Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd
[2005] SGHC 224

Case Number : Suit 1044/2003, SIC 3965/2005

Decision Date : 08 December 2005

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Mohd Sadique Bin Ibrahim Marican and Anand Kumar (Sadique Marican and Z M Amin) for the plaintiff; Shahiran Ibrahim and Lim Ker Sheon (Asia Law Corporation) for the defendant

Parties : Evergreat Construction Co Pte Ltd — Presscrete Engineering Pte Ltd

Contract – Contractual terms – Parties agreeing to resolve differences through independent assessor – Whether terms of reference appointing independent assessor as expert or arbitrator – Difference between arbitration and expert determination – Whether grounds existing for setting aside award made by independent assessor – Whether terms of reference obliging independent assessor to give reasoned award existing

Contract – Prevention principle – Whether duty of plaintiff to co-operate arising – Whether conduct precluding plaintiff from taking advantage of own wrong existing

8 December 2005

V K Rajah J:

1 What is the difference between the role of an expert as contrasted to that of an arbitrator? In what circumstances can a decision of an expert be challenged? Is an expert under any legal obligation to give reasons for his determination? These are some of the issues raised in these proceedings. The plaintiff's attempt to set aside an expert's award also shines the light brightly on its rather remarkably cavalier conduct in patently flouting the assessment process. Can the "prevention principle" apply in such circumstances to deny it any relief?

Introduction

2 The plaintiff was the main contractor for the construction of Woodlands Junior College ("the Project"). The defendant was the subcontractor appointed by the plaintiff to design, supply and install the micro-piling foundation ("the micro-piling") for the Project.

3 The defendant did not meet the contractually stipulated deadline for the completion of the micro-piling. Both parties then promptly blamed each other for the consequential delay and resulting losses. Unable to resolve their differences, the plaintiff initiated proceedings to recover its alleged losses. The defendant in turn counterclaimed for the unpaid balance of the price of the works rendered as well as damages.

4 The hearing of the claims was fixed for five days from 7 to 8 and 11 to 13 October 2004. On the second day of the hearing, in an apparent attempt to diminish the expenditure of costs, the parties agreed to resolve all their differences by referring all pending claims to an independent assessor from the construction industry, who would assess the respective claims as an expert rather than as arbitrator. It is as plain as day that the parties desired a swift resolution of their outstanding disputes while avoiding the technicalities of arbitration, and needless to say, the costs and inconvenience of further court proceedings.

5 Counsel jointly settled and submitted a Consent Order which stated:

1 . The matter be submitted to an independent assessor for assessment of liability and quantum;

2. Each party to nominate two (2) reputable persons as an independent assessor within 14 days from the date of this order;

3 . In the event, parties are unable to agree to the identity of the independent assessor within 21 days of this order, the Honourable Court shall select a suitable assessor which shall be binding on the parties subject to the hearing of objections as hereinunder provided;

a. The appointed assessor and his employer be a party whom/which has no commercial dealings with either or both of the parties for the preceding three (3) years;

b. If such dealings exist, the same be declared by way of a sworn or affirmed statement presented to the parties for objections, if any and to the Honourable Court within 21 days from the date of this order;

c. Any objections thereto are to be submitted in writing within 28 days from the date of this order;

d . *Once selected, the independent assessor be at liberty to determine all issues of procedure for the assessment which shall be final;*

4. The independent assessor be *at liberty*, including but not limited to, interview witnesses, consult parties, collate information and evidence as in [*sic*] his sole discretion deems fit;

5. The independent assessor shall submit *his report* to the parties and to the Honourable Court within 120 days from the date of appointment. *The independent assessor's decision and findings on all issues of procedure, liability and quantum be final*;

6. The timelines provided herein may be extended by consent of the parties in writing;

7. The initial costs of appointing the independent assessor is to be borne equally. However, all reasonable costs occasioned by the assessment shall be at liberty to the assessor to award all costs [*sic*] upon completion of the assessment; and

8. There be liberty to apply for directions, if any.

[emphasis added]

6 The parties were subsequently unable to agree on the identity of the independent assessor ("IA"). Pursuant to the Consent Order, I then appointed Mr Seah Choo Meng, a well-regarded quantity surveyor as the IA. In the light of the subsequent events, it bears mention that the IA was in point of fact the plaintiff's nominee.

7 The IA held his first meeting with counsel on 12 January 2005. Various timelines for the filing of the relevant claim papers, exchange of relevant contractual documents, payment of the IA's fees and the hearing dates were set out by the IA. Both parties unequivocally accepted this schedule. Notwithstanding, the plaintiff apart from filing its Claim and its response to the defendant's

Counterclaim failed to comply with any of the remaining directions of the IA. It also omitted to pay the IA its half share of his professional fees (contrary to para 7 of the Consent Order) and/or to comply with its discovery obligations. The IA made numerous attempts to repair the plaintiff's defaults through a number of consequential directions but to no avail. On 16 May 2005 the IA issued Order for Directions No 7 directing, *inter alia*:

> I hereby order that unless the Plaintiffs comply with my Order for Directions No 6 by 25 May 2005, I shall proceed with the assessment of the Counterclaim of the Defendants, *leaving the Claim and Defence to Counterclaim of the Plaintiffs to be assessed as and when he [sic] complied with my Order for Directions No 6*. [emphasis added]

8 Once again the plaintiff failed to respond to the IA's direction. The defendant was naturally deeply perturbed by the plaintiff's persistent defaults. It applied to court for further directions. On 31 May 2005, Mr Tan Kin Hoon ("Mr Tan") and his wife (both directors of the plaintiff) together with the defence counsel, appeared before me to explain the plaintiff's position in relation to its failure to comply with the IA's directions. Mr Tan stated that the plaintiff had just discharged its solicitors. He added that it was "not *viable* for [the] company to proceed with [the] matter". I adjourned the matter to allow him time to consider whether the company could obtain legal representation and/or intended to reconsider its stance on the matter.

