



# Insight

Commercial Dispute Resolution

23 June 2010

## Case Study of Dispute Resolution Clauses in Practice

With the growing trend towards compulsory Alternative Dispute Resolution (ADR) prior to court proceedings commencing, commercial parties can ensure that they take advantage of the ADR processes before ending up in court by the inclusion of Dispute Resolution Clauses in contracts.

Set out below is a case study of a dispute which shows how ADR can be used in practice without going through possibly lengthy and costly court proceedings

### How did the dispute arise?

A dispute arose out of a joint venture to develop a CBD commercial property (**the Property**).

In 2001, the Property was purchased by way of a joint venture. The joint venture was documented by a Joint Venture Agreement (**JVA**). It was agreed in the JVA that the Property would be developed by a Development Manager for 5 years pursuant to a Development Management Agreement (**DMA**). Two documents therefore governed the relationships between all relevant parties, a JVA and a DMA. We acted for the Development Manager.

Pursuant to the JVA and DMA, the Development Manager was entitled to be paid (amongst other things) a Capital Entitlement, being a percentage of the appreciation of the value of the Property. In order to determine the amount of appreciation in the Property, and therefore to calculate the Capital Entitlement, the parties were required to determine the "Fair Value" of the Property.

A dispute arose between the Development Manager and the Joint Venture partners in relation to the meaning of the "Fair Value" of the Property amongst other things, and consequently the calculation of the Development Manager's Capital Entitlement.

### What was the Dispute Resolution Clause?

The JVA contained a Dispute Resolution Clause, which required the parties to go through a formal dispute resolution process, on a confidential and without prejudice basis which included a mediation in the event that a dispute arose between the parties relating to the JVA or DMA.

### Why did the parties want to use the Dispute Resolution Clause?

The main issue in dispute was the amount of the Capital Entitlement payable to the Development Manager. The parties were many millions apart on this figure.

The Dispute Resolution Clause placed an obligation on the parties to attempt to resolve the dispute in accordance with the mediation process set out in that clause. However, the following factors also made the dispute resolution process attractive to the parties:

1. The parties had an ongoing relationship;
2. The parties did not want the dispute to be aired 'in public' as could be the case in court proceedings; and
3. The parties wanted the matter to be resolved as quickly and efficiently as possible.

## Insight: Case Study of Dispute Resolution Clauses in Practice

23 June 2010

### How did the ADR clause work?

In accordance with the requirements of the JVA and the DMA, Dispute Notices under each of those agreements were served on the other parties. These were formal documents which specifically set out a series of issues which our client deemed to be in dispute between the parties.

The Dispute Notices also set out a proposal for resolution of the dispute, which was as follows:

1. There was to be a two-day mediation before a retired judge acting as mediator.
2. The parties were required to exchange written submissions regarding the matters in dispute at least 5 days prior to the mediation.
3. The first day of the mediation was to involve the parties and the mediator attending a short view of the Property. There would then be an opportunity for the parties to make submissions to the mediator and the mediator would be requested to provide a non-binding neutral oral opinion on certain key matters in dispute, and
4. The second day of the mediation was to be an opportunity for the parties to resolve the issues commercially by agreement.

The mediation proceeded on the basis of this structure and was conducted without prejudice. The parties were all represented by solicitors and barristers. All submissions were prepared and presented by the legal representatives as they would have been had this been a court proceeding.

Unfortunately, the parties were unable to resolve the dispute at the mediation.

A few days after the mediation, the mediator provided his written opinion to the parties on each of the key matters in dispute in respect of which he had been asked to provide a non-binding determination.

### Benefits of this approach

Although the matter did not settle, the two-day mediation approach was useful for the following reasons:

1. It allowed the parties to focus on the key issues in dispute between them, by being required to narrow those issues down to a series of questions in a Dispute Notice.

2. Both parties had the opportunity to prepare and exchange written submissions with other and to the mediator prior to the mediation, so as to make it clear what each party's arguments were and the legal basis for such arguments. This was not wasted work because it was all useful preparation for future negotiations or court proceedings, if required.
3. The parties had the benefit of the non-binding opinion of an independent and highly qualified third party (retired judge) on certain key matters in dispute. The non-binding opinion gave the parties a very useful indication as to the likely outcome should the matter proceed to litigation. On this basis the parties could engage in meaningful commercial negotiations in an attempt to resolve the matter in a confidential environment.
4. The non-binding opinion of a retired judge was received at an early stage (ie during the first day of the mediation). This meant that the parties could move straight into commercial negotiations on the second day of the mediation without having to spend time arguing the benefits of their position in an adversarial way.
5. The parties had the benefit of receiving a written opinion from the mediator which could be referred to in future informal negotiations.
6. The entire process described above was completed in approximately 4 weeks.
7. The process was private and conducted on a without prejudice basis.

The ability of the parties to be able to take part in detailed but without prejudice negotiations, allowed the parties fully and frankly argue their case without the associated risks and cost consequences of court litigation.

This is just one example of how ADR can work in practice in a commercial dispute and how parties can ensure that they are bound by contract to attempt to resolve disputes on a without prejudice basis before venturing into or being dragged into expensive court proceedings.



## Insight: Case Study of Dispute Resolution Clauses in Practice

23 June 2010

### Contact details

#### Melbourne



Howard Rapke, Partner

T: +61 (0)3 9321 9752

E: [howard.rapke@holdingredlich.com.au](mailto:howard.rapke@holdingredlich.com.au)

#### Sydney



Harold Werksman, Partner

T: +61 (0)2 8083 0405

E: [harold.werksman@holdingredlich.com.au](mailto:harold.werksman@holdingredlich.com.au)

#### Brisbane



Paul Venus, Partner

T: +61 (0)7 3135 0613

E: [paul.venus@holdingredlich.com.au](mailto:paul.venus@holdingredlich.com.au)

### Disclaimer

The information in this publication is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, we do not guarantee that the information in this publication is accurate at the date it is received or that it will continue to be accurate in the future. We are not responsible for the information of any source to which a link is provided or reference is made and exclude all liability in connection with use of these sources.

**AUTHOR** Kristin Watkins - Senior Associate

#### Melbourne

350 William Street, Melbourne VIC 3000

T: +61 (0)3 9321 9999 F: +61 (0)3 9321 9900

#### Sydney

Level 65, MLC Centre, 19 Martin Place, Sydney NSW 2000

T: +61 (0)2 8083 0388 F: +61 (0)2 8083 0399

#### Brisbane

Level 1, 300 Queen Street, Brisbane QLD 4000

T: +61 (0)7 3135 0500 F: +61 (0)7 3135 0599