BUDDLE FINDLAY

Legal update on litigation and dispute resolution - December 2017

Scott Barker, Seb Bisley, Willie Palmer, Susan Rowe, David Broadmore, Peter Niven, Bridie McKinnon, Kelly Paterson, Oliver Gascoigne, Olly Peers

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Abuse of process in litigation funding agreements

The Supreme Court has given new guidance on when a litigation funding arrangement will amount to an impermissible assignment of a bare cause of action in *PricewaterhouseCoopers v Walker* [2017] NZSC 151.

The case concerned the validity of a litigation funding agreement between SPF No.10 Limited (SPF), and the liquidators of Property Ventures Limited (PVL) and related companies, Messrs Robert Walker and John Marshall (Funding Agreement).

SPF funded litigation by the liquidators against PriceWaterhouseCoopers (PwC) (among others) under the Funding Agreement. SPF also took an assignment of a general security agreement over the assets and undertaking of PVL and the other respondents (Assignment). The liquidators alleged that PwC breached various tortious and contractual duties owed as auditor to PVL.

PwC applied to stay the proceeding on the grounds that the combined effect of the Funding Agreement and Assignment amounted to an abuse of process. The Funding Agreement and Assignment gave SPF control in a legal sense over the liquidator's claim against PwC, as well as an entitlement to all or substantially all the proceeds of a successful claim. In effect, SPF was both funding the litigation, and would also receive the fruits of any litigation.

Despite the parties settling prior to the hearing being argued in the Supreme Court, the Court delivered judgment on the basis that the "appeal involves important issues on which the court heard full argument".

The Supreme Court held it was arguable that the arrangement would have constituted an abuse of process. It did not need to decide that point because SPF provided last-minute undertakings to the Court in which it agreed not to exercise certain rights under the Funding Agreement and Assignment.

- The timing of an impugned transaction is relevant. In this case the Assignment occurred after the litigation had commenced
- The courts will look to the substance of a transaction to ascertain whether it amounts to a bare cause of action
- The courts will scrutinise the utility of the transaction
- The amount of the potential judgment sum will be relevant in assessing whether the assignment is permissible.

See the Court's decision here.

Earthquake claims, representative actions, and litigation funding

Litigation funding arrangements continue to receive attention from the courts, including in the recent Court of Appeal decision of *Southern Response Earthquake Services Limited v Southern Response Unresolved Claims Group* [2017] NZCA 489.

This decision was an appeal from the High Court, granting leave to bring a proceeding as a representative action on behalf of an unincorporated body of homeowners (Group), and others who wished to join the proceeding. Each member of the Group had unresolved insurance claims against Southern Response Earthquake Services Limited (Southern Response) arising from the Canterbury earthquakes.

The Group alleged that Southern Response breached the respective insurance contracts in both procedural and substantive respects. The Group also alleged that Southern Response had engaged in a deliberate strategy designed to deceive policy holders, and delay claims with a view to reducing its own financial liability.

In granting leave to bring a representative action, the High Court considered that the materials used by the Group to promote the representative action had been misleading. The Court imposed terms requiring the Group to provide further information to its

members about the action and the funding arrangements, and also to provide the members with a cooling off period to decide whether they wished to leave the Group. Southern Response appealed the granting of leave and the Group cross-appealed the terms imposed.

The Court of Appeal held that the individual claims had sufficiently common issues that could be addressed through the representative process. This would promote efficiency and economy in the conduct of the litigation. The fact that significant issues would need to be worked through after the common issues were addressed by the Court, and on an individual basis, was no bar to the grant of leave.

In considering the terms imposed on the Group, the Court acknowledged that the Group's marketing materials were misleading and made the following general comments:

- It is not the role of the Court to "approve" litigation funding arrangements. The grant of leave to bring representative proceedings is not, and should not be seen as, an endorsement of the funding arrangements
- Nevertheless, the Court will ensure that, in granting leave, it is not facilitating an abuse of its processes. If a representative proceeding is based on clearly misleading funding arrangements for example, then the Court will not grant leave knowing that its processes are being used to facilitate unlawful conduct.

The appeal by Southern Response was dismissed and the cross-appeal by the Group was allowed in part, with the previous imposed term for a cooling off period set aside but the other terms remaining in force.

See the Court's decision here.