9 On 3 June 2005, the plaintiff's original counsel appeared with Mr Tan and defence counsel, stating that his firm had discharged itself from further involvement in the matter as its professional fees had not been settled. Mr Tan did not dispute this, lamely claiming that he was still attempting to find new solicitors. I then directed both defence counsel and Mr Tan to inform the IA that he ought to vary his existing directions and/or timelines to take into account the change of circumstances. Neither party sought any precise directions from the court itself on the IA's timelines or scheduling.

10 On 8 June 2005, the IA issued a peremptory directive to the plaintiff:

> 1 That the Plaintiffs shall permit the Defendants to inspect the documents that they shall use at the hearing and the documents that have been requested by the Defendants, during office hours, on or before 12noon, 11 June 2005. Written notice shall be given by the Plaintiffs to the Defendants' solicitors of their intention to comply with this Order for Directions by no later than 12noon, 11 June 2005. *Should the Plaintiffs fail to comply with Order for Directions, the Plaintiffs' Claim and Defence to Counterclaim shall be struck off forthwith*.
>
> 2 That the Plaintiffs shall file the Plaintiff's List of Documents and the Bundle of Documents in my office and serve a copy of the same on the office of the Defendants on or before 12noon, 11 June 2005, *failing which the Plaintiffs' Claim and Defence to Counterclaim shall be struck off forthwith*.
>
> *3 That the Plaintiffs comply with paragraphs 1 and 2 of this Order and do pay the required deposit as security for my costs in compliance with my Order for Directions No 6 no later than 12noon, 11 June 2005, failing which*:
>
> > *3.1 the Plaintiffs' Claim and Defence to Counterclaim shall be struck off forthwith; and*
> >
> > *3.2 I shall consider the merits of the award to the Defendants in the sum of $358,184.36 together with interest and costs as claimed, and damages to be assessed at a date to be fixed by me.*

4 Should you comply with this Order for Directions on or before 12noon, 11 June 2005, the hearing will be held from 20 to 22 June 2005, commencing at 10am on each day.

[emphasis added]

11 Suffice it to say, that the plaintiff again ignored this directive. Indeed, the plaintiff did not so much as bother to attend the meeting with the IA on 8 June 2005 despite being accorded adequate prior notice. The defendant on its part complied with all of the IA's directions applicable to it.

12 On 14 June 2005, the IA informed the parties, *inter alia*, that:

As directed in my Order for Direction No 8, in the event the Plaintiffs failed to comply with the directions in that said Order, I shall consider the merits of the award to the Defendants of the sum of $358,184.36. In this connection, I shall inform the parties separately on the available dates for the hearing and *make the award on the basis of the evidence before me as submitted by the Defendants*. [emphasis added]

13 Despite this very precise direction and actual *notice* of it, the plaintiff steadfastly chose not to respond to and or participate in the assessment. The plaintiff was to all intents and purposes completely uninterested and unconcerned about the assessment procedure and/or outcome.

14 In response to a query from the defendant's solicitors in relation to the procedure applicable to the assessment, the IA on 20 June 2005 clarified that:

For the sake of good order, as the appointed Independent Assessor, in making an award, *I have to review all the evidence before me* as submitted by the Defendants in their bundle of documents and consider the merits. Once that is completed, I will then proceed to make a *reasoned award*. [emphasis added]

15 After receipt of the relevant information from the defendant, the IA proceeded to assess the defendant's counterclaim. To finalise his assessment, he also requested for additional documentary evidence from the defendant. In a letter dated 29 June 2005 addressed to the defendant and copied to the plaintiff, the IA in addition to seeking clarification of the defendant's counterclaim notified the plaintiff:

By copy of this fax to the Plaintiff, I have not received any response from the Plaintiff to my Orders for Directions as follows:

- 18 Apr 05 … Order for Directions No 3
- 3 May 05 … Order for Directions No 4
- 9 May 05 … Order for Directions No 5
- 9 May 05 … Order for Directions No 6
- 16 May 05 … Order for Directions No 7
- 8 Jun 05 … Order for Directions No 8

There was no further substantiation of the Plaintiff's Claim or Reply and Defence to Counterclaim.

If there are such documents, please submit by **5.30pm, Monday 4 July 2005** through the Plaintiff's appointed legal representatives, *failing* which in all fairness, and to bring the matter to finality, I will proceed to make a reasoned award.

