COMMENTS

OBSERVATIONS ON STANDARD CLAUSES IN RESOURCE DOCUMENTS

Michele Muscillo*

INTRODUCTION

It is fair to suggest that in the context of negotiating complex and lengthy acquisition or other documents in a resource context where both parties are commercially sophisticated and undoubtedly legally represented, logically the focus of lawyers' efforts in the negotiation process rests on what are perceived to be the "critical issues" – the consideration, positive and negative covenants, warranties and the like. What can be termed as "boilerplate" clauses are, as their name might suggest, afforded less consideration given their relative importance to the parties in the context of the proposed transaction. However, as a raft of cases have suggested, extreme care needs to be taken in the drafting of such clauses, and in considering whether they ought to be included in a particular document, given the scope of their potential operation.

To examine the impact of such clauses, it is important to understand why such provisions have become commonplace in modern (and in many cases not so modern) commercial arrangements. The purpose of this paper is to examine the effectiveness of a selection of "boilerplate" clauses and to highlight a number of concerns arising as a result of recent judicial authority which might require the amendment of such provisions in appropriate cases.

PROHIBITION ON ASSIGNMENT

> "…the parties acknowledge and agree that for the term any matter whatsoever of any legal or beneficial interest in the [property] other than pursuant to the provisions of this Agreement and further, any such disposition in accordance with this Agreement shall be of no effect unless and until the assignee or transferee consents and agrees in writing to be bound by the terms of this Agreement (the *Restriction*).
>
> …Despite the Restriction, a Party may assign the whole or any part of its interest in the [property] to any related corporation."

The above represents a common (albeit crude) example of a restriction upon one party who owns an asset from disposing of it unless the disponee agrees to be bound by the various provisions of the document in which the restriction is embodied. Such provisions are typically also accompanied by pre-emption provisions in favour of the continuing party. The inclusion of such clauses is not uncommon and generally seek to restrain assignment where, for example, the identity of one party is important in the context of the arrangement, or perhaps more commonly, in order to ensure that there is an ongoing obligation on a contracting party (or its assignee) to comply with positive and negative covenants in the relevant document.

* Hopgood Ganim Lawyers.

It is clear that such restrictions are effective to restrain parties to a contract from inconsistently dealing with a right or interest[1]. The non-breaching party may be entitled to specific performance[2] and rectification of the share register (in the case of shares)[3]. Whilst dicta in *Hunter v Hunter*[4] suggests that it may be possible to invalidate an agreement entered into in breach of pre-emption provisions, it is likely the case that a transfer in defiance of a pre-emption (or other assignment restriction) provision would not be void.[5]

The issue arises therefore in two contexts:

1. Where a contractual arrangement fails to contain any restriction upon a contracting party from dealing with their interests or rights; and

2. Where such a provision does exist, however it is not drafted in sufficiently wide terms to cover particular dealings by a contracting party with some of their rights or interests.

It is beyond the scope of this paper to consider the reasons why one party would seek to ensure that another party not be able to freely assign its interests in property; these reasons go without saying. It is important however to consider what legal principles apply where such provision is not present or ineffective in the circumstances.

Avoidance of Legal Obligations

There are numerous examples of cases where commercial contracts do not contain sufficiently wide restriction on assignment/dealing provisions, presumably on the basis that the parties either did not consider that they were warranted in a particular context or simply did not turn their minds to the provision's inclusion. Whilst they may be fairly commonplace in shareholders' agreements or joint venture agreements in a resources context, it is submitted that there are circumstances where the provisions might be less likely to be *sufficiently wide* (or less likely to be found at all), including in the following contexts:

(a) where an entity has agreed to pay a royalty based on a percentage of production or cash flow;

(b) where an entity has agreed to provide a certain quantity of a resource or product over a certain period and has agreed for that period not to provide any resource or product to any competitor of the acquirer.

