

The Efficacy of Using Independent Experts in Dispute Resolution Clauses – Are they Practical for Complex Disputes?

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ABSTRACT

In the recent decision of *Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corporation* [2018] FCAFC 118 (*Onslow v BTAC*) the full bench of the Federal Court dismissed an appeal regarding the Federal Court's first instance decision refusing to stay proceedings in the matter.¹ The primary judge refused to stay proceedings despite the plaintiff not following the requirements of a dispute resolution clause included in a Deed that specified the use of an independent expert to resolve disputes between the parties. Although it is a well-established principle that parties should be held to their agreed dispute resolution procedures, this decision highlights the exceptional circumstances where a court may refuse a stay and depart from the commercial bargain struck between the parties to an agreement.

I INTRODUCTION

Expert appraisal and determination is a creature of dispute resolution where the parties to the dispute seek the assistance of a technical expert rather than a judge, legal expert or arbitrator to decide a dispute.² Similar to other forms of alternate dispute resolution, its use is motivated by overlapping goals and objectives of the parties including the demand for quick, reliable, private and low-cost alternatives to traditional litigation.³

Although the use of independent experts in dispute resolution clause has wide-spread use in contracts and agreements, the appeal decision in *Onslow v BTAC* raises doubt over the efficacy of such clauses that rely on independent experts in complex and or multi-party disputes. Analysis of the decision in *Onslow v BTAC* highlights the use of independent experts in dispute resolution clauses may not be considered mandatory where the dispute is complex; the dispute resolution mechanism chosen by the parties is not suited to the subject of the dispute; the dispute involves a third party; or the independent expert's determination is an opinion only (and not binding upon the parties to the dispute).

II BACKGROUND TO THE DISPUTE BETWEEN BUURABALAYJI THALANYJI ABORIGINAL CORPORATION AND ONSLOW SALT PTY LTD

A Initial Decision

Buurabalayji Thalanyji Aboriginal Corporation (*'BTAC'*) is the holder and trustee of native title rights on behalf of the Thalanyji people, for an area of land to the south of Onslow in Western Australia (*'WA'*).⁴ In November 1992, the WA Government granted Onslow Salt

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¹ *Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd* [2017] FCA 1240.

² LexisNexis Butterworths, *Dispute Resolution LexisNexis Custom Publication for Murdoch University*, (LexisNexis Butterworths, 2016) 87.

³ Brian C. Willis, 'Resolving Disputes by Expert Determination: What Happens When Parties Select Appraisers, Accountants, or Other Technical Experts to Decide Disputes' (2017) 7 *Florida Bar Journal*.

⁴ *Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd* [2017] FCA 1240 [6].

Pty Ltd (**‘Onslow’**) a mining lease under the *Mining Act 1978* (WA) and ratified it under the terms of the *Onslow Solar Salt Agreement Act 1992* (WA) (**‘State Agreement’**). The mining lease covered an area of land located to the south-west of Onslow near the coast and within the native title area held in trust by BTAC.⁵

In March 1996, Onslow entered-into a ‘Deed’ with the Native Title Claimants of the Thalanyji people. The BTAC has been a party to this Deed since September 2008, representing the native title interests of the Thalanyji people regarding the terms of the Deed and any future act under a Future Act Agreement between Onslow and BTAC.

The State Agreement entitled Onslow to submit to the Minister for Mines proposals to expand, modify or otherwise vary its activities beyond its initially approved activities in the mining lease area. In January 2010, upon approval from the Minister for Mines, Onslow agreed to surrender to Chevron Australia Pty Ltd (**‘Chevron’**) 343 hectares of land within Onslow’s mining lease area as part of Chevron’s Wheatstone gas project principally to provide fill for flood mitigation.

In July 2017, BTAC commenced proceedings against Onslow and the State of Western Australia (**‘State’**) in the Federal Court concerning the above activities within the native title area.⁶ Onslow then brought an application for stay of BTAC's proceedings on the basis that BTAC had breached the requirements of their dispute resolution clause (which provided that a disputed question or difference to be referred to an independent expert) under the Deed.⁷ In response, BTAC submitted that there was no requirement for compliance with the dispute resolution clause as the nature of dispute in this particular matter fell outside the scope of the dispute resolution clause.

Upon consideration of the facts and relevant authorities,⁸ McKerracher J held that the dispute resolution clause of the Deed was not applicable in this instance and that the stay of proceedings sought by Onslow should be refused. His reasons were that, although parties should generally be held to their bargain in relation to a dispute resolution clause, such clauses do not oust the discretion of the court to hear the matter of the dispute in question.⁹ As a general proposition, a stay will not be granted in exceptional circumstances where it would be unjust to deprive the applicant of their right to have their claim heard in court. McKerracher J held that the use of an independent expert in the application of a dispute resolution clause, that can only produce an opinion that is non-binding on the parties, falls into that exceptional category whereby a stay will not be granted.¹⁰

B Appeal Decision

⁵ *Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corporation* [2018] FCAFC 118 [2].

⁶ *Ibid* [3].

⁷ *Ibid* [4-5].

