Multi-tiered dispute resolution clauses: a reminder of the Court of Appeal's split decision

By Jo Delaney and Charlotte Hendriks

The dispute resolution clause is often referred to as the "midnight clause" as it is commonly reviewed at the 11th hour of the contract negotiations. As a result, many dispute resolution clauses, particularly arbitration clauses, are given insufficient consideration. Despite this multi-tiered dispute resolution clauses are commonly included in many agreements. The decision of *Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82 is a timely reminder of the importance of carefully drafting the dispute resolution clause.

This case concerned an appeal from the Supreme Court of New South Wales on the question of whether a claim for unliquidated damages fell within the scope of the multi-tiered dispute resolution clause. The clause provided for the informal and formal dispute resolution of all disputes that "arise out of this Agreement" (**Clause 23.1**). The dispute resolution process provided, amongst other things, that where mediation was unsuccessful, any disputes that "concern any monetary amount payable and/or owed…under this Agreement" must be referred to arbitration (Clause **23.6.1**).

After an unsuccessful mediation, Gregory Hannigan (**Hannigan**) sought to refer the matter to arbitration pursuant to Clause 23.6.1. Inghams Enterprises Pty Ltd (**Ingham**) sought to restrain the referral to arbitration on the basis that:

- the dispute did not fall within the ambit of Clause 23.6.1 as a dispute "under this Agreement"; or, in the alternative
- Hannigan had waived his right to insist on compliance with Clauses 23.1 and 23.6.1 and refer the matter to arbitration as a result of court proceedings he had commenced in 2017 in which he successfully sought a declaration that the contract had been wrongfully terminated by Ingham (refer to *Francis Gregory Hannigan v Inghams Enterprises Pty Limited* [2019] NSWSC 321).

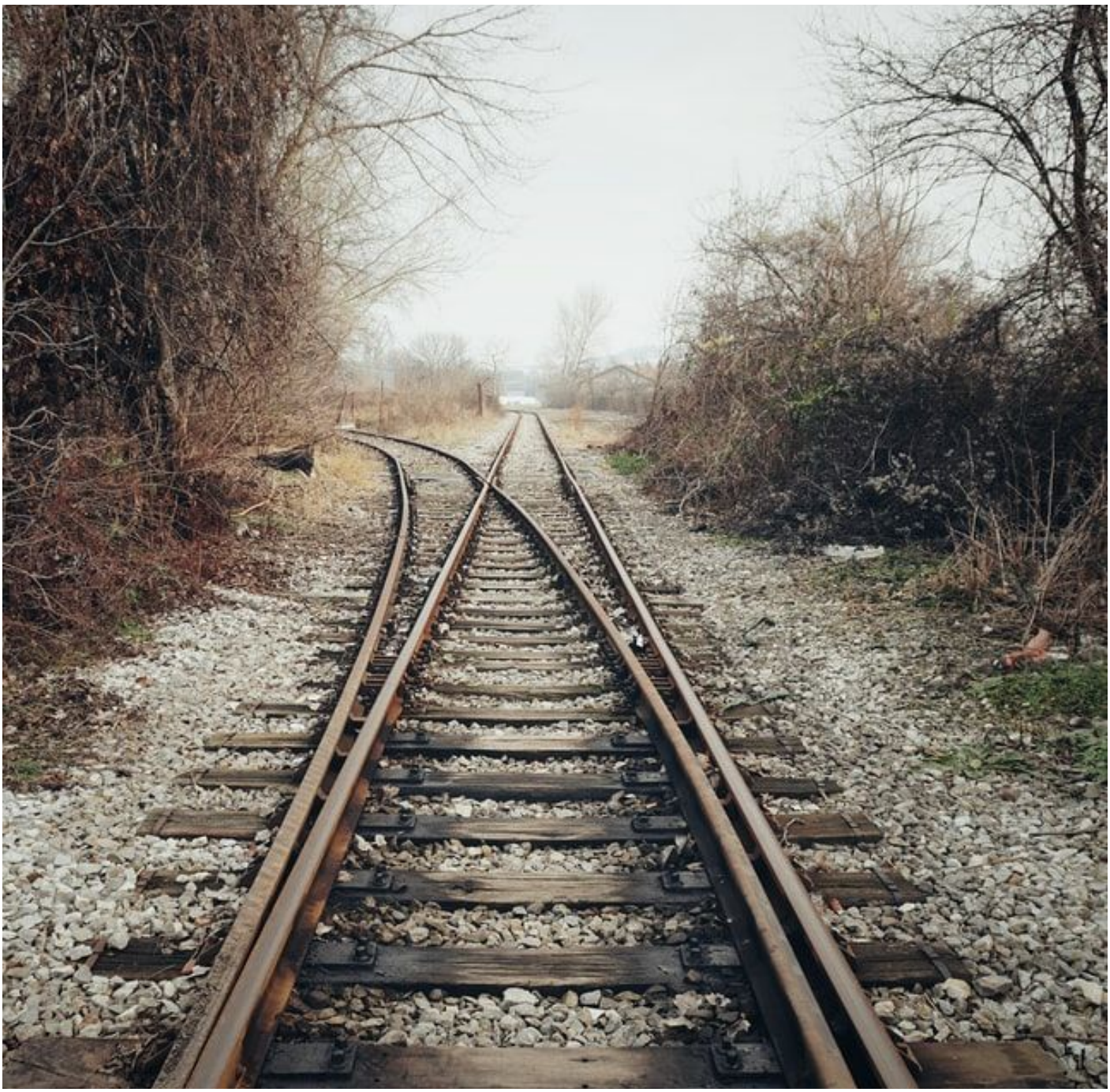
At first instance, Hannigan was successful in seeking to refer the matter to arbitration. Ingham then appealed to the Court of Appeal.

