SUPREME COURT OF QUEENSLAND

CITATION:	*Hooks Enterprises Pty Ltd v Sonnenberg Pty Ltd & Ors* [2017] QSC 69
PARTIES:	**HOOKS ENTERPRISES PTY LTD (ACN 010 082 998)** (plaintiff) **v** **SONNENBERG PTY LTD (ACN 117 668 667)** (first defendant) **BRUCE QUENTIN SHELLY QUARTERMAN** (second defendant) **BENJAMIN POWELL GRIFFIN** (third defendant)
FILE NO/S:	BS No 11414/16
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	4 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	23 January 2017
JUDGE:	Daubney J
ORDER:	**1. The proceeding be stayed pending completion of the dispute resolution and expert determination procedure provided for in clause 12 of the Development Management Agreement dated 20 December 2012.** **2. I will hear the parties as to the costs of this application.**
CATCHWORDS:	PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – TO STAY OR DISMISS ORDERS OR PROCEEDINGS GENERALLY – where a stay of the proceeding was sought on the basis of an alternative dispute resolution clause – where the parties had agreed to refer disputes to expert determination – whether the dispute is amenable to expert determination – whether there is a proper basis to exercise the discretion to allow the proceeding to continue – whether the proceeding should be stayed pending the performance of the

dispute resolution process

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the parties had agreed to an alternative dispute resolution procedure – where the procedure involved referral to expert determination – where the agreement did not prevent proceedings being brought – where proceedings had been commenced before the alternative dispute resolution procedure was commenced – whether the agreement still required the parties to participate in the alternative dispute resolution procedure

Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd & Ors [1993] AC 334, cited

Dance with Mr D Ltd v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332, cited

Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd [2012] QSC 290, cited

Santos Ltd v Fluor Australia Pty Ltd [2016] QSC 129, cited

Straits Exploration (Australia) Pty Ltd v Murchison United NL (2005) 31 WAR 187, applied

Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] 2 Qd R 563, considered

COUNSEL: D de Jersey for the applicant defendants

R J Anderson QC for the respondent plaintiff

SOLICITORS: Thynne & Macartney for the applicant defendants

Thomson Geer for the respondent plaintiff

Background

[1] By a 'Development Management Agreement' ("DMA") dated 20 December 2012, the first defendant was to provide certain services to the plaintiff, principally to obtain development approval to construct a fast food or convenience store ("the Project") on the plaintiff's property, and to facilitate construction of that development.

[2] By mid-2016, no tenancies had been secured for the property and the final design for the construction of the Project had not been finalised. On 5 September 2016, the plaintiff terminated the DMA.

[3] On 4 November 2016, the plaintiff filed a claim and statement of claim seeking damages for breach of contract in the sum of $2,219,379, and in the alternative, damages pursuant to section 236 of the *Australian Consumer Law* for misleading and deceptive conduct alleged to have been committed by the defendants.

[4] On 9 December 2016, the defendants filed a conditional notice of intention to defend and this application by which they seek a stay of the proceeding.

[5] The applicants contend that the proceeding should be stayed because clause 12 of the DMA provides a procedure by which disputes arising out of or in connection with the contract are to be determined by an independent expert.

[6] Clause 12.1 of the DMA provides that the clause will survive regardless of termination or invalidity. Clause 12 continues:

> '12.2 If a party asserts that a dispute exists between the parties arising out of or in connection with this Agreement, the party can give a Notice of Dispute to the other party specifying –
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> a. the nature of the dispute;
> b. the areas of expertise it considers are required to resolve the dispute;
> c. the major issues for determination; and
> d. the relief or outcome being sought.
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> 12.3 Within seven (7) days of receipt of the Notice of Dispute, the other party must provide a Notice of Response stating its position in relation to the dispute, including –
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> (a) the areas of expertise it considers are required to resolve the dispute;
> (b) any additional issues that should be referred for determination; and
> (c) any comment on the relief or outcome referred to in the Notice of Dispute.
>
> 12.4 Within seven (7) days of receipt of the Notice of Response, the parties must take reasonable steps to resolve the dispute.
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> 12.5 Either party may refer the dispute for expert determination pursuant to this clause if the dispute is not resolved in the period referred to in clause 11.4.
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> 12.6
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> (a) The parties may agree to appoint a particular person the expert.
> (b) Failing agreement, either party may request the President for the time being ("President") to appoint the expert. The request must include copies of the Notice of Dispute and the Notice of Response and ask the President to appoint the expert as soon as possible and advise the parties in writing of the appointment.
> (c) A party must not make any request or suggestion to the President that a particular person be appointed as the expert.
> (d) The parties authorise the President to appoint the expert on the request of one of them without needing the consent or approval of the other party.
>
> …

12.8 The expert must inform the parties immediately and the expert's appointment will terminate unless the parties agree otherwise if the expert becomes aware at any stage of any circumstance which might reasonably be considered to adversely affect the expert's capacity to act independently or impartially.