⁸ *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332 [54]; *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563; *Raskin v Mediterranean Olives Estate Ltd* [2017] VSC 94.

⁹ *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563 [10]-[15].

¹⁰ *Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd* [2017] FCA 1240 [81].

Onslow appealed the initial decision of the Federal Court. On 2 August 2018, the full bench of the Federal Court affirmed the initial judgment and held that the primary judge was correct to refuse the grant of stay of proceedings. The Court ordered that the appellant pay the respondent's costs. The following sections examine the relevant principles that the Federal Court considered in refusing the grant of stay of proceedings in *Onslow v BTAC*.

III DISCRETIONARY POWER OF COURT TO GRANT A STAY OF PROCEEDINGS

It is a well-settled legal principle that the power of the court to grant a stay of proceedings is discretionary and will only be granted if good reasons are shown.¹¹ The onus of showing good reason rests with the party opposing the stay of proceedings – in this case BTAC.

Generally, a stay of proceedings will be refused if it would be unjust to deprive a party to a dispute of their right to have the matter judicially heard by a court.¹² Although each case should be determined on its own facts and circumstances, some examples of the circumstances where the court may refuse to grant a stay of proceedings include:¹³

- the agreed dispute resolution process would deal with only part of the dispute;
- there would be duplication of effort if the agreed process was to be followed in the particular case;
- the refusal of a stay would result in a multiplicity of proceedings;
- in the case of an expert determination, the dispute is inapt for determination by an expert because it does not involve the application of specialist knowledge to matters to be observed or investigated by the expert or is outside the expert's field of expertise; and
- the agreed procedures are inappropriate or inadequate for the nature of the dispute.

In the earlier authority of *Dance with Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332, Hammerschlag J held that the court will hold the parties to their bargain of using a resolution clause unless the party opposing the stay of proceeding can show strong reasons against doing so.¹⁴ Furthermore, the court will not lightly refuse to grant a stay of proceedings where the dispute resolution clause relied upon is enforceable on the parties to a dispute.¹⁵ This principle imposes an onus on the party opposing the stay to establish that exceptional circumstances exist for not using the dispute resolution clause procedures.¹⁶

Ordinarily, a stay of proceedings will be refused if it would be 'unjust to deprive a party of its right to have its claim determined judicially'.¹⁷ Such onus can only be discharged by showing that the agreed dispute resolution mechanism did not apply in their particular case.¹⁸

¹¹ *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563 [10]-[15].

¹² *Onslow Salt Pty Ltd v Buurabalyji Thalanyji Aboriginal Corporation* [2018] FCA 1240 [15].

¹³ *Ibid* [16].

¹⁴ *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332 [89].

¹⁵ *Ibid* [21].

¹⁶ *Ibid*.

¹⁷ *Ibid* [54].

¹⁸ *Ibid* [22]-[27].

IV EXAMINATION OF THE GENERAL PRINCIPLES FROM *ONSLow v BTAC*

A Scope of the Onslow Dispute Resolution Clause

Both parties agreed at the initial hearing of the stay application, that BTAC had failed to refer the dispute to an expert in a manner required under the dispute resolution clause of the Deed. The BTAC argued that there was no requirement to do so in these exceptional circumstances, as it would not be possible on a realistic assessment, for an expert to resolve the issues within this particular dispute.

The dispute resolution clause of the Deed provides that where there is a dispute, parties shall refer the 'disputed question or difference...to an independent expert'.¹⁹ The dispute resolution clause further outlines the obligations of the selected independent expert to carry out their functions to 'act as an expert and not as an arbitrator...and express in writing an opinion on the matter in dispute'.²⁰ The dispute resolution clause also provides that 'no party shall be entitled to commence or maintain any action or proceedings until that dispute decision or difference has been referred to and considered in accordance with this clause'.²¹

In the initial decision, McKerracher J acknowledged that the dispute between Onslow and BTAC involved 'extremely complex factual matters raised in a lengthy pleading' where BTAC sought a variety of relief.²² The relief sought included:

- damages against Onslow for intentional interference with native title rights and economic interests held by BTAC, misleading and deceptive conduct, and breach of contract;
- damages against Onslow and the State under the tort of conspiracy;
- damages against the State for negligence, breach of its duty of care, and breach of statutory duty;
- a declaration that the purported approval of the Minister is void and of no effect at law;
- a declaration that in causing the fill to be removed from the salt mining area, Onslow acted without any valid authorisation or permission; and
- interest as a component of such damages or in terms of s 51A of the *Federal Court of Australia Act 1976* (Cth).²³

Having regard to the extensiveness of the matters raised in BTAC's pleadings, McKerracher J established that an expert would not be able to resolve the complex issues in these circumstances. Furthermore, the disputed matters involved a third party (the State of Western Australia) who was brought into proceedings on claims outside the scope of the Deed.²⁴ In making his decision, McKerracher J noted that his decision was not based on a deficiency of the dispute resolution clause, but rather the dispute resolution clause was more appropriate for

¹⁹ *Buurabalayji Thalanyi Aboriginal Corporation v Onslow Salt Pty Ltd* [2017] FCA 1240 [46].

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid* [6].

²³ *Ibid* [36].

