BUDDLEFINDLAY

Legal update on litigation and dispute resolution - August 2016

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Expanding scope of judicial review: the Supreme Court in Ririnui v Landcorp Farming Ltd

A majority of the Supreme Court in *Ririnui v Landcorp* has expanded the scope of judicial review of commercial and policy decisions affected by a material error.

Landcorp a state-owned enterprise (SOE), entered into an agreement to sell a farm to the highest bidder in a tender process. Before it did so, it was advised by the Office of Treaty Settlements (OTS) under a non-binding protocol arrangement that the farm was not of potential interest for future Treaty settlements. OTS' advice was based on the erroneous belief that the claims of all iwi in the region had been settled, when, in fact, Ngāti Whakahemo's claim had not been. Ngāti Whakahemo applied for a judicial review of Landcorp's decision to enter into the agreement, as well as OTS' decision to disclaim interest in the farm and the decision of Landcorp's shareholding Ministers to not intervene to stop the sale. Ngāti Whakahemo also claimed that Landcorp's decision was tainted by bad faith, and the shareholding Ministers were entitled to prevent the sale under the Duomatic principle (a common law doctrine of company law that, at its highest, unanimous shareholder consent could bind the company).

Ultimately, the Court issued two declarations by shifting majority:

- The Ministers' decision not to intervene was a wrongful exercise of public power because it was made under a material mistake (Elias CJ, Glazebrook and Arnold JJ)
- Landcorp's decision to sell was a wrongful exercise of a public power because it was made under a material mistake (Elias CJ, Glazebrook, Arnold and O'Regan JJ).

Elias CJ and Arnold J would have referred the matter back to the Ministers to consider whether they should request that Landcorp negotiate with Ngāti Whakahemo, with a possibility of the sale agreement being set aside if they did. O'Regan J and Glazebrook J, however, declined to set aside the agreement as it would unfairly prejudice the third party purchaser. William Young J held that section 21 of the State-Owned Enterprises Act 1986 prevented interference with commercial contracts entered into by SOEs.

The plurality of the judgment allowed all parties to enjoy some success, while creating uncertainty as to the scope of judicial review. It is likely to be significant in relation to:

- The extent to which a material error can render subsequent decisions, made without knowledge of that error, wrongful
- The reviewability of policy decisions and decisions made by SOEs
- The ability of the Court to set aside contracts entered into by SOEs
- The demise of the *Duomatic* principle.

Buddle Findlay acted for Landcorp in the High Court proceeding and successive appeals.

See the Court's decision here.

Drawing a line - the limitations of building work: Carter Holt Harvey Limited v Minister of Education [2016] NZSC 95

Carter Holt Harvey Limited (CHH) appealed against the Court of Appeal's refusal to strike out actions against it in negligence by the Minister of Education (MOE), who also cross-appealed the Court of Appeal's decision to strike out MOE's negligent misstatement claim against CHH. CHH had manufactured allegedly defective "Shadowclad" sheet and cladding systems which were installed in schools throughout New Zealand. The Supreme Court unanimously held that all of MOE's negligence claims were arguable and required examination in the light of proper factual findings at trial.

The principal point of interest in this case arose in relation to section 393 of the Building Act. That section provides for

(among other things) a 10-year long stop limitation period in relation to civil proceedings that relate to "building work". CHH argued that the proceedings related to “building work” under that provision and therefore the 10-year limitation period in the Act prevented the respondents from bringing a large number of their claims.

The Court held that section 393 does not apply to claims related to defective building products and materials, and so these claims are not related to “building work” for the purposes of the provision. As a result, the 10-year limitation period of section 393 does not apply:

The fact that the product has been used in the construction of a building does not mean that the civil proceedings against the manufacturer/supplier are proceedings relating to building work. They are proceedings relating to negligent manufacture and the supply of defective products, to which the usual rules that limitation periods arise on discoverability apply.

Of note, the Supreme Court deliberately expressed no view as to whether a contribution claim (such as by CHH against the installers of its products) would be time barred by the longstop provision - ie, whether to leave suppliers of materials 100% liable; or whether to overwrite the benefit enjoyed by those involved in building work who would otherwise be protected by the section 393 longstop. The Court simply stated that whatever view may be expressed, the outcome would be anomalous.

See the Court's decision here.

UK Supreme Court clarifies the illegality defence: another turn on the merry-go-round

In *Patel v Mirza* [2016] UKSC 42, a nine Justice panel of the Supreme Court found the opportunity to clarify the "illegality defence"; an area of law which, until now, was in what the President described as a state of "*some disarray*".

Patel concerned a contract between Messrs Patel and Mirza, under the terms of which Mr Patel would pay Mr Mirza sums totalling £620,000 for the purpose of betting on the price of RBS shares, using advance insider information that would affect the price of the shares. As it happened, the insider information was not forthcoming, so no such betting occurred. Mr Mirza did not repay Mr Patel. Mr Patel therefore brought his claim for recovery of the amounts paid to Mr Mirza on various bases including contract and unjust enrichment.

