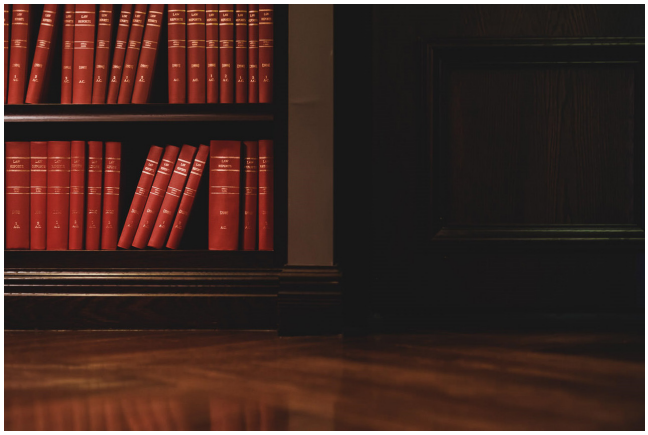

LEVEL TWENTY SEVEN CHAMBERS

Raising the bar for businesses: the ACL's reach in business negotiations and brand protection

Seminar notes from Level Twenty Seven Chambers

25 Oct 2018

Bargaining in the shadow of the ACL: unconscionable conduct in the wake of Ipstar Australia Pty Ltd v APS Satellite Pty Ltd

Courts and legislators have historically resisted calls to apply the doctrine of unconscionable conduct to the commercial sphere. In the business context, parties are ordinarily allowed to drive the hardest bargain achievable within the constraints of competition law.

The recent New South Wales Court of Appeal Case of *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd*[1] provides an example of how commercial bargaining could trigger the unconscionable conduct provisions of the Australian Consumer Law.

Background facts

Ipstar was a wholesaler of satellite broadband services. APS Satellite Pty Ltd, formerly known as SkyMesh, was a licensed telecommunications carrier. Skymesh purchased internet bandwidth from Ipstar, which it then sold to internet users.

In 2008, SkyMesh customers experienced difficulties connecting to the network. The parties discovered that some of the terminals connecting the SkyMesh customers to Ipstar's satellite network were faulty. The terminals had been supplied by Ipstar. In 2009, the parties agreed to a process for identifying the extent of the problem, with a view to compensating SkyMesh for the costs of replacement.

Ipstar became concerned about the potential costs it may incur as a result of SkyMesh's claims. It undertook a dual strategy, involving:

1. Raising the price SkyMesh paid by 20%, to cover its estimated future liability; and

2.Refusing to pay all claims (including those that it knew to be valid) until all claims had been properly substantiated.

SkyMesh ultimately agreed to the price increase. However, upon expiry of the agreement, it brought a claim for damages for unconscionable conduct.

Decision

The Court of Appeal upheld the primary judge's finding that the conduct had been unconscionable. Chief Justice Bathurst (with whom Beazley P and Leeming JA agreed) held that:

1. Whether certain conduct is unconscionable requires a consideration of all the circumstances to determine whether the conduct in question falls below acceptable norms, standards or values;

[1] [2018] NSWCA 15; 329 FLR 149.

2. In applying this test, the Court will have regard to:
   a. the terms of the statute itself;
   b. the approach taken by the courts in dealing with cases under the unwritten law (whilst recognising these cases do not limit the scope of the provision);
   c. judgments in related areas including cases involving want of good faith; and
   d. all the circumstances surrounding the transaction;

3. In this case, the conduct fell below acceptable standards, because:
   a. Ipstar was in a position of commercial disadvantage, as its business model made it commercially reliant upon Ipstar; and
   b. Ipstar had "*calculated a price increase based on a liability to pay claims, while at the same time refusing to pay any of them*."

Implications

The decision provides a cautionary tale for businesses in conducting their commercial negotiations.

Following the passage of the *Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018* (Cth), liability for unconscionable conduct will extend to public companies. This amendment may provide further cases to shed light on the conduct that will fall below "the standards of conduct expected of commercial enterprises."