An important aspect of the above is that depending on how they are framed, the obligations are likely to be *personal* obligations of one contracting party. However, the question arises as to whether or not any recourse might be open to a contracting party where (adopting the above examples):

(a) a party (for the purposes of this paper, the *first party*) transfers its interest in an asset to a related corporation, such that the first party does not derive any "cash flow" or achieve any "production" for the purposes of a royalty;

(b) without assignment, the first party enters into some other form of contractual relationship (not prevented under the relevant contract) with a related body corporate (for example,

---

1 *Rayfield v Hands* [1960] Ch 1.
2 Ibid.
3 *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1, 29.
4 [1936] AC 222, 262.
5 *Reef & Rainforest Travel Pty Ltd v Commissioner of Stamp Duties* [2001] QCA 249 at paragraph 10.

management or other leasing style of arrangement) whereby the related body corporate and not the first party derives income or achieves production;

(c) a related body corporate of the first party enters into an agreement to provide a resource (an off-take agreement) which, if entered into by the first party, would constitute a breach of the restrictive covenant in a contractual arrangement with a third party.

If a non-assignment style of provision is non-existent or not wide enough to cover the above contingencies, a contracting party may be left without any contractual breach upon which to base an action seeking an injunction and/or damages. That is, based on the pure construction the contract, there is no breach of the *first party* which might entitle the other contracting party to a remedy.

A Solution? Lifting the Corporate Veil

It is settled law that the separate legal entity doctrine applies in Australia, such that absent certain circumstances, an agreement by one entity in a corporate group will not automatically bind other entities in that group[6]. Accordingly, it would not be open to a contracting party to argue that any of the above examples, a related body corporate of the first party was automatically bound by virtue *only* of the corporate group relationship.

However, the question arises as to whether or not in an appropriate case the corporate veil ought to be "lifted" or "pierced" to sheet home any contractual obligations of one party onto another in the same corporate group – or, adopting the above examples, whether the court would look behind an assignment to a related body corporate which has the effect of the first party avoiding express legal obligations.

The relevant principle was espoused by the English Court of Appeal in *Gilford Motor Company Ltd v Horne*[7]. In that case, Lord Hanworth held that the relevant entity was a "mere cloak or sham" and a device for enabling the controller of the company to commit breaches of a restrictive covenant which the controller had agreed to personally. Accordingly, an injunction was granted against the company (though itself not a party to the restrictive covenant), in respect to conduct otherwise in breach of the relevant restrictions.

By implication, the contracting party (in the examples provided above) might seek to argue that the related body corporate of the first party is merely a device being used to evade obligations or restrictions under an arrangement which the first party could not itself lawfully engage in.

Although the English Court of Appeal in *DHN Food Distributors Ltd v London Borrow of Tower Hamlets*[8] espoused a wide view of the power of the court to pierce the corporate veil in view of the harsh and unfair consequences in not doing so[9], that decision has been criticised widely as a "hard case" making bad law[10].

---

6 *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254.

7 [1933] 1 Ch 935.

8 [1976] 3 All ER 462.

9 In that case, unless the corporate veil was able to be lifted, one member of a corporate group would be disentitled from claiming compensation for disturbance to its interests following a resumption of land as another member of the corporate group owned the relevant land and it had already been compensated.

10 See for example *Pioneer Concrete Services and Yelnah Pty Ltd* (1986) 5 NSWLR 254, H Ford and R Austin, *Ford's Principles of Corporations Law,* Butterworths (2000) at [4.250].

In Australia, courts following *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* have adopted a cautious approach to piercing corporate groups. The principle appears to be that a court will only agree to do so if "the Court can see that there is in fact or in law a partnership between companies in the group or alternatively where there is a mere sham or façade"[11] or where it can be said that the corporation is "formed for the sole purpose or for the dominant purpose of *evading a contractual or fiduciary obligation*".[12]

Whilst on first glance Young J's pronouncement in *Yelnah* would tend to suggest that there is wide scope for a court to look behind a transaction within a corporate group (such as those set out in the above examples), it is also clear that where there is "good commercial purpose" for having separate companies in a group performing different functions even though they may be ultimately centrally controlled, the corporate veil will not be lifted. Such a position was ultimately reached by Young J on the facts in *Yelnah*.