[emphasis added]

This bears testament to a final attempt and plea by the IA, notwithstanding the plaintiff's contumacious disregard of his earlier directions, to persuade the plaintiff to submit to him any documents substantiating any of the matters raised by the plaintiff either in support of its claim and/or to rebut the defendant's counterclaim. The plaintiff yet again ignored the IA's request.

16 On 20 July 2005, the IA issued his award ("the award"). He, *inter alia*, stated:

9 Having given sufficient time and notice to the Parties, the Claimants/Plaintiffs failed to response [*sic*] to my Order for Directions No 3, 4, 5, 6, 7 and 8, following upon which, the Claimants'/Plaintiffs' Claim and Defence to Counterclaim shall be struck off.

10 The Respondents/Defendants have agreed that I be asked to make an award on the matters, save for the issue on the Respondents'/Defendants' counterclaim of damages, amount of which to be assessed and directed in a further award after having heard the Parties on that issue.

…

NOW THE Claimants'/Plaintiffs' Claim and Defence to Counterclaim having been struck off and having reviewed and considered the evidence and the submissions given on behalf of the Parties, I FIND AND HOLD AS FOLLOWS

Balance Payment for Works Carried Out

1. The Respondents/Defendants claimed $358,184.36 being the unpaid balance of the invoices issued by the Respondents/Defendants for works carried out and particularized in Annex A of the Respondents'/Defendants' Statement of Defence and Counterclaim.

2 Having *sighted the pile records and other further supporting documents, I am satisfied that the work had been carried out*. *In the absence of any evidence that the work was rejected or disputed, there was no ground to deny payment for work done*.

3 I note from the Respondents'/Defendants' evidence that there was a typographical error in the indicated installation depth of pile ref no C285, the installation depth should read as 11.7 metres instead of 15.3 metres. Consequently, after making adjustment of the said error, the total value of work done is assessed to be $1,249,275.00.

4 For the *reasons* given above, I assess the total balance payment for work carried out to be **$357,638.36**, breakdown as follows:

Value for Work Done:	**Amount Before GST**	**GST**	**Sub Total**
Amount (subject to 4% GST)	1,247,515.00	49,900.60	1,297,415.60

Amount (subject to 5% GST)	1,760.00	88.00	1,848.00
Sub-Total	1,249,275.00	49,988.60	1,299,263.60
LESS Previous Payment			(660,000.00)
LESS Contra Charges			(281,625.24)
TOTAL BALANCE PAYMENT			**$357,638.36**

[emphasis added]

17 It is evident from para 3 that the IA did not assess the entire sum claimed by the defendant to be the precise amount due to it. He made a slight adjustment to take into account what appeared to him to be a typographical error. The final sum awarded to the defendant was $357,638.36.

The plaintiff's application to set aside

18 Soon after the IA published the award the plaintiff quite suddenly and rather unexpectedly sprang into action. Taking a renewed interest in the dispute, in an uncharacteristic display of newfound energy and enthusiasm, it shed its calculated indolence and engaged new solicitors. These solicitors applied to court on 3 August 2005 to set aside the IA's award, on the rather audacious basis that the IA had failed to "assess the liability of parties" as had been agreed in the terms of reference. It further alleged that the IA had improperly disregarded the plaintiff's Claim, its Defence to the defendant's Counterclaim as well as all relevant underlying supporting documents which would have undermined the defendant's counterclaim. To crown it all, the plaintiff went as far as to assert that the IA had failed to articulate his reasons for the award. It was alleged in particular that the IA had made a manifest error in simply echoing and then accepting the defendant's counterclaim.

19 On 2 September 2005 I dismissed, without diffidence, the plaintiff's setting aside application. The plaintiff has appealed against this decision and I now set out my grounds of decision.

The plaintiff's complaints

20 The plaintiff in its setting aside application claimed that the IA had failed to consider:

(a) the valuation of the defendant's work, which was an issue that had to be evaluated and determined;

(b) the defendant's alleged failure to comply with contractual specifications;

(c) the defendant's failure to meet the contractual schedule; and

(d) the plaintiff's correspondence that disputed the veracity of the defendant's counterclaim.

I shall deal with these complaints collectively under the heading "the merits complaint".

21 Additionally, the plaintiff asserts that the IA had breached the terms of his appointment. The plaintiff claims that the IA was obliged to make an "assessment" of both the liability and quantum of all claims. This in turn entailed the furnishing of a "reasoned award"; in other words, not only was the IA required to make an assessment of the respective liabilities of the parties and the quantum to be awarded, it was also imperative that the IA state in full the basis for his final determination. For convenience I shall refer to these various related points as the "terms of reference complaint". I now address each of the plaintiff's two contentions as labelled.

The merits complaint

22 This particular complaint must be viewed in its proper setting. First, the persistent, calculated and contumacious refusal of the plaintiff to observe almost the entire catalogue of the IA's directions. Secondly, the sheer oblivious indifference of the plaintiff in refusing to attend any of the scheduled hearings. Thirdly, the discharge of the plaintiff's original solicitors accruing from the plaintiff's failure to pay their fees. Fourthly, Mr Tan's unqualified and blatant statement to the court on 31 May 2005 that it was "not *viable* for [the] company to proceed with [the] matter".