A five Justice majority, led by Lord Toulson, reformed the law on the illegality defence; doing away with the "reliance test" from *Tinsley v Milligan* [1994] 1 AC 340 and instead focused on the central issue of whether or not allowing the claim would be harmful to the integrity of the legal system, which was to be analysed by a trio of considerations:

- The purpose of the prohibition that was transgressed and whether that purpose would be enhanced by denial of the claim
- Any other relevant public policy on which the denial of the claim may have an impact
- Whether denial of the claim would be a proportionate response to the illegality.

In the majority's view, the policy behind the prohibition on insider trading was not infringed, because no insider trading had ever taken place.

The minority thought that the "trio of considerations" adopted by the majority was inappropriate because it amounted to ill-defined judicial discretion; and that restitution alone was sufficient to dispose the case. The minority also considered that restitution ought to be available in cases where an illegal contract was part or wholly performed, provided that mutual restitution of any benefits conferred remained possible.

However, the Supreme Court was unanimous in holding that Mr Patel was entitled to return of the sums paid to Mr Mirza, since the intended illegality had never taken place.

See the Court's decision here.

Court of Appeal on issue estoppel and foreign judgments

The recent decision of *van Heeren v Kidd* [2016] NZCA 401 provides invaluable appellate guidance on precisely when "issue estoppel" should operate to bar a party to a proceeding from re-litigating matters already the subject of a prior judgment.

The case concerned a long term business relationship between Messrs van Heeren and Kidd. Messrs van Heeren and Kidd terminated their business relationship using five key documents. A dispute arose as to the effect of those documents on the distribution of various assets between the parties.

Mr Kidd sued Mr van Heeren in both South Africa and New Zealand. The New Zealand proceeding was stayed in 1997

pending the South African courts' determination of the validity of an indemnity between the parties, which, if valid, would have prevented Mr Kidd from bringing claims to some of the business assets.

That issue was determined by the South African High Court on 20 May 2013 in favour of Mr Kidd. Mr Kidd then applied to revive the New Zealand proceeding for the purposes of taking an account between the parties, as well as for payment of the amount ascertained as owing. Mr van Heeren argued that his liability in the New Zealand proceeding depended upon a finding of partnership; that the relationship was a joint venture; and while the South African High Court had made a finding of partnership, that finding was not objectively necessary for determination of the challenges to the validity of the indemnity. Mr Kidd in turn argued that issue estoppel operated to bar Mr Van Heeren from re-litigating the partnership issue.

The Court of Appeal, in agreement with Fogarty J below, found for Mr Kidd and held that the question of whether issue estoppel arises requires examination not only of what the first court decided but also as to whether what was decided was necessary for the decision. However, the Court of Appeal rejected the argument for Mr van Heeren that the second court should determine whether or not the findings were "*objectively necessary*" for the judgment in the first court. The Court held it would be sufficient to show that the finding sought to be impugned formed part of the "*ground work*" of the first decision, whether or not that finding was directly the point in issue.

The Court upheld Fogarty J's order for an account between the parties, and an interim payment of US$25 million from Mr Van Heeren to Mr Kidd.

See the Court's decision here.

Collateral lies: effect on insurance claims

In a decision which could have a significant impact for insurers and the insured alike, a 4:1 majority in the UK Supreme Court recently delivered judgment in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45. The Court was asked to consider whether collateral lies rendered a claim fraudulent, which would have the effect of voiding the entire claim.

A collateral lie (otherwise known as a fraudulent device) is a lie told by the insured party to bolster their claim or speed up the claims process, which does not inflate an insurer's liability. The majority distinguished collateral lies from the fabrication of the entire claim and the dishonest exaggeration of a claim, both of which will still void an entire claim.

In finding collateral lies were not fraudulent conduct, the majority held that the policy of deterring fraudulent or dishonest conduct did not justify voiding an entire claim where the fraudulent conduct was immaterial to the claim itself.

Importantly, it was made explicit that the decision would apply not only to maritime insurance (the context of the dispute before the court) but to all consumer and commercial insurance policies.

See the Court's decision here.

Setting aside a settlement agreement for fraudulent misrepresentation

In *Hayward v Zurich Insurance Company plc,* the United Kingdom Supreme Court considered the issue of setting aside a settlement agreement for fraudulent misrepresentation. The Supreme Court unanimously allowed the insurer's appeal and the settlement agreement was set aside.

Mr Hayward (Respondent) brought proceedings against his employer after suffering a workplace injury in June 1998. The employer admitted liability, but claimed the Respondent deliberately and dishonestly exaggerated the extent of the injury in order to obtain the highest settlement figure of £134,973.11 from the employer's insurer, Zurich Insurance Company (Appellant). By 2009 the Appellant had gathered further evidence showing that the Respondent had recovered a full year before the settlement of the claim. Subsequently, it sought to set aside the settlement and claimed damages for deceit and fraudulent misrepresentation.

The critical issue on appeal was whether the defrauded party (the insurer in this case) had to prove that it settled because it believed that the misrepresentations were true.

