IN THE COURT OF APPEAL OF NEW ZEALAND

CA775/2013
[2015] NZCA 62

BETWEEN	WATERFRONT PROPERTIES (2009) LIMITED Appellant
AND	LIGHTER QUAY RESIDENTS' SOCIETY INCORPORATED First Respondent
	BODY CORPORATE 326496 (NORTH AT LIGHTER QUAY) Second Respondent
	BODY CORPORATE 343562 (STRATIS AT LIGHTER QUAY) Third Respondent
	BODY CORPORATE 358939 (HALSEY AT LIGHTER QUAY) Fourth Respondent
	BRUCE GRAY QC Fifth Respondent

Hearing:	19 February 2015
Court:	Wild, French and Cooper JJ
Counsel:	P G Skelton QC and S M Thompson for Appellant M P Reed QC and P A Morten for First, Second, Third and Fourth Respondents No appearance for Fifth Respondent
Judgment:	11 March 2015 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay one set of costs to the first, second, third and fourth respondents together for a complex appeal on a band A basis together with usual disbursements. The Court certifies for second counsel.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Waterfront Properties (2009) Ltd (Waterfront) appeals a decision of Ellis J.[1] In the decision, Ellis J declined to strike out or stay various claims brought by the first, second, third and fourth respondents (the respondents) against Waterfront and Mr Gray QC.

[2] The key issue is whether it is arguable that an expert making an expert determination materially breached his mandate by failing to question witnesses in circumstances where he considered himself unable to resolve critical conflicts in the evidence without the benefit of such questioning.

Factual background

[3] Waterfront was the building manager of a residential apartment complex in Auckland known as "Lighter Quay". The complex comprises four unit titled buildings each with its own body corporate, together with some common facilities and a water space. The second, third and fourth respondents are three of the bodies corporate in question, while the first respondent manages the common facilities shared by the bodies corporate.

[4] Each of the respondents has a written contract with Waterfront governing the provision of management services to the complex. There are some differences between the contracts but for present purposes those differences are immaterial.

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1 *Lighter Quay Residents' Society Inc v Waterfront Properties (2009) Ltd* [2013] NZHC 2678.

[5] Central to the issues in this case is a clause in the contracts that provided for resolution of disputes by way of expert determination. The clause (which for ease of reference we shall call clause 15) was as follows:

> **15 DISPUTE RESOLUTION**
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> 15.1 If a dispute arises between the parties in connection with this agreement then that dispute must be dealt with in accordance with this clause.
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> 15.2 If:
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> 15.2.1 a party has given to the other party notice of a dispute in connection with this agreement; and
>
> 15.2.2 the parties are unable in good faith to settle the dispute within 14 days after notice under sub-clause 15.2.1 has been received by the other party, then the dispute may be submitted by either party to such person as may be nominated by the president or vice-president for the time being of the Auckland District Law Society. The person nominated is to act as an expert and not as an arbitrator.
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> 15.3 Both parties are entitled to make written submissions to the expert so appointed upon the matter the subject of the dispute.
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> 15.4 The expert's decision is final and binding upon the parties and the cost of the expert's decision will be borne by the parties in such shares as the expert may determine.

[6] The contracts also contained identical termination clauses that empowered the respondents to terminate the contract on the grounds of gross misconduct or gross negligence by Waterfront in the performance of its duties under the agreement.

[7] At various dates during June and July 2011, each of the respondents purported to terminate their respective contracts with Waterfront. The notices of termination did not give any reasons for termination.

[8] Waterfront disputed the respondents' right to terminate the contracts and invoked the dispute procedure in clause 15.

[9] In addition to the dispute about the terminations, Waterfront also sought resolution of other disputes that had arisen between it and the respondents.

[10] The parties failed to resolve the disputes themselves. Waterfront then submitted the disputes to a person nominated in accordance with clause 15.2.2 by the President of the New Zealand Law Society.[2] The person nominated was Mr Gray QC.

[11] In December 2011, Mr Gray convened a directions conference with the parties' legal representatives. A timetable was agreed for the exchange of pleadings and a further conference scheduled to discuss whether the parties wanted to vary the clause 15 process by entering into a more detailed agreement for either expert determination or arbitration. In a minute issued after the conference, Mr Gray noted "[w]hether or not oral evidence is necessary, Counsel believe the parties would prefer there to be a hearing".

