

Litigation Alert

27 May 2009

The long reach of the Commerce Act

The Court of Appeal's recent decision in the lengthy *Koppers Arch* litigation has confirmed that overseas defendants cannot shield themselves from the Commerce Act 1986 ("**Commerce Act**") by simply not holding meetings or sending communications within New Zealand.

On 18 March 2009 the Court of Appeal in *Harris & Ors v Commerce Commission* [2009] NZCA 84 found the Commerce Act can apply to persons who are alleged to have entered into arrangements directed at New Zealand markets; even where they:

- (a) are not resident or even carrying on business in New Zealand, and
- (b) have not personally engaged in any conduct in or communications to New Zealand.

The Commerce Commission had alleged that between 1998 and 2002 manufacturers and suppliers of wood treatment chemicals, together with various individuals including the appellants, had been involved directly in price fixing; contravening sections 27 and 29 of the Commerce Act. Despite the appellants residing offshore the Commission had served notice without seeking the Court's permission.

The appellants promptly filed proceedings disputing the jurisdiction of the High Court under rule 131(6)(a) (now r 5.49) of the High Court Rules. They argued that the Commerce Act did not apply to them as overseas defendants because s 4(1) of the Commerce Act prescribes the only circumstances in which conduct of overseas actors would be within jurisdiction of the Commission:

This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to that extent that such conduct affects a market in New Zealand.

The Court of Appeal rejected this interpretation and upheld the High Court decision of Justice Hugh Williams. Because the Commerce Act does not directly contemplate situations where a defendant is not a New Zealand resident or carrying on business here the Court must look to the purposes of the Commerce Act to interpret whether the conduct of the appellants fell within the Commission's jurisdiction. Three factors were integral to their decision:

- (a) Because the Act applies to actions aimed at the New Zealand market, positive conduct in New Zealand was not a necessary factor for the Court. However, a case for jurisdiction may be stronger where the parties involved have, for example, attended meetings or sent communications within New Zealand.
- (b) The Commission asserted that the anti-competitive behaviour in question was analogous to criminal conspiracy, and the Court agreed that this was an appropriate comparison for interpreting the territorial scope of the Commerce Act. Criminal conspiracy formed abroad to commit an illegal act in New Zealand can be prosecuted here even though nothing has occurred here in furtherance of it. By incorporating this concept into the Commerce Act, Parliament, the Court implied, must have intended the legislation to have application in situations beyond the limitations of s 4.
- (c) Finally, the Court considered that a legal analysis of the Commerce Act must reflect the realities of the evolving commercial sector and its decreasing geographical boundaries. Taking this into account the actions of the Commission were therefore within the jurisdiction provided under the Commerce Act, and a full trial could now proceed.

Consequently, the Court of Appeal has extended the territorial reach of the Commerce Commission. An overseas entity, by directing an anti-competitive arrangement at a New Zealand market and then implementing it through local entities, will still

engage the Commerce Commission's jurisdiction.

However, the Court was quick to note that the Commission will face practical problems in bringing parties to account.

Court signals that FTA continues to have teeth

Despite all the recent controversy and debate about the role the Commerce Commission should play under the new National Government, the recent decision in *Commerce Commission v The Warehouse* (District Court Auckland, 2008-004-11407/2007-004-14313, 27 February 2009) shows that the Court continues to take a hard line when it comes to awarding penalties in cases where consumers may have been misled or deceived.

Aside from the negative publicity, The Warehouse received total fines of \$209,600 for a number of breaches under the Fair Trading Act ("**FTA**") which included:

- (a) A "Madagascar" DVD being advertised for \$10 in a brochure when it was intended that the \$10 was only a deposit;
- (b) Goods advertised as "Advertised Special" or on sale for a "limited time" when they were available at the same price prior to the "sale";
- (c) Certain products claimed as being "exclusive to The Warehouse" when they were available at other stores nationwide;
- (d) Various products advertised for sale at specific prices, but there was not a reasonable quantity of stock to support the advertisements ie bait advertising;
- (e) The contents of three types of duvet inners were incorrectly labelled as containing certain percentages of goose down and duck down clusters when the real content was significantly less.

