

## Haridemos v Labathas [2015] ACTSC 110

### FACTS

Haridemos agreed to construct two new residences, on two properties in McKellar for Labathas. Disputes arose during the construction work. Haridemos sought resolution under the Security of Payment regime and entered the Adjudication Certificates obtained into judgment. Labathas initiated an appeal process against the Adjudication Certificates. During the appeal process, the parties signed a Settlement Deed which included finalising the appeal proceedings and a process for resolution of the underlying dispute.

The process provided by the Settlement Deed including appointment of an expert to provide a determination which would be binding on the parties' subject to a right of appeal under the s38 of the Commercial Arbitration Act 1986 (ACT) (CAA) Subsequently, a determination was made and Haridemos appealed the determination.

### ISSUE

Whether the parties agreed to appoint an expert or an arbitrator, whether the Court has jurisdiction under the s38 of the CAA to hear the appeal against an expert determination.

### FINDING

The primary function of an arbitrator is to hear and resolve opposing contentions and may be described as to the distinction between his role and that of a valuer or an assessor, as quasi-judicial.

Decisions of arbitrators will be governed, in addition to the terms of the arbitration agreement, by the statutory requirements (the CAA, ACT).

If a person is appointed to make a valuation, in such a manner that in making it he/she may, in accordance with the appointment, decide solely by the use of his/her eyes, knowledge, and skill, he/she is not acting judicially. The person is not an arbitrator, but an expert.

When deciding what the parties agreed in the Deed they have signed, the Court take into the consideration of the facts such as: the words used in the appointment, i.e. "Expert" "Determination", the requirement stated in the Deed, i.e. "to provide his expert opinion" on the value, and the qualification of the appointed person, i.e. the quantify surveyor holding himself out as having particular expertise in estimating the value of construction works.

### QUOTE

Mossop AsJ held that:

*[23] "... Looked at as a matter of substance the process contemplated was to be one in which the expert applied his own expertise to the assessment of the value of the works in the light of the material put forward by the parties and was not engaging in a quasi-judicial process of determining the case...."*

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[25] “... I do not consider that ...unless the process is wholly dependent upon only the expertise of the decision-maker it cannot be an expert determination. Rather...there may be a number of factors that need to be weighed in reaching a decision in a particular case.”

## **IMPACT**

The case highlights the importance of clarity in the dispute resolution clauses and the expensive consequences of a confused arbitration clause when the wisdom of the Courts is a necessary indulgence.

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