The more recent Supreme Court of New South Wales decision in *Sea Containers Ltd v ICT Pty Ltd*[13] (per O'Keefe CJ) and the decision in that case on appeal in *ICT Pty Ltd v Sea Containers Ltd*[14] provide an insight into the potential application of decisions such as *Yelnah* and other legal principles to acts by one contracting party which are allegedly engaged in to avoid various restrictions under an agreement.

That case concerned an agreement between ICT Pty Ltd (ICT) and Sea Containers Limited (SCL) in relation to the construction of vessels for SCL. As part of the bargain, ICT agreed to enter into a "commercial protection agreement" whereby it agreed, in summary, to be subject to various restrictions on the construction and sale of vessels to any competitor of SCL for a period. During the currency of that restriction, ICT assigned a vessel to Incat Chartering Pty Ltd (an entity in the "ICT Group") which entity then sold the vessel to an entity who chartered the vessel to a European competitor of SCL, allegedly in breach of the commercial protection agreement. Further, ICT assigned its entire ship building business to Incat Tasmania Pty Ltd (an associated entity). SCL subsequently bought proceedings against ICT and other entities in the "ICT Group" alleging breach of the commercial protection agreement.

At first instance, O'Keefe CJ held that:

(a) on the basis of the decisions in *Gilford* and *Yelnah*, the use of associated entities described above in the "ICT Group" was "probably primarily dictated by a concern about and desire to avoid problems arising from the restrictions imposed by the (commercial protection agreement)"[15];

(b) on the basis of various post contractual representations, members of the "ICT Group" had represented that they were treating themselves bound by the commercial protection agreement, though not parties to it; and

(c) the purchaser of the vessels from Incat Tasmania had the knowledge of the commercial protection agreement and its intent in completing the purchase from Incat Tasmania was that ICT would evade its legal obligations to SCL, such that the purchaser was liable to SCL on the basis of the tort of interference with contractual relations.

---

11 *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254 at 267.
12 *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254 at 267 (emphasis added).
13 1994 (unreported).
14 [1995] 39 NSWLR 640 (Per Clarke, Handley & Sheller JJA).
15 *Sea Containers Ltd v ICT Pty Ltd* 1994 (unreported) at paragraph 31.

Importantly, the reasoning of O'Keefe CJ in relation to (a) sought to cast doubt upon the otherwise narrow interpretation of Young J in *Yelnah* (that is, the requirement that the entity allegedly used to avoid a contractual obligation must be *formed* for that purpose), but rather sought to extend that reasoning to any entity *used* (though not necessarily formed) for the purpose described in *Yelnah*[16]. Though ultimately deciding that the adoption of a broader approach was not relevant to the matter before him, O'Keefe CJ clearly took the view that equity would not be so constrained to suggest that the actual *formation* of an entity for the purpose of evading a legal obligation was required.

In the Court of Appeal decision, Clarke, Handley and Sheller JJA reversed O'Keefe's decision and cast serious doubt upon both the reasoning of that earlier decision and importantly, whether or not *Gilford* stands for authority that equity will intervene in circumstances where an entity has been formed for the purposes of evading a legal obligation at all. The Court of Appeal sought to explain *Gilford* and *Jones v Lipman*[17] as decisions best understood and supported on the ground that the relevant company was acting as *agent* for the company seeking to avoid a contractual obligation[18]. Further, their Honours held (at paragraph 24) that appropriate remedies would be available to a contracting party on the basis that the third party entity had interfered with contractual relations and had become liable in tort.

Where do the authorities leave us? It is unclear following the Court of Appeal decision in *ICT v Sea Containers* whether or not a wide view of the principles in *Gilford* and *Yelnah* will continue to be followed in Australia. In the recent decision of Dodds-Stretton J of the Supreme Court of Victoria in *Varangin Pty Ltd v OFM Capital Ltd*[19], whilst holding that the principles discussed in *Gilford* and *Yelnah* were not applicable in that matter, Dodds-Stretton J did impliedly accept that an entity formed or used for the sole or dominant purpose of facilitating the evasion of existing legal or fiduciary obligations, sham or fraud were "recognised [bases] for ignoring the company's separate legal identity"[20].

