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Liquidator's Liability for GST – *Deputy Commissioner of Taxation v PM Developments*

In light of the Federal Court's recent decision in Deputy Commissioner of Taxation v PM Developments Pty Ltd, the Government has announced that it will amend the GST law with retrospective effect from 1 July 2000, to ensure that representatives of incapacitated entities are liable for GST on post-appointment transactions. The Government is expected to release draft legislation for consultation. Dispute Resolution Associate, Jane Fraser, explores the implications.

The amendments effectively reverse the decision in *PM Developments*, a case in which the Federal Court held that the GST liability for transactions occurring during the period of the liquidator's appointment is a liability of the company in liquidation rather than a liability of the liquidator. The Court decided that since the liquidator acted as agent for the company, the liquidator did not make the relevant supply and was therefore not personally liable for GST. The GST, being a post liquidation debt, may not be able to be paid if the liquidator has no funds available, for example, where a secured creditor had retained the proceeds of sale.

Proposed Amendments

In response to the decision in *PM Developments*, the ATO has issued a Decision Impact Statement setting out the administrative accounting for GST payments and refund claims until the amendments become law.

If the proposed amendments become law, liability of the liquidator for GST will be satisfied where:

- the correct amount of GST has been paid by the liquidator on behalf of the company in the period pending Royal Assent
- the liquidator, on behalf of the company, authorises the ATO to treat the amount as paid on behalf of the liquidator
- no claim for the amount paid (i.e. no refund claim) is made against the ATO without further action by the liquidator.

Pending any amendments becoming law, the ATO will consider any claims for refunds on their merits, having regard to the following principles:

- Where the payment was made by the liquidator personally and not on behalf of the company as its agent in the relevant transaction, the ATO will consider that an overpayment may have occurred and therefore a potential refund entitlement may arise.
- Practitioners will need to consider whether they can demonstrate that the payment was made by the liquidator personally, otherwise a refund will not be paid.
- Any entitlement to a refund would also be subject to the relevant provisions of the *Taxation Administration Act 1953*. Therefore, no refund would be allowed where the liquidator would have been required to make the payment on behalf of the company in the event:
  - » the ATO is not satisfied that the liquidator has personally reimbursed a corresponding amount to the recipient of the relevant supply
  - » the recipient of the supply is registered or required to be registered for GST purposes.

Implications for Insolvency Practitioners

The decision in *PM Developments,* although concerning a liquidator, also applies to administrators and receivers as "representatives" of companies.

Under the current law, a liquidator will not be personally liable for any GST on supplies made whilst acting as liquidator. However, if the proposed amendments are enacted, liquidators who did not pay GST on supplies may face personal liability for back-dated GST payable. This may have a severe impact where the liquidator no longer controls the assets of the company. The decision in *PM Developments* should not affect liquidators who personally accounted for GST on supplies during the interim period.

Until the proposed amendments become law, practitioners may wish to set aside funds to account for any GST liability. Practitioners will be allowed 28 days after the amendments become law to bring to account GST on transactions in which they acted as agent for an incapacitated entity prior to any penalties or general interest charge being imposed.

Alternate remedies for employees wishing to enforce employment contracts post WorkChoices

*Dispute Resolution lawyer, Jacqueline Rennie, considers the case of McRae v Watson Wyatt Australia Pty Ltd which explores alternate remedies for alleged breaches of employment contract available to employees under the Trade Practices Act (Cth) 1974 (**TPA**)*

"WorkChoices" has significantly restrained actions available to employees and since the introduction of this legislation, alternative remedies have been sought by those seeking damages for breaches of employment contracts.

Ms McRae sued her former employer Watson Wyatt Australia Pty Ltd for damages she allegedly suffered when she was made redundant from her position. She claimed that when her employment contract was negotiated with the Managing Director, Mr Dillon, he represented to her that in the event of her being made redundant, she would receive a severance payment no less valuable than what she described, as the "industry standard" of three weeks pay for each year of service.

