Private action

Qantas Airways v Aravco Limited

High Court of Australia
27 May 1996

The issue in question was whether s. 68 of the Trade Practices Act rendered void a contractual term that required Aravco to indemnify Qantas for any liabilities incurred by Qantas that might arise when performing services for Aravco.

Background

Qantas entered a contract with Aravco, whereby Qantas was to perform certain services in relation to an aircraft operated by Aravco but owned by BAT industries.

Due to the negligence of Qantas, the aircraft suffered damage.

BAT sued Qantas in the NSW Supreme Court for negligence. Qantas admitted liability but sought indemnification from Aravco, under clause 4 of the contract between itself and Aravco which stated:

> The operator agrees to indemnify Qantas for all damage however occurring, including damage to third parties [in this case BAT].

Clause 7(2) stated, as far as is relevant:

> Liability for breach of a condition or warranty implied into the contract by the Act, is limited to the supplying of services again or the payment of the cost of having the services supplied again.

Aravco argued s. 74 of the Trade Practices Act implied a statutory warranty into the contract for services so that Qantas was to provide services with due skill and care. Aravco argued in its defence the indemnity clause was inconsistent with the statutory warranty and was thus, by the operation of s. 68, void.

Section 74(1) provides:

> In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

Section 68(1) provides:

> Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying —
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> (a) the application of all or any of the provisions of this Division;
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> (b) the exercise of a right conferred by such a provision;
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> (c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or
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> (d) the application of section 75A,
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> is void.

Qantas agreed the contract contained the statutory warranty and that in damaging the aircraft it breached that warranty. However, Qantas argued Aravco had not sued Qantas for breach of the warranty nor pleaded it as an answer to Qantas' claim for indemnity.

Even if Aravco had sued for breach of warranty, Qantas claimed clause 7 restricted Qantas' liability to the payment of the cost of having the services supplied again ($5000) as permitted by s. 68A of the Act. Or, as Aravco was the operator not the owner of the plane, damages payable might be no more than nominal.

First instance decision

Giles J decided the indemnity did not exclude, restrict or modify the application of s. 74.

Accordingly, Aravco was entitled to bring proceedings against Qantas for breach of the implied warranty in s. 74 and claim damages

for loss, including moneys paid by Aravco to BAT. Qantas could seek indemnification from Aravco for the liability of Qantas to BAT.

NSW Court of Appeal decision

The court held the indemnity did modify Qantas' liability for breach of the statutory warranty implied by s. 74.

High Court decision

The majority (Brennan, Gaudron, McHugh, Gummow JJ) upheld Qantas' claim.

It was held Qantas could enforce the indemnity in relation to Qantas' liability to BAT, but obtaining that indemnity did not affect Qantas' liability to Aravco for breach of the warranty implied by s. 74.

Aravco could have claimed damages for breach of the s. 74 warranty, including a claim for the amount Aravco was liable to reimburse Qantas under the indemnity. (However, Aravco did not so claim.) Qantas could have pleaded clause 7 in defence, allowing it to limit its liability, forcing Aravco to rely on s. 68A(2) and contend it was not fair or reasonable for Qantas to rely on clause 7.

Section 68A(1) provides:

> Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under s68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty (other than a condition or warranty implied by s69) to...
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> (b) in the case of services —
>
> (i) the supplying of the services again; or
>
> (ii) the payment of the cost of having the services supplied again.

Section 68A(2) provides:

> Sub-section (1) does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract.

If it was fair or reasonable for Qantas to rely on clause 7, Qantas would have recovered an indemnity of $1 million from Aravco but only be liable to Aravco in the amount of $5000.

However, in this matter BAT had sued Qantas for breach of a common law duty of care that Qantas owed BAT, not for the breach of the s. 74 warranty that Qantas gave Aravco. The indemnity clause required Aravco to indemnify Qantas for the latter's liability to BAT. Giving effect to that indemnity did not affect the liability of Qantas to Aravco for breach of the s. 74 warranty.

Kirby J (dissent)

Kirby J emphasised that Part V of the Act is concerned with protecting consumers, and if the court adopted a narrow construction of that Part, it would be inconsistent with the wide words used by Parliament.

> The Act itself uses broad language designed to achieve a large social purpose far beyond the commercial circumstances of the present dispute. [at 6]

Aravco was a 'consumer', as the price of the services supplied by Qantas to Aravco was $5000. Aravco acquired the relevant services from Qantas, a 'corporation'. The question was whether the indemnity clause had the effect of restricting or modifying in an impermissible way the application of s. 68 or s. 74.

Qantas argued that if Aravco had sued Qantas for breach of the implied warranty Qantas could have invoked s. 68A, limiting its liability to the cost of the provision of the services ($5000). Aravco would then have been entitled to seek to rebut such a limitation by relying on s. 68A(2) and contending it would not be fair or reasonable for Qantas to rely on the indemnity clause.

Kirby J found the s. 74 warranty was incorporated into the contract for the supply of services between Qantas and its consumer, Aravco. Qantas had no contract with BAT.

Kirby J was of the opinion the indemnity clause modified the application of the consumer protection provisions, and modified Qantas' liability for breach of the warranty implied in s. 74.

> It would be extremely odd ... if the prohibition effected by s. 68(1) of the Act were so readily susceptible to circumvention by the mere use of the device of a promise of 'indemnity'. [13]

Kirby J stated s. 68 should not be regarded as having a narrow interpretation. Section 68 contained words of broad operation ('restrict' and 'modify') and focused on 'the effect' rather than the language of the impugned term, to prevent the undermining of consumer protection and allow the court to take a practical approach, 'not one blinded by legal formulae'. That is, any term of a contract that would modify the application of any of the consumer protection provisions of the Act should be considered void.