Some Recent Developments in Tasmanian Commercial Law

EUGENE CLARK*

Contract Law

Arguably, the most significant development in Australian Contract Law in the last few years has been the clarification of promissory estoppel in Waltons Stores[1] and the application of the doctrine of promissory estoppel to an increasing variety of new situations.[2] Indeed, so strong have the winds of equity been blowing through contract law that some have complained that estoppel is likely to be raised every time contractual negotiations break down.[3] The growth of promissory estoppel, coupled with the expansion of such provisions as s52 of the *Trade Practices Act* and its counterpart in the Fair Trading Acts of each State have made legal advice and caution at the pre-contractual stage more important than ever.

In Tasmania, promissory estoppel was unsuccessfully raised in the recent case of *Howard v Hotel Investments Pty Ltd*[4]. The case involved a three-year lease of licensed premises known as 'The Star and Garter Hotel' and the accompanying purchase by the respondents of plant, equipment and stock-in-trade used in connection with the licensed premises.

The estoppel issue arose out of a claim by the appellant that he was not obliged to comply with an obligation under the lease to replace damaged windows prior to leaving the premises because the

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* Senior Lecturer in Law, University of Tasmania.

1 *Walton Stores (Interstate) v Maher* (1988) 164 CLR 387.

2 See e.g., *Foran v Wight* (1989) 88 ALR 413; *Commonwealth v Verwayen* (1990) 170 CLR 394;
Callin v Holden [1988] VR 510; *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466; *Stevens v Standard Chartered Ban Aust Ltd* (1988) 53 SASR 323; *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251; *Metropolitan Transit Authority v Waverly Transit Pty Ltd* [1991] 1 VR 181; *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582

3 See e.g., *Milchas Investments Pty Ltd v Larkin* (1989) 96 FLR 464, at 472 (concern about misuse of estoppel); See generally, Bagot, CNH, 'Equitable Estoppel and Contractual Obligations in Light of Waltons v Maher (1988) 62 ALJ 926; E. Clark, 'The Swordbearer Has Arrived: Walton Stores (Interstate) Ltd v Maher (1987) 9 *Tasmanian Law Review* 68; M. Dorney, 'The New Estoppel' (1991)*Australian Bar Review* 19; A. Leopold, 'Estoppel: A Practical Appraisal of Recent Developments' (1991) *Australian Bar Review* 47.

4 3 Tasmania Supreme Court Unreported Judgments, No 75/1990.

appellant had made a representation to him that he would not enforce the covenant to repair if the appellants permitted access to the respondent's builder to do some renovations prior to the termination of the lease. As to the issue of detriment, the appellant argued that the detriment suffered 'was in permitting the respondent's builder to enter the premises and carry out works, although it became clear that the real detriment alleged was a downturn in business as a result of the dislocation occasioned whilst the building works were being carried out.'[5]

However, as Mr Justice Zeeman, pointed out, the estoppel argument overlooked -

'the fact that by refusing access the appellants were in breach of the agreement of 28 August 1986 which contained a provision whereby the appellants covenanted with the respondent that they would allow the respondent "to undertake and effect all renovations and/or alterations to the premises . . ." . There was no suggestion other than that the builders who arrived at the premises and to whom the first appellant refused access, were there for the purposes referred to in this covenant. The first appellant was in breach of that covenant by refusing access.[6]

Thus, the respondent did no more than persuade the appellant to do what which he was already under a contractual obligation to do. It was further held that the appellant suffered no detriment because he permitted no more work or repairs other than that which he was contractually bound to permit. Finally, there was no evidence submitted to the trial court that any falling off of business was caused by work done by the defendant which would not have been authorised by the contract referred to above.

Accordingly, it was held that the trial judge decided correctly that appellants were under a contractual duty to repair broken windows and that respondents were not estopped from claiming for the same.