Ms McRae made a claim under sections 52, 53B and 82 of the TPA.

Section 52 of the TPA prohibits misleading and deceptive conduct in certain circumstances. Section 53B prohibits misleading and deceptive conduct in the context of employment which relates to employment that is to be, or may be, offered.

In 1988, Ms McRae accepted a role in the graduate program at National Mutual Holdings Ltd (**National Mutual**). In 1988, she commenced work in the Corporate Superannuation area of that company. In 1991, National Mutual began a retrenchment program in order to reduce the size of its workforce in Sydney. Under the program, staff could apply for voluntary redundancy through a scheme that was communicated extensively to staff. The terms and conditions of the redundancy were not included in the staff contract and were published separately. The benefit was a payment in lieu of notice plus a severance payment of three weeks for every year of service, capped at a total of 75 weeks. Ms McRae applied for the redundancy program but was not accepted. In about 1995, the superannuation division of National Mutual was purchased by Buck Consultants Pty Ltd (**Buck**). Further, redundancies were made however Ms McRae maintained her position. In March 1996, Ms McRae left Buck and took a position with Prudential Life Insurance (**Prudential**).

On 9 October 1996, Ms McRae was retrenched from Prudential. The payment terms determined were eight weeks' salary in lieu of notice and three weeks' salary for every year of service with a minimum of 12 weeks. Ms McRae then went to work at State Street Ltd Australia (**State Street**). In the second half of 1997, Ms McRae was approached by Buck and asked to return to work with them. She accepted this offer and returned in October 1997.

In 1998, Buck was taken over by NSP Lewis Pty Ltd and the companies merged to be known as NSP Buck Pty Ltd. Senior staff were offered a contract which was required to be signed by June 1999. Ms McRae and other colleagues took advice about the contract because of concern relating to existing benefits (one of which was retrenchment benefits) which should have been preserved. Ms McRae resigned from NSP Buck on 16 June 2000 because she was approached by Watson Wyatt Australia Pty Ltd (**Watson Wyatt**). Pre contract negotiations were undertaken including a telephone conference between Mr Dillon and Ms McRae on 12 June 2000. It is during this telephone conversation that Ms McRae discussed retrenchment benefits. She signed a contract on 18 June 2000.

On 14 August 2007, Ms McRae was terminated by the company by reason of redundancy. Ms McRae was initially offered a termination payment of three months' notice, which was the period nominated in her contract and one which she had negotiated with Mr Dillon, plus one month's severance payment. Ms McRae did not believe this represented the arrangement she originally made with Mr Dillon, which she claimed would be at least three weeks for every year of service. Negotiations were undertaken and eventually the company offered Ms McRae an extended superannuation benefit provided that she signed a deed of release. It did not offer her any additional severance payment. This offer was not accepted.

Evidence of the discussions between Ms McRae and Mr Dillon played a key role in this case. Ms McRae received her letter of offer from Watson Wyatt dated 5 June 2000. On receipt of this documentation, she called Mr Dillon for clarification of a number of matters. It was Ms McRae's assertion that she noted items for discussion on the back of the envelope which contained the letter of offer.

This envelope was tendered in evidence. In a blue biro, the words "termination" and "redundancy" were written on the back of the envelope. The words "standard" and "redundancy" were clearly written next to the word "termination" in a different black biro. Also in a green biro were the words "redundancy – look after staff". It was held that Ms McRae initially wrote down points of discussion and then used a different biro to record answers provided by Mr Dillon.

Federal Magistrate Raphael stated that the following representations were made by Mr Dillon to Ms McRae:

- Watson Wyatt always looked after its staff.
- Watson Wyatt had a very generous redundancy policy compared to the three weeks per year of service Ms McRae claimed was the industry standard (based on her previous experience).
- In the unlikely event that Ms McRae's position was made redundant, Ms McRae would be well looked after.
- Watson Wyatt did not include the redundancy policy in contracts of employment.

