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Welcome to this issue of Herbert Smith Freehills’ Australian Construction Dispute Resolution Newsletter.

This newsletter updates you on legal developments relevant to your industry by featuring Australian court decisions and legislative developments of particular interest.

In this issue, we look at:

- expert determination as the final step in the resolution of a dispute, including whether it can lead to the holy grail – a cheap, quick and final resolution of a dispute.
- recent cases from New South Wales which, for different reasons, led to roadblocks in payment of the amount found to be payable in adjudication determinations made under the NSW security of payment legislation.

We also feature an article on an interesting recent decision of the Privy Council considering termination and set off rights provided under the terms of the FIDIC Red Book written by our colleagues in Herbert Smith Freehills’ Tokyo office.

We trust that you will enjoy this and future issues of the Australian Construction Dispute Resolution Newsletter.
EXPERT DETERMINATION AS A FINAL STEP IN A DISPUTE RESOLUTION CLAUSE – HOW FINAL IS IT?

The recent downturn in Western Australia in the resources industry has seen many parties to construction contracts revisiting their dispute resolution clauses to consider escalating claims via the dispute resolution process.

Introduction
In the recent past, parties have often accepted adjudication determinations as ‘the final word’ on the dispute and moved on. Increasingly, parties are either revisiting previously ‘determined’ disputes or, knowing that such determinations are on account, are increasingly taking the opportunity to seek a final determination of rights and obligations under the contract. Parties to a construction contract typically choose litigation or arbitration as a final step in the dispute resolution process. Both are seen as robust and appropriate fora for making a final determination of parties’ rights and obligations under a contract.

However, in an environment of cost-cutting and where the pipeline of future projects is diminishing, some companies cannot (or are unwilling to) commit to the full cost of arbitration or court proceedings. Instead, alternative ‘final’ dispute resolution processes are emerging. An expert determination can be a cheaper and quicker option.

In this article, however, we examine the finality of an expert determination and whether, as a process, it can lead to the holy grail - a cheap, quick and final resolution of a dispute. Specifically, we consider the options to challenge the enforcement of the determination or the process itself.

What is expert determination?
An expert determination is a contractual process under which parties agree to refer usually only certain disputes (but in some cases, all disputes) for determination by an independent expert. Unlike litigation and arbitration, it is not governed by legislation or a set of procedural rules.1 In the dispute resolution clause of the contract, parties can and typically:

(a) agree the type of disputes that can be referred to expert determination;
(b) agree the procedure of the determination, by way of incorporating the rules of bodies such as IAMA (now the Resolution Institute), or by setting out their own procedural rules in the contract.
For example, the parties can agree on an exchange of submissions (or the expert has a discretion to allow them) and whether an expert is obliged to give reasons. Alternatively, parties often leave the procedure to the discretion of the expert;
(c) describe the function of an expert, including whether there will be an appointing body or an expert with specific qualifications. The parties will usually also provide that an expert acts as an expert, and not as an arbitrator; and
(d) specify whether the outcome of the expert determination is ‘final and binding’ on the parties.

Grounds to challenge the process of the expert determination or the enforcement of the expert determination
Limited rights to challenge
The recipient of an unfavourable determination will typically seek to challenge either:
(a) the determination itself – usually by alleging the expert determination should be set aside or is not binding; or
(b) enforcement of the expert determination – by alleging that the clause giving rise to the expert determination:
(1) is void as it constitutes an ouster of the Court’s jurisdiction; or
(2) should not be enforced for other public policy reasons.2

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2. As was contended in Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd (1997) 14 BCL 277.
Challenging the expert determination itself

The law is reasonably well settled on this point. A Court will set aside an expert determination where:

(a) there is fraud or collusion; or

(b) it is not ‘in accordance with the Contract’.

The difficulty in determining when an expert determination is not ‘in accordance with the contract’ was noted by Wheeler J in *Straits Exploration (Australia) Pty Ltd v Murchison United NL* at [16]. Gummow and Bell JJ in *Shoalhaven City Council v Firedam Civil Engineering Pty Limited* observed that the question was one of construction, which required the Court to examine:

(a) what the parties agreed that the expert was to do; and

(b) whether the determination made by the expert satisfies those requirements.

On the requirement of the determination being in accordance with the contract, the Courts have found as follows.