23 It bears reiteration that in his letter to the plaintiff of 29 June 2005, the IA, *inter alia*, stated:

> There was no further substantiation of the Plaintiff's Claim or Reply and Defence to Counterclaim. *If there are such documents, please submit by* ***5.30pm Monday, 4 July 2005*** through the Plaintiff's appointed legal representatives, failing which in all fairness, and to bring the matter to finality, I will proceed to make a reasoned award. [emphasis added]

The plaintiff wilfully ignored this invitation to submit any relevant documentation.

24 Throughout the entire relevant period, the plaintiff expressed no explicit or implicit desire, intention or indeed any interest in participating, let alone complying, with the IA's assessment exercise and/or directives. Ironically, such a stance totally ran counter to the fact that the reference to the IA was wholly consensual and that the IA was in fact the plaintiff's nominee. Plaintiff's counsel cannot conceivably refute that, until after the award was made by the IA, the plaintiff showed no interest whatsoever in the conduct of the assessment. The plaintiff's grievance is not a case of or a complaint occasioned by breach of natural justice or the setting of unreasonable or unconscionable timelines. To put it bluntly, this amounts, on the contrary, to a case of outright and contumacious disdain: disdain for the assessment process, disdain for the IA's directives, and not least, total and utter disregard for the parties' agreement *apropos* the modalities for dispute resolution.

25 It is noteworthy that from the point that the original solicitors discharged themselves right up to the point that the award was made (a period of a few months), the plaintiff made no visible effort whatsoever to engage another solicitor let alone ask the IA for additional time to respond to his directions. Both its statements on record and its conduct amount to unequivocal testimony that the plaintiff was unconcerned with the assessment. Simply put, the plaintiff at all material times evinced no interest whatsoever in either prosecuting its claim or defending the defendant's counterclaim as in its own words it was "not viable" to do so.

26 The crux of the merits complaint is in reality a plea to the court to reopen the award through the back door by examining the purported merits of the plaintiff's Claim and its alleged Defence to the Counterclaim, notwithstanding the agreement that the IA's decision was to be "final" in all respects.

27 Given its client's contumacious conduct, plaintiff's counsel was unable to coherently articulate why and/or how the court could or should allow the plaintiff a second bite at the cherry on the merits. In particular, he was unable to develop any rational argument as to how the plaintiff could conceivably obviate the Consent Order that the IA's decision and findings on all issues of procedure, liability and quantum are to be *final*. The starting point for the modern statement on the law relating to experts is to be found in *Campbell v Edwards* [1976] 1 WLR 403, where Lord Denning MR opined at 407:

> It is simply the law of contract. If two persons agree that the price of property should be fixed by [an expert] on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. *Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it*. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything. [emphasis added]

28 In *Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co* [1978] 1 Lloyd's Rep 175 Lawton LJ said at 181:

> They [the auditors] were to be experts. Now experts can be wrong; they can be muddle-headed; and, unfortunately, on occasions they can give their opinions negligently. Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening. What is not acceptable is the risk of the expert being dishonest or corrupt.

29 In the absence of fraud or any corrupt colouring of the IA's determination, there is neither liberty nor latitude to interfere with or rewrite the parties' solemn and considered contractual bargain, see [5]. It is quite inappropriate for a court to substitute its own view on the merits when the parties have already agreed to rely on the expertise of an expert for a final and irrevocable determination. I must in the context of the current circumstances add that, even if there were a discretionary right to reopen the award, I would not exercise that option – given the wholly inappropriate and cavalier conduct manifested by the plaintiff throughout the assessment process.

The terms of reference complaint

30 The IA appeared in his letter of 4 July 2005 to take the view that he was obliged to make a reasoned award. In this letter he stated, *inter alia*:

> I could [*sic*] only proceed to make a *reasoned award* … upon receipt of the Defendant's submission of the Further Particulars. [emphasis added]

31 On the basis of this declaration by the IA, the plaintiff asserts that the IA himself recognised that he was obliged to give a reasoned award explaining his findings in detail. Defendant's counsel, on the other hand, contends that by virtue of the IA's statement in para 2 of the Award (see [16]) the award is indeed a "reasoned award". The plaintiff vigorously disputes that the abbreviated reference to "supporting documents" is tantamount to the furnishing of reasons.

32 It is appropriate at this juncture to examine the IA's contractual obligations in this matter. What was he obliged to do? How was he obliged to make and substantiate his determination(s)? Was he required to give any reasons for his award, let alone detailed reasoning?