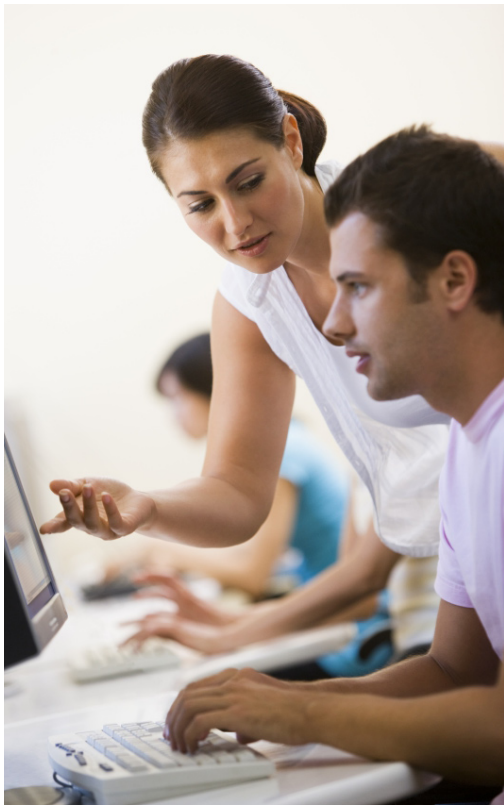
Raphael FM examined the situation in Ms McRae's case and ruled that the representations made to her "… constituted a clear representation that in the unlikely event that she was made redundant, (she) would receive at least 3 weeks' salary for each year of service as an additional severance payment".

It was contended by Watson Wyatt that Ms McRae may have been out of a job when the account that she worked on at NSP Buck moved to Watson Wyatt with a colleague. Whilst this was held by Raphael FM to be a good reason for her acceptance of the position with Watson Wyatt, it did not mean she was excluded from relying on the representations made about a redundancy package. A representation does not need to be the sole inducement that leads to the formation of a contract; it must be a "real" inducement in the sense that it "materially affected the representee's decision to contract".

It was held by Raphael FM that the evidence pointed towards Mr Dillon having made actionable representations under ss52 and 53B of the TPA in the course of negotiations of her contract of employment.

Raphael FM also examined whether the terms negotiated between Ms McRae and Mr Dillon during their telephone conversation constituted oral contractual terms. It was held that Ms McRae's contract of employment included both written and oral terms and that the contract contained the oral terms in relation to redundancy.

This case illustrates the litigation avenues available to employees as a result of alleged breaches of employment contract.



The Latest on Confidential Information

Trade and Transport Associate, Jane Roberts, reviews a recent unreported decision of the Full Court of the Federal Court of Australia in Victoria, Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd & Anor which considers the duties owed by employees to employers regarding confidential information both during the employment relationship and after.

The appellant (**Futuretronics**) is a designer, importer and wholesaler of electronic goods and accessories.

Futuretronics alleged that in June or July 2005 it entered into an agreement with the first respondent (**Graphix**) under which Graphix was to manufacture for Futuretronics covers for mobile phones, iPods, handheld games and electronic game controllers (**skins**) using a particular material which did not 'bubble' or leave adhesive on the items.

The second respondent, Mr Atta (**Atta**), was employed by Futuretronics between January 2004 and 29 September 2006, and at the time of his resignation was National Sales Manager. On 12 February 2004, Atta signed a confidentiality agreement with Futuretronics, which provided that after his employment he would maintain Futuretronics' confidential information and prevent its unauthorised disclosure to third parties, and would not himself, or for any third party, appropriate, copy, memorise or in any manner reproduce any of the confidential information.

On 13 September 2006, while still employed by Futuretronics, Atta sent two emails to Graphix's General Manager. The first referred to a discussion the day prior, and set out four 'concepts' for producing and marketing Graphix's own range of skins. The second email contained a reference to Atta conducting a normal store visit and during the course of this, identifying brands in the market which were producing iPod accessories and who might be interested in skins.

