BUDDLE FINDLAY

Legal update on litigation and dispute resolution – December 2018

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New public interest defence to defamation

The Court of Appeal in *Durie v Gardiner* [2018] NZCA 278 broke new ground in revising the law relating to defamation, recognising the existence of a defence of 'responsible communication on a matter of public interest'. This replaces the former defence of qualified privilege.

The case concerned the status of alleged defamatory publications made by the Māori Television Service (MTS) about Ms Donna Hall and her husband, Sir Edward Durie. MTS' TV broadcast and website stories related to the couple's supposedly strained relationship with the Māori Council; MTS claimed these publications were protected by qualified privilege.

The Court of Appeal assessed overseas developments in defamation law, concluding that the existing defence of qualified privilege as stated in *Lange v Atkinson* [2000] 3 NZLR 385 (CA) was ill-equipped to deal with social and legal developments that had occurred since that case. The Court considered qualified privilege's exclusive application to political discussion to be outdated, given the increasing influence of non-political bodies on matters of public concern. Equally outdated was the assumption that allegations would continue to be reported responsibly, as modern technology has allowed individuals to publish information on a mass scale with minimal oversight.

Based on these considerations, the Court recognised the existence of a public interest defence to defamation claims. The elements of the defence are that:

- The subject matter of the publication is of public interest
- The communication is responsible.

Whether something is in the public interest will be determined on a case-by-case basis, though it will generally concern a matter that invites public attention, or about which the public or a segment of the public has some substantial concern because it affects the welfare of citizens, or is one to which considerable public notoriety or controversy has attached. Whether a communication is responsible will be determined by having regard to all the relevant circumstances of the publication. The relevant circumstances may, but not always, include:

- The seriousness of the allegation
- The degree of public importance
- The urgency of the matter
- The reliability of the source
- Whether comment was sought from the subject of the allegations and accurately reported
- The tone of the publication
- The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

In light of the new public interest defence, the proceeding has been sent back to the High Court to determine whether the defence applies in the circumstances of this case.

The decision can be found here.

Litigation privilege extended to company's investigation of possible wrongdoing

In *Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006, the English Court of Appeal considered litigation privilege where a multinational company had conducted an internal probe following allegations of bribery at overseas operations.

Eurasian Natural Resources Corp Ltd (ENRC), incorporated in England, was part of a multinational group of natural resources companies. In 2009 and 2010, ENRC received allegations of corruption and financial wrongdoing relating to operations in Kazakhstan and Africa. The ENRC board launched investigations that included interviews and a forensic records review.

The Serious Fraud Office (SFO) began a criminal investigation into ENRC in 2013. ENRC claimed that litigation privilege applied in respect of documents related to ENRC's investigations and as a consequence, that it was not required to disclose them.

In the United Kingdom, as in New Zealand, the protection only begins when legal proceedings are "in contemplation". The question for the Court was, when had ENRC first reasonably considered that there was a possibility of prosecution?

The Court of Appeal found that litigation privilege did apply to the documents.

- Internal ENRC communications showed that its senior executives expected an SFO investigation in early 2011
- In August 2011, the SFO wrote to ENRC, urging it to consider the SFO's 'Self-Reporting Guidelines'. These Guidelines indicated that civil or criminal proceedings were possible, and self-reporting would only reduce the likelihood of criminal prosecution, not eliminate it.

The Court of Appeal also found that the documents created in ENRC's investigations met the second legal test of having the dominant purpose of resisting or avoiding the prosecution.

ENRC did not have to give the investigation documents to the SFO.

The Court of Appeal considered its approach would avoid discouraging companies from investigating allegations of wrongdoing, out of fear their work product would be used against them by a prosecuting authority.

The decision is highly likely to influence the New Zealand courts' approach to litigation privilege, allowing 'breathing room' for companies to conduct investigations in similar circumstances.

The SFO has advised that it will not seek leave to appeal the decision to the Supreme Court.

The decision can be found here.

Feltex prospectus contained untrue and misleading revenue forecast

In *Houghton v Saunders* [2018] NZSC 74 the Supreme Court held that a revenue forecast in a prospectus was an untrue statement for the purposes of the Securities Act 1978 (Act) and breached the Fair Trading Act 1986 (FTA).

In May 2004, Feltex Carpet Ltd (Feltex) issued a combined investment statement and prospectus (the IPO). By December 2006, Feltex had been put into liquidation. Mr Houghton brought a representative claim in 2008 on behalf of himself and other disgruntled investors. The Supreme Court has determined the final appeal, but in doing so, sent the matter back to the High Court for a stage 2 trial.

The Supreme Court held that Feltex's revenue forecast in the prospectus was an untrue statement for the purposes of section 56(1) of the Act and breached section 9 of the FTA, because at the time of the allotment of shares, the Feltex directors knew that the forecast would not be achieved.