The status of the IA

33 The first issue to legally determine is the status of the IA irrespective of the parties'

intentions. Was he an expert or an arbitrator? There are important differences between the two roles that in turn attract varying attributes and entail consequences peculiar to the respective appointments. Unfortunately, the two appointments are often confused with one another. See John Kendall, *Expert Determination* (Sweet & Maxwell, 3rd Ed, 2001) ("*Expert Determination*") at para 1.1.2:

> Experts are often loosely described as being some kind of arbitrator. The fact is that they are not. Experts are a distinct species of dispute resolver whose activities are subject to little or no control by the court, from whose decisions there is no appeal, but who may nevertheless be liable for negligence in performing these otherwise unreviewable functions. Arbitrators, by contrast, are subject to control by the court, some of their decisions are, at least in theory, subject to appeal, and they are immune from actions for negligence. A partnership or company can be an expert, whereas an arbitral tribunal always consists of readily identifiable individuals. *The crucial difference between expert determination and arbitration lies in the procedure and the absence of remedies for procedural irregularity in expert determination*. An arbitration award may be set aside because the procedure fails to conform to the statutory standard of fairness which is closely derived from the principles of natural justice: no such remedy is generally available to invalidate an expert's decision. *An expert can adopt an inquisitorial, investigative approach, and need not refer the results to the parties before making the decision. An arbitrator needs the parties' permission to take the initiative, and must refer the results to the parties before making the award*. [emphasis added]

Arbitration and expert awards also have different legal status. Experts' decisions are founded purely on contract and must be enforced as contractual bargains both within and without the jurisdiction. Arbitration awards, on the other hand, have an exalted status by virtue of domestic statutes and international treaties such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("the New York Convention"). They can, subject to certain conditions, be enforced in the same manner as judgments.

34 Both arbitration and expert awards, however, have the same fundamental and common foundation – contract law. The law upholds and recognises such agreements and the consequential awards because of the sanctity it accords to contractual arrangements. I can do no better than to echo the observations of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 353:

> [T]hose who make agreements for the resolution of disputes must show good reasons for departing from them, …

An expert's decision can be set aside on the basis of fraud or partiality. Beyond that it is probably correct to say that only a breach of an expert's terms of appointment would suffice to set aside his decision. Errors of fact or law will not vitiate an award if the expert acts within his contractual mandate. In contrast, there is a statutory mechanism albeit a very limited one for the review of both domestic and international arbitration awards.

35 At the end of the day, the modern distinction between an expert and arbitrator does not lie purely in whether the office holder is performing a judicial, quasi-judicial or purely discretionary function. The essential difference is in the duties and/or functions the terms of appointment impose on an appointee. The labelling of an appointment as "arbitrator" or "expert" is not in itself always conclusive. It is the precise contractual arrangement and the ensuing obligations of the office holder that is, in the final analysis, paramount. Is he obliged to act solely on the evidence before him and the submissions made to him or does he have a discretion to adopt an inquisitorial function? Does he

have complete discretion over the applicable rules of procedure? If he has the sole discretion to arrive at his determination without being hamstrung by procedural and evidential intricacies or niceties, it is most unlikely that the court will view the proceedings to be arbitration proceedings. An expert is permitted to inject into the process his personal expertise and to make his own inquiries without any obligation to seek the parties' views or consult them. An expert is also not obliged to make a decision on the basis of the evidence presented to him. He can act on his subjective opinion; that is the acid test.

36 There are two fundamental aspects or facets of natural justice that generally apply to dispute resolution. The first is that a decision maker should be disinterested in the outcome. The second is due process; both parties have the right to be heard on all the issues that are to be determined. This second facet of natural justice does not apply to an expert's determination. This is the single most significant distinction between expert determination and litigation/arbitration.

37 I should further add that there is nothing wrong or contrary to public policy in allowing an expert to resolve all disputes in a matter; regardless of whether such issues are legal or factual. An expert's role need not be confined to giving opinions on matters that are not in dispute. While experts have historically acted mainly in valuations and "look and sniff" evaluations, the sphere has now evolved to include other areas of dispute resolution. Granting that references to experts are commonly found in construction documents, there is no reason as a matter of policy why parties cannot by contract extend this practice to other disputes. This is part of a wider trend for an expeditious, economical and user-friendly alternative to litigation and arbitration. Expert determination is particularly suitable for resolving technical issues and/or disputes. The court's jurisdiction is not completely excluded or ousted by such an arrangement. Its jurisdiction to police the contract to ensure that the expert has not exceeded his remit continues to prevail. Like the ubiquitous "conclusive evidence" clauses, "expert" clauses will be upheld on the basis that they are *contractual* arrangements; see *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR 345 at [19] where it was stated:

> The real foundation for the legal efficacy of such a clause is contract. It can be cogently argued that if parties expressly agree on the modalities for determining a matter, such an agreement should be upheld in the absence of any relevant public policy considerations. Indeed, this is the very basis on which the court recognises and gives effect to arbitration agreements, conclusive certificates of engineers and architects found in construction contracts and experts' decisions, amongst others.

38 Historically, alternative dispute resolution has not consistently been viewed positively by the English common law courts. The reasons for this hostility were at times somewhat self-serving. It has been incisively noted in David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2005) at p ix:

> Specialised means for the resolution of commercial disputes have dominated for centuries. In medieval England, merchants frequently submitted disputes to the arbitrament of the guilds or members of the guilds. Likewise, those engaged in international trade would turn to the mercantile law as, for example, administered by the fairs' courts. It was even observed by Lord Campbell in *Scott v Avery* that at one time the judges of the common law courts saw arbitration as a threat to their livelihood as the judges had no fixed salary and depended upon the fees generated by litigation. There was said to be a "great jealousy of arbitrations whereby Westminster Hall was robbed of those cases which came not into the King's Bench, nor the Common Pleas nor the Exchequer."

