BUDDLE FINDLAY

# Legal update on litigation and dispute resolution - May 2013

Sherridan Cook, Scott Barker, Willie Palmer, Seb Bisley, Susan Rowe, David Broadmore, Peter Niven, Kelly Paterson

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## English Court of Appeal finds Google a 'publisher' for a third party statement

*Payam Tamiz v Google Inc* was an appeal from the English High Court regarding a claim of defamation against Google by Payam Tamiz, a British Conservative Party candidate. The defamatory comments were published anonymously on a blog hosted on Google's blogging platform 'Blogger'. The key issue for the court was whether Google was a "publisher" of the comments.

The High Court had found that the comments were defamatory but Google was not a "publisher" of those comments and, therefore, it was not liable for them. The Court of Appeal, however, distinguished between the periods before and after Google was notified of the defamatory material. They agreed with the High Court that Google could not be considered a publisher before it was notified of the defamatory comments. However, they disagreed with the High Court's conclusion that Google could not be considered a publisher for the period after notification.

The Court of Appeal considered the situation to be analogous to the publishing of notices on a notice board, where the owner of the notice board has control over its contents, as Google can readily remove or block access to any blog that does not comply with its terms. As a result, the continued presence of the allegedly defamatory comments on the blog after Google was notified of them could be inferred as Google having associated itself with, or to have made itself responsible for, the continued presence of the defamatory comments on the blog and therefore it was a publisher of the defamatory material.

Notwithstanding this conclusion, as the period between notification of the complaint and the removal of the offending comments was very short, the appeal failed on the basis that any damage to the appellant's reputation during that period was trivial.

As discussed recently in our analysis of *A v Google New Zealand Limited*, the New Zealand position regarding the liability of an ISP or hosting service for hosting defamatory comments by third parties is uncertain. It is likely that the New Zealand Courts will look to overseas decisions such as this for guidance. As a result, ISPs and hosting services in New Zealand should be aware that they may face potential liability as a 'publisher' of defamatory material if they fail to remove from their services material over which they have a large degree of control once they have been notified of that material

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## English Supreme Court refuses to extend legal advice privilege to communications with accountants

The English Supreme Court recently rejected an appeal seeking to extend legal advice privilege (LAP) to communications between chartered accountants and their clients in connection with expert tax advice. The High Court and the Court of Appeal both considered that LAP did not extend to those communications even where there was no doubt that LAP would apply if the same advice was given by a member of the legal profession.

The majority of the Supreme Court agreed. Given that LAP is entirely for the benefit for the party receiving the legal advice, the Court acknowledged that there was a strong case for allowing the appeal. However, notwithstanding this concession, the majority agreed that they should not extend LAP to advice given by non-lawyers because:

- The consequences were hard to assess and would likely lead to a clear and well understood principle becoming unclear and uncertain
- The issue raises questions of policy which should be left to Parliament, to be considered within its legislative process, with its wide powers of inquiry and consultation and its democratic accountability
- Parliament had previously enacted legislation relating to LAP which suggested that it would be inappropriate for the court to extend the law.

The dissenting judges considered that the focus should be on the rationale of the privilege, not the status of the advisor, and there can be no principled reason for distinguishing between the advice of solicitors and accountants. Legal advice on tax issues is increasingly given by accountants and as a creature of the common law LAP should be capable of re-definition to cater for changed conditions.

The position in New Zealand is significantly different. In 2005, sections 20B-20G were inserted into the Tax Administration Act 1994 (TAA), creating a statutory privilege in relation to any confidential "tax advice document" where the relevant "tax advisor" is a member of an "approved advisor group" approved by the CIR. Only the advice itself is protected, not any other information that may form part of the accountant's file or briefing.

In April 2009, in *ANZ National Bank Limited v CIR* [2009] 3 NZLR 123, the Court of Appeal confirmed that the protection afforded by section 20B was much more confined than LAP and it did not provide a basis for resisting discovery in Court proceedings. Rather, it applied solely to a request by the Commissioner for information pursuant to section 17. Section 20B of the TAA was swiftly amended in October 2009 to extend its application to the disclosure of information "under a discovery obligation".

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## Use of a generally descriptive word does not constitute trade mark infringement

InterCity operates InterCity Coachlines and owns the INTERCITY registered trade mark. Recently, InterCity sought interim orders restraining Nakedbus, which operates a competing bus service, from using the word "intercity" and variants, or any other names similar to INTERCITY, in any of its advertising or marketing material.

InterCity complained that Nakedbus had infringed its registered trade mark and misled consumers about the relationship between the two companies. In particular, use by Nakedbus of the term "inter city" involved the use of a sign which is identical to or confusingly similar to InterCity's registered INTERCITY trade mark in respect of identical or similar goods or services for which the mark is registered. InterCity also alleged that by using the phrase "inter city" as a Google keyword for online advertising, Nakedbus had breached a purported oral undertaking given in June 2009 that it would cease using the term "intercity" in any of its advertising and instead use the term "city to city".