12.9 The expert will –

(a) act as an expert and not as an arbitrator;
(b) act independently of and fairly and impartially as between the parties, giving each party a reasonable opportunity of presenting its case and countering any arguments of any opposing party, and a reasonable opportunity to make submissions on the procedure or the expert determination;
(c) proceed as the expert thinks fit;
(d) determine if it is appropriate to sue legal or other technical expertise to assist in the resolution of the dispute;
(e) conduct any investigation the expert considers necessary to resolve the dispute;
(f) examine such documents and interview such persons as the expert requires; and
(g) make such directions for conduct of the expert determination as the expert considers necessary.

12.10 The parties –

(a) must provide the expert with any security deposit reasonably required by the expert to secure payment of the expert's estimated fees and disbursements;
(b) must comply with any procedural direction given by the expert;
(c) have the right to legal representation during any conference or at any other stage of the expert determination;
(d) must take all reasonable steps for the expeditious and cost effective conduct of the expert determination;
(e) release, discharge and indemnify the President, officers, employees and agents of the Queensland Law Society and the expert from and in respect of any act, omission or liability which would otherwise exist in relation to the appointment of the expert or any part of the expert determination.

…

12.12 The determination of the expert –

(a) must be in writing, accompanied by reasons;
(b) is final and binding on the parties; and
(c) is not an arbitration within the meaning of any statute.'

[7] The reference to "clause 11.4" in clause 12.5 above is obviously a drafting error and as it plainly refers to clause 12.4 of the DMA it will be read accordingly. Similarly, the reference to "President" in clause 12.6(b) clearly refers to the President of the Queensland Law Society, as is made clear by clause 12.10(e).

Progress of the dispute

[8] The plaintiff, by its solicitors, wrote to the defendants on 6 September 2016 alleging the breaches of the DMA and the misrepresentations now pleaded in the statement of claim. That letter also gave a formal notice of termination of the DMA and advised the defendants that 'the full extent of [the plaintiff's] claims will be calculated and notified to you, after which legal proceedings will be commenced against your company'.[1]

[9] The defendants, by way of a letter sent by the third defendant and director of the first defendant, Mr Griffin, responded on 21 September 2016 rejecting the plaintiff's termination of the DMA and denied the reasons given by the plaintiff for its purported termination. Mr Griffin stated that unless the plaintiff performed certain steps as the defendants believed were required by the DMA, 'then we are left with no option but to instruct our solicitors Thynne & Macartney to commence the formal process of securing your client's performance of his responsibilities according to the Development Agreement.'[2]

[10] On 17 October 2016, the defendants' solicitors sent a further response. They again rejected the plaintiff's purported termination, its interpretation of the DMA and the alleged misrepresentations said to have been made by the applicants. The letter also relevantly stated:

> '9. The subject matter of the dispute between our respective clients falls within the scope of clause 12 of the DMA, and our client intends to activate the ADR/expert determination process described in that clause by separate notice under clause 12.2. This is appropriate, especially noting: (a) the nature of the DMA and the relationship of the parties thereunder; (b) that the clause is designed to survive the DMA; (c) that the clause can be activated by either party and be mandatory; and (d) that the ADR clause takes up 3 pages of the 10 page DMA.
>
> 10. In the interim, we are instructed to invite a meeting to discuss the current dispute in the immediate future.
> We think our respective client's positions can be clearly put in a meeting, and there is prospect for a sensible resolution to be quickly reached and documented.
> Please advise by 2pm on Thursday, 20 October 2016 whether your client is prepared to meet as suggested above. If so, please advise suitable times in the week from 21 October 2016.
> If your client does not wish to engage with our client, then our client will proceed as foreshadowed at points 9 and 8 of this letter.'[3]

[11] Despite at least one "without prejudice" meeting, the parties were unable to resolve their differences.[4]

[12] The plaintiff's solicitors replied[5] on 1 November 2016 reiterating the plaintiff's position and stating that they held instructions to commence proceedings against the defendants, and that if no confirmation of instructions to accept service was given by the defendants' solicitors within seven days that service of the statement of claim would be effected directly.

