BUDDLE FINDLAY

Legal update on litigation and dispute resolution - February 2015

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Supreme Court rules on meaning of dispute for purposes of referral to arbitration

Under the Arbitration Act 1996, where the parties have agreed to refer disputes to arbitration, a party may object to such a referral on the basis that no real "dispute" exists. The Supreme Court has recently considered the threshold that must be met to establish this ground.

In *Zurich Australian Insurance Limited t/a Zurich New Zealand v Cognition Education Limited* [2014] NZSC 188*,* Cognition had brought summary judgment proceedings against Zurich, after it declined Cognition's insurance claim. Zurich argued that the Court proceedings must be stayed, as the parties had agreed to refer all disputes to arbitration. Cognition responded that the summary judgment proceedings should be determined before Zurich's stay application, as if they were successful, there would be no dispute to be arbitrated

The issue for the Supreme Court was whether:

- The Court should grant a stay only where it is satisfied that a defendant has an arguable defence for the purposes of a summary judgment application ("broad test"); or
- All that is required for a stay is that it is not immediately demonstrable that the defendant is not acting bona fide in asserting a dispute, or that there is, in reality, no dispute ("narrow test").

The Court found in favour of the narrow test, noting that matters could properly be described as disputes, even if capable of being determined by a summary process. The fact that one party's view on the issues is held to be incorrect does not meant that the dispute is not legitimate. The relevant distinction is between a situation in which the defendant disputes the claim on grounds that the plaintiff is very likely to overcome and a situation in which the defendant is not really raising a dispute at all.

In light of its adoption of the narrow test, the Court held that Zurich's stay application had to be determined before the summary judgment proceedings. While the parties settled the dispute shortly after the hearing, the Court nevertheless released the judgment, on the basis that it dealt with issues of public importance.

A flea in the ointment: trade mark dispute over pet products

Businesses seeking to register a trade mark may face a hurdle if the mark is similar to one already registered. This is illustrated by a December 2014 Court of Appeal decision (*Virbac SA v Merial* [2014] NZCA 619) involving two French veterinary pharmaceutical giants, Merial and Virbac, and their respective trade marks for flea treatments.

Merial is the maker of the well-known FRONTLINE products, sold in New Zealand since 1994. Virbac has applied to register the trade mark FIPROLINE in respect of rival products, which are not yet sold in this country. The question for the Court of Appeal was whether the use of FIPROLINE was reasonably likely to cause deception and confusion amongst a substantial number of persons, either generally, because of its similarity to FRONTLINE, or specifically, when used on products which do not contain the active ingredient fipronil.

The Court held that the relevant class of persons for the purposes of these issues was the general public as a whole. It also found that the entire class should not be characterised as discerning and cautious.

Against this background, the Court found that the two marks were sufficiently dissimilar to permit registration of FIPROLINE. It noted that the only similarity was the first letter "f" and the concluding element "line", that FIPROLINE is an unusual and distinctive invented word, that it evoked the active ingredient fipronil and that the sound of the two marks is different. In these circumstances, it was not likely to deceive or cause confusion vis-à-vis FRONTLINE.

As to fipronil content, the Court found that FIPROLINE suggests that products bearing the mark contain that component.

Accordingly, it held that registration should not be permitted in relation to goods which do not contain fipronil as an active ingredient.

The New Zealand case is only one of many between the parties around the world. Registration has been allowed in Spain but refused in Argentina and Costa Rica. Outcomes are still awaited in many of the 15 other jurisdictions in which applications were made at the same time as New Zealand.

Rights of finance lessee against seller may be limited

Many businesses acquire equipment from suppliers by means of third party finance leases. A recent case highlights that if they wish to have the same rights of recourse against both the supplier and the lease company, the contractual arrangements must address specifically this.

In *John Austin Ltd v CTrack Ltd and Rent Plus Limited* [2014] NZHC 2687, Minorplanet (later known as CTrack) had agreed to supply John Austin with a digital vehicle tracking system, via a lease from Rent Plus. John Austin entered into contracts with both Minorplanet and Rent Plus to give effect to the deal. While the sale contract between Minorplanet and Rent Plus contained several warranties, including that the equipment was fit for purpose and of merchantable quality, those warranties were not repeated in the subsequent lease contract between Rent Plus and John Austin.

When the equipment failed, John Austin sued both parties and contended that the warranties in the Minorplanet contract should also be implied into the Rent Plus agreement, and that quality representations made by Minorplanet should be imputed to Rent Plus. Both claims failed, as:

- The Court could not imply the warranties provided by Rent Plus to Minorplanet into Rent Plus' contract with John Austin. Not only was it not necessary for business efficacy but it would also conflict with the express terms of that contract, notably those which excluded warranties.
- Rent Plus was not liable in respect of any representations made by Minorplanet regarding the quality and capability of the system. Rent Plus did not become involved in the transaction until Minorplanet asked it to fund the deal and it had no means of knowing whether any representations made were correct. It was therefore fair and reasonable that it should be permitted to rely on the exclusion clauses in its contract with John Austin.

This case underlines the simple but critical principle that contracts must explicitly say what parties intend them to say. A Court will not lightly imply terms where the parties have expressly chosen not to include them.

Unforeseen circumstances and the right to cancel a contract

Contracts will occasionally contain clauses entitling parties to cancel in the event of "unforeseen" circumstances. However, if the cancelling party had any warning of the events in question, it will not easily be able to rely on them to avoid its contractual responsibilities.

