BUDDLE FINDLAY

Legal update on litigation and dispute resolution: bumper class action edition – May 2019

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Opt-in class action against Southern Response

The High Court in *Ross v Southern Response Earthquake Services Limited* [2018] NZHC 3288 has allowed the Rosses to bring a representative action against Southern Response.

The Ross' claim challenges Southern Response's decision not to disclose to them a version of a document known as 'Detailed Repair/Rebuild Analysis' (DRA). The version disclosed to the Rosses was alleged to be 'abridged' in that it did not include some items included in the 'full' DRA. They say that this constituted a breach of the Fair Trading Act 1986, misrepresentation and breach of an implied duty of good faith on the part of Southern Response.

Southern Response did not oppose the Court making a representative order. Instead the focus was on the terms of the representative order and whether the class members should be determined on an opt-in or an opt-out basis.

Associate Judge Matthews decided that the class should be determined on an opt-in basis (claimants are part of the class only when they chose to opt-in). Despite opt-out orders being preferred in other jurisdictions, the Judge was not prepared to depart from earlier authority (French J in *Houghton v Saunders)* to the effect that there would need to be legislative change in New Zealand before an opt-out procedure is available.

The class has been limited to people who owned properties that were damaged beyond economic repair, who did not receive the 'full' DRA and who entered into a settlement with Southern Response before 1 October 2014. Southern Response managed repairs and rebuilds are excluded from the class.

Leave has been granted for the Rosses to appeal to the Court of Appeal. The full decision can be found here. Buddle Findlay acts for Southern Response in this proceeding.

£14 billion class action poised to proceed

In a landmark decision, the UK Court of Appeal has recently overturned the Competition Appeal Tribunal's decision refusing certification in MasterCard's £14 billion collective action claim: *Merricks v MasterCard Inc* [2019] EWCA Civ 674. The claim by Walter Merricks, a former Financial Services Ombudsman, seeks damages arising from Mastercard's alleged breach of competition law in respect of the level of fees charged to retailers for using its cards, which were allegedly anticompetitive and passed on to end consumers. The proposed class is immense: almost all consumers who had made purchases in the UK over a 16 year period.

The claim was brought under the Consumer Rights Act 2015 which introduced an opt-out class action regime into English law in 2015 for damages arising from breaches of UK or EU competition law. The new regime permits a claimant representative to bring an opt-out collective action on behalf of a class of individuals. Importantly, claimants who fall within the defined class (and are domiciled within the UK) are automatically included in the claim unless they opt out. Jurisdiction to hear such cases was given exclusively to the UK's specialist Competition Appeal Tribunal (CAT). The first stage of any such claim is for the Tribunal to authorise the representative to bring the collective proceeding by making a collective proceedings order. The Tribunal must consider whether the claims raise the 'same, similar or related' issues of fact or law and are suitable to be brought in collective proceedings, and whether it is 'just and reasonable' for the representative to act on behalf of the class. Once granted, the substantive claim can proceed.

In 2017, the Tribunal declined the application to certify the proceedings, accepting Mastercard's arguments that the claims were not suitable to be brought collectively for two principal reasons:

- First, the application provided inadequate data to support the proposed methodology to calculate the level of overcharge passed on to consumers
- Second, there was no plausible way of calculating the loss suffered by each individual claimant at the distribution stage.

In relation to the first reason, the Court of Appeal considered that the Tribunal had set the bar too high in assessing whether the claim should proceed. In relation to damages, the Court of Appeal also clarified that difficulties in assessing individual losses suffered by each represented person did not preclude the making of an aggregate award of damages in collective proceedings. The Court proceeds at the certification stage, as in Canada, on the basis that a calculation of the level of pass-on to the class as a whole will be a common issue for all individual claimants. On that approach it satisfies the test of commonality of issue necessary for certification.

The case is to be remitted to the CAT for certification to be considered again. However, it is understood that Mastercard is considering appealing to the Supreme Court. A copy of the decision can be found here.

James Hardie class action plaintiffs backed by overseas litigation funder ordered to pay security for costs

In *White v James Hardie New Zealand* [2019] NZHC 188, Whata J considered applications for security for costs of $350,000 and disclosure of the plaintiff's funding arrangements. The substantive proceeding involved claims by the owners of 1,241 properties alleging the defendants, James Hardie New Zealand and associated companies, had sold defective cladding products over a period of 27 years. The plaintiff homeowners were funded by Harbour Fund II, LP, Europe's largest litigation funder.

