BUDDLE FINDLAY

Legal update on litigation and dispute resolution - May 2016

Sherridan Cook, Scott Barker, Willie Palmer, Susan Rowe, Bridie McKinnon, David Broadmore, Kelly Paterson, Olly Peers, Peter Niven

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'Commercial common sense' in contractual interpretation

The Court of Appeal in *New Zealand Carbon Farming Limited v Mighty River Power Limited* [2015] NZCA 605 has affirmed, and clarified, Lord Neuberger's critique of the imperial march of 'commercial common sense' as a default way in which to interpret contracts.

The modern approach to contractual interpretation is an objective one, which seeks to ascertain "*the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*": *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912.

However, the courts have increasingly invoked 'commercial common sense' as means of contractual interpretation, which Lord Neuberger was keen to caution in *Arnold v Britton* [2015] 2 WLR 1593 (UKSC), covered in our September 2015 update.

Carbon Farming concerned an emissions reduction purchase agreement between New Zealand Carbon Farming Ltd (NZCF) (as seller) and Mighty River Power Limited (MRP) (as buyer). The agreement contemplated that NZCF might be obliged to sell (and MRP to buy) a different number of carbon credits than those fixed by the agreement at the date of execution. Under the agreement, that turned on whether there had been a change in the accounting mechanism approach in operation under the Climate Change Response Act 2002. NZCF claimed there was such a change - in the vicinity of double the amounts of carbon credits to be sold. MRP, predictably, denied such a change.

The Court rejected NZCF's argument: *"we consider it cannot have been the common intention of the parties to contract on a basis that would almost double the number of units…well beyond the expected capacity of the forest*". In doing so, the Court noted, that while commercial common sense cannot be definitive, it is still a *"very important factor"*, such that it cannot be entirely ignored if an absurd result were to otherwise arise.

See Court decision here.

Privy Council considers effect of dispute resolution clauses which provide that parties "may" arbitrate

Many dispute resolution clauses say that a dispute "must" be referred to mediation or arbitration as opposed to court, however, a clause which says that a dispute "may" be referred to mediation or arbitration was considered by the Privy Council in *Anzen Ltd v Hermes One Ltd* [2016] UKPC 1.

The Privy Council ruled that there is a clear difference between "must" and "may". If a contract says that "any party may submit a dispute to binding arbitration" then that party has a right, but not an obligation, to arbitrate - the party can instead choose to bring court proceedings. However, if one party does bring court proceedings and the other wants to stop the proceedings and require the other party to bring an arbitration instead, according to the Privy Council, it is not too late to force that party to take a different route.

The Privy Council ruled that both parties have an option to require arbitration and can do so before or after proceedings have commenced. It found that the clause contemplated a consensual approach, and a mutual agreement to arbitrate fitted that approach. The position being that a clause which entitles either party to elect arbitration (but provides for litigation otherwise) is a valid arbitration agreement once that option is exercised, by starting arbitration. However, where Anzen goes further is that it confirms that merely invoking arbitration (without actually commencing it) can be enough to make the arbitration agreement binding. We take from Anzen that the scope for disputes and about disputes clauses can be significantly reduced if the clause, instead of using permissive language such as "may", uses clear and mandatory wording, such as "must".

See Court decision here.

UK Supreme Court restates law on vicarious liability

Mohamud (claimant) v WM Morrison Supermarkets Plc (respondent) [2016] UKSC 11 considered whether an employer can be held vicariously liable for the errant conduct of an employee who attacks a customer. The claimant entered the respondent's premises and asked whether he could print documents. Mr Khan (the employee) responded in a racist and threatening manner and attacked the claimant. The claimant brought proceedings against the respondent on the basis that it was vicariously liable for the actions of its employee, Mr Kahn. The Court unanimously allowed the claimant's appeal and held the respondent vicariously liable for its employee's actions.

Lord Toulson restated the "close connection" test laid down in *Lister v Hesley Hall Ltd* [2001] UKHL 22, in terms of a twofold test; the first question being what functions or "field of activities" were entrusted by the employer to the employee and second, whether there was a sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be liable under the principle of 'social justice'.

The Court's elaboration of the "close connection test" provides guidance for New Zealand courts dealing with similar cases. Prior to *Mohamud*, the test gave no guidance on the type or degree of connection required. The Court expanded on the approach by providing two stages to the test. Arguably, employers could be held liable for the actions of their employees, committed during working hours, whilst in the role they were employed to do. Applying *Mohamud*, if an employee acts in a way that is in connection with the business he works for, whilst undertaking the job he was employed to do, in a role entrusted to him by his employer, then the employer can be vicariously liable for the employee abusing that positon.