In sentencing The Warehouse, the Court took into account a number of aggravating factors which may be relevant for a large number of businesses who promote their goods and services to the general public, including:

- (a) The statements made in relation to the duvet inners were more serious as they were "deliberate". The misleading nature of the representations was brought to The Warehouse's attention but it continued selling the goods, albeit at a discounted price, and the customer was totally reliant on the advertising and representations made by The Warehouse;
- (b) The representations were made nation-wide;

- (c) The financial circumstances of The Warehouse including the number of stores, the number of employees and the annual turnover. It was noted that The Warehouse is a "large organisation with resources to implement compliance programmes";
- (d) The Warehouse had previous convictions under the FTA and had received prior warnings.

This decision, following on from the penalties awarded in decisions such as the airline, bank and Ribena cases shows a willingness by the Court to impose significant penalties on major traders in New Zealand. These decisions should act as a strong incentive for businesses to ensure their compliance systems are in place and, more importantly, are actually working.

IRD - powers of search and seizure

This IRD has some of the most extensive search and seizure powers of any public agency in New Zealand. A recent High Court case discussed the limits on these powers and how they relate to the search and seizure of information stored on computers: *Avowal Administrative Attorneys Limited and Ors v District Court at North Shore* (2009) 24 NZTC 23,252.

This decision is the latest in a line of decisions stemming from IRD searches of locations associated with Mr Petroulias, a former Assistant Tax Commissioner in Australia who was successfully prosecuted for wrongdoings in office. Section 16 of the Tax Administration Act 1994 ("**TAA**") permits IRD officers to enter premises to inspect and remove any "books or documents" considered necessary for carrying out the Commissioner's functions under the Inland Revenue Acts. In this case, searches were carried out at several locations in New Zealand, during which several hard drives and computers were seized or copied by the IRD.

The first issue concerned whether computer hard drives fell within the meaning of "books and documents" in the TAA. Given the expansive definition of those terms in the TAA, which include reference to computer discs and reels "or any other type of record", Venning J concluded that computer hard drives are books or documents under the TAA and therefore capable of seizure.

At two of the search locations the plaintiffs made a blanket claim of legal privilege over all material stored on computer hard drives. Following that claim of privilege, the IRD did not conduct a keyword search of the hard drives to check if they contained relevant information. Such a preliminary search should ordinarily be undertaken by the IRD under s 16 to ensure that the material being seized or copied is necessary or relevant to the investigation. This requirement stems from the New Zealand Bill of Rights Act 1990, which protects

against unreasonable searches and seizures. The plaintiffs contended that as a preliminary relevance test had not been undertaken the seizure and copying of the hard drives was unlawful.

The Court rejected the plaintiffs' argument. It held that while the IRD should ordinarily carry out a preliminary inspection of books or documents before copying or removing, where a blanket claim of privilege is made, that claim should be respected until the District Court determines whether it was properly made under s 20 of the TAA. It was therefore appropriate for the IRD officers not to carry out a preliminary inspection before copying the hard drives once the claim to privilege had been made. The Court noted however that it may be appropriate in such circumstances to conduct a keyword search with only a brief and cursory inspection to ensure that the documents might be relevant.

Another issue in the decision related to the process to be undertaken with encrypted information. At one of the search locations, the contents of a hard drive were encrypted and could not be easily keyword searched. The Court found that in those circumstances a preliminary keyword search is not necessary. The Court concluded that the ultimate test is whether the inspection is conducted in a reasonable fashion and whether the search and decision to copy is a reasonable one having regard to all the circumstances of the case. Since the information was encrypted a keyword search would be ineffective, and because the IRD officers reasonably believed that the encrypted information was likely to provide information relevant for the purposes of the investigation, it was reasonable and open to them to take copies of the encrypted hard drives or remove them under s 16B of the TAA without a preliminary inspection.

While the IRD did conduct keyword searches on most of the non-encrypted computers copied or seized in this case, it did not do so for all computers and hard drives. In respect of these computers, the relevance test had not been satisfied and the taking of the information from those hard drives and computers was unreasonable and unlawful. As a result the IRD was required to return two hard drives, a laptop, and a USB drive to the plaintiffs.

Without prejudice letter not admissible

A recent ruling of the House of Lords in *Ofulue v Bossert* [2009] UKHL 16 has found that a without prejudice letter sent by tenants offering to buy the property could not be used as evidence of acknowledgement of the owners' title to the property so as to defeat the tenants' claim to adverse possession.

