Supreme Court of New South Wales

BANKING & FINANCIAL SERVICES LAW ASSOCIATION CONFERENCE

7 September 2024

Judicial case law update

Convergences and divergences – the last 40 years

Contract and implied terms

- Objective approach to contractual construction in Australia and New Zealand
- Australia – commence with the language used and have regard to objective surrounding circumstances: *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014); *Price (dec'd)) v Spoor (as trustee)* (2021)
- New Zealand - seems to have adopted a broadly similar approach to contractual interpretation: *Bathurst Resources Ltd v L & M Coal Holdings Ltd* (2021)
- Implied terms - Australia generally follows *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) - term must be reasonable and equitable; necessary to give business efficacy; so obvious that 'it goes without saying'; capable of clear expression; and not contradict any express term of the contract
- New Zealand adopts strict standard of necessity; first three factors are analytical tool and fourth and fifth are essential - *Bathurst Resources*

Penalties

- *Andrews* (HCA 2012) – equitable jurisdiction as to provisions that are collateral or accessory to primary stipulation, not limited to breach of contract
- *Cavendish Square Holding/Parking Eye* (2015) – rejects *Andrews* - Lords Neuberger and Sumption (Lord Carnwath agreeing) (1) penalty principle limited to breach of contract (2) a clause is enforceable if it does not impose a detriment on the party in breach of contract that is disproportionate to the legitimate interest of the innocent party - Lords Mance, Hodge, Clarke and Toulson adopt somewhat different approaches, including whether a sanction is extravagant or unconscionable
- *Paciocco* (HCA 2016) - Focus on legitimate interests of party which has benefit of clause, but not as wide as *Cavendish* as to non-financial interests; fee that is extravagant, by reference to greatest loss that could conceivably follow from breach, assessed at time of contract, would constitute a penalty at general law or in equity.
- *127 Hobson Street Ltd v Honey Bees Preschool Ltd* (2020) - whether the stipulated consequence out of all proportion to the legitimate interests of the innocent party in the performance of the primary obligation

Equity

- Meagher Gummow and Lehane on Lord Cooke; Butler and Miller on New South Wales; but the differences don't live up to expectations
- Similar approach to fiduciary duties
  - *Hospital Products Ltd v United States Surgical Corporation* (1984), *United Dominions Corporation v Brian* (1985)
  - *Chirnside v Fay* (2006); *Premium Real Estate Ltd v Stevens* (2009)
- Does NZ law take view that no positive fiduciary duties? – *Breen v Williams* (HCA1996); *Howard v CoT* (HCA 2014)
- Recognition that limited by terms and scope of relationship
- Earlier NZ cases more receptive to assimilation of common law and equitable principles than Australian cases – but limited divergences in practice – contributory negligence, exemplary damages and knowing receipt
- Acceptance of a unified estoppel principle in New Zealand

Competition and consumer law

- Substantial similarities in the *Australian Consumer Law* and the *Fair Trading Act* 1986 (NZ)
- Both Australia and New Zealand also have statutory prohibitions on unconscionable conduct
  - *ACL* ss 20-22; recent decision in *Wills v ACCC* [2024] HCA 27
  - *Fair Trading Act* (NZ) ss 7-8, introduced by the *Fair Trading Amendment Act* 2021 with effect from 16 August 2022
- Prohibition on misleading or deceptive conduct
  - *ACL* s 18, *Fair Trading Act* (NZ), s 9
  - whether conduct is misleading or deceptive is determined as a question of fact, with reference to the general usage of those terms, and liability does not require an intention to mislead or deceive
  - *Contract and Commercial Law Act* 2017 (NZ), s 35
- Unfair contract terms – *ACL* ss 23-28, *Fair Trading Act* (NZ) ss 26B-26E, but NZ allows limited contracting out

Insolvency

- Similarities in the Australian and New Zealand insolvency regimes, with questions as to the effectiveness of those regimes.
- Similar liquidation regimes - corresponding approach to preferences, now not permitting the "peak indebtedness" approach *Timberworld v Levin* (NZ 2015), *Bryant v Badenoch Integrated Logging Pty Ltd* (HCA 2023)
- Australia introduced "simplified" form of liquidation for businesses with liabilities of less than AUD$1 million which commenced from 1 January 2021, only in creditors' voluntary liquidation
- Primary alternative to a liquidation in Australia is a voluntary administration under *Corporations Act* Pt 5.3A; New Zealand adopted broadly similar voluntary administration regime in *Companies Act* 1993 (NZ) Pt 15A. Simplified restructuring process introduced in Australia as alternative to the Australian voluntary administration regime but is little used
- Both Australia and New Zealand permit schemes of arrangement under *Corporations Act* Pt 5.1 and *Companies Act* (NZ) Pt 15 - largely used for members schemes and only rarely for creditor's schemes in Australia. New Zealand law permits a compromise with creditors without court involvement under *Companies Act* (NZ) Pt 14

Duty to take account of creditors' interests and insolvent/reckless trading liability

- Duty to take into account creditors' interests where there is a real and not remote risk of insolvency - *Nicholson v Permakraft (NZ) Ltd (in liq)* (1985); frequently cited in Australian case law, but not followed in England in *BTI 2014 LLC v Sequana SA* (2023)
- Australia - insolvent trading liability under Corporations Act s 588G, now with safe harbour defence to promote restructuring
- New Zealand
  - *Companies Act* (NZ) s 135 prohibits reckless trading and is not limited to a company that is in or near insolvency; *Madsen-Ries (as liquidators of Debut Homes Ltd (in liq)) v Cooper* (2021)
  - *Companies Act* s 136 prohibits a company incurring an obligation unless "the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so"
  - *Yan v Mainzeal Property & Construction Ltd (in liq)* (2023) - duties under ss 135 and 136 are owed to the company and directed to protecting the interests of creditors

Financial services

- Australia – Future of Financial Advice reforms; product design and distribution obligations and new case law; BEAR and now Financial Accountability Regime.
- Recent focus on the complexity of aspects of the Corporations Act, and particularly Chapter 7 dealing with financial services – ALRC Report but no government response
- Recent case law considering application of licensing and other requirements to cryptocurrency products
- New Zealand - Scope of financial services regulation expanded
  - New regulatory regime for financial advice introducing additional conduct requirements introduced by the Financial Services Legislation Amendment Act 2019 (NZ), with effect from 15 March 2021
  - Financial Markets (Conduct of Institutions) Amendment Act 2022 (NZ) introduced Conduct of Financial Institutions or "CoFI" regime for regulation of retail banking and insurance services and an obligation to treat customers fairly commence from 31 March 2025.
- Both Australian and New Zealand financial services law adopt product disclosure regimes
- Does New Zealand face similar issues to Australia as to the effectiveness of enforcement and complexity?