(a) In *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd*, the expert in that case was also required to provide reasons for his determination. Firedam contended that the reasoning for the determination was inconsistent, and therefore the determination was not in accordance with the requirements of the contract and not binding. French, Crennan and Kiefel JJ stated that, as a general rule, where a determination contains mistakes, it will not prevent the determination from being binding. However, the Court stated that errors in an expert’s reasons will rob the determination of its binding effect in the following circumstances:

1. The deficiency or error may disclose that the expert has not made a determination in accordance with the contract; and

2. The deficiency or error may be such that the purported reasons are not reasons within the meaning of the contract and, if it be the case that the provision of reasons is a necessary condition of the binding operation of the determination, the deficiency or error will have the result that the determination is not binding.

(b) Where an expert ‘misconceived his function, asked himself the wrong question or applied the wrong test’, then the expert determination will lose its binding nature.

(c) Unless the contract expressly requires the expert to afford parties procedural fairness, an expert is not required to comply with the rules of procedural fairness in the same way with which a Court or arbitral tribunal is required to comply. Accordingly, if an expert is not required to, and fails to afford a party natural justice or procedural fairness, then that will not affect the binding nature of the expert determination.

Accordingly, it can be seen that the grounds on which a party can challenge the expert determination process itself are very narrow.

5. [2011] HCA 38 [37].
6. Ibid.
8. Ibid [26].
9. Ibid [27].
10. *Glenvill Projects Pty Ltd v North North Melbourne Pty Ltd* [2013] VSC 717 [58].
11. *Glenvill Projects Pty Ltd v North North Melbourne Pty Ltd* [2013] VSC 717 [49].
**Challenging the enforcement of an expert determination**

The other method of ‘challenge’ is to contend that the expert determination itself should not be enforced.

One of the disadvantages of expert determination is that a party is required to enforce an expert determination through the Courts, either by seeking a declaration that the expert determination is binding or by seeking an order for specific performance.12

*Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*13 considered whether a clause which provided that all disputes under a contract could be resolved by expert determination (as opposed to discrete issues) could be enforced by the courts. In this case, the parties to an engineering contract agreed that disputes under the contract would be determined by an independent third party, and not the Court. The contract provided that the expert was to act as an expert and not an arbitrator and was entitled to ‘make his decision on it in any manner that he shall see fit’,14 subject to a number of caveats. The disputes for determination by the independent third party (who was an accountant) involved mixed issues of fact and law, including questions of contractual interpretation.15

Heenan J found the expert determination clause to be void and against public policy as it:

(a) was an ouster of the jurisdiction of the courts; and
(b) prescribes a procedure which is entirely unsuited to the resolution of disputes which may arise out of the contract.16

Specifically, Heenan J took the view that the independent referee could not resolve the matters by acting as an expert rather than as an arbitrator.17

In *Straits Exploration (Australia) Pty Ltd v Murchison United NL*,18 the Western Australian Court of Appeal was asked to consider whether the expert determination clause was void on the grounds of being an ouster of the court’s jurisdiction. In the primary proceedings, Master Sanderson found that it was an ouster of the Court’s jurisdiction and relied on *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*19 in making his finding.

The Court in *Straits Exploration (Australia) Pty Ltd v Murchison United NL*20 considered the decision in *Baulderstone* and made the following findings.

(a) There is a general rule that parties to a contract cannot oust the jurisdiction of the Court.
(b) In recent times, parties have been contractually agreeing to refer a number of disputes to an expert for determination. As a consequence, the Court emphasised that the ‘recent trend’ is to enforce expert determination clauses in accordance with the contractual intention of the parties.

‘The tendency of recent authority is clearly in favour of construing such contracts, where possible, in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court.’21

(c) The Court emphasised that the ‘effect of a valid expert determination clause, however, is not to oust the jurisdiction of the court, but to limit, in some circumstances, the matters which the court can consider.’22
(d) The Court referred to cases and commentary which have criticised the *Baulderstone* decision and stated ‘it is not authority for any wider proposition and, in particular, is not authority for any proposition about the general invalidity of expert determination provisions in contracts.’23

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12. As Vickery J stated in *Glenvill Projects Pty Ltd v North North Melbourne Pty Ltd* [2013] VSC 717 [74], specific performance will only be available where there is a “specific obligation to be filled by the appointed Expert...” (1997) 14 BCL 277.
15. Ibid [8].
16. Ibid [9].
17. Ibid [8].
21. Ibid [14].
22. Ibid [15].
23. Ibid [23].
The approach of the court in *Straits Exploration (Australia) Pty Ltd v Murchison United NL*, to give effect to the expert determination process (or the dispute resolution process agreed by the parties), has been reinforced in the following, recent cases.