[12] In their statements of defence filed after the directions conference, the respondents asserted they were entitled to terminate the contracts because (amongst other things) Waterfront had been guilty of gross misconduct or gross negligence. Particulars of the gross misconduct alleged included the fabrication of invoices to justify costs charged to the first respondent, the deliberate overcharging of cleaning services and lack of performance.

[13] At the second directions conference, the parties agreed they did not want to vary the dispute resolution procedure set out in the contracts. They further agreed to exchange statements of evidence (including statements in reply).

[14] Subsequently there was also agreement that Mr Gray determine the termination dispute as a preliminary issue.

[15] On 1 March 2012, Mr Gray wrote to counsel confirming that the preliminary issue for determination was whether the management agreements had been lawfully terminated or wrongfully repudiated.

[16] Later on 14 March 2012, the lawyer acting for the respondents wrote to Mr Gray advising that he intended to make two of their key witnesses available at

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[2] No issue appears ever to have been taken that clause 15.2 refers to the President of the Auckland District Law Society, and not the New Zealand Law Society.

the hearing to answer any questions put to them by Mr Gray. This was strongly opposed by Waterfront's counsel primarily on the grounds that the clause 15 procedure was not an arbitration process and did not provide for oral evidence.

[17] In response, Mr Gray proposed that witnesses from either party be permitted to attend the hearing and that if a party wanted the witness to supplement their written evidence by making oral statements, the matter could be addressed at the time. The respondents agreed to that proposal. Waterfront maintained its opposition to any witness giving further evidence or being questioned on their written statements.

[18] The hearing duly took place and lasted a full day. It appears most of the time was taken up with submissions from counsel addressing the relevance of documents in the common bundle which Mr Gray had not yet had an opportunity to read. The respondents' two witnesses were present but were not questioned by Mr Gray. The possibility of cross-examining them was not raised by either party or by Mr Gray. There is, however, uncontested affidavit evidence that, at the end of the hearing, counsel for the respondents told Mr Gray the respondents' witnesses would make themselves available to provide further evidence once Mr Gray had had an opportunity to read all the materials.

[19] On 22 June 2012, Mr Gray issued his preliminary determination. He held that the respondents had not validly terminated the contracts.

[20] The determination contains the following passages:

> 18. The hearing proceeded on the basis of the sworn statements. No witness gave oral evidence, and no witness was cross-examined. This means I have a series of sworn assertions, some of which conflict with each other, but have had no opportunity to evaluate witnesses. *As will be seen, this has meant that some conflicts of evidence are not able to be resolved.*
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> ...
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> 24. The essence of this part of the dispute is that the Society and the Bodies Corporate say the Particulars they have pleaded are evidenced by the witness statements they have filed, and amount to gross misconduct or gross negligence so that the Agreements have validly been terminated. Waterfront [and a claimed assignee of

> Waterfront Properties] say the evidence is disputed, and is unclear. They also say that even if proved, the allegations do not amount to gross negligence or gross misconduct and so there have been no grounds for valid termination.
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> ...
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> 77. I interpret gross misconduct to refer to intentional conduct such as fraud or deceit. Both submissions and evidence given by the Society and the Bodies Corporate argue there has been intentional misconduct of this type.
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> ...
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> 81. The onus of proving fraud or deceit is the civil onus of balance of probabilities. Cogent evidence is required.
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> 82. *It is very difficult to be in a position to find intentional misconduct without having an opportunity to hear oral evidence and assess the witnesses who gave that evidence.*
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> ...
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> 85. In the circumstances the evidence available does not reach the level of cogency required for me to find that there has been the kind of intentional misconduct which has reached the level characterised by the Agreements as "gross".
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> ...
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> 96. I do not believe the evidence goes this far. If evidence given by witnesses for the Society and the Bodies Corporate were unchallenged, *or if I had been given an opportunity to hear witnesses give evidence orally, it may have been possible for me to find that there was no possible explanation for the financial management failures alleged, and that the failures amounted to gross negligence.*
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> ...
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> 102. Also as with allegations of financial mismanagement, *I am unable to resolve conflicting evidence* about the scale of deficiency, or the causes for it. In the absence of an ability to do this, the evidence does not persuade me that any negligence is "gross" because it is accompanied by the degree of foreseeability of harm or indifference to harm which the cases require.
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> (Emphasis added) (Footnote omitted)

[21] On receipt of the determination, the respondents asked Mr Gray to recall it on the grounds that he had the power to determine his own procedure and that, once the conflicts in the evidence had become apparent to him, he should have exercised that power to require the cross-examination of witnesses.

[22] Mr Gray declined the application to recall his determination.

