BUDDLE FINDLAY

Legal update on litigation and dispute resolution - December 2016

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Make Britain great again - Will the Brexit appeal succeed?

On 5 December, an eleven justice panel of the Supreme Court of the United Kingdom will hear the appeal against the Divisional Court's landmark Brexit decision (*R (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin). The Divisional Court held that the Government was not entitled to give notice of its intent to withdraw from the European Union under article 50 of the Treaty on European Union without first putting that matter to Parliament. The appeal is of profound significance with global ramifications.

The Divisional Court began its judgment by emphasising that it was not concerned with the merits or politics of Brexit. Appropriately, the Divisional Court relied on *The Case of Proclamations* (1610) 12 Co Rep 74, in which Sir Edward Coke defied the power of King James I in holding that the King "had no prerogative, but that which the law…allows him". Coke's decision was seen as inherently political - so too the Divisional Court's, which has attracted widespread and unjustified criticism with no small degree of historical continuity.

The principle from *The Case of Proclamations* was determinative in the Divisional Court. The Court held that the European Communities Act 1972 (ECA), which gives domestic effect to European Community law in the national legal systems of the United Kingdom, was of such constitutional significance, and so entangled with domestic law, that Parliament had displaced the usual powers of the Crown to conduct international relations (ie trigger article 50) without recourse to Parliament.

The Crown's written argument on the appeal relies on the 'dualist' nature of Britain's legal system. It argues that the Crown is free to conduct international affairs under royal prerogative, and that the prerogative can alter domestic law. Under this view, the ECA is merely a conduit of international law, which enables the Crown to trigger article 50 as it pleases. The respondents' written arguments take the position that by the ECA, Parliament implemented major constitutional changes and statutory rights that only Parliament may undo. As a result, the Crown cannot trigger article 50 without Parliament's consent. The Scottish Government's written argument takes the point that if the Crown were to trigger article 50, it would be interfering in a 'devolved matter' for which it would first require the Scottish Parliament's consent. Overall, these arguments turn on how one sees European law - is it a fundamental part of the United Kingdom's constitutional fabric? Or is it merely foreign law of which the Crown may wash its hands? Case law would appear to support the former proposition.

There are, still, further difficulties. Article 50 is part of European law, and therefore justiciable by the European Court of Justice - which, in an ironic twist, may end up having the final say on Brexit. If Parliament's consent is required - there are also questions as to what consent is effective. Lady Hale has opined, extra-judicially, that the constitutional nature of the ECA may require some special form of repeal.

For now, the Government has drafted a 'bombproof' three-line bill to obtain Parliament's approval in the event the appeal should fail. Assuming that the bill is sufficient - the Government must still convince the House of Lords, where peers are said to be strongly opposed to Brexit.

See the Court's decision here.

Non-publication orders and open justice - the Supreme Court weighs in

The Supreme Court in Erceg v Erceg [2016] NZSC 135 recently explored the tension between non-publication orders and the principle of open justice.

An application was made to prevent publication of particular matters that could arise in oral argument during a prospective hearing. These matters included such details as the financial amounts, and the identities of family members receiving those amounts, distributed under two trusts that had been settled by the late Michael Erceg, the founder of Independent Liquor.

The Court noted that the principle of open justice was a principle of constitutional importance and was fundamental to the common law system of civil and criminal justice. Nonetheless, there were circumstances when this principle would be departed from to the extent necessary to serve the ends of justice. A classic example is the suppression of the identity of victims of sexual assault.

The Court affirmed that the New Zealand courts have the inherent power to make non-publication orders binding against the public at large. This was contrary to an earlier Privy Council decision that held the power must be conferred by legislation (see Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago [2004] UKPC 26, [2005] 1 AC 190 at [67]).

However, the threshold for success in obtaining non-publication orders is a high one. Prior decisions were noted in which the courts had declined to make non-publication or confidentiality orders for matters which would be:

- Embarrassing (such as, a person being under financial pressure); or
- Unwelcome (such as, the public airing of what were seen as private family matters).

The party seeking the order must show specific adverse consequences sufficient to justify an exception to the fundamental rule. An example where an order may be granted is for the protection of confidential information, such as trade secrets and commercially sensitive information.

