Article Information

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"Near enough notice is not good enough notice" – requirements for strict compliance with contractual notice provisions only get stricter

We recently considered the decision in *Santos Limited v BNP Paribas* [2019] QCA 11, that a failure to include the words of a particular form rendered a call on a bank guarantee invalid. At the time, we suggested that "*parties would be wise to consider the risk that such a principle may be extended to documents to which they are a party*". In *JPA Finance Pty Ltd v Gordon Nominees Pty Ltd*, the Supreme Court of Victoria has now held in a similar way, relating to notice provisions in a Call Option Deed.

Recent Australian decisions reinforce the risks of not strictly complying with notice requirements. Whereas strict compliance was held to be "fundamental to the efficacy and dependability" of performance security documents[1], an appropriate risk management approach would be to expect the principle to apply more broadly and arguably to construction contracts where strict notice and "time bar" provisions are common place. Where a term of contract requires to notices to be given in particular fashion such notice ought to strictly comply with the contractual provisions.

JPA Finance Pty Ltd (**JPA**) issued a statutory demand to Gordon Nominees Pty Ltd (**GNPL**) for the payment of a debt arising out of the negotiation, preparation and execution of a Call Option Deed (**Deed**). GNPL refused to comply with this demand, disputing the amount claimed and whether the expenses claimed by JPA were within the scope of the Deed.

After several months of correspondence regarding the debt, JPA purported to terminate the Deed. While GNPL acknowledged that its conduct had triggered JPA's right to terminate the Deed, it argued that form of the notice of termination (and hence the termination) was invalid as it was not addressed to GNPL, but rather to a solicitor acting for that company.

The Victorian Supreme Court in *JPA* considered *Tricontinental Corporation Ltd v HDFI Ltd* ***[2]*** as to whether a notice for default issued under a surety agreement and delivered to an office of a company other than as contractually prescribed (Sydney rather than Perth) complied with the notice provisions. There, the Court held that, given the provisions regarding notice had not been strictly met, the condition to liability had not been triggered. Whilst the Court in *Tricontinental* acknowledged the breach as 'trivial', it held that it was a condition precedent which was either performed, or not. Simply put, there could be no ''substantial compliance'' with a condition precedent: it must be complied with, or not.

The Court also considered *Bond v HongKong Bank of Australia Ltd*[3]regarding a notice of demand served on an address other than as stipulated in the guarantee. There, the New South Wales Court of Appeal stated that despite potentially harsh results for minor non-compliance, where the language of the contractual instrument is mandatory, '*there is no room for saying that near enough is good enough*'.

In the instant case, the Supreme Court ultimately held that the principles above extended to the service of the notice of termination by JPA. It reasoned that where notice of termination had properly been given, it would result in GNPL's immediate loss of a valuable right, being an option to acquire units in a trust. In circumstances where JPA had failed to strictly satisfy the preconditions for service of a notice, the Deed had not been validly terminated by JPA.

Where the giving of a notice is a precondition to establishing a material liability, mere substantial performance of notice provisions is likely to be considered insufficient to give effect to the commercial purposes of the agreement. Performance of the obligation should be unequivocal and complete. As such, where parties have agreed to use specific words, phrases, names and addresses, any notice or demand served by the parties will be required to strictly comply with those requirements.

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[1] *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85 at 97

[2] (1990) 21 NSWLR 689 ("*Tricontinental v HDFI*").

[3] (1991) 25 NSWLR 286 ("*Bond v HK*").