Graham Legal

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Expert Determination of Disputes

In VCAT on 20 December 2013 Deputy President Aird gave reasons for her Order in proceedings *Eliana Constructions and Development Group Pty Ltd v Sidrak (Domestic Building) [2013] VCAT 2160*.

The parties' dispute had been an involved one. After an unfinished final hearing lasting 4 days, the parties agreed to enter into Terms of Settlement.

As is not uncommon in matters where it is alleged that building works are incomplete or defective, the Terms of Settlement provided that the builder would return to the site and complete the remaining works under the supervision of an expert Building Consultant appointed under the Terms.

The Terms of Settlement specifically provided that the parties would accept as final and binding the expert's assessment of the costs to complete and/or rectify the works as if it was a determination by a special referee appointed under Section 95(1) of the VCAT Act (even though no such order had been made).

Ultimately, the jointly appointed expert issued his determination but the builder did not like it. The builder made a further application to the Tribunal for reinstatement of the proceedings and argued that the expert's determination should not be binding.

The engagement of the expert had been expensive ($33,777.38).

Phillip Graham

News

- On 14 January 2014 Rose Maina celebrated the first anniversary of her debut at GL.
- On 1 February 2014 GL celebrated its 24th anniversary at 1059 Mt Alexander Road, Essendon.
- On 1 March 2014 Phillip Graham will celebrate 38 Years since his admission to practice as a lawyer.

Expert Determination

under Terms of Settlement

Although the settlement had saved the parties whatever costs would have been associated with the continuation of the original hearing, the builder wanted out of it.

It was once the case that VCAT construed agreements to refer disputes for expert determination as agreements that contravened Section 14 of the Domestic Building Contracts Act 1995 (see *Age Old Builders Pty Ltd v Swintons Pty Ltd [2002] VCAT 1489 (6 December 2002)*).

However, in rejecting the builder's claim Deputy President Aird, at paragraph 89 and following of her reasons, referred and adopted the decision of Gillard J in the Supreme Court in *Commonwealth v Wawbe [1998] VSC 82* from which she quoted the following extract:

The parties to a contract agree that the value is to be determined by an expert acting as such and using his own skill, judgement and experience.

He is not a lawyer. His authority derives from the contract. The terms of the contract are to be considered by him.

It would be contrary to the parties' common intention to expect the valuer to construe the contract and apply it as a court would. The parties have entrusted the task to an expert valuer, not a lawyer.

They must be taken to accept the determination "warts and all" and subject to such deficiencies as one would expect in the circumstances.

The parties put in place the procedure, they must accept the results unless it was contrary to their common intention.

The Deputy President rejected all of the builder's criticisms of the expert's handling of the obligations delegated to him under the Terms of Settlement and, most importantly, made an Order in accordance with the expert's determination without requiring the parties to run the dispute all over again.

There are three important lessons here.

First, Terms of Settlement need to be drawn very carefully particularly if it is intended to make the decision of the expert binding.

Secondly, choice of the right expert is essential. Choose the wrong one and you will probably be left with a decision whether it is right or wrong.

Thirdly, the engagement of an expert can be compared with the writing of a blank cheque. Avoiding the costs of a trial is one thing but incurring more than $35,000 in expert fees is certainly not to be trivialised.

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