In 1976 the Ofulues became the registered owners of a property in Bow, East London and let the property to a Mr Osborne. In 1981 Mr Osborne sublet the property to Mr Bossert and his daughter. On visiting the property in 1983 and finding the Bosserts in occupation, Mr Ofulue asked them to leave. They declined to do so. The Ofulues commenced proceedings in 1987 to regain possession. The Bosserts counterclaimed for the grant of a lease, claiming they had been promised one in return for carrying out repairs. In 1991, with the possession proceedings still pending, the Bosserts made an offer to buy the property in a without prejudice letter. The Ofulues rejected the offer but failed to pursue the possession proceedings which were stayed automatically in 2000.

In 2003, the Ofulues issued new proceedings. By this stage Mr Bossert had died. His daughter contended that ownership of the property had passed to her by adverse possession after she and her father had been in uninterrupted possession as trespassers for more than 12 years before the proceedings started. The judge accepted this claim, rejecting the Ofulues' contention that the admission of title constituted an acknowledgement for the purposes of s 29 of the Limitation Act 1980 ("**Act**") which had stopped time running. The Ofulues appealed to the Court of Appeal which dismissed the appeal and confirmed the judge's findings.

The majority of the House of Lords, led by Lord Neuberger (with Lord Scott of Foscote dissenting) disagreed with the Court of Appeal stating that the admission of title in defence and the offer to purchase the property in the letter were both capable of amounting to acknowledgements for the purpose of s 29 of the Act. However, because the defence was served more than 12 years before the proceedings began the Ofulues could not rely on this argument. The admission of title in defence in the earlier proceedings did not operate as a continuing acknowledgement of the claimants' title for the purposes of s 29 but only arose as at the date of the document.

Mrs Ofulue's only argument to defeat the claim would be to rely on the without prejudice letter, and an exception to the rule that statements made in negotiations are inadmissible and cannot be given in evidence. However, the majority of the House of Lords found that the privilege attaching to the without prejudice letter was sacrosanct and held there were no good grounds for admitting the offer to purchase into evidence.

Calls to restrict the without prejudice rule were not viewed with much enthusiasm by the majority of the Court. Lord Roger of Earlsferry stated at paragraph 57 that as a matter of principle, he would not restrict the without prejudice rule unless justice clearly demanded it, and in this case, it did not. The without prejudice rule was founded partly in public

policy and partly in the agreement of the parties with the underlying objective being to give parties the protection to speak freely about all issues in the litigation.

The decision of the Court was not unanimous however with Lord Scott of Foscote seeking to restrict the protection to the proceedings or issues that the without prejudice negotiations sought to settle. On the suggestion that there should be an exception where the admission did not go to any issue in the earlier proceedings, Lord Neuberger held that, "save perhaps where it was wholly unconnected with the issues between the parties to earlier proceedings, a statement in without prejudice negotiations should not be admissible in evidence in any proceedings, other than in exceptional circumstances".

Feltex Carpets - Refining the Scope of the Personal Property Securities Act

Feltex Carpets Limited went into receivership in September 2006, sparking a spate of litigation across the country.

Two and a half years on, the company has again attracted media attention following the recent laying of charges against its directors under the Financial Reporting Act 1993. The High Court's recent judgment on the Feltex class action litigation was also covered in our November 2008 Litigation Alert.

On 6 April 2009, the Court of Appeal delivered its judgment in *J S Brooksbank and Company (Australasia) Limited v EXFTX Limited (In Receivership and Liquidation) & Anor* [2009] NZCA 122. Although perhaps not as well publicised as other judgments in the Feltex litigation, the case is notable in that it further defines the scope and application of the Personal Property Securities Act 1999 ("**PPSA**").

The case concerned the supply of wool by J S Brooksbank & Co (Australasia) Limited ("**JSB**") to Feltex Carpets Limited (which later changed its name to EXFTX Limited (In Rec and Liq)) ("**Feltex**"). JSB had been a supplier of wool to Feltex for some time. However, it was required to revisit its supply arrangements with Feltex in 2006 when its insurers withdrew credit cover in respect of JSB's dealings with Feltex due to Feltex's financial difficulties.