²⁴ *Ibid* [75].

simpler and more specific issues arising under the Deed.²⁵ The dispute resolution clause was 'meant to provide a quick possible resolution to problems arising under the tasks identified in the Deed'.²⁶ The nature of the matter in *Onslow v BTAC* fell outside the scope of a dispute resolution clause independent expert clause due its complexity and into the exceptional category of matters.

B Involvement of the State of Western Australia in the Proceedings

An exceptional characteristic of *Onslow v BTAC* is the involvement of the State of Western Australia as a second respondent in the proceedings. The nature of relief sought includes a claim to public law relief. Moreover, there is a wider public interest for this dispute to be dealt with in the courts rather than within the private confines of the parties utilising an independent expert under a dispute resolution clause of a Deed, to which the State is not a party.²⁷ The Full Court of the Federal Court in *Onslow v BTAC* emphasised in their decision, that the agreements of the parties to use an alternative dispute resolution method cannot oust the jurisdiction of the courts.²⁸ Where there are wider public interests beyond those of the parties in dispute, it may be a significant factor to refuse a grant of stay.

C Binding Nature of the Agreed Mechanism

An independent expert has a duty to deliver their decision based on the prescribed protocol (dispute resolution clause) of the agreement.²⁹ Depending upon the dispute resolution clause protocol in an agreement, the decision may be binding or non-binding upon the parties to the dispute. In *Onslow v DTAC*, the court found that it was relevant to consider whether the dispute resolution clause would produce a binding or non-binding outcome on the parties in dispute in exercising the court's discretion to grant a stay of proceedings.³⁰

In *Onslow v BTAC*, the independent expert's decision on a disputed matter that has been referred under the dispute resolution clause was considered to be nothing more than an advisory opinion. Consequently, Onslow and BTAC are not contractually bound by the outcome of an independent expert's opinion.³¹ On this basis, the court found that the 'non-binding' nature of the dispute resolution clause added further weight to the argument behind utilizing judicial discretion as to whether to grant a stay or not.

The scope for challenging an independent expert's decision is usually limited to circumstances where the expert failed to follow technical procedures, where there may have been an undisclosed conflict of interest, or where the expert may have exercised collusion, partiality or may have been guilty of fraud. The NSW Court of Appeal in *Australian Vintage Limited v*

²⁵ Ibid [76].

²⁶ Ibid [80].

²⁷ *Onslow Salt Pty Ltd v Buurabalyji Thalanyji Aboriginal Corporation* [2018] FCA 1240 [17].

²⁸ Ibid [17].

²⁹ Paul Worthington, 'Provision for Expert Determination in the Unitization of Straddling Petroleum Accumulations' (2016) 23 *Journal of World Energy Law and Business*.

³⁰ *Onslow Salt Pty Ltd v Buurabalyji Thalanyji Aboriginal Corporation* [2018] FCA 1240 [38].

³¹ *Onslow Salt Pty Ltd v Buurabalyji Thalanyji Aboriginal Corporation* [2018] FCA 1240 [37].

Belvino Investments No 2 Pty Ltd confirmed that an expert determination conducted under a contract can be subject to review if the expert does not carry out the task that the expert was contractually bound to carry out.³² This is the case even if the contract states that the determination is final and binding.³³

V IMPLICATION OF THE DECISION

The affirmed decision in *Onslow v BTAC* to refuse a stay of proceedings does not undermine the efficacy of dispute resolution clauses in commercial agreements between parties.³⁴ Rather, the court confirmed that parties must comply with the agreed procedure in the contract unless the party wishing to abandon it is able to show good cause in doing so. *Onslow v BTAC* is an example of where it may be appropriate to abandon a dispute resolution clause to the recourse of the courts due to the complexity of the issues and the wider public interest associated with the dispute.³⁵

VI CONCLUSION

In all cases, against the refusal of a stay is the weighty consideration that the parties should be held to their bargain. The Court will respect the terms of any agreement between the parties committing to alternative processes for the resolution of disputes, such as:

- (a) good faith negotiation;
- (b) arbitration;
- (c) conciliation;
- (d) mediation; and
- (e) expert determination,

and encourage disputes to be resolved through the mechanisms that parties have agreed to in the dispute resolution clause of their contracts or agreements. This means that the Court will not lightly refuse to grant a stay in circumstances where the dispute resolution clause relied upon is enforceable. In most cases, the existence of an enforceable agreement to submit to a dispute resolution process will be a weighty consideration against the refusal of a stay and only in the exceptional circumstances which have been elaborated upon above will Courts be likely to depart from the principled notion outlined by Dixon J in *Huddart Parker Ltd v The Ship Mill Hill* [1950] HCA 43, who stated that there is "a strong bias in favour of maintaining the special bargain".

³² [2015] NSWCA, 275.

³³ [2015] NSWCA, 275; Paul Martin, 'Expert Determinations under Contract: Reviewable even if Final' (2015) 86 *Law Society of NSW Journal*.

³⁴ *Onslow Salt Pty Ltd v Buurabalyji Thalanyji Aboriginal Corporation* [2018] FCA 1240 [76].

³⁵ *Ibid* [75].