Court of Appeal decision

The Court of Appeal found that Clause 23.1 did apply to the agreement as, constructed broadly, it covered any dispute relating to the agreement, including a claim for unliquidated damages. However, the majority (Meagher and Gleeson JJA agreeing) allowed the appeal on the basis that the claim for unliquidated damages did not fall within the scope of Clause 23.6.1 as it was not a claim "under this Agreement".

Whilst the Court adopted a broad construction of Clause 23.6.1, the majority found that the dispute did not concern a monetary amount payable under the Agreement because:

1. the words "*a monetary amount payable and/or owed*" referred to an obligation owed by one party to the other to pay a monetary amount;
2. the phrase "*under this Agreement*" identified the contract as the source of the payment obligation; and
3. whilst unliquidated damages may be quantified by reference to performance under the contract, the actual source of the



obligation to pay the unliquidated damages is not contained within the contract but is an obligation arising by operation of law as a result of a breach.

As a result, the majority declared that the dispute was not subject to the arbitration agreement contained in Clause 23.6.1.

Interpretation of multi-tiered dispute resolution clauses

Justice Bell, President of the NSW Court of Appeal, disagreed with the decision of the majority in its assessment of whether unliquidated damages for breach of the agreement was a claim "under the Agreement". Bell P found that the damages claim was a claim "under the Agreement". Bell P gave extensive consideration to dispute resolution clauses, emphasising the importance of the courts taking a broad and liberal approach to the construction of dispute resolution clauses. His Honour noted, with reference to recent case law, that "*in Australia, unlike other jurisdictions, the process of contractual construction of dispute resolution clauses has not been overlaid by presumptions*". In particular, his Honour commented: "*where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it.*"

Whilst this decision demonstrates that the Australian courts will continue to interpret dispute resolution clauses objectively with reference to orthodox principles of contractual interpretation, in reality, the application of those principles in practice is not entirely clear, as indicated by the split decision of the Court of Appeal.

The decision in this case demonstrates the need for clearer guidance on the interpretation of arbitration clauses and dispute resolution clauses in general. Unfortunately this guidance was absent from the decision of the High Court of Australia in *Rinehart v Hancock Prospecting Pty* [2019] HCA 13 (see here). This grey area of the law will continue to develop through decisions of the courts. The comprehensive analysis of the dispute resolution clause cases by Bell P (including the summary of relevant clauses in an Appendix to his Honour's judgment) is a significant contribution to this development.

Nonetheless, it is fundamentally important that parties give careful consideration to the drafting of dispute resolution clauses, particularly arbitration clauses, to ensure that the clause is clear, certain and enforceable and that it accurately reflects their intentions.

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