Brand protection and the ACL: when too much good news can be misleading

Background facts

Meriton offers serviced apartment accommodation across locations throughout Queensland and New South Wales. In about August 2013, Meriton commenced participating in TripAdvisor's "Review Express" service, by which Meriton was to provide to TripAdvisor on a weekly basis the email address of all guests who stayed at Meriton properties. TripAdvisor would then send an email to each guest, inviting them to post a review of the Meriton property on TripAdvisor.

The ACCC contended that during the period November 2014 to October 2015, Meriton adopted two practices:

1. First, Meriton instructed its frontline staff to add the letters "MSA" to email addresses of guests who made a complaint during their stay.

[2] [2017] FCA 1305. See also: *ACCC v Meriton Property Services Pty Ltd (No 2)* [2018] FCA 1125.

2. Secondly, where a property had suffered a major service disruption (such a lifts being out-of-order), Meriton withheld from TripAdvisor the email addresses of all guests who stayed at the relevant property during the period of service disruption.

Both practices resulted in guests who made complaints or who experienced service disruption not receiving an email invitation to post a review of the property on TripAdvisor.

Meriton essentially accepted that it engaged in the two practices contended for by the ACCC; but denied that such conduct had the misleading effect or likely effect alleged by the ACCC.

Decision

Justice Moshinsky agreed with the ACCC and found that, by engaging in these two practices, Meriton breached both section 18 and section 34 of the ACL.

In reaching this conclusion, Moshinsky J accepted the expert evidence led by the ACCC that the two practices had the effect of reducing the proportion of negative reviews of the relevant Meriton properties appearing on TripAdvisor. In reaching this conclusion, his Honour observed that the focus of both section 18 and section 34 of the ACL was upon "conduct", finding:[3]

"*the fact that, in the present case, the relevant statements on the TripAdvisor website were made by guests, rather than by Meriton, does not of itself present an obstacle to the potential application of the provisions. Each of these provisions was drafted and enacted at a time well before the internet as we now know it, and websites such as TripAdvisor, existed. Nevertheless, each provision is drafted in elegant and simple language capable of potential application to new circumstances that arise through developments in technology.*"

Meriton was ordered to pay a pecuniary penalty of $3 million.

Implications

Since this case was determined, the maximum civil pecuniary penalty for corporations under the ACL has increased from $1.1 million per contravention to the greater of:

• $10 million; or
• if the court can determine the value of the benefit obtained from the offence by the corporation (and any related bodies corporate) – three times the value of the benefit; or
• if the court cannot determine the value of the benefit – 10% of the annual turnover of the corporation.

As the penalties for non-compliance increase, it is critical that businesses make sure that they get their online strategies right. Failure to do so could not only be costly but could cause significant harm to the business' reputation and brand.

[3] At [202].

LEVEL TWENTY SEVEN CHAMBERS

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Claire has been recognised by Australasian Lawyer as one of the 50 Rising Stars of the legal profession and is listed in the Doyle's Guide to the Australian Legal Profession as a Recommended Construction & Infrastructure Junior Counsel.

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She is frequently briefed to appear in both state and federal jurisdictions at trial and appellate level. In 2018, Claire was briefed to appear with Counsel Assisting the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

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Prior to being called to the bar, Mei worked as an associate to the Hon. Justice Margaret Wilson of the Supreme Court of Queensland, and as a solicitor at Herbert Smith Freehills. Mei has advised both Australian and international clients on complex construction disputes, civil penalty proceedings and general commercial disputes in State and Federal Courts. Her broad commercial practice has a particular focus on building and construction, regulatory and general commercial disputes.

Mei holds a Bachelor of Laws with First Class Honours from the Australian National University, and a Master of Laws as a James Kent Scholar from Columbia University, New York.

She is admitted to practice in Australia and in New York.