Atta ceased employment with Futuretronics on 29 September 2006 and commenced with Graphix on 4 October 2006. After commencing with Graphix, Atta sent an email to Cygnett, one of the brands identified in his second email of 13 September 2006, seeking to sell it skins as an employee of Graphix. In this email Atta identified a supplier of Futuretronics, Storm Electronics.

Claim by Futuretronics against Atta

Futuretronics alleged that Atta had breached the confidentiality agreement, and the fiduciary duty owed by Atta to Futuretronics in Atta's capacity as National Sales Manager.

The allegations made against Atta included:

- disclosure of confidential information (being pricing information for the sale of Futuretronics products)
- disclosure of confidential information and breach of fiduciary duty (disclosing the identity of Storm Electronics to Cygnett)
- breach of fiduciary duty by using Futuretronics' resources for and on behalf of Graphix in order to create business plans for Graphix to allow it to compete with Futuretronics; advising Graphix of business opportunities for skins; and failing to advise Futuretronics of these business opportunities
- breaches of the *Corporations Act 2001* (**the Act**) by reason of the conduct referred to above.

Futuretronics brought proceedings against Graphix regarding infringement of copyright and breaches of implied terms of their agreement, and sought a declaration that Atta had authorised the infringement. However these matters are not dealt with in this article.

Decision at First Instance

The primary judge rejected the claims of breach of duty under the confidentiality agreement.

His Honour found that the emails of 13 September 2006 were neither a breach of Atta's fiduciary duty, nor of the Act. His Honour held that there was no confidential information in the emails; that the 'business plans' were unsophisticated and would have been obvious to anyone reasonably familiar with the industry; and that he was not satisfied that Atta had used the time of Futuretronics for his own benefit, rather than for Futuretronics.

In relation to the email to Cygnett, his Honour considered that the name of the supplier disclosed to Cygnett was not confidential information, as there was no evidence that the name of the company as a supplier to Futuretronics was not generally known outside Futuretronics.

The primary judge made declarations, and awarded damages, only in relation to the infringement by Graphix of Futuretronics' copyright, and dismissed the application insofar as it dealt with breaches by Atta of the confidentiality agreement, fiduciary duty, and the Act.

Appeal

Futuretronics appealed. The appeal concerned two issues:

1. Whether the primary judge erred in holding that Atta did not breach his fiduciary duties or his duties under the Act by sending the 13 September emails

2. Whether the primary judge erred in holding that the evidence did not establish that the name Storm Electronics was not generally known as a supplier to Futuretronics outside Futuretronics, and was not confidential information.

Futuretronics did not challenge the primary judge's analysis of the law relating to the contractual and fiduciary duties of an employee to an employer, but the application of the law to the facts.

The Full Court noted that the primary judge:

'[H]ad earlier referred to the duty of fidelity and good faith, including therein a duty of confidentiality. He went on to say… that:

> *Within the fiduciary duties is a duty on an employee to act in his employer's interests and not in his own interests at the expense of his employer and also a duty not to misuse confidential information.'*

The Court held that the primary judge's formulation of the duty accorded with the balance of authority. The Court upheld the trial judge's finding of fact on the September emails, stating that:

> *"The first email did not disclose any aspect of the way in which Futuretronics' business functioned, or any secret process or strategy. It is impossible to regard the information it contained as having been acquired by him from Futuretronics in circumstances importing an obligation of confidence.*
>
> *Counsel did not explain how Mr Atta's list in his second email of well-known stores he had visited, such as David Jones… could have provided information that was adding to Graphix's marketing plan. In any event, those… retail names have not been shown to be confidential."*

In relation to the Cygnett email, Futuretronics attempted to show that three passages of cross-examination of Atta, in conjunction with the email, showed that the name Storm Electronics was 'not generally known outside Futuretronics'. The Court held that Futuretronics had failed to bring direct evidence that the name was not generally known and was therefore confidential information, and that its indirect attempts to show this were no more than suggestive of that fact.

