Age Old Builders Pty Ltd v Swintons Limited

[2003] VSC 307 (21 August 2003)

Expert Determination agreement – whether void as requiring a dispute to be referred to arbitration, contrary to the Domestic Building Contracts Act 1995 (Vic) – the Institute's Rules for the Conduct of Expert Determinations *1997 - difference between expert determination and arbitration*

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The last issue of *The Arbitrator & Mediator* (Volume 22 No 2 August 2003) contained an article by David Levin QC (page 67) and a Case Note (page 81) on the VCAT decision in *Age Old Builders Pty Ltd v Swintons Limited* [2002] VCAT 1489, noting that an appeal to the Supreme Court of Victoria was to be heard. The facts of the case were set out in that earlier Case Note (at pages 82–83), and are not repeated here.

Justice Osborn delivered judgement on 21 August 2003. He allowed the appeal, and remitted the matter back to a differently constituted VCAT tribunal to deal with some outstanding matters.

Section 14 of the *Domestic Building Contracts Act 1995 (Vic)* provides that *'Any term in a domestic building contract or other agreement that requires a dispute under the contract to be referred to arbitration is void'.* His Honour found that, on its proper construction, s. 14 of the Act is not intended to apply to agreements which refer present disputes to arbitration, having regard to the objects of the Act, the choice of language utilised, the reports of proceedings in Parliament in which the purpose of the provision was stated, and the consequences of the construction contended for (see paragraphs 37, and 41 to 57 of the Judgment). That finding would have been sufficient to allow the appeal.

Of wider interest to readers of this Journal is the further basis on which the appeal was allowed, namely that the process agreed to be conducted by the building consultant was an expert assessment rather than an arbitration. Given the dearth of modern authority on the difference between arbitration and expert determination, the relevant parts of the judgement are set out below.

In paragraph 59 of the judgment, his Honour quoted from the judgment of Lord Esher MR in *Re Carus Wilson and Greene* (1886) 18 QBD 7, where his Lordship said, at page 9:

> *'The question here is, whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or an arbitrator.* ***If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon the evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry***

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worked out in a judicial manner. *On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of mere valuation.* ***There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances.*** *I think that this case was clearly not one of arbitration, and that it falls within the class of cases where a person is appointed to determine a certain matter, such as the price of goods, not for the purpose of settling a dispute which has arisen, but of preventing any disputes.'* (emphasis added)

Justice Osborn then continued:

'60. It is the appellant's case that the referral in issue in the present case was of the "intermediate kind" referred to "where, though a person is appointed to settle disputes that have arisen, still, it is not intended that he should be bound to hear evidence or arguments."

61. In Hammond v Wolt [1975] VR 108, Menhennitt J considered a building contract which included the following provision:

"(b) Any arbitrator appointed under the provisions of this agreement shall at his own discretion act as arbitration or assessor. Where he considers that any question arising out of the dispute refers to the quality or value of any work or material supplied he may act as an expert and arrive at and make his assessment in such manner as he considers fit. Where any question arising out of the dispute shall relate to the interpretation or existence of any agreement between the parties hereto then the arbitrator shall act as arbitrator and allow the parties to appear before him and to produce witnesses and give evidence to him relating to the dispute and on the evidence so given and on his own investigations and on any assessment which he may make arrive at his decision and make his award."

62. In Hammond v Wolt the owner issued court proceedings for breach of the contract. The builder desired to submit the dispute to arbitration and sought a stay of the proceeding pursuant to s. 5 of the Arbitration Act 1958. The builder failed to obtain a stay in the first instance because the clause quoted gave to the person appointed a discretion as to whether he would act as an arbitrator or assessor. Consistently with the statement of Lord Esher and after referring to subsequent authority, his Honour emphasised that the first characteristic of an arbitration is that it involves an inquiry in the nature of a judicial inquiry. As a component of such inquiry the parties have a right to be heard if they so desire. If the parties have a right to call evidence that is an indication that the reference is to arbitration although it was unnecessary for the Court to decide whether

such a right was an essential component of arbitration. It is, however, not inconsistent with an arbitration for the arbitrator to be entitled to rely upon his own expertise in making a determination.

