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Construction Matters

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Update – Choice of Law Clauses: When things go wrong

In the October 2015 edition of Construction Matters, we reported on the benefits of including an express choice of governing law clauses in commercial contracts. In particular, we emphasised that a clear governing law clause gives certainty of the contract terms and avoids the applicability of legal systems that are less predictable or preferable.

In addition to governing law clauses, most construction contracts will almost invariably include forum selection clauses which stipulate that the parties must commence dispute resolution processes, such as litigation or arbitration, in a particular jurisdiction.

Where a party to these contracts commences litigation in opposition to the relevant choice of law and forum selection clauses, this can cause difficulties, as evidenced by recent court decisions in Victoria and New York involving Lew Footwear Holdings Pty Ltd (**Lew**) and Madden International Limited (**Madden**). [1]

Background

In 2009, Lew, an Australian-based distributor entered into a licence agreement and royalty agreement with Madden, a company incorporated in Hong Kong and a subsidiary of Steve Madden Limited, a company based in New York. Relevantly, the licence agreement contained governing law and forum selection clauses providing for the law of the state of New York to govern the contract and for disputes to be heard exclusively in that state.

In 2013, Lew terminated the contract and commenced proceedings in the Supreme Court of Victoria claiming, in addition to various contractual claims, loss and damage by reason of alleged misleading and deceptive conduct by Madden in contravention of the Trade Practices Act 1974 and the Australian Consumer Law.

Australian Litigation

The decision of the Supreme Court of Victoria in *Lew v Madden* concerned various, competing interlocutory applications by the parties. Madden sought orders that the proceedings be stayed, as well as an injunction restraining Lew from further prosecuting the proceedings. In opposing the orders sought by Madden, Lew argued that that a stay would jeopardise its ability to make claims under Australian legislation if it were required to make its claims in a New York state court.

Initially, Justice Elliot made orders providing for a stay of the proceedings because Lew had failed to establish that procedural rules requiring its originating process to be properly endorsed for service outside Australia ought to be dispensed. This was because the court was not satisfied that Lew had a strongly arguable case in relation to its misleading and deceptive conduct claims. As to whether a stay could be granted on the basis of forum, Justice Elliott found that he would not have considered the Victorian Supreme Court to be a "clearly inappropriate forum" for resolution of the dispute. In this regard, Justice Elliot applied the following principles:

- Forum selection clauses did not exclude the jurisdiction of the Court, but merely constituted a ground for the Court to refuse to exercise its jurisdiction.
- There is a strong presumption in favour of maintaining the parties bargain with respect to a forum selection clause.
- A stay may be refused on public policy grounds of the local jurisdiction.

[1] *Lew Footwear Holdings Pty Ltd v Madden International Ltd* [2014] VSC 320 and *Madden International, Ltd.v Lew Footwear Holdings Pty Ltd*, 50 Misc.3d 1210(A), 1217 (NY, 2016)

Justice Elliot acknowledged that claims for misleading or deceptive conduct pursuant to the Trade Practices Act or the Australian Consumer Law may give rise to policy considerations which may otherwise override an otherwise binding choice of forum clause. Those considerations included ensuring that foreign corporations do not place themselves outside "*this fundamental and important legislation which governs commercial interaction throughout Australia.*"[2]

Accordingly, the court found that where an overseas corporation engaged in misleading or deceptive conduct, and a plaintiff could establish that such conduct was committed within Australia or caused damage suffered wholly or partly in Australia, then a foreign choice of forum clause would not be a proper basis for staying of proceedings, save for where there was a law in the competing foreign jurisdiction which substantially reflected the Australian law which might otherwise be excluded.[3]

Justice Elliot found that there was a real risk Lew's misleading and deceptive conduct claims would be dismissed without consideration if the claims were required to be heard in New York, because there was no equivalent law in that jurisdiction. Justice Elliot also took into account more practical considerations such as the location of the parties and relevant evidence, and that the court could easily apply New York law to the contractual dispute.

After permitting Lew to file further evidence to support its statutory claim, Justice Elliott subsequently determined that Lew had a strongly arguable case,[4] set aside the requirement to properly endorse the originating process for service outside of Australia and dismissed Madden's application to stay the proceedings.[5]

Key Takeaways

Overseas principals and contractors operating in Australia (and their Australian subcontractors) should be conscious of the public policy and other considerations which could influence Australian courts to override an exclusive forum selection clause providing for proceedings in non-Australian jurisdictions.

In next month's edition of Construction Matters, we will consider the litigation conducted in New York and report on key lessons that principals and contractors may learn from the broader dispute.

2 *Lew Footwear Holdings Pty Ltd v Madden International Ltd* [2014] VSC 320, [233].

3 *Lew Footwear Holdings Pty Ltd v Madden International Ltd* [2014] VSC 320, [235].

4 *Lew Footwear Holdings Pty Ltd v Madden International Ltd* (No 2) [2014] VSC 541, [60].

5 This decision was upheld by the Victorian Court of Appeal; see *Madden International Limited v Lew Footwear Holdings Pty Ltd* [2015] VSCA 90.

Ralmana Pty Ltd v BGC Contracting Pty Ltd [2016] WASC 131

In our July 2015 edition of Construction Matters, we considered the implications of the Supreme Court of Western Australia decision in *CMA Assets Pty Ltd v John Holland Pty Ltd*[1], in particular that the courts will be reluctant to make a finding that a contractor is entitled to an extension of time in circumstances where a contract prescribes clear notice requirements which have not been met.

In this edition, we consider a recent decision of the same court handed down by Kenneth J Martin in *Ralmana Pty Ltd v BGC Contracting Pty Ltd*,[2] which re-emphasises the need for parties to construction contracts to:

- Comply with conditions precedent to making claims for time or money under the contract.
- Keep sufficient contemporaneous records so that compliance with such preconditions may be easily established.