As the information in all emails was not confidential, the Court upheld the decision at first instance.

As a final point, the Court noted that the disclosure of the supplier's name would not be considered a misuse of confidential information in equity either, as the name had become part of Atta's own knowledge, skill and experience through previous employment.

The decision does not establish any new points of law but confirms the obligations of an employee regarding their employer's confidential information both during and after the employment relationship, which are generally as follows:

- An employee owes a fiduciary duty to his/her employer to act in their employer's interests and not their own, and to not to misuse their employer's confidential information.

- The fiduciary duty ceases after the end of the employment relationship, however the duty regarding confidential information remains.

- An employee is entitled to make use of knowledge, skill and experience which becomes theirs during the course of the employment.

The Do's and Don'ts of Terms and Conditions in Road Transit

Trade and Transport Associate, Amanda Lazarou, provides an outline of the various issues faced by transport operators when attempting to reduce and/or limit their liability for damage by exclusion clauses.

Appropriate Drafting

Generally, for an exclusion clause to operate to effectively exclude liability for negligence, the clause needs to expressly or specifically refer to negligence. However, where words like "howsoever caused" and "whatever its cause" have been used, they have been deemed sufficiently wide to include negligence. The Courts have upheld the validity of such clauses in the context of road carriers.

Incorporation of Terms and Conditions

Once a carrier has appropriately drafted terms and conditions, unless they are appropriately incorporated into each contract with each customer, they are not enforceable.

There are three main methods by which terms and conditions are incorporated:

1. *Incorporation of Terms and Conditions of Contract by Signature*

The most recent pronouncement in this area is the High Court decision of *Toll v Alphapharm*. In that decision, the Court held that:

> *"The general rule, which applies in the present case, that where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document."*

Accordingly, it will generally be the case that, absent some special case of fraud or misrepresentation, where a document includes conditions printed either on the reverse side of the document or in some separate document, a party's signature will be sufficient to bind that party to all of the conditions, whether or not it has read them. In the absence of a signature, however, a party seeking to rely upon terms and conditions will be required to show that it did what was reasonably necessary to draw the other party's attention to those terms and conditions.

2. *Incorporation of Terms and Conditions of Contract by Reasonable Notice*

In situations where there is no document actually signed by the parties, it is open for the terms to be incorporated by reasonable notice in the circumstances.

The leading case in this area is the New South Wales Court of Appeal decision of *Remath Investments No 6 Pty Ltd v Chanel (Australia) Pty Ltd.*

In that case the Court was required to consider whether the notation "All services performed are subject to our conditions of contract, copies of which are available on request" on the bottom of Remath's invoices was sufficient to incorporate those conditions into the contract. In rejecting the appeal, the Court stated:

> *"Why should Mr Borwick [an employee of Chanel] at that stage be expected or required to do anything to find out more about Remath's conditions of contract? Why should the law allow Remath to introduce restrictive conditions by stealth when it made no attempt to introduce them openly and directly at the time that the contracts were made. In our opinion in the circumstances of this case there was no onus whatever on Mr Borwick to make any inquiry of Remath simply because he had received and read invoices in this form."*

Accordingly, extrapolating the reasoning of the Court of Appeal, any **mere reference** to the availability of terms and conditions on a website would also not be considered "reasonable notice" by the Court.

3. *Incorporation of Terms and Conditions of Contract by a Prior Course of Dealings*

The incorporation of terms and conditions through a prior course of dealings is similar to that of incorporation by reference. However, in order for a party to incorporate terms and conditions

of contract through a prior course of dealings, regard must be had to the extent of the dealings between the parties, and whether those dealings were consistent and sufficiently long.