At the stage 2 hearing, the High Court will determine:

- Whether investors invested on the faith of the prospectus
- Whether the untrue statement caused any loss to the investors
- Whether the investors are entitled to any remedy under the FTA.

The decision can be found here.

Company director personally liable for deceitful representations

The Court of Appeal in *Inter Export LLC v Townley* [2018] EWCA Civ 2068 upheld an award for damages against a company director who had made ongoing false representations that caused loss to a contracting company.

Ms Lasytsya was a director of Nerida Trading Ltd (NTL), which contracted to buy sunflower oil from Inter Export LLC. She falsely assured Inter Export that NTL could pay for the shipment of oil, and Inter Export received (forged) payment

network messages that it had been paid – but Inter Export never actually received funds.

The English Court of Appeal found the director personally liable for NTL's unmet obligations, dismissing Ms Lasytsya's appeal and reaffirming the principle that directors will be personally liable for deceitful representations made on a company's behalf.

The appeal also addressed the calculation of damages in this situation. The parties agreed that the correct measure of damages should be an award putting the vendor in the position it would have been in, had no deceit been perpetrated. However, the purchaser accepted liability for only the costs associated with the preparation of the sunflower oil, arguing that it would not have gone ahead if the deceit had not occurred. The Court rejected this argument, finding that the deceit continued to have effect until the oil was delivered. Inter Export's loss amounted to the total market value of the oil.

The decision can be found here.

Supreme Court quashes order to sign on the dotted line

The New Zealand Supreme Court overturned prior Court of Appeal and High Court decisions concerning shareholders' rights in *Baker v Hodder* [2018] NZSC 78.

The High Court had ordered the Bakers to authorise a major transaction by the family company in which they were minority shareholders (30%, against the Hodders' 70%). The Hodders wanted the family company to sell a farm it owned. This was a major transaction requiring passage of a special resolution under section 129 of the Companies Act 1993 (Act). The Bakers had refused to approve the resolution, but the High Court ordered them to sign under section 174 of the Act, which concerns unfair or oppressive conduct. The farm was sold.

The Court of Appeal had dismissed the Bakers' initial appeal on the grounds that it was moot – the farm sale could not be undone.

The Supreme Court decided that the Court of Appeal should not have refused to address the substance of the Bakers' appeal. The farm was unobtainable, but the Bakers could still win a vindication of their position and a costs award against the Hodders. In the circumstances, the Supreme Court found that the High Court was wrong to order the Bakers to sign an authorisation and therefore quashed the order. The Supreme Court declined to define the circumstances in which exercise of minority shareholder rights might constitute oppression because this question had not received a full and fair hearing.

The decision can be found here.

Unlawful removal of a trustee

In *Waho v Te Kōhanga Reo National Trust* [2018] NZHC 1935, the High Court quashed a decision by the Te Kōhanga Reo National Trust (Trust) to remove Mr Waho as trustee.

The Trust had done this in 2014 on the grounds that Mr Waho had brought the Trust into disrepute by reporting various allegations of wrongdoing against Trust Board members, and Board members of the Trust's commercial arm, to Ministers.

Mr Waho said he was acting honourably and in accordance with his duties as a trustee. He asked the High Court for a declaration that he did not bring the Trust into disrepute and that his removal was unlawful.

The Court noted that generally, a decision to remove a trustee is a matter for the board's judgment, and there are only limited grounds upon which the Court can intervene.

In this case, two key obligations came into play. First, the Trust's funding agreement with the Ministry of Education contained a 'no surprises' clause that required certain issues to be brought to the government's attention. Second, the Trust Deed specified that a meeting to consider and vote on the fitness or suitability of a trustee could only be held in certain instances, including if a trustee had brought the Trust into disrepute. In these circumstances, the Court held that, while the decision to remove a trustee was for the Board's judgment, the threshold question of disrepute was not purely discretionary. The Board needed to have a proper, objectively-verifiable basis upon which to assert that Mr Waho had brought the Trust into disrepute, before it could decide whether to remove him.

It was apparent that there was no such factual basis. The Trust was obliged to bring the allegations to the attention of Ministers. Mr Waho's actions had been consistent with the Trust's contractual obligations and his fiduciary duties as a Trustee, so he could not be said to have brought the Trust into disrepute. Accordingly, the Court declared the Board's decision unlawful.

The decision can be found here.

IP rights-holders to cover costs of ISPs' compliance

The English Supreme Court has found that internet service providers (ISPs) should be indemnified for the costs of blocking access to trademark infringing websites by the holder of those trademarks in *Cartier International AG v British Telecommunications Plc* [2018] UKSC 28.

This case related to the costs of an injunction requiring that several large ISPs block access to certain websites that facilitated the sale of goods that infringed the Richemont Group's trademarks. The Court of Appeal had ordered the ISPs to pay the costs of implementing the injunction – this was the grounds for the appeal to the Supreme Court.

