The Facts

The parties entered into a sub-contract, whereby Kayah Holdings agreed to provide shop drawings for the structural steel fabrication on a project managed by Baulderstone. A dispute arose between the parties as to whether Kayah Holdings had completed the drawings within the prescribed time and as required by the contract, and also as to whether it was entitled to payment for additional work, delay costs and variations. Meanwhile, another sub-contractor engaged on the project commenced an action against Baulderstone claiming damages resulting from the late supply of, and defects in, the drawings supplied by Kayah Holdings.

A clause in the contract provided for reference to an independent third party, other than the court, in order to resolve disputes arising out of that contract. Relevant sections of the clause are as follows:

"... If any dispute arises out of this Agreement, the Parties shall in the first instance attempt to resolve such dispute by mutual consultation between the Chief Executive Officers of the Parties and any party may at any time serve a notice on the other Party requesting such consultation and stating the nature of the dispute.

If after fourteen (14) days of service of such notice the dispute has not been settled, then each Party may serve a notice on the other requiring that the dispute be resolved by the determination of an independent third party (the "Referee") acceptable to both parties. If the Parties cannot agree on the Referee within seven (7) days of the date of service of the notice then either Party may request the Chairman of the Institute of Arbitrators Australia to nominate the Referee.

The Referee who has been agreed upon or appointed shall act as an expert and not as an arbitrator.

The Referee shall investigate the dispute and make his decision on it in any manner that he shall see fit, subject to the following:

- (a) *He shall observe the principle of procedural fairness and natural justice.*
- (b) *He shall make his decision in writing and include in it a statement of the reasons for making his decision.*

- (c) *The investigation and decision shall be kept confidential between the parties and the Referee.*

The decision of the Referee shall be final and binding upon the parties, except that the Referee may correct his decision where in his opinion it contains a clerical mistake, an error arising from an accidental slip or omission, a defect of form, a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the decision ..."

The Court was required to decide whether or not the clause was void as being against public policy and in either event whether, in light of the institution of court proceedings which raised the same issues between the parties, the reference already under way should continue.

Clause Void As Against Public Policy

Justice Heenan observed that, as a general rule, the Court will recognise as proper any procedure which the parties have agreed upon to settle a dispute. If the parties have agreed in writing to refer disputes to arbitration, their agreement will be recognised and enforced, as shown by the provisions of the *Commercial Arbitration Act 1985*. Even if the procedure agreed upon is not arbitration, the agreement might well be enforceable as a matter of contract. Usually the court will not intervene when the parties have referred a matter for the determination of an expert if such determination is within the referee's particular field of expertise.

The main limitation posed upon the power of contracting parties to prescribe their own rules, is that they cannot contractually oust the jurisdiction of the Court. In this case, the clause provided for the resolution by the referee of any dispute arising out of the contract, whether or not the determination of the dispute was within the referee's particular field of expertise. The clause purported to make the referee's decision final, rather than making the determination nothing more than a condition precedent to a legal right capable of enforcement by action through the court. To that extent, Justice Heenan found that the clause operated to oust the jurisdiction of the Court and would not be recognised.

Referee Required To Act As Expert, Not Arbitrator

The parties agreed that the referee "*shall observe the principle of procedural fairness and natural justice*" and shall state his decision and his reasons for it in writing. Although the referee was required to use his own skill and knowledge as an expert, the referee shall not "*act ... as an arbitrator.*"

Justice Heenan found that an arbitration involved a judicial inquiry worked out in a judicial manner. Thus an arbitrator must not only be impartial, but, unlike an expert, must decide the dispute in accordance with the substantive law and on the basis of such evidence and submissions as the parties present to him, where the nature of the dispute does not render this inappropriate.

The issues for determination in this case involved matters both of fact and of law. Among other things, there were issues as to whether the contract was partly oral and partly written, and as to whether there was any agreement as to the price for additional work undertaken. In Justice Heenan's view, satisfactory determination of those matters by a referee who was required to act as an expert and not as an arbitrator was impossible: by its very nature the task was one for an arbitrator and not an expert.

Severance

Kayah Holdings submitted that even if the clause was not valid and enforceable, the Court could, pursuant to another clause in the contract, sever the passage requiring the referee to act as an expert and not as an arbitrator. His Honour found that despite the broad terms of the severance clause in the contract, it did not enable the court to sever the paragraph of the clause in order to bring about a result which would be in conflict with the express intention of the parties, and that would certainly be the case here.

Proceeding With The Reference

The Court has jurisdiction to restrain any party or the referee from proceeding with a reference. The guiding principles are that a stay must not cause injustice to the other party, and that the applicant must satisfy the court that the continuance of the reference would be oppressive or vexatious or an abuse of the process of the Court. Because the determination clause was void, it is followed that there should be a stay of the reference in this case. Justice Heenan noted other practical reasons for the stay, which included the expense and delay occasioned by the conduct of two sets of proceedings relating to the same dispute, the potentiality for inconsistent findings and the convenience of having the claim of the third party against Boulderstone determined at the same time as the dispute between the parties to this action, something which could not be achieved in the reference, and, lastly the unsatisfactory nature of the process described in the clause.

Conclusion

The clause in question was not an arbitration clause and the Court could not make it so. The clause was found to be against public policy in that it purported to oust the jurisdiction of the Court and prescribed a procedure which was entirely unsuited to the resolution of the dispute which arose out of the contract. The clause was void.

Because the clause was void a stay of the reference was granted given the circumstances.

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