The High Court Rules 2016 require a defendant seeking security for costs to establish that the plaintiff is either resident or incorporated outside of New Zealand, or there is reason to believe the plaintiff will be unable to meet a costs award if it is unsuccessful in its claim. The plaintiff homeowners were not collectively impecunious, were covered by insurance, and were supported by Harbour. Despite not meeting the threshold tests, Whata J considered Harbour's involvement as a litigation funder was enough to trigger a security order. The order was made in the exercise of the Court's inherent jurisdiction. Whata J held that if such an order was not made, Harbour may have been able to gain financially from the litigation whilst transferring all the risk of costs and potentially the burden of enforcement to James Hardie. The parties were invited to reach an agreement as to quantum. Whata J did not order disclosure of the plaintiff's funding arrangements.

See the judgment here.

Supreme Court denies James Hardie class action defendants' attempts to be removed from proceeding

Defendants involved in the James Hardie Group class action have failed in the Court of Appeal (*James Hardie Industries PLC v White* [2018] NZCA 580) and the Supreme Court (*James Hardie Industries Plc v White* [2019] NZSC 39) to be removed from class action proceedings.

James Hardie Industries plc (JHI) protested the jurisdiction of the New Zealand courts to determine the proceeding against it, whilst James Hardie New Zealand Holdings (JHNZH), and RCI Holdings Pty Limited (RCI) requested summary judgment. Both parties submitted that there was no serious question to be tried.

In dismissing the appeals, the Court of Appeal noted, with regard to the summary judgment claims of JHNZH and RCI, that the affidavit evidence was insufficient to conclude on the issues before the Court, therefore requiring those questions to be determined at trial.

Furthermore the Court of Appeal considered the development of new law in New Zealand with regard to parent company liability for negligence in respect of a defective product manufactured and supplied by its subsidiary.

The Court of Appeal found that though the general principle is that a parent company would not owe a duty of care for the operations of its subsidiary company, a parent cannot escape liability in circumstances in which it is significantly involved in the operation of its subsidiary. The Court identified three categories through which potential liability for the parent may arise:

- When the parent takes over the running of the business of the subsidiary
- When the parent has superior knowledge of the relevant business of the subsidiary, the subsidiary relied on that knowledge and the parent knew or ought to have foreseen the alleged deficiency in process or product
- When the parent takes responsibility for the policy or advice which is linked to the wrongful act or omission.

The Court held that, based on the evidence, there was a serious question to be tried with regard to JHI's liability for the defective products of its subsidiaries.

The Supreme Court refused leave to appeal to JHI, JHNZH and RCI. The Court stated that allowing the appeal would be of limited utility and some disadvantage for a number of reasons, including: the limited disadvantage to JHI being kept as a party, the disadvantage of further delay to the claimants, and the arguments on jurisdiction being disproportionate to the character of the challenge; the last of those reasons reflecting recent observations from the UK Supreme Court in *Vedanta Resources PLC v Lungowe* [2019] UKSC 20 (see separate report).

The Court of Appeal's recognition of a new area of law may be subject to change since the *Vedanta* decision in which Lord Briggs noted that the issue of a parent company's duty of care for the operation of a subsidiary can be determined by application of standard common law principles of negligence.

The Court of Appeal decision can be found here.

The Supreme Court decision can be found here.

Parent company liability for negligence determined on ordinary principles – Zambian class action proceeds in England

The UK Supreme Court has ruled that a class action by 1,826 Zambian citizens is to be heard in England: *Vedanta Resources PLC v Lungowe* [2019] UKSC 20.

The claimants argued that their watercourses were contaminated by toxic discharges from a copper mine owned and operated by the defendant companies. The second defendant, Konkola Copper Mines PLC (KCM), was the Zambian-incorporated company with immediate ownership of the mine. The first defendant, Vendata Resources PLC (Vendata), was the London-based parent company of KCM.

The plaintiffs' ability to file proceedings against KCM in the English courts was dependent on their having a real issue to be tried against Vendata as the 'anchor defendant' domiciled in England. In delivering the judgment of the full court, Lord Briggs considered this threshold broadly reflected the test for summary judgment. Lord Briggs cited considerable prior authority which emphasised the importance of proportionality in litigating jurisdictional (and summary judgment) issues. The parties' time, effort and costs were considered better spent arguing the substantive claim.