[13] On 4 November 2016, the plaintiff filed its claim and statement of claim.

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[1] See pp. 20-21 of ex MAM 3 to the affidavit of Marc Andrew Paul Maskell filed 9 December 2016.
[2] See pp. 28-29 of ex MAM 3 to the affidavit of Marc Andrew Paul Maskell filed 9 December 2016.
[3] See pp. 42-44 of ex MAM 3 to the affidavit of Marc Andrew Paul Maskell filed 9 December 2016.
[4] See p. 74 of ex MAM 3 to the affidavit of Marc Andrew Paul Maskell filed 9 December 2016.
[5] See pp. 45-46 of ex MAM 3 to the affidavit of Marc Andrew Paul Maskell filed 9 December 2016.

[14] On 8 November 2016 at 2.07pm,[6] the plaintiff's solicitors sent the claim and statement of claim to the defendant's solicitors by email, stating that unless they heard otherwise, the plaintiff's solicitors would arrange service on the defendants the next day.

[15] At 3.36pm on the same date, the defendants' solicitors replied[7] acknowledging the email, but stating that the attached claim and statement of claim had not been read or provided to their client. The reply email attached a letter which had been prepared before the first email was received. The letter, *inter alia*, was a notice of dispute calling for the parties' dispute to be referred to expert determination in accordance with clause 12 of the DMA.

[16] The plaintiff's solicitors replied[8] on 16 November 2016 arguing that the letter was not a valid notice of dispute, and that this Court is the appropriate forum. The plaintiff's solicitors stated that this was because the approach to expert determination outlined by the defendants involved areas of expertise across several disciplines not reasonably capable of being determined by a single expert, and involved resolution of disputes which are not matters of expertise.

[17] The plaintiff, on this application, advanced two reasons as to why the proceeding should not be stayed. First, the dispute resolution procedure in clause 12 is not mandatory, in that it does not expressly bar a party from commencing legal proceedings while the procedure is engaged, and the respondent is not in breach of the DMA by commencing proceedings. Secondly, the dispute is not amenable to determination by an expert.

Mandatory process

[18] Clause 12 is couched in permissive language. A party who "asserts" the existence of a dispute "arising out of or in connection with" the DMA "can" give a notice of dispute, to which a notice of response "must" be provided by the other party within the given timeframe. The parties "must" then take reasonable steps to resolve the dispute within the given timeframe. If this is not successful, a party "may" then refer the dispute to expert determination.

[19] It is uncontroversial that the issues in dispute concerning the alleged breach of the DMA and misrepresentations arise "out of or in connection with" the DMA. Such phrases, in similar contexts, have been interpreted broadly.[9]

[20] Clause 12 does not expressly provide a bar to the commencement of legal proceedings prior to the determination of alternative dispute resolution procedures. These contractual provisions are distinguishable from expert determination clauses considered in *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* ("*Downer*"):[10] 'a party may not commence court proceedings concerning the Dispute'.[11] Similarly, in

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[6] See pp. 47-61 of ex MAM 3 to the affidavit of Marc Andrew Paul Maskell filed 9 December 2016.
[7] See pp. 62-70 of ex MAM 3 to the affidavit of Marc Andrew Paul Maskell filed 9 December 2016.
[8] See pp. 73-74 of ex MAM 3 to the affidavit of Marc Andrew Paul Maskell filed 9 December 2016.
[9] For example, *Dance with Mr D Limited v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332, [79] per Hammerschlag J; *Straits Exploration (Australia) Pty Ltd & Anor v Murchison United NL & Anor* (2005) 31 WAR 187, 196 per Wheeler JA.
[10] [2012] QSC 90.
[11] at [6].

