

UPDATE ON CONTRACT


Paul David KC, Eldon Chambers, Auckland

April 2024

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Contract law cases over past two years

Main areas covered:

- Finding terms of informal oral contracts
- Interpreting written contracts
- Contract terms including:
 - contractual discretions
 - *force majeure*
 - exclusions
- Misrepresentation, Fair Trading Act, damages, exclusions
- Sale of land – breach of condition

Introduction

- Pandemic behind us – contract cases that arose addressed on general principles – refer previous review – two Australian cases
- End of debate in our courts over scope of evidence admissible in interpretation?
- Business as usual on interpretation?

Finding and interpreting the terms of informal oral agreements

The difficulty in working out the terms of informal agreements and what they mean:

- High Court of Australia: *Realestate.com.au v Harding* [2022] HCA:
 - inferring or implying terms that agreement to use would be on standard terms of website

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Interpreting an oral agreement

- United Kingdom Supreme Court: *Barton v Gwyn Jones* [2023] UKSC 3:
 - simple question posed by oral agreement for the introduction of a buyer for a property by a commercial party (not a real estate agent). What was the agreement and what did it mean? Oral dealings – contract hard to determine at trial
 - “I will pay you x dollars if property sold to a buyer introduced by you for the sum of y dollars”
 - split decision (in courts below) and in Supreme Court – majority three to two
 - held no payment if price paid by buyer was lower than stipulated in the oral agreement
 - no implied term for reasonable payment

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Interpreting contracts in writing

- *Bathurst* sets out the approach to interpretation and implied terms – Court agreed on principles – split three to two on the meaning of the deal
- Will the possibly wider range of evidence that may be admitted under New Zealand law be regretted?
- Sequel to *Bathurst* in the High Court – attempted claim under guarantee but still no money for the claimant:
 - *LMCHB Ltd v Buller Coal Ltd* [2023] 2 NZLR 680

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Interpreting contracts in writing

cont'd

Sky City Entertainment Group Ltd v MPF Parking Ltd [2023]
NZHC 3446:

- Issue to determine compensation sum to be paid on termination
- Affidavit evidence of commercial background to the deal – too much?
- Plain meaning of contract not displaced by various arguments based on commercial context – textual focus required with commercial contract of this nature.
- Difficulties with the approach under New Zealand law – more time-consuming/costly?

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Interpreting contracts in writing

cont'd

- Contextual approach means it can be hard to predict outcomes even if admissible evidence is more limited:
 - when does interpreting the contract become mending the bargain?
- Supreme Court United Kingdom: *Sara & Hossein v Blacks* (2023) UKSC 2:
 - commercial lease interpretation of commercial lease on determination of service charge
 - certification by landlord of “the amount of total cost and sum payable by the tenant” – certificate “conclusive” subject to narrow exceptions

Interpreting contracts in writing

cont'd

- majority found meaning from context or agreement overall and commercial context applying established principles
 - minority found that they were re-writing the contract
- There will always be hard cases where we are concerned with meaning of language

Interpreting contracts in writing

cont'd

- *Local Government Mutual Funds Trustee Ltd v Napier City Council* [2023] 1 NZLR 184:
 - interpreting exclusion in mutual insurance scheme put in place by Councils – no cover for liability for claims alleging or arising directly or indirectly out of ... failure of building to meet ... Building Code in relation to leaks, water penetration etc
 - claim against Council settled globally – did exclusion apply to all elements of claim on proper interpretation of the exclusion
 - CA and SC held claim divisible, so exclusion did not exclude cover for liability for payment of parts not concerned with weathertightness
 - High Court decision other way – too much background information?

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Interpreting contracts in writing

cont'd

- Interesting to read a comment by Justice Kós in NZ Law Review article noting that New Zealand did not consider Australian contract cases on interpretation in the period when it was looking at the principles to be applied to interpretation – Australian cases simpler approach – some regret expressed
- Too late to rewind now?
- Need to control the scope of the interpretation exercise so that decisions can be made promptly and cost effectively but difficult task

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AFTERNOON TEA 3.00-3.30PM

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Contractual discretions – implied terms

- High Court (*Woolley v Fonterra* [2021] NZHC 2690): last review
- Court of Appeal (*Woolley v Fonterra Co-Operative Group Ltd* (2023) 3 NZCA 266):
 - upholds the High Court decision that no breach of contract by Fonterra
 - applies the implied limit on contractual discretion based on UK law – accepted on the pleadings by Fonterra and finds no breach
 - but full consideration of this area and implied terms controlling discretion is for another day

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Force majeure clauses – interpretation and application