See Court decision here.

Unpacking the Matryoshka doll: English courts clarify joint and successive interests in privilege

In *Shlosberg v Avonwick Holdings Ltd* [2016] EWHC 1001 (Ch), Mr Shloesberg applied for an order restraining Dechert (a firm of solicitors) from acting for Avonwick (the first respondent) and Mr Shloesberg's Trustees in bankruptcy (the third respondents).

Mr Shloesberg applied on the basis that Dechert had received some documents comprising over 44,000 pages over which Mr Shloesberg maintained privilege. Dechert had received those documents on behalf of, and through the powers of the Trustees for whom they acted. Avonwick, through Dechert and with the consent of the Trustees, sought to use some of those documents in an unlawful conspiracy claim against Mr Shloesberg (and others).

The critical issue was whether or not Mr Shloesberg's privilege in the documents now held by Dechert had transferred to his Trustees as a result of the bankruptcy.

Arnold J held that Mr Shloesberg's privilege was, by and large, not transferred to his Trustees. The key points were that:

- There was a distinction between the ownership of documents and the right to claim privilege
- The legislation empowered the Trustees to use Mr Shloesberg's documents in discharge of their statutory functions, but it did not follow that the Trustees could therefore use those documents for the purposes of litigation
- Privilege was not within the definition of "property", "power over property" or "interests" that vested in the Trustees.

Avonwick succeeded on one narrow class of documents; Mr Shloesberg received a judgment debt regarding an attack on his cat. As that judgment sum itself was not personal property, the Trustees were therefore successors in title, and so entitled to privilege in respect of the documents related to that judgment debt.

While not binding on a New Zealand court, the *Shloesberg* decision accords with well-established principles of New Zealand law: the existence of a right to legal privilege does not depend upon the possession of the documents over which it is asserted (*B v Auckland District Law Society* [2004] 1 NZLR 326 (PC)). A New Zealand court would therefore likely derive assistance from *Shloesberg* when determining if, and to what extent, privileged information of a bankrupt has passed to the Official Assignee.

See Court decision here.

Accepting risk of a mistake under an agreement

The Court of Appeal decision of *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67 recently considered

the degree to which a settlement agreement may by implication provide for the risk of a mistake and assign the risk to one of the parties (making relief unavailable for that party in relation to a mistake).

Prattley owned a commercial building in Christchurch that was insured with Vero for indemnity value with a per-claim limit of $1,605,000. The building was damaged in the Christchurch earthquakes of 4 September 2010, 26 December 2010 and 20 February 2011. Subsequently, Prattley and Vero negotiated a settlement agreement for the amount of $1,050,000, which included a clause stating that the agreement covered all claims whether "known or unknown [or] in the contemplation of the parties". Prattley sought to set the agreement aside under the Contractual Mistakes Act 1977, claiming that it (and Vero) mistakenly believed that market value was the correct measure of indemnity.

The Court noted that the parties knew market value was not the only measure of indemnity available and held that the mistake was of a kind that the parties must have had in their mind when negotiating, as the mistake related to the subject matter of the settlement - the measure of Prattley's entitlement to indemnity under the insurance policy. Therefore, there was no contextual or purposive justification for reading down the general words of the clause which plainly extended to any unknown claim under the policy for earthquake damage to the building.

See Court decision here.

Everybody's doing it! Pink Batts and the revocation of trade marks

The Court of Appeal in *Tasman Insulation New Zealand Ltd v Knauf Insulation Ltd* [2015] NZCA 602 has provided further clarity as to when registration of a trade mark will be revoked on the basis that the mark has, as a result of the acts or inactivity of the owner, become a common name in general public use for the product or services in respect of which it is registered.

Tasman, who is well known for their Pink Batt products, was the owner of the trade mark "BATT" in relation to insulation. In 2011, a company associated with Knauf arranged for the importation into New Zealand of insulation products. These products included the term "BATT" on the label and the words "batt" or "batts" were used elsewhere on the packaging, and other related material. Tasman brought proceedings against Knauf, including for infringements of their trade mark. One of the responses by Knauf was a counterclaim against Tasman seeking to revoke Tasman's trade mark under section 66(1)(c) of the Trade Marks Act 2002.