[23] Dissatisfied with that outcome, the respondents filed proceedings in the High Court against both Waterfront and Mr Gray. The statement of claim pleads six causes of action:

(a) The first cause of action – described as breach of contract – alleges that Mr Gray misdirected himself as to the procedure to be followed and as a result failed to determine the dispute that had been submitted to him. The main relief sought is a declaration that Mr Gray's preliminary determination is not binding.

(b) The second and third causes of action are against Waterfront only and allege numerous breaches of the management agreements. A declaration is sought that the contracts were validly terminated or, if not validly terminated that there should be an inquiry into damages.

(c) The fourth cause of action is a claim against Waterfront for breach of fiduciary duty.

(d) The fifth cause of action is a claim under s 140 of the Unit Titles Act 2010.

(e) The sixth cause of action relates to quantum issues arising out of an earlier determination by another expert Mr Mills QC.

[24] On 7 February 2013, Waterfront filed an application in the High Court to strike out or stay all of the claims except the claim under the Unit Titles Act. The main ground of the application was that the matters at issue had already been either determined by Mr Gray or submitted to him for determination.

[25] The application came before Ellis J and it is her judgment declining Waterfront's strike out application that is the subject of the current appeal. For reasons which will become apparent, it has not proved necessary for us to traverse the High Court decision in any detail.

[26] Finally in this recital of the background history, we record that Mr Gray appropriately did not take an active part in either the High Court hearing or the hearing in this Court.

Arguments on appeal

[27] On appeal, Waterfront made three important concessions:

(a) It accepted that an expert determination is an inquisitorial process and that the expert has the power to hear oral evidence, allow cross-examination and question witnesses on his or her own initiative without the process necessarily losing its character as an expert determination and becoming an arbitration.[3]

(b) Contrary to the position it had taken before Mr Gray, Waterfront accepted that clause 15 did not preclude Mr Gray from exercising those powers had he chosen to do so.

(c) It agreed that if we were to find the first cause of action was not amenable to strike out, then that would be the end of the matter. The other five causes of action should remain in the High Court. And it would also not be necessary for us to consider a further issue about the interaction between clause 15 and another dispute resolution clause in the contract. This latter issue had occupied much of the time in the High Court.

[28] The focus of the argument before us was therefore very much on the first cause of action and in particular whether it was arguable that Mr Gray's failure to hear oral evidence or question witnesses meant he had not discharged his mandate.

[29] As explained by Ellis J,[4] the conventional approach is that where an expert determination clause provides (as it does in this case) that any determination by the

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3 *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160.

4 At [59].

expert shall be "final and binding", those words without any qualification[5] mean there are only very limited grounds on which the determination may be challenged. More particularly, the decisions state that the courts may intervene only where the expert has departed from his mandate in a material respect and failed to do what he was appointed to do.[6] It is not enough to show the expert has made a mistake, was negligent or even patently wrong.

[30] Mr Skelton for Waterfront submitted that, although Mr Gray may have had difficulties, he *did* in the end make a determination that under clause 15 was final and binding on the parties regardless of whether the decision was correct or not. In Mr Skelton's submission, all Mr Gray did was decide the case on the basis of the evidence that was available to him and the onus of proof, something which decision-makers do every day in courts and tribunals throughout New Zealand. He was entitled to determine it on that basis and, although he may have had the power to determine it on another basis, he was not under any obligation or duty to do so. Having made a determination of the very issue he was asked to determine, he could not reasonably be said to have departed from his mandate.

[31] Mr Skelton further argued that even if Mr Gray had made a mistake, any error was an error of process and an error of process cannot in law take an expert outside his mandate. At best for the respondents, Mr Gray answered the right question in the wrong way but that is not a ground for judicial intervention.

[32] In support of this latter proposition, Mr Skelton referred us to the following passage from the decision of the English Court of Appeal in *Barclays Bank PLC v Nylon Capital LLP*.[7]

> [37] … there is no procedural code for expert determination, in contradistinction to arbitration. The activities of an expert are subject to little control by the court, save as to jurisdiction or departure from the mandate given. Unless the parties specify the procedure, the expert determines how he will proceed; it is rare for what might be perceived as procedural unfairness in an arbitration to give rise to a ground for challenge to the procedure adopted by an expert.

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5 Such as in the "absence of manifest error".

6 See the leading case of *Jones and others v Sherwood Computer Services plc* [1992] 2 All ER 170.

7 [2011] EWCA Civ 826; [2012] 1 All ER (Comm) 912.