63. *Whilst Hammond v Wolt has been overruled or distinguished on other points, the proposition that arbitration involves an inquiry in the nature of a "judicial inquiry" continues to be applied in more recent authority; see Goldflax Pty Ltd v Reefield Pty Ltd (Supreme Court of Queensland, unreported decision, 6 September 1999) where Jones J had to answer the "threshold question" of whether the process there in issue was an arbitration and Santos Ltd v Pipelines Authority of South Australia (1996) 66 SASR 35 at 46-47 where Debelle J stated "it is well established that an arbitration involves an inquiry in the nature of a judicial inquiry" and set out some indicia of such an inquiry:*
    a) *the parties have the right to be heard if they so desire;*
    b) *the parties are each entitled to see and hear the evidence advanced by their respective opponents;*
    c) ***the parties have the right to give evidence if they so desire;***
    d) ***each party is entitled to test by cross-examination or by other appropriate means the opposing case and to answer the opposing case.***
64. *The Tribunal referred to and quoted from the judgment in Hammond v Wolt at paragraph 18 of its decision. It addressed the criteria identified in Hammond v Wolt at paragraph 19 and it concluded that the reference to the building consultant in the present case was a reference which contemplated an inquiry in the nature of a judicial inquiry because:*
    a) *the building consultant was required to make a determination and this requirement contemplated a rational inquiry;*
    b) *the determination was required to made according to law and such a decision was inconsistent with an expert determination;*
    c) *the building consultant was required to proceed in accordance with the rules of procedural fairness which the Tribunal regarded as "an incorporation of the rules of natural justice" which arbitrators are required to observe;*
    d) *the determination was agreed to be final and binding, which was also regarded as a hallmark of a judicial inquiry;*
    e) *the referral was of an actual dispute and was made in terms which used the word "submitted" a word used in the Arbitration Act 1958.*
65. *The Tribunal further concluded that there was a right to be heard in the relevant sense either as a consequence of the requirement to provide "procedural fairness" or as a result of the parties' right to make written submissions. Furthermore attendance was envisaged at conferences convened by the building consultant as "necessary and appropriate". The Tribunal noted the referral provided for no right to call evidence unless such right was subsumed in the notion of*

"procedural fairness". The building consultant was, however, required to make his determination on the basis of the information received from the parties and Hammond v Wolt did not decide whether a right to call evidence was a necessary element of arbitration. The Tribunal further concluded that the requirement that the building consultant must make his determination on the basis of his own expertise was not inconsistent with an arbitration.

66. *The Tribunal went on to consider other indicia of the character of the referral to the building consultant to which I shall return* ***but in my opinion the above analysis fails to properly apply the critical requirement of an inquiry in the nature of a judicial inquiry****.*

67. *The concept of an expert determination is a well recognised one. The Tribunal quoted from the decision of Einstein J in Heart Research Institute Ltd v Psiron Ltd [2002] NSWSC 646 where he quoted from guidelines as follows:*

"Guidelines for Expert Determination

[15] Business disputes can often be best resolved by the parties with the assistance of an independent third party. Expert Determination is a dispute resolution process which assists parties resolve disputes without the delay and expense of going to court or arbitration. The parties agree by contract to be bound by the decision of the Expert who has expertise in the area where the dispute has arisen. The parties select the Expert from a panel of Experts provided by ACDC. The parties then present documentation relevant to the dispute to the Expert. The Expert considers the documentation and generally arranges to meet with the parties to discuss the dispute. The Expert then makes a determination which binds the parties."

Einstein J stated:

"Expert Determination and Ouster of Jurisdiction

[16] As the plaintiffs point out, in practice, Expert Determination is a process where an independent Expert decides an issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the Expert. Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kinds. [17] Unlike arbitration, Expert Determination is not governed by legislation, the adoption of Expert Determination is a consensual process by which the parties agree to take defined steps in resolving disputes. I accept that Expert Determination clauses have become commonplace, particularly in the construction industry, and frequently incorporate terms by reference to standards such as the rules laid down by the Institute of Arbitrators and Mediators of Australia, the Institute of Engineers Australia or model agreements such as that proposed by Sir Laurence Street in 1992. Although the precise terms of these rules and guidelines may vary, they

have in common that they provide a contractual process by which Expert Determination is conducted."

