NEWSLETTER

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Commercial Litigation Newsletter

Cornwalls' Litigation News

Welcome to our October issue of the Commercial Litigation newsletter.

This quarter we have included news on:

- expert evidence and when it can be challenged
- business' responsibility for social media content
- intellectual property – plain packaging litigation
- litigation funding update
- a case note on a decision concerning a prospective lessee withdrawing from negotiations relating to an agreement to lease.

Please don't hesitate to contact us if you would like more information on any topic, whether covered in this newsletter or not. We hope you find the newsletter informative and useful.

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When an expert is not an expert

Background

In the recent case of *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)* [2012] VSC 99 (**Dura**), the Supreme Court of Victoria found that the majority of the expert evidence led by the plaintiff was inadmissible. The case involved the construction of an apartment building with many alleged defects. Both parties appointed twelve experts to substantiate their claims in court. The experts produced joint reports and gave evidence at trial. On day 19 of the trial application objections were raised by both sides as to the admissibility of the expert evidence.

The decision

To decide whether opinion evidence given by the experts was admissible, Justice Dixon considered the *Evidence Act 2008* and relevant case law, and summarised admissibility into four rules with relevant questions as follows:

1 *The relevance rule:* is the opinion relevant or of sufficient probative value?

2 *The expertise rule:* does the witness have specialised knowledge?

3 *The expertise basis rule:* is the opinion wholly or substantially based on specialised knowledge?

4 *The factual basis rules:* is the opinion wholly or substantially based on facts assumed or observed that have been, or will be, proved? There are three sub rules that also need to be considered:

(a) *The assumption identification rule:* are the facts and assumptions on which the expert's opinion is founded disclosed?

(b) *The proof of assumption rule:* is there evidence admitted or ought to be admitted capable of proving matters sufficiently similar to the assumptions made by the expert to render the opinion of value?

(c) *The statement of reasoning rule:* is there a statement of reasoning showing how the facts and assumptions relate to the opinion stated to reveal that the opinion is based on the expert's specialised knowledge?

By applying the above rules, the court ultimately found that the majority of the expert evidence of Dura was not admissible.

Comment

The case highlights the importance of thoroughly assessing each proposed witness and their opinion evidence according to the four admissibility rules prior to the trial commencing (and/or prior to any witnesses providing joint evidence). In this instance, the failure of Dura (Australia) Constructions Pty Ltd to make these types of assessments undermined its defence to a damages claim against it.

On 13 August 2012 the Commercial Court of the Supreme Court of Victoria published an amended paper on expert evidence which can be found at **www.commmercialcourt.com.au**. The paper provides an overview of the relevant legislation and rules governing this area, including an overview of the Dura case. It is a timely reminder to those who provide expert reports to familiarise themselves with rules regarding expert evidence, so as to avoid the risk and embarrassment of challenges to the admissibility of their reports.

Authored by: Rena Solomonidis & **Leneen Forde**, Cornwall Stodart

Backed up against the wall: business' responsibility for social media content

Recent cases before the Advertising Standards Board (**ASB**) and the Federal Court have confirmed the accountability of businesses for user-generated content on their social media sites, such as Facebook and Twitter.

Cases brought against VB Beer[1] and Smirnoff[2] involved complaints that written and photographic content on the brands' Facebook pages was in breach of the Australian Association of National Advertisers Code of Ethics (**AANA Code**) and the Alcohol Beverages Advertising Code (**ABA Code**).

Notably, the complaints were in relation to posts by the pages' users in response to questions posted by the brands, such as, 'What makes a great Australia Day BBQ?' The ASB found that certain responses were sexist, racist, homophobic, featured irresponsible drinking and excessive consumption of alcohol, and/or used obscene language. By allowing such content to remain on the pages, VB Beer's Facebook page, and its operators, had breached the AANA Code.

This approach is consistent with the one taken by Greer LJ, albeit 67 years ago, in a case concerning a misleading noticeboard posted on the wall of a golf club. In that case, the golf club's knowledge of the misrepresentative noticeboard, yet its failure to remove it, amounted to it taking part in the board's publication.[3]

Similarly, in *ACCC v Allergy Pathway Pty Ltd*[4], the Federal Court held that Allergy's knowledge of, and subsequent decision not to remove, customer testimonials (which, in light of previous undertakings given to the court in response to misleading and deceptive conduct, would have amounted to contempt of court had Allergy published them itself) from its Facebook and Twitter pages thereby rendered it the publisher of, and responsible for, that content.

Social media as advertising

It is important to note that the ASB's findings in the VB Beer and Smirnoff cases boiled down to whether a business' Facebook page meets the AANA Code's definition of 'advertising or marketing communications'. That is, 'any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and over which the advertiser or marketer has a reasonable degree of control, and that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct.'

