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Aiton Australia Pty Ltd v Transfield Pty Ltd

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contents

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Current developments in ADR

Aiton Australia Pty Ltd v Transfield Pty Ltd

In this case[1] the court had to deal with an application for a stay of proceedings. Transfield, the defendant, claimed that the contracts which formed the basis of Aiton Australia's claim contained dispute resolution procedures which had to be followed prior to either party commencing proceedings. Transfield requested a stay until these procedures had been carried out.

Clause 28 of each of the contracts between the parties provided an elaborate process for dispute resolution. It required the parties to 'make diligent and good faith efforts to resolve disputes in accordance with the provisions of the section before either party commences mediation, legal action or the expert resolution process, as the case may be'.

Einstein J found that, despite the fact that Transfield had 'sought to frustrate the plaintiff's attempts to regularly invoke' the process for dispute resolution in the contracts, Aiton had failed in the circumstances to invoke all of the required dispute resolution procedures.

The crucial issue for determination, however, was whether the dispute resolution clause was valid and enforceable. Here Einstein J, despite commenting that the 'parties ought to be bound by their freely negotiated contracts', dismissed the application for a stay on the grounds that the mediation agreement was unenforceable. In arriving at this finding, he made some interesting observations concerning dispute resolution clauses, specifically on the requirements for a clause to have sufficient certainty and on the meaning of 'good faith' in a dispute resolution procedure.

Certainty of dispute resolution clauses

In discussing those factors required for a finding of certainty of a dispute resolution clause, Einstein J observed that the Court will not grant a stay of proceedings to allow dispute resolution procedures to be followed 'if the procedures are not sufficiently detailed to be meaningfully enforced'. Here he approved the general approach in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd.*[2]

It is trite law that a contractual clause will not be certain if it involves an agreement to agree. However, in *Con Kallergis v Calshoni*[3] Hayne J had drawn a distinction between an 'agreement to agree', which is unenforceable, and an 'agreement to negotiate', which is part of a broader dispute resolution process and is enforceable. Einstein J quotes this judgment with approval. The distinction drawn by Hayne J focuses on the requirement for the parties to take part in a process which has an identifiable end, as opposed to the requirement to negotiate to achieve agreement, which would be unenforceable.

Einstein J observed that the focus in a dispute resolution clause should be on the process provided by the dispute resolution procedure, and the agreement to attempt to negotiate then constitutes a stage in that process. He quotes with approval from the well known *Hooper Bailie* case[4] that enforcement relates to the participation in a process from which consent might come, rather than the co-operation and consent itself. Thus it is ➢

The ADR Bulletin

➢ the *process* in which the parties must participate that must be sufficiently certain to be enforceable.

In applying these principles to the facts of the *Aiton* case, a difficulty arose with cl 28 in relation to the ADR practitioner's costs. There was no reference to either the quantum of these costs or to how they would be apportioned between the parties. It was the latter omission which was problematic. Einstein J found that the apportionment of costs was not so obvious an arrangement that it could go without saying; thus it could not be incorporated into the agreement as an implied term under the *Codelfa* conditions.[5] While it is common practice for mediators' fees to be shared equally by the parties, there are too many options which the parties could have intended for arranging payment. Einstein J held that the lack of this information rendered the clause uncertain.

Interestingly, there was no problem with the lack of reference to the quantum of the mediator's fees, presumably on the basis that this would be determined by the mediator. With the apportionment of the mediator's fees, however, the parties would have to reach their own agreement, thus rendering this an unenforceable agreement to agree.

The remainder of the dispute resolution procedure was sufficiently certain, partly due to the fact that the parties were able to determine when the required dispute resolution procedure had concluded. It is not without irony that the clause's invalidity was based on a relatively minor feature of the overall dispute resolution system.

'Good faith' as a requirement of an ADR clause

On the question of a good faith requirement in a dispute resolution clause, Einstein J also referred to Hayne J in *Con Kallergis v Calshonie*:

> although there may be difficult questions of fact and degree about whether evidence of particular conduct reveals a lack of good faith or honesty or reasonableness, the obligation to act in good faith or honestly or reasonably is an obligation that is certain.[6]

Einstein J again noted the distinction between an agreement to take part in a process as opposed to an agreement to reach a satisfactory outcome. In his opinion:

> a notion of good faith is implicit in any alternative dispute resolution procedure, as without it there is no chance of reaching a mutually satisfactory conclusion.[7]

His Honour suggested that the good faith requirement should be approached as a matter of principle on a case by case basis, using the broad discretion of the trial court. The concept of good faith depends very much on the particular wording of the clause and surrounding circumstances in each case and is thus heavily fact intensive. As a result, Einstein J held that it is 'undesirable to attempt to formulate a list of factual indicia suggesting compliance or non-compliance with the obligation to mediate in good faith'.

However, a general framework could be provided in order to ensure sufficient certainty in the use of the phrase. His Honour provides a guide to these core elements, although he does not purport to provide an exhaustive list:

(1) to undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable);
(2) to undertake, in subjecting oneself to that process, to have an open mind in the sense of:
    (a) willingness to consider such ➢

➢ options for the resolution of the dispute as may be propounded by the opposing party or by the mediator as appropriate; and

(b) a willingness to give consideration to putting forward options for the resolution of the dispute.

Subject only to these undertakings, the obligations of a party who contracts to negotiate or mediate in good faith do not oblige or require the party:

(1) to act for or on behalf of or in the interests of the other party; or

(2) to act otherwise than by having regard to self interest.[8]

It follows from these factors that a good faith requirement does not require a negotiating party to make concessions which are not in its interests, let alone to reach an agreement.

Thus an agreement to participate in a dispute resolution procedure in good faith is valid and enforceable, provided no aspect of it amounts to an agreement to agree.

Implications for drafting ADR clauses in light of *Aiton v Transfield*

In the light of this decision, drafters of ADR clauses should:

- ensure that the focus is on the process of dispute resolution rather than on the outcome and that the process itself is sufficiently certain — for example, the terms 'mediation' or 'negotiation' need to be sufficiently defined;
- ensure that the parties are able to determine when the required procedure has concluded;
- include a clause providing for the apportionment of the ADR practitioner's costs; and
- not feel restricted about the inclusion of a good faith requirement. ●

Endnotes

1. [1999] NSWSC 55020 of 1999, 1 October 1999.

2. (1995) 36 NSWLR 709.

3. *Con Kallergis Pty Ltd v Calshonie Pty Ltd* (1998) 14 BCL 201.

4. *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 206.

5. *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1981) 149 CLR 337.

6. *Con Kallergis Pty Ltd v Calshonie Pty Ltd* (1998) 14 BCL 201 at 211-2.

7. At 124.

8. At 156.