68. ***The Tribunal also set out the relevant "rules" for the expert determination of commercial disputes which the parties adopted in the present case as the basis on which the building consultant was retained. In my view a consideration of these rules demonstrates the following:***

(a) ***The parties expressly agreed that the expert was not an arbitrator. They agreed:***

"The expert is not an arbitrator of the matters in dispute and shall not be deemed to be acting in an arbitral capacity. The Process or any process conducted under or in any connection with these Rules is not an arbitration within the meaning of any legislation or rules dealing with commercial, industrial, court annexed or any other form of arbitration. Any conference conducted under these Rules is not a hearing conducted under any legislation or rules dealing with commercial, industrial, court annexed or any other form of arbitration."

Such an agreement cannot be conclusive of the characterisation of the referral *(see See Ajzner v Cartonlux Pty Ltd [1972] VR 919).* ***But it must be regarded as significantly indicative of the intention of the parties as to the nature of the task the building consultant was to undertake.*** *In Badgin Nominees Pty Ltd v Oneida Ltd & Anor [1998] VSC 188, Gillard J stated:*

"[56] It is noted here that the parties expressly provided that the valuation should be by an expert and not an arbitrator. Clearly the parties intended that the procedure should not be by way of arbitration."

b) ***Although the parties might be required by the building consultant to attend a preliminary conference the agreed Rules simply did not provide for any right to a hearing as to the substance of the dispute.*** *The Rules provided a discretion to the building consultant to convene a preliminary conference "to make such procedural and administrative arrangements as are necessary."*

c) ***The core procedure provided for was simply the making of initial submissions in writing by one party, a submission in response by the respondent and a submission in reply. If, but only if, the building consultant decided "further information or documentation is required to determine the dispute" the building consultant might require further submissions or documentation and/or call a conference between the parties and the expert. If a conference were called it might take the form of a view and at the conference the expert might permit the making of further submissions and the provision of further information.***

69. ***In my opinion the Rules simply do not provide for an inquiry in the nature of a judicial inquiry. After the conclusion of the initial submission process no adversarial process is envisaged. Further the process thereafter is at the discretion of the expert. Most significantly the parties do not have the fundamental right to a hearing. It is not to the point that this process requires a "determination", no referral to an expert for determination could be expected to do otherwise than envisage a rational determination. Nor is it to the point that the expert is required to make his determination according to law and in accordance with procedural fairness. The parties and the expert are entitled to agree as to these matters and they are subsidiary to his essential role. The notion of procedural fairness is a flexible one applicable to a process which falls short of an inquiry in the nature of a judicial inquiry*** *(cf Kioa v West (1985) 159 CLR 550 at 585 per Mason J: "In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case."). Therefore, the fact an expert may be bound to accord procedural fairness (as that notion is applicable to the particular case) to the parties does not necessarily give the process the character of a judicial inquiry or an arbitration (see Sutcliffe v Thackrah [1974] AC 727; Arenson v Casson Beckman Rutley & Co [1977] AC 405).* ***The fact that the process results in a determination which is agreed to be final and binding is also hardly surprising. An expert determination would be no more than an advisory opinion if it did not have this effect. In summary although the Rules provide for some matters which would be appropriate in an arbitration the essential character of the procedure was not that of an arbitration.***

70. ***There are three further aspects of the Tribunal's reasoning which deserve specific consideration.***

    a) ***First, the Tribunal appears to give substantial weight to the fact that the dispute went beyond matters in respect of which the building consultant had apparent expertise.*** *There are two factual observations to be made with respect to this. The first is that the curriculum vitae of the building consultant which was supplied by the respondent to the appellant as evidence of his appropriateness before his appointment, is in fact so extensive as to suggest he could properly be regarded as having expertise in assessing claims under a contract of the type in issue. An expert may become an expert through experience as well as through qualification. It is very far from clear that the building consultant's expertise should be regarded as necessarily limited in the manner contemplated by the Tribunal. Secondly, the respondent put forward the building consultant as an expert presumably precisely because it believed he did have appropriate expertise to make an appropriate*