The application was declined on the basis that it had not been demonstrated to the requisite high standard that the interests of justice required a departure from the usual principle of open justice.

See the Court's decision here.

Decision upheld - Privilege not transferable to Trustees of a Bankrupt

In Schlosberg v Avonwick Holdings Ltd [2016] EWCA Civ 1138, the Court of Appeal of England and Wales unanimously dismissed an appeal against the decision of the High Court (covered in our previous update here) in which a firm of solicitors (Dechert) was ordered to cease acting for Avonwick on the grounds that Dechert had the benefit of a large amount of documents over which a bankrupt, Mr Schlosberg, maintained legal professional privilege.

The key issue was whether the High Court was correct in finding that the privilege attached to the information in the documents concerned did not vest in the bankrupt's Trustees upon their appointment.

The Court of Appeal, relying heavily on the fundamental nature of solicitor-client privilege, held that the privilege attached to the information in the documents could not form part of the bankrupt's property as a result of which it could not vest in the bankrupt's Trustees upon their appointment. The Court also held that privilege could not be viewed as a 'power' that Trustees can exercise over the property in accordance with statute, based on the notion that privilege is an inherently personal right.

Although the relevant statute expressly permits the Trustees to take possession of privileged documents within the bankrupt's estate, the Court held that the documentation could only be used to the extent that such use would not amount to a waiver of the privilege concerned. Waiver of privilege was not necessary to fulfil the Trustees' functions, as the ability to view the documents was a sufficiently valuable tool in itself.

See the Court's decision here.

Green around the wills: the Court of Appeal confirms principles relating to probate undue influence

In Green v Green [2016] NZCA 486, the Court of Appeal affirmed the High Court's previous ruling that the late Hugh Green's decisions to remove his daughter as trustee of the trusts controlling the Green Group, and to remove her as a director of certain Green Group companies, along with his signing of a new will in April 2012 were the result of undue influence exerted by his son.

While the appeal was predominantly concerned with factual issues, the Court confirmed that impropriety on the part of a defendant was not a requirement for there to be a finding of undue influence. In respect of probate undue influence, the Court declined to hold that it was required that there be "no other possible hypothesis" and instead confirmed that the Court must be satisfied that the circumstances raise a more probable inference in favour of undue influence than not.

The Court also confirmed that while parties exercising general rights of appeal are entitled to the independent opinion of the Court, the appellant has the onus of showing the lower court was in error, and the appellate court will take into account the

advantages held by the court of first instance. That is particularly so with respect to factual findings and issues as to the credibility of witnesses.

See the Court's decision here.

High Court of Australia rules on Anshun Estoppel

In Timbercorp Finance Pty Ltd (in liquidation) v Collins; Timbercorp Finance Pty Ltd (in liquidation) v Tomes [2016] HCA 44, the High Court of Australia (HCA) considered whether an 'Anshun estoppel' had arisen to bar the respondents from relying on their defences.

Anshun estoppel precludes the assertion of a claim or of an issue of law or fact if the claim or issue was so connected to the subject matter of a prior proceeding as to make it unreasonable, in the context of the prior proceeding, for the claim or issue not to have been made or raised.

In Timbercorp, the HCA noted that an Anshun estoppel is likely to arise when a ruling in the second proceeding would lead to inconsistent judgments on the issue in which Anshun estoppel is alleged. The HCA highlighted, however, that there is a variety of circumstances that may justify a party refraining, reasonably, from litigating an issue in earlier proceedings - expense of litigation being a prime example. Of relevance to the Timbercorp proceeding was that the prior litigation was a group proceeding. It is long established that in group proceedings, every individual issue may not be dealt with and can often lead to subsequent litigation.

In this case, the HCA held that although there were some common questions raised in the earlier group proceeding, making a finding on the issue in question would not lead to any inconsistency with earlier judgments.

See the Court's decision here.