(a) In *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd*,24 Martin CJ referred to a line of authorities in Australia and other jurisdictions whereby the Courts have taken a ‘liberal’ approach to construing dispute resolution clauses:

‘...authorities in Australia and in other comparable jurisdictions which establish that generally the courts should adopt a broad, liberal and flexible approach to the construction of such agreements and should favour a construction which provides a single forum for the adjudication of all disputes arising from, or in connection with, that agreement.’25

Even though *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* was concerned with the construction of an arbitration agreement, Martin CJ’s comments, and the cases referred to, are applicable not just to arbitration clauses but also expert determination clauses.

(b) In recent decisions on the technology, engineering and construction lists of the Victorian Supreme Court, Vickery J held in:

(1) *500 Burwood Highway v Australian Unity & Ors*,26 that an expert determination will be binding on the parties where the parties agree to refer an issue to an independent expert, assuming the expert acts honestly and in good faith; and

(2) *Glenvill Projects Pty Ltd v North North Melbourne Pty Ltd*,27 that an expert determination process was not open for review, as the expert made the procedural determination in accordance with the contract.

**Limited remedies available**

As can be seen from the above cases, the Courts have consistently stated that if parties agree to refer disputes to expert determination under a contract, then the Courts will construe the clause to give effect to the parties’ contractual intention. If a party agrees to a contractual process of expert determination, then is dissatisfied with the determination, the Courts will only allow that party to seek solace in the Courts in very limited circumstances.

It follows then that the remedies and relief a party can seek are equally limited.

Where a party has agreed that expert determination will resolve all disputes as a final step in a dispute resolution clause, relevant disadvantages include:

(a) as expert determination is not governed by legislation, a disgruntled party does not have a legislative right of recourse to the Courts (such as in domestic arbitration);

(b) if a party wishes to enforce an expert determination, it is required to seek enforcement through the Courts, usually in the form of a declaration or specific performance;

(c) to the extent a party is entitled to challenge the expert’s determination itself, the remedies are limited. For example, remedies in administrative law are not available. As Vickery J stated in *Glenvill Projects Pty Ltd v North North Melbourne Pty Ltd*,28 ‘A contractually appointed expert, being a privately appointed person, is not amenable to administrative law remedies. Even through such expert may have contractual authority to determine questions affecting the rights or obligations of individuals and a duty to act in a fair manner, being a purely private appointment, certiorari and prohibition, for example, will not lie. It is well accepted that an arbitrator’s award, resulting from the appointment of a private arbitrator, is not amenable to prerogative writ.’

(d) Where the dispute resolution clause provides that a party is not entitled to commence proceedings unless it complies with the process in an escalating dispute resolution clause, then a party is not at liberty to commence legal proceedings to ‘sue upon the contract’.29 If a party does commence legal proceedings, then *Wheeler J in Straits Exploration (Australia) Pty Ltd v Murchison United NL* stated the Court will exercise its discretion to grant a stay to the Court proceedings to require a party to comply with the procedure in the dispute resolution clause.30 If the Court grants a stay in those circumstances, Wheeler J stated that a party will not lose access to the Courts, but its access will be ‘postponed’ until it has complied with the expert determination procedure.31 Wheeler J went on to say that if there are proceedings on foot, in the Court dealing with a specific dispute, and a party proceeds to commence expert determination in relation to that same dispute, the Court has discretion to either:

(1) stay the proceedings; or

(2) ‘restrain a party from proceeding with an expert determination’32

(e) In any event, even if a party brings proceedings after the expert determination process has been completed (and it has complied with the dispute resolution clause), the circumstances in which the Court will set aside the determination are very narrow.

**Conclusion**

If a party agrees that its final rights under a contract can be determined by expert determination, but is then dissatisfied with the result, it cannot simply elect to sue upon the contract and have its rights determined by a Court. Notwithstanding the perceived cost and time benefits of expert determination, parties need to understand that if they opt for a process that is neither judicial nor arbitral, the consequences are severe: the expert determination will almost always be final and binding.