In assessing this counterclaim, the Court noted that the heart of the inquiry under section 66(1)(c) is establishing whether the trade mark at issue has become a common name in general public use such that it has ceased to distinguish the owner's goods or services from those of others. Nevertheless, should a trade mark lose its distinctiveness due to extraneous events over which the owner has no control, the trade mark will not be revoked. Therefore, the owner of a trade mark is only responsible for taking *reasonable* steps to protect its trade mark.

On the facts, Knauf fell well short of satisfying section 66(1)(c) of the Act. While there had been some use of the word in descriptive terms, some descriptive use was not sufficient to establish loss of distinctiveness of a trade mark as a badge of origin. Any of Tasman's failures to protect its mark had to be balanced against what it did, and what it ensured its distributors did, to promote the correct use of the brand. Tasman had acceptably and continuously promoted the Pink Batt related trade marks in New Zealand for over 40 years, and as a result their Pink Batt branded products had become iconic in New Zealand.

See Court decision here.

A common issue for a common claim

Southern Response Unresolved Claims Group (Group) sought to bring a representative claim against Southern Response Earthquake Services Ltd (Southern) for breach of contract under insurance policies.

The Group claimed that Southern was in breach of insurance policies between itself and individual Group members. In applying to have their individual disputes heard in a representative action, the Group claimed it had a common interest based on (a) the fact that the Group members all had the same or similar policies with Southern, (b) they had endured the same damaging causing event and (c) were each subject to the same contractual breaches by Southern.

In considering the application, Mander J stated that the overarching consideration for the Court was the need for a just, speedy and inexpensive determination of proceedings. His Honour also stated that it was necessary to identify a central, common issue that unites individual claimants. It is not necessary that all issues arising from Group members' claims be common between them. However, a group must identify the core or predominant and overriding question or questions in dispute between the parties.

His Honour held that the Group had not sufficiently identified a common issue or "spine" of the representative action. The circumstances of the individual Group members were too varied and the issues present in each of their disputes too different to found a successful claim for a representative action.

On that basis the application for a representative action was declined.

See Court decision here.

Continuing publication is a publication

In *Peters v Electoral Commission* Mallon J heard an application for judicial review brought by Winston Peters in relation to a refusal by the Electoral Commission to refer an internet video statement to the Police.

The claim concerned a video statement in which Kenneth Wang, deputy leader of the Act party, stated that Mr Peters was anti-Chinese. The video was posted on the internet 12 days before the 2014 general election and was available online until the day before the election.

Mr Peters claimed the statement was a breach of Section 199A of the Electoral Act 1993 (Act), which prohibits the publication of a statement which is made to influence voters and which the publisher knows to be false within two days of a polling day (Prohibited Period). Mr Peters requested that the Electoral Commission refer the statement to Police. The Electoral Commission declined this request, stating that it did not view the statement as in breach of the Act.

Mallon J firstly considered whether the Electoral Commission's response was a judicially reviewable decision, holding that it was reviewable on the basis that the response centred on an investigation into the rights or liabilities of a person and was of potentially important public consequence.

In reviewing section 199A of the Act, Her Honour then considered whether a publication which was first published outside the Prohibited Period is nonetheless published within the Prohibited Period if the publication was still available within that period.

Her Honour held that a statement which is published before the Prohibited Period but which continues during the Prohibited Period is nonetheless classified as having been published during the Prohibited Period. The harm to a fair election that a continuing publication has justified classifying the statement as having been published within the Prohibited Period.

See Court decision here.

From each according to his ability: the right to contribution not always equal

In *Milloy v Dobson* [2016] NZCA 25, the Court of Appeal dismissed an appeal and cross appeal from the original High Court decision on the proper apportionment of liability under a bank loan. The dispute concerned a claim in contribution made between co-guarantors. The Court of Appeal, in agreement with the High Court, found that the equitable presumption that co-guarantors contribute equally had been displaced on the evidence of a clear intention of unequal sharing.

The normal rule is that an equitable right to contribution means that co-guarantors will share responsibility equally: *Trotter v Franklin* [1991] 2 NZLR 92 (HC). However, the courts may adjust that rule and apportion contribution unequally in order to produce a just result.

In this case, Mr Dobson's house had been sold to meet his obligations under a guarantee given by him, and Messrs Milloy and Reid. Mr Dobson sought to recover the amount of proceeds from the sale of his house applied by the bank to the portion of liability held by Mr Milloy. The High Court found Mr Dobson liable for 17.33% of the debt, with Messrs Milloy and Reid each liable for 43.33% of the debt. Central to that finding was a deed of contribution and indemnity dated 2007 (2007 Deed), which provided for agreed apportionment of liability in those terms. There was also a further unexecuted deed contribution and indemnity dated 2009 (2009 Deed), which again provided for the same apportionment.