Under JSB's revised supply arrangements with Feltex, Feltex was not to obtain possession of, or title to, any JSB wool until after JSB had received payment for that wool by way of cleared funds. Unfortunately, due to a communication breakdown, some wool was released to Feltex by JSB's brokers before it had been paid for by Feltex. Realising the mistake, Feltex employees set aside

the wool. Although subsequent attempts were made to pay for the wool, Feltex was put into receivership before it could do so. When JSB realised that the wool had not been paid for, it sued the receivers for possession of the wool.

The High Court found that the contractual arrangement between the parties was a conditional sale agreement and involved an agreement to sell wool subject to the retention of title. JSB's interest in the wool under the supply contract was therefore a security interest within the terms of the PPSA and, being unregistered, was subordinate to the registered security interest held by a bank over all Feltex's present and after acquired property. JSB appealed to the Court of Appeal from this decision.

Contrary to the High Court's ruling, the Court of Appeal found that JSB's rights to the wool were not affected by the PPSA and that the wool was not subject to the bank's security interest in Feltex's present and after acquired property. As such, JSB was entitled to sue in conversion for the return of the wool.

Unlike the typical retention of title situation, the intention of the supply agreement between JSB and Feltex was not to enable JSB to have recourse to the wool if payment was not made - rather, it was intended to prevent any such issue from ever arising. The Court of Appeal found that the supply agreement therefore did not "in substance" secure payment by Feltex, and therefore did not give rise to a security interest under the PPSA.

Further, the bank's security interest in Feltex's property could only "attach" to that property when Feltex obtained rights in it. In this case, the delivery of the wool to Feltex in error did not give Feltex any rights in the wool, nor did it impose any obligations on Feltex to pay for it. The wool therefore never became subject to the bank's security interest.

Importance of time limits reaffirmed

A series of recent cases involving appeals from decisions of the Human Rights Review Tribunal ("**Tribunal**"), have highlighted the need to be aware of and strictly adhere to statutory time limits when bringing appeals from any Tribunal.

In the case of *Attorney-General v Howard* (High Court, Wellington, CIV-2008-485-1291, 17 April 2009, Williams J) the Tribunal had, on 15 May 2008, issued a declaration that clause 52 of the First Schedule to the Injury Prevention Rehabilitation and Compensation Act 2001 ("**IPRC Act**") was inconsistent with s 19 of the Bill of Rights Act 1990 ("**BORA**").

On 16 June 2008, the Attorney-General purported to appeal this decision pursuant to s 123(4) of the Human Rights Act 1993 ("HRA"), which requires any appeal to be "made" within 30 days of the Tribunal's decision. The Attorney-General filed his notice of appeal in the High Court on 16 June (the last day of the 30-day time limit), but failed to serve and file a copy of the notice of appeal on Mr Howard and in the administrative office of the Tribunal respectively, until several days later.

The Attorney-General subsequently sought to cure the defective service, with the consent of Mr Howard, in reliance on rule 1.5 of the High Court Rules. The Tribunal however was not advised of the application. Upon becoming aware of the application, the Tribunal brought to the Court's attention what it perceived to be an issue as to whether the Court had jurisdiction to cure non-compliance with a statutory time limit, even by consent.

In support of his application the Attorney-General argued that the time limit specified in s 123(4) of the HRA had been waived by Mr Howard. Alternatively, he argued that, even if it had not, the time limit applied only to the requirement to file a notice of appeal in the High Court and not to the requirements to serve and file copies of the notice of appeal on Mr Howard and the Tribunal respectively.

In delivering his decision, Joseph Williams J held that while in theory at least it might be possible to waive mandatory statutory filing requirements (where there is consent from all the parties) his preferred view was that there is no jurisdiction for the Court (even with consent) to waive or extend a statutory time limit, except as provided for by the statute. Williams J did not have to decide this point, however, because he held that, as a party for the purposes of the proceeding, the Tribunal's consent to waive the time limit ought to have been, but had not, been obtained.

Turning to the Attorney-General's alternative argument, His Honour held that in order for an appeal to be "made" under s 123(4) of the HRA it was necessary not only for a notice of appeal to be filed in the High Court, but also for a copy to be served on all other parties and a copy filed in the administrative office of the Tribunal within the 30-day appeal period. The 30-day time limit in s 123(4) therefore applied to not one, but all three of these requirements.

