TIPS FOR SCHOOLS CONTRACTING WITH EXTERNAL SUPPLIERS

According to lawyer David Ford you must read and understand the fine print.

All sensible people are selfish, and nature is tugging at every contract to make the terms of it fair.

Ralph Waldo Emerson

Sadly but almost inevitably, schools in dealing with external providers will be presented with contracts which are quite unfair. This article provides some practical tips for school administrators to deal with such situations.

We all know what happens. A teacher, Will Sign, decides to organise an excursion. Hopefully, he gets approval to do so and then heads out to deal with Wonder White Water Rafting. He visits their site on the banks of a fast flowing river and observes an activity in progress. It looks like lots of fun and he's sure his Year 9 boys will love it so he tells Bob Swift, the site manager, that the school would love to come next month. Bob hands Will a pre-printed form with 43 clauses of terms and conditions on the back in 9 point. They fill out the front page together by inserting the school's name and address, the date the class will come and the cost. Will glances at the back and quickly loses interest in trying to read the unintelligible legalese. He then signs at the bottom of the front page. Bob signs as well and gives Will a copy. Will drops it on the Bursar's desk the next day with a post-it note saying "Please file". The Bursar decides to read it over her morning cup of coffee, having first had her PA enlarge the print at the photocopier. This clause catches her attention:

> *The school releases and indemnifies Wonder White Water Rafting (WWWR) against all actions, suits, claims and demands (including costs) for personal injury or property damage suffered by any person while attending WWWR activities. This release and indemnity applies even if the personal injury and/or property damage was caused by the negligence or any other act or omission of WWWR or its employees.*

Should the Bursar be worried? She rightly thinks the clause sounds totally unfair. WWWR could use boats with leaks, drown the students and hide behind this clause.

Allocation of Risk

How did clauses like this ever find their way into contracts? Originally, when parties contracted, they sat down at the outset and identified the various risks involved with what they were about to do. Then, they allocated the risks: they decided who would take what risks. Then their lawyers documented what they had agreed with clauses like the ones we see today. The problem is that all too often in many of the routine contractual situations schools find themselves in there is no discussion about risks and who should take them. Rather, the supplier high handedly says: *You take all the risks and I'll take none.*

So how should risk be allocated? In one sense, there are no rights and wrongs in this area. However, I believe a good and fair starting point is that each party should accept the risks in the areas over which they have control. So the external supplier should accept the risks arising from the use of its equipment and the actions of its employees. And the school should accept the risks arising from the actions of its students and staff.

Once that is clear, each party can take out insurance to cover its own risk exposure or liability. Normally, schools already have such insurance in place.

Releases and Indemnities

The clause set out above contains both a release and an indemnity.

A release is simply a provision in a contract that excludes one party from an obligation to the party giving the release, normally the other party to the contract. The release in the clause would have effect, for example, if a WWWR employee negligently damaged some school property in the course of the white water rafting activity. When the school tried to get WWWR to pay for the damage, WWWR could hold up the release and say: *You agreed not to bring any claims against us for such damage*.

Release clauses are construed according to the natural and ordinary meaning of the words used, read in the light of the contract as a whole. One gives due weight to the context, including the nature and purpose of the contract. Where it is unclear or ambiguous, the clause is understood in a way which least favours the person getting the benefit of the release.

With an indemnity, the party giving it undertakes to reimburse the indemnified party if that party has to pay someone else. So, in the clause, if a student was injured, even because of negligence by a WWWR employee, and successfully seeks damages from WWWR, WWWR can enforce the indemnity and ask the school to reimburse it for everything it has had to pay the student.

Courts look very carefully at the actual words of an indemnity to understand precisely what obligation it is that the indemnifier has undertaken. It is to be understood according to its natural and ordinary meaning but, in case of ambiguity, it is to be construed in favour of the person giving the indemnity.

If a school agrees to give an indemnity, it ought to check with its insurer. The policy may provide cover where there is liability for negligence but not where there is liability under a contractual indemnity.

Authority to sign contracts

It is clear that many teachers do not understand the implications of some of the more one-sided clauses external suppliers insert in their contracts. Therefore, staff must be educated about such matters and, in many cases, simply prohibited from signing these contracts. The school may wish to authorise some teachers to make contracts but ought to let the others know that they do not have that authority.

What happens if, like Will, a teacher does sign a contract for the school? Is the school bound? Usually, a person in Bob Swift's position making a contract with a corporate body (as most schools are) does not have to be concerned about whether an individual like Will who represents the school has authority to do so. If the teacher has apparent authority, his or her acts will bind the school and the contract will be with the school and not the teacher.

Section 126 of the Corporations Act confirms this: *A company's power to make a contract may be exercised by an individual acting with the company's express or implied authority and on behalf of the company.* However, as one can see, there is an issue as to whether the company has authorised the individual to sign the contract on its behalf. Judges have said that there is no doubt that a company can confer actual authority on someone to act on its behalf and that the fact that this has happened can be implied from the company's conduct. Therefore, if a school allows teachers to negotiate with external suppliers and provides them with business cards with impressive titles, it will be very hard to argue later that the teacher did not have the authority to make a contract for the school.

Personal Liability

A good reason for teachers to avoid signing contracts for schools is that they can unwittingly find themselves personally liable. Clauses like this are to be avoided:

> *By signing this document you warrant that you have the authority of the hirer to do so and that your signing of this document will legally bind the hirer. Where you do not have this authority, you agree that you will be liable as if you were the hirer.*

Likewise, teachers and administrators ought to avoid signing clauses like this:

> *I hereby personally guarantee that the charges levied by Streetwise Conference Centre will be paid by the School.*

They mean what they say. If Will had signed this one, and if the school had pulled out, Will would be left facing a hefty bill from WWWR.

Despite the present hard times we are all going through, schools ought not to allow any of their external suppliers to insist on any form of personal guarantee from school staff.

Five points to remember

Bursars, when about to enter contracts with external providers, remember:

1. Read the contract!
2. Have protocols for who in the school can sign contracts to bind the school and make sure staff understand what authority they have and don't have.
3. Be prepared to negotiate the terms of contracts even if they appear to be in standard form.

4. Get advice on clauses you don't understand or feel may be unfair to your school.
5. Be prepared to go elsewhere if the external provider won't budge on unreasonable terms.

ABOUT THE AUTHOR

David Ford is the senior partner at Emil Ford & Co - Lawyers of Sydney. He practises mainly in commercial and education law. He has advised well over 50 educational institutions throughout Australia. David is also often engaged by schools to investigate allegations against members of staff.

David is President of the NSW Chapter of the Australia & New Zealand Education Law Association (ANZELA) and a former member of the ANZELA Board. He is a member of the American and South African Education Law Associations and of the Editorial Board of the CCH School Principals Legal Guide. He is the editor of *Education Law Notes*, which keep schools throughout Australia up-to-date with education law developments. David is also a former Chairman of the Council of MLC School, an independent school for girls in Sydney.

David has presented at conferences in the United Kingdom, Europe, South Africa, New Zealand and throughout Australia, and published numerous papers on topics as varied as student rights; teachers' liability; tort law reform; investigations; risk management; teachers, school counsellors and confidentiality; bullying and cyber bullying; outdoor education; multiculturalism in education; discrimination; and child protection. He regularly presents in-school seminars for both teachers and administrators on education law matters. He also consults to schools and their boards on governance issues.

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