BUDDLEFINDLAY

Legal update on litigation and dispute resolution – August 2019

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20 August 2019

Court appoints receivers to recover US$25m payment

The Court of Appeal in *Kidd v van Heeren* [2019] NZCA 275 and [2019] NZCA 352 exercised its powers under rule 7.48 of the High Court Rules 2016 to make an order to appoint receivers over the shares of Worldwide Leisure Limited (WLL) to recover the overdue sum of US$25m that Mr van Heeren was ordered to pay in an earlier proceeding.

The case involved decades of litigation between Mr van Heeren and Mr Kidd, his former business partner. In 2015, the High Court ordered Mr van Heeren to pay US$25m as an Interim Payment Order to the court in respect of his liability to Mr Kidd for his share of their partnership assets. No payment was made. Three years later, Mr Kidd filed an application seeking the appointment of receivers to sell WLL's partnership assets (including Huka Lodge), to discharge Mr van Heeren's obligations under the Interim Payment Order.

The Court of Appeal held that there was jurisdiction under r 7.48 to enforce the Interim Payment Order. The scope of the rule was not limited by the examples listed and that ultimately 'the Court's power must be exercised in such a way as to best meet the requirements of justice in the particular case'. The Court was also not fazed that another company held the shares in WLL, finding that the shares were held as a bare trustee for Mr van Heeren.

Ultimately the court appointed Kare Johnstone and Andrew Grenfell of McGrathNicol as receivers over the shares in WLL, rather than over its assets, in order to protect the value of the assets. An eleventh hour variation order or alternatively a stay in proceedings to allow a sale agreement for Huka Lodge to be finalised was declined.

Above board: conduct complaint founders in judicial headwinds

Colin Craig and Jordan Williams were already at loggerheads in their long running defamation battle, when Williams cried foul over a summer sailing trip taken by Mr Craig's counsel and a Supreme Court Justice. Williams applied for recall of its judgment that found in favour of Craig on a 3-2 split. The application was made on the basis that a fair-minded observer might reasonably consider that Arnold J might not have brought an impartial mind to the resolution of the appeal.

Following the hearing in September 2018 (but before the Court issued its decision on 11 April 2019), Craig's lead counsel, Stephen Mills QC, and Supreme Court Judge, Justice Arnold planned a sailing trip for February 2019. In late January, Mr Mills took soundings with Williams' lawyer about the trip, noting that it had been planned for some time. Williams said he had some concerns of the proposal at face value, but did not offer any opposition to the trip, and the trip went ahead as planned.

When the Court's decision was issued in favour of Craig, dismissing Williams' cross-appeal, Williams sought a recall and rehearing on the basis that:

- The lawyer and judge had breached the Guidelines for Judicial Conduct that advised judges "to avoid direct social contact with practitioners who are engaged in cases before the judge"
- The trip gave rise to apparent bias
- Williams' consent was not informed consent because he was not aware of the Guidelines.

The Supreme Court noted that non-compliance with the Guidelines does not necessarily comprise apparent bias. The Court dismissed Williams' application on the basis that he had consented, there was no confusion as to what would occur, and the trip had gone ahead as foreshadowed without any discussion about the case. The Court also noted that the Guidelines are publicly available, and that Williams' complaint was delayed until after judgment was issued, suggesting that the delay in raising the matter was tactical and disqualifying.

The decision can be found here.

No abuse of process in representative action

The case of *Paine v Carter Holt Harvey Limited* [2019] NZHC 1614 concerns a representative claim by the plaintiffs that 'Shadowclad' external house cladding, which is made, supplied and promoted by the defendant, is inherently defective. The defendant filed an application to stay or dismiss the representative claim contending that the claim was an abuse of process.

The defendant alleged that the claim was brought without the Court's (necessary) permission. However, the Court held the plaintiffs did not need to seek the Court's permission before bringing the representative claim because all those represented consented to the claim.

