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ACC In-house Counsel Day

Contract Law Update

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Contract Law Update

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Dispute resolution clauses:
Rinehart v Hancock
Prospecting in the High Court of Australia

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Unfair contract terms and
the ACCC

1

**Dispute resolution
clauses: *Rinehart v
Hancock Prospecting*
in the High Court of
Australia**

Dispute resolution clause

Hope Downs Deed, clause 20: "*[i]n the event that there is any dispute under this deed*" there is to be a confidential arbitration.

Other Deeds contained similar clauses, referred to "*all disputes hereunder*" rather than "*dispute under this deed*".

Stay of proceedings

- Mrs Rinehart applied for stay of Court proceedings and that all matters be referred to arbitration (s.8 *Commercial Arbitration Act 2010* (NSW))

Rinehart v Welker (2012) 95 NSWLR 221

- While arbitration clauses should not be construed narrowly, they should not be given a meaning that they do not have to satisfy a perceived commercial purpose.

- Clause should be construed liberally and consistently with the ordinary meaning of the words to the extent possible.

- Words ‘under this deed’ have consistently been given a narrower meaning; word ‘under’ means an outcome is either governed / controlled by the deed or invokes some right created by the deed.

Fiona Trust [2007] 4 All ER 951

- Construction of arbitration clauses should start from the presumption that parties are likely to have intended any dispute arising out of the relationship be decided by the same tribunal.
- **Unless** the language makes it clear that certain questions were intended to be excluded.

Rinehart v Hancock Prospecting [2019] HCA 13



- Resolved by applying orthodox principles of interpretation, considering the context and purpose of the deeds in question.
- Commercial contract is to be construed by reference to the language used by the parties, the surrounding circumstances, the purposes and objects to be secured by the contract:
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7 [35].

Rinehart v Hancock Prospecting [2019] HCA 13

- Parties must have intended dispute be determined by confidential arbitration:
 - the **substantive** claims depend upon whether the **validity** claims are available (and if they're made out), therefore validity claims should be classed as disputes 'under' the deed; and
 - parties could not have thought the challenge to the efficacy of the deeds would be determined in public spotlight as they were aware of commercial sensitivity and allegations of undue influence when entered into.
- No need to reference *Fiona Corporation* because the arbitral clauses in the deeds, construed in context, clearly include validity claims.

2

Issues of informality

Contract formation

- Requirements
 - Intention
 - Consideration



Offer/acceptance?

“ [A] number of authorities discuss the need not to constrict one’s thinking in the formation of contract to mechanical notions of offer and acceptance.” ”

- *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [369] per Allsop J

Informal formation – no express consent

“

...there are circumstances where acceptance of an offer can be inferred in the absence of express consent. This will be the case if an objective bystander would conclude from the offeree's conduct, including his silence, that the offeree has accepted the offer and has signalled that acceptance to the offeror”

”

- *Empirnall* (1988) 14 NSWLR 523, 528-9 (Kirby P) and 534–5 (McHugh JA with whom Samuels JA agreed)

Inference

“

...it is now accepted that the existence of a contract can be established or inferred where a manifestation of mutual assent must be implied from the circumstances”

”

- *Vroon v Foster's Brewing Group Ltd* [1994] 2 VR 32, 81-83

High hurdle

... Where mutual promises are sought to be inferred, the conduct relied upon must, on an objective assessment, evince a tacit agreement with sufficiently clear terms. It is not enough that the conduct is *consistent* with what are alleged to be the terms of a binding agreement. The evidence must positively indicate that both parties considered themselves bound by that agreement”

- *Adnunat Pty Ltd v ITW Construction Systems Australia Pty Ltd* [2009] FCA 499 [39] per Sundberg J

All conduct considered

In determining if an agreement has been made in this way regard must be had to the entirety of the relevant conduct. The precise point in time at which the agreement comes into existence may not be clear, and the relationship between the parties themselves may be dynamic in such a way that the terms of the agreement might be added to or superseded over time

- *PRA Electrical v Perseverance Corporation Pty Ltd* (2007) 20 VR 487 at [5]

What if no non-essential terms?

In this context the absence of non-essential terms, or a lack of agreement on non-essential terms, will not invalidate the existence or effective operation of a binding contract

- *Empirnall* (1988) 14 NSWLR 523 at 530 (Kirby P)

What if essential terms missing?