Fortunately, in the more enlightened present day judicial climate, such "public policy" impediments no longer motivate unseemly judicial interference with contractual agreements.

39 Returning to the facts, to construe the role of the IA in the assessment, it is plain that in so far as the terms of reference to the IA are concerned he was "at liberty" to adopt any procedure he saw fit. He had complete discretion over the entire assessment process. His decision on whether to adopt an inquisitorial, adversarial or any other procedure in the assessment process was deemed to be final. He was also at liberty to act on his own opinion in arriving at any determination. The IA was indubitably an expert. His "decision and findings on all issues of procedure, liability and questions [were to] be final". Pertinently, both counsel unequivocally accepted the IA's status and role as an expert. Nevertheless, plaintiff's counsel contended the IA had acted outside his remit in failing to "assess" the plaintiff's Claim and its Defence to the Counterclaim.

Challenging an expert's award

40 The next issue that arises is: in precisely what circumstances can an expert's report be challenged? The leading case in point is the English Court of Appeal decision in *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277. The views of Dillon LJ at 287 are instructive:

> On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning M.R. said in *Campbell v. Edwards* [1976] 1 W.L.R 403, 407G, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect — e.g. if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in *Jones (M.) v. Jones (R.R)* [1971] 1 W.L.R 840, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that — either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.

41 The crux of the matter is that if the parties agree to appoint an expert to resolve a dispute, his report or award cannot be challenged unless the expert has departed from his instructions in some material respect. In *Shell UK Ltd v Enterprise Oil plc* [1999] 2 Lloyd's Rep 456 at [98], Lloyd J declared:

> I should also say that, if the expert has committed a material breach of instructions, then as a matter of law the relevant act is not binding on any of the parties, leaving aside of course the effect of their subsequent acts. It is not a point on which the Court has a discretion whether or not to allow the expert's act to stand. I do not consider that Mr. Justice Lightman intended to suggest that there was such a discretion when summarizing the law in *British Shipbuilders v. VSEL Consortium plc,* [1997] 1 Lloyd's Rep 106 at p.109, even though he said that the Court "may" set the decision aside. That he did not mean to indicate that it was a discretionary issue appears in any event from the next following sentence. The relevant passage is this:
>
> > If the expert in … his determination fails to comply with any conditions which the agreement requires him to comply with in making his determination, the Court may intervene and set his decision aside. Such a determination by the expert as a matter of construction of the agreement is not a determination which the parties agreed should affect the rights and duties of the parties and the court will say so.

42 In *Commonwealth of Australia v Wawbe Pty Ltd* (BC 9805379, Lexis) Gillard J, correctly, in my view, observed:

> *In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract*? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. ***The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract***. [emphasis added in bold italics]

43 The IA did not depart from his remit in his assessment. He acted well within the ambit of his terms of reference (which afforded him absolute and complete procedural mastery over the conduct of the assessment) in assessing only the defendant's claim upon the plaintiff's conscious and deliberate decision not to participate in the assessment process. The plaintiff had earlier informed the court that it did not intend to participate in the assessment process because it was "not viable" to do so. Should this preclude or prevent the defendant from proceeding with the mutually accepted procedure to have its claim assessed? Is it correct for the plaintiff to have stood by consciously and silently while the assessment was effected and now bemoan that its claim and defence(s) were not considered? Decidedly not. The plaintiff cannot be allowed to blow hot and cold. Through its unambiguous intentions manifested by its unequivocal conduct the plaintiff had amply demonstrated that it was neither interested in having its claims assessed or in having its views heard on any of the pending matters or issues.

Was the IA under an obligation to provide reasons for his award?

44 The next issue to address is whether the terms of reference of the IA required a "speaking" or "reasoned" award? If so the point to ponder is whether the IA gave a reasoned award and if not, the consequences of such a failure (if any). See *Expert Determination* ([33] *supra*) at para 15.13.1:

> The decision of an expert may be known either as "speaking" or "non-speaking". A speaking decision is one which gives the reasons and calculations behind the decision, whereas a non-speaking decision does not. The expressions are also used with the words "certificates", "decisions", "determinations" and "valuations", and are sometimes found in describing whether reasons accompany an arbitration award; and an expert decision is often referred to as an award. Hence the expressions "speaking award" and "non-speaking award" can be used to describe both expert decisions and arbitration awards.

and at para 15.13.4:

> However, as a practical matter, a non-speaking decision is very hard to challenge. In a case where the expert's decision dealt with each disputed item but did not show detailed workings, the expert was alleged to have failed to take the effect of tax into account. The Court of Appeal refused to invalidate the decision, but did say that, if it could be proved that materials relevant to the tax issue had not been put before the expert, the decision might be questioned. The point was made graphically in a later case:
>
> > The whole point of instructing a valuer to act as an expert (and not as an arbitrator) is to achieve certainty by a quick and reasonably inexpensive process. *Such a valuation is almost invariably a non-speaking valuation, with the expert's reasoning and calculations concealed behind the curtain*. The court should give no encouragement to infer, from ambiguous shadows and murmurs, what is happening behind the curtain.
>
> [emphasis added]