On the breach of undertaking cause of action, InterCity failed to establish that there was a serious question to be tried. The Court preferred the evidence of Nakedbus that such an undertaking had never been given. Rather, Nakedbus had gone no further than to assure InterCity that it would not use the word "InterCity" in a manner that breached InterCity's trade mark.

With regard to the purported trade mark infringement, InterCity had to show that the use of the term "inter city" by Nakedbus had adversely affected, or was liable to adversely affect, the functioning of the trade mark, in particular its essential function of guaranteeing to the consumers the origin of the goods.

The Court considered that it failed to do so. The registered mark was a generally descriptive word which had acquired a secondary meaning and there was nothing to prevent its use in the primary descriptive sense being "between cities". On the information available to the Court, it appeared that members of the public were likely to attribute to "inter city" its primary descriptive sense rather than understand it to refer to InterCity. Therefore, there was no risk that customers would be confused or deceived as to the origins of the services on offer, nor could the actions of Nakedbus be said to involve misleading or deceptive conduct.

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## An agreement to arbitrate is upheld notwithstanding a defect

The Court of Appeal has recently recognised the importance of upholding and enforcing arbitration agreements and awards, even where part of the agreement is found to be invalid.

In *Gallaway Cook Allen v Carr* [2013] NZCA 1, a law firm and one of its clients signed an agreement to refer their professional negligence dispute to arbitration. The arbitration agreement, which was the subject of lengthy negotiations between the parties, contained a clause purporting to allow appeals on "questions of law and fact". The New Zealand Arbitration Act 1996 (Act) allows appeals from arbitration awards on questions of law, but not fact. Therefore, the terms of the arbitration agreement professed to confer jurisdiction on the Courts by contract that was expressly excluded by statute.

The arbitrator issued a partial award for the law firm. The client then sought to exercise his right of appeal on fact. Upon opposition by the firm on the grounds that the Act limits rights of appeal to questions of law, the client applied to have the arbitration award set aside on the basis that it was invalid. In both the High Court and Court of Appeal it was common ground that the jurisdiction of the Courts to hear appeals from arbitration awards was prescribed by statute and could not be extended by contract. The issue was whether the words "and fact" could be severed from the arbitration agreement leaving the remainder of the agreement as enforceable, or whether such severance changed the nature of the mutual promises contained in the agreement and rendered the entire agreement invalid. The High Court found that the latter applied.

The Court of Appeal overturned this decision, finding that in this case it was entirely appropriate to sever the offending phrase, "and fact", leaving the remainder of the agreement in force as, amongst other things, doing so altered only the extent of an ancillary right of appeal and not the nature and character of the agreement to arbitrate.

## Defamation: boundaries to the absolute privilege from suit for witness evidence

The extent of absolute privilege of witness statements subject to defamation proceedings was recently discussed by the English Court of Appeal in *Mr Mashood Iqbal v Dean Manson Solicitors & Ors (No 2)* [2013] EWCA Civ 149. The rule of absolute privilege provides that no action will lie against a witness for defamatory words used with reference to the inquiry upon which he is called to give evidence. However, this privilege does not extend to statements which have no reference at all to the subject matter of the proceedings.

The Court of Appeal dismissed Mr Iqbal's appeal against the lower court's decision that the witness statements produced by Dean Manson Solicitors were covered by absolute privilege. Mr Iqbal claimed that the lower court had misapplied the relevant principles when it stated that the documents in question had "no reference at all to the proceedings." The Court of Appeal, however, considered that there was no relevant distinction between the test of "no reference at all to the subject matter of the proceeding" and the lower court's shortened expression of the principle.

Mr Iqbal also claimed that the documents in question were wholly extraneous, irrelevant and gratuitous libels. The Court of Appeal disagreed. Although the statements in question had only a weak relevance to the subject matter of the proceeding, this was sufficient to satisfy the test as it could not be said that the documents as a whole had no reference at all to the subject-matter of proceeding.

## Interest will not accrue on costs until a costs order is made

In *Chesterfields Preschools Ltd & Ors v The Commissioner of Inland Revenue* [2013] NZCA 44, the Court of Appeal considered whether interest could be claimed on an award of costs from the time the costs were incurred. The appeal derived from proceedings involving an application by Chesterfields for judicial review in 2006. Chesterfields sought interest on costs for the period of approximately five and a half years between the judgment and the award of costs in 2012.

The Court rejected Chesterfields' submission that section 87 of the Judicature Act (which sets out the powers of the Court to award interest on debts and damages) should apply to an award of costs not yet quantified by the Court. The proceedings to which the cost judgment related were applications for judicial review and not a "*proceeding....for the recovery of debt or damages*" as required under section 87.

Instead the Court concluded that High Court Rule 11.27 was applicable. This rule provides that a judgment debt carries interest from the time judgment is given at the rate(s) prescribed under section 87 of the Judicature Act if the High Court has either:

1. Awarded costs in a specific sum, or

2. Made a costs order in terms that costs enable to be calculated or determined without reference back to the court.

In both of these situations, interest accrues from the date of the costs award even if, in the case of (b), the quantification is not completed and the amount of costs not determined until a later date.

Until the most recent judgment against the CIR for costs (effectively a debt due), there was no order by to pay a fixed or ascertainable, mistake free, sum of costs. Accordingly, interest on costs did not accrue from the date of the earlier judgment.

