

The Law Relating To Expert Determination

- **Karyn Mealey, Partner,
Dunhill Madden Butler, Solicitors, Sydney.**

"... an agreement to shut out the power of the King's Courts to guide the proceedings of inferior tribunals without legal training in matters of law before them is calculated to lead to erroneous administration of law, and therefore injustice ...

*... commercial men will be making a great mistake if they ignore the importance of administering settled principles of law in commercial disputes, and trust to the judgment of business men, however experienced in business, based only on the facts of each particular case, and with no knowledge of or guidance in the principles of law which must control the facts ..."*¹

EXPERT DETERMINATION DISTINGUISHED

Before entering into a legal discussion of the distinction between arbitration and expert determination, it is as well to be reminded of the main differences between the referee, the arbitrator, the mediator, the expert and the valuer.

An arbitrator takes authority from, in New South Wales, the *Commercial Arbitration Act* 1984, (and there is similar legislation in all of the States and Territories of Australia). An arbitrator acts judicially and makes binding adjudications (subject to a limited right of appeal to the courts) in an adversarial setting, with the sanction of the court for ordering directions and production of material on subpoena (pursuant to Part 3 of the *Commercial Arbitration Act*).

Mediation is generally a voluntary, co-operative, non-adversarial, non-binding and conciliatory attempt to arrive at a negotiated commercial arrangement facilitated by a mediator. Generally, the cost is relatively low and confidentiality may be protected. A mediation may be brought on quickly, with the possibility of preserving commercial relationships and placating both parties and, if successful, is likely to be concluded with a binding agreement.

Expert determination involves the opinion of an expert being provided as to certain defined issues following an inquisitorial investigation. It may be binding or non-binding and it is used as an alternative to arbitration. There is perceived to be an increased opportunity to

preserve relationships than with litigation. As expert determination is only governed by the contract directing its use (apart from those cases where it is directed by a court during litigation, in which case it is governed by the order of court and the court rules²) for dispute resolution there may be, depending on the terms of the contract, only a limited right to review the determination. Notably, the expert has no coercive power to, for example, issue a subpoena for the production of further material.

What today passes for expert determination used to be referred to as "valuation" or appraisal. Nowadays, valuation and valuers simply value, for example, the sale of business and figures for sales in accounts³.

In modern commercial contractual disputes where significant fees are paid to the adjudicator, and parties still wish to be represented by counsel, these "alternative" forms of dispute resolution will not necessarily provide the expected costs savings and it may be cheaper to engage in litigation, where filing fees are the only additional costs.

ARBITRATION VERSUS EXPERT DETERMINATION

A number of criteria must be examined in order to clarify whether or not the process observed is to be regarded as an expert determination or an arbitration. If it is an arbitration it will be governed by the *Commercial Arbitration Act*. Astor and Chinkin⁴ list a number of criteria, as follows:

Nature of Enquiry

If the rules of evidence do not apply and the adjudicator is bound to consider evidence in light of personal expertise, then the implication would be that the proceeding is an expert determination. If the proceedings are inquisitorial or the adjudicator is conducting an investigation drawing upon personal expertise, then the implication would be that the proceedings are to be considered to be expert determination rather than arbitration⁵.

Basis of Decision

An expert is committed to using personal expertise and may rely upon personal judgment "unfettered by the submissions of the parties"⁶, depending upon the terms

of reference. This contrasts with the arbitrator who must decide upon evidence presented during the proceedings.

Natural Justice

Following the principles of natural justice does not mean that the proceedings will necessarily be considered to be an arbitration. As shall be seen, the terms of an expert determination are very much governed by contract, and there has been a tendency to consider procedural fairness to be an implied term in any such expert determination contract.

Finality

An arbitration is final and binding. Depending upon the intention of the parties, so too an expert determination may be considered final and binding, subject to judicial review for a failure to comply with the contract or where there is some material vitiating factor relevant to the determination⁷. The scope and power of the expert determination, as has been suggested, is very much dependant upon the intention of the parties as expressed in the contract. The contract can provide for expert determination in the event of dispute. Where a determination is made which is outside the terms of the appointment, the decision may be subject to judicial review. In addition, if there has been collusion or fraud, the determination is reviewable by a court. Further, though, the expert decision may possess a finality even in the event of an incorrect application of law by the expert.