Of central importance was whether Vendata exercised sufficient control over KCM's mining operations so as to assume a duty of care to the plaintiffs. Lord Briggs held that the existence of a duty through parent / subsidiary company relationships could be determined on ordinary negligence principles, without recognition of a novel category of duty. The Supreme Court ultimately upheld the lower courts' decisions in determining that the case could proceed in England on the basis that there was a real risk the plaintiffs would be unable to obtain substantial justice in the Zambian jurisdiction.

The decision can be found here.

No sharp public/private divide in the FMA Act - more investor class actions in the offing?

The Supreme Court has recently considered the Financial Markets Authority Act 2011 (Act) in a leave application decision.

A bank had applied for leave to appeal on the issue of whether the FMA can disclose to third parties the bank's documents that the FMA had obtained through the exercise of its statutory powers under s 25 of the Act. The application for leave was declined.

Under the Act, disclosure is permitted in prescribed circumstances, including that it is for the purpose of, or in connection with the performance of any function, power or duty conferred or imposed on the FMA: s 59(3)(c).

The Court of Appeal considered that the disclosure of information could be for purposes of considering whether a claim should be brought against a party or to enable the FMA to decide whether to exercise its step in powers. It said that the Act contemplates the FMA working with investor groups in exercising step in rights.

While the High Court considered that the FMA cannot further purely private interests, the Supreme Court agreed with the Court of Appeal that the FMA Act does not draw a sharp public/private distinction.

This decision will be of interest to those who are urging the FMA to step into the shoes of investors to bring proceedings against those involved in other failed companies, such as CBL Corporation, which listed on the NZX and ASX in October 2015, and had a market cap of $747m before being placed into administration in February 2018 and faces liquidation this month.

The decision may also be of interest to those who are compelled to disclose documents to a regulator, in that they won't know where those documents will ultimately end up or how they will be used.

The decision can be found here.

High Court considers Quistclose trusts and resulting trusts

In *Li v 110 Formosa (NZ) Limited* [2018] NZHC 3418, the Court confirms that a resulting trust arises when an investor invests into a company for the purpose of acquiring property, but ultimately the sale proceeds without the investor's involvement.

Mr Wang and others became interested in purchasing the Formosa Golf Course. Due to the need for additional finance, Mr Li became involved. A draft joint venture agreement was drafted and listed each party's funding and shareholding in the proposed holding company of the property (JEHL). In addition, the parties entered into a cooperation agreement. Mr Li contributed $4.8m to JEHL in exchange for a proportion of shares. The sale did not proceed.

Subsequently another attempt to purchase the property went ahead, this time with a different corporate vehicle and without Mr Li's involvement. Mr Li's investments in JEHL were not refunded.

Mr Li's claim that the current owner of the property held a portion of it on constructive trust for him failed on the basis that the parties' expectations were to acquire an interest in the corporate vehicle purchasing the property, not an interest in the property itself.

Mr Li was however successful on resulting trust principles. The Court outlined the parameters of a Quistclose trust, a species of resulting trusts: "a Quistclose trust arises where a loan or advance of funds is made for a specific purpose and, upon the failure of that purpose, a resulting trust applies over the funds in favour the lender."

In this case Mr Li deposited money but never received his commensurate shareholding in the corporate vehicle that acquired the Formosa property. The Court held that Mr Wang held the proportion of his shareholding which represented an original contribution of $4.8m on resulting trust for Mr Li.

110 Formosa's director and majority shareholder, Gui Rong Wen, is no stranger to litigating property disputes (*Ngoi v Wen* [2017] NZCA 519).

The decision can be found here.

Final word on long-lasting family dispute over rural property

After numerous court hearings spanning more than three years, the Court of Appeal has delivered what is likely to be the final word on a family dispute over a residential property in South Auckland: *Almond v Read* [2019] NZCA 26.

The dispute concerned the legal ownership of the property and two homes constructed on it. Ms Almond, as sole registered proprietor, refused to acknowledge that the financial contributions made to the property by her mother and brothers gave them a proportionate beneficial interest.

Ms Almond initially asserted in the High Court that she provided the purchase money for the property, and that any contributions by her relatives were either 'rent payments' or payments to recognise the care she provided her parents (who also lived in the property). The High Court found Ms Almond's version of events to be implausible and held that an institutional constructive trust arose by operation of the principles of equity.

On appeal, Ms Almond changed her story, and argued that her parents agreed to help her buy and develop the property with no expectation of a proprietary interest. The payments from her brothers were said to be made on her parents' behalf.

