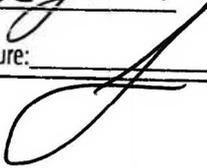




Queensland Legislative Assembly
Number: 5619TS27
 3 APR 2019
MP: John James
Clerk's Signature: 
Tabled
By Leave

Mark Peters
Chief Executive Officer
Gold Coast 2018 Commonwealth Games Corporation
Level 5, 2 Corporate Court
Corporate Centre One
BUNDALL QLD 4217

Date : 16 October 2012
Our Ref : JJM:KSW:JJM General
Contact : John Mullins 07 3224 0210
Email : jmullins@mullinslaw.com.au

Dear Mark

COMMONWEALTH GAMES FEDERATION 2018 HOST CITY AGREEMENT

I refer to the writer's telephone conversation with you on Monday the 15th instant and to the abovenamed agreement. You have provided the relevant pages of this agreement to me for my consideration.

CURRENT ISSUE

I understand the current issue to be the possibility that the State of Queensland may wish not to host the Commonwealth Games in 2018 and/or that the Queensland Government may wish to hold various events in Brisbane as opposed to the Host City of the Gold Coast and that your query is what affect would these decisions have on the agreement and what are the possible consequences of that action.

DOCUMENTATION

There is obviously a significant amount of the documentation that I have not perused but I do not think that it is necessary to do so to respond to the issues being raised.

THE AGREEMENT

Clause 2 deals with the appointment and provides as follows:-

- "2. *Appointment*
- (a) *Overall control of the Games will remain with the CGF at all times in accordance with Article 3.*
- (b) *In reliance on the acknowledgements, representations and undertakings contained in this Contract, in the 2018 Candidate City Manual and in the 2018 Candidature File, and in*

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consideration of the payments to be made under this Contract, the CGF entrusts the organisation and staging of the Games to the Host City and the CGA.

- (c) The CGA will delegate the organisation of the Games to the OC within 6 months of the date of this Contract (unless otherwise agreed by the CGF Executive Board);*
- (d) The OC, the CGA, the Government and the Host City will be jointly and severally responsible for organising and staging the Games and for all commitments related to the organisation and staging of the Games, including, without limitation, all financial commitments relating to the organisation and staging of the Games in accordance with the Games Documents."*

This clause clearly articulates the obligation of the OC, CGA, the Government and the Host City to stage the games and meet all financial commitments.

TERMINATION OF THE CONTRACT

Clause 42 provides as follows:-

"42 Termination

- (a) The CGF may terminate this Contract and withdraw the Games from the CGA and the OC if:*
 - (i) the Host Country or the Host City at any time before the Opening Ceremony or during the Games, is in a State of war (declared or undeclared) or in a situation recognised as one of belligerence; or*
 - (ii) the CGA or the OC commit a material breach of this Contract or the Games Documents, provided that, in the case of a breach capable of remedy, the CGF will give written notice to both the CGA and the OC specifying such breach and requiring that such breach be remedied within 45 days of a service of the notice. Following service of such notice the CGF, the CGA and the OC will negotiate in good faith during the notice period to agree how the breach specified in the notice will be remedied. The CGF may only exercise its right to terminate this Contract if such negotiations fail and the default is not*

remedied within such 45 days or such longer period as may be agreed.

- (b) *Upon termination of this Contract:*
- (i) *all licences to use the CGF IPRs terminate immediately; and*
 - (ii) *the CGA and the OC must cease to exercise any of the rights otherwise granted under this Contract, including without limitation ceasing to use any and all of the CGF IPRs."*

This follows the normal contractual law position in Australia and that is that a party is entitled to terminate the agreement if there is a breach of an essential or material term.

In this case as you would expect in such an agreement, such termination can only occur following a period which enables the breach to be remedied. Upon termination, the party who terminates is entitled to pursue its claim for damages which is their rights in Contract.

There is the other possibility of seeking an order for specific performance.

SPECIFIC PERFORMANCE

Where a party is in breach of a contractual obligation, rather than terminate it is open for the party not in breach to seek an order from the Court compelling the party in breach to remedy their breach and to comply with their obligations under the Contract. This is called specific performance.

