

DRAFTING EFFECTIVE TERMINATION FOR CONVENIENCE CLAUSES

Joanna Pugsley, Partner

Nick Christopoulos, Solicitor

Clayton Utz, Melbourne

While termination for convenience clauses are drafted in a variety of different ways, and can be for the benefit of either party, they are typically drafted for exercise by the principal. Further they encompass the following fundamental aspects:

- a right unilaterally to terminate which is clear and unambiguous and exercisable without default; and
- an entitlement to compensation where the right of termination is exercised.

Where the parties have agreed that one (or both) of them is to have the right to terminate the contract unilaterally in this way, it is crucial that this be made absolutely clear in the contract as there is no common law right to terminate for convenience.

To understand how to draft an enforceable termination for convenience clause, it is worthwhile revisiting some key cases where the drafting of such, or similar, provisions has been challenged.

CLEAR AND UNAMBIGUOUS RIGHT OF TERMINATION

In *Thiess Contractors v Placer (Granny Smith) Pty Ltd (2000)* 16 BCL 255, Placer terminated its mining contract with Thiess pursuant to a clause which entitled it, 'at its option, and at any time and for any reason it might deem advisable', to cancel the contract. In that event, Thiess was entitled to receive compensation for unit-price items and demobilisation, as well as certain other defined additional compensation.

Thiess commenced proceedings against Placer alleging, amongst other things, that the termination was unlawful, and claimed substantial damages in consequence.

Where the parties have agreed that one (or both) of them is to have the right to terminate the contract unilaterally in this way, it is crucial that this be made absolutely clear in the contract as there is no common law right to terminate for convenience.

Justice Templeman at first instance considered whether the above clause of the contract should be read down so as to permit termination only if the work under the contract ceased. His Honour held that the clause was clear and unambiguous in providing Placer with an absolute and uncontrolled right of termination.

While Justice Templeman's decision was overturned on appeal by the Full Court on a different issue, his decision with respect to the principal's entitlement to terminate the contract pursuant to the termination for convenience clause was upheld.

GIVING WORK TO OTHERS

In *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327, the principal removed work from the contractor for the purpose of having the work done by a third party. Notwithstanding that the variation clause relied upon to do so provided that the principal could 'in his absolute discretion' instruct the omission of work, the High Court said that the words used did not, in their natural meaning, extend so far so as to allow the principal to omit work for the purpose of having the works completed by another contractor. This amounted to an act of repudiation which would entitle the contractor to terminate the contract and claim damages or payment on a quantum meruit. The justification for this decision is that the contract for execution of work confers on the contractor not only the duty to carry out the work but the corresponding right to do so. Accordingly, the basic bargain between the contractor and principal had to be honoured and a principal who finds he has entered into a bad bargain is not allowed to escape from it by use of the omissions clause.

Having said that, Justice Fullagar left the door ajar to future drafters by saying that if, in fact, it was agreed that the principal could remove work from a contractor and give the work to another contractor, which would be a most unreasonable power, 'very clear words' would be required.

While *Carr v JA Berriman Pty Ltd* concerned the redirection of works from one contractor to another contractor pursuant to a variations power, the reasoning of the High Court may arguably be extended and applied to a situation where a principal engages in similar conduct where terminating a contract for convenience.

Accordingly, if an owner is intending to use a termination for convenience clause in order to complete the work itself or give the work to another contractor, the termination for convenience clause should expressly state this right.

COMPENSATION

To avoid a claim for additional compensation being brought upon termination pursuant to a termination for convenience clause, for example on the basis of restitution, the clause relied upon should expressly state that any compensation payable to the contractor upon termination is the limit of any liability the principal may have.

Adequate compensation needs to be provided in the termination for convenience clause to ensure that the clause is not unenforceable for want of consideration. Termination for convenience clauses will often include payment for costs incurred by the contractor to the date of termination and demobilisation costs. The question is the extent to which the contractor should be entitled to recover any loss of profit on the incomplete work. In

Abbey Developments Limited v PP Brickwork Ltd [2003] EWHC (Technology) 1987, Justice Lloyd said:

... [termination for convenience clauses] frequently provide that the Contractor is to be compensated for its losses, including loss of profit and overheads contribution on the balance of the work. If they do not then they risk being treated as leonine and unenforceable as unconscionable.

It remains unsettled whether providing the contractor with compensation for goods and materials ordered (which will then vest in the owner) and reasonable costs of demobilisation from the work site will be adequate compensation or whether a termination for convenience clause need also provide for an amount on account of loss of profit. Out of an abundance of caution, a principal who wants to ensure the enforceability of the clause should also include an additional payment on account of loss of some of the profit that the contractor would have otherwise earned if it completed the project.