Leaky home owners allowed to bring representative action

In *Cridge v Studorp Limited* [2017] NZSC 178 the Court of Appeal upheld a decision by Ellis J allowing representative proceedings to be brought by several owners of leaky homes against Studorp Ltd and James Hardie New Zealand.

The test for a representative action is whether the parties to be represented have the same interest in the proceeding as the named parties. The Court of Appeal upheld the decision of Ellis J, and concluded that there was a common factual matrix between the members of the proposed class, and that minor variables could be accommodated by the creation of sub-classes. The Court said that to require the same evidence to be given in respect of each claim would be a wasteful duplication.

The Court of Appeal also considered a cross-appeal by the representative owners in relation to the length of time allowed under the opt-in order for qualifying members to opt in. Ellis J determined the length of the opt-in period by reference to the periods of time between filing the proceedings and the date the limitation period expired. The Court of Appeal held that the purpose of an opt-in period is not to enforce the limitation period, but rather to reduce the original class to those who take the positive step of opting in. The Court held that the length of time should be determined by considering what period of time is reasonable in all the circumstances to allow potential class members to be made aware of the proceeding, and to consider their options after making any necessary investigations and taking advice.

Given the Court of Appeal's conclusions on the above issues, it was not necessary for the Court to determine related issues about when the time stopped running under the Limitation Act for the representative owners. Nonetheless, it held that a proceeding is brought for limitation purposes when the statement of claim is filed, and that this must logically apply whenever a proceeding is commenced as a representative proceeding, regardless of whether it is judicially allowed to continue on that basis or not. Once a proceeding is filed by representative owners within a limitation period, everyone else on whose behalf they purport to sue will not be time barred.

See the Court's decision here.

Contractual interpretation: Essential term?

In *Kawarau Village Holdings v Ho Kok Sun* [2017] NZSC 150, the Supreme Court considered whether completion of all three-stages of a three-stage development was an essential term of a contract for the sale and purchase of apartments purchased off plans. The Supreme Court concluded that completion was an essential term. As the vendor was unable to complete the three-stages of development at the time of settlement, the purchasers of the apartments in the first stage were not obliged to settle their purchases.

The Supreme Court addressed the issue of essentiality in *Mana Property Trustee v James Development*, under which the courts assess essentiality by asking whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That question is determined objectively.

The minority in the Supreme Court suggested the majority had misstated the test set out in *Mana Property*. While the minority judgment considered that reference to the "centrality" of completion may be seen as a reference to its essentiality, that reference was followed by a statement that the purchasers were entitled to expect the vendor to live up to its promise relating to the development. That alludes to the existence of a promise, not the essentiality of the promise.

See the Court's decision here.

Contractual interpretation and the implication of terms: The latest from the Court of Appeal

In *Ward Equipment Ltd v Preston* [2017] NZCA 444, Kós P sought to cure the uncertainty around the proper approach to the implication of contractual terms by declaring the tasks of implication and interpretation as techniques of contractual construction.

Ward Equipment Ltd involved a licence agreement (Licence) between Mevon Pty Ltd (Mevon) (as licensor), and Ward Equipment Ltd (Ward) (as licensee). Mevon sought to cancel the Licence under an implied term permitting termination on reasonable notice. Ward rejected the termination on the basis that no such implied term existed.

The High Court agreed with Mevon, relying on a range of authority that it said established an inference that the Licence was terminable on reasonable notice in the absence of express provision.

In the Court of Appeal, French and Winkelmann JJ (with whom Kós P concurred), disagreed. French and Winkelmann JJ considered that, on the basis of "established principle", the correct approach was one of construction involving the application of ordinary principles. Since the Licence, among other things, had detailed provisions governing termination, the Licence left little room for the implication of the suggested term.

Kós P, in a concurring judgment, did not see the law on implication of terms as uncertain. In his Honour's view, implication, interpretation, and rectification are all techniques of construction. Kós P's view appears to be that both the traditional approach to the implication of terms reflected in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC), and Lord Hoffmann's more modern approach in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, are simply two sides of the same coin. Experience often teaches as much. In *Ward Equipment*, the Court was agreed that the disposition of the case was identical whichever approach the Court applied.

See the Court's decision here.

UKSC: Contractors agree to impossible contracts at their own risk

In *E.ON Climate & Renewables UK Robin Rigg East Limited v MT Højgaard A/S* [2017] UKSC 59, the Supreme Court for the United Kingdom held that it is the contractor who carries the risk, if the contractor agrees to work to a design that renders the item incapable of meeting the criteria to which he has agreed. This is a decision of significance to all commercial contracts.