Specific Performance is a remedy that is only available if damages will not be an adequate remedy, for example, where the subject matter of a contract is unique or rare. This remedy is most commonly granted in matters involving contracts for the sale of land. I am of the view that this would be an appropriate remedy in this instance.

For an application for specific performance to succeed a number of requirements need to be satisfied, as follows:

- 1 The contract must have been made for valuable consideration;
- 2 It must be enforceable; and
- 3 Damages must be inadequate in the circumstances.

REPUDIATION

A party is deemed to have repudiated an agreement where a party by their conduct or words indicates an unwillingness or inability to perform its obligations under the entire contract that they no longer intend to be bound by the agreement. Accordingly, it is possible for a contractual party such the Government or the Host City to repudiate the agreement.

Where repudiation occurs, the other party simply has to accept the repudiation and the contract is at an end. No notice to remedy breach is required and the same consequences arise that the party not in breach is entitled to damages for repudiation.

The quantification of damages is the same as for a breach of Contract.

DAMAGES

Damages is the most common remedy for a breach of contract.

The damages for repudiation and damages arising from termination are essentially calculated on the same basis. The aim of an order for damages is to put the innocent party (as far as money can do it) in the same position as it would have been in had the other party performed its obligations under the contract.

If the breach did not occur then the CGF would have received a series of payments – the Host fee and the Games being conducted on the Gold Coast. The damages would be the unpaid payments to the CGF and an amount equal to the cost of hosting the Games elsewhere to a similar standard. I imagine those damages would be similar to the cost of hosting the Games on the Gold Coast. It may be that you could run the Games more cheaply somewhere else, but the quantum of damages would still be massive.

If it is not possible for the innocent party to demonstrate that the performance of the contract would have resulted in a profit, the innocent party will be awarded damages to cover the expenses that the innocent party incurred in reliance of the other party's promise.

GOVERNING LAW

It is noted that the Governing Law is the law of England. There is agreement that certain dispute resolution shall be undertaken by the Court of Arbitration for Sport, but the issue of an order for specific performance or an order for damages would be made by a Court, not by virtue of some dispute resolution mechanism.

The laws of England with respect to damages and specific performance are going to be very similar if not exactly the same as the laws of Queensland in relation to contractual matters, but I make this reservation that the advice that we have provided herein is based on the position of the law in Australia.

We can confirm this position with lawyers in the United Kingdom if this is necessary, but for your current purposes, there was not sufficient time.

HOST VENUE IS NOT ON THE GOLD COAST

It is clear that the documentation would contain an obligation that the events would take place at specifically nominated locations.

It would seem to me that the location of the events would be an essential term of the agreement and the unilateral decision of the Government to move the location would be a breach of an essential term of the agreement.

The agreement probably contains a clause which deals with variations to the agreement, and even if it doesn't, the contractual law position is that if the parties agreed to a variation to the agreement, then the agreement can be varied to that extent.

To that extent, it is possible for the Government and the Gold Coast to request with the agreement of CGF that certain venues be relocated.

If these changes were not agreed however, then those changes could not occur.

PARTIES

There could be an argument that the obligations fall to the Gold Coast 2018 Commonwealth Games Corporation solely and the State and the Gold Coast City Council could avoid liability. Significantly, more detailed consideration of all of the documents would be necessary to form a view on this. On the basis of clause 2(d) alone, I think that position is very unlikely.

SUMMARY

If the Government breaches its obligations under the agreement which gives rise to the right to terminate, the CGF could seek an order to compel the Government to comply with its obligations – an order for specific performance.

If an order for specific performance was made, this would compel the Government to comply with its obligations contained in the agreement.

Such an order would do immeasurable damage to the standing of the State of Queensland and the Gold Coast as a Host City for any international event. It would say that even if Queensland/the Gold Coast enter into a Contract, they may seek to renege on this in the future.

If an order for specific performance was not obtained, the Government would still be liable for damages for breach of Contract. Such damages would be substantial.

We await your further advices and instructions.

Yours faithfully



J.J. MULLINS
Partner