Santos Limited v Fluor Australia Pty Ltd ("*Santos*"),[12] the relevant clause read '[a]ny Dispute … must be dealt with in accordance with this clause 60'.[13]

[21] Those examples can be contrasted with the circumstances in *Zeke Services Pty Ltd v Traffic Technologies Ltd* ("*Zeke Services*")[14] in which the contract stated:

> '**7.6 Warranty Claims**
>
> In the event the Purchaser makes a claim … for damages for breach of any of the Warranties in accordance with this clause 7… the following will apply:
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> …
>
> (a) if the Claim has not resolved in the Initial Period, either party may refer the matter to the Australian Institute of Chartered Accountants to appoint an independent expert (**Expert**) to resolve the Claim. Any decision of the Expert will be final and binding on the parties'.[15]

[22] There was no clause in *Zeke Services* similar to those in *Downer* and *Santos* that sought to limit recourse to the courts pending the dispute resolution process. An argument was advanced in *Zeke Services* that the dispute resolution procedure clause in that case was nonetheless void as it purported to oust the jurisdiction of the courts. Chesterman J rejected this argument and held that the clause 'does not prohibit access to the courts. It provides for a means by which an identified area of dispute, which might arise under the share sale agreement, should be resolved.'[16]

[23] The dispute resolution procedure in *Zeke Services* is however slightly different to the present case. In that case the procedure required a specific party (the 'Purchaser') to make a claim for damages before the dispute could be referred to expert determination. Here, the procedure in clause 12 is capable of being triggered by either party simply asserting the existence of a dispute and providing a complying notice as permitted by clause 12.2.

[24] Senior counsel for the plaintiff argued that clause 12 is not mandatory and the plaintiff had a choice to commence proceedings in the court rather than embark on the dispute resolution procedure. It was argued that because the plaintiff was the party who raised the dispute, it therefore enjoyed an option to either trigger the alternative dispute procedure or commence legal proceedings.

[25] Counsel for the defendants argued that clause 12 should instead be read as mandatory, once a party embarks upon it. According to the construction advanced by the defendants, following notice being provided by one party, the other party is compelled to respond to the notice. The parties must then then take reasonable steps to resolve the dispute within a given timeframe, following which either party has the option to refer the dispute to an expert for determination. It was argued that this procedure is compulsory once the initial notice is given, regardless of whether or not proceedings are commenced in the meantime.

[26] I am not persuaded by the plaintiff's contention that clause 12 is to be read as giving only the plaintiff the option to commence the dispute resolution procedure in the

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[12] [2016] QSC 12.
[13] at [3].
[14] [2005] 2 Qd R 563.
[15] at 564 – 565.
[16] At 568.

agreement or to choose to commence court proceedings. In *Zeke Services*, the clause contemplated an initial claim being made by a specific party. Failure to resolve this claim by negotiation then gave a right for either party to refer to expert determination. Here, only one party need merely assert that a dispute exists in order to bind the other party to the completion of the dispute resolution process, including expert determination. Clause 12 does not require an initial claim to be made by one party, nor does it state that a party must be the first to agitate the dispute in order to provide a notice of dispute; clause 12 does not reserve the right to serve the notice of dispute so narrowly.

[27] In correspondence, the solicitors for the plaintiff argued that the notice of dispute provided by the defendants on 7 November 2016 was not valid.[17] While this point was not raised in argument before me, I consider that the notice provided complies with the terms of clause 12.2. The letter outlines the lost profit and claims of both parties, the need for financial and legal expertise, the issues to be determined and the relief sought by both parties.

[28] Being satisfied that the defendants had a right to commence the procedure in clause 12 and that a complying notice of dispute had been provided, the remaining question is whether or not, in the absence of an "any disputes" clause such was discussed in *Downer* and *Santos*, the proceeding should be stayed pending the outcome of the expert determination.

[29] As confirmed in *Zeke Services*, there is 'an undoubted jurisdiction to stay a legal proceeding where the parties have by contract agreed that their dispute shall be determined by means other than curial adjudication'.[18] It was submitted by senior counsel for the plaintiff that this principle is inapposite to the present case because there was no breach of the parties' agreement. The DMA did not restrict the parties to expert determination as a condition precedent to litigation, so it cannot be said that the respondent is in breach by electing to commence court proceedings.

[30] However, *Zeke Services* dealt with a similar contract where there was no express provision limiting the ability of a party to commence proceedings pending the outcome of the expert determination. Chesterman J did not find any difficulty in that case in staying the proceeding despite the absence of an "any disputes" or other like prohibitive clause. His Honour said:

> 'The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner … However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate.'[19]

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[17] See pp. 73-74 of ex MAM 3 to the affidavit of Marc Andrew Paul Maskell filed 9 December 2016.