Since the Attorney-General had failed to comply with all of these requirements within the time limit, and since Williams J had found that the time limit had not been waived by the parties, His Honour accordingly held that the appeal had been brought out of time and that the Court had no power to correct the flaw.

Just a short time after being delivered, this decision was affirmed by French J in *Stoves v Commissioner of Police* (High Court, Christchurch, CIV-2009-409-0011, 20 April

2009). This case concerned very similar facts, except that the appellant in this case was a self-represented lay litigant rather than the Attorney-General and the subject matter was a complaint under the Privacy Act 1993. Again, a notice of appeal had been filed in the High Court within the 30 days specified by s 123(4), but a copy was not served on the other party and or the Tribunal until much later.

While expressing sympathy for the appellant and his argument that allowances should be made for the fact that he was not a lawyer, and the fact that no one had been prejudiced by the delay, French J nonetheless held that the authorities (including *Howard*) clearly established there was no jurisdiction for the Court to waive or extend a statutory time limit under rule 1.5 of the High Court Rules (nor rule 1.19 or 20.4(3)).

While *Howard* and *Stoves* centre on the appeal provisions in the HRA, the provisions as to service of appeal notices are strictly applied in many settings, as the range of cases traversed in both judgments makes clear. It remains to be seen whether either of these decisions will be appealed. However, the message to would-be appellants remains clear: adhere to statutory time limits.

Note: The Tribunal was represented by Russell McVeagh Partner, Andrew Butler. The Crown has appealed against the High Court decision.

Real estate company punished for breach of fiduciary obligations

On 6 March 2009 the Supreme Court in Wellington upheld the High Court decision that Auckland real estate company Premium Real Estate ("**Premium**") breached its fiduciary obligations to Auckland couple, Mr and Mrs Stevens, over the sale of their luxury residence (*Mark Moncrieff Stevens and Others v Premium Real Estate Ltd* [2009] NZSC 15). The decision heralds a vivid warning to real estate agents representing vendors that they must make full disclosure of any past dealings they have had with the purchaser.

In 2004 the Stevens signed a sole agency agreement with Premium for the sale of their home. Premium was aware that the Stevens had purchased a residence in Parnell, though this agreement was conditional upon the couple selling their home for \$3 million or "such lesser sum as they may accept". The Stevens made it clear they believed the property was worth \$3 million but Premium advised that it was worth less. In April 2004, based on the advice of Premium, the Stevens agreed to sell their property for \$2.575 million. Litigation was sparked when the Stevens discovered that just four months

later the purchaser resold the property for \$3.555 million and that Premium had acted as the agent for the vendor in the subsequent sale.

In the High Court it was revealed that Premium knew that the original purchaser intended to on-sell the property for commercial gain and yet they did not correct the Stevens' impression that the house was being purchased as a private residence. Finding the Stevens' property to be worth \$3.25 million at the time of its initial sale, the High Court held Premium liable for breach of fiduciary duty and ordered them to pay damages of \$675,000 (the difference between what they had sold the property for and what the High Court assessed the value to be) and to return the commission earned on the property's sale. The Court of Appeal dismissed an appeal by Premium but reduced the monetary award owing to the Stevens to \$225,000 and allowed Premium to retain the commission.

Premium further appealed to the Supreme Court who unanimously dismissed their appeal against liability and, by majority, allowed the Stevens' appeal against the quantum of compensation awarded to them by the Court of Appeal. Whilst the Court declined to confirm that there is a general duty of real estate agents to disclose all potential conflicts of interest, the Court was firm in its view that Premium had deliberately misled the Stevens about the purchasers purpose in acquiring their property and that the High Court and Court of Appeal were correct in their assessment that a breach of fiduciary duty of loyalty had taken place. Elias CJ put it simply in her concluding remark that "concealment of material information, thereby perpetuating a misleading impression given by the agent, was a breach of the obligation of loyalty". Premium was ordered to pay the Stevens \$659,813 (the difference in net proceeds of a sale and a sale at \$2.575 million). Furthermore, the High Court's order for repayment of the commission of \$67,050 was reinstated on the premise that, in the absence of good faith representation, it was not earned.

