



Précis Paper

Expert Determinations of Commercial Contracts

A discussion about the recent decision of *Craigmoor Pty Ltd v Harvest Investment Co (No 2) Pty Ltd & Anor* (2020) QSC 131.

Discussion Includes

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Expert Determinations of Commercial Contracts

In this edition of BenchTV, Anand Shah (Barrister, Brisbane Chambers, Brisbane) and Peter Matthews (Associate, AR Conolly and Company, Sydney) discuss the recent decision of *Craigmoor Pty Ltd v Harvest Investment Co (No 2) Pty Ltd & Anor* (2020) QSC 131.

Nature of the dispute

1. The case of *Craigmoor Pty Ltd v Harvest Investment Co (No 2) Pty Ltd & Anor* (2020) QSC 131 involved a commercial contract dispute between two experienced players in the commercial arena.
2. The case involved whether an expert determination that had been made before the proceedings remained or should be set aside. The court was also asked to decide whether it agreed, in any event, with the expert determination as to what particular clauses in the contract meant.

Facts

3. The case involved a large block of vacant land on the Sunshine Coast in Qld which was owned by Craigmoor. Craigmoor entered into an agreement with another company, Harvest, allowing them to carry out the usual approvals with the local council.
4. As Harvest was doing so, it became aware that there were telecommunication pits located in a road that needed to be widened. The cost of removing the pits and relocating them was expensive. As a result, Harvest, the proposed developer requested to renegotiate the deal on the basis of the additional costs to make it more acceptable to them.
5. The parties ended up executing effectively the same contract at a reduced purchase price of around one million dollars.
6. Together with the new contract, they executed a side deal called the Profit Share Deed which noted that if Harvest went ahead with the proposed development and earned a profit out of it at the end or that it did not expend as much as was envisaged on the telecommunication pits, that money would go back to Craigmoor, the owner of the land. In effect, the Profit Share Deed was an opportunity for Craigmoor to recoup the reduction in the purchase price of the land.
7. There was also a guarantee signed by the second defendant, Mr Slack, the sole director of Harvest who guaranteed Harvest's liability under the Profit Share Deed but capped at half a million dollars
8. Subsequently, Harvest nominated a third party to purchase the land from Craigmoor, being a company called Big Fish who ultimately became the owner of the property. Harvest then

effectively exited the project. Once everything settled, Craigmoor became aware that there was no money spent on the telecommunication pits and requested the return of the decreased purchase price under the Profit Share Deed.

9. Harvest claimed that they did not have to do that and that they had to wait until the development finished to see whether that money had been expended or not, whether it be by them or by a third party coming in such as Big Fish.
10. The question to be determined by the expert was therefore, whether the liability crystallised at that point in Harvest or at a later time.
11. Further, there was a provision under the Profit Share Deed that any dispute would be submitted by the parties to an expert of their nomination, for a binding determination before litigating.

Expert's determination

12. The Expert's determination was that he found that Harvest was in fact liable under the Profit Share Deed for the one million dollars, the main basis being the telecommunications cables expenses issue.
13. The clause in the Profit Share Deed confirmed that the expert determination was binding and final on both Craigmoor and Harvest unless it was infected with manifest error. Subsequently, Harvest did not honour the determination, which required Craigmoor to institute proceedings.

Pleadings

14. Before the determination was handed down, proceedings were brought in the District Court against the guarantor, Mr Slack who was not bound by the determination as he was not a party to the Profit Share Deed.
15. After these proceedings had commenced, the determination was handed down in Craigmoor's favour.
16. Harvest did not pay the one million dollars, so Craigmoor set to enforce the expert determination in the Supreme Court. Craigmoor commenced proceedings to effectively seek a declaration that the expert determination was final and binding.
17. Justice Jackson listed the matter on the commercial list and at the same time, transferred the District Court proceeding against Mr Slack up to the Supreme Court and it was consolidated.
18. The first part of the case pleaded by Craigmoor was an enforcement of the expert determination. The parties also decided to ask the court in the alternative, to proceed in any event to decide what it thought about Harvest's liability under the Profit Share Deed.

19. Harvest denied that the expert determination was binding and infected by a number of manifest errors and argued that, in any event Harvest had no liability under the Profit Share Deed as it had not crystallised in terms of its liability.

Errors identified by Harvest

20. The two broad errors noted by Harvest were firstly that the expert failed to take into account the recitals in the Profit Share Deed when construing what it meant and secondly, that he got wrong what the purpose of the Profit Share Deed was.

