PiperAlderman

Article Information

Author: Ian Nathaniel
Service: Dispute Resolution & Litigation

Rebecca Raskin v Mediterranean Olives Estate Limited (ACN 091 024 396) & ORS [2017] VSC 94

In the matter of Rebecca Raskin v Mediterranean Olives Estate Limited & ORS [2017] VSC 94 the Supreme Court of Victoria decided that an expert determination clause was not a submission to arbitration and it will be void for uncertainty where the clause does not provide for essential dispute resolution procedures.

In the matter of *Rebecca Raskin v Mediterranean Olives Estate Limited & ORS* [2017] VSC 94 the Supreme Court of Victoria decided that an expert determination clause was not a submission to arbitration and it will be void for uncertainty where the clause does not provide for essential dispute resolution procedures.

Partner, Ian Nathaniel, Senior Associate, Ben Hartley and Law Graduate, Olivia Dalton, discuss further.

Ms Raskin brought a claim in the Supreme Court seeking various forms of compensatory relief against Mediterranean Olives Estate Limited (**Mediterranean Olives**) and others. Mediterranean Olives applied to stay the proceeding until the determination of the disputes was made by an independent expert, in accordance with the 'project constitution' governing the parties' relationship. The disputes related to overlapping horticultural, accounting, management and legal interpretation issues. Ms Raskin contended that the process or model to be employed for the dispute resolution clause required subsequent agreement between the parties.

The issues before Hargrave J were:

- Was there a submission to arbitration?
- Is the expert determination clause void for uncertainty?
- Should the proceeding be stayed?

Mediterranean Olives sought to rely on the decision of the High Court in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd**[1]** where the contract specified that the expert was to act as 'an expert and not as an arbitrator.' Mediterranean Olives reasoned that the lack of any reference in the expert determination clause assisted the conclusion that arbitration was in fact, intended and the clause was not void for uncertainty.

Hargrave J rejected Mediterranean Olives' arguments. His Honour made it clear that as the expert determination clause did not identify any procedural directions to be adopted by the independent expert in settling the dispute, nor could such an intention be implied, with his Honour noting that the clause in question required the 'independent expert' to conduct a settlement conference as well as determine the issues in the dispute. This was inconsistent with determination of a dispute in a judicial manner.

In the circumstances, his Honour concluded that the absence of the 'process or model to be employed' rendered the clause uncertain and unenforceable and he was not willing to imply any such process or model from the clause. This conclusion was perhaps reinforced by the multiplicity of issues in dispute.

As a result of the the expert determination clause being uncertain and thus unenforceable, it was unnecessary for Hargrave J to consider whether the proceeding should be stayed on the basis of the clause. His Honour noted that should his conclusion be erroneous, he would have nevertheless have refused the stay application. This was on on the basis that it would have been unjust to all parties due to the multitude of issues raised by the pleadings, which in turn may have led to further disputes.

It is important to note that this decision goes against the usual approach of the courts to favour agreed methods of alternative dispute resolution. To the extent that Ms Rankin was successful underlines the importance of properly drafted dispute resolution clauses between parties that set out adequately and appropriately how disputes are to be resolved. This is particularly important in circumstances where the disputes between the parties are wide and involving questions of expert knowledge, mixed fact and law.

Ian Nathaniel and Ben Hartley have extensive experience in procedural matters regarding dispute resolution and should you have any queries relating to these matters, please do not hesitate to contact us.