

SNAPPING THE OLIVE BRANCH: WHEN EXPERT DETERMINATION CLAUSES GO WRONG

by Karen Ingram

Raskin v Mediterranean Olives Estate Limited & Ors [2017] VSC 94

Expert determination clauses in commercial contracts are at risk of being too uncertain to be enforced if complex disputes arise and details of the expert determination process have been left to be agreed at a later time.

The case of *Raskin v Mediterranean Olives* is an example of the impact of such uncertainty.

The Facts

Rebecca Raskin (plaintiff) invested in the Mediterranean Olives Project (first defendant), of which Anthony May (second defendant) was a director. The project was governed by a 'project constitution' to which only the plaintiff and first defendant were parties.

The plaintiff alleged that the execution of certain other investment agreements by the second defendant on her behalf was unauthorised, that project projections provided by the second defendant were misleading, and that the conduct of the first and second defendant amounted to a breach of contractual and legislative obligations. The defendants disputed the allegations.

The project constitution contained an expert determination clause permitting either party to require the dispute to be submitted to, and determined by, an independent expert, if the dispute had not been resolved through a prior settlement conference.

The plaintiff, after a failed settlement conference, commenced proceedings against

the defendants in the Victorian Supreme Court. The first defendant then applied for a stay of those proceedings, invoking the expert determination clause, and arguing that the clause in question in fact amounted to a submission to arbitration. The plaintiff contended, among other things, that the expert determination clause was too uncertain to be enforced.

Expert determination by name, submission to arbitration by nature?

The Court found that the clause was an expert determination clause in name and in nature, and not a submission to arbitration. Hargrave J drew a distinction between clauses that evidence contracting parties' intention to submit a dispute to a judicial process - more akin to the nature of an arbitration - and clauses that evidence an intention to appoint an adjudicator to determine the dispute on the basis of his or her skills and experience alone; being an expert determination. Factors indicative of a judicial process (and therefore arbitration) include:

- the conducting of proceedings according to judicial rules;
- requirement that parties and evidence be heard and decision made on those submissions (rather than an application of the independent person's evaluative skill); and
- neutral impartiality of the independent person.



Too uncertain to be enforced?

The plaintiff, arguing that the expert determination clause was too uncertain to be enforced, had a high threshold to meet. Hargrave J emphasised that the existing case authority for construing dispute resolution clauses directed the Court to give effect to the intention of the contracting parties to have their disputes resolved otherwise than by litigation.[1] His Honour accepted that it is common place that dispute resolution clauses do not specify every detail of the relevant process. However, the clause must be drafted with sufficient clarity and completeness to enable the dispute resolution process to be initiated.

In this case, the dispute encompassed legal, accounting and agricultural issues for determination; and had issues of both law and of fact at play. The project constitution specified the nature of the expert to be appointed in the event that the dispute encompassed one of any of the three issues; but was silent on the outcome if the dispute encompassed all three. Nor was there any agreement as to the procedure to be followed by the expert once appointed. Hargrave J was of the view that those were "essential matters which ought to have been included in the expert determination clause to make it sufficiently certain to be enforceable". On that basis, the clause was found to be uncertain and unenforceable.

To stay, or to proceed?

Notwithstanding his finding of unenforceability, Hargrave J held that he would

have refused the stay application anyway. Typically there is a heavy onus in opposing a stay application where a dispute resolution clause has been invoked. One way that onus can be discharged is, as in this case, where the chosen mechanism is not appropriate for the dispute. In circumstances of complicated disputes of fact or of law, the more informal, technical application of knowledge to a dispute may not serve the interests of resolution.

In this case, the dispute involved a mixture of fact and law, across legal, accounting and agricultural fields. Under the expert determination clause agreed in the project constitution, this would require different experts to make separate assessments; running the risk of inconsistent findings, conclusions and determinations. Further, neither the second defendant, nor the proposed third defendant, were parties to the project constitution or bound by the expert determination clause. Based on the risk of multiplicity of proceedings, Hargrave J held that a refusal of a stay of proceedings was appropriate in this case, even if the expert determination clause had been enforceable.

Implications

This decision illustrates the importance of contracting parties turning their minds to the drafting of their expert determination clauses. Does the clause provide sufficient certainty in the case of a complex dispute involving multiple issues and mixed questions of fact and law? Are the qualifications of the expert appropriately identified? Is the agreed process sufficient to at least enable the expert determination process to be initiated?

The case also re-affirms several principles central to the operation of expert determination clauses:

- Expert determination is substantively distinct from arbitration - it is not a judicial process;
- Expert determination clauses may be too uncertain to be enforced where further agreement on initiating process or procedure is needed, or inconsistencies are not resolved; and
- The court may exercise its discretion to refuse to stay proceedings where the contractual expert determination mechanism is inappropriate given the nature of the dispute.

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End Notes

[1] *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1

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