

Insurance Brief

October 2002
Issue 13

A WIDENED LIABILITY UNDER THE FAIR TRADING ACT?

Kinsman v Cornfields Limited
Court of Appeal 13/12/01

Specialised Livestock Import Limited v Borrie
Court of Appeal 28/03/01

The obligations and potential liabilities imposed by section 9 of the Fair Trading Act not to engage in conduct that is misleading or deceptive or likely to mislead or deceive will be very familiar to readers.

What will be less familiar is how far that liability may extend. The above cited recent New Zealand Court of Appeal decisions extend liability to the personnel within a corporate who actually engaged in the conduct complained of.

Not only does this represent a significant incursion into the concept of limited liability for a company, it gives rise to the question of whether Directors and Officers or Employers Liability cover should extend to such situations.

At common law, the principle established in *Trevor Ivory Limited v Anderson* held that the corporate veil would only be pierced if a person assumed a personal responsibility that then

gave rise to a claim for negligent misstatement in tort.

In the *Kinsman* case, Mr Kinsman sold his franchise to Cornfields. Representations as to turnover were made which were held to be out of date albeit that they appeared to be current. They overstated the turnover.

The question was whether Mr Kinsman could be personally liable rather than his company. The argument propounded by Mr Kinsman was that his statements should be seen as being made by the company and that he was but a conduit. The "conduit" defence is well established in Fair Trading Act cases: essentially it says, "I did not myself make the representation, I merely passed it on".

The Court held that it would be a rare case that a director who takes a role in negotiations could avoid the Fair Trading Act liability on this basis. The Court said the director in such a case was clearly the alter ego of the company and could not fairly say he was just passing another party's words on.

In *Specialised Livestock Import Limited v Borrie*, a similar sort of argument was based on contracts for the sale of live ostriches and the importation of ostrich eggs. Representations

were made in the course of those transactions and in the High Court judgment was entered under the Fair Trading Act against both the vendor companies as well as the shareholders personally.

On appeal, the Court of Appeal upheld the High Court's decision that the vendors could be personally liable for their conduct in making representations under section 9.

These cases have effectively ushered in a regime of concurrent personal liability for directors or employees speaking on behalf of their company or employer. Whether there is a corresponding right of indemnity from company to director or employer to employee remains unclear.

Quite apart from the underlying public policy concerns that such a non-legislated development gives rise to, it nevertheless would appear to establish a new liability for insurers offering Directors and Officers and Employers Liability Cover.



In this Issue

- | | |
|---|---|
| 1 | <i>A Widened Liability Under the Fair Trading Act?</i> |
| 2 | <i>Revisiting Exemplary damages</i> |

REVISITING EXEMPLARY DAMAGES (YET AGAIN)

A v Bottrill, Privy Council, 6 September 2002

Last year, the Court of Appeal allowed Dr Bottrill's appeal against a High Court order for a new trial. The trial was to canvass an exemplary damages claim against Dr Bottrill arising from his alleged negligent misreading of cervical smears. In doing so, the Court laid down guidelines setting out when exemplary damages would be awarded for acts of negligence.

The Court put a gloss over the test of Tipping J. in **McLaren Transport Limited v Somerville**. Instead, the Court of Appeal said:

"... exemplary damages may be awarded for negligence only in those cases where the defendant is subjectively aware of the risk to which his or her conduct exposes the plaintiff and acts deliberately or recklessly taking that risk."

By a majority, the Privy Council has now quashed that in its recent judgment.

Their Lordships were split 3:2. The majority in the Privy Council was not prepared to say that intentional wrongdoing or conscious recklessness was an essential prerequisite to an award for exemplary damages in negligence cases. Their Lordships believed this would limit the Court's jurisdiction.

Additionally, the majority challenged the Court of Appeal's argument relating to policy. The Court of Appeal had relied on several policy considerations. These centred on the lack of certainty for parties if intentional wrongdoing or conscious recklessness was not a prerequisite and a concern that there would be an increase in claimants seeking exemplary damages for negligent acts if there were not clear tests restricting the number of such

claims. It was, essentially, a "flood gates" argument.

Their Lordships believed themselves able, on the facts of this case, to evaluate these policy considerations, despite the fact that it normally leaves these matters to the local Court to decide.

In essence their Lordships did not really consider that the "flood gates" argument constituted a real threat. They noted also that New Zealand judges are very restrictive anyway on the quantum of awards that are made on successful exemplary damages claims.

It was held therefore that the exemplary damages doctrine should not be limited in negligence cases. As a result, the matter was sent back to the High Court for a trial to be held on whether any award of exemplary damages is justified.

Dr Bottrill will now have to stand trial and be cross-examined. Whilst the legal arguments were interesting, what we now have is a decision which essentially reverts the law back to the **McLaren Transport v Somerville** test. This is arguably unhelpful.

The problem with the **McLaren Transport** test was that whilst it said that exemplary damages could be awarded for cases of negligence, what constituted negligence serious enough to justify exemplary damages was always something open to interpretation and could depend upon which judge one struck on any given day.

Therefore the uncertainty which the Court of Appeal was trying to avoid seems likely to continue. The only saving grace is that the Privy Council was quick to say that any

award of exemplary damages must continue to be at a low level. It was said:

"... their Lordships cannot over-emphasise what has already been indicated more than once. The cases where it is appropriate to make an award of exemplary damages are exceptional.

The cases where it is appropriate to make an award of exemplary damages in the absence of intentional wrongdoing or conscious recklessness will be exceptional and rare indeed. It must always be kept in mind that compensation is not the purpose of exemplary damages. A perceived need for compensation, or further compensation, is not a proper basis for making an award of exemplary damages."



PAUL SMITH
PARTNER

Fortune Manning

66 Wyndham Street
Auckland
Phone 09 915 2401
Fax 09 915 2402

Geoff Turner
gjt@fmlaw.co.nz
DDI 09 915 2435

Rob Coltman
rpc@fmlaw.co.nz
DDI 09 915 2417

Paul Smith
pms@fmlaw.co.nz
DDI 09 915 2415

Visit our website
www.fmlaw.co.nz