The defendants had also alleged that the plaintiffs' solicitor made misleading statements in promoting the proposed representative action. The Court ruled that most of the relevant statements were not misleading and that the plaintiffs' solicitor did not encourage meritless claims. The Court found statements by the plaintiffs' solicitor regarding the value of the claims in the proposed suit were misleading but that this fell well short of an abuse of process.

Finally, the defendant alleged that the litigation funding arrangements were objectionable. The Court was satisfied that the litigation funding agreement did not constitute an abuse of process and did not assign the causes of action to the funder. The Court was careful to point out that it was not endorsing or approving the funding arrangement (as it considered that was not a matter for the courts).

The Court dismissed the defendant's abuse of process application.

The decision can be found here.

Parent company controlled litigation and ordered to pay non-party costs

Non-party costs are exceptional and are only awarded when it is just to do so and when 'something more' about the non-party's conduct warrants costs. The involvement of a parent company in litigation and avoiding a realistic settlement is an example of the 'something more' requirement being met. In *Minister of Education v H Construction North Island Ltd* (in req and liq) [2019] NZHC 1459, the High Court found that McConnell Ltd's (McConnell) actions in this litigation warranted awarding non-party costs and disbursements of over a million dollars.

The background to this claim is the negligent construction of Botany Downs Secondary College by Hawkins Construction North Island Limited (Hawkins) (as it was known at the time). The High Court found Hawkins liable for almost $13.5m, the amount required to repair the school.

Hawkins is one of several subsidiary companies that was owned by McConnell as the parent company. When Hawkins was unable to pay its own legal fees, another related company called Hawkins Group Limited (HGL) paid its legal fees. HGL fell behind in payments and in January 2018, McConnell guaranteed payment of Hawkins' legal costs to its lawyers.

The High Court was satisfied that the 'something more' element was established. McConnell authorised Hawkins' approach, at least implicitly, given commonality of directorships. There was direct oversight by key figures in McConnell. The Court considered that McConnell authorised Hawkins vigorously to defend a claim that should have been settled, was complicit in using Hawkins' likely insolvency as a weapon, and guaranteed representation when Hawkins would otherwise have been unrepresented. McConnell was the 'real party' to the proceeding.

Non-party costs were not awarded against McConnell's directors personally as the directors did not inject any of their own money and there was no evidence that the directors would benefit personally from refusing settlement in favour of a trial.

The decision can be found here.

The Supreme Court confirms reinstatement is not a right that can be assigned

The Supreme Court in *Xu v IAG New Zealand Limited* [2019] NZSC 68 has had the final say on the status of 'on sold' earthquake damaged properties insured by IAG at the time of the Canterbury earthquakes. Click here to view our insight into this case.

Discretion prevails over hard and fast rules where liability of litigation funders is concerned

The English High Court in *Davey v Money* [2019] EWHC 997 (Ch) has clarified the law relating to the liability of litigation

funders for adverse third party cost orders.

The case concerned the liability of ChapelGate Credit Opportunity Master Fund Limited (ChapelGate), a litigation funder that had backed an unsuccessful plaintiff in an earlier case. Following that case, the defendant applied for a non-party costs order against ChapelGate under s 52 Senior Courts Act 1981 (to accompany a costs order against the plaintiff).

ChapelGate accepted that an order should be made, but contended that its total liability should be limited to the overall funding it provided the plaintiff, a principle referred to as the 'Arkin cap' (after the decision of the Court of Appeal in *Arkin v Borchard Lines Ltd* (Nos 2 and 3) [2005] 1 WLR 3055).

The Court found that the Arkin cap was not "a rule to be applied automatically in all cases involving commercial funders". As established in *Dymocks Franchise System (NSW) Pty v Todd* [2004] 1 WLR 2807 (UKPC), any decision made under s 51 is "ultimately a matter of discretion to be exercised on the basis of what is just in all the circumstances of any individual case".

In the circumstances, the Arkin cap was not applied, and ChapelGate was found liable for the entirety of the costs award. ChapelGate treated its funding as a commercial investment, sufficiently aware that the plaintiff was arguing a difficult case and could not pay a costs award. Accordingly, there was no basis to limit its liability.