The Court of Appeal again found this to be unconvincing and unsupported by evidence. In dismissing the appeal, the Court confirmed the existence of an institutional constructive trust. The courts found that there was an express common intention shared by the parties that each would own an interest in the property in proportion to their contribution to it. It was therefore unconscionable for Ms Almond to deny the respondents' interests.

The decision can be found here.

IPENZ disciplinary hearing to proceed following High Court challenge by Attorney-General

In *Attorney-General v Institution of Professional Engineers New Zealand Inc* [2018] NZHC 3211, the High Court held that IPENZ's Investigation Committee erred in law in dismissing the disciplinary complaint laid by Mr Charles Stannard against Dr Alan Reay in relation to the collapse of the Canterbury Television Building during the 22 February 2011 earthquake.

Dr Reay resigned as a Member of IPENZ in February 2014. In a March 2014 determination the Committee dismissed Mr Stannard's complaint on the basis that following Dr Reay's resignation from IPENZ there were no applicable grounds of

discipline.

The Attorney-General applied for judicial review of the Committee's decision and sought that it be set aside. Collins J held that the decision was amenable to judicial review, but that the scope of that review was principally to be governed by the terms of the contract of membership between Dr Reay and IPENZ.

Collins J concluded that the Committee had erred in law in dismissing Mr Stannard's complaint. With reference to statute based disciplinary regimes (in this case IPENZ's jurisdiction was purely contractual) and overseas research on professional associations, Collins J reached a view that IPENZ's disciplinary procedures had an important public trust element. Consequently Collins J found that the term 'Member' in the relevant IPENZ Rules and Disciplinary Regulations includes a person who was a member of IPENZ at the time disciplinary proceedings were instituted, but who resigns from IPENZ before those disciplinary proceedings are completed.

Collins J considered that the public interest overwhelmingly favoured the granting of relief as sought by the Attorney-General. The Committee's decision to dismiss Mr Stannard's complaint was declared unlawful and was set aside. The Court also held that IPENZ had jurisdiction to investigate, hear and determine Mr Stannard's complaint.

The decision can be found here. Dr Reay has appealed the decision. IPENZ (now Engineering NZ) has taken steps to reopen its investigation into Mr Stannard's complaint. Buddle Findlay's Christchurch office acts for Dr Reay in this proceeding.

Without notice disclosure duty breached

The English case of *PJSC Commercial Bank Privatbank v Kolomoisky* [2018] EWHC 3308 (Ch) considered allegations of non-disclosure and misrepresentation by the applicant bank on a without notice application for a freezing order. The bank had brought proceedings in the English courts seeking a worldwide freezing order against defendants residing in various countries for misappropriation and concealment of funds to the detriment of the bank and for their unjust enrichment. The freezing order was granted in favour of the bank; a decision that was then challenged by the defendants.

The Court held that there were serious breaches by the bank of its duty in a without notice hearing to make full and frank disclosure of all material facts. The Court found that the bank knew more than it disclosed in its evidence in the application and crafted the particulars of its claim to make the English defendants appear central to the scheme in order to establish jurisdiction in the English Courts when the English defendants were merely incidental players in the scheme. The Court set aside the freezing order.

The judgment can be found here.

Legal professional negligence carries large penalty in Canada

The Canadian Supreme Court in *Salomon v Matte-Thompson* 2019 SCC 14 has held a lawyer and his firm responsible for his clients' multi-million-dollar losses in a Ponzi scheme.

The client sought advice from her lawyer, Mr Salomon, in her capacities as a beneficiary of her late husband's estate and director of a company, 166376 Canada Inc. Mr Salomon recommended that she consult Mr Papadopoulos, his personal friend and financial advisor.

Mr Papadopoulos recommended that the client and the company invest in funds managed by his firm, Triglobal Capital Management Inc. Over the next four years, the client and the Company together invested more than $7.5m Canadian dollars in Triglobal funds. Mr Salomon continually endorsed Mr Papadopoulos and encouraged these investments, despite knowing that the funds were not suitable for the client's needs. There was evidence that Triglobal had given Mr Salomon commissions.

Mr Papadopoulos then disappeared with the savings of around 100 investors, including that of the client and the Company.

Mrs Matte-Thompson and the Company sued Messrs Papadopoulos and Salomon, and the lawyer's firm, for their losses.