Fair Trading Act (FTA): A Sleeping Giant in the Area of Consumer Law

In General: Many False and Misleading Practices Now Covered in Tasmania

In December 1990, Tasmania passed the Fair Trading Act. Its significance for consumers and businesses is that firstly, it adopts many of the provisions of Part V of the *Trade Practices Act* (Cth), including the very broad language of s. 52 in prohibiting conduct

5 Ibid at 8-9 per Mr Justice Zeeman.
6 Ibid 9.

which is 'misleading or deceptive or likely to mislead or deceive.' As such, the new legislation fills a major gap in Tasmanian commercial law by providing legal redress for many false and misleading practices in the selling of goods and services. In addition to the broad proscription against engaging in misleading or deceptive conduct (s14), other sections prohibit false representations (s16), false representations in relation to land (s17), misleading conduct in relation to employment (s18), offering gifts and prizes with intent to mislead (s19), misleading conduct in relation to goods (s20), certain misleading conduct in relation to services (s21), bait advertising (s22), provisions with respect to statements that include a private box number (s23), accepting payment without intending or being able to supply as ordered (s24), harassment and coercion (s26), and unsolicited credit cards (s27).

Relationship to the Trade Practices Act

Unlike the TPA, the Tasmanian legislation is not limited to corporations, but applies as well to partnerships and sole traders. It thus provides that 'A person shall not in trade or commerce engage in conduct which is misleading or deceptive or likely to mislead or deceive.' (*Fair Trading Act*, s14).

Also unlike the TPA, from which many Commonwealth, State and Territory bodies are exempted by shield of the Crown or specific legislation, the FTA binds the Crown (s13). Fourthly, the FTA also incorporates most of the broad range of remedies which exist in the TPA. Unfortunately for consumers, however, the Tasmanian FTA does not include the compulsory warranties provisions found in the TPA (Division 2 and 2A). Finally, with Tasmania's adoption of a *Fair Trading Act* similar legislation is now in place in every Australian jurisdiction, thus providing greater unity to Australian commercial law and making it easier for marketers to plan on a national, as opposed to state-by-state level.

However, like the TPA, some of the provisions relate only to the supply of goods or services to 'consumers'. The definition of 'consumer' under the FTA is the same as that under the TPA: "unless a contrary intention appears - (a) a person shall be taken to have acquired particular goods as a consumer if the price is $40,000 or less. (b) or if the goods are over $40,000 but are of a kind ordinarily acquired for personal, domestic, or household use or consumption (eg a pleasure yacht) or consisted of a commercial road vehicle". Goods will not be consumer goods if they are purchased for the purpose of re-supply or for the purpose of using them up or transforming them in a process of production or manufacture (FTA, s5).

Section 33 provides that if a person is convicted under Commonwealth Law, (eg the TPA) for an offence, they cannot be

convicted for the same conduct under the same offence against the FTA. Section 50 provides that unless the Act expressly provides otherwise, it does not limit, restrict, or otherwise affect any right or remedy a person would have had this Act not been been enacted.

Relationship to the Sale of Goods Act

The FTA is much broader than the *Sale of Goods Act* because it applies to goods 'acquired' not only by sale or agreement to sell, but also by way of exchange, or taking on lease, on hire or hire-purchase (s3). The FTA also applies to services in trade or commerce as well as goods and this includes services of a professional such as a lawyer, accountant, dentist or engineer (s3).

Remedies under the Fair Trading Act

Remedies under the *Fair Trading Act* are found in Division 3 of the Act. As with the *Trade Practices Act*, the remedies available under the FTA are both more flexible and wider than those available under the common law or *Sale of Goods Act*. These remedies include:

Injunctions. Sections 34 and 35 empower the court to issue an order to stop or prevent the offending conduct from occurring. Importantly, s 34 provides that an injunction may be granted on the application of the Minister, Director, *or any other person*'. Thus one business may seek an injunction against another business or other person who is in contravention of the Act. Tasmanian businesses are in this way encouraged and empowered to enforce a standard of fair trading within the State. Note that this is an excellent example of the broader scope of remedies available under the FTA in that under the common law an injunction would not normally be available to a business which itself has suffered no harm.

Corrective advertising. Section 36 empowers the court to order a party to disclose information or to publish, at the expense of the offending party, an advertisement on such terms as the court sees fit. No such remedy exists in the common law or other Tasmanian legislation - again an example of the advantage of bringing an action under the FTA.

