

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

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EXEMPTION CLAUSES, THE CIVIL LIABILITY ACT AND THE TRADE PRACTICES ACT (REPEALED)

By Edmund Finnane

In *Insight Vacations Pty Ltd v Young* [2011] HCA 16 the High Court had to consider the operation of s 74(2A) of the *Trade Practices Act 1974* (Cth) (*Repealed*) (TPA) where a defendant relies on s 5N of the *Civil Liability Act (2002)* (NSW) (CLA).

The implied warranties in relation to the supply of services, in s 74 of the TPA, were, by subsection 74(2A), made subject to any state laws limiting liability for a breach. The TPA has now been repealed, and the *Australian Consumer Law*, being Schedule 2 of the *Competition and Consumer Act 2010* (Cth), which replaces it, does not contain an equivalent provision to s 74(2A). However, the *Trade Practices Act* provisions are likely to arise in litigation for some time yet.

The plaintiff had purchased from the defendant a tour package, which included a coach trip. In the course of the coach trip she was injured while out of her seat. The contract contained an exemption clause, which took effect if a passenger was not wearing her safety belt. The plaintiff sued the tour company for failing to render services with due care and skill, in breach of the warranty implied by s 74(1) of the TPA.

The defendant tour company sought to rely on s 5N of the CLA as being a state law of the type relevant to s 74(2A) of the TPA. Section 5N provides that contracts for the supply of recreational services may include terms excluding liability for breach of an express or implied warranty that the services will be rendered with reasonable care and skill, and limits the circumstances in which such provisions can be rendered void or unenforceable.

The Court (French CJ, Gummow, Hayne, Kiefel and Bell JJ) held that s 74(2A) of the TPA does not pick up s. 5N of the CLA and apply it as a surrogate federal law. The provision does not by its own terms limit liability for breach of contract, and so it is not a law of the kind described in s 74(2A).

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EVIDENCE - RULE IN BROWNE v DUNN - INFERENCE OF DISHONESTY & BRIGINSHAW STANDARD: Bale & Anor v Mills [2011] NSWCA 226

The trial judge found that a solicitor employed by the respondent's solicitor deliberately misled the respondent, sufficient to ground professional misconduct. The findings were made based upon inferences drawn from two letters from the solicitor, in circumstances where he was not cross-examined in relation his letters or their subject.

The Court of Appeal emphasised that fairness of the administration of justice is central to the rule of practice in *Browne v Dunn*, the purpose of which is to ensure a fair trial for the parties and to ensure the fair treatment of witnesses. Breach of the rule requires the whole conduct of the trial to be examined to appreciate the consequences of the breach and to determine what should be done to correct any unfairness.

Adopting that approach, fairness dictated that in the absence of any cross-examination on the subject no adverse inference could be drawn from the letters. Further, an inference of dishonesty could not be drawn having regard to s 140 of the *Evidence Act* and *Briginshaw v Briginshaw* [1938] 60 CLR 336 which require clear and cogent proof of allegations of dishonesty and other serious allegations.

By Gary Doherty

INTERNATIONAL ARBITRATION – STATE IMMUNITY - The Democratic Republic Of Congo & Ors v FG Hemisphere Associates LLC [2011] HKCFA 67

This landmark decision concerned the enforcement of two International Chamber of Commerce ('ICC') arbitration awards against the Democratic Republic of Congo's ('the Congo') assets in Hong Kong. The core question of law was whether, after China's resumption of the exercise of sovereignty on 1st July 1997, it was open to the Hong Kong courts to adopt a doctrine of state immunity which recognizes a commercial exception to absolute immunity and therefore a doctrine on state immunity which is different from that practised by the Peoples Republic of China ('PRC').

The doctrine of Absolute Immunity now applies in Hong Kong, and a foreign state's assets will be immune from execution in Hong Kong unless it is clear that it has waived both immunity from suit and from execution. Written waiver clauses in the arbitration agreement will not be effective to establish waiver at the enforcement stage.

This decision raises doubt as to the continued suitability of Hong Kong as an appropriate forum for investor/state arbitrations in circumstances where it will not be possible to seek judicial assistance in aid of arbitration against foreign states.

By Jennifer Beck

APPEALS – DISCOVERY – Palavi v Radio 2UE Sydney Pty Limited [2011] NSWCA 264

The Court upheld a decision of the District Court striking out two allegations in the plaintiff's Statement of Claim in a defamation action on the basis of a finding that she had failed to comply with discovery obligations. The plaintiff was found to have deliberately disposed of two mobile phones (which come within the definition of "documents" under the Interpretation Act 1987 and the Evidence Act 1995) in order to avoid complying with an order for discovery.

The Court was satisfied that the plaintiff's actions, which amounted to an abuse of process, created "a not insignificant risk to the ability of the [defendant] successfully to propound its defence", so that the proper order was to strike out two of the allegations in the Statement of Claim.

By Jason Downing

ANNOUNCEMENTS

Jennifer Beck has been invited to Judge the 10th National Round of Jessop Moot Court International Law Competition in Beijing in February 2012.

Seminar papers added to the website

Therese Catanzariti: "Capacity - Testamentary, Powers of Attorney and Financial Management Orders"

<http://www.13wentworthselbornechambers.com.au/catanzariti.html>

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