

ANOTHER INSTANCE IN WHICH PARTIES ARE HELD TO PRE-AGREED DISPUTE RESOLUTION

By Jennifer McVeigh and Hazal Gacka

Hooks Enterprises Pty Ltd v Sonnenberg Pty Ltd

Significance

The Supreme Court held that parties must comply with the dispute resolution provision and processes in a contract even if compliance is not a condition precedent to commencing litigation.

Facts

In 2012, the plaintiff, Hooks Enterprises Pty Ltd (**Hooks Enterprises**), and the defendant, Sonnenberg Pty Ltd (**Sonnenberg**), entered into a Development Management Agreement. By mid-2016 Sonnenberg had not fulfilled its obligations and Hooks Enterprises terminated the contract.

The contract contained a dispute resolution provision (Clause 12), which outlined several processes for dispute resolution:

- commencing with giving a notice of dispute;
- the recipient providing a notice of response;
- both parties taking reasonable steps to resolve the dispute within 7 days of the notice of response; and
- either party referring the remaining dispute for expert determination.

Contrary to this provision, Hooks Enterprises commenced proceedings seeking damages for breach of contract, or alternatively, damages pursuant to section 236 of the Australian Consumer Law for misleading and deceptive conduct. Sonnenberg issued a notice of dispute

under Clause 12. Hooks Enterprises contended that the court was the appropriate forum for resolution of the dispute.

Sonnenberg filed an application to stay the proceedings on the basis that the dispute should be referred to expert determination pursuant to Clause 12. Hooks Enterprises argued that Clause 12 was not mandatory and therefore not bar to it commencing litigation. Hooks Enterprises also argued that the dispute was not amenable to expert determination because the process operated without safeguards or the supervision of the court and the claims raised mixed questions of fact and law.

Decision

The court ordered that the proceeding be stayed pending the completion of the expert determination procedure under Clause 12.

Daubney J found that Clause 12 did not expressly bar the commencement of proceedings. However, his Honour found that once a party provided a notice under Clause 12, the procedure to resolve the dispute by expert determination became compulsory. Although there was no express provision preventing a party from commencing proceedings pending the outcome of expert determination, his Honour found that parties should be held to their bargain to resolve their dispute in the agreed manner, and that a party opposing a stay must persuade the court that there is good reason to allow the action to proceed.

“ **The Supreme Court held that parties must comply with the dispute resolution provision and processes in a contract even if compliance is not a condition precedent to commencing litigation.** ”

SUPREME COURT OF QUEENSLAND
DISTRICT COURT OF QUEENSLAND

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Jennifer's expertise is in strategic thinking – applied to resolution of construction disputes, infrastructure and mining sector procurement contracts and project delivery.

A qualified mediator and arbitrator, Jennifer has 30 years' experience in the construction industry including four years as the full time member of the Queensland Building Tribunal.

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