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25. Ibid [44].
27. [2013] VSC 717.
28. Ibid [75].
30. Ibid.
31. Ibid.
32. Ibid [30].
AVOIDING PAYMENT OF SECURITY OF PAYMENT ADJUDICATION DETERMINATIONS – RECENT DEVELOPMENTS

Two recent decisions from the Supreme Court of New South Wales provide interesting examples of the way in which adjudication determinations under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act) can be impacted by subsequent decisions of the Court. In each case, the immediate impact of the relevant adjudication determination was counteracted – in one instance through a challenge to the adjudicator’s jurisdiction; in the other, through a challenge to the statutory demand which the contractor issued when the adjudicated amount (the judgment debt) remained unpaid.

In the matter of J Group Constructions Pty Ltd [2015] NSWSC 1607

The J Group case concerned a dispute over the supply of materials and labour required to paint a building in Strathfield. The developer, J Group, claimed that the contract required the contractor, PGA, to use Dulux rather than Rockcote products. In the alternative, J Group claimed that PGA had applied the Rockcote product defectively and that the finish of the paintwork meant the product was not fit for purpose.

PGA issued a payment claim, and in response J Group issued a payment schedule setting out its reasons for refusing to pay the claimed amount. PGA applied for adjudication, which resulted in a determination that J Group was liable to pay PGA $166,531.58 (including GST). J Group did not pay this amount, and separately commenced proceedings in the NSW District Court, pleading various breaches of contract.

PGA filed an adjudication certificate under the SOP Act, resulting in the conversion of the sum payable into a District Court judgment. Next, PGA issued to J Group a statutory demand (which annexed a copy of the District Court judgment for the amount of $173,761.80). J Group sought to set aside this amount in the current proceedings before Robb J, pursuant to sections 459G, 459H and 459J of the Corporations Act 2001 (Cth) (Corporations Act).

Sections 459H and 459J of the Corporations Act permit a Court to set aside a statutory demand where it is satisfied that:
- there is a genuine dispute between the parties about the existence or amount of a debt to which the demand relates (s 459H(1)(a));
- the applicant to set aside the statutory demand has an offsetting claim (s 459H(1)(b));
- because of a defect in the demand, substantial injustice will be caused unless the demand is set aside (s 459J(1)(a)); or
- there is some other reason why the demand should be set aside (s 459J(1)(b)).

The interplay between these sections of the Corporations Act and the SOP Act is interesting, and the Court took the time to consider a number of cases dealing with these sorts of issues. In particular, Robb J considered the principles applied in In the matter of Douglas Aerospace Pty Ltd [2015] NSWSC 167 and concluded that the Court should follow that decision in the present case. In the Douglas Aerospace case, the Court held (at [98]) that:

where a party serves a statutory demand based upon a judgment obtained by filing an adjudication certificate following an adjudication under the Security of Payment Act, the company served with the statutory demand cannot claim that it has a genuine dispute as to the existence of the debt for the purposes of s 459H(1)
(a), where the company’s only right is to assert that the underlying debt the subject of the adjudication certificate has not arisen under the contract. The company can mount an offsetting claim under s 459H(1)(b) if it has a counterclaim, set off or cross demand that does not deny the debt, but asserts a countervailing liability.

Having considered the case law and the legislation, the Court held (at [103]) that so long as there is a statutory debt created by the SOP Act, or where a judgment issued under that Act is in force, ‘a company which is so indebted cannot genuinely dispute the existence of the debt’ for the purposes of s 459H(1)(a).

That said, an offsetting claim could exist where the claim made by the plaintiff ‘accepts the validity of the debt, but asserts that there is a countervailing liability’ (see [101]).

The Court noted that the threshold for establishing either a genuine dispute, or a genuine claim is relatively low – it is enough for there to be a serious question to be tried based on a cause of action that is being advanced in good faith – in other words, a claim that is not frivolous or vexatious.

The Court also noted that the claim must be one capable of being quantified in money terms. Importantly, this allows an assessment of the amount by which the offsetting claim exceeds or falls short of the amount of the demand. The narrower the margin between the two, the greater the need for particularity in assessing the amount.

In the present case, Robb J concluded that J Group had several offsetting claims relating to defective work and fitness for purpose obligations which the adjudicator does not appear to have made an allowance for in the adjudication certificate. The parties had submitted expert evidence in the proceedings in relation to the offsetting claims, including costs for the remedial work necessary to repair the defective application of the Rockcote product. The Court was prepared to accept the evidence put forward by J Group on this issue, and considered that those figures were sufficient for assessing the ‘offsetting claim’. The Court was therefore able to determine what, if any, difference existed between the ‘admitted total’ (the statutory debt) and the ‘offsetting total’. In this instance the ‘offsetting total’ was $165,218.90, being $8,542.90 less than the statutory debt.