The respondent, MT Højgaard (MTH), installed and built two wind farms for the applicant companies, E.ON. The foundation structures of both wind farms failed shortly after the project's completion. MTH denied liability for this failure because:

- The failure was due to MTH designing the wind farms in accordance with an international standard, J101, that contained a material error
- The relevant contract:
  - required MTH to comply with J101
  - did not require the windfarms to have a lifetime of 20 years. If this was a requirement, it was inconsistent with the requirement to comply with J101.

Overturning the decision of the Court of Appeal, and restoring the order made at first instance, Lord Neuberger (with whom the rest of the Supreme Court agreed) held that:

- An obligation to design the windfarms so that they would have a lifetime of 20 years was not inconsistent with the obligation to comply with J101
- While each case turns on its own facts, the courts in similar cases have generally given full effect to requirements that an item be produced to comply with prescribed criteria (eg a lifetime of 20 years). It is the contractor who can be expected to take the risk of agreeing to work to a design that would render the item incapable of meeting the prescribed criteria
- In this case, compliance with J101 was clearly a minimum standard, and MTH had a duty to identify the need to improve on the design
- The contracts did require the windfarms to have a lifetime of 20 years, although that requirement was only contained in the

tender documents. The terms of the contract clearly gave the relevant part of the tender documents contractual effect.

See the Court's decision here.

Assessing contractual damages - the High Court on *Golden Victory*

In the recent decision of *Forest Holdings Ltd v Mangatu Blocks Incorporation* [2017] NZHC 448, the High Court considered the controversial decision of the House of Lords in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisa* (The Golden Victory) [2007] UKHL 12, [2007] 2 AC 353, which held that events subsequent to breach of a contract may be taken into account for the purposes of assessing damages.

Forest Holdings Ltd concerned an appeal from an arbitral award. In the contract in dispute Mangatu Blocks Incorporation (MBI) granted Forest Holdings Limited (FHL) a forestry right. MBI terminated that contract ten years into its fifty year term on the basis of FHL's failure to comply with various resource management conditions imposed by Gisborne District Council. At arbitration, FHL claimed that the termination was wrongful, and sought $10.7m in damages.

The arbitrator found that MBI should have allowed FHL 120 days to remedy the problems prior to terminating the contract. However, the arbitrator concluded that FHL could not have remedied the issues within 120 days, and that any damages awarded would therefore be nominal.

The High Court reversed the decision of the arbitrator, and held that damages must be re-assessed. On ordinary principles, Heath J considered the value of the forestry right at the time of MBI's repudiation of the contract should have been taken into account. Had MBI given proper notice, FHL might have, for example, assigned the contract to a third party. FHL deserved the opportunity to adduce evidence on that point.

Heath J then went on to hold that applying Golden Victory produced the same result. It is difficult to see how Golden Victory is relevant to Forest Holdings Ltd. In Golden Victory, the Court reduced the innocent party's damages by reference to actual events occurring subsequent to the breach of the contract. That differs from the orthodox position of assessing damages as at the date of breach. However, in Forest Holdings, there are no actual subsequent events which the arbitrator could take notice relevant to the issue of damages. This is because MBI had not given the 120 days' notice as required. Accordingly, applied in this case, the analysis in Forest Holdings will be hypothetical whether damages are assessed as at the date of breach, or at some later point in time. In those circumstances, Golden Victory is unlikely to be applicable.

See the Court's decision here.

EWHC confirms avenue to attack trust assets

In *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev & ors* [2017] EWHC 2426 (Ch), the High Court for England and Wales has affirmed a possible avenue to attack trust assets, where, on a proper construction of the trust deed or deeds at issue, the substance of those deeds permits a debtor/defendant to retain beneficial ownership of the trust assets.

The claimants in the case obtained judgment in Russia against Mr Pugachev in 2015 for approximately US$1b (Judgment). In 2016 the claimants brought proceedings in England to enforce the judgment against assets held in discretionary trusts associated with Mr Pugachev. The claimants argued, among other things, that:

- The true effect of the deeds of trust was to create bare trusts for Mr Pugachev
- Alternatively, the deeds of trust were shams and the true intention was to create bare trusts for Mr Pugachev.