## A vendor may be liable for a misrepresentation made to a third party associated with a purchaser

In *Rondova v When Routine Bites Hard Limited* [2013] NZHC 267, Justice Woodhouse examined when a misrepresentation will be brought to the knowledge of a purchaser and when it will induce a purchaser to enter a contract. He allowed the vendor's appeal from the District Court proceedings, on the basis that when a purchaser wishes to cancel on the grounds of a misrepresentation that has substantially altered the benefit or burden of the contract, but that misrepresentation is capable of rectification, the purchaser must first issue a notice making time of the essence, before cancelling if the situation is not redeemed. If this notice is not given by the purchaser, any purported cancellation will be invalid. This was an extension of the application of section 7(4)(b) of the Contractual Remedies Act 1979 in *Mana Property Trustee Ltd v James Development Ltd* [2010] NZSC 90.

Justice Woodhouse also commented on the issue of whether a purchaser company will be taken to have sufficient knowledge of a representation where it has been made by the vendor to a person associated with the purchaser company. In this case, the original enquiry regarding the property was made by Mr Dawson. The representation was made to him, and he advised that he would submit a tender. A tender was subsequently received in the name of the company (WRBHL). The vendor claimed that she did not link the company with Mr Dawson by the relevant date on which she accepted the tender. However, the tender document, its backing sheet, and the cheque that accompanied them all mentioned Mr Dawson. The Court found that the vendor knew by the relevant date that Mr Dawson was purchasing the property through his company WRBHL, and so the purchaser was entitled to rely on the representation previously made to Mr Dawson.

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## The dishonest lawyer: a cautionary tale for all solicitors and their clients

The High Court case of *Cityside Asset Pty Ltd v 1 Solution Ltd* [2012] NZHC 1382 involved a breach of a franchise agreement following its termination. In particular, the plaintiffs alleged the defendants breached restraint of trade and confidentiality provisions by wrongfully continuing the businesses that had been operating under the franchises and were utilising a new company structure to conceal the connection. An email of advice from the defendants' solicitor was inadvertently disclosed to the plaintiffs. That email noted the defendants had "*gone to great lengths to hide the fact that you continued to trade in breach*". In addition the solicitor advised the defendants, among other things, to permanently delete the accounts and that it would be "*better if you were not in possession of*" the old computer equipment.

The defendants' claim of privilege over the email was challenged by the plaintiffs under section 67(1) of the Evidence Act 2006, which provides a privilege claim must be disallowed if there is a prima facie case that the communication:

- Was made or received for a dishonest purpose, or
- Enabled or aided anyone to commit or plan an offence.

Justice Woodhouse noted that Parliament's use of the term "dishonest purpose" provided a notably lower threshold than the common law which required something akin to a "fraud", "sham" and "trickery". He noted that the test of dishonesty was determined by considering how an honest person would have acted in those circumstances.

The defendants argued there was no dishonesty and that the solicitor advised the defendants to delete the material because to retain it would have been a continuing breach of the restraint of trade. However, Justice Woodhouse found in favour of the plaintiffs. The solicitor's advice that evidence should be destroyed would defeat the plaintiffs' right to that evidence through discovery and established a prima facie attempt to obstruct the course of justice. Further, the email in its entirety was dishonest as it amounted to advice as to how to better conceal the connection between the businesses during the period of exposure that would arise from litigation.

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## High Court avoids "manifest commercial absurdity" by implying contract term

In its decision in *Pernod Ricard NZ Ltd v Lion – Beer, Spirits & Wine (NZ) Limited* [2012] NZHC 2801, the High Court has revisited the legal principles relating to implied terms in contracts. The case involved an agreement under which Pernod, New Zealand's largest wholesale wine distributor, sold certain of its assets to Lion, New Zealand's leading beer distributor. A dispute arose in relation to the payment of excise duty by Pernod, which argued that despite the agreement for sale and purchase being silent on the point, Lion was liable to reimburse it for the amount of excise duty paid. In support of its claim, Pernod pleaded (among other things) an implied term.

Ultimately, Pernod succeeded in its claim based on an implied term. The Court referred to the legal test which requires that for a term to be implied, the term must: (1) be reasonable and equitable; (2) be necessary to give business efficacy to the contract; (3) be so obvious that "it goes without saying"; (4) be capable of clear expression; (5) not contradict any express term of the contract. Justice Allan also noted the decision of the Privy Council in *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 (PC), in which Lord Hoffman stated that the key question is what the instrument, read as a whole against the relevant background, would reasonably be understood to mean. Lord Hoffman stated that the 5-point test is "best regarded, not as [a] series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means".

This decision confirms that the threshold for implying a term in a contract is high, particularly where the contract documents are complex, and that the need for commercial certainty is an important factor to consider. However, in this case there was significant evidence which showed that prior to signing the contract both Pernod and Lion envisaged that Lion would pay excise tax on finished goods. Moreover, the implication of the term proposed would avoid manifest commercial absurdity, and therefore the Court was justified in intervening in the contract.

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## Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

## Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

## Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659