However, the kink in an otherwise clear case was that there were two facilities, and two sets of guarantees in each of 2007 and 2009. When payment ceased under the 2009 facility, the bank called upon the 2009 guarantees, and since the 2009 Deed was unexecuted, it could not be assumed that the 2007 Deed constituted an express or implied agreement as to liability for the amounts due. However, what the 2007 Deed did show was an intention between the guarantors that they would share liability unequally. Further, it was held just, in the circumstances, to return to the last point of agreement in force between the parties - the 2007 Deed.

On that basis, the Court of Appeal rejected Mr Dobson's appeal.

Furthermore, the Court of Appeal upheld the findings of the High Court that there was no conduct disentitling Mr Dobson from relief. The Court also dismissed the appellant's counterclaim alleging breach of fiduciary obligations owed to them.

See Court decision here.

Supreme Court balances dying man's 'unwavering' final intentions

The late Mr Blackwell was diagnosed with an inoperable brain tumour in 2000. He decided to lease his farm to his neighbours and grant a right of first refusal. In 2004, he renewed the lease; the farm's valuation was $1.8 million; and the right of first refusal was replaced with an option to purchase at $1.5 million. The parties informally agreed that the option would not be exercised while Ross lived. Edmonds Judd was the solicitor for both parties.

In 2005, the option to purchase at $1.5 million was extended to 30 April 2010. From 2008, Ross required full-time residential care. In 2010, Ross agreed to renew the lease and extend the option to 30 April 2016. His brothers intervened and the lease was not renewed. The neighbours then wished to exercise the option, but Ross was alive and the agreed option price was now less than half the market value.

The neighbours sought specific performance of the option. The High Court and Court of Appeal granted specific performance in relation to the purchase despite arguments from Ross' brothers that Ross either lacked capacity at the time the transactions were executed or that the agreements constituted unconscionable bargains.

The Supreme Court disagreed with the Court of Appeal that Ross' unwavering intention was to sell the farm at $1.5 million - while Ross did intend to benefit his neighbours at his own detriment, limits were set on this benefit: the original discount of only 16.67% from the market value for the first three years and the reversion to market value after three years.

The Court held that, if he had received competent advice, Ross would have included a condition (in place of the informal understanding) that the option not be exercised in his lifetime. He would, however, have agreed after the first three year period to an exercise price at a discount to market value of 15-25%.

The market value as at 2010 was $3,222,500. Given Ross' concern about affordability, the Court considered a 20% discount was appropriate. This meant a proved loss of $1,000,000 above what the neighbours had paid and orders were given for the neighbours to pay this sum with interest dating back to the 2010 purchase.

See Court decision here.

Bank owes no duty to secret third party

Playboy Club London Ltd (Club) used Burlington Services Limited (Burlington) as a front for checking the Club's patrons' financials before inviting them to gamble at its premises. The purpose of Burlington was to keep the Club's patrons' gambling predilections private.

Burlington had requested a reference from a prospective patron's (Mr Barakat) bank ahead of him gambling at the Club. The bank mistakenly provided a positive reference to Burlington "in strict confidential" for the amount of £1.6 million even though Mr Barakat's account had a nil balance. Barakat played roulette at the Club using counterfeit cheques and the Club consequently lost £802,940 and lodged a claim in negligence against the bank after Barakat could not be found. The Mercantile Court found in favour of the Club, stating that the reference failed to put a third party on enquiry and but for the reference, the Club would not have accepted the cheques. However, the Court did find the Club contributorily negligent for 15% of the claim, having not spotted the counterfeit cheques.

The determinative issue on appeal was whether the bank owed a duty of care to anyone besides Burlington, and if so, whether that duty was owed to the Club.

Drawing on the development of the three-fold test of Hedley Byrne, the Court of Appeal considered that the bank had no special relationship with, and assumed no responsibility, to the Club as it was giving the reference to Burlington "in strict confidential" which meant that the reference could not be passed on to (and relied on by) third parties.

The Court also considered it unfair to impose liability on the bank: "the Club wishes to remain anonymous, it is hardly just and reasonable for it to assert that a duty of care is owed to it when it deliberately conceals its existence".

The Club was ordered to repay to the bank the award granted to it by the Mercantile Court, along with £110,000 in legal costs.

See Court decision here.

Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659