Intentions

The intention of the parties, as to whether the proceedings are to be considered to be arbitration or expert determination, will be important but not conclusive of whether the person acts as expert or arbitrator. The case law demonstrates that express words in a contract will not be conclusive but will be very persuasive⁸. This becomes important for adjudicators when attempting to claim immunity from negligence under the *Commercial Arbitration Act*, on the basis that the adjudicator was engaged as an arbitrator and not as an expert.

As is evident this far, there are no precise guidelines which one can apply to determine whether an adjudicator is acting as an expert or arbitrator. Only a close examination of the above criteria will assist in determining whether the process is an arbitration or expert determination. Even then, the answer is not without difficulties.

ENGAGEMENT AND POWERS

An expert determination is typically specified in a contract to come into effect when the dispute arises. A dispute may also be referred to an expert by agreement after the dispute has arisen. A referral to an expert need not be in writing, although obviously there will be greater difficulty in interpreting the intentions of the parties should the agreement not be in writing.

It can be seen from cases such as *Northern Regional Health Authority v Crouch*⁹ that the limit of an expert's jurisdiction will be set by the terms of the relevant contract

provision. This may be of greater significance in more complicated transactions such as construction contracts where there can be a wide variety of subject matter and types of review.

In a clause prescribing expert determination, it is usual for the clause to allow the parties to agree an expert, and in the event they cannot agree, the clause will provide for an appointing authority to decide who is to conduct the matter. Usually, a professional qualification will be prescribed for the expert.

As discussed above, parties desiring an expert determination should expressly specify the adjudicator to be acting as an expert and not as an arbitrator, although the wording on this matter is not decisive¹⁰.

Further attributes which an expert determination agreement should contemplate, include:

- provision for a party to apply on its own for determination;
- whether the decision be final and binding (the meaning of this is discussed below);
- a due date for payment of the determination fees;
- whether or not the expert should have the power to award interest;
- do the parties each want to bear costs equally, or should costs follow the cause?;
- qualifications of the expert¹¹.

It should not be necessary to specify the procedure to be followed, other than perhaps to specify the parties' right to make representations or submissions, so that the parties have the right to state their case. This may be left until after the appointment of the expert and need not necessarily be contained within the contract where the dispute resolution clause is contained¹².

LIABILITY OF THE EXPERT

Liability in Contract and Generally

An expert can encounter liability on a whole range of grounds. Unlike arbitrators, experts do not have any legislative protection from liability in relation to the conduct of their determination¹³. If the parties do not specify how the proceedings are to be conducted, an expert finds himself or herself in a ruleless vacuum, left to his or her own opinions and devices¹⁴. Indeed, in the absence of agreement by the parties as to procedures, the procedures are to be decided by the expert¹⁵. This necessarily opens the possibility of the parties suing for professional negligence or breach of the contract with respect to the procedure adopted by the expert as well as for the determination itself.

The types of claims which may be commonly brought against an expert have been summarised as:

1. failure to carry out the reference properly;
2. failure to deliver a timely decision;
3. failure to follow the parties' instructions;
4. failure to provide the standard of care and diligence expected of a professional in the expert's position¹⁶.

The above claims could lead to the expert losing his fees and being subject to damages for loss of the parties' time and money. Significantly, where the parties have failed to appoint an expert in accordance with the contract or by clear agreement, the reference may be invalid and, in this case, the expert may not have a fee entitlement unless the agreement provides that fees are to be paid even in the event of an invalid reference¹⁷.

Limiting Liability

The most effective method for an expert to avoid liability is to obtain an indemnity from the parties with respect to the determination. The drafting of such an indemnity should be carefully undertaken as, where there is any ambiguity as to the scope and effect of the indemnity it will be interpreted in the way which is least protective of the expert¹⁸.