[18] *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd.R. 563, 568. See also *Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd & Ors* [1993] AC 334, per Mustill LJ at 352.

[19] at 569.

[31] Likewise, in *Straits Exploration & Anor v Murchison United NL & Anor*,[20] Wheeler JA said:

> 'Where a contract contains a dispute resolution clause, and a party who has not first proceeded in accordance with that clause sues on the contract, the court has, however, a jurisdiction to stay the proceeding so as, in a practical sense, to force the party to fall back upon the contractual procedure.'[21]

[32] Here, a notice of dispute has been given and the procedure has been embarked upon. There is no doubt that a response to the notice of dispute is mandatory, as indicated by the word "must" in clause 12.3. It follows that the plaintiff is bound to respond and participate in the procedure, and its failure to do so is a breach of its agreement with the first defendant to decide the dispute in accordance with clause 12.

Dispute amenable to expert determination

[33] It is then necessary to determine whether there is any proper basis to exercise the discretion to allow the proceeding to continue. As Chesterman J said in *Zeke Services*, there is a heavy onus on the party opposing the stay to show why the justice of the case is against staying the proceeding.[22]

[34] Senior counsel for the plaintiff advanced two reasons in argument as to why the procedure in clause 12 is inappropriate. First, that the process of expert determination operates without the supervision of the court, without safeguards and with no stipulation about the process to be followed. Secondly, that the dispute is not suited to expert determination because it is a claim for breach of contract and misleading and deceptive conduct, which raise mixed questions of fact and law.

[35] The first contention was also raised in *Zeke Services*. In that case, however there was an absence of procedural rules to be observed by the expert, in a situation where the expert was obliged to investigate disputed questions of fact and/or law. Further, as the expert in that case, an accountant, had been already been nominated, it was held that the expert in that case had 'no obviously relevant skill or learning to equip him for an adjudication of disputed fact'.[23]

[36] In the present case, clause 12.9 stipulates safeguards, including the requirement to act in accordance with natural justice. Clause 12.12 requires that the expert give written reasons for its determination and clause 12.6 provides that in the case of disagreement between the parties, that the expert is to be appointed by the President of the Queensland Law Society. There is in my view no justification for refusing a stay on this ground because there is no danger of the appointment of an unqualified expert and procedural rules are stipulated, including a requirement to comply with procedural fairness and natural justice.

[37] With respect to the second contention, it is apparent on the face of the statement of claim that three issues arise: first, whether development of the property was capable of being completed within three years; secondly, whether the property was suitable for development during that period; and thirdly, whether the profit claimed by the respondent was realistic or achievable. It is clearly feasible that an appropriate

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[20] (2005) 31 WAR 187.
[21] at 193.
[22] at 569.
[23] at 572.

expert, such as a forensic accountant experienced in matters of property development, would be capable of providing answers to these questions. To the extent that it is necessary to comment on the respondent's argument that the purported termination of the DMA and misrepresentations are not matters capable of falling within such a forensic accountant's field of expertise, I note the following observations by Hammerschlag J in *Dance with Mr D v Dirty Dancing Investments Pty Ltd*:[24]

> '[81] There is no reason why a suitably qualified lawyer, whether it be a solicitor, barrister or retired judge, could not easily determine the proper construction of the agreement and determine, according to that construction, the plaintiff's money claim. Where the dispute is one in respect of any financial or accounting matter a suitably qualified chartered accountant is to be the expert. Financial or accounting matters will often (if not always) comprehend the proper construction of the agreement, even if it is not in dispute. Although there are undoubtedly many commercial lawyers who are capable of dealing appropriately with financial or accounting matters there are undoubtedly also candidates who are both lawyers and qualified chartered accountants'.[25]

[38] Similarly, I can see no difficulty in the appointment of a suitably qualified individual, armed with the assistance of submissions and evidence from the parties, who would be able to determine the financial and legal questions posed by the pleadings.

[39] I consider that the plaintiff has not met the heavy onus necessary to refuse the stay. The respondent had bargained for disputes to be resolved in the form outlined in clause 12 of the DMA and there is no good reason why it should not be held to that agreement.

Order

[40] Accordingly, there will be the following orders:

1. The proceeding be stayed pending completion of the dispute resolution and expert determination procedure provided for in clause 12 of the Development Management Agreement dated 20 December 2012;

2. I will hear the parties as to the costs of this application.

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[24] [2009] NSWSC 332.
[25] at [81].