The Court therefore varied the statutory demand, such that the amount of the demand became $8,542.90.

The New South Wales Netball Association Ltd v Probuild Construction (Aust) Pty Ltd [2015] NSWSC 1339

This case concerned a dispute over payment claims served by Probuild on the NSW Netball Association Ltd pursuant to a contract where Probuild agreed to construct the ‘Netball Centre of Excellence’ at Sydney Olympic Park. Probuild served an adjudication application in respect of Payment Claim 24 for the amount of $10,380,083.42. Netball sought an injunction to restrain adjudication of Payment Claim 24 on the basis that it was not valid since, being the second payment claim served in respect of the same reference date, it contravened s 13(5) of the SOP Act.

The Court refused to stop the adjudication process, but restrained Probuild from enforcing any adjudication certificate until further order.

The adjudicator proceeded to issue her determination, finding that the sum of $124,599.23 was due to Probuild (an amount that was less than 2 per cent of the amount claimed).

Contrary to its previous position, Probuild now asserted that the determination was void and that the adjudicator did not have jurisdiction to determine the matter. It sought an order in the nature of certiorari, in effect quashing the determination.

In a similar volte-face, Netball argued that Probuild’s ‘approbation and reprobation’ should not be rewarded by the Court and that the Court should not find the determination to be void.

The Supreme Court held that where excess jurisdiction is shown, certiorari is granted almost as a right. However, it is a discretionary remedy which, for good reason, can be withheld.
In obiter, Stevenson J commented on the ‘opportunist’ behaviour of both parties. For Probuild, this opportunistic behaviour arose from its assessment as to where its commercial interests lay. His Honour accepted the principle laid down in *Express Newspapers plc v News (UK) Ltd* (1990) 18 IPR 201 at 210 where it was held that:

**There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.**

Despite this being a powerful factor to take into account to decline the relief that Probuild sought, Stevenson J ultimately considered a number of factors which swayed his decision to grant the relief sought by Probuild. These included:

- Probuild’s behaviour could not be characterised as acquiescence, delay, abandonment or bad faith. In other words, the Court saw no reason to believe that, up to the point of the determination, Probuild was acting in a way other than in good faith, advancing arguments it genuinely believed were open;
- The determination was made in excess of jurisdiction and of itself, was a nullity; and
- The fact that a further reference date existed and that it was undesirable for the status of the earlier determination to be left unresolved, despite Probuild’s conduct.

Despite the multitude of factors which may influence the Court’s discretion in granting relief, the overarching issue is whether or not the adjudicator’s determination was made in excess of jurisdiction and is therefore a nullity. If the answer is yes, it is difficult to persuade the Court to refuse relief since doing so would ‘enable the parties to confer jurisdiction by consent on a person exercising statutory functions, where otherwise that person did not have jurisdiction’ (per McDougall J at [45] in *Oppedisano v Micos Aluminium Systems* [2012] NSWSC 53).

**What these decisions mean for you**

Those who deal with security of payment legislation in NSW and elsewhere will be well aware of the interesting twists and turns that can result from adjudication determinations. The two cases considered here go to show that, whilst not always easy, other legislation and Court discretion provide avenues for overcoming (at least partially) the interim determinations made by adjudicators.

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INTERNATIONAL FEATURE
PRIVY COUNCIL RULES ON FIDIC CLAUSES

In this newsletter we report on the recent case of NH International v National Insurance1 where the Privy Council ruled on the operation of certain provisions in the FIDIC Red Book2, namely Sub-Clause 2.4 ‘Employer’s Financial Arrangements’ and the contractor’s corresponding termination right in Sub-Clause 16.2(a); and whether the Employer is entitled to exercise a right of set-off in circumstances where it has not followed the requirements of Sub-Clause 2.5 ‘Employer’s Claims’.

The facts
The dispute concerned an agreement for the construction of a hospital in Tobago (the “Agreement”), which was subject to the FIDIC Red Book. NHIC (the contractor) issued a request to NIPDEC (the employer) under Sub-Clause 2.4 of the FIDIC Red Book, requesting reasonable evidence that financial arrangements had been made to enable NIPDEC to pay the contract price.