Still discontent with the decision, Premium's latest plea was an application to recall the Supreme Court's judgment and refer the question relating to the market value of the property back to the Court of Appeal. On 3 April 2009 the Supreme Court dismissed the application and was critical of Premium's earlier lack of concern over the Court's ability to properly assess the question of valuation. The Court concluded it was not in the interests of justice that "having with apparent deliberation omitted to provide sufficient support for its argument on valuation, the respondent should be given an opportunity of remedying that omission in the manner which it now proposes".

Adjudicator's ability to determine their own jurisdiction under the Construction Contracts Act

One of the core features of the Construction Contracts Act 2002 ("**Act**") is to provide a mechanism for the quick and inexpensive determination of disputes under construction contracts. The Act achieves this by enabling parties to construction contracts to refer disputes for the determination of an adjudicator. If the result of the adjudication is that one party is required to pay the other money, the party owed money may apply to have the determination entered as a judgment in the District Court. The High Court has considered in *Patel v Pearson Group Limited* (High Court, Wellington, CIV 2008-485-2571, 24 April 2009, Miller J) the novel issue of whether an adjudicator is able to determine his or her own jurisdiction when considering a claim, and also the role of the District Court in determining whether to refuse to enter a determination as a judgment. The High Court held that an adjudicator is able to determine his or her jurisdiction on a provisional basis and that the determination will be binding unless it is challenged in the District or High Court. When considering an application opposing entry of a determination as a judgment, it was held the District Court can consider whether the adjudicator had jurisdiction to hear the claim.

Ms Patel entered into an oral construction contract with Mr Pearson for alterations to the building where her business and home were located. Mr Pearson began work and subsequently incorporated a company, Pearson Group Limited ("**Pearson Group**"), through which he conducted his construction business. Ms Patel became dissatisfied with his work and refused to pay the amounts invoiced. Pearson Group initiated an adjudication claim under the Act. Although she initially admitted that she "contracted the claimant", partway through the process Ms Patel asserted that the contract was between her and Mr Pearson, not with Pearson Group, and therefore the adjudicator did not have jurisdiction to hear the matter.

In his determination the adjudicator stated he gave "scant attention" to Ms Patel's jurisdictional point and determined in favour of Pearson Group. Pearson Group applied to the District Court to have the determination entered as a judgment under s 73 of the Act. Ms Patel opposed this under s 74, again asserting that the adjudicator had no jurisdiction to hear the dispute. Although it was accepted that the contract was between Ms Patel and Mr Pearson personally and that the adjudicator was in error, the District Court held that it was not permitted to judicially review or consider an

appeal of an adjudicator's decision as to the identity of the parties to the contract. The District Court therefore entered the adjudication as a judgment.

Ms Patel appealed to the High Court. Miller J held that an adjudicator is entitled to make a "provisional" determination as to whether he or she has jurisdiction to hear a claim, including whether the parties to the claim are parties to the construction contract, as is required by the Act. An adjudicator's determination is therefore provisionally binding unless it is judicially reviewed in the High Court or its entry as a judgment is opposed in the District Court. However, Miller J held that as one of the grounds a District Court is entitled to refuse to enter a determination as a judgment under s74 is "the contract to which this Act applies" it is entitled to consider whether the adjudicator had jurisdiction to hear the claim. The High Court therefore determined that the District Court erred in its decision.

Despite this error the District Court's decision to enter the determination as a judgment was upheld. Under s 38(2) of the Act, the parties can agree in writing to extend an adjudicator's jurisdiction beyond what is provided for in the Act, as Ms Patel had done when she initially conceded that she had contracted with Pearson Group. Miller J considered that it would be contrary to the purposes of the Act to allow a party to submit to adjudication, but resile from the process on jurisdictional grounds if the determination was unfavourable. While the High Court suggested that Ms Patel may have been on stronger grounds to judicially review the adjudicator's determination on the basis that he did not afford her natural justice, as the case had not been argued on that basis it did not consider the issue.

Consumer Guarantees Act

Five major New Zealand electricity generators and retailers brought proceedings in the Wellington High Court against the Electricity and Gas Commissioner ("**Commissioner**"), seeking declarations as to the proper interpretation of the Consumer Guarantees Act 1993 ("**Act**") as applied to the supply of electricity as a "good" (*Contact Energy v Jones*, High Court, Wellington, CIV 2007-485-2761, 24 April 2009, Miler J).

