Appeal

The defendant appealed the decision of Justice Hedigan but it was unanimously upheld by Justices Buchanan and O'Bryan stating that they believed the decision was "plainly correct".[7] Dow Jones is considering taking the case to the High Court despite the failure of the appeal.[8] As it stands, Joseph Gutnick retains the right to sue Dow Jones in Victoria.

Implications of *Gutnick v Dow Jones*

The ruling by Justice Hedigan is considered by some commentators to signify a real threat to free speech.[9] The outcome of the decision is that anyone publishing material online may be forced to comply with vastly different libel laws in numerous jurisdictions.

Although Justice Hedigan drew a distinction between internet publications and world wide web publications, there is still some substance to Dow Jones' argument that international websites may become wary about granting subscriptions to Australians for fear of being sued under Australian law. In comparison to other countries such as the UK and US, Australian defamation laws are regarded as more strict.[10]

We will have to wait and see whether Dow Jones will appeal the case in the High Court. Until then, international websites may need to think twice before they publish any online material that could be regarded as defamatory of citizens of countries that have stricter libel laws. Some publishers could even decide to address this issue by excluding certain countries from accessing their web content to avoid the risk of being sued.

1 [2001] VSC 305

2 See n1 above, as per Hedigan J at [68]

3 See n1 above, as per Hedigan J at [20]

4 By virtue of R8.09 of the Supreme Court's Rule.

5 See n1 above, as per Hedigan J at [8]

6 See n1 above, as per Hedigan J at [102]

7 *Dow Jones & Company Inc v. Joseph Gutnick,* Court of Appeal, 21 September 2001, unreported judgement.

8 K Towers, "Dow Jones looks at High Court move in Gutnick action", Australian Financial Review, 22 September 2001.

9 "Gutnick ruling threaten net and free speech", Editorial from The Australian, 29 August 2001 and see also J Birmingham, "What first Amendment?", The Industry Standard, June 18 2001. www.thestandard.com.au/articles/article_print/0,1454,14519,00.html (accessed 27 September 2001)

10 P Barlett, "Victorian libel law casts a global net", published at www.it.mycareer.com.au on 29 August 2001, (accessed 27 September 2001)

RACV wins IT case against Unisys

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Overview

For IT suppliers, the case of *RACV Insurance Pty Ltd & Anor v Unisys Australia Ltd & Ors*[1] should remind them to not make any false or misleading representations in pre-contractual negotiations.

For customers, litigation of this kind is expensive. Coupled with the risks inherent in running a case heavily reliant on witness recollection means that customers should seek alternative forms of settlement to litigation when dissatisfied with their suppliers.

Australian cases involving corporate customers initiating proceedings against suppliers of IT systems which fail to meet expectations have been relatively rare. Nevertheless, this is what RACV Insurance Pty Ltd (RACVI) and RACV Group Services Pty Ltd (RACVGS) did in December 1996, when they filed proceedings in the Supreme Court of Victoria against Unisys Australia Ltd (Unisys).

The history of the case goes back to 1993, when RACVI entered into a contract with Unisys to design, supply and install a work flow management system, based on the imaging of documents (WMS System). The idea of the WMS System was to replace RACVI's existing paper base system for the processing of claims. The system handed over by Unisys as complete in March 1995 was a failure. Although Unisys attempted to fix the problems with the WMS System, it was unsuccessful. In June 1996, RACVI terminated its contract with Unisys.

Five years later, the matter came to trial before Hansen J who handed down a judgment in favour of RACVI and RACVGS in August 2001.

Causes of action alleged against Unisys

RACVI and RACVGS alleged three causes of action against Unisys. They were:

- contravention by Unisys of section 52 of the Trade Practices Act (TPA) which prohibits a corporation engaging in conduct which is misleading or deceptive
- negligent statement by Unisys
- breach of contract by Unisys.

RACVI and RACVGS alleged that Unisys had made negligent statements and certain false representations in

breach of section 52, both in the lead up to the signing of the contract in December 1993 and subsequently in the period to termination of the contract in June 1996. Primary reliance was placed by the plaintiffs on section 52. Ultimately, the claim for negligent statement was abandoned and breach of contract was put as a "fall-back" position.