“It is established by authority, both ancient and modern, that the courts will not lend their aid to the enforcement of an incomplete agreement, being no more than an agreement of the parties to agree at some time in the future.”

- *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 604 per Gibbs CJ, Murphy and Wilson JJ

“ In commercial transactions the Court should strive to give effect to the expressed arrangements and expectations of those engaged in business, notwithstanding that there are areas of uncertainty and notwithstanding that particular terms have been omitted or not fully worked out. But there are limits...” ”

- *Australia China Business Bureau Pty Ltd v MCP Australia Pty Ltd* [2003] FCA 934 at [208]

Limits...

“ If the parties intended to be bound, the Court will strive to find a means of giving effect to that intention by filling any gaps. But if the parties did not intend to be bound unless they themselves filled the gap (rather than leaving the task to the Court or a third party) then the agreement will not be binding if there are unagreed matters which the parties themselves regard as a prerequisite to any agreement.” ”

- *Australia China Business Bureau Pty Ltd v MCP Australia Pty Ltd* [2003] FCA 934 at [208], Hely J

It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether they are important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, ‘the masters of their contractual fate’. Of course, the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called ‘heads of agreement’.”

– *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd’s Rep 601 at 619

Wells v Devani [2019] UKSC 4

(13 Feb 2019)



owner engaged
a real estate
agent to sell a
flat



oral
agreement



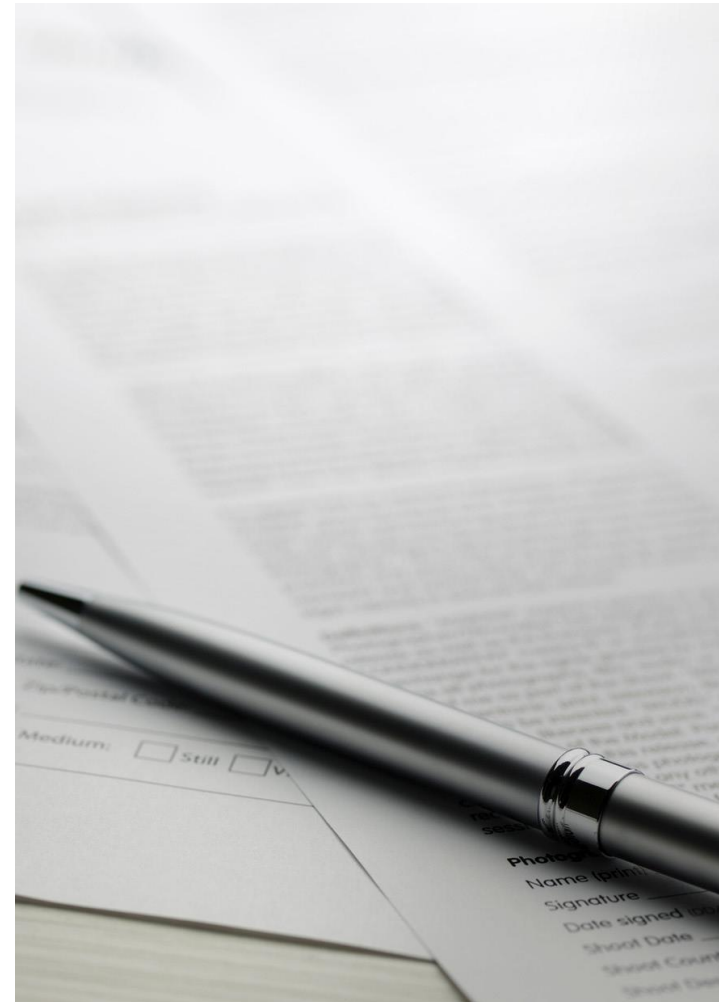
no mention of
when
commission
would be
payable

Lower courts

- Trial judge
 - imply minimum term to give business efficacy to agreement
 - commission payable on completion of purchase
- Court of Appeal (Lewison and McCombe LLJ)
 - court can only imply terms when contract is concluded
 - cannot make a contract for the parties
 - timing of payment of commission was essential to formation
 - contract was incomplete
 - Arden LJ – dissent
 - find contract by construction not implied term

UKSC

- contract found by conduct
- “I have no doubt it would naturally be understood that payment would become due on completion and made from the proceeds of sale. Indeed, it seems to me that is the only sensible interpretation” [19] Lord Kitchin
- alternatively a term could be implied



Indicia against formation?

