BUDDLE FINDLAY

Legal update on litigation and dispute resolution - September 2015

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Seller beware: negligence and real estate agents

A recent High Court decision involving a multi-million dollar beach-side property is likely to cause some anxiety amongst real estate agents, particularly those dealing with delayed settlements.

The case involved a claim in negligence by Mr and Mrs Messenger against the real estate company (Stanaway) that acted as their agent in the sale of an Auckland house. Stanaway negotiated an agreement whereby the purchase price was to be paid in two instalments, the first of which was due on the possession date and the second of which was to be paid two years later. The settlement date was not expressly specified in the agreement but the Messengers took the view that it coincided with the payment of the last instalment. As it turned out, the purchasers disagreed, with unfortunate consequences. They failed to make payment of the first instalment and instead placed a caveat on the property's title, preventing further dealings with the land.

The property eventually sold to a third party for over $1.5 million less than the original price. When the original purchasers went bankrupt, the Messengers looked to recover their losses from Stanaway, alleging that it had been negligent.

The High Court agreed. It found that as it was obvious on the face of the agreement that the Messengers would only receive part of the purchase price on possession date, any reasonably competent agent would have sought confirmation of the settlement date. Instead, the Stanaway agent had simply told Mr Messenger that she was "unsure" on this front. The Court also found that, given the instalment nature of the contract, the agent should have advised the Messengers to insert a standard vendor finance clause and to secure the unpaid balance by way of registered mortgage.

In addition to contesting liability, Stanaway tried to attack the amount of damages claimed by the Messengers, contending that, if the sale had not gone ahead, the Messengers would have accepted the other, lower, offer available to them at the time or another offer of a similar value. This argument was dismissed by the Court as "pure speculation". The correct approach was to look to the objective market value of the property at the time.

However, it was not all bad news for Stanaway. The damages award was discounted by 20% to take account of the Messengers' contributory negligence in failing to obtain legal advice before signing the agreement. While it will not always be negligent to fail to consult a lawyer before concluding an agreement, the Court held that the Messengers should have done so in this case. Not only had the agent expressed uncertainty about when settlement was to occur, but the agreement contained an unusual caveat clause, which should have prompted the Messengers to consult a solicitor.

While the case will be of particular interest to real estate agents, it also carries an important message for anyone who is a party to an agreement for sale and purchase: if in doubt, seek professional advice.

Stanaway has appealed against the findings on the Messengers' claim. We will report on any subsequent Court of Appeal decision in a future update.

No claim against shadow purchaser of real estate

The Court of Appeal has recently considered a financing arrangement for the purchase of an Auckland property, which, while it seemed to the parties to provide an ingenious solution to a cashflow problem, quickly went wrong.

The case *of Marr v Parkin* [2015] NZCA 371 arose as a result of the mortgagee sale of Ms Marr's home. Hoping to retain the property, Ms Marr arranged for a friend, Ms Guttenbeil, to bid for it at the auction, thus buying Ms Marr more time to arrange finance. The third link in the chain was Mr Parkin, who agreed to provide "bridging finance" by paying the deposit, on the basis that if there was a failure to settle, he would buy the property himself.

While Ms Guttenbeil's offer on the property was accepted, things went downhill from there, as Ms Marr was unable to secure

finance to complete the deal. Ultimately, the purchase was not settled. Mr Parkin then attempted to complete the deal in his own name, but was prevented from taking possession by a caveat lodged by Ms Marr's children.

Ms Marr brought proceedings against Mr Parkin alleging that he had knowingly received the property subject to a constructive trust in favour of Ms Marr. She also claimed that, as a result of the payment of the deposit by Mr Parkin, she and he had entered into a consumer credit contract for the purposes of the Consumer Credit Contracts and Finance Act 2003 (CCCFA) and that Mr Parkin had failed to comply with that legislation. The High Court rejected both arguments.

The Court of Appeal agreed with the High Court, finding that:

- In order to succeed with a knowing receipt claim, Ms Marr had to prove that Ms Guttenbeil had breached a fiduciary duty to her. There was no such breach. While Ms Marr and Ms Guttenbeil were originally in an agency relationship, that terminated when it became clear that Ms Marr would not be able to raise the funds to complete the purchase. This occurred well before the purchase by Mr Parkin. As a result, there could be no breach of duty upon which to base the claim. Even if that were not the case, Mr Parkin lacked the requisite state of knowledge to make out a claim in knowing receipt.
- To the extent that there was a credit contract, it was between Mr Parkin and Ms Guttenbeil. There was no evidence that Ms Marr assumed responsibility to repay Mr Parkin the deposit. In these circumstances, Mr Parkin could not have breached the CCCFA.

The far-reaching Fair Trading Act: injunction granted against website designer in India

A recent decision involving a website allegedly designed to mislead the public into believing that it is operated by Immigration New Zealand (INZ) provides further confirmation that the Fair Trading Act 1986 (FTA) can apply to businesses based overseas.