The Ministry which was funding the project responded saying that “without prejudice” funds were available in a sum equal to the final estimated cost of the work under the Agreement. NHIC responded expressing concern about the term “without prejudice”, and queried whether there had been the necessary Cabinet approval for payment of the sums due under the Agreement. It did not receive a response to its request, and proceeded to suspend the work under Sub-Clause 16.1.

Over a year later, NHIC received a letter from the Ministry confirming that the completion of the project was of the highest priority, and that the government would meet the financial requirements for the completion of the project. NHIC wrote to NIPDEC requesting confirmation that the Cabinet had approved the funds, but no such confirmation was provided. NHIC issued a notice of termination under Sub-Clause 16.2. NIPDEC claimed that NHIC did not have the right to terminate the Agreement and therefore that it had not been validly terminated.

A separate issue arose when the engineer later proceeded to assess the value of the work done up to the date of termination, with NIPDEC claiming that it was entitled to exercise a right of set-off against any sums due and payable to NHIC. NHIC argued that, as NIPDEC had not given proper notice of its claims to NHIC in accordance with Sub-Clause 2.5, the last paragraph of that provision operated to exclude those claims.

Decisions

Arbitrator’s awards

Termination of the Agreement: The arbitrator found that Sub-Clause 2.4 required more than showing that the employer was able to pay or that it was enthusiastic about the project. It required evidence of positive steps on the part of the employer which showed that financial arrangements had been put in place. In this case, the use of the words “without prejudice” in the Ministry’s first letter, and the absence of any confirmation of Cabinet approval, entitled the contractor to suspend work under Sub-Clause 16.1. The subsequent termination under Sub-Clause 16.2 was similarly justified.

NIPDEC’s set-off: In a separate award, the arbitrator also considered whether NIPDEC’s right of set-off was excluded on account of the fact that it had not satisfied the requirement under Sub-Clause 2.5 to give adequate notice of its claims to NHIC. The arbitrator found that “clear words” were required to exclude common law rights of set-off and abatement and (by implication) Sub-Clause 2.5 was not clear enough. Therefore, the claim for set-off could be maintained.

Court of Appeal

Termination of the Agreement: The Trinidad and Tobago Court of Appeal overturned the decision, reasoning that the arbitrator had sought the “highest standard” of assurance rather than “reasonable evidence”. It should be noted that the Court did not suggest anywhere that the arbitrator had wrongly interpreted the provisions of the FIDIC Red Book. The Court’s conclusion was therefore one of fact rather than of law.

NIPDEC’s set-off: The Court upheld the arbitrator’s decision as to NIPDEC’s rights of set-off under Sub-Clause 2.5.

Privy Council

Termination of the Agreement: The Privy Council rejected the Court of Appeal’s conclusions. It held that courts should respect the arbitrator’s findings of fact, assessments of evidence and formations of judgment, unless they were shown to be unsupportable. This was based on the reasoning that the parties had mutually agreed to have the issue determined by an arbitrator, and that the Court should not therefore substitute its judgment for that of the arbitrator. In this case, there was no basis for interfering with the arbitrator’s conclusion that the termination of the Agreement had been valid.

NIPDEC’s set-off: The Privy Council disagreed with the Court of Appeal on this point. It noted that the purpose of Sub-Clause 2.5 was to ensure that the employer’s claims should be the subject of a notice, which must be given “as soon as practicable”. Any claims must be raised promptly, and in a particularised form, and late notices were not permitted. However, abatement arguments – e.g. that performance was so poor/defective that it does not justify any payment, or deserves reduced payment – could still be raised. The award was remitted to the arbitrator for him to reconsider the sums awarded as any of those sums which (i) were not the subject of appropriate notice under Sub-Clause 2.5, and (ii) could not be characterised as abatement arguments as opposed to set-offs or cross-claims, must be disallowed.

Comment

The Privy Council’s decision (especially as it comes from five members of the UK Supreme Court) is one of importance to contractors and employers. The case provides useful guidance on what is required of an employer in order to comply with Sub-Clauses 2.4 and 2.5 of the FIDIC Red Book:

- It highlights that an employer may be required to provide relatively clear and detailed financial information demonstrating its ability to pay the estimated contract price. It will not be sufficient to show merely that the employer is enthusiastic about the project, or even that the employer is wealthy.
- Employers intending to raise set-off or counterclaims should do so as soon as practicable, and in accordance with the terms of the contract.

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