BUDDLE FINDLAY

Legal update on litigation and dispute resolution - November 2010

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International convention takes precedence over domestic Sale of Goods Act

A recent High Court decision highlights to New Zealand businesses selling or buying goods internationally that their contracts may be subject to the United Nations Convention on the International Sale of Goods ("CISG"). Generally, CISG will apply where a counter-party is located in another contracting state, unless the parties expressly agree to exclude it or the terms of their contracts are inconsistent with it.

In *Smallmon v Transport Sales Limited* CIV-2009-409-363, 30 July 2010, the Australian plaintiff purchased trucks from the New Zealand based defendant company. When the trucks arrived in Australia, the Queensland authorities refused to register them. As a result, the plaintiff brought a variety of claims against the defendant including under CISG and its domestic equivalent, the Sale of Goods Act 1908 ("SOGA").

French J found that as CISG applied, the plaintiff was precluded from suing under SOGA. She also dismissed the parties' argument that in determining the claim under CISG, she should take into account domestic case law. Instead, she followed the principles established by the CISG decisions of overseas Courts, which provide that a seller will only be responsible for compliance with the regulatory provisions or standards of the importing country if certain circumstances exist. As those circumstances did not exist in the *Smallmon* case, the plaintiff's claim failed.

The case is a reminder that parties to international sale of goods contracts should ensure that they are fully informed about the implications of CISG before finalising their contracts. In certain cases it may be in their interests to contract out of some or all of CISG's provisions.

See Court decision here.

Oral guarantee upheld under Fair Trading Act

The Property Law Act 2007 provides that in order to be enforceable, guarantees must be evidenced in writing. However, a recent High Court case illustrates that even in the absence of writing, a person who promises to assume personal liability for a debt may still be liable for that debt under the Fair Trading Act 1986 (the "FTA").

In *McKeown Group Limited v Russell* CIV-2008-476-530, 19 August 2010, French J held that when the defendant promised to assume liability for her company's debt, she knew that she was likely to have insufficient means to do so. As a result, this was *"one of those rare cases where a plaintiff is able to prove a dishonest intention at the time the promise was made"* and the defendant's conduct was misleading and deceptive for the purposes of s9 of the FTA. The defendant argued that the claim should fail on public policy grounds as it was a backdoor method of circumventing the requirement that guarantees be evidenced in writing. French J dismissed this argument, noting that the claim succeeded not because the defendant gave a guarantee *per se* but because at the time she did so, she did not have a present intention to make good her promise.

It is likely that as a result of this decision, parties faced with otherwise unenforceable oral guarantees will have increasing recourse to the FTA in an attempt to recover their debts. However, as the High Court noted, the cases in which the requisite dishonest intention can be proved will be rare.

See Court decision here.

Sale and purchase of real estate: outline plans may be subject to change

In two separate decisions, the High Court has recently considered attempts by purchasers to cancel agreements for sale and purchase on the basis that buildings failed to comply with outline plans.

In *Jones v L&Y Holding Limited* CIV-2010-404-1667, 28 July 2010 the purchasers relied on the fact that outline plans attached to the agreement did not show or refer to a column which was subsequently built in the retail unit they contracted to buy. They contended that it was an essential term of the contract that there would be no such column. The Court dismissed this argument and held that the purchaser was not entitled, on a summary judgment application, to a declaration that the contract had been properly cancelled.

See Court decision here

The claim in *11 Maunganui Road Limited v Evaroa* CIV-2010-404-1678, 20 September 2010 also related to changes to outline plans. The vendors issued summary judgment proceedings seeking specific performance of agreements for the sale and purchase of three residential apartments. The purchasers, in turn, alleged that they had been justified in cancelling the agreements on the grounds that there had been a number of changes to the apartments, including a reduction in the size of the decks, a change to the fire-safe paths and additions of structural columns. These arguments were rejected by the Court and orders for specific performance of the contracts were made. The Court noted that the agreements made express provision for both variation to the outline plans and reduction in the size of the decks. Whilst the purchasers may have been disappointed with the columns, cancellation of the agreements was not justified. It could not be said that it was essential to the purchasers that there be no columns within the apartments. Nor did the purchasers get *"something substantially different from that which was contemplated by the agreement"*.

These decisions indicate a willingness on the part of the Courts to uphold the right of vendors to make changes to outline plans, particularly where the agreements for sale and purchase provide a wide discretion to do so.

See Court decision here.

Trade Me sellers not immune from price-fixing laws

The Commerce Commission has issued a warning to users of Trade Me that they are not exempt from laws prohibiting price-fixing and other anti-competitive behaviour.

The Commission recently announced that it has reached a settlement with two tyre sellers who were subject to a price-fixing investigation after selling their stock on Trade Me. In January 2010, one of the traders, Tyre Guys Limited, sent an email to the other, Adens Trading Limited, advising of its Trade Me prices for six brands of tyres. Adens Trading Limited then set its own Trade Me advertisement for three of the brands to match its competitors.