The website at issue in *MBIE v Swastik Solution Limited* [2015] NZHC 1913 operated at http: //www.immigration-govt.nz. The only distinction between it and the legitimate INZ site was the replacement of the full stop between "immigration" and "govt" with a hyphen. The website is registered in the name of Swastik, a website designer based in New Delhi.

Information gathered by INZ strongly suggests that the purpose of the website is to facilitate the sale of fake New Zealand visas. This led INZ to make a without notice application for an interim injunction pending trial, restraining Swastik from using the domain name and from using, publishing or continuing to publish any of the material on the website that is accessed through it. The applications were made on the basis that Swastik's conduct amounted to a breach of the FTA and the Copyright Act 1994.

Applying the criteria applicable to interim injunction applications, the Court held that there was a "serious question to be tried" as to whether Swastik had committed the breaches alleged. In doing so, it held that notwithstanding that Swastik and many of its intended victims were based out of New Zealand, it had jurisdiction to grant the relief sought, for the following reasons:

- The domain name was registered in New Zealand on a New Zealand based register operated by the Domain Name Commission
- Although the content of the website may have been created in India, it fell within the extra-territorial provisions of the FTA because the content relates to the supply of goods and services by INZ
- The injunctions constitute a restraint on Swastik's future conduct. Under section 41(3), the Court may grant an injunction to prevent conduct contrary to the FTA if the Court is satisfied that the defendant has engaged in the conduct and if, in the opinion of the Court, it is desirable to do so.

Financial advisers succeed on limitation argument

In a previous legal update we reported on the case of *Smith and Martin v Singleton and McDouall Stuart Securities Limited* [2014] NZHC 2672. It involved an unsuccessful application by investment advisers to strike out claims in (amongst other things) negligence and negligent misstatement, on the basis that more than six years (being the statutory limitation period) had expired since the date of loss.

The defendants subsequently applied to the High Court for review of the decision. The results of that review are reported in the case of *Smith and Martin v Singleton and McDouall Stuart Securities Limited* [2014] NZHC 1643.

The key issue for the Court on review was when the relevant loss arose, as it is that loss that triggers the running of the limitation period. At first instance, the Court had rejected the argument that the relevant date was the time of investment, holding that it was not possible to conclude that the plaintiffs' net worth had been reduced at that time. Happily for the defendants, the reviewing judge disagreed, finding that time began to run at the time that the plaintiffs received an investment that was riskier than they had wanted.

One cause of action survived the strike out application, namely the claim in equity that the investment advisers breached their fiduciary duties because they recommended an investment from which they stood to benefit personally, thus placing themselves in a conflict of interest position. The Court held that a detailed factual enquiry was necessary to determine the applicability of an equitable limitation defence and that this was not appropriate at the strike out stage.

The decision to strike out the negligence claims is likely to provoke a sigh of relief amongst the investment adviser community, as the methodology it adopts effectively results in a shorter limitation period for negligent financial advice than had previously been the case.

No public interest in disclosure of inadvertently released confidential information

In *Blum v ANZ Bank New Zealand Limited* [2015] NZCA 335, Mr Blum unsuccessfully appealed against a permanent injunction granted by the High Court to prevent him from disclosing confidential information inadvertently provided to him by ANZ.

On appeal, Mr Blum submitted, amongst other things, that he should, in the public interest, be able to disclose additional details about the confidential information. In rejecting this argument, the Court did not attempt a definitive statement of the ambit of the "public interest" defence. Rather, it accepted that the defence might potentially be raised to justify disclosure of confidential information in order to uncover "almost any civil wrong" and that it can usefully be viewed as an extension of the equitable "unclean hands" defence.

The Court observed that two competing public interests must be balanced, namely whether the information is a matter of public interest and whether it is in the public interest that the duty of confidence should be breached. In this case, seven factors had to be weighed up in determining which public interest should prevail, including the following:

- The breach was inadvertent
- The disclosing party was a bank rather than a public body
- ANZ took prompt steps to investigate the disclosure and contain any potential damage to customers
- The disclosures took place over two years ago
- Mr Blum appeared to have been motivated by commercial advantage and a desire to cause damage to ANZ. His motivations were not altruistic or public-minded

After considering the above factors, the Court concluded that the public interest in having confidential information protected well outweighed any interest or benefit to the public in receiving the information Mr Blum sought to disclose.

Dishonest assistance and corporate groups: lessons from the Bahamas

Almost 20 years after it first began, a case originating in the courts of the Bahamas and involving a complex web of banking transactions, has reached its conclusion in the Privy Council. The judgment provides useful guidance on the law of fiduciary duties and dishonest assistance, particularly in the context of corporate groups.

The facts of *Central Bank of Ecuador v Conticorp SA* (2015) UKPC 11 are complicated but, in essence, it centred on three transactions by which the second appellant mutual fund (IAMF) transferred to the first respondent (Conticorp) the bulk of its assets in return for the issue of certain securities. It later transpired that these securities were worthless.