The full decision can be found here.

Trustees' reasonable costs

The Court of Appeal recently issued a decision on the correct approach to trustees' costs in *Jones v O'Keeffe* [2019] NZCA 222.

This was an appeal from a High Court decision in a dispute between two executors and trustees of an estate. Ms O'Keeffe had applied to have Mr Jones removed as a trustee based on alleged misconduct and breakdown of their relationship. She initially claimed full indemnity costs against Mr Jones personally, but later sought payment from trust funds. The Trustee Act 1956 provides for trustees' reasonable administration-related costs to be reimbursed from trust funds.

The primary dispute was settled by consent orders replacing both trustees with the Public Trust.

However, Mr Jones opposed Ms O'Keeffe recovering any costs from either himself or trust funds. The costs issue was the only outstanding question that required a hearing.

After the hearing, the High Court ordered Mr Jones to pay all of Ms O'Keeffe's costs personally, based on his 'questionable' administration, antagonistic approach to Ms O'Keeffe and unnecessarily prolonging the proceeding. Mr Jones appealed this decision.

The Court of Appeal overturned the High Court's decision in part, distinguishing between the application and litigation phases of the proceeding.

Ms O'Keeffe's application to remove Mr Jones as a trustee had been reasonable and she had succeeded. However, Mr Jones' conduct in this phase had also been reasonable, as evidenced by the consent orders. There was no basis to order indemnity costs under the Trustee Act, nor personal liability by Mr Jones. Ms O'Keeffe's costs incidental to the application process were to be reimbursed from trust funds under the Trustee Act.

The Court held that the High Court Rules 2016 applied to Ms O'Keeffe's costs related to the litigation phase, and such costs awards should be based on parties' conduct **during** proceedings, not **beforehand** – as in the Supreme Court decision *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26. Mr Jones' alleged conduct of trust administration was not relevant to the question of the costs award arising from the hearing. That said, his opposition to Ms O'Keeffe's claim to reimbursement of her costs from trust funds wholly necessitated the hearing and was unreasonable. Accordingly, Mr Jones was personally liable for her costs related to the hearing on a solicitor/client basis.

UK Supreme Court allows application to set aside judgment obtained through fraud to proceed

In *Takhar v Gracefield Developments Limited* [2019] UKSC 13, the United Kingdom Supreme Court allowed Mrs Takhar's application to set aside an earlier judgment to proceed on the basis that the earlier judgment was obtained through fraud.

The case involved a dispute about the future of Mrs Takhar's properties. A profit share agreement purportedly signed by Mrs Takhar led to a finding in the trial that the properties had been transferred to the defendant. After the trial, Mrs Takhar engaged a handwriting expert who found that the signature on the profit share agreement had been transposed from an earlier letter. Mrs Takhar applied for the judgment and order to be set aside on the ground that it was obtained by fraud. The issue of authenticity was not raised at the trial.

The key issue for the Supreme Court's determination was whether Mrs Takhar had to show that the alleged fraud could not have been discovered before the original trial by reasonable diligence on her part. The Supreme Court disagreed with the Court of Appeal that a 'reasonable diligence' requirement should be imposed, stating that "the idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice".

Lord Kerr distinguished *Henderson v Henderson* (1843) 3 Hare 100, which was relied on by the Court of Appeal for the 'reasonable diligence' requirement. It was silent on two critical points: whether the rule applies when the new point was not in issue in the first trial, and whether the rule requires modification when the new issue raises an allegation of fraud by which the original judgment was obtained.

On the facts of this case, the fraud principle prevailed over the finality principle.

The Supreme Court granted the appeal and allowed Mrs Takhar's application to set aside the judgment to proceed to trial for determination.

The decision can be found here.

Drilling into the minefield of jurisdiction and undisclosed principals

The English Court of Appeal in *KAEFER Aislamientos SA de CV v AMS Drilling Mexico SA de CV and others* [2019] EWCA Civ 10 has tried to clarify the correct test to apply when considering whether the Court has jurisdiction over parties that are alleged undisclosed principals to a contract.