Damages. Section 37 entitles a person who suffers loss or damage caused by conduct of another person in breach of the Act to recover from that other person, the amount of the loss or damage.

Ancillary orders. Section 41 of the FTA further empowers a court to make a wider range of other orders varying the contract between the trader and consumer. These include directing work to be done, refusing enforcement of part of the contract, orders to repair or provide parts, an order for specific performance of a contract etc.

Statute of Limitations

Another advantage of the FTA is in regard to the statute of

limitations. Interestingly, while the provisions of the TPA are limited, in most cases, by a two or three year statute of limitations, the FTA has no such limitation. Thus, one would infer that the limitation period is the same as for other actions, which especially in the area of contract law (6 years) is a distinct advantage over the TPA.

Emphasis on Voluntary Codes of Practice

Consistent with the approach of the Trade Practices Commission, the FTA places an emphasis on business to develop their own voluntary codes of practice in consultation with consumers and other members of the public. Part IV (Sections 43-45) of the FTA empowers the Governor, on the recommendation of the Minister, to make regulations prescribing a Code of Practice. Section 45 empowers the Director of Consumer Affairs to apply to the Magistrate to order a person to cease contravening a provision of a code of practice or to rectify any consequence of such a failure or contravention.

Conclusion

The FTA is a significant piece of legislation with enormous potential scope of application. In view of this fact, it is surprising that to date there is little evidence that it is either widely known or utilised. No doubt that situation will soon change.

Insurance-Consumers-ADR: New Alternative Dispute Resolution Procedures

Establishment of a New Dispute Resolution Scheme

As of 22 May 1991, a new industry run and created insurance dispute resolution scheme came into being. Pursuant to the new scheme the Insurance Council of Australia and the Life Insurance Council of Australia have established impartial panels to review complaints up to $250,000 regarding life insurance and general insurance respectively. The aim of the scheme is to resolve disputes quickly and without the need for expensive litigation. Concurrent with the dispute resolution scheme, the industry has also articulated a 'Code of Practice' which prescribes minimum standards of conduct which member insurance companies have agreed to adopt when dealing with inquiries and complaints by policyholders.

Initiating the Procedure

The scheme is free of charge to the parties. If consumers have an insurance complaint or query they should initially contact the Insurance Council of Australia (see contact list at the end of this chapter). Participating insurance companies agree to make a decision on the complaint within 10 working days (or 30 days, if home office must be involved). The Panel will function as informally as possible and the use of lawyers is discouraged. The Claims Review Panel (for

general insurance) and Complaints Review Committee (for life insurance) will consider and determine all matters before it within a reasonable period of time.

General Insurance (fire, burglary, theft, plate glass - all property insurance)

In the case of general insurance, a Claims Review Panel has been established, consisting of an independent chair appointed by the Insurance Industry Complaints Council; a person with experience in consumer affairs appointed by Minister for Consumer Affairs; and a person experienced in insurance matters appointed by Insurance Council of Australia.

Participating insurers are bound by the Panel's decisions involving amounts up to $100,000. The Panel and can also make a 'recommended' settlement in disputes up to $250,000 if the parties consent. Finally, the Panel may also take a small business claim provided both parties agree. Complaints must be lodged with the Panel within three (3) months of getting a decision from the insurance company. The Panel is also empowered to call on outside expertise. Once the Panel makes its decision, the complainant has 20 days to accept the decision. If the complainant does not accept the decision, further legal avenues may be pursued

The Panel is to make it's decision having regard to fairness, law and good insurance practice. The Panel will not take complaints involving business insurances, or those made by third parties. In other words, only the person insured can make a complaint.

CONTACT NUMBER for the Insurance Council of Australia:
40 Murray Street
Hobart Tasmania 7000
Phone: (002) 345744
After hours: (002) 342109

Life Insurance (life, personal accident and sickness insurance)

The setup for life insurance complaints is very similar to that of General Insurance. However, inquiries and complaints regarding life insurance must be directed to the Life Insurance Federation of Australia (LIFA) whose number is listed in the Contact Points below and at the end of this chapter. As with general insurance, conciliation is attempted first. If that is unsuccessful the matter can be arbitrated before a special Complaints Review Committee comprised of an independent chair, a member from the insurance industry and a representative of consumers.

