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Insurance Insights

Agreement to mediate … are you certain? – *East Metropolitan Health Service v Sturm* [2022] WASC 316

https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/ViewDecision?id=f87fb820-782c-439e-bdfb-7e269bee2491

Key takeaways

- **A contractual dispute resolution clause may be unenforceable for uncertainty if the clause does not set out all necessary terms for the conduct of a preferred dispute resolution process.**
- **Only the defined parties to a contract can be bound by a dispute resolution clause.**

Background

In April 2021, East Metropolitan Health Service (**EMHS**) commenced proceedings against five defendants in the Supreme Court of Western Australia, including Isopogen Pty Ltd (**Isopogen**) and Isopogen WA Ltd (**Isopogen WA** and collectively, **Isopogen Parties**), regarding the ownership of intellectual property rights over a cell creation process invented by Dr Sturm, a former employee of EMHS.

Four years prior to the commencement of proceedings by EMHS, Isopogen had entered into an IP Licence Agreement (**Agreement**) with Cell and Tissue Therapies WA, a facility in Royal Perth Hospital under the management of EMHS.

Clause 13.4 of the Agreement contained a dispute resolution process including for the parties to endeavour to settle any dispute by mediation, administered by the Australian Commercial Disputes Centre, before having recourse to arbitration or litigation.

Courts have commonly sought to support the primacy of enforceable dispute resolution clauses of this nature by ordering a stay of any Court proceedings issued before the contracting parties have completed the agreed dispute resolution process. Courts generally take the view that parties should be held to their bargain, including as to how disputes between them are to be determined.

The Isopogen Parties subsequently applied to the Supreme Court to stay the proceedings on the basis EMHS had failed to comply with the dispute resolution process contained in clause 13.4 of the Agreement (**Application**).

Decision

The Supreme Court refused the Application on two key grounds:

- the uncertainty created by the drafting in clause 13.4, and
- the nature of the dispute was not amenable to the process set out in clause 13.4.

Uncertainty

The key provisions that doomed the Application to failure were sub-clauses (d) – (f) of clause 13.4, which stated:

- "*any mediation shall be conducted in accordance with the ACDC Guidelines for Commercial Mediation*" (**ADC Guidelines**)
- the ADC Guidelines "*set out the procedures to be adopted …* ", and
- the terms of the Guidelines were incorporated into the Agreement.

Clause 4(a) of the ADC Guidelines provided that "*A draft Mediation Agreement will be provided to the parties after the matter is registered with ADC*" [emphasis added].

The Court held that the reference to a "draft" agreement was nothing more than an agreement to agree and so was uncertain. The terms of the mediation agreement were unresolved and further agreement was required as to its terms before it could be binding on the parties to that mediation.[1] The Court observed that the parties could have annexed a final form of mediation agreement to the ADC Guidelines that had been incorporated into the Agreement[2].

By making the Application, the Isopogen Parties effectively required EMHS to sign an as yet unknown agreement as an important step of the mediation process and so engage in conduct of "*unacceptable uncertainty*". The clause was therefore incapable of enforcement because of that uncertainty[3].

Nature of the dispute

The dispute between the parties was characterised as a commercial dispute in which Isopogen holds property that EMHS seeks to obtain by way of the proceedings. This fell within the definition of "dispute" under the Agreement[4].

[1] At [43] – [44].

[2] At [49].

[3] At [45].

[4] See [59] (for the definition of dispute) and [63].

However, it was determined that the dispute was not amenable to mediation, due to the contractual framework between the parties involved.

The Agreement was between EMHS and Isopogen. While the Isopogen Parties had brought the Application, it was found that any requirement to mediate could only be binding upon the parties to the Agreement. The other four defendants, including Isopogen WA, were not parties to the Agreement and so could not be bound by clause 13.4. [5]

In the circumstances, it was relevantly considered that: [6]

- any mediation between EMHS and Isopogen risked a fragmentation of the proceedings with the potential for at least two sets of proceedings to run in the dispute, and
- clause 13.4 was inadequate for the determination of the dispute as a whole, because it did not cover all of the parties to the dispute.

Implications

We regularly see plaintiffs commence legal proceedings without first engaging in the contractual dispute resolution procedure available to them. Where those procedures are mandated under the contract, the plaintiff is at risk of having the proceedings stayed unless they can show the dispute resolution clause to be unenforceable.

Furthermore, the time and cost of legal proceedings may be avoided through the incorporation and use of a properly drafted dispute resolution clause obliging the parties to engage in methods of alternative dispute resolution such as mediation or an expert determination.

To avoid a dispute resolution clause being found to be uncertain and incapable of enforcement, the parties to a contract should:

- Consider the scope and description of (a) the parties to the contract and (b) the potential parties to a dispute in the event of a breach of that contract. If a party to a later dispute is not a party to the contract, it is unlikely the non-contracting party will be bound by the dispute resolution clause.
- Agree in advance all the necessary terms on which any mediation (or other form of dispute resolution) will proceed in the event of a dispute and set these out in the contract, whether in the dispute resolution clause or by way of an appendix or annexure.
- Consider specifically appending a form of mediation agreement to the contract which the parties are obliged to enter into if the dispute resolution clause is triggered.

[5] At [65] and [69]

[6] At [69].

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