45 In my view, if the parties in appointing an expert fail to stipulate or mandate in the terms of reference for a "speaking" or "reasoned" award the court itself cannot, and indeed should not, insist on this. To require reasons to be given *apropos* such an award would be tantamount to rewriting the bargain. By the same token, it would be akin to imposing a new obligation on an expert who has undertaken the appointment on the basis that the invariable practice is not to give reasons unless the terms of reference require it. The notion and objective of providing reasons is inextricably linked to the notion and possibility of review by another body. One must bear in mind however that when an expert's award is made as opposed to an arbitrator's award, there is no legal review process prescribed by law. Parties, who appoint an expert, must acknowledge and accept the risk that though an expert might and can err, they consciously and sanguinely accept that risk in lieu of the expense, uncertainty and perhaps delay that court and/or arbitration proceedings may occasion. The position would be, of course, quite different if there was an express term in the remit that required a reasoned or speaking award. A court would then enforce such a term as an integral part of the contract. See *Expert Determination* ([33] *supra*) at para 16.7.12:

> Experts prefer to issue non-speaking decisions; i.e. those not disclosing their reasons. This stems from the fact that the less an expert discloses, the less anyone can find fault with it. The provision of reasons increases an expert's vulnerability to claims because details of the workings and calculations may be the very evidence that would otherwise be lacking. *An expert cannot be compelled to give reasons for the decision unless it is part of the remit. It is a matter determined by the terms of the expert's contract*. Some experts accept appointments only on the basis that they will not be giving reasons. It is common in rent review for reasons to be given only if the parties pay the expert higher fees. [emphasis added]

46 It is incontrovertible that the IA's remit or terms of appointment, see [5], did not oblige him to give reasons for his decision(s) made in the course of the assessment. However, as observed from the correspondence before me, the IA appeared to assume that a "reasoned decision" was required. He also evidently also took the position that his final award was "reasoned"; see para 4 of the award at [16].

47 As he was not legally obliged to give reasons *qua* expert, the plaintiff's complaint about the lack of a "reasoned award" is entirely without merit. The IA's decision is final and I need neither remove nor peer behind the curtain for the relevant "whys" and "wherefores" of his determination. For the avoidance of doubt, I should also state that from a legal point of view, had the IA been under an obligation to give a reasoned or speaking award, the award itself could be characterised as a "reasoned" one in a strict legal sense. A reasoned award or determination requires at the very least a reasoned consideration of the evidence and an explanation for the final determination – however brief that may be. Such an explanation can be verbose or taciturn but not wholly mute. A mere sparse statement narrating facts without dealing with and seeking to elucidate the basis for the determination of issues posed is not a reasoned award. In the award the IA gave a reason for accepting the defendant's counterclaim. There was no evidence before him "of any evidence that the work was rejected or disputed". This was not a bald and bare determination. It must also be emphasised that the plaintiff wholly disregarded his many requests for contrary evidence. I do not think, in the circumstances, given the plaintiff's conduct anything more was required of the IA.

The plaintiff's obligation to co-operate

48 When parties make and seal a contract, they are deemed to have done so on the basis that they intend and desire the contract to be performed and taken to its conclusion. As far back as the decision in *Stirling v Maitland* (1864) 5 B & S 841; 122 ER 1043 at [852], Cockburn CJ declared:

> I look on the law to be that, if a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

49 This is a well-known and respectable principle; see also *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 and *Schindler v Northern Raincoat Co Ltd* [1960] 1 WLR 1038. Another facet of a contracting party's obligation to honour its undertaking is the implied duty to co-operate. In *Mackay v Dick* (1881) 6 App Cas 251 at 263, Lord Blackburn stated:

> [W]here in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that *each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect*. [emphasis added]

50 It is plain that the plaintiff was in patent breach of its obligation to co-operate with the defendant in facilitating the assessment process; see also *Expert Determination* ([33] *supra*) at paras 9.3.3 and 9.15.9. The plaintiff has by its conduct repudiated its obligations under the terms of reference embodied in the Consent Order. The defendant should be absolved from the consequences of the plaintiff's conduct. As Lord Finlay LC aptly stated in *Morris v Baron and Company* [1918] AC 1 at 9:

> A party to a contact which imposes certain obligations and confers certain rights upon him cannot claim to exercise these rights while repudiating his obligations in material particulars.

Plaintiff cannot take advantage of its own wrong

51 Even assuming, *arguendo*, that the IA had "failed" to "assess" the plaintiff's claim as provided in the terms of reference, is the plaintiff in a position to even advance such a contention? The courts accept that in general, a party in default under a contract cannot take advantage of his own wrong: *Chitty on Contracts* vol 1 (Sweet & Maxwell, 29th Ed, 2004) at para 1-025. This long established principle may be relevant in a contractual dispute either as a principle of construction or as a rule of law depending on the circumstances; *Kensland Realty Ltd v Whale View Investment Ltd* (2001) 4 HKCFAR 381. The House of Lords decision of *Alghussein Establishment v Eton College* [1988] 1 WLR 587 involved an agreement for a lease that included a covenant by the intending lessee to build. A clause in the agreement provided that if for any reason attributable to the wilful default of the lessee the development remained uncompleted by a certain date the lease "shall forthwith be completed". The clause was awkwardly drafted. The court opined that the lessee was not entitled to take advantage of its own wilful default in securing a benefit under a continuing contract, namely, the lease itself. Lord Jauncey of Tullichettle stated at 594:

> Although the authorities to which I have already referred involve cases of avoidance the clear theme running through them was that no man can take advantage of his own wrong. There was nothing in any of them to suggest that the foregoing proposition was limited to cases where the parties in breach were seeking to avoid the contract and I can see no reason for so limiting it. A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations.