Writing for the Court, Lord Sumption surveyed English case law, identifying that the starting point in situations when an innocent party must assist a rights-holder whose rights have been breached is that the rights-holder covers the costs of compliance. From there, he assessed whether European Union Directives relating to the liability of ISPs for hosting illegal content would displace this starting point.

Departing from the Court of Appeal's judgment, Lord Sumption found that the Directives gave no guidance regarding the burden of compliance costs. While the possibility of an injunction is raised by the Directives, it is only done so in general terms, leaving ambiguities to be resolved by reference to national law. The earlier outlined position was applied, resulting in an order that the ISPs be indemnified for the reasonable costs incurred in blocking access to infringing websites.

The decision can be found here.

No requirement for regulator to treat all equally

The English Supreme Court has declared that equal treatment is not a distinct principle of administrative law, in *R (on the application of Gallaher Group Ltd) v The Competition and Markets Authority* [2018] UKSC 25.

Gallaher Group Ltd was among 13 companies being prosecuted by the UK Competition and Markets Authority (the CMA, and its predecessor) for alleged price fixing arrangements in the tobacco market. Gallaher reached an 'Early Resolution Agreement' which involved admission of involvement and penalties. Meanwhile, the CMA gave an assurance of consistent treatment to one party, TM Retail Group Ltd (TMR): if another party successfully appealed the CMA's decision to find that the parties had infringed, then the contrary principles would be applied to TMR's case. Some parties did successfully appeal, and the CMA refunded TMR's penalty payment. Gallaher and other parties requested equal treatment, and when that was refused, sought judicial review of the CMA's actions.

The Court held that English law does not recognise equal treatment as a distinct principle of administrative law. While consistency is generally desirable, it is not an absolute rule. In the traditional judicial review categories, consistency could be an aspect of rationality. Similarly, 'simple fairness' is not a ground for judicial review, although it too arises in other recognised grounds, such as procedural fairness.

The decision can be found here.

Minister of Commerce's decision on Chinese steel flawed

In *New Zealand Steel Ltd v Minister of Commerce and Consumer Affairs* [2018] NZHC 2454, the High Court quashed a July 2017 decision by the then-Minister of Commerce under the Dumping and Countervailing Duties Act 1988 (Act).

Following consideration of an investigation and report by the Ministry of Business, Innovation and Employment (MBIE), the Minister had determined that any subsidy by the Government of China (GOC) of galvanised steel products manufactured in China and imported to New Zealand was *de minimis* and did not cause any material damage to the domestic industry, meaning no countervailing duties should be imposed. MBIE's report had concluded that the GOC was not subsidising Chinese steel beyond a negligible level – contrary to international consensus.

New Zealand Steel (NZ Steel) successfully challenged the Minister's decision through judicial review proceedings.

The Court held the report was flawed as:

- MBIE had erred in its application of the test for determining whether entities, which had provided loans and other benefits to Chinese steel producers, were 'public bodies' possessing, exercising or vested with governmental authority in the provision of subsidies
- To the grounds on which equivalent overseas investigations had made their findings and for failing to take into account such investigations as a valid source of available information, given the limited cooperation from the GOC and Chinese

steel producers.

The Court quashed the Minister's decision on the basis that MBIE's advice contained material errors. NZ Steel's application must be reconsidered (by the current Minister) in light of this judgment.

The decision can be found here.

MPI unlawfully seized fruit trees

Several companies involved in commercial fruit production successfully brought judicial review proceedings against the Director-General and officials within the Ministry of Primary Industries (MPI) for wrongful seizure of imported fruit trees, in *Waimea Nurseries Limited v Director-General for Primary Industries* [2018] NZHC 2183.

The Biosecurity Act 1993 (Act) allows nursery stock to be grown and stored at overseas facilities accredited by MPI before being given a phytosanitary certificate by overseas authorities. This certification supports biosecurity clearance by MPI upon import into New Zealand.

MPI identified deficiencies at one facility in the United States and withdrew its accreditation. Consequentially, it issued a notice that biosecurity clearances for 47,827 trees had been wrongly issued between 2012 and 2018, meaning that the trees were 'unauthorised goods' as defined by the Act. MPI decided to seize them for containment or destruction under section 116 of the Act, which did not provide for compensation.

The High Court held that the trees could not be classified as 'unauthorised goods' under the Act because the false, misleading or incomplete information underpinning the wrongful biosecurity clearance must relate to the goods themselves. In this case, it was about the American facility's deficient record-keeping. Furthermore, the planted trees were not 'goods' as defined in the Act because they did not constitute 'moveable personal property'.

Accordingly, the Court held that MPI's decision to seize the trees was unlawful. Cooke J granted interim orders preventing MPI from taking further action under section 116, while allowing five working days for MPI to consider its more appropriate powers for addressing biosecurity risks within the environment under sections 114, 121 and 122 of the Act.

The decision can be found here.

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