

EXPERT DETERMINATION

J McMullan, 28 September 2009

1. Overview

Expert determination is typically described as an adjudicative process in which an independent expert in the subject matter of the dispute is appointed to investigate and deliver a decision that the parties agree will be determinative of the issues between them.¹

Expert determination has been used, successfully, regularly in recent years, in construction disputes. Many Standard Form General Conditions of Contract provide for the appointment of an independent superintendent, engineer or architect to administer the contract. Other contracts typically provide for an independent Valuer or Adjudicator to determine entitlements.²

Experience in expert determination indicates that the process avoids the time and cost associated with litigation and commercial arbitration, while the legal processes that the parties give up, rarely cause any substantive disadvantage. As observed by Einstein J in *The Heart Research Institute Ltd v Psiron Ltd*³:

Expert determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind

The Institute of Arbitrators and Mediators Australia (IAMA) keeps some figures as to the number of disputes referred to IAMA seeking nomination of an expert, however, like commercial arbitration, the process is private.

The substantive advantage of expert determination is that the process is cheap, quick, informal and final. The key disadvantage is that the parties need to forgo the full legal processes (pleadings, discovery, evidence, cross-examination, appeal rights).

The real gamble is that, in choosing expert determination over arbitration, parties may be forsaking an internationally enforceable award and an established system of domestic and international laws in favour of what may prove to be the illusory advantages of reduced cost, speed, and informal procedure.⁴

However, in practice, giving up the full legal processes is rarely a great disadvantage to most parties (especially in the lower money disputes) and that the cost and time saved in avoiding the protracted legal process has more commercial value.

For example, a reasonably non-complex construction contract dispute, where the amount in dispute is of the order, say, of A\$1 million, might usually take of the order of nine to eighteen months to come to hearing in litigation or commercial arbitration, compared to an expert

¹ Barry Tozer, 'Settling Disputes of an Intermediate Kind by Expert Determination' (2008) 24 *Building and Construction Law* 238, 238.

² Ibid, 239.

³ *The Heart Research Institute Ltd v Psiron* [2002] NSWSC 646, 16.

⁴ Doug Jones, 'Construction Project Dispute Resolution: Options for Effective Dispute Avoidance and Management' (2006) 132 *Journal of Professional Issues in Engineering Education and Practice* 3, 230.

determination, which might take, say, of the order of four to six weeks.

No doubt, the cost of the litigation/commercial arbitration process to each party will vary depending on the degree of preparation and seniority of counsel.

By comparison, the cost of referring the dispute to expert determination, (written submissions rather than, say, pleadings, discovery, evidence, cross-examination, etc ...), may be substantially less.

2. The process

The process is up to the parties, but would usually follow this general approach:

- a) The referral process is exactly like commercial arbitration. The parties agree to go to expert determination (usually, like in commercial arbitration, this agreement is contained in the original contract). The expert and/or the person to nominate the expert, is set out in that agreement. Alternatively, the parties agree to refer their dispute to expert determination, pick an expert, and the parties execute an expert determination agreement.
- b) The dispute process is usually something like:
 - i) The Claimant submits written submissions (including any documents Claimant relies on) to the expert and to the other party.
 - ii) The Respondent submits written submissions (including any documents Claimant relies on) to the expert and to the other party.
 - iii) The Claimant submits a reply (if any).
 - iv) The parties have a meeting/conference/make submissions before the Expert, and make any further submissions.
 - v) The expert delivers a written determination.

3. Legal Status of Expert determination

The legal standing is more complex. Mr Justice McHugh identified three key legal issues in a recent paper⁵:

- a. What is the scope of the expert determination, ie what is the Expert entitled to do?
- b. In what circumstances will a court hold the expert determination to be an attempt to oust the jurisdiction of the court, and be therefore invalid?

⁵ The Hon Michael McHugh AC, "Expert Determination", paper delivered to the Chartered Institute of Arbitrators (Australia) Ltd, 30 April 2007; (2008) 74 *Arbitration: the Journal of the Chartered Institute of Arbitrators* 2, 148-162.

- c. In what circumstances will the courts set aside an expert determination on the ground that the Expert has made an error in reaching his or her decision?

Mr Justice McHugh reviews the historical development of the court's approach to reviewing errors of the Expert in the determination.

Lord Denning at one point, expressed the wide view, in the (then) leading case of *Dean v Prince*⁶, that:

... if the courts are satisfied that the valuation was made under a mistake, they will hold it not to be binding on the parties.

Lord Denning later said, however, in *Arenson v Arenson*⁷:

... Whenever two persons agree together to refer a matter to a third person for decision, and further agree that his decision is to be final and binding upon them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. They cannot reopen it for mistake or error on his part or for any reason other than for fraud or collusion....

This seems to be the more universal approach by the courts (ie that parties, except in extreme circumstances, are generally to be held to their agreement to be bound by the determination of the Expert).

In his paper, Mr Justice McHugh referred to his own judgment in *Legal & General Life of Australia Ltd v A H Hudson Pty Ltd*⁸ where he had said:

*In my opinion the question whether a valuation is binding upon the parties depends in the first instance upon the terms of the contract, expressed or implied... 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 a conclusion to be drawn would 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 the 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 the 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 agreed 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. It is now settled that an action for damages for negligence will lie against a valuer on whom the parties have referred the question of valuation if one of them suffers loss as the result of the negligent valuation: *Sutcliffe Thackrah* [1974] AC 727; *Arenson v Arenson* [1977] AC 405. But as between the parties to the main agreement the valuation can stand even though*

⁶ ([1954] Chancery 409

⁷ [1973] Ch 346

⁸ [1985] 1 NSWLR 314

it was made negligently. While the 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 a 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 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.

His Honour notes, however, that a review of the many cases since his judgment in *Legal & General* suggest a different trend:

... Courts are very ready to imply terms of a party or other person will act reasonably. And there is a natural judicial reluctance to uphold a decision which is regarded as unreasonable.

In summary, it seems that the court will look to the contract (for example : “the parties agree to be bound “) and, except in extreme cases, decline to overturn the determination of the Expert, in the absence of some factor that goes beyond the contract that the parties bound themselves to (eg fraud, collusion, or some substantive total factual error , ...).