Birss J reviewed the trust deeds and held:

- Mr Pugachev was the settlor, discretionary beneficiary, and protector of the trusts. Objectively construed, the trust deeds allowed him to retain complete control over the assets he settled into the trusts. Accordingly, the Judge concluded that "in substance the [trust] deeds allow Mr Pugachev to retain his beneficial ownership of the assets"
- Additionally, the trust deeds were also a sham because subjectively the true intention was that Mr Pugachev retain control. Notwithstanding the fact that a New Zealand lawyer was appointed as a director of each of the trustee companies, the Judge held that the lawyer had no intentions independent of Mr Pugachev.

On both bases, the Court held that the trusts did not prevent the claimants from enforcing the Judgment against the trust assets. This decision confirms creditors will have the ability to attack trusts in cases where the settlor has extensive powers under the trust deed to ensure the settlor ultimately controls and retains ownership over trust assets.

The decision is noteworthy from a New Zealand perspective, as the trusts were governed by New Zealand law, and the Court

considered and applied principles held in a New Zealand Supreme Court case of *Clayton v Clayton* [2016] NZSC 29. As such, the decision is likely to be highly persuasive in New Zealand.

See the Court's decision here.

World-wide injunctions in the Canadian Supreme Court

In *Google Inc v Equustek Solutions Inc* [2017] SCC 34, the Supreme Court of Canada upheld a world-wide injunction issued against Google, as a non-party, requiring Google to de-index websites associated with copyright infringement.

Equustek Solutions Inc (Equustek), a manufacturer of industrial networking equipment, brought proceedings against its distributor, Datalink. Datalink manufactured and digitally marketed a competing product that infringed Equustek's intellectual property. Datalink abandoned the proceedings, refused to comply with earlier injunctions, and left the jurisdiction.

Equustek obtained an injunction requiring Google to de-index Datalink's websites world-wide. Google unsuccessfully appealed to the Supreme Court of Canada.

The Court considered a global injunction necessary to prevent irreparable harm to Equustek. Although Google had de-indexed Datalink's pages from searches conducted on "google.ca", the pages remained accessible through foreign Google URLs.

Google submitted the grant of an order with extra-territorial effect violated international comity and required Google to violate the laws of foreign jurisdictions. Without being provided evidence to support Google's submission, the Court dismissed these concerns as theoretical, noting that most countries recognise breach of intellectual property rights as a legal wrong.

The Court also rejected Google's submission that as a non-party to the substantive proceedings it could not be the subject of an interlocutory injunction, citing extensive authority to the contrary.

Google argued the injunction infringed freedom of expression. Abella J held the injunction did not remove speech that engaged freedom of expression values, because freedom of expression did not embrace the unlawful sale of goods.

Finally, the balance of convenience favoured granting the injunction - world-wide de-indexing could be done at one location from which Google's search engine was controlled.

The decision is likely to be highly persuasive in New Zealand.

See the Court's decision here.

Commercial panel of the High Court commenced

Section 19 of the Senior Courts Act 2016 establishes a specialist judicial commercial panel in the High Court. The Chief High Court Judge announced the commencement of the panel on 1 September 2017.

Eight High Court Judges were announced as the initial panel Judges, six in Auckland (Venning, Heath, Courtney, Wylie, Katz and Muir JJ) and two in Wellington (Mallon and Dobson JJ).

The Chief High Court Judge may assign a panel Judge to certain commercial proceedings. The types of proceedings include cases where transactions of more than $2m are in dispute, where a public authority is seeking to enforce regulatory standards of commercial behaviour, and cases relating to intellectual property rights. Justice Venning's announcement explains that as a general rule, panel judges will manage cases from their home registry, while the substantive hearing will be held in the filing registry. Assigned judges will, where practical, deal with interlocutory matters and case management as well as hearing substantive fixtures.

The Chief High Court Judge's announcement can be found here.

High Court rules payment of sum not urgent interlocutory relief under arbitration clause

Parties frequently agree under contract to settle any disputes about that contract by arbitration, save for any "urgent interlocutory relief". In *Clark Road Developments Ltd v Grande Meadow Developments Ltd* [2017] NZHC 2589, the High Court confirmed, unsurprisingly, that an injunction ordering payment of the $3m at issue between the parties was not "urgent interlocutory relief" for the purposes of such a dispute resolution clause.

The case concerned a development cooperation contract (DCA), under the terms of which Clark Road Developments Ltd (CRD), and the first to third defendants (Development Companies), contracted for the purpose of subdividing and developing land.