Result

If the Court of Appeal's narrow view (in *ICT v Sea Containers)* of *Gilford* is to be accepted, then unless the contracting party in the examples described above is able to prove either that the related body corporate is acting as "agent" of the first party or that the relevant body corporate had the requisite intent to induce breach of existing contractual relations of the first party (which may be difficult to prove on the evidence of a particular case) then a contracting party may be left without a remedy. Whilst the Court of Appeal stated at (paragraph 25) that the "Court would not wish to sanction colourable evasion of contractual liabilities by the use of interposed companies or similar devices", the impact of their decision may ultimately lead to that result.

Respectfully, it is submitted that though Court of Appeal decision clearly acknowledges the primacy of the separate legal entity doctrine in corporate law, the impact of that decision fails to adequately protect a contracting party from intentional conduct of the first party to avoid that which was previously agreed.

Although the Young J approach in *Yelnah* or that of O'Keefe CJ in *Sea Containers* (at first instance) may provide a greater degree of assistance to a contracting party seeking to restrain the

---

16 Ibid at paragraph 31.
17 [1962] 1 WLR 832.
18 *ICT Pty Ltd v Sea Containers Ltd* [1995] 39 NSW LR 640 at paragraph 25.
19 [2003] VSC 444.
20 Ibid at paragraph 150.

first party's alleged questionable conduct "through" a related body corporate, a degree of uncertainty exists. In view of this, one can clearly see the need for a "non assignment provision" to *expressly* prevent dealings with assets *or rights* particularly in the case of negative or positive covenants, as the availability of any equitable intervention may be limited.

Avoidance of Prohibition on Assignment

The recent decision of the English Court of Appeal in *Don King Productions Inc v Warren* [21] stands as authority for the proposition that even where property might not be assignable on the basis that to do so would breach an express prohibition on assignment, a contracting party would still be entitled to declare itself trustee of the benefit of being the contracting party as well as trustee of the benefit of any rights conferred.

In that case, Don King Productions Inc and Warren agreed to hold certain promotion and management contracts with professional boxers on trust for a partnership to be constituted between them. It was accepted by the Court of Appeal that neither of the parties would be entitled to assign their interests for the benefit of the partnership on the basis of certain express prohibitions on assignment in the relevant promotion and management contracts, as well as on the basis that:

(a) the burden of a contract is unable to be assigned; and

(b) the benefit of the relevant contracts was not able to be assigned (without the consent of the relevant contracting party) as the contracts were for the provision of personal services and involved the "personal mutual confidence of the boxer and promoter and manager"[22].

Whilst it is clear that the effect of a declaration of trust of the type described in the *Don King Productions Inc* case would not be enforceable as against the other contracting party to the promotion and management contracts (that is, the boxer and their management), there is undoubtedly scope for rights and obligations to be dealt with in a manner otherwise than is the intent (including express intent by virtue of non-assignment provisions) of that contracting party[23].

By way of example in a resources context, one can see how a declaration of trust of joint venturer's interest in a project may be able to circumvent a non-assignment provision in the joint venture agreement with the effect that indirectly one joint venturer is forced to share the fruits of a project with parties not within its contemplation and which might in fact, harm its own commercial interests.

Further, cases such as *Mount Isa Mines v Seltrust Mining Corporation Ltd*[24] illustrate that a contracting party (in that case a joint venturer) may be able to rely on express rights conferred upon them, to achieve results which are clearly unintended by the other contracting party[25].

There is therefore an obvious need to ensure that a non-assignment provision is drafted widely enough to cover a declaration of trust over the benefit and the burden of the relevant contractual relationship or other *indirect* dealing with contractual rights. The onus is clearly on the parties at

---

21 [2000] CH 291.