In dismissing the appeal and ruling that the alleged undisclosed principals were not bound by the exclusive jurisdiction clause, the Court ruled that the correct test to determine jurisdiction is that set out by the UK Supreme Court in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34. The Court set out the three limbs of the test as:

- The claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway
- If there is an issue of fact about the relevant jurisdictional gateway, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so
- However, the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

This test remains somewhat opaque and complex, so should be applied carefully.

See the Court's decision here.

English High Court confirms there must be a credible risk of asset dissipation to justify a freezing order

This litigation concerns a dispute between Orlov and Tugushev over a stake in the Norebo Group, an international fishing business. In July 2018, a Worldwide Freezing Order (WFO) against Orlov's assets was made without notice. In *Tugushev v Orlov* [2019] EWHC 2031 (Comm), Orlov successfully challenged the WFO on the basis that Tugushev had not complied with his duty of disclosure to the Court in the without notice application. There was no credible risk of Orlov dissipating his assets so the application was not regranted.

In without notice applications the Court only hears one side of an issue. To ensure fairness there is a duty on the applicant of full and frank disclosure of all material facts. Orlov argued that Tugushev failed to disclose a number of material facts in his without notice application. All but one of the allegations were dismissed. The one that Orlov succeeded on was Tugushev's failure to disclose documents that suggested he had divested himself of his shares in AA, the predecessor to Norebo, in 2003 prior to taking public office in Russia. This evidence related to a core piece of Orlov's defence. Tugushev's failure to investigate whether the documents existed justified discharge of the WFO.

Regarding whether there is a real risk of dissipation so as to justify continuation of the WFO, the court stressed that the risk is not to be inferred lightly and that there must be solid evidence of the risk of dissipation. Each case is fact specific and relevant factors must be looked at cumulatively. Here, the majority of Orlov's assets were his shareholding in the Norebo. The court considered that there was no credible risk of Orlov reducing his shareholding to defeat any judgment in Tugushev's favour.

Finally, the court emphasised that Tugushev could reapply for relief in the form of a freezing order if there were material

new developments identifying a risk of dissipation.

The judgment can be found here.

Developer in breach of 'reasonable endeavours' clause

The English case of *Gaia Ventures Limited v Abbeygate Helical (Leisure Plaza) Limited* [2019] EWCA Civ 823 considered a dispute about the content of a 'reasonable endeavours' clause in an agreement entered into by the defendant, Abbeygate Helical (Leisure Plaza) Limited (Abbeygate) and the claimant, Gaia Ventures Limited (Gaia), as part of Abbeygate's re-development of the Leisure Plaza in Milton Keynes.

Gaia claimed that Abbeygate failed in its obligation to use 'reasonable endeavours' to obtain a clear title to the land and trigger the conditions for payment of a £1.4m overage 'as soon as reasonably practicable'. The conditions were not satisfied by the longstop date and Gaia Ventures Limited issued proceedings against Abbeygate for damages.

The High Court held that Abbeygate had failed to fulfil its obligation. It emphasised that what is undertaken is a 'positive obligation', and that the question is "whether the relevant step was feasible, and then whether in all the circumstances it was reasonable to take it (or unreasonable not to take it), balancing the risk of adverse consequences against the obligation to perform the promise".

The Court of Appeal dismissed Abbeygate's appeal, finding that there was no objective justification for the delay in satisfying the conditions. Instead, Abbeygate 'devoted its energies' to delaying the satisfaction of the conditions and 'dragged its feet' in order to avoid making the overage payment. It exhibited a conscious desire to leave things as late as possible.

Abbeygate claimed that the High Court was wrong to construe the obligation to use reasonable endeavours as excluding its ability to wait until finance was secured from a third party investor. It argued that it was entitled to have regard to its own commercial interests when deciding what steps to take to satisfy the conditions. Lord Justice Patten stated that it would be too broad to state that questions of profitability are not to be considered when determining what is reasonable. Nevertheless, the issue in this case was not simply one of profitability. The Court held that Abbeygate had deliberately worked to a timetable that was designed to avoid the satisfaction of the conditions until after funding was in place and the longstop date had passed.

