

Article Information

Service: Projects & Construction

Sector: Infrastructure

To Litigate Or Not To Litigate? That Is The Question

In the recent decision of *Hooks Enterprises Pty Ltd v Sonnenberg Pty Ltd* [2017] QSC 69, the Supreme Court of Queensland held that parties must comply with a dispute resolution provision even where compliance is not expressed to be a condition precedent to litigation. Andrew MacGillivray, Senior Associate and Denise Burloff, Law Graduate discuss.

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Facts

The parties entered into a contract whereby the defendant was required to obtain development approval and facilitate the construction of a fast food or convenience store (**Project**). Almost five years after contracting, the Project had still not commenced, and so the plaintiff terminated.

The contract contained a dispute resolution provision, which provided that:

1. either party can give a Notice of Dispute if it asserts that a dispute exists;
2. the other party must provide a Notice of Response;
3. the parties were to take reasonable steps to resolve the dispute within 7 days of the Notice of Response; and
4. either party may refer the dispute for expert determination if the dispute is not resolved within the time provided.

The contract also set out extensive provisions in relation to how an expert was to be appointed and how the expert determination was to be conducted.

The plaintiff ignored this provision and commenced proceedings, after which the defendant issued a Notice of Dispute seeking to refer the dispute to expert determination. The plaintiff responded stating that the Court was the appropriate forum. The defendants applied to stay the proceedings on the basis that the dispute should instead be referred to expert determination pursuant to the contract.

Plaintiff's argument

The plaintiff argued that the proceeding should not be stayed as the:

1. dispute resolution clause was not mandatory and did not bar a party from commencing proceedings; and
2. dispute was not amendable to determination by an expert because:
 - the process operated without safeguards or supervision of the Court; and
 - the claims raised mixed questions of fact and law.

Court's Decision

The Court noted that a refusal to grant the stay would result in the parties not being held to their agreement, and consequently that the plaintiff had a heavy onus to persuade the Court that the stay application should be refused.

In response to the plaintiff's first argument, the Court distinguished the clause with dispute resolution clauses that had previously been considered by the Courts. These clauses required strict compliance with the processes. The Court determined that this clause did not prevent the parties from commencing legal proceedings without first referring the dispute to expert determination.

In response to the plaintiff's second argument, the Court concluded that adequate safeguards had been incorporated into the dispute resolution clause. In the Court's view, the clause properly required:

1. the President of the Queensland Law Society to appoint the expert, ensuring that the expert would be suitably qualified; and
2. the expert was required to comply with procedural fairness and natural justice.

Although the dispute raised both legal and financial questions, the Court reasoned that a suitably qualified expert would be able to decide on each issue.

The Court ultimately held that the proceedings were to be stayed.

Lessons learnt

In many instances, parties in dispute may wish to proceed directly to litigation, rather than dealing with the dispute through an ADR method (such as expert determination).

If parties intend to resort to litigation to resolve their dispute, without first dealing with the dispute under the ADR methods set out in the contract, then the parties should expressly require this to be drafted into the contract.

For example, parties may draft a provision that proceedings can be commenced notwithstanding a failure to comply with the relevant process set out in the dispute resolution clause in certain circumstances. For example::

"Notwithstanding clause [dispute provision], a Party may elect to commence proceedings if the dispute is in respect of a reasonable claim by a Party for any loss, liability, expense or costs of over \$1 million arising directly in relation to any defects in the Works"

Otherwise, it is apparent from this case that the Court will honour a dispute resolution clause, even if it's not expressed to be a precondition to litigation.