The scheme is designed to handle many one-off complaints which are not suitable to litigation. Participating insurance companies are bound by the decision of the Committee, though the

consumer/complainant may elect to pursue the matter further through the courts. The Committee will function as informally as possible and the use of lawyers will be discouraged. The decision is to be based upon what is fair and reasonable having due regard to relevant principles of insurance and superannuation law and practice.

Note that the Committee has no power to deal with complaints regarding the level of premium or the factors taken into account in offering insurance on non-standard terms or in rejecting a proposal for insurance. Neither does the Committee have power to determine matters arising out of a contract for disability insurance which involves the interpretation of medical evidence.

CONTACT NUMBER for the Life Insurance Federation of Australia (LIFA)
310 Queen Street
Melbourne Victoria 3000
Phone: (free) 008 335405

Evaluation and Comment on the New Insurance ADR Procedure[7]

The new ADR procedure was established in consultation with the Insurance and Superannuation Commission, the Federal Bureau of Consumer Affairs and the Trade Practices Commission. However, these bodies did not back the new procedure unreservedly, and it will be subject to review after 12 months of operation.

The Insurance Council of Australia has released statistics of complaints received under the new scheme for the 6 month period 1/6/91 through 30/11/91. On a national scale, 2313 complaints were received. In Tasmania there were 31 complaints, with two-thirds of these concerning house (buildings) insurance (35%) and goods in transit (30%). The other major category was motor comprehensive insurance (19%).

As to the nature of the complaints, the major category in Tasmania was 'denial of liability (61%) followed by settlement amount (19%); other aspects of settlement (19%) and delay (8%). On a national scale, the major agencies for referring the 2313 complaints on to the General Insurance Council were the Consumer Affairs Bureau (47%), friend/word of mouth (15%), media (11%), solicitor (4%), broker (3%), State Ombudsman (3%), insurance company (2%), politician (1%), other (14%).

Concerning the resolution of complaints, of the 2313 complaints recorded, 42% were resolved through informal action or advice from the Insurance Council; 20% were referred to senior management, 8%

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7 See generally, R. Drake, 'Alternative Dispute Resolution: Dealing with Insurance Conflicts' (1991) 29 (7) Law Society Journal 79; see also, Insurance Law Reporter (Sydney, CCH) para 19-420.

were not resolved and 30% were still in progress. Following the insurer review of the complaint, 50.3% of the cases resulted in the company changing its decision in favour of the consumer, while in 49.7% of the cases the company confirmed its original decision. The Complaints Review Panel itself decided 15 cases during the 6 month period with 8 resolved in favour of the consumer and 7 in favour of the insurance company. A further 39 cases were in progress at the time of reporting and 13 cases had been rejected because they were outside the jurisdiction of the Claims Review Panel, were outside the statute of limitations period, etc.

Some commentators[8] have argued that the Australian scheme, in contrast to insurance ombudsman schemes in other countries, is too tied to the insurance industry itself because the insurance industry provides the secretariat for administering the scheme. This is contrast to Denmark and the UK where an independent secretariat administers the complaints and review procedure.[9] The other major complaint is that the new procedure is unduly limited in scope, covering as it does only complaints in which the consumer suffers economic loss. Excluded from consideration under the new scheme are common and important complaints about pricing, underwriting decisions, misleading advertising, and so on.[10]

Banking: Tasmania Moves Towards Adoption of Uniform Legislation For Non Banking Financial Institutions

Australian Financial Institutions Act

Tasmania, in conformity with all other Australian jurisdictions, will soon adopt legislation which provides a new and uniform framework for the operation and prudential supervision of credit unions and building societies. Queensland was the first State to pass the Australian Financial Institutions Bill. The Tasmanian Financial Institutions (Applications of Laws) Bill which has passed the lower house and has the support of the upper house will, when passed at the next sitting of Parliament, utilise the Queensland template legislation as a model. Effectively, the new Act will repeal the *Building Societies Act* 1876, *Building Societies Act* 1887, *Building Societies Act* 1895, *Building Societies Act* 1958, *Building Societies Amendment Act* 1985 and *Building Societies Amendment Act* 1987.