22 Ibid at page 301.

23 *Burwood Project Management Pty Ltd v Polar Technologies International Pty Ltd* [1999] NSWSC-1203.

24 5 July 1985 (Unreported, Supreme Court of Western Australia).

25 In that case Seltrust had agreed to sell all of the product to which it was entitled from a joint venture with Mt Isa Mines in return for the purchaser paying Seltrust's share of joint venture expenditure. It was held that on a pure construction of the relevant non-assignment provision (granting a right of pre-emption), no breach had occurred

the time of contracting. In fact, the Court of Appeal in the *Don King Productions Inc* case held that "if one party wishes to protect himself [or herself] against the other party declaring himself [or herself] a trustee, and not merely against an assignment, he [or she] should expressly so provide"[26].

ENTIRE AGREEMENT PROVISION

> "This agreement supersedes all prior representations, arrangements, understandings and agreements between the parties and represents the entire complete and exclusive understanding and agreement between the parties relating to the subject matter of this agreement."

Provisions such as the above, sometimes called "entire agreement" or "whole agreement" provisions are commonplace amongst boilerplate provisions in many standard contracts. The question however undoubtedly arises as to how effective such a provision may be in circumstances where antecedent negotiations or a pre-existing contractual relationship may give rise to inconsistent or additional rights and obligations with respect to the subject matter of the particular written contract.

At first glance, one's immediate reaction is that a court would surely not take as binding a "boilerplate" provision such as the above where the parties may not have fully turned their minds to its implications, particularly where the parties had previously expressly agreed (or had made representations) with respect to other matters relating to the subject matter of the agreement. However to do so arguably offends the "primary emphasis of the law of contract in common law";[27] namely that a court's role is to consider "how one party's words and conduct ought reasonably to have been understood by the other, rather than their subjective states of mind."[28]

Take an illustration of this conundrum in the following example. Two entities (parties A and B) sign a memorandum of understanding or heads of agreement with respect to a subject matter (say for example an agreement to acquire an interest in a project and to jointly proceed to its commercialisation). Following a protracted period of negotiation, a formal acquisition agreement and a joint venture agreement are prepared and entered into. The arrangement contains an "entire agreement" provision.

Following completion and during the currency of the joint venture arrangements, party A discovers that the formula for calculating payments to that party (for example a royalty) is not reflective of what it understood to have been the impact of the relevant provisions of the joint venture agreement nor what was initially agreed upon in the memorandum of understanding. Party A alleges when the joint venture agreement and the prior memorandum of understanding are read together, party A's interpretation must be accepted. Party B argues that the words of the joint venture arrangement are plain and the "entire agreement" provision excludes the memorandum of understanding from consideration.

Would a court consider itself bound by the entire agreement provision in circumstances where each party had negotiated their position and had been legally represented prior to the entry into of the joint venture arrangement, or would a court consider it unfair or unjust to be bound by such a provision in order to establish the "intent" of the parties?

---

26 *Don King Productions Inc v Warren* [2000] CH 291 at page 321.

27 J W Carter, D J Harland; *Contract Law in Australia* (3rd ed), Butterworths (1996) Sydney, at paragraph [1213]; *Taylor v Johnson* (1983) 151 CLR 422.

28 Ibid.

The above scenario mirrors the facts in the Supreme Court of the ACT decision (per Miles CJ) in *Skywest Aviation Pty Ltd v The Commonwealth* [29]. In that case, Skywest alleged that if regard was had to pre-contractual negotiations, the interpretation of a price adjustment mechanism in the relevant service contract would be interpreted in favour of Skywest. The Commonwealth sought to rely upon an entire agreement provision.

Miles CJ, quoting Kirby P in *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd*[30] stated that "except in the case of fraud, and subject to any statutory provision, an "entire contract" clause will bind the parties in accordance with its terms, properly construed." Further, it was said that such a clause itself gives rise to an *estoppel* by convention which operates to exclude any "estoppel which might have otherwise have had effect"[31] but for the entire agreement provision. Put simply, agreement to the entire agreement provision estops a contracting party from referring to antecedent dealings.