- silence alone is not acceptance
- emphatic rejection of written terms
- written document incomplete
- lack of negotiation of terms
- performance before written document



Indicia suggesting formation?

- discussions about written agreement
- type of relationship – continuing commercial relationship makes it more likely contract
- written document of a standard ‘type’
- progress payments made in accordance with written document
- receipt of a written agreement, not rejected

3

Unfair contract terms and the ACCC

Section 23 - unfair terms

- A term of a consumer contract or small business contract is void if the term is ***unfair*** and the contract is a standard form contract.
- Will be a small business contract if:
 - the contract is for a supply of goods or services, or a sale or grant of an interest in land; and
 - at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
 - either of the following applies:
 - the upfront price payable under the contract does not exceed \$300,000;
 - the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.

Section 24 - meaning of *unfair*

- A term of a consumer contract is unfair if:
 - it would cause a **significant imbalance** in the parties' rights and obligations arising under the contract; and
 - it is not reasonably necessary in order to protect the **legitimate interests** of the party who would be advantaged by the term; and
 - it would cause **detriment** (whether financial or otherwise) to a party if it were to be applied or relied on.

Section 24(4) – onus on advantaged party

- A term of a consumer contract is **presumed not to be reasonably necessary** in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

How determine if unfair? Section 24(2), (3)

- A court must take into account :
 - the extent to which the term is **transparent**;
 - the contract as a whole.
- A term is transparent if it is:
 - expressed in reasonably plain language; and
 - legible; and
 - presented clearly; and
 - readily available to any party affected by the term.

ACCC enforcement

- Legislative provisions commenced 12 November 2016
- *ACCC v JJ Richards & Sons Pty Ltd*
 - approximately 26,000 standard form contracts for provision of waste management services
 - eight terms found to be unfair and consequently void

Unfair terms

- binding customers to later contracts unless they cancel within 30 days before term
- allowing unilaterally increase of prices
- no liability for JJ Richards if performance is “prevented or hindered in any way”
- granting JJ Richards exclusive rights to remove waste from customer’s premises
- creating unlimited indemnity in favour of JJ Richards

ACCC v Servcorp Ltd [2018] FCA 1044

- ACCC instituted proceedings in September 2017.
- The Federal Court declared by consent that 12 terms in standard form contracts are unfair and therefore void.

ACCC v Servcorp Ltd [2018] FCA 1044

- The terms had the effect of:
 - automatically renewing a customer’s contract, unless the customer had opted out, and allowing Servcorp to then unilaterally increase the contract price;
 - permitting Servcorp to unilaterally terminate contracts;
 - unreasonably limiting Servcorp’s liability or imposing unreasonable liability on the customer; and
 - permitting Servcorp to keep a customer’s security deposit if a customer failed to request its return.

Hutchison Ports Australia

- April 2019, ACCC announced that Hutchison Ports Australia gave an undertaking to remove variation and liability clauses that are not acceptable in standard form contracts with small businesses
 - Variation Clause: allowed for unilateral variation of terms in agreements without notice, including fees paid by the land transport operators.
 - Liability Clause: limited liability for loss or damage suffered by the transport businesses, while not offering the transport businesses the same protections.

ACCC's focus

1



Terms that give one party an unconstrained right to unilaterally vary key aspects of a contract.

2



Terms that unfairly seek to shift liability from the contract provider to the small business.

3



Terms that provide unnecessarily broad termination rights.

Disparagement clauses

“ Any standard form contract terms that prevent or limit a customer from making public comments about goods or services are likely to be unfair under the Australian Consumer Law.”

”

ACCC Commissioner Sarah Court (ACCC media release, 6 June 2018)

ACCC v Smart Corporation (trading as Australian 4WD hire)

- In April 2019, ACCC commenced proceedings alleging that a non-disparagement clause is an unfair term
- ACCC alleges that the clause “*had the effect of preventing honest, critical reviews of A4WD from being posted online [by its customers], thereby distorting genuine consumer choice and indirectly damaging AWD’s competitors.*”



Questions and discussion



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