Abbeygate was held to be in breach of its obligation and ordered to pay the £1.4m overage payment to Gaia.

The judgment can be found here.

Hong Kong Court explores dishonesty test

The Hong Kong Court considered the test for dishonesty in *Galleria (Hong Kong) Limited v DBS Bank Limited* [2019] HKCFI 1877.

For some years prior to GHK's collapse, its directors were involved in a fraudulent scheme involving supplying fake bills of lading to lenders, including the defendant bank. The bank was notified by a third party that some bills of lading were false. The liquidators alleged that the bank must have known about or turned a blind eye to GHK's fraud, but continued to finance GHK's fraudulent business. The liquidators claim was brought in knowing receipt, dishonest assistance and fraudulent trading.

The Court considered this was a case of dishonesty, which is a serious allegation requiring proof based on cogent evidence. In assessing dishonestly, the Court said:

- The question of a person's state of mind is subjective; it concerns what the person actually knew. However whether the person is honest or dishonest given what he or she knows is objectively assessed
- Carelessness or negligence are not in themselves manifestations of dishonesty
- The imputation of blind-eye knowledge requires a suspicion on the defendant's part that certain facts may exist, and the defendant's deliberate and conscience decision to refrain from taking steps to confirm their existence
- The knowledge of knowledge in different people within a company cannot be aggregated to create a 'notional super-mind' of the company.

The Court found contemporaneous documents showed that the bank's officers did not have any knowledge or serious suspicion of fraud. The Court considered that it would be extraordinary if bank officers knowingly ignored fraud against the bank and assisted in inducing a fraud on itself. The inherent probabilities were stacked against the liquidators' case.

The test for dishonesty is the same in New Zealand: *Sandman v McKay* [2019] NZSC 41. Our report of this decision can be found here.

The judgment can be found here.

Privy Council clarifies test for ostensible authority

The Privy Council in *East Asia Co Ltd v PT Satria* [2019] UKPC 30 heard an appeal concerning a transaction where PT Satria entered into a Heads of Agreement (HOA) with East Asia Company Limited (EACL) for the purchase of all the shares in Bali Energy Limited (BEL). The transaction was facilitated by Mr Joenoes and Mr Hata, who were directors of both BEL and EACL.

Originally, the Bermuda Court of Appeal found in favour of EACL, declaring the HOA and subsequent transfer of shares to PT Satria invalid. PT Satria appealed the decision on the basis that Mr Joenoes had the ostensible authority to enter into the HOA with PT Satria. PT Satria asserted that EACL was therefore required to honour the HOA and subsequent share transfer of 100% of shares in BEL to PT Satria.

The Privy Council held that the HOA and the subsequent share transfer were invalid on the basis that:

- EACL did not hold out to PT Satria, either expressly or impliedly, that Mr Joenoes had the authority to act on its behalf in the sale of its only asset
- PT Satria had not in fact relied on any representation by EACL as to Mr Joenoes's authority in any event
- PT Satria was put on inquiry as to Mr Joenoes' lack of authority, given the unusual features of the transaction
- Mr Joenoes and Mr Hata's undisclosed financial interest in the transaction meant that they were disqualified from voting at the EACL board meeting relating to the transaction. As a result, the EACL board meeting did not have proper quorum to ratify the HoA.

Significantly, the Privy Council chose not to follow the decision of Lord Neuberger in *Akai Holdings Ltd v Kasikornbank PCL* [2011] 1 HKC 357 where it was held that a party can rely on the ostensible authority of an agent **unless** it has actual knowledge of the agent's lack of actual authority, or when it dishonestly or irrationally believed that the agent had actual authority.

The Privy Council's dismissal of this analysis is consistent with the conventional view that when a party has reason to believe that the agent does not have actual authority, and fails to make the relevant inquiries that a reasonable person would make in the circumstances, then it cannot rely on the ostensible authority of that agent.

You can find the full decision here.

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