Court of Appeal rejects Fonterra's view on misleading conduct in trade

In *Fonterra Co-operative Group Ltd v Mcintyre and Williams Partnership* [2016] NZCA 538, the Court of Appeal dismissed Fonterra Co-operative Group's (Fonterra) appeal against a decision of Muir J in the High Court. The decision was that Fonterra had breached s 106 of the Dairy Industry Restructuring Act 2001 in relation to the contract terms offered to, among others, McIntyre and Williamson dairy farmers (Respondents).

One question at issue in the appeal was whether Fonterra breached s 9 of the Fair Trading Act 1986 (FTA) by providing misleading or deceptive advice to the Respondents about the Respondents' inability to buy shares.

The Respondents claimed that Fonterra representatives had made false representations regarding the Respondents' share-purchasing rights.

The Court held that when conduct merely induces a state of wonderment as to the true nature of affairs, it will be insufficient to establish an infringement of s 9, but when the misleading conduct induces a positive misunderstanding that is incorrect, as was the case here, liability may arise.

Fonterra also submitted that entire agreement clauses were relevant in determining a breach of s 9. However, the Court disagreed, stating such a clause is relevant only to causation or remedial discretion under s 43 of the FTA.

Aside from making FTA claims more difficult to strike out, the Court's confirmation of that approach appears to signal the way in which the new s 5D of the FTA will be interpreted. When an entire agreement clause is at issue, it may not be sufficient simply to rely on the fact of that clause alone as "agree[ment] to contract out of section 9, 12A, 13, or 14(1)" (s 5D(3)(c)(ii)), because it would appear that the particular conduct may still on its face be misleading within the meaning of those sections.

See the Court's decision here.

Hadley v Baxendale not always the touchstone in defining consequential loss

The UK High Court in Star Polaris LLC v HHIC-Phil Inc [2016] EWHC 2941 (Comm) considered the meaning of 'consequential or special losses, damages or expenses' in a shipbuilding contract, after an Arbitration Tribunal concluded the phrase was not aligned with the second limb of Hadley v Baxendale.

The claimants were purchasers of the vessel Star Polaris, which was built and delivered under a variant of a standard form contract. The vessel suffered serious engine failure and was towed to South Korea for repairs. The defendant shipbuilder denied

all liability and the matter was submitted to arbitration. The claimants were successful in their claim for the cost of repairs, but were unable to claim for diminution in value of the ship during repairs. The Tribunal considered this loss to be 'consequential' in the cause and effect sense, and therefore excluded under the contract.

The claimants appealed, arguing that 'consequential loss' should be interpreted in the Hadley v Baxendale sense, as they had contracted with this established meaning in mind.

The High Court agreed with the Tribunal that, despite the judicial history of 'consequential loss', the relevant clause must be approached on its particular wording. Unless the same clause had been subject to the courts' consideration before, then the Court is not bound by any particular interpretation. Of importance was the fact that the relevant Article IX provided a complete code for determining liability between the parties. The construction of the Article showed that the defendants had guaranteed to repair defective items, with all other financial consequences falling on the buyer.

The decision indicates the Hadley v Baxendale approach is secondary to the wording and construction chosen by the parties.

See the Court's decision here.

Litigation funding arrangement not an abuse of process

In Day v The Official Assignee as Liquidator of GN Networks Ltd (in Liq) [2016] NZHC 2400, the High Court rejected a claim that the funding arrangement at issue constituted maintenance or champerty.

In 2014, an unsecured creditor of GN Networks Ltd (GNN), Mr Day, issued proceedings in the Auckland High Court against Babbelbek Finance Limited (Babbelbek) for amounts received by Babbelbek during the receivership. Mr Day's litigation was funded by a third party. Babbelbek applied to strike out (or alternatively to stay) Mr Day's claim (or parts thereof) as an abuse of process.

The basis for Babbelbek's claim was two-fold:

- First, that the funding arrangement amounted to maintenance and champerty
- Second, that Mr Day's rights as a creditor had been assigned to him and that the assignment was void as it constituted an assignment of a bare right to sue.

Faire J rejected those claims. The funder did not have any control over the litigation and did not stand to profit from it. Nor was the assignment a bare assignment of a cause of action. To the contrary, Faire J considered that Mr Day had "a genuine commercial interest in the litigation" and that the assignment was merely an attempt by him to obtain further rights, in addition to those that he already had.

