

Supreme Court once again reinforces the binding nature of Expert Determination Clauses



May Harlow Pty Ltd v Winten (No 48) Pty Ltd [2020] NSWSC 1011

Alternative dispute resolution mechanisms are becoming widely used across all sectors, not just in the building and construction industry. This is because they are often cheaper and faster when compared to convention litigation through the court system.

A well-drafted expert determination clause can provide parties to a contract with certainty that disputes will be resolved according to the process agreed in the contract.

Most recently, Construction Legal successfully acted for Winten Property Group in the Supreme Court decision of *May Harlow Pty Ltd v Winten (No 48) Pty Ltd [2020] NSWSC 1011*. In that decision, her Honour Williams J reinforced the notion that parties will be held to their commercial bargain and will not be entitled to commence proceedings to resolve disputes if they nominated expert determination as their mode of dispute resolution provided that the expert determination clause was valid and binding.

A copy of the decision can be found [here](#) and is summarised below.

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Overview

The case involved a dispute in relation to the amounts payable under a Project Delivery Agreement (**Contract**) which was entered into between the parties for the purposes of developing certain land located in Waitara, New South Wales (**Waitara Project**).

The Waitara Project commenced in mid-2013 and was completed in or around June 2017. From on or about 8 November 2016 to early 2019, the parties exchanged in a series of communications with respect to the calculation of Project Costs and the fees payable under the Contract, ultimately leading to the ensuing dispute.

The dispute resolution process nominated disputes to be determined pursuant to clause 13 of the Contract which in turn required the parties to engage in chief executive resolution followed by expert determination. Relevantly, the expert determination clause stated that all determinations would be final and binding.

The parties formally initiated the expert determination clause under clause 13 of the Contract by May Harlow serving Winten with a notice of dispute and briefing paper. Winten reciprocated by serving their briefing paper and nominating dates for a chief executive meeting. May Harlow did not respond to this correspondence choosing instead to commence proceedings by filing their Statement of Claim (**Claim**). The Claim was swiftly met by a motion from Winten seeking a permanent stay of the proceedings in light of expert determination clause set out in the Contract.

The Proceedings

The key issue on trial was whether the proceeding should be permanently stayed on the basis that the parties agreed to resolve their dispute via expert determination. Both parties acknowledged that the dispute fell within the bounds of clause 13 of the Contract, therefore, the onus was on May Harlow to demonstrate why the Court should not stay the proceeding.

Winten's position was simple, i.e. that the dispute fell within the terms of the dispute resolution clause of the Contract and therefore the parties should be held to their bargain and be required to follow the expert determination procedure. Further, the dispute was of a relatively small compass, involving factual questions about the disputed charges and the construction of the term "Project Costs" – both which could be sufficiently determined by an expert.

May Harlow's position on the other hand was that clause 13 of the Contract was inadequate to resolve the dispute because it did not contain a process to compel a party to produce documents relevant to the dispute and the 30 day timeframe given to the expert to make a determination was inadequate given that a detailed accounting process was necessary.

The Court found that May Harlow failed to discharge the onus of demonstrating why the Proceedings should not be stayed and accordingly Winten's motion was successful.

Practical Takeaways

May Harlow v Winten 48 demonstrates the power of a validly drafted dispute resolution clause and how such clauses can provide parties to an agreement with certainty that any dispute that may arise under such agreement will be dealt according to how the parties agreed.

To make sure a dispute/expert resolution clause is validly enforceable, one must make sure that it is drafted clearly and sufficiently canvasses the parties intentions in dealing with a dispute. Construction Legal has extensive experience in drafting robust expert determination provisions when negotiating construction contracts.

Please [contact Logan Cavanagh](#) or [Jessica Rippon](#) of our office for more details if you would like assistance in negotiating an expert determination clause in your next contract.

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