> [38] I therefore accept that if the parties have chosen such a process and the dispute falls within the jurisdiction of the expert, then they must be held to it, whatever view might be taken as to the appropriateness of the procedure for the matters submitted to the expert.
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> (Footnotes omitted)

Analysis

[33] The first point we make is that Mr Gray is a legal expert who was essentially undertaking a factual inquiry. That is to say, it was not a situation of an expert applying his or her own expertise without reference to external evidence. Moreover, it was a factual inquiry into an issue (the existence or otherwise of gross misconduct) which was, as Ellis J put it, "inherently contestable".[8]

[34] The second point is that Mr Gray did more than state he had experienced "difficulties" in resolving the conflict in the evidence. Rather, he expressly stated he had not been *able* to resolve it. Yet the conflicting evidence was central to the issue that required determination. Mr Gray also stated that with the benefit of oral evidence and questioning, the outcome of his decision could have been different.

[35] In those circumstances, we consider it distinctly arguable that in proceeding to issue a determination despite, by his own admission, being unable to resolve issues of fact that were fundamental, Mr Gray thereby departed from his mandate in a material respect.

[36] Either Mr Gray was unaware of the extent of his inquisitorial powers or he made a conscious choice not to exercise the powers and remain passive. Either way, in our view, once he had realised he was not going to be able to do what the parties had asked him to do without taking further steps, he should have communicated that to the parties and reconvened the hearing.

[37] The fact that Mr Gray was acting as an inquisitor does, in our view, distinguish the situation from the adversarial examples of determining issues on the evidence available postulated by Mr Skelton. It also disposes of the argument that because the respondents never requested cross-examination, they are somehow

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8 *Lighter Quay Residents' Society Inc v Waterfront Properties (2009) Ltd*, above n 1, at [79].

estopped from challenging the determination now. We agree with Ellis J that it was arguably Mr Gray's responsibility, not the parties', to ensure he had the necessary processes in place in order to do what he was mandated to do.[9]

[38] We fully accept as emphasised by Mr Skelton that in agreeing to expert determination, parties have agreed to a dispute resolution process which has the advantages of cost, speed and finality. Courts must be careful to keep parties to their bargain and not undermine the benefits of expert determination.

[39] We also accept as noted in *Barclays* that procedural unfairness or an expert's failure to observe due process will seldom be a ground of challenge in itself.[10] But where the expert is effectively unable to discharge his mandate because of a process error, then that takes the case into a different category.

[40] We emphasise that the facts of this case are most unusual and unlikely to be repeated.[11] We also emphasise that at this stage we are only dealing with a strike out application and therefore not reaching any concluded views. All that we are saying is that it is arguable this is one of those relatively rare cases where setting aside an expert determination may be warranted. Accordingly we agree with Ellis J that the first cause of action in the High Court (breach of mandate) should be allowed to proceed.

[41] It follows as a result of Waterfront's concession that the other five causes of action must also remain in the High Court.

[42] Finally for completeness, we record that in the High Court, Ellis J also held it was arguable Mr Gray had become a de facto arbitrator rather than an expert, thus rendering the determination ultra vires and void.[12] This was not the basis of the first cause of action as pleaded. Nor was it an argument advanced by the parties in the High Court. We see some difficulties with the analysis including the fact the Judge appears to have relied on dicta from a dissenting judgment in *Northbuild*

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9 At [81].
10 *Barclays Bank PLC v Nylon Capital LLP*, above n 7, at [37].
11 Counsel were unable to find any other case with similar facts.
12 At [52].

Constructions Pty Ltd v Discovery Beach Project Pty Ltd in the mistaken belief that it was the dicta of the Court.[13]

[43] However, because of the view we have taken in relation to the mandate issue, it is unnecessary for us to consider the point further.

Outcome

[44] The appeal is dismissed.

[45] Counsel agreed that costs should follow the event and be assessed on the basis this was a complex appeal requiring two counsel. The respondents also sought a twenty per cent uplift "because of the range of issues raised by the appeal and their complexity." The appellant opposed any uplift.

[46] We are not persuaded the appeal was sufficiently wide ranging or complex to justify any uplift. However, in light of counsel's agreement, we are prepared to order that the appellant must pay one set of costs to the first, second, third and fourth respondents together for a complex appeal on a band A basis and usual disbursements. We also certify for second counsel.

Solicitors:
Buddle Findlay, Auckland for Appellant
Skeates Law, Auckland for First, Second, Third and Fourth Respondents
McElroys, Auckland for Fifth Respondent

[13] Above n 3.