In New Zealand, companies that generate electricity tend to be responsible for its supply to end consumers. Transpower transmits electricity to exit points on the national grid. Lines companies are responsible for the distribution of the electricity to consumers. The plaintiffs, Contact Energy, Empower, Genesis, Meridian and Mighty River Power are all generators as well as retailers of electricity. They are also all members of the Electricity and Gas complaints scheme. The scheme facilitates the resolution of consumer complaints

about electricity services by the Commissioner. Where disputes cannot be settled, the Commissioner can make recommendations which are binding on the relevant member company.

Five consumers were indirectly involved as the Commissioner had resolved, or proposed to resolve their complaints against the retailers. All five complaints involved damage to appliances or property as a result of fluctuations in power supply, caused by incidents occurring during the distribution process.

Under the Act, electricity is supplied as a "good" by retailers and as a line function "service" by distributors. Although generators can also be considered suppliers within the terms of the Act, Miller J noted that it is unlikely that consumer faults will be able to be attributed to generation defects. The Act provides that when goods are supplied there is a guarantee that they will be of acceptable quality. Services are supplied with the guarantee that they will be carried out with reasonable care and skill.

The issue was whether the retailers' guarantee of acceptable quality excluded their liability for losses caused by distribution faults. The Commissioner interpreted the legislation to mean that retailers could be liable for damage or loss from any failures within the supply system which results in electricity at the point of supply being of less than acceptable quality when those failures are not the result of uncontrollable forces, fair wear and tear or the actions of a third party. The plaintiffs argued that because Parliament decided to impose fault-based liability on distributors, it cannot have intended to impose strict liability for line faults on retailers who cannot manage the risk of line faults or necessarily pass the cost of liability onto distributors.

Miller J held that retailers can be liable for the supply of electricity that is below acceptable quality regardless of at which point in the supply chain the defect arose. His Honour noted that legislative history indicated the Act was designed to ensure that consumers do not have to prove whether the retailer or distributor was responsible for the defect in electricity, as this should be resolved between the two firms. By adding electricity to the definition of goods and services under the Act, Parliament must be taken to have accepted concurrent, but stricter retailer liability for line faults.

Determining whether electricity is of acceptable quality is a complex and context-specific inquiry. Miller J noted that the reasonable consumer is taken to know about a number of factors affecting the reliability of electricity distribution in New Zealand and thus is taken to have accepted a degree of imperfection. Whether a supply is of acceptable quality to the reasonable consumer depends on a range of factors.

His Honour rejected the Commissioner's contention that retailers will be liable for all failures to supply electricity

of acceptable quality where the defect is not caused by uncontrollable forces or third party action. This contention gave insufficient weight to the fact that consumers are taken to have accepted the risk of defects arising from inconsistencies internal to the supply chain. The retailers' argument that liability should be negated when probable cause and absence of fault can be shown was similarly rejected as it inappropriately injected a fault based test.

The retailers' terms and conditions alert the consumer to the risk of defects in supply and suggest that insurance be arranged or steps be taken to minimise the impact of power fluctuations. The Judge found that these terms will only be sufficient to negate liability if they are adequately specific. This will be a question of fact depending on the consumer's particular circumstances. In addition, liability will not automatically be negated by the consumer's use of power sensitive appliances without surge protection equipment on the grounds that such use is unreasonable. Whether such behaviour is unreasonable will depend on the facts of the specific case. However, if protection was available to the consumer and could have prevented the loss, this may be reflected in a reduction in the damages awarded against the retailer.

The declarations sought by the retailers could not be made as there were insufficient facts regarding each claim to determine whether the Act had been breached. However, as the Judge concluded that the Commissioner's approach was mistaken in at least some respects, the Commissioner was ordered to reconsider the 5 complaints.

Judicial review following Lab Tests

In a recent decision of the Wellington High Court (*New Era Energy Incorporated v The Electricity Commission & Transpower New Zealand Limited*, High Court, Wellington, CIV 2007-485-002774, 4 May 2009, Wild J), a decision by the Electricity Commission ("**Commission**") to approve an amended proposal ("**Proposal**") from Transpower New Zealand Limited ("**Transpower**") to upgrade the electricity transmission lines from Whakamaru to Otahuhu was upheld. New Era Energy Incorporated ("**New Era**"), an incorporated society set up on behalf of numerous affected properties to investigate alternatives to Transpower's proposed transmission line, applied for judicial review of the Commission's decision, claiming that it was predetermined, biased, illegal, unreasonable, and based on a mistake of fact. New Era was unsuccessful on all grounds.