In its media release announcing the settlement, the Commission warned that *"online sellers should decide on the reserve price and the "buy now" price themselves and try not to agree prices with competitors. Any attempt to lessen competition through price fixing will be viewed seriously, no matter what the forum […]."*

The case is a warning to users that the Commission monitors sites such as Trade Me and, even where the amounts and parties involved are comparatively small, it will take action against what it perceives to be anti-competitive behaviour.

Prada or Farmers? No confusion

The High Court has dismissed a claim by Prada that the *"mimi"* trade mark owned by the Farmers retail chain is likely to deceive or cause confusion because of its similarity to Prada's *"miu miu"* mark.

In *Prada S.A. v The Farmers Trading Co Ltd* CIV-2010-485-58, 21 September 2010, Priestly J upheld the decision of the Assistant Commissioner of Trade Marks to register the mimi mark, and found that such similarities as there are between the marks are superficial. Furthermore, those similarities are strongly outweighed by the visual, aural and conceptual differences.

Priestly J did agree with Prada's argument that, in reaching her decision, the Assistant Commissioner should not have taken into account the fact that Prada and Farmers operate through different trade channels. However, given the degree of dissimilarity between the marks, he found that this did not invalidate her conclusion that the consumers were unlikely to be confused or deceived.

This is not the first case in which Prada has failed to uphold its mark against the word Mimi. It has similarly failed to do so in overseas decisions. Priestly J acknowledged those decisions in passing, noting that they were not determinative but merely reinforced his conclusion.

See Court decision here.

Trade practices round-up: recent case law on misleading advertising

There have been a number of recent decisions concerning misleading advertising and the Fair Trading Act.

In *Commerce Commission v Progressive Enterprises* [2010] NZCA 374, 16th August 2010the Court of Appeal dismissed the Commission's appeal against the High Court's decision quashing Progressive's convictions under the FTA. The case arose out of the supply by Progressive of cereals whose packets carried offers of prizes which were no longer available as the relevant competition had closed. The Court of Appeal confirmed that in order to be liable under s17 of the FTA, which deals with offering gifts and prizes, the offeror must have the specific intention not to offer the gift or prize. Inadvertence or carelessness will not suffice.

See Court decision here.

In *Commerce Commission v Shell New Zealand Limited* CRN09085500387, 3 September 2010, the District Court found that Shell's advertisement stating that certain brands of its fuel *"were designed to take you further"* was not misleading or deceptive or likely to mislead or deceive. The Court held that the claim was literally true and that it was not a comparative claim. It also noted that there was no evidence that anyone was actually misled and that while this is not an essential element of the offence, the absence of such evidence was *"surely striking."*

See Court decision here.

In *Commerce Commission v Prokiwi International Limited* CRI-2010-099-09397, 9 August 2010 the Court imposed fines totalling $48,000 on Prokiwi for misleading labelling in breach of the FTA. In imposing this fine the Court stated *"This Act has teeth and judges are expected to bite with them"*. The charges related to supplying products that were labelled in a manner which suggested that they were made in New Zealand when they were actually made in China using only Asian ingredients. The evidence relied on by the Commission included the use of iconic New Zealand images such as a kiwi, a kiwifruit, a merino ram in front of Mt Cook, a manuka flower and the inclusion of the words "New Zealand" and "Aotearoa New Zealand" in the products' names. The Court considered that Prokiwi's misrepresentation of the products was blatant and cynical: *"It was a deliberate deception to dupe overseas tourists who have English as a second language"*. Further, Prokiwi was unfairly competing with genuine articles in the market. Following the Commission's investigation, Prokiwi placed the words "made in China" in small print on the products. The Court described this attempt at compliance as a *"minimal and ineffectual"* graphic and held that it did not cure the misleading and deceptive conduct. The case illustrates that in determining whether conduct is misleading or deceptive, the overall impression may mean that "corrective" words are insufficient.

See Commerce Commission media release here.

The new Limitation Act 2010

On 1 January 2011 the Limitation Act 2010 ("the Act") will come into force, repealing the Limitation Act 1950 ("the 1950 Act") and significantly changing the law relating to limitation defences. The new Act is intended to clarify the law, and is aimed at protecting defendants from the unjust pursuit of stale claims. The defences provided by the Act apply to claims based on an act or omission after 31 December 2010. Claims based on acts or omissions prior to this date will continue to be governed by the 1950 Act, unless the parties agree otherwise.

The Act introduces the new concept of "money claims", which is defined as meaning a claim for monetary relief at common law, in equity or under statute, and includes a claim for money secured by a mortgage. Generally, the Act will provide a defence to a money claim filed six years after the date of the act or omission on which the claim is based. The primary limitation period of six years will apply to most other claims, except those involving minority, incapacity, acknowledgement or part payment, and fraud, or where special limitation periods are created by other legislation (such as the FTA).

