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CONTRACT LAW UPDATE

WRONG CLAUSE REFERENCE INVALIDATES DISPUTE RESOLUTION PROCEDURE

It has been a generally held belief that, in striving to uphold the intentions of the parties to a contract, courts will generally remedy a simple error in cross-referencing. However, a recent case shows that some errors are not as simple as they may seem, and serves as a warning that a final, thorough check of a contract is essential to avoid a clause being struck out for uncertainty, with potentially disastrous and certainly unintended consequences.

In *Hardesty and Hanover International LLC & Ors v Abigroup Contractors Pty Ltd* [2010] SASC 44, the Full Court of the South Australian Supreme Court declared that due to incorrect cross-referencing an expert determination was void on the basis that the alternative dispute resolution clause in the contract between the parties was uncertain.

FACTS

The State of South Australia engaged Abigroup Contractors Pty Ltd (**Abigroup**) to design and construct two opening bridges spanning the Port River in Port Adelaide. Abigroup engaged Hardesty and Hanover International (**HHI**) to provide construction support services and design services.

HHI and Abigroup entered into the Consultant Services Agreement that made provision for dispute resolution in both its 'general' and 'special' conditions. The contract provided that the special conditions were to take precedence over the general conditions.

General condition 8 (Dispute resolution) of the agreement provided for staged dispute resolution commencing with service of a notice of dispute, negotiations between the senior personnel of the parties and finally escalating to expert determination, provided the amount to be awarded did not exceed \$500,000. **Special condition 12** (Alternative dispute resolution) also provided for staged dispute resolution and, importantly referred to the issue of a notice of dispute under **general condition 12(b)**. General condition 12(b) however, did not exist.

ISSUE

A dispute arose between the parties which they attempted to resolve by way of mediation in place of the notification and negotiation stages of the dispute resolution clauses. At mediation, HHI claimed it was owed \$860,000. The mediation ultimately failed.

HHL issued two notices of dispute, each for approximately \$435,000, and sought to refer the dispute to expert determination. Abigroup challenged the jurisdiction of the expert, alleging that the disputes referred to the expert were disputes contrived by HHL attempting to bring each dispute within the boundaries of the expert's jurisdiction, which was limited to disputes under \$500,000.

Despite Abigroup's contentions, the expert determined that he had jurisdiction and found in favour of HHL. Abigroup contended that, under the dispute resolution clause, the expert determination was non-binding.

HHL commenced a cross-action against Abigroup seeking a declaration that the expert determination was binding upon Abigroup.

First instance decision

Justice Anderson concluded that the expert had erred in deciding he had jurisdiction to determine the dispute and therefore the determination was unenforceable. His Honour stated that the reference to general condition 12(b) in special condition 12 was meaningless, because there was no such clause. Therefore, there was no procedure to initiate the dispute. Accordingly, special condition 12 could not operate as it was void for uncertainty.

Appeal

HHL appealed, stating that the references in special condition 12 were intended to refer to the unnumbered paragraphs of general condition 8.

The Full Supreme Court of South Australia dismissed the appeal. It was held that special condition 12 failed to provide a meaningful procedure for the commencement of the dispute resolution process. If the parties had intended to use the procedures in general condition 8 to resolve

a dispute under special condition 12, it would have been simple for the draftsman to refer specifically to the general condition.

The Court observed that they could not simply excise the incorrect cross-referencing, as the notice was the trigger for the process described in the balance of the clause. Given that special condition 12 was void for uncertainty, the issues were to be determined by reference to general condition 8 alone.

The Court stated that general condition 8 required strict compliance with the process set out and this process had not been adhered to by HHL. General condition 8 required the dispute to be referred to the Australian Commercial Disputes Centre, instead the dispute was referred to Engineers Australia as contemplated by special condition 12. This inevitably resulted in a different person, with different expertise, being appointed.

Therefore, the Court held that the expert acted without jurisdiction, and both determinations were not binding.

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Check out The PIC <http://blogs.dlaphillipsfox.com/the-pic/> - a new blog on procurement, infrastructure and construction issues from DLA Phillips Fox.

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