The purpose of the new legislation is to establish high prudential standards for risk management, capital adequacy and disclosure. The philosophy of the legislation is to move from the present regime of prescriptive legislation to one of prudential

8 Ibid.
9 See R. Drake, 'Insurance Dispute Resolution: Lessons from Europe' (June 1991) 16 (3) Legal Services Bulletin 125.
10 Ibid.

supervision. While this will provide financial institutions with greater flexibility in their decision making, it also means that responsibility for prudential management rests primarily with each credit union or building society itself.[11] Another important aspect of the new legislation is the creation of a state-based contingency fund to protect depositors from such events as the insolvency of a credit union or building society, such as occurred recently in Victoria. Finally, the new legislation, by removal of previously existing regulatory impediments, will make it easier for credit unions to trade interstate.

Australian Financial Institutions Commission and State Supervisory Authorities

The new regulatory scheme for non banking financial institutions will be administered nationally by a newly established Australian Financial Institutions Commission (AFIC) which was established by the Australian Financial Institutions Act 1992 (AFIA). State Supervisory Authorities (SSAs) are also provided for and will be established under the new State legislation.

The role of the AFIC will be to ensure that risks are not undertaken unnecessarily or unknowingly; and that when risks are taken, that depositors are given maximum protection. However, it is important to stress that the AFIC will not act as a guarantor of deposits, as occurs in the United States.

The legislation also gives the SSAs various powers to enforce prudential standards. These include increasing the capital required to support a financial institution's operations in accordance with its assessed overall risk rating. The ultimate power of the SSA in regard to a financial institution failing to comply with prudential standards is to place that financial institution under direction.[12]

Transition Period for the New Legislative Regime

Obviously, not all credit unions, building societies and other NBFIs will be able to meet the new prudential standards. Accordingly, the proposed legislation provides for a transition period. Once the uniform regulatory regime is up and running (estimated to be 1 July 1992), individual credit unions and building societies must provide the SSA in their State with a report regarding the extent to which their operation complies with the newly established prudential standards. Where the prudential standards are not met, the financial institution must in addition provide a statement which details how the financial institution intends to achieve compliance with the relevant standards. It is expected that

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11 See Australian Financial Institutions Commission, *'Book 4 (Draft) Prudential Guidelines for Credit Unions'* (May 11, 1992) at 2-3.

12 id, at 3.

by December 1992 all financial institutions will meet with their relevant SSA to discuss plans to meet their target for compliance with standards. Failure by the financial institution to meet set targets will be considered as failure to meet the prudential standards themselves.[13]

Nature of the Prudential Standards Involved[14]

To give readers an idea of the type of prudential requirements required under the new legislation, below is a brief description of just a few of the requirements.

The SSA will require that financial institutions maintain the appropriate level of capital commensurate with their risk taking. In specified cases, the SSA will require SSA approval before the financial institution can undertake the transaction.

Financial institutions will also be required to demonstrate the expertise and have in place necessary systems to manage the risks involved. For example, one risk relates to the security and integrity of its data. The institution will be required to maintain detailed records of all financial transactions and to store it in more than one location. Adequate disaster recovery plans should also be in place.

Prudential requirements will also require that each financial institution maintain at all times a minimum proportion of its balance sheet in specified prime liquid assets. Financial institutions must also provide the SSA with a written description of its systems to measure, control and monitor operational liquidity. These systems must be audited annually and are subject to on-site review by the SSA.

Systems must also be in place to manage market, credit and operational risks. For example in the area of operational risk it is recommended that as a minimum, financial institutions should have insurance to cover: a) fidelity guarantee; b) fire, storm, tempest, explosion, impact, water damage, malicious damage, riots and strikes; c) directors' and officers' liability; d) public liability, including office premises, defamation; d) professional indemnity to cover legal liability to third parties through a breach of professional duty; and e) loss of profit insurance to cover profit losses due to lost/damaged records, or interrupted business operations.[15]

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13 id, at 3-4.
14 See generally, id.
15 id, 14-15.