

Client Alert



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Experts don many hats

Experts are responsible for an increasing variety of roles in commercial disputes. It is critical that you know and understand the scope of your role and the source, and parameters, of your rights and responsibilities as an expert. This knowledge and understanding will help protect you from criticism and/or appeal and ensure that expectations are met, including those of any court.

This alert examines three roles experts fulfil and factors to consider with regard to each role.

Expert determination

Expert determination allows contracting parties to predetermine how they will resolve future disputes, typically those of a technical nature. The major difference between an expert determination and an expert giving evidence in court is that the expert becomes the decision maker.

The process is informal, expeditious and economical. The parties agree contractual terms by which the nominated expert is empowered to make a determination of the issues in dispute. The scope and extent of the expert's task is governed by the contract between the parties (or for example by the adoption of the *Australian Commercial Disputes Centre Rules* or the *Institute of Arbitrators and Mediators Rules*) and, the determination may be deemed to be binding or non binding.

The High Court decision in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 281 ALR 635 highlights for those acting as the expert in an expert determination, how critical it is to identify, understand and, to closely follow, the contractual provisions and/or applicable rules when delivering a determination. Failure to do so can result in the determination failing to legally bind the parties.

In this case, Firedam Civil Engineering Pty Ltd (Firedam) was engaged by Shoalhaven City Council (Shoalhaven) to design and construct a waste water collection and transport system. The contract incorporated New South Wales Government GC21 (Edition 1) General Conditions of Contract (General Conditions). The General Conditions contained an expert determination clause. Importantly, the expert was required to "issue a certificate in a form the Expert considers appropriate, stating the Expert's determination and giving reasons...".

There were six unresolved variation claims made by Firedam against Shoalhaven and a cross-claim by Shoalhaven for costs incurred because of delayed completion of the project by Firedam. Each of these claims were referred to the expert and a determination was delivered which ultimately found that an amount of \$497,142.55 plus interest was payable by Shoalhaven to Firedam.

Firedam then sought, but was not granted, a declaration by the Supreme Court of New South Wales that the expert determination was not binding on the parties because it was inconsistent and, it therefore did not accord with the requirements of the contract. The Court of Appeal of the Supreme Court of New South Wales

overturned this decision and ultimately the matter was appealed to the High Court. The High Court found that the determination was binding on the parties and the orders of the Supreme Court of New South Wales were reinstated.

The key findings in this case for experts are as follows.

- Know the scope and extent of your engagement, including timing and costs.
- Know the procedure to be adopted, including whether you must give reasons for decisions and how detailed they must be.
- Make sure you are consistent at all times with the relevant contractual provisions and/or rules to be followed.
- Answer each and every question validly put to you.
- Be aware of the specific rights of appeal, including thresholds for judicial review.

In the Shoalhaven case, it was ultimately held by the High Court that the expert answered the questions put to him "meticulously" and, that he gave adequate explanations for his determination.

Superintendent

A superintendent is nominated by contracting parties, (typically in construction matters) to decide major issues of dispute under the contract between the principal and the contractor. They are often architects, engineers or other construction experts who assess claims relating to extra payment, extensions of time, quality of materials and performance.

Walton Construction Pty Ltd v Illawarra Hotel Co Pty Ltd [2011] NSWSC 1188 provides a good example of the typical responsibilities of a superintendent and how a superintendent is subject to challenge.

In this case, Illawarra had engaged Walton Construction to refurbish the Illawarra Hotel in Wollongong. Works were immediately delayed and practical completion was not achieved on time. Clause 23 of the contract provided that the principal was required to ensure that there was at all times a superintendent who would act honestly and fairly and arrive at reasonable measures or values of work, quantities or time.

Matters that the superintendent was required to assess included:

- the fair cost of works necessary and reasonable to bring the incomplete works into conformity with the contract;
- the proper adjusted date for completion; and
- what payment Walton Construction was entitled to with respect to any extensions of time.

Walton Construction successfully argued in the Supreme Court of New South Wales that the superintendent's determination did not meet the contractual standard of reasonableness. Pivotal in the decision was the Judge's reliance on a special referee's report (see below).

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Special referee

Special referees are specialised experts who are referred technical matters usually by a court during a proceeding (see for example *Federal Court of Australia Act* (Cth) s54A). Engaging a special referee enables the court to more quickly address core technical issues and reduce the cost and length of the dispute.

It is usually a proposal driven by the parties. The court has the discretion to adopt, vary or reject the special referee's report, partially or wholly.

In *Walton Construction Pty Ltd v Illawarra Hotel Co Pty Ltd*, the Court used the special referee's findings to measure the reasonableness of the superintendent's determination. The Court concluded that the large disparity could not be explained by the existence of a reasonable range of estimation.

The Court preferred the special referee's findings on the cost of variations and the extension of time. The superintendent's initial determination was therefore unreasonable, having failed to meet the required contractual standard.

Conclusion

Experts perform crucial roles in providing disputing parties and courts with the technical evaluation necessary to make correct findings. The critical messages from both cases reviewed in this alert are:

- understand the proper scope of your role and follow the contractual provisions to the letter when carrying out that role; and
- clarify with the parties any areas of uncertainty before commencing your review and making a determination or finding.

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