The decision is significant as the Proposal has been the subject of ongoing widespread public interest and concern

since its inception. It also contains some observations of wider effect in relation to judicial review proceedings generally, and in particular, the Court's reluctance to interfere with decision making processes such as those under consideration in this case.

One of the preliminary observations of the Court, and of relevance to other judicial review applications, was that it is inappropriate to conduct a high level of "intensity" review on highly technical decisions made by specialist bodies such as the Commission. Drawing support from the recent Lab Tests decision (*Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385), the Court cited an earlier decision to which the Commission was also a party (*Major Electricity Users' Group Incorporated v Electricity Commission & Anor*, High Court Wellington, CIV 2007-485-2508, 14 March 2008, Wild J), in which it was stated that a Judge, having only the benefit of counsel's submissions and unexamined affidavit evidence, is not equipped to review decision making processes in such situations. For this reason, the Court held that any such review will succeed on the basis of unreasonableness only if the decision making process is shown to be unreasonable in the "classic" sense (for example, the decision-maker "taking leave of its senses").

New Era effectively relied on three grounds for review - predetermination and bias, illegality and unreasonableness, and mistake of fact. In relation to predetermination, New Era argued that the Commission was predetermined in its view of the Proposal due to various Government interventions which effectively forced the Commission to accept the Proposal. The Court disagreed and found that, while some concern was raised by various Ministers regarding delay, there was no evidence to suggest that the Commission was in any way affected by any alleged pressure. Further, the events complained of by New Era were so disconnected from the Commission's deliberations on the Proposal that there could not be said to be any causative link between the two.

The Court reiterated that the test for predetermination requires decision-makers to give due consideration to the merits of the options before them; they cannot approach decisions with "fixed views" or "closed minds", however - and again of wider relevance - a "blank mind" is not required. Wild J observed that: "Decision-makers are not expected to be completely uninfluenced by previous considerations of the matters involved; they are simply required genuinely to apply themselves to the decision at hand."

New Era relied on the same factual circumstances for its claim in bias as it did for predetermination. The Court found that all aspects of Government intervention related to process and not substance: pressuring the Commission to expedite its process is not the same as pressuring the Commission to accept a particular outcome.

The Court applied the two-stage test adopted by the Court of Appeal in *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 and held that none of the circumstances had the capacity to lead a fair-minded observer to believe that the Commission was not impartial when considering the Proposal. The Court went on to say that: "This is a paradigm example of how decision-makers are not expected to operate in sanitised vacuums. The Commission was certainly working in a highly politicised and pressurised environment. But this in and of itself is insufficient to prove bias."

In relation to illegality and unreasonableness, New Era argued that the Commission had failed to take into account relevant considerations and had given incorrect weightings to others, such that its decision to approve the Proposal was both illegitimate and unreasonable. The Court discussed the concept of relevance and distinguished between those considerations that are relevant and those that are mandatory: the former refers to those matters which are not irrelevant and so may legitimately be taken into account; the latter refers to those matters which are so relevant that they must be taken into account. In doing so, the Court acknowledged that there are degrees of relevance. The Court applied this broad test and accordingly held that

the Commission was justified in taking into account the considerations that it did.

As to New Era's allegation of incorrect weighting, the Court reiterated that (as noted above) the barrier for review is high: the weighting must be "manifestly unreasonable" for it to be the subject of review. If this threshold is not met, no such review can take place. The Court found that New Era had failed to meet the threshold; none of the factors taken into consideration, either independently or combined, amounted to unreasonableness on the Commission's part. For the Court to find otherwise would be to engage in a merits-based review.

The final claim by New Era was that the Commission made a mistake of fact in not considering certain additional factors. The Court swiftly rejected this claim, having been satisfied with the reasons provided by the Commission in its written decision.

The Court ultimately found against New Era on all three grounds, effectively upholding the Commission's decision to approve the Proposal. While this decision certainly marks a victory for Transpower, it is unlikely to signal an end to public resistance against the Proposal.

Please let us know if any of these matters are of interest as we would be happy to discuss them further with you.

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