The Act also introduces the concept of "*late knowledge*". Where a claimant has "*late knowledge*" of certain defined facts required to make the claim, the claim must be brought within three years of the date on which the claimant gained such knowledge (or reasonably ought to have gained such knowledge). The new Act therefore addresses unfairness created by the 1950 Act, where claimants could become time barred from gaining relief in some cases before they even became aware that they had a claim. The "late knowledge" provisions are subject to the requirement that no claim may be brought 15 years after the date of the act or omission on which the claim is based ("the long-stop period").

The limitation period for the enforcement of judgments has changed. The limitation period under the 1950 Act was 12 years. Under the new Act, claims to enforce a judgment (including arbitral awards and judgments obtained in foreign countries) must be brought within six years of the date on which the judgment became enforceable. There is no time bar on enforcing judgments using *"enforcement processes"* through rules of court (such as attachment, charging and sale orders), although the Court's leave is required in order to enforce a judgment if six years have elapsed since the date of the judgment. Similarly, no limitation defence is available in relation to applications to have a debtor adjudicated bankrupt or a company put into liquidation on the basis of a

judgment debt.

Notably, the parties to an agreement are permitted to contract out of or modify the Act. Specific consideration should therefore be given to the Act during the course of contractual negotiations

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Trans–Tasman Proceedings Act 2010

As reported recently the Trans-Tasman Proceedings Act 2010 was passed on 31 August 2010. A date has not yet been set for when the new regime will come into force. The purpose of this Act is to streamline the process for resolving trans-Tasman civil proceedings, which should reduce costs, improve efficiency and minimise existing impediments to enforcing Australian judgments.

Unfair contract terms – new consumer legislation now in operation in Australia, and proposed in New Zealand

On 1 July 2010 the Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010 ("ACLA") came into effect in Australia. This Act is relevant to all New Zealand businesses which enter into standard form contracts with Australian consumers. All such contracts will now need to comply with the ACLA.

The ACLA applies to standard form "consumer contracts". Consumer contracts are defined as being contracts for the supply of goods or services, or the sale of land, *"to an individual"* for *"personal, domestic or household use or consumption"*. The ACLA does not cover business to business contracts.

The ACLA empowers the Court to declare a term of a consumer contract void if the term is *"unfair"* and contained in a standard form contract. Where a term is held to be void, the contract as a whole will continue to bind the parties if it is capable of operating without the unfair term. The Courts also have a wide range of enforcement powers, including the power to grant injunctions, to order the refund of money or return of property and to award damages.

The ACLA contains a broad definition of the term *"unfair"*, giving the Courts a wide discretion. A term will be unfair if:

- It would cause a significant imbalance in the parties' rights and obligations under the contract;
- It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term. (Notably, a term in a consumer contract will be presumed not to be reasonably necessary, unless the supplier proves otherwise); and
- It would cause detriment (whether financial or otherwise) to a party if applied.

In addition, the Court must consider the extent to which the term is *"transparent"* - that is, expressed in reasonably plain language, legible and readily available.

The ACLA contains a non-exhaustive "grey-list" of fourteen examples of types of terms which *"may"* be unfair. In each of these examples the term permits one party (the supplier) to act on a one sided or unilateral basis. For example, a term *"may"* be unfair if it permits one party only to terminate, vary or renew a contract, or penalises only one party for breach.

There is a real possibility that similar legislation may be introduced in New Zealand. In June 2010 the New Zealand Ministry of Consumer Affairs ("the Ministry") introduced a Consumer Law Reform Discussion Paper, in which it recommended including unfair contract terms in the New Zealand FTA *"along the lines of the Australian unfair contract term provisions"*.

In September 2010 the Ministry issued a Consumer Law Reform Additional Paper ("the Issues Paper") containing further analysis. This paper reiterated the need to provide consumers with a remedy to protect themselves from unfair contract terms contained in standard form contracts. The Ministry again recommended that unfair contract term provisions be added to the FTA. Notably, the Ministry suggested that the New Zealand legislation should be further reaching than the Australian ACLA in the following respects:

- The Ministry suggested that the Disputes Tribunal should have jurisdiction to declare that contract terms in standard form consumer contracts are unfair (whereas in Australia this jurisdiction is limited to the Courts);
- The Ministry suggested that the Commerce Commission should have similar powers to the UK Office of Fair Trading to apply to the Court for an injunction banning the use of specified unfair contract terms by particular suppliers or industry sectors; and
- The Ministry is considering whether the right to challenge unfair contract terms in standard form contracts should be available to small businesses as well as consumers. Such a provision would have a dramatic effect on business service providers which use standard form contracts. New Zealand is predominately a nation of small and medium sized businesses. As at 2009, 97.2% of enterprises in New Zealand employed 19 or fewer people, and 89% employed 5 or fewer people.

The proposed inclusion of unfair contract term provisions in the FTA would have a significant impact on New Zealand businesses.

Submissions on the Ministry's Discussion Paper have now closed. However, the Ministry's Issues Paper concludes by stating that the Ministry *"would welcome additional feedback on this paper"* and is available to meet with interested parties.

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