Manifest Error

21. A manifest error is an obvious error that the expert has committed. A manifest error must be a very clear error and germane to the actual decision that was actually made and not on the periphery. It does not have to be a legal error, it can be an obvious factual error that has been made. A manifest error was not shown by Harvest, however the court considered the alternative pleadings and the construction of the contract.

Interpretation of the contract

22. In Australia, the common law is that a contract is binding when it is wholly in writing. Australia construes contracts objectively about what a reasonable business person would think the words in the Profit Share Deed meant and not what the parties think they meant.
23. It is only where there is an ambiguity in the meaning of a term in the contract that the court will look outside the contract, for example at previous emails or negotiations.
24. It is about objective principles of contract interpretation and not looking at what the subjective party's intentions were prior to the contract. Even if it was an agreed upon intention by both parties as to what they meant, it still doesn't mean that it will come into play in the interpretation of the contract if the contract is unambiguous.

Effects of the guarantee

25. The guarantee capped the liability of the guarantor at half a million dollars, whereas Harvest's liability was one million dollars.
26. The capping also included any costs of enforcement of the guarantee and despite the capping, the court made an order that Craigmoor would still be able to recover its costs over and above the \$500,000.00.

27. An indemnity costs order was made against Harvest as Craigmoor had made an offer in the proceedings and costs were made on the standard basis against the second defendant, Mr Slack.

Tips on drafting expert determination /ADR clauses in commercial contracts

28. The first focus for practitioners is to consider which types of ADR clauses that they should have in the contract.
29. Despite Craigmoor ultimately having succeeded, the parties agreed in the contract that the costs of the expert determination would be borne by each party themselves. As a result, Craigmoor still had to bear its own costs for the expert determination. This may be something for practitioners to consider, that is in the event of someone challenging the expert determination with the result being that the challenge is unsuccessful, whether or not the unsuccessful party should bear the costs of the determination as an incentive to not challenge it.
30. In this case, the guarantor was not bound by the expert determination and upon reflection of this case, it may be prudent for practitioners to ensure that the guarantor is bound by the determination.
31. It is also important for practitioners to think about the liability of guarantees for any unsecured portion of monies.

Admissibility of precontractual negotiations

32. The principles are that one can only generally look objectively at what the terms of the contract mean.
33. Where there is an ambiguity, Australia's common law says that it is possible to look at external circumstances, such as emails or correspondence that predated the contract to try to assist the court as to the meaning of a term in the contract. Courts today however, are particularly keen on managing such information to make sure that that sort of evidence is objectively admissible.

Key takeaways

34. Practitioners should strongly consider whether an ADR/expert determination clause should be included in the contract in the view of their client's best interests if there is a dispute.
35. Practitioners should also be aware of the importance of construing contracts on the basis of the objective view of what a reasonable business person would understand and be careful about introducing extraneous matters into a fully formed contract.

BIOGRAPHY

Anand Shah

Barrister, Brisbane Chambers, Brisbane

Anand has been in continuous private practice for 30 years, 11 years as a solicitor and 20 as a barrister.

Anand's main area of practice is commercial litigation, covering areas such as corporations' law, contract, equity, consumer law, property, trusts, insolvency, bankruptcy, banking and insurance. Other areas of practice include administrative law, judicial review, succession, defamation, human rights and personal injuries.

As counsel, Anand has appeared in the High Court, Queensland Court of Appeal and in all the State Courts at interlocutory and trial level as well as the District Court in its appellate jurisdiction. Anand has also appeared in the Federal Court and the Federal Circuit Court of Australia and in many Tribunals.. He has also appeared at coronial inquests both as counsel and solicitor.

Anand is a nationally accredited mediator and has been appointed to act as a mediator in disputes concerning commercial law, professional negligence, succession and personal injuries..

Anand has been actively involved in the affairs of the Bar Association of Queensland including having been elected by the Bar, on nine occasions, to serve on its peak executive body, the Bar Council. Anand is also a past president of Queensland Young Lawyers and has served on many Queensland Law Society committees including the Property Law and Development Committee.

Anand has a keen interest in legal education delivering many papers and articles for the Queensland Law Society, Bar Association of Queensland and professional legal providers such as LexisNexis and Thomson Reuters. He has also taught in the areas of civil procedure and evidence. He holds a masters of law from the Queensland University of Technology.

Anand is President of the Asian Australian Lawyers Association (AALA) (Qld Branch). AALA seeks to promote and encourage cultural diversity within the legal profession.

Peter Matthews

Industrial Officer at RTBU NSW

Peter Matthews was formerly an associate at AR Conolly and Company and holds a Bachelor of Law and Bachelor of Science.

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