See the Court's decision here.

Privy Council finds Cook Islands National Superannuation Fund lawful

In Arorangi Timberland Ltd v Minister of the Cook Islands National Superannuation Fund (Cook Islands) [2016] UKPC 32, the Privy Council upheld a Cook Island Court of Appeal decision which declared that the superannuation scheme set up by the Cook Islands' National Superannuation Act 2000 (Act) was constitutional.

The appellants sought to prove the scheme was unconstitutional and thus invalid on two points. First, that it involved 'taking' or 'deprivation' in a manner contrary to the Cook Islands Constitution (Constitution). Second, that it was unjustifiably discriminatory contrary to the Constitution.

The first question required an analysis of the proportionality test used in the Court of Appeal. The Board determined that the Court had erred in adopting a 'Wednesbury irrationality' test with respect to the presumption of constitutionality. Instead, they found that the standard of review depends on several factors including the rights involved, the identity of the decision-maker and the nature of the issue. Adopting that analysis, the Board acknowledged that some provisions of the Act would benefit from Parliament's reconsideration, but held that the purported concerns were insufficient to render the Act unconstitutional. They rationalised that the right concerned was important, but mild in comparison to others, and further that the decision-maker was a democratically elected legislature.

The Board concluded that the Act establishing the scheme could not fail on constitutionality, but found that s 53, which had the effect of prohibiting migrant workers from recovering their employer's contributions to the scheme in specified circumstances, was invalid because it was unjustifiably discriminatory to migrant workers. Lord Sumption dissented in part, stating that the Privy Council did not have grounds to decide on the validity of the social policy underlying s 53, and preferring to declare the Act constitutional as a whole.

See the Court's decision here.

English courts break new ground: The 'notification injunction'

In Holyoake v Candy [2016] EWHC 970 (Ch), the High Court of England and Wales has broken new ground in asserting the existence of a 'notification injunction'. The purpose of that injunction is to require a defendant to notify a claimant before the defendant should dispose or deal with its assets.

The case concerned a loan given by the sixth defendant (CPC Group Limited) to the first claimant (Mr Holyoake) in October 2011 for the amount of £12m. What followed was a "highly unpleasant and atrophic campaign of threats, abuse, intimidation and coercion", which the claimant said amounted to what was broadly described as a conspiracy on the part of the defendants. The result of that conspiracy was, in the claimant's view, to require the second claimant to sell the property acquired with the loan at a loss in February 2014, and pay a total of more than £37m to CPC Group Limited.

The claimants brought the application for an injunction because of their concerns that the defendants may make it difficult or impossible to enforce any judgment against them if the claimants were successful in the action.

Nugee J held that such a 'notification injunction' was available for the following reasons:

- The jurisdiction of the Court to grant injunctive relief arose from s 37 of the Senior Courts Act 1981
- It was well established that an injunction was available under s 37 of the Senior Courts Act 1981 when there was a threat to do an act that constituted an "invasion of a legal or equitable right"
- It is also well established that a freezing order is an appropriate means of protecting the rights or obligations as between claimants and defendants
- Requiring a defendant simply to notify a plaintiff was less onerous than freezing the assets altogether, which meant that if the Courts could do the latter it could plainly do the former.

The Court held that the claimants would need to show that there was a "good arguable case" in the sense that it is one "more than barely capable of serious argument".

Nugee J found there was a genuine risk that the defendant's assets would be dissipated, and that the balance of convenience was in favour of the claimants, such that a notification injunction was an appropriate remedy.

It is an open question as to whether or not the New Zealand Courts would apply the Holyoake decision. The jurisdiction of the High Court to grant injunctive relief arises from s 16 of the Judicature Act 1908, which is drafted broadly. Further, the Court of Appeal in Shaw v Narain [1992] 2 NZLR 544 (CA) at 158 emphasised the importance of reserving the flexibility of the freezing order jurisdiction, pointing out that the principles are "still evolving". There would seem to be no reason in principle why Holyoake would not be applied, given that a 'notification injunction' is less onerous than a freezing order, yet still required to meet the stringent test that applies to the latter.

See the Court's decision here.

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