The ASB held that both content generated by the page creator and content posted by users on that page constituted 'advertising or marketing communications', thereby attracting the operation of the Codes.

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[1] ASB Case Report 0271/12

[2] ASB Case Report 0272/12

[3] *Byrne v Deane* [1937] KB 818 at 830

[4] [2011] FCA 74

Removal of content

Against this backdrop, businesses are now required to monitor their social media and ensure that infringing material is removed within a 'reasonable timeframe'. While no definition of what constitutes a 'reasonable timeframe' is provided by the ASB, the ACCC has alluded to the factors that a court will consider in determining 'reasonableness':

- size of the business;
- extent of the business' investment in a social media strategy;
- the nature of the relevant content.

According to the ACCC, it follows that 24 hours may be reasonable for a large, well-resourced company.

Legal implications

As demonstrated by the above cases, businesses will be held responsible for both their social media content and the content of their users. This means that businesses are at an increased risk of liability for claims for breach of privacy and intellectual property infringement, misleading and deceptive conduct, defamation and breach of relevant Codes.

Practical implications

In order to protect themselves against such claims, businesses should develop and strictly enforce policies and procedures relating to the monitoring and maintenance of their social media sites. This is likely to be on both a technical level (ie using the existing filtering and moderation functionalities of sites such as Facebook and Twitter) and a personal level (ie providing staff training on acceptable terms of social media use).

#Whattotakeawayfromthis

- Social media such as Facebook, Twitter and webpages now legally amount to 'advertising or marketing communications'.
- Businesses are responsible for all content on those sites, whether posted by them or third parties.

Infringing content must be removed within a reasonable timeframe to avoid liability.

Authored by: **Ora-Tali Korbl**, Cornwall Stodart

Butt out! The battle between big tobacco and big government over plain packaging

The battle between big tobacco and the federal government over the regulation of tobacco packaging highlights the fact that intellectual property owners do not have an absolute right to the use of their trade marks in Australia. The heavily regulated tobacco industry was dealt another blow with the passing of the *Tobacco Plain Packaging Act 2011* (Cth) (**Act**) in late 2011. The High Court has subsequently confirmed that the Act is constitutionally valid.

As of 1 December 2012, all cigarettes sold in Australia will be packaged in olive green and without the distinguishing trade marks and colours that tobacco companies have long used. Instead, the manufacturer's brand and sub-brand will be displayed in small, inconspicuous plain font together with a prominent graphic health warning. In other words, famous and instantly recognisable, but non-verbal, trade marks such as the Marlboro 'Red Roof' will no longer be able to be used in Australia.

On 16 August 2012, the High Court issued a short statement announcing its decision that the *Tobacco Plain Packaging Act 2011* (Cth) is constitutionally valid. The unabridged reasons for the decision are expected to be released later this year. The crux of the legal challenge brought by the major players in the first round of litigation was that the legislation involves a misappropriation and acquisition of their intellectual property rights contrary to section 51(xxi) of the Australian Constitution. The plaintiffs, including British American Tobacco, Phillip Morris, Japan Tobacco International and Imperial Tobacco argued that the plain packaging requirement would 'effectively extinguish and render redundant' registered trade marks and give full control of the cigarette packaging to the Commonwealth.

Proponents of the new law argue that the tobacco industry's marketing power has been stymied significantly, and will lead to a further decrease in the number of smokers. However, in the absence of similar legislation anywhere in the world, the effects are still speculative. Yet the fact that tobacco giants have vowed to continue to challenge the legislation suggests they too believe that plain packaging will minimise the appeal of cigarettes and therefore impact on their long-term sales and profits. The Act is currently being challenged via the WTO, with tobacco company plaintiffs assisted by small tobacco growing nations in arguing that Australia's legislation violates the Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS**).

It is expected that our move to plain packaging will be followed by a number of other nations. Furthermore, there is no reason why similar legislation could not be enacted to regulate, for example, alcohol and fast food. While the effects of plain packaging on the habits of young people and other consumers is yet to be fully

understood, it is clear that trade mark owners in other possible target markets are at risk of losing their valuable intellectual property rights.

Authored by: Remziye Hussein & **David Moore**, Cornwall Stodart

Regulation of litigation funding

Litigation funders form an important part of the landscape in commercial litigation. In particular, many shareholder class actions would never have occurred but for the assistance of a funder, and similarly insolvency practitioners often utilise litigation funders where there are insufficient funds in the administration to support the costs of litigation.

