

## *Rollings v Portrange Pty Ltd & Xstrata Nickel Australasia Operations Pty Ltd [2014] WADC 56*

### Key Points

- Reliance on indemnity position.
- This case is an important example of when an indemnity clause can be successfully enforced through the courts if properly worded.

### Background

The second defendant was the owner and operator of the Cosmos Mine Site (**site**). The plaintiff was supplied by the first defendant to provide electrical services at the site pursuant to purchase order.

The purchase order was issued on 26 May 2005. However, the first defendant had previously supplied another to the second defendant's site dating back to early 2004. The second defendant relied upon a separate document containing terms and conditions (**terms**) also formed part of the broader contractual arrangement with the first defendant.

The second defendant relied upon the fact that terms were typically sent by fax to the first defendant on the reverse side of the purchase orders. On this particular occasion, the terms were not facsimiled to the first defendant with Purchase order 519582. Nevertheless, an email from the second defendant to the first defendant's insurers on 21 January 2004 referred to 'contract conditions', and an email on 22 January 2004 from the first defendant's insurers acknowledged receipt of the terms. Further, an email from the first defendant to the second defendant dated 12 January 2004 attached copies of the first defendant's insurance certificates. Witnesses for the second defendant testified that the first defendant knew that insurance cover was a prerequisite for its personnel to access the site.

The plaintiff was an employee of the first defendant (a labour hire company). On 29 July 2005, the plaintiff injured himself during the course of his employment at the second defendant's mine site. Relevantly the plaintiff had been supplied by the first defendant to the second defendant pursuant to a contract which included indemnity provisions. The plaintiff commenced proceedings against the first and second defendants for negligence and breach of statutory duty. The plaintiff's claim was settled and the settlement sum was apportioned 20 per cent to the first defendant and 80 per cent to the second defendant.

The second defendant commenced contribution proceedings against the first defendant for full indemnity for the settlement sum.



## The Law

The ultimate question for the court was whether the terms could be incorporated into the broader contractual arrangement between the second and first defendants. The second defendant claimed that pursuant to the contract the first defendant was obliged to:

- indemnify the second defendant against the plaintiff's claim; and
- effect insurance which indemnified the second defendant against liability for the injury to persons including the plaintiff.

## Conclusion

### The Incorporation of Terms

The ultimate question for the court was whether the terms could be incorporated into the broader contractual arrangement between the first and second defendants, in circumstances in which the first defendant had not acknowledged the incorporation of the terms by way of a signature. Scott DCJ observed that in these circumstances it was necessary for the second defendant to prove that reasonable notice of the terms had been given to the first defendant prior to the formation of the contract. Parties to a contract may also incorporate terms into a contract by their conduct or by a history of dealings, in which case, it is not necessary for the documents containing the relevant terms to have been sent to the other party.

On the facts of the case, His Honour was satisfied that the terms had been incorporated into the contract on the basis that the second defendant had given reasonable notice to the first defendant of the terms. His Honour cited, among other things, that it was common practice for the terms to be sent to the first defendant; and the email from the first defendant's insurer dated 21 January 2004 referring to the 'contract conditions', as the basis for his findings.

His Honour was also satisfied that the terms had been incorporated into the contract based on the conduct of the parties in negotiating insurance cover pursuant to the terms as a pre-requisite for access to the site. This was consistent with a common intention among the parties that the terms were to be incorporated.

### Indemnity Clause

The second defendant claimed that it was entitled to be indemnified by the first defendant pursuant to clause 11.2(c) and 11.2(d)(i) of the terms. Clause 11.2 read:

*Unless due solely to the negligence of the [second defendant], [the first defendant], shall be liable for and must indemnify the [second defendant] ...against any and all Claims arising, whether at common law or under statute, and caused or contributed to, whether wholly or in part and whether directly or indirectly, by:*

- (c) *reason of any acts, neglect or default by the [first defendant] ... in connection with or in relation to the supply of Goods; or*

(d) *the presence of any [personnel of the first defendant] on or about the [second defendant's] premises in respect of:*

(i) *injury to or death of any person.*

His Honour observed that a contractual provision will be enforced as an indemnity if the court is satisfied that both parties intended the provision to apply to liabilities as between the parties which arise from the indemnified party's fault.

The first defendant argued that the claim was due solely to the negligence of the second defendant. His Honour disagreed and found that negligence on the part of the first defendant by reason of the first defendant admitting it was liable to the plaintiff in negligence to the extent of 20%. As such, the second defendant was entitled to indemnity pursuant to clause 11.2(c).

As to an indemnity by way of clause 11.2(d), His Honour observed that the plaintiff would not have been injured had he not been on the site in performance of the works pursuant to the contract. To that end, the plaintiff's presence on site when he sustained injury sufficient for the purposes of the sub clause and the second defendant was entitled to the benefit of indemnity

## Lessons Learnt

This case is a reminder of the importance of incorporations of terms or conditions into a contract and acknowledged by both parties of those terms and conditions. Where an issue arises as to whether terms and conditions have been incorporated into an agreement the Court will look to whether reasonable notice has been given of the terms of conditions as well as to whether the conduct of the parties was consistent with a common intention to have the term incorporated.

The case is a useful example of when an indemnity clause can be successfully enforced through the courts if properly worded.

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