determination. ***The essence of the agreement between the parties was that the expert would perform an agreed role. It was for the parties to that agreement to agree as to whether he was for their purposes sufficiently qualified to perform that role. In circumstances of this kind considerations of convenience and cost effectiveness may lead to an agreement that a person having some relevant expertise (only) is to be regarded as sufficiently expert by the parties. I can see nothing in such an agreement which is improper or transforms the character of the expert's role into that of an arbitrator.*** *Once it is accepted as the Master of the Rolls said in Carus Wilson that there is an intermediate category which is not to be regarded as arbitration, where though a person is appointed to settle disputes that have arisen, it is still not intended he or she should enter into an inquiry in the nature of a judicial inquiry,* ***the extent of the expert's expertise cannot be decisive of the characterisation of his role****.*

b) ***Secondly, the Tribunal expressed the view that the expert was not a preventor of disputes but a "settler" of them*** *in terms of the principles stated by the Master of the Rolls. In Ajzner Pape J observed:*

"I must confess to having some difficulty in understanding quite how far these observations in Re Carus Wilson and Greene in relation to avoiding disputes from arising go, for I find it difficult to imagine any case where a matter is referred to another for determination where there is not some dispute or difference. No reasonable man would incur the expense of referring a matter to the determination of another if both interested parties were in agreement with regard to the matter to be referred. However that may be, the important consideration is, in my view, not whether a dispute has arisen, but what the parties have referred to the determination of another. If there is a dispute and the parties have referred their differences to the determination of another, it may well be that the scope of the reference is limited by the extent and area of the dispute. This may be the position of an arbitration pursuant to cl 18 of the lease. But if they have not referred their differences to the determination of an another, but have agreed upon an open reference and have merely referred an objective fact, such as a rental or a price, to him for determination in default of their agreement, then I fail to understand why the mere fact that they, at some stage, have disagreed should lead to the conclusion that an arbitration stricto sensu was intended. In this case the difference arising from the offer and counter offer has relevance only to show that there has been a default of agreement which brings the agreement to refer into operation."[1972] VR 919, at p. 930

In the present case the initial terms of agreement and in particular the rules adopted, did not determine what was submitted to the expert. It might be an objective fact "such as a rental or price" or it might be a competing set of contentions. In turn it can be seen that it may not be entirely straightforward to characterise a claim for assessment of extension of time, consequential costs of the extension of time, and consequential liquidated damages payable as a result of the builder exceeding the completion date under the contract despite the extension of time. The matters to be assessed are essentially matters which were initially assessed by the architect under the contract and are fundamentally matters of "price". Nevertheless ***it was contemplated that the parties would have the opportunity to make written submissions with respect to these matters and they in fact did so. Accordingly the expert may be regarded as being retained to settle a dispute. Accepting that this is the correct view the critical characteristic which determines whether the role carried out by the expert was that of an arbitrator is whether the expert was retained to undertake an inquiry in the nature of a judicial inquiry. For the reasons I have stated the making of initial written submissions by the parties was not in my view sufficient to give rise to a judicial inquiry.***

c) ***Thirdly, the Tribunal identified a whole series of related ancillary procedural attributes of an arbitration. These included the lack of immunity being given to the expert [14], the propriety required of the expert [20], the powers given to make orders giving effect to the determination [21], the requirement to give reasons [22] and the power to govern his own proceedings [23]. Once again none of these matters in my view govern the fundamental character of the expert's role which was not that of an arbitrator simply because it did not have at its heart an inquiry in the nature of a judicial inquiry.***

71. ***It follows that in my view it has been established that the Tribunal erred in law in its conclusion that the referral to the building consultant should not be regarded as a referral to expert determination as distinct from arbitration…..'*** (emphasis added)

On 19 September 2003, the Respondent was granted leave to appeal to the Victorian Court of Appeal, apparently having regard to the significance of the issue concerning the proper construction of the Domestic Building Contracts Act 1995 (Vic). It remains to be seen whether any appeal from such a well reasoned judgment in fact proceeds.