In essence, even if the parties expressly provide that the contract shall *ipso facto* determine upon the happening of a certain event, such a provision is to be construed subject to the principle that no

man can take advantage of his own wrong, so that one party may not be allowed to rely on such a provision where the occurrence of the event is attributable to his own act or default; *Chitty on Contracts* at para 22-054. This principle is also referred to as the "*prevention principle*" and is wedded to notions of fair play and commercial morality. It offends all sensible norms of commercial intercourse to allow a party in breach of its contractual obligations to rely on its very breach to either evade responsibility or, even more farcically, to assert that the other contracting party must also willy-nilly accept or sustain the consequences of that breach.

52 In order to invoke this principle it must be shown that the contractual right or benefit that a party is asserting or claiming is a direct result of that party's prior breach of contract. The relevant breach, the factual consequences flowing from the breach and the advantage the contract breaker is seeking to raise must be identified. The principle seeks to prevent the contract breaker from seeking an "advantage" arising from his default; *Kensland Realty Ltd v Whale View Investment Ltd* ([51] *supra*), *Nina's Bar Bistro Pty Ltd v MBE Corporation (Sydney) Pty Ltd* [1984] 3 NSWLR 613. See also the illustrations of this principle in Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 3rd Ed, 2004) at para 7.09. *Chitty on Contracts* ([51] *supra*) at para 12-082 states:

> It has been said that, as a matter of construction, unless the contract clearly provides to the contrary it will be presumed that it was not the intention of the parties that either should be entitled to rely on his own breach of duty to avoid the contract or bring it to an end or to obtain a benefit under it. This presumption applies only to acts or omissions which constitute a breach by that party of an express or implied contractual obligation, or (possibly) of a non-contractual duty, owed by him to the other party. Breach of a duty, whether contractual or non-contractual, owed to a stranger to the contract will not suffice. However, such a "rule of construction" appears to be somewhat different in nature from those discussed above. It may therefore be that it is better regarded as depending on an implied term of the contract in question or as one illustration of a more general principle that "A man cannot be permitted to take advantage of his own wrong."

53 In my view, what the plaintiff was in reality attempting through the purported complaint about the IA's failure to assess its claim and defence(s) was to benefit from its own "wrong" that sprung from a conscious and a calculated indifference to the entire assessment process. It cannot be allowed to do so. The plaintiff committed an egregious breach of its contractual obligation by failing to co-operate with the defendant (as well as the IA) in the assessment process. Having distanced itself from and disregarded that process, how can it now even begin to complain that the IA failed to assess its claim and/or consider its defence(s)? How can it in all fairness prevent the defendant from reaping the rewards of the latter's committed and conscientious participation in the assessment process, given that there is no suggestion of any personal impropriety on the part of the IA?

Conclusion

54 The plaintiff made a deliberate and defiant decision not to partake in the assessment proceedings conducted by the IA:

(a) It disregarded the IA's several requests for information pertaining to its Claim and/or Defences to the defendant's Counterclaim.

(b) It failed to pay to the IA his requisite fees.

(c) It stood by silently when the IA struck out its claim.

(d) It failed to appoint new solicitors when its previous solicitors declined to represent it any further on account of unpaid professional fees.

55 Despite all this, the plaintiff displays remarkable temerity by asserting that the IA failed to "assess" the plaintiff's claim and was therefore in breach of his contractual remit. This is absurd, to say the least. The plaintiff chose to ignore virtually the entire assessment process in nothing less than a premeditated decision. It knew at an early stage that the IA would not assess its claim because of its serial defaults and that it was obliged to co-operate with the IA as well as to pay his fees. It had decided, at a very early juncture, and articulated that it was "not viable" to proceed with the assessment. How then can it now complain that the IA failed to assess its claim? In the circumstances of the matter, this would be tantamount in spirit to the plaintiff attempting to take advantage of its own wrong. It cannot be allowed to do so. It had explicitly repudiated its contractual obligations to the defendant. The plaintiff's contentions both start and end on impossible premises. Why should it be given a second bite at the cherry with a new assessment process when it so blatantly and nonchalantly ignored the first? I have no hesitation in dismissing this entirely unmeritious application.

56 It is plain that if an expert makes a mistake in performing what he was sanctioned to do his award remains binding. The parties cannot complain on that score. However, if he deviates from his mandate or steps outside the parameters of his remit, the parties should not and cannot be bound by his findings. In this case, the IA did precisely and only what he was asked to do. He decided the claim as it was presented to and prosecuted before him. He did not assess the plaintiff's claim or defence(s), and correctly so, as the plaintiff evinced no interest whatsoever in prosecuting its claim(s) or in presenting rebuttal evidence.

57 The plaintiff's application is dismissed.