Parties may find the basis of the claim for professional negligence in the reasons given by the expert for their determination. Accordingly, an expert may gain some level of protection by providing minimal reasons and thereby reducing the exposure to liability.

On a practical level, experts can attempt to limit their potential liability by having a process of their own which they follow in a determination. The following is a list of matters which an expert may wish to determine prior to commencing an expert determination:

- whether there is a contract pursuant to which the expert is to be appointed and a determination made;
- the relevant clause in the contract;
- the manner in which the expert is to be appointed;
- the issues to be decided;
- whether there is a specific nature and form which the proceedings are to take;
- how the expert's fees are to be paid, and other costs issues such as venue costs etc.

By determining these matters, the expert will know what, if any, rules are to be followed and will limit arguments over issues, costs and so on at a later date.

Liability in Tort?

The requisite elements to bring a tortious action for negligence are:

1. whether there is a duty requiring conformity to a certain standard, known as a "duty of care";
2. negligence, or a failure, to meet the required standard, ie. breach of the duty;
3. loss as a result of the negligence.

An expert who makes a determination between two parties is likely to owe a duty of care to those parties as they will be relying on the expert to ensure that a proper determination is made. The standard of care that the expert would be required to satisfy is to conduct the determination with the same degree of diligence as other experts in the

same position. Should the expert fail to satisfy that standard of care, the expert would be liable for all loss and damage caused by that failure.

Concurrent Liability in Contract and Tort

From cases such as *Bryan v Maloney*¹⁹ and *Hill v Van Erp*²⁰ it is clear that a person such as an expert does not only owe a duty in contract to the parties to the determination, but also, a duty of care breach of which will give rise to liability in tort for negligence to third parties affected by the determination and to the parties themselves.

Although, this dual liability of an expert is unlikely to have practical consequences in relation to the amount of damages that an expert may be liable for (although, the method of assessment of those damages is technically different), it may have practical consequences in relation to the duration of an expert's liability.

The time limitation of liability for both breach of contract and the tort of negligence is 6 years from the day upon which the cause of action accrues²¹. However the way in which the day upon which the cause of action accrues is decided differently for breach of contract and negligence.

For a claim based on breach of contract, time begins to run from the day of the breach, regardless of whether damages has then occurred or not.

From the decision in *Wardley Australia Ltd v State of Western Australia*²² it is clear that the time limit on liability in negligence only begins to run from the day that the relevant damage becomes known or manifest to the claimant rather than when the relevant act occurred.

Duties of the Expert

Even where the expert's contract with the parties does not contemplate the procedures and duties which are to be followed, a number of duties may be implied.

A duty to make independent investigations:

If parties have not submitted adequate material to the expert, then arguably there would be a duty to make independent investigation. It would, however, be difficult to prove that the material omitted caused the loss the subject of the complaint. In any case, the party complaining may be liable for contributory negligence for not drawing the information to the attention of the expert in the first place²³.

A duty to be fair:

This will be governed by the contract²⁴. However, where the contract is silent on the matter and not otherwise agreed by the parties, there is support for the position that the expert is obliged to be fair²⁵. However, what is "fair" will depend on the circumstances of each determination. The relevant provision of the contract between the parties may set guidelines as to what is "fair" and this needs to be balanced against the expert's duty to investigate the matter and apply his or her own knowledge and experience. Subject to the terms of the parties' contract it

is likely to be appropriate for each party to make submissions to the expert (copied to the other party) and then for each party to have an opportunity to comment on the other party's submission. This would not, however, relieve the expert from investigating, including asking questions of the parties, any matter that was not dealt with to the expert's satisfaction.

A duty to provide a conclusive decision:

Although the question of whether an expert must provide a conclusive decision will ultimately be decided by the contract, it is likely that such an obligation will be implied in the absence of a clear statement²⁶.

Duties to third parties:

An expert will owe a duty to a third party insofar as the expert's negligent determination may cause damage to a third party, where damage of that type was reasonable foreseeable²⁷.