While IAMF was supposedly an independent fund, operated by its sole director, Mr Taylor, it was ultimately owned by Conticorp or associated interests, which also appointed Mr Taylor. The result of the transactions was that Conticorp effectively stripped its subsidiaries of their assets without providing proper value. After the Central Bank of Ecuador took over the IAMF it brought claims against Conticorp and three of its principal shareholding officers in order to recover the lost assets.

The legal issues for the Privy Council were two-fold: first, whether Mr Taylor had breached his director's duties to IAMF by following the instructions of the respondents without exercising independent judgment as to the best interests of IAMF; and secondly, whether the respondents had dishonestly assisted such breaches.

The Privy Council found both a breach of duty and dishonest assistance and held the respondents liable to repay almost US$192 million plus interest. In reaching this conclusion, it noted that, amongst other things, no independent or impartial consideration was given to IAMF's interests before it entered into any of the transactions, notwithstanding that they resulted in a significant level of risk being transferred from Conticorp to IAMF while giving Conticorp the value of IAMF's valuable assets.

The case serves as a warning to companies and directors operating within group structures. While limited exceptions exist (see

for example, the carve-out in sections 131(2), (3) and (4) of the Companies Act 1993) generally speaking, simply doing the bidding of a parent company without giving independent thought to the interests of a subsidiary may result in extensive, and expensive, liability.

Limitation clauses and interim injunctions: the issue of adequacy

The English Court of Appeal has released a judgment that discusses the relevance of damages limitation clauses in interim injunction applications. This is an important issue as one of the factors to be taken into account when deciding whether to grant an injunction is whether damages are an adequate remedy.

At the heart of *AB v CD* [2014] EWCA Civ 229 was a clause in the contract between the parties excluding liability for various heads of loss, including consequential damages. The High Court noted that the result of this clause was that any award of damages would be less than would have been available in the absence of the clause. However, this did not affect its analysis of whether damages would be an adequate remedy, as the clause represented an agreed limit on damages. Accordingly, it declined the injunction application.

The Court of Appeal overturned this decision, noting that an agreement to restrict the recoverability of damages in the event of a breach cannot be treated as an agreement to excuse performance of a primary obligation. In reaching its decision, it rejected the submission that its approach would enable every applicant for an injunction to rely on an exclusion or limitation clause to claim that damages would not be an adequate remedy. Claimants must still show that if the threatened breach occurs, there is (at least) a substantial risk that they will suffer loss that would otherwise be recoverable but for which they will (or at least may) be prevented from recovering by the clause in question. In exercising its discretion as to whether to grant an injunction, the fact that a restriction on damages has been agreed may still be a relevant factor, as may the scale of any shortfall and the risk of it occurring.

Contractual interpretation: the latest from the UK Supreme Court

In recent years the doctrine of "commercial common sense" has been increasingly invoked in cases involving disputes over the interpretation of the terms of a contract. The UK Supreme Court has recently made it clear that while commercial common sense has a role to play in interpretation disputes, it is no substitute for a close analysis of the actual language of the contract.

Arnold v Britton [2015] 2 WLR 1593 concerned clauses in leases that provided for incremental increases in relation to service charges. The tenants argued that an interpretation that provided for fixed sum payments resulted in such absurdly high charges that it could not be right and that the clause should be read as requiring payment of a variable sum. The High Court and Court of Appeal rejected this position, on the basis that the natural meaning of the words was clear. The Supreme Court agreed.

Lord Neuberger gave the leading judgment, noting that when interpreting a provision of a written contract it is appropriate to take into account the following matters:

- The natural and ordinary meaning of the clause
- Any other relevant provisions
- The overall purpose of the clause and the agreement as a whole
- The facts and circumstances known or assumed by the parties at the time that the document was executed
- Commercial common sense.

It is not appropriate to have regard to subjective evidence of any party's intentions.

Within this framework, Lord Neuberger emphasised six additional factors:

- The reliance placed on commercial common sense and surrounding circumstances should not undervalue the actual language of the provision to be interpreted
- The less clear the words, the more appropriate it is to depart from their natural meaning. However, that does not justify the court searching for or constructing drafting errors in order to justify such a departure
- Commercial common sense cannot be invoked retrospectively. The fact that a contract has worked out disastrously is not a reason to depart from its natural language
- A court should be slow to reject the natural meaning of a provision as correct simply because it seems to be an imprudent term for a party to have agreed
- When interpreting a contractual provision, it is not right to take into account a fact known to only one of the parties. Only facts

and circumstances known to all can be considered

- When an event subsequently occurs that was plainly not intended or contemplated by the parties, if it is clear what they would have intended, the court will give effect to that intention.

The decision of the Supreme Court makes it clear that, under English law, the starting point when interpreting a contract must always be the actual words agreed by the parties. Commercial common sense is simply an aid to construction. This approach is consistent with the principles applied by the New Zealand courts, recently outlined in *New Zealand Carbon Farming Limited & Another v Mighty River Power Limited* [2015] NZHC 1274 as reported here.

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