Beware of Track Changes

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Without doubt, technology has helped develop a truly global legal community, and lawyers today routinely work with clients around the world.
It is natural, therefore, that parties in contract negotiations would rely on technology to find changes in the document being negotiated, particularly where proposing amendments and developing clauses.

In the past, we would rely on the other side to direct us to amended clauses in a contract or to relay the substance of the proposed or incorporated amendment. In some instances, we would have to read the document from top to bottom to identify each and every change.

Today, thanks to technology, we rely on 'track changes' or compare software which raises the question: "What is accepted practice now that we conveniently use track changes?"

Earlier this year, the Queensland Supreme Court considered two important question in the case Thiess Pty Ltd v FLSMIDTH Minerals Pty Limited [2010] QSC 6: (i) what is a lawyer's duty when making changes to draft deeds; and (ii) when should the Court intervene to rectify a document.

The facts of the case

Queensland Aluminium Limited (QAL) had engaged Thiess Pty Ltd (Thiess) to design and construct three high temperature processing plants, known as calciners, at QAL's operation in Gladstone. Thiess subcontracted a large part of the design work to FLSMIDTH.

In mid-2003, the calciners, built to FLSMIDTH's design, were found to have structural problems and by the end of 2004 Thiess had commenced proceedings against FLSMIDTH to recover its overruns and lost bonuses under the head contract with QAL.

In early 2005, QAL, Thiess and FLSMIDTH began negotiations toward a settlement. After months of negotiations, the parties entered into a settlement deed (Main Deed). As part of these negotiations, Thiess and FLSMIDTH agreed to enter into a separate Side Deed that, amongst other things, dealt with the ongoing liability of Thiess and FLSMIDTH and, in particular, reserved Thiess' rights and FLSMIDTH's liability in relation to the proceedings on foot.

Initially, the Main Deed between QAL, Thiess and FLSMIDTH included a limitation clause that sought to limit FLSMIDTH's liability to the limit of the indemnity under the Project Specific PI Policy in accordance with the Consultancy Agreement. The parties believed that this included the primary policy of insurance provided by QBE and the excess policy provided by Liberty.

FLSMIDTH's solicitors moved the limitation clause from the Main Deed to the Side Deed and at the same time amended it in a material way.

When the amendment appeared in the next version of the Side Deed, the whole of the clause was marked up on the basis that it was a new clause in the Side Deed. The covering email sent by FLSMIDTH's solicitors identified some of the changes to the document but not the material changes to the limitation clause.

Negotiations between FLSMIDTH and Thiess continued for another five weeks before the documents were finally executed.

After the execution of the deeds, Thiess claimed that the changes to the version of the limitation clause in the Main Deed were intentionally not identified and did not reflect their understanding of the commercial deal.

Thiess consequently commenced proceedings against FLSMIDTH seeking rectification of the Side Deed on the basis of common or alternatively unilateral mistake. Thiess also made submissions that FLSMIDTH's solicitor's failure to identify the changes to the Side Deed was intentionally deceptive and misleading.

What the court decided

The judge (His Honour McMurdo J) conducted a detailed examination of:

• all the dealings between the parties and, in particular, of their lawyers, the drafts and correspondence accompanying the amendments; and

• the evidence called by both sides regarding proper practice of solicitors in the process of drafting and redrafting of such documents.

According to the expert called by Thiess, a careful and competent solicitor of good repute would direct their opponent's attention specifically to such a change within their previous draft of the clause.

On the view of the expert called by FLSMIDTH, that was not required, because a competent solicitor in receipt of such an email would not rely simply on the covering email. They would read its attachment, in this case the draft Side Deed, and it would be sufficient for them to mark the whole of the proposed clause 8, as FLSMIDTH's solicitors did.

The judge held that the new limitation clause contained a markedly different commercial element to the overall settlement. In those circumstances, Thiess' solicitor "could have expected" that the amending solicitor would have drawn attention to such a material change.

In addition, the judge found that the drafting of the new clause would have a result that was quite different from that which the parties and their solicitors had been discussing. While the judge excused the amendment to some extent, noting that it appeared that FLSMIDTH's solicitors were not aware of the effect of the change made, the court acknowledged that it was the continued common intention of the parties that the deeds would not affect the proceedings that were on foot. The court ordered that the Side Deed reflect the initial intent of the parties.

Things to consider

It would seem that the judge in this case excused the masked amendment as misunderstanding of the legal effect. However, had the judge held the parties strictly to the words they had agreed to, the amount Thiess may have been able to recover under the first proceedings would have been significantly reduced.

So, even though 'track changes' is convenient, you should always check what you receive from the other side because it will not be an easy process to have an error

rectified.

Moreover, lawyers should draw attention to any material change they make. Otherwise, they may fall foul of ethical standards if, unlike in the Thiess case, a judge forms the view they were well aware of the impact of a change and communicated the change in a way that it might go unnoticed by the other side.