Potential Liability for Defamation

Although there is a possibility that an expert may become liable for defamation in making a determination, an expert's exposure is likely to be small.

Firstly, the determination is likely to be confidential, either by specific agreement or merely by the circumstances of the situation. Accordingly, it is unlikely that a statement made by an expert will result in a defamation, that is, the claiming party being able to demonstrate that its reputation in the public or market arena has been damaged.

Secondly, it is likely that the defamation laws will afford the expert defences in relation to any defamatory material arising out of the position held by the expert. The most significant among these defences is that of qualified privilege.

Qualified privilege protects a person who makes a statement in a report, that may otherwise be defamatory, from a claim, if the person giving the report and making the statement is under a duty to give that report. However the defence of qualified privilege does not provide protection where the statement is malicious. An expert, being obliged to make a determination, is likely to be entitled to use the defence of qualified privilege provided that his or her statements are not malicious²⁸.

ENFORCEABILITY OF AN EXPERT'S DECISION

There is no legislative basis upon which an expert determination may be enforced. Accordingly, the enforcement of an expert's determination is dependant on the terms of the contract between the parties.

The most common forms of enforcement of an expert determination in contracts are:

1. failure to comply with the determination is a breach of the contract entitling the innocent party to terminate the contract;
2. the value of determination is a debt due and payable to the innocent party;
3. the determination is final and binding and the

parties are obliged to conduct themselves in accordance with the determination.

CHALLENGING THE DECISION

A decision may be challenged on the basis of fraud or actual bias, although not necessarily where there is simply a conflict of interest or a perceived lack of independence²⁹. It may also be challenged if it appears the expert acted beyond the terms of his or her appointment.

A decision may not be challenged simply upon the revocation of authority by one party, as this may be considered to be a repudiation of contract, giving the other party the right to damages.

Except for those cases where the determination would cause an illegality³⁰, a determination will stand unless and until it is successfully challenged.

If the decision is outside the terms of the expert clause, for example if there is no authority for a certain question to be decided or the appointment of the expert is invalid, then the determination would be unenforceable if it is challenged. Similarly, if the conditions precedent to the expert determination were not satisfied, a decision would be open to challenge³¹.

The situation of mistake raises interesting questions. Generally speaking, a court will not interfere where the decision has been a matter of opinion. The old view was that a decision could be overturned in the event of a miscalculation, or for mistake of jurisdictional principle of law (including interpretation of documents)³².

The position was modified in *Jones v Sherwood*³³. If it is contracted that the decision should be final and binding, and if the right questions have been asked, then the decision of the expert will stand despite a mistake. In *Nikko v MEPC*³⁴, even though the right question was answered in the wrong way, the decision was still held to be binding.

A distinction should be made between "speaking" and "non-speaking" awards. A speaking award provides reasons for the decision. A speaking award, given that there are reasons, will obviously be easier to overturn given the evidence of error on reading the decision. *Jones v Sherwood*, cited above, provides that the distinction between a speaking and non-speaking awards is doubtful, although the real issue is whether or not there is material to assist challenging the decision³⁵. Practically, it should therefore follow that a speaking award will be easier to challenge than a non-speaking award, given the fact that there will be more material to assist the challenge of the award.

Points of law cannot be questioned unless the expert has asked the wrong question of law, in other words, provided that the expert has considered the relevant question of law it is irrelevant that he answered it incorrectly, provided that it does not result in substantial injustice³⁶. Importantly, where the parties have agreed to allow a matter to be determined by an expert, the expert's scope for the determination of all aspects of that matter, including for example, legal consideration of a document

by an expert accountant³⁷. However, where there has been a manifest error which would produce a materially different result and, therefore, substandard injustice, the court will usually substitute the correct valuation for the incorrect valuation³⁸.

However, should the expert act outside his scope of expertise, he or she may expose himself or herself to a claim of negligently conducting the determination (negligence has been discussed above). Accordingly, where the expert is forced to consider a matter that is outside his or her scope of expertise, it may be appropriate for the expert to seek the assistance of other appropriate professionals. Unless the contract between the parties or the expert's terms of engagement specifically give an entitlement to the expert to engage other professionals, the expert should discuss the matter with the parties and agree to an appropriate course of action.