The representations complained about by RACVI and RACVGS were said to be contained or made in:

- the July and October 1993 responses by Unisys
- correspondence passing between the parties
- brochures on the InfoImage product, which was utilised in the WMS System
- during demonstrations of the WMS System by Unisys
- the course of conversations between representatives of the parties.

Although the plaintiffs cited a number of alleged false representations by Unisys, His Honour ultimately only examined and found for RACVI and RACVGS on three key representations. In respect of all three, Hansen J held that they had been made by Unisys. Insofar as they contained representations as to a future matter, His Honour further found that Unisys had no reasonable grounds for making such representations. Finally, His Honour found that RACVI and RACVGS had relied upon such representations to their detriment.

Key representations by Unisys

The first representation which the plaintiffs claimed had been falsely made by Unisys was that the WMS System would provide adequate storage capacity to provide, on a "date-forward basis", for all open claims online, all claims near-line for three months following closure and close claims older than three months offline. His Honour found that the representations relating to online storage were misleading. Unisys had never configured the WMS System to store all current claims online and did not have reasonable grounds for making that representation. His Honour was further satisfied that the requirement of adequate storage capacity for all open claims online was critical for RACVI in order to quickly retrieve document images.

The second and third key false representations made by Unisys concerned retrieval time of online and near-line claims. In particular, Unisys had represented that the system would provide high-speed image access for online claims with retrieval time approximately two to four seconds and image access in near-line claims with an expected response time of 20 seconds maximum. His Honour accepted that the system did not perform in accordance with these representations.

Unisys had argued that certain qualifications in its July 1993 response were important because these qualifications effectively excluded any commitment to response times. Unisys asserted that by reason of these qualifications the parties had since dealt with each other and entered into the December 1993 contract on that basis and without making any commitment to any particular configuration. This argument was rejected by Hansen J. His Honour found that such an important qualification should have appeared in the section of the July response dealing with online requirements. Instead, the qualification appeared in the section of the response dealing with the level of post implementation service and support. His Honour found that the reference to response times was a reference to the time which Unisys would take to respond to calls concerning problems, and not a reference to the time taken by the WMS System to respond to the requirements of the user for information.

Damages claim

A plaintiff successful under section 52 of the TPA is entitled to damages on the basis that the plaintiff should be put in the position it would have been in had the contravention not taken place. His Honour found that had the false representations not been made, RACVI would not have contracted with Unisys. Accordingly, His Honour ordered Unisys to pay RACVI and RACVGS $4 million plus $1.5 million by way of interest. The $4 million included sums paid by RACVI and RACVGS to Unisys, third parties such as Deloittes and on external training, capital expenditure, software and hardware connected to the WMS System.

Lessons to be learnt

From the perspective of suppliers of IT systems, this case serves as a timely reminder that:

- suppliers must take great care in pre-contractual negotiations to ensure that they do not make any false or misleading representations in relation to the features or benefits of their IT systems. Such representations are not just confined to those contained in written proposals but may also be made in a less formal context, such as in demonstrations and conversations
- qualifications in written proposals may not be sufficient to override false or misleading representations
- although the contract negotiated by Unisys contained a cap on Unisys' liability, this cap was not effective in relation to a claim based on section 52 of the TPA.

From the perspective of a customer, litigation is certainly not for the faint hearted. The case took six years to come to trial and involved 32 sitting days in Court. The plaintiffs called 10 witnesses while Unisys called 12. After Counsel's closing addresses, the number of transcript pages totalled 3,178. The Court book comprised 49 lever arch files containing 18,935 pages. The decision of Hansen J amounted to another 148 pages. Clearly, litigation of this kind is expensive and demanding on executive time. These factors, coupled with the risks inherent in running a case heavily reliant on witness recollection, makes it likely that many customers who are dissatisfied with their suppliers will seek alternative forms of settlement to litigation.

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[1] [2001] VSC 300 (24 August 2001)