THE DEVIL IN THE DETAIL

State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited

Banabelle Electrical Pty Limited v State of New South Wales & 3 Ors

State of New South Wales & 2 Ors v Fugen Holdings Pty Limited

Fugen Holdings Pty Limited v State of New South Wales & 2 Ors

State of New South Wales & Ors v Automatic Fire Protection Design Pty Limited

Automatic Fire Protection Design Pty Limited v State of New South Wales & Ors

[2002] NSWSC 178 (22 March 2002) New South Wales Supreme Court, Einstein J

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The Minister for Public Works and Services entered trade contracts for the redevelopment of the Sydney Conservatorium of Music and Conservatorium High School. Those contracts contained a dispute clause which, amongst other things, required disputes to be referred to expert determination.

The relevant clause for present purposes (clause 46.5) required the expert to 'be a person agreed between the parties or, if they fail to agree, a person nominated by the person prescribed in the Annexure'. The Annexure failed to identify any person for that purpose.

Three trade contracts produced six sets of proceedings in the Supreme Court relating to the project. Part of the proceedings involved a claim by the defendants (the Minister, Walter Construction Group and the Superintendents) that the claims of the plaintiffs (Banabelle, Autofire and Fugen) should be restrained so that each of their claims could be dealt with pursuant to the expert determination procedure in each trade contract.

In deciding that that claim should fail, Mr Justice Einstein made certain noteworthy observations:

1. The nomination mechanism in clause 46.5 was an essential machinery provision giving the entirety of the clause its character and certainty. It provided a critical fulcrum both for that purpose and to provide a valuable insight into the extent to which it could be inferred by the Court that the parties intended there to be, a legal (as opposed to a moral) obligation upon each to co-operate, and to use good faith, in seeking to agree upon the identity of an expert.

2. There was no legal obligation upon either party to co-operate, or to use good faith, in seeking to agree upon an expert. The nomination mechanism militated against any such intention.

3. It was inappropriate to server the 'offending' part of clause 46.5 because to do so would not reflect the intention of the parties and further because the remainder of the clause would not then be capable of independent operation.

4. Whilst the Courts have a power to imply a term as to co-operation, the co-operation sought to be relied upon was unreasonable in the context. In short, clause 46.5, rather than imposing any obligation, simply announced that the expert would either be a person agreed or nominated.

5. Clause 46.5 was void for uncertainty.

The defendants had obviously formed the view that it was in their interests to have the plaintiff's claims dealt with by expert determination rather than by, the court. That strategy was frustrated by what some would described as a minor, incidental omission. That omission, however, struck at the heart of the dispute resolution mechanism in the trade contracts. The case is a timely reminder that seemingly simple mistakes can have serious consequences.

In the heat of finalising contract negotiations/documentation, it is easy to overlook the completion of 'incidental' parts of the contract. Unfortunately, such oversights have the potential to produce distress in terms of money, time and strategy. There is no substitute for meticulous attention to detail. 'The devil is in the detail', as the saying goes.

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