Lord Clarke accepted the Appellant's submission that it is not necessary to prove that the insurer believed that the representation was true. He held that it must be shown that the defendant made a materially false representation which was intended to, and did, induce the insurer to act to its detriment. While the Appellant had doubts about the extent of the injuries claimed as a result of its due diligence process, such qualified belief in the misrepresentation did not rule out the conclusion that the insurer was induced to settle on a false basis.

The appeal therefore succeeded. The Court ordered the settlement to be set aside, with a reduced sum paid to the Respondent as compensation for injuries.

See the Court's decision here.

Court of Appeal on settlement privilege and waiver

The decision of *Minister of Education v Reidy McKenzie Ltd* [2016] NZCA 326 by the Court of Appeal has affirmed principles relating to the waiver of privilege in the context of settlement negotiation privilege.

Reidy McKenzie Limited (McKenzie), a builder, constructed schools for the Minister of Education (Minister). The Minister considered work on some of the schools to be deficient and issued proceedings against McKenzie (School Proceedings).

During these proceedings, McKenzie entered into settlement negotiations with the Minister, in the course of which, financial accounts were disclosed by McKenzie - in circumstances that attracted settlement negotiation privilege. Memoranda were provided to the Court by McKenzie and the Minister, which referenced the provision of these financial accounts to the Minister. This occurred in the context of matters more procedural in nature, such as the potential vacation of a trial date. Settlement was not reached between the parties.

Later, the Minister brought liquidation proceedings against McKenzie and sought to rely on the financial accounts. The Minister argued, among others, that privilege over thee accounts had been waived by McKenzie because McKenzie had relied upon those financial accounts in the School Proceedings.

The Court of Appeal dismissed this argument, holding that the financial accounts had not been relied upon by McKenzie in the School Proceedings. The financial accounts were provided to assist the Minister in determining whether it was financially worth continuing her proceedings against McKenzie. The Court held that this determination was unrelated to the merits or substance of the Minister's claims in the School Proceedings.

As an aside, the Court noted that where a document is used only for procedural purposes, it is highly probable that a claim of waiver will fail; however, this is not an absolute proposition. The appeal was ultimately dismissed.

See the Court's decision here.

Challenge to broadly worded settlement agreement fails

In *Marsden v Barclays Bank Plc* the UK High Court granted the defendant summary judgment against Mr Marsden's claims arising out of his allegation that the defendant had mis-sold him two interest-rate swaps.

Following cancellation of his swaps, Mr Marsden and the bank entered into a restructured loan agreement and a full and final settlement in respect of claims connected with the swaps.

The bank subsequently reviewed its sales of interest-rate-hedging products, and offered redress to Mr Marsden in the sum of £608,614.14, together with any additional amounts Mr Marsden wished to claim for consequential losses. In seeking additional compensation, Mr Marsden challenged the settlement agreement for want of consideration and alleged that it was entered into as a result of economic duress. Mr Marsden also alleged breach of statutory duty, negligence, breach of contract and misrepresentation by the bank.

In dismissing Mr Marsden's claim, the Court held that:

- The settlement agreement was an integral part of the arrangements between Mr Marsden and the bank - its execution subsequent to the new loan agreement did not render it void for want of consideration
- The bank's threat to cancel the new loan facility if the settlement agreement was not signed was a threat to adopt an entirely lawful position
- The settlement agreement post-dated Mr Marsden's allegation that the bank had made misrepresentations to him. Therefore, the agreement's reference to "all causes of action" encompassed deceit claims
- The swaps contracts were private and, therefore, not void owing to regulatory failings
- The review of the sale of interest rate swaps was gratuitous and did not create legal relations between Mr Marsden and the bank.

See the Court's decision here.

UK Supreme Court permits claim for malicious prosecution of a civil claim

In *Willers v Joyce* [2016] UKSC 43, the UK Supreme Court considered whether a claim in malicious prosecution could be brought in relation to civil proceedings by one individual against another. The Court of Appeal had struck out Mr Willers' claim, stating he had no cause of action in English Law, and that malicious prosecution existed solely in relation to criminal proceedings.

The majority (five to four) considered that it would be instinctively unjust for a person to suffer injury as a result of the malicious prosecution of legal proceedings for which there is no reasonable ground, and yet not be entitled to compensation for the injury intentionally caused by the person who instigated it.

The minority thought allowing the tort would:

- Be inconsistent with the general rule that a litigant owes no duty to his opponent in civil litigation
- Be inconsistent with witness immunity from civil liability
- Create a danger of satellite litigation
- Possibly have a chilling effect on the bringing of civil proceedings.

The Court, in setting out the test for the tort, noted that the combination of the requirements that the claimant must prove not only the absence of reasonable and probable cause, but also that the defendant must not have a bona fide reason to bring the proceedings, means that the claimant has a heavy burden to discharge.

Accordingly, the Court considered Mr Willers' case should be permitted to go to trial.

See the Court's decision here.

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