- *MUR Shipping BV v RTA Limited* [2022] EWCA Civ 1406 – Court of Appeal of England and Wales – on appeal to UK Supreme Court
- Interpreting a *force majeure* clause in common terms in a contract of affreightment in particular of meaning of *force majeure* event as one that cannot be overcome by reasonable endeavours by party affected
- Can a party affected by a *force majeure* event be obliged to accept non-contractual performance to overcome the *force majeure* event?
- High Court held no – Court of Appeal reversed
- Appeal recently heard by Supreme Court

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Misrepresentation, Fair Trading Act and exclusion clauses

- *R (in right of New Zealand acting by and through the Chief Executive of the Dept of Corrections) v Fujitsu New Zealand Ltd* (2023) NZHC:
 - contract warranty and standard terms of contract addressing misrepresentation (entire agreement no reliance) in contract for provision of software solution
 - operation of s 5D FTA and ss 34 and 50 CCLA
- *CBL Insurance Ltd (in liq) v Johnstone (as liquidators of CBL Insurance Ltd (in liq))* [2021] NZHC 13:
 - High Court held that clauses requiring claim only against contract party and limiting liability of contract party in terms of engagement of PwC to provide actuarial services to insurance company were effective

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Misrepresentation, Fair Trading Act and exclusion clauses

cont'd

- *PGG Wrightson v Routhan* [2023] NZCCLR 7:
 - damages for FTA and in negligence for advice on sale
 - scope of responsibility assumed by person giving advice – *SAAMCO* principle
 - loss assessed by difference of value on sale or all consequential loss?
 - Court of Appeal reversed High Court and held that damages should be assessed by reference to difference of value on sale because party advising did not take wider responsibility
 - Supreme Court appeal heard – important such claims for damages are common and it is difficult to arrive at the appropriate level of damages

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Sale of land – breach of condition

- *Melco Property Holdings (NZ) Ltd v Hall* [2022] NZSC 60:
 - caveat proceedings
 - sale and purchase agreement conditional on purchaser being satisfied that property suitable after due diligence – if not fulfilled by due date or waived – V could cancel
 - V cancelled when not fulfilled – whether V failure to facilitate access to property meant caveat by purchaser could be sustained
 - whether V failure to allow access was sufficiently causative/connected to failure to fulfil condition by P?
 - what is the required degree of connection that must be shown? Materially contribution to failure – SC maintained caveat

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No oral modification clauses

- Among common clauses in commercial agreements
- Are such clauses effective to bar claims on later oral agreements?
- No final statement yet from New Zealand courts on the clauses
- Should they be upheld?

New Zealand Fair Trading Act amendments

- Unconscionable conduct – general provision, no definition and expressly not limited by common law or equity (s 7 FTA 1986)
- Extension of unfair contracts regime to trading contracts with annual value less than \$250,000 – limited extension
- Limited unfair contracts regime – only Commerce Commission can take steps

Contract law and the pandemic

- Cases addressed on established principles
- Will not produce significant changes to law although there has been some comment on the lack of flexibility in the doctrine of frustration
- No doubt greater focus on express terms providing for *force majeure*
- United Kingdom insurance cases on business interruption cover are the most high profile and economically significant

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Contract law and the pandemic

cont'd

- Two Australian cases:
 - completing sale and purchase as the pandemic starts: *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* (2023) HCA 6 – contract interpretation – compliance with conditions for completion of sale of hotel business – requirement “to carry on the business in usual and ordinary course as regards its nature scope and manner” – impact of public health COVID measures shutting business limiting operation on vendor ability to serve notice to complete – High Court (reversed NSW CA) held that vendor entitled to serve notice to complete

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Contract law and the pandemic

cont'd

- class action for damages in Australian Federal Court by cruise passengers on Ruby Princess after voyage terminated when COVID-19 struck: *Karpik v Carnival Cruises* [2023] HCA 39 – operation of Australian consumer law regime on terms of ticket – waiver of class action clause unfair and unenforceable
- Established principles applied in special circumstances produced by the pandemic

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Final thoughts – what lies ahead for the law of contract?

- Tempting to say more of the same, but I don't think so – we are living in a technological revolution:
 - ever increasing ability of everyone to generate documentary information
 - harder for lawyers and courts to work effectively, to advise and provide timely decisions, but great need for this
 - increased opportunity for deception and fakery
- Likely that we will see radical transformation of how contracts are drafted, analysed and disputes resolved:
 - not least because we need more help to absorb and analyse the tide of information

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Final thoughts – what lies ahead for the law of contract? cont'd


- Role for lawyers who know principles and can analyse language for meaning but likely to be much changed?
- I hope that this paper and presentation helps you all in your work

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QUESTIONS

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