The Supreme Court found that Mr Salomon's actions had gone beyond a mere referral (which may not carry legal liability for the result). He had been a trusted advisor, and had failed to advise Mrs Matte-Thompson and the company as a competent, prudent and diligent lawyer would have done. He had also breached his duty of loyalty to them through his conflict of interest.

These breaches were 'a true cause' of their losses. The Supreme Court found that had Mr Salomon properly advised the client and the company, they would never have invested with Triglobal.

The decision can be found here.

Supreme Court rejects dishonest assistance claim against solicitors

The Supreme Court has upheld the Court of Appeal's decision in granting a defendant's summary judgment application in favour of the law firm Wilson McKay: *Sandman v McKay* [2019] NZSC 41.

This brings an end to a dispute concerning whether Mrs Elizabeth Sandman lacked the requisite testamentary capacity when she executed her second will in 2010, as Mrs Sandman's son, Mr Mark Sandman, had claimed. Mr Sandman further argued that Wilson McKay, the solicitors acting for Mrs Sandman, had dishonestly assisted in a breach of trust and/or fiduciary duty.

The majority of the Supreme Court agreed that the Court of Appeal was correct to grant summary judgment in favour of Wilson McKay. The Court affirmed that the test for dishonesty is an objective one, judged against the background of what the defendant subjectively knew. A defendant is dishonest if they have actual knowledge that the transaction is one in which the defendant could not honestly participate. If Wilson McKay knew Mrs Sandman lacked testamentary capacity or was wilfully blind to that risk, then this would have constituted dishonest assistance. The contemporaneous documentation showed that the solicitor did not doubt Mrs Sandman's capacity, nor was she wilfully blind to that possibility.

With reference to a defendant's summary judgment application, the majority explained that summary judgment will be inappropriate when there are factual disputes and in particular, credibility issues that cannot be resolved on the basis of affidavit evidence. Credibility was not an issue in this case.

The decision can be found here.

Court of Appeal finds indemnity clause not a penalty

The Court of Appeal recently revisited the doctrine on the prohibition of penalty clauses in *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2019] NZCA 122. The alleged penalty clause in the commercial lease provided that if the landlord failed to install a second lift within a specific timeframe, the landlord would indemnify the tenant for all obligations under the lease, including the payment of rent and operating expenses, until expiration of the lease. The landlord failed to install the second lift within the timeframe, and the tenant sought to enforce the total indemnity.

Notwithstanding the harsh effect of the clause, the Court of Appeal upheld the High Court's decision that the clause was not a penalty, and therefore was lawful and enforceable.

The Court of Appeal affirmed the approach adopted in its earlier decision in *Wilaci Pty Ltd v Torchlight Fund No 1 LP (in rec)* [2017] NZCA 152, which modified the common law on penalty clauses in New Zealand to align with commonwealth developments in the United Kingdom and Australia to give greater effect to freedom of contract and the enforcement of consensually agreed terms of contract. The Court of Appeal also clarified that the doctrine of penalty clauses is one of common law rather than equity. Paragraphs [29]-[42] contain useful discussion on the development of the doctrine, and the current status of the law in New Zealand.

Click here to read the judgment in full.

Banks may use clear express contractual terms to exclude the Quincecare duty of care

The High Court of England and Wales in *Federal Republic of Nigeria v JP Morgan Chase Bank, NA* [2019] EWHC 347 (Comm) has recognised that banks may use express contractual terms to exclude the *Quincecare* duty.

The *Quincecare* duty was formulated in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363. This duty requires banks to refrain from making a payment when the bank is put on inquiry or has reasonable grounds to suspect the order is an attempt to misappropriate funds. Once put on inquiry, a positive duty is imposed on the bank to make reasonable enquiries to investigate the fraud.

In *Federal Republic of Nigeria*, the defendant bank argued that the *Quincecare* duty was excluded by the express terms of the agreement with the claimant. The Court agreed that in principle it may be possible for the *Quincecare* duty, as an implied term, to be excluded by an express contractual term. As the duty is imposed for good policy reasons, clear wording is required before a court will conclude that the *Quincecare* duty does not arise.

In this case, the Court concluded that the defendant bank did not have clear wording in the agreement that excluded the *Quincecare* duty. There must be clear inconsistency between the terms of the agreement and the *Quincecare* duty for

banks to exclude their duty of care. It is likely that any attempts to exclude this duty will require direct reference to the *Quincecare* duty.

A copy of the judgment can be found here.

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