A dispute arose between CRD and the Development Companies when CRD instructed a construction company in a manner the Development Companies alleged to breach the DCA. Following mediation, CRD alleged that the Development Companies agreed to pay CRD a sum of almost $3m. The defendants refuted that. In any event, engineers engaged separately by both CRD and the Development Companies both certified the sum of $3m as a "fair and reasonable" sum for the purposes of the costs incurred by CRD under the DCA.

The High Court rejected that an interim mandatory injunction for payment of that sum was appropriate for the following reasons:

- The relief sought by CRD was inconsistent with the Arbitration Act 1996. The Court was not satisfied that the harm "is not adequately reparable by an award of damages", since the sum sought was in fact damages under the DCA
- CRD made its application on the basis that the Development Companies had no arguable defence, which in substance was akin to a summary judgment claim. However, in *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 the Supreme Court made clear that a party cannot use summary judgment to thwart a dispute otherwise governed by arbitration under contractual agreement
- It was clear that there was a dispute governed by arbitration under the DCA
- Interim mandatory injunctions for payment of money "are at best rare".

See the Court's decision here.

Limits of pre-commencement discovery

Walker v Forbes [2017] NZHC 2694 concerned two interlocutory applications for particular discovery and pre-commencement discovery of any insurance policies held by the defendants. Those policies were not at issue in the pleadings. All defendants reached agreement with the plaintiffs, under which they confirmed that they held no relevant policies of insurance, except Mr Hansen who declined to provide the plaintiffs with details of his insurance policy.

The plaintiffs alleged particular discovery orders were necessary because it was not in the public interest for a plaintiff to be required to proceed with a lengthy and expensive trial in circumstances where any judgment was likely to be of limited value because of the defendants' inability to meet it.

Dismissing the plaintiff's claim, the High Court took the view that existing authorities in New Zealand firmly establish that documents not at issue in pleadings are neither relevant nor discoverable. The High Court considered:

- The application amounted to an attempt to require Mr Hansen to provide information regarding an aspect of his financial position. A plaintiff does not have the right to obtain such information, other than in circumstances where the plaintiff can demonstrate a real risk that the defendant is dissipating his or her assets (and in those circumstances a plaintiff may obtain a Mareva injunction or Anton Piller order)
- It is for the plaintiffs to determine whether it is worthwhile to pursue the defendants' through judgment, based on its view of the merits of the claim, together with such knowledge it can glean of the defendants' financial position
- The role of the court is to determine cases that come before it, this task must be undertaken without consideration of the likely value of the judgment to the parties.

The plaintiffs sought pre-commencement discovery under High Court Rule 8.20 on the basis that they may wish to bring a claim directly against Mr Hansen's insurer. The High Court dismissed this claim, stating that the plaintiffs were not genuinely considering the claim, instead using it as a purpose of obtaining disclosure of Mr Hansen's insurance policy to assist them in the settlement negotiations, and to determine whether it was worth pursing Mr Hansen to judgment.

This case bears resemblance to the Court of Appeal's decision in *Finnigan v Ellis* [2017] NZHC 1397, which we reported on in our insolvency update here.

See the Court's decision here.

Enforcing settlement agreements that curb rights

In *Mionis v Democratic Press SA* [2017] EWCA Civ 1194, the Court of Appeal for England and Wales upheld the enforceability of a Tomlin Order that enjoined media from publishing allegedly defamatory comments.

Mr Minois was embroiled in reports of tax evasion and sought to sue the responsible newspaper for libel. Settlement was reached

on the basis that the newspaper would withdraw the offending articles and not publish anything further. More articles were published shortly after settlement. The High Court of England and Wales refused to grant Mr Minois an injunction against the newspaper. The Court of Appeal overturned that decision.

The case in the Court of Appeal focused on balancing the right to freedom of expression against the public interest in holding parties to agreements into which they freely enter. While the right to freedom of expression was undoubtedly important, when an agreement was entered into in settlement of litigation, with legal advice received, it would require a strong case for a court to conclude such a bargain was disproportionate, and unenforceable. Generally, there were benefits to parties, the administration of justice, and the public interest in allowing proceedings to settle. Here, there were obvious advantages for both parties in settling, and the parties had each taken expert legal advice before settling. In those circumstances, the Court found there was nothing disproportionate about holding the parties to their agreement.

See the Court's decision here.

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