In addition, the degree of knowledge (either actual or implied in the circumstances) of the party against whom the terms are sought to be imposed remains to be the key consideration. Accordingly, the onus still remains on the party seeking to rely on the terms to establish that they brought the actual terms to the notice of the other contracting party in the first instance.

The implications of the *Trade Practices Act*

It is important to note that, despite having appropriately drafted and incorporated terms and conditions, the *Trade Practices Act 1974* (Cth) (**the Act**) has mandatory application to transactions between corporations and consumers. Two provisions of the Act are most relevant to carriers' activities.

Section 74 – statutory warranty in relation to supply of services

First, the statutory warranty in section 74 of the Act may not be excluded by contract and, as such, is mandatory. Section 74(1) relevantly provides as follows:

> *"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."*

However, some contracts of carriage will not be subject to this warranty, because of an exception set out in section 74(3) of the Act, which relevantly provides as follows:

> *"A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under:*
>
> *a. a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored…"*

It follows that the mandatory statutory warranty in section 74 of the Act will not always apply to a contract of carriage. In any event, section 68A of the Act provides an exception to the mandatory application of the warranty in section 74 of the Act, as follows:

> *"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 section 68 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 section 69) to:*
>
> *b. in the case of services...*
>
> *iii. the supplying of the services again; or*
>
> *iv. the payment of the cost of having the services supplied again."*

However, the decision of *Wallis v Downard-Pickford (North Queensland) Pty Limited* held that the test for the application of section 74(3) was the purpose of the movement, not who foots the bill for their transit. If the purpose of the move is more personal then the warranty under section 74 will be implied.

Section 52 – prohibition on misleading and deceptive conduct

There has been considerable judicial comment as to whether or not exclusion clauses in contracts may operate as to exclude or limit a corporation's liability to a consumer for breach of section 52 of the Act.

In *Oraka Pty Ltd v Leda Holdings Ltd,* Burchett J made the following statement in relation to an exclusion clause in a lease agreement which was alleged to have been entered into as a result of misrepresentations made by the lessor prior to execution of the lease agreement:

"It cannot be thought that the very agreement that was obtained by a misrepresentation can be made good by incorporating in it a further misrepresentation falsely asserting that it was not procured by the means which were in fact employed. The agreement that so seeks to sustain itself was obtained by a misrepresentation, and no verbal magic of an added clause can change that. Many authorities have made this clear…

… In my opinion, a clause of this kind could only assist the respondent if, in reality, its terms formed part of a complex set of circumstances leading to the conclusion that the respondent's conduct was not truly misleading, or did not truly induce the action it was alleged to induce. If, on the other hand, the conduct really was misleading, and did induce the applicants to execute the document… the fact that this document happened to include cl9 cannot enable the respondent to evade the consequences of its conduct."

That statement has been approved subsequently by courts in most Australian jurisdictions and should be accepted as the law in Australia on the proper treatment of exclusion clauses in contracts found to have been entered into by one party in reliance upon misrepresentations made by the other party to the contract who seeks to enforce the exclusion clause.

Issues when dealing with claims involving principals and subcontractors

The Operation of Himalaya Clauses

As with any exclusion clause, a Himalaya Clause must be both appropriately drafted and incorporated. To that end, the test for establishing whether a third party is to be protected by a Himalaya Clause drafted by a carrier was established in *Midlands Silicones Ltd v Scruttons Ltd*:

- The terms and conditions must make it clear that the third party is intended to be protected.
- The terms and conditions must make it clear that the carrier is contracting as agent for the third party and that its provisions should apply to that third party.
- The carrier must have authority from the third party to contract for them, although where this has not occurred, a later rectification will suffice.
- There must be no difficulty about the third party providing consideration.

Accordingly, whilst Himalaya Clauses are useful tools when attempting to avoid liability as a subcontractor to a principal, subcontractors are left to rely on the principal having an appropriately drafted clause and ensuring that it is adequately incorporated.

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