Important Points

Some important points that may be taken from this decision include:

- Conditions precedent and time bars are no longer just a theoretical problem to be ignored in the course of contract administration, management of claims and commencement of legal proceedings.
- When claiming an extension of time (**EOT**) or delay costs in legal proceedings, plaintiffs will be required to plead sufficient material facts to establish the satisfaction of any contractual conditions precedent to making the claim.
- Accordingly, parties to construction contracts should not only comply with contractual conditions precedent but also ensure that sufficient records are maintained to evidence such compliance.

1 No 6 [2015] WASC 217.

2 [2016] WASC 131.

Facts

BGC Contracting Pty Ltd (**BGC**) engaged Ralmana Pty Ltd (**Ralmana**) to carry out excavation and filling of earthworks for rail embankments and roads on the Roy Hill project (**Subcontract**).

The Subcontract provided that in order to make a claim for an EOT, Ralmana was required to request an EOT from BGC's representative, within the time periods specified in the Subcontract. Accordingly, the grant of an EOT by BGC's representative was a necessary, and mandatory, step in order to claim delay costs.

Ralmana complained of a number of delaying events, including insufficient access and inadequately prepared ground and commenced proceedings claiming approximately AU$33 million for delay costs suffered on the project.

The claim was pleaded in a manner that assumed that Ralmana's entitlement to EOTs, and the resulting delay costs, would be assessed and determined by the court at trial.

BGC brought an interlocutory application to strike out portions of Ralmana's further re-amended statement of claim on the grounds that it failed to disclose a reasonably arguable cause of action.

BGC contended that Ralmana was required to positively plead the conditions precedent in the Subcontract requiring it to seek and receive an EOT from BGC's representative.

Further, BGC argued that if Ralmana's pleadings were permitted to stand, the role of BGC's representative in assessing claims for EOTs and delay costs would be ignored, and that these EOT and delay cost quantification tasks would be reallocated from BGC's representative to the court, which would determine the issue on a de novo basis.

Ralmana argued that it was entitled to rely on order 20 rule 8(4) of the *Rules of the Supreme Court 1971* (WA) so that it was not required to positively plead the satisfaction of a condition precedent to legitimately pursue its contractual entitlements. Effectively, this required the court to assume that the precondition was satisfied, leaving it to BGC to raise in its defence, Ralmana's failure to comply with relevant conditions precedent.

Decision

Justice Kenneth Martin preferred BGC's argument, and struck out a number of paragraphs in Ralmana's pleadings (with leave for Ralmana to replead its case) on the basis that the further re-amended statement of claim was legally embarrassing and failed to disclose a reasonably arguable cause of action.

In particular, it was held that:

- Satisfaction of conditions precedent for the claim for a liquidated sum, such as notice provisions, are a necessary material fact that must be pleaded in the ordinary way.
- The claim for delay costs under the Subcontract was based on a prior grant of an EOT by BGC's representative, such that if no EOTs were given, a key component of the claim for a liquidated amount is missing.
- The approach by Ralmana to have the court assess the duration of an EOT claim and quantification of delay costs is problematic, as the role of BGC's representative in completing these tasks is both functional and inescapable.
- By failing to plead the satisfaction of the condition precedent when seeking a liquidated amount, Ralmana ignored key express provisions of the Subcontract prescribing a carefully constructed notice and assessment regime and, in effect, sought to unilaterally re-write the agreement.

SIAC Announces Revised Arbitration Rules

On 27 May 2016, during its 2016 Congress, the Singapore International Arbitration Centre (**SIAC**) announced a new set of Arbitration Rules (**Arbitration Rules 2016**). SIAC's arbitration rules were last updated in 2013.

As with changes to the arbitral rules of other institutions, the revisions in the Arbitration Rules 2016 seek to reduce the costs associated with international commercial arbitration and improve the efficiency of arbitral proceedings. The President of the Court of Arbitration of SIAC, Gary Born, stated that the revision of SIAC's rules was "*aimed at ensuring that SIAC stays at the cutting edge of international arbitration practice around the world.*"

Although the draft version of the Arbitration Rules 2016 remains subject to revision before its official release, some of the primary changes include:

- The introduction of revised rules regarding consolidation of multiple arbitrations and the joinder of third parties to better reflect the complexity of disputes coming before SIAC (Rules 6, 7 and 8).
- Rules permitting early dismissal of claims or defences that are "*manifestly without legal merit or manifestly outside the jurisdiction of the tribunal*" (Rule 28).
- Shortening time frames for the appointment of emergency arbitrators and an order of award of interim relief and providing for a regime of fixed, rather than sliding, fees for emergency arbitrations (Rule 29, Schedule 2 and Schedule of Fees).
- Requiring the Court of Arbitration of SIAC to issue reasoned decisions for all arbitrator challenges (Rule 16).

SIAC's press release announcing the Arbitration Rules 2016 stated that the rules were intended to take effect from 1 July. However, the rules are yet to be formally released and SIAC has announced that the rules will set out the date of application once they have been released.

We will provide a more detailed analysis of the revisions in the Arbitration Rules 2016 following the formal release of the revised rules.

Safety-Edge

To help our clients overcome uncertainty about their increasing workplace health and safety (WHS) compliance obligations, our Labour & Employment team has developed Safety Edge.

Safety Edge is designed to help clients save time and reduce legal costs when addressing complex regulatory schemes, while also providing a due diligence defence to directors and other key decision makers under WHS legislation.

In short, Safety Edge is a legal audit and gap analysis of WHS systems and processes performed by our team. The findings and recommendations of the legal audit and gap analysis are provided in a comprehensive written report and/or explained to clients in a workshop format.

Please click here for more information.

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