In *Burntcopper Ltd (t/a Contemporary Design Unit) v International Travel Catering Association Ltd* [2014] EWHC 148 (Comm), the plaintiff (CDU) had entered into a five year contract with the defendant (ITCA) under which CDU would provide management services for ITCA's annual trade show. ITCA insisted on the inclusion of a clause providing that if for some unforeseen circumstance the show did not take place, the contract would not be enforced for the year in question.

At the time it was negotiating the contract, ITCA was also negotiating the sale of the show. The sale went ahead after the contract was concluded and ITCA then told CDU that the contract was at an end. When sued by CDU, ITCA argued (amongst other things) that the sale was an unforeseen circumstance, rendering the contract unenforceable.

The Court held that "unforeseen circumstances" had to be given its ordinary and natural meaning. Against the backdrop of commercial reality, given that at the time the contract was being negotiated ITCA was receiving emails using the language of "commercial courtship" from a buyer, the sale was not unforeseen. It took little account of the evidence from ITCA personnel that they believed a deal was unlikely and, at best, no more than a possibility or that a series of decisions had to be taken before a sale came about. Moreover, it was influenced by the fact that the evidence showed that ITCA wanted a clause terminating CDU's rights under the contract if ITCA sold the show, but that a clause saying that expressly would have been rejected by CDU.

Amongst other things, the decision highlights the risk for parties in relying on arguments which are contradicted by documents that have to be "discovered" to the other side during the litigation process. In this case, ITCA's own emails served as damning proof of its negotiations with the buyer.

Limitation periods and financial adviser negligence cases

Even the strongest legal cases may fail if brought outside the statutory limitation period. In most cases, a six year time limit will apply. However, arguments will often arise as to exactly when that period should be deemed to begin.

Smith and Martin and Others v Singleton and McDouall Stuart Securities Limited [2014] NZHC 2672 is a case in point. It involved claims by the plaintiffs against their former investment advisers in (amongst others) negligence and negligent misstatement. The parties agreed that the claims were subject to a six year limitation period, beginning at the date that the plaintiffs suffered loss. However, they disagreed about the actual date of that loss.

Naturally, the defendants argued for an earlier date of loss, fixing on the date when the plaintiffs' investments were actually made. The plaintiffs contended that the loss occurred later, effectively when the investments actually lost their value.

The plaintiffs applied for an early ruling that the limitation arguments were so strong that the case should not be permitted to proceed to trial. However, the Court was unable to make this finding, holding that it was not possible to conclude that the plaintiffs' net worth had immediately been reduced when they entered into the investments. While the plaintiffs had received "risky" investments rather than the "secure" ones they expected, it was inappropriate in a negligence claim to adopt the simple approach that what they did get was necessarily less valuable.

As the Court refused the strike out application, the case will now proceed to a full trial, at which (unless the proceeding settles) the limitation arguments will be considered in further detail. We will report on the outcome of that trial in a subsequent update.

A bad day at the office: administrative error leads to failure of a company

The English government agency, Companies House, has recently been left red-faced and potentially facing a hefty damages award after it recorded on its website that the wrong company had been placed into liquidation.

Sebry v Companies House & Anor [2015] EWHC 115 (QB) arose after Companies House (the English equivalent of the Companies Office) entered on its register that Taylor & Sons Limited – rather than the similar but differently-named Taylor & Son Limited – had gone into liquidation. The error was corrected three days later. However, by then, a number of people had accessed the register, believed the company to have been liquidated and had spread this information via word of mouth. Moreover, Companies House had included the information in packages sold to various subscription-based information services and had taken little action to communicate the correction to customers. The company's director sued Companies House and the Registrar of Companies, alleging that the misinformation led to such a downturn in the company's fortunes that it resulted in administration.

The issues for the Court were whether a relevant duty of care existed, whether it had been breached and, if so, whether the breach had caused the company to go into administration.

The Court was not satisfied that there was a claim for breach of statutory duty. However, it did find that the Registrar owed a common law duty of care when entering winding up orders on the register to ensure that such orders are not entered against the wrong company. It also held that that duty had been breached and that the breach led to the company's administration. In this regard, it took into account that while the company had suffered as a result of the recession, it had taken steps to improve its fortunes, its prospects were good and its suppliers were trading with it on ordinary terms. By contrast, after the error, suppliers – believing the company to be in financial trouble – refused to supply without up-front payment. This led to an outflow of cash and a reduction in income, resulting in the decision to place the company in administration.

In light of the above findings, the case will now continue to a full trial at which the issue of damages will be considered. Lawyers acting for the plaintiff have reportedly valued the claim at £8.8 million.

Recovery of legal costs – time of in-house counsel may be taken into account

The recent English case of *Ladak v DRC Locums Limited* [2014] UKEAT 0488-13-1606 has confirmed that awards of legal costs in the English Employment Appeal Tribunal may take into account costs incurred by in-house counsel.

This decision reflects the long-established position in New Zealand, as illustrated by *Commissioner of Inland Revenue v Harbour City Tow and Salvage (2003) Limited* HC Auckland CIV-2006-485-2002, 12 February 2007. In that case, the unsuccessful defendant submitted that the plaintiff was not entitled to legal costs because all of its legal work had been carried out by in-house counsel and, accordingly, its actual costs were not known.

The Court disagreed and awarded costs according to the High Court scale. In doing so, it noted that the plaintiff had confirmed that its lawyers had spent almost 45 hours working on the proceeding and that on a normal counsel charge-out rate, even at the most basic level, the costs involved would have well exceeded those payable according to that scale.

In light of these decisions, businesses whose in-house lawyers work on litigious matters should ensure that those lawyers keep an accurate note of the time they spend on specific tasks associated with the case. In the event of a success at trial, those time records will be useful evidence when it comes to applying for costs.

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