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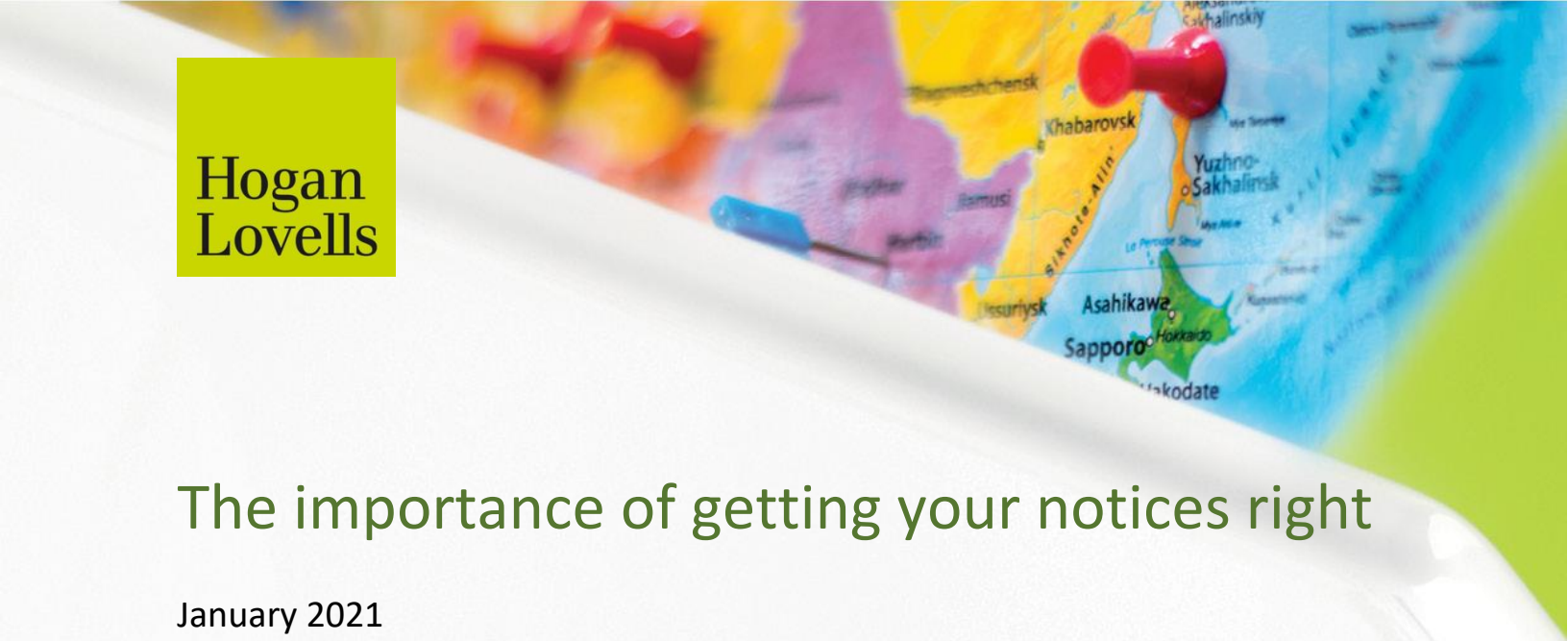

The importance of getting your notices right

January 2021

Where notice requirements are clear and unambiguous, those required to give notices should expect them to be strictly enforced.

In the recent Court of Appeal decision *Maeda Kensetsu Kogyo Kabushiki Kaisha v. Bauer Hong Kong Ltd.* [2020] 5 HKLRD 328, a claim that was otherwise valid was disallowed by the court because the subcontractor's notice (which was submitted in time) failed to state the precise contractual provision being relied upon.

The contract in question specifically required the notice to state, "the contractual basis together with full and detailed particulars and evaluation of the claim." Compliance with the notice requirements was expressly stated to be a condition precedent to entitlement.

The subcontractor sought to recover its loss and expense claim. Under the contract, loss and expense could be recovered in a number of circumstances. Clause 21.1.6 provided that a claim could be founded upon a subcontract variation, whilst Clause 21.1.1 permitted a "like rights" claim to be advanced.

The subcontractor's notice made reference to Clause 21.1.6 but did not make reference to Clause 21.1.1. It was only after the notice period had expired that the subcontractor first made reference to a "like rights" claim arising from the same set of facts.

Arbitration and Court of First Instance

The dispute between the parties was the subject of an arbitration. The subcontractor failed on its claim under Clause 21.1.6 but succeeded on its alternative "like rights" claim under clause 21.1.1. The arbitrator, an eminent former judge of the Technology and Construction Court, recorded that the subcontractor did not refer to Clause 21.1.6 in its notice, but took a sympathetic view:

"...both as a matter of sympathy and as a matter of construction, the contractual basis of the claim stated in the [notice] does not have to be the contractual basis on which the party in the end succeeds in an arbitration."

The main contractor disagreed and took the matter to the Court of First Instance in Hong Kong, where the arbitrator's decision was overturned. The Court, whilst also expressing sympathy with the subcontractor's position, disagreed with the arbitrator's view and concluded that no valid notice had been issued because there was no reference to Clause 21.1.1:

> Clause 21 employs clear and mandatory language for the service and contents of the notices…with no qualifying language such as 'if practicable' or 'in so far as the sub-contractor is able'…there can be no dispute that the notices are conditions precedent, must be strictly complied with, and a failure to comply with these conditions will have the effect that the Defendant will have no entitlement.

Court of Appeal

At the Court of Appeal hearing, counsel for the subcontractor submitted that this was not a case where the subcontractor had failed to state any contractual basis in the notices. In addition, it was also argued that Clause 21 did not expressly require the subcontractor to identify the contractual basis upon which its claim will ultimately succeed in the arbitration, nor did it prevent the subcontractor from amending or substituting a contractual basis. Counsel for the subcontractor submitted that to do so would heavily prejudice the subcontractor's ability to advance any claim.

Unfortunately for the subcontractor, the Court of Appeal upheld the first instance decision, noting that Clause 21, "…is clear and unambiguous [and that] the Subcontractor is required to give notice of the contractual basis [and] not any possible contractual basis which may turn out not to be the correct basis."

Points to note

It is to be noted that this case turned on the express wording of the notice provision, the language deployed in the case was explicit – this is often not the case.

Unless this decision is the subject of further appeal, where the requirements concerning notices are stated to be conditions precedent and where these requirements are expressed in clear and unambiguous language, those issuing notices should expect these requirements to be strictly enforced.

As seen in this decision, what would otherwise be a valid claim (it is noteworthy that the subcontractor in this case had successfully established an entitlement) was struck out on a technicality. An unintended consequence of this form of wording is that the main contractor could not recover the subcontractor's loss and expense from the employer as cost forming part of its own loss and expense claim arising from the same event. A view might be taken that sufficient protection might be secured by the main contractor, limiting its liability to passing down an appropriate share of any recovery.

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