Procedural fairness is not necessarily an appealable point unless it is stipulated in the contract that procedural fairness should apply: see *Capricorn Inks* (cited above).

RECOMMENDATIONS

Given that the determination process is heavily dependent upon contract, it is imperative that a contract contemplating expert determination should be drafted carefully. Suggestions have been made above for what should be included in such provisions.

From an expert's point of view, less reasoning provided by the expert will leave less chance for challenge and less susceptibility to liability for evidence of negligence.

Footnotes

1. *Czarnikow v Roth Schmidt & Co.* [1922] 2 KB 478 at 489 per Scrutton LJ.
2. See, for example, Parts 39, 72 and 72C of the NSW Supreme Court Rules.
3. John Kendall, *Dispute Resolution: Expert Determination* (Longman Group, 1992), p33.
4. Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (Butterworths 1992) pp133-139.
5. *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd.*
6. *Palucath v Flanagan* [1985] 2 ALL ER 161
7. *Fletcher Construction Australia Limited v MPN Group Pty Ltd* unreported decision of Rolfe J in the Supreme Court of NSW dated 14.7.97.
8. *Palacath Ltd v Flanagan* [1985] 2 All ER 161.
9. [1984] 1 QB 644.
10. *Palacath Ltd v Flanagan* [1985] 2 All ER 161.
11. Kendall, pp49-53.
12. *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*, unreported decision of Rolfe J in the Supreme Court of NSW 14.7.97.
13. s.51 of the *Commercial Arbitration Act* in relation to the exclusion of liability of arbitrators and umpires.
14. Courts will not stipulate procedures to be followed

in an expert determination if the parties have not agreed to any - *Triano Pty Ltd v Triden Contractors Limited* (1990) BCL 305 at 307.

15. *Fletcher Constructions Australia Ltd v MPN Group Pty Ltd*, unreported decision of Rolfe J in the Supreme Court of NSW, dated 14.7.97.
16. Kendall, p115.
17. *Darlington Borough Council v Waring and Gillow (Holdings) Pty Ltd* [1988] 2 EGLR 159.
18. *Darlington Future Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500.
19. (1995) Aust. Torts R 81-320.
20. (1997) 142 ALR 687.
21. Section 14 of the *Limitation Act* 1969.
22. (1992) 175 CLR 514.
23. In this regard see *Wallshire Ltd v Aarons* [1989] 1 EGLR 147.
24. *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8.
25. See Denning LJ in *Lee v Showmans Guild* [1952] 2 QB 329 at 342.
26. *Sherrock Ltd v Meggit PLC* [1991] BCC 471.
27. *Hill v Van Erp* (1997) 142 ALR 687.
28. The leading case on qualified privilege is *Adam v Ward* [1917] AC 309.
29. There is no reported case law directly dealing with this matter and analogy is drawn from the principles of administrative law. However, for consideration of these matters see *Midland Montagu Leasing (UK) Ltd v Tyne and Wear Passenger Transport Executive and Earnest and Whining*, unreported decision of the Chancery Division of the English High Court dated 23.2.90.
30. *Darlington Borough Council v Waring and Gullar (Holdings) Ltd* [1988] 2 EGLR 159.
31. *Golling and Co Ltd v Karenlee Nominees Pty Ltd* (1983) 49 ALR 135.
32. Lord Denning in *Dean v Prince* [1954] 1 Ch 409 at 427.
33. [1991] NPC 60.
34. [1991] 28 EG 86.
35. Kendall, p98.
36. *Nikko v MEPC* [1991] 28 EG 86.
37. *Chelsea Mar plc v Vivat Holdings plc*, unreported decision of the English Court of Appeal dated 24/8/89.
38. *Sudbrook v Eggleton* [1983] AC 444.

- This paper was first presented to the NSW Chapter of The Institute of Arbitrators Australia. It was the catalyst for a robust discussion on expert determination, including about problems and pitfalls which may arise.