The area of litigation funding in Australia has to date been largely unregulated, which has meant there is little protection for parties to a funding agreement. This has been changed, at least partially, by the recent Corporations Amendment Regulation 2012 (No 6), dated 12 July 2012. The Explanatory Statement of the amendment indicates that it was brought in primarily to specifically exclude litigation funding arrangements from definition as managed investment schemes, as a result of the decision by the Federal Court of Australia in *Brookfield Multiplex Limited v International Litigation Funding Partners Pty Ltd* (2009) 260 ALR 643.

The amendment also seeks to impose a requirement on funders to have 'adequate arrangements' in place to manage conflicts of interest, non-compliance with which may result in a fine of up to 50 penalty units. Previously, a funding agreement may have included a dispute resolution clause providing for an independent senior counsel to be appointed as an adjudicator in the event of a dispute (but there was no obligation to include such a clause).

Of particular note is the requirement on funders to 'protect the interests of members of the scheme'. The extent to which funders are required to protect those interests is not yet clear, though it may mean that a funder will be prohibited from controlling a proceeding or seeking to influence the legal practitioners retained in proceedings, and limit the ability of a funder to terminate a funding agreement.

However, it must be stated that the recent amendments do not go so far as regulating litigation funders for the protection of plaintiffs (and defendants). There is no requirement on litigation funders to prove they have sufficient assets to pay costs and adverse costs orders that they may be obliged to pay, and an over reliance on the security for costs regime to adequately protect defendants (which can sometimes fall short). Nor is there any requirement regarding the corporate make-up of a funder – indeed, in Australia, any person or any entity (other than lawyers) can fund litigation.

While there can be little doubt this amendment is a step in the right direction, without further clarity on the rights and obligations of parties to a funding agreement, there remains the potential for abuse by inadequately resourced local funders seeking to make profit while avoiding the adverse costs if unsuccessful, as well as overseas funders comfortable in the knowledge that they are beyond the reach of Australian courts if unsuccessful.

Authored by: Alex Nicol, Cornwall Stodart

Case note: *BBB Constructions Pty Ltd v Aldi Foods Pty Ltd* [2012] NSW 224

Background

A recent NSW Court of Appeal decision concerning a prospective lessee withdrawing from negotiations relating to an agreement to lease is a reminder to parties to carefully consider at which point during negotiations they wish to be bound and make this clear from the outset of negotiations. While it concerns a lease negotiation, this case is applicable to all forms of commercial negotiation.

Facts

BBB Constructions Pty Ltd (**BBB**) owned land approved for development. Aldi Foods Pty Ltd (**Aldi**) wrote to BBB, setting out a lease proposal for Aldi to lease land and a second basement on the site. The second basement was not originally included in the

design for the development of the site. Importantly, at the end of the letter were the words 'this offer is subject to Aldi board approval'.

The parties entered into negotiations to finalise an agreement to lease. During negotiations BBB commenced construction and expended money to meet the requirements of Aldi.

Throughout negotiations, Aldi made representations to BBB that the lease would be signed. However, even though execution copies of the lease were provided in May 2007, there were still outstanding issues. In May 2007, BBB began negotiations for the lease of the site with IGA. These negotiations ultimately did not result in a lease.

Final documents relating to the lease were issued in July 2007. Aldi's board did not approve the tenancy and Aldi informed BBB that they would not be continuing with the agreement for lease.

BBB commenced action in the Supreme Court of New South Wales, alleging Aldi had engaged in misleading and deceptive conduct or had acted unconscionably.

The decisions

The Supreme Court held in favour of Aldi because BBB knew that the agreement would only be binding once it was signed by both parties. BBB also knew that the proposal was subject to Aldi board approval. The Supreme Court also found that representations made by Aldi were not misleading and deceptive because BBB did not rely on them.

BBB appealed on the basis that they had suffered loss as a result of Aldi's representations and that Aldi's board approval was a mere formality. The Court of Appeal dismissed the appeal on the basis that Aldi's board approval was a condition to Aldi entering the lease. The Court of Appeal also held that BBB's conduct of engaging in negotiations with IGA indicated that they had not relied on Aldi's representations. The Court of Appeal held that any expense incurred by BBB in constructing the basement was to BBB's commercial advantage in any event. However, the Court of Appeal did note that had Aldi decided not to proceed with the lease, but had failed to inform BBB, they may have engaged in unconscionable conduct and been responsible for BBB's costs in constructing the basement.

Authored by: Lauren Bartlett, Cornwall Stodart

Cornwalls' Litigation Team Member Profile

Leneen Forde, Partner

Leneen's areas of expertise include contract law, property related disputes, defamation and media, and education law. Her clients value her direct approach, commercial advice and her understanding of all aspects of litigation.

As a commercial litigator, Leneen specialises in corporate and commercial dispute resolution. Her experience includes advising on contracts, trade practices claims, property, intellectual property issues, equity matters and defamation. She also advises on breach of privacy and confidence, and suppression orders.

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