It is said that Miles CJ's formulation[32] recognises the primacy of what has been agreed between the parties and embodied in the contract, whilst it "leaves room for departure from the terms of the formal contract where it would be *plainly unjust* to enforce those terms"[33].

Ultimately, it was held in *Skywest* that the actual agreement reached between the parties and embodied by the written contract did not contemplate the interpretation of the price adjustment mechanism suggested by *Skywest*. On the basis of this authority, it would therefore seem difficult for party A in the example above to argue that, absent fraud or other statutory provision, the parties intended otherwise than to depart from what had previously been agreed upon in the memorandum of understanding.

The decision of Miles CJ was followed in the Supreme Court of New South Wales by Bryson J in *Australian Co-operative Foods Ltd v Norco Co-operative Ltd*[34]. However, citing McHugh JA in *State Rail Authority (NSW) v Heath Outdoor Pty Ltd*[35], Seddon argues that in certain circumstances it may be "unconscionable" for a party to insist on his or her strict legal rights (by virtue of the entire agreement provision) where absent the provision, that person might be estopped from denying the existence of pre-contractual negotiations[36].

On the basis of the decisions in *Skywest* and *Australian Co-operative Foods*, it is clear that extreme care needs to be taken in the inclusion of an entire agreement provision where there is a risk that the particular written contract does not reflect the entirety of the bargain. This is particularly so when one considers the difficulty that a party might have in raising arguments based on unconscionable conduct, in light of recent observations on the restrictions on that doctrine[37].

---

29 [1995] 126 FLR 61.

30 [1986] 7 NSWLR 170 at 177.

31 *Skywest Aviation Pty Ltd v The Commonwealth* (1995) 126 FLR 61 at paragraph 66.

32 Following McClelland J in *Johnson Mathey Ltd v AC Rochester Overseas Corporation* (1990) 23 NSWLR 190 at 195-196.

33 *Skywest Aviation Pty Ltd v The Commonwealth* (1995) 126 FLR 61 at paragraph 67 (emphasis added).

34 [1999] NSWSC 274.

35 [1986] 7 NSWLR 170.

36 N Seddon, "Can contract Trump estoppel?" (2003) 77 ALJ 126 at 133.

37 See for example, *Romanos v Pentagold Investments Pty Ltd* (2003) 201 ALR 399*; Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 197 ALR 153.

It is also important to note in this context, that there may be some scope to argue for relief on the basis of misrepresentation, breach of the *Trades Practices Act 1974* (Cth) or on the basis of contractual mistake[38], however those heads are beyond the scope of this paper.

CONCLUSION

In the main, boilerplate provisions have become commonplace in commercial contracts as a result of judicial pronouncements on the construction of particular arrangements and the rights of contracting parties under those documents. These provisions have therefore evolved to effectively "contract out" of the effect of particular decisions or legal concepts.

This paper seeks to highlight that before inserting a boilerplate provision into any contract, it is important to consider what mischief the particular provisions are seeking to prevent and what the particular circumstances (and interests) of a contracting party are in entering into an arrangement. Without an appreciation of these matters, boilerplate provisions can have unintended consequences.

As illustrated above in the case of a prohibition on assignment provision, they may not go wide enough to protect a particular party's interest in a particular circumstance. Care must be taken.

In a resources context where parties are generally legally represented and negotiations may be lengthy and comprehensive, there is perhaps an even higher need to ensure that such provisions are appropriate in the circumstances as courts have shown an unwillingness to interpret broadly or look behind (as the case may be) express provisions where the parties and their legal representatives *ought to have* turned their mind to the issue[39].

---

[38] Absent "common mistake" of both parties it may be difficult for one party to argue that the contract be rectified on the basis of a unilateral mistake as to content unless the contracting party knows that an instrument contains a mistake in its favour but does nothing to correct it (see for example *A Roberts & Co Ltd v Leicestershire County Council* [1961] CH 555.

[39] *Skywest Aviation Pty Ltd v The Commonwealth* (1995) 126 FLR 61 at 68.