Superintendent’s Certificate to Arbitration: Interpreting Liquidated Damages from a Queensland Court of Appeal

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In the recent decision of **Pacific Diamond 88 Pty Ltd v Tomkins Commercial & Industrial Builders Pty Ltd [2025] QCA 50**, the Queensland Court of Appeal offered some illuminating perspectives on how arbitration clauses can interact with (and ultimately safeguard) the parties’ substantive rights when a contract’s payment and security mechanisms are under strain. Although the dispute at hand revolved largely around liquidated damages and set-off provisions, the Court’s reasoning provides a clear reminder of the “final safety net” that arbitration can represent for parties who wish to challenge a Superintendent’s certifications or the Principal’s contractual interpretations.

From the outset, Justice Bond observed that “in this form of contract disputes would ultimately be resolved by arbitration, although parties were permitted to have recourse to the courts in certain circumstances.” The judgment underscores that an **arbitral process** can be the ultimate recourse when a party seeks to contest Superintendent-issued certificates or claim extensions of time. Justice Bond explained that because the parties had **deleted** vital passages in the standard form contract (AS4902-2000) that would otherwise allow the Principal to set off liquidated damages progressively, the correct interpretation was that “the Principal would only be able to utilise any certified liquidated damages as part of

the final certificate process."

Where that final certificate process might yield a sum payable by the Contractor—or, conversely, reduce the amount payable to the Contractor—the aggrieved party retains the right to dispute the Superintendent's certification through arbitration. Justice Bond phrased it succinctly:

> *"If the Contractor disputed that by giving notice pursuant to cl 37.4(d) on the basis that it should have been granted an extension of time, it might vindicate that position in arbitration obtaining a direction from the arbitrator that there should have been an extension of time."*

This statement highlights a crucial lesson: even if the Superintendent has issued a certificate imposing a monetary liability on the Contractor (or absolving the Principal from having to pay), that certificate does not necessarily settle the question once and for all. The presence of an **arbitration clause** in the contract—and the parties' careful drafting around final certificates and dispute notices—means the Contractor (or the Principal) can still put those issues before an arbitrator, seeking an authoritative ruling about the correctness of the Superintendent's or the Principal's stance.

Justice Bond also pointed out the logical sequence under which arbitration would be triggered. Once the Superintendent's final certificate is issued, the "final certificate shall be conclusive evidence" except in certain circumstances, including "unresolved issues the subject of any notice of dispute pursuant to clause 42, served before the 7th day after the issue of the final certificate." That notice of dispute procedure, in turn, funnels the parties into arbitration if they cannot otherwise resolve their differences.

Practitioners should note, too, the Court's observation that this approach—deferring any real monetary consequences of

Superintendent certifications to the final certificate stage—does not leave a party permanently deprived of its entitlement. Instead, it reflects a commercial bargain that ensures the Principal can still seek the benefit of liquidated damages, but only when the project is sufficiently far along (or completed) such that final entitlements are being ascertained in a single accounting. Meanwhile, the Contractor retains a robust right to **arbitrate** any alleged missteps in certifying or quantifying that liability.

All told, **Pacific Diamond 88** serves as a timely reminder that parties who strike out the more immediate set-off or recourse mechanisms in standard forms are not banishing themselves to a realm of indefinite uncertainty. Instead, as Justice Bond indicates, they are choosing to "unite in rejecting" a mid-project set-off process, and deferring the question of liability or entitlement until the end-game—knowing the law, and the arbitration clause in particular, will still allow them to test the Superintendent's conclusions when it truly matters.

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