Recreational services and geographical limitation of the *Civil Liability Act*

Insight Vacations Pty Ltd v Young [2011] HCA 16

By Andrew Naylor

On 11 May 2011 the High Court delivered judgment in *Insight Vacations Pty Ltd v Young*.[1] At issue was the proper construction of s74(2A) of the *Trade Practices Act* 1974 (Cth) – which made provision for state and territory laws to limit the application of the statutory implied warranty that services be supplied by corporations with due care and skill – and s5N of the *Civil Liability Act* 2002 (NSW), which allows for the limitation of liability in relation to a contract for the supply of recreation services.

The High Court's judgment stands for two propositions. First, s5N of the *Civil Liability Act* does not limit the operation of the implied warranty of due care and skill in relation to the provision of recreation services. This is because s5N is not a law of a kind that is picked up by s74(2A) of the *Trade Practices Act* and applied as 'surrogate federal law'. By implication, it is unlikely that s5N of the *Civil Liability Act* is a 'surrogate federal law' for the purposes of the equivalent to s74(2A) in the new *Australian Consumer Law*, namely, s275 of Schedule 2 to the *Competition and Consumer Act* 2010 (Cth).

The second proposition for which *Insight Vacations v Young* stands is that, insofar as s5N of the *Civil Liability Act* can apply, it is restricted to contracts where the recreation services are supplied in NSW. The reference in s5N(1) to 'a term of a contract for the supply of recreation services' should be read as subject to a geographical limitation.[2] Irrespective of whether the contract specifically provides that the proper law of the contract is to be the law of NSW, if the recreation services are supplied or delivered outside of NSW, a clause in a contract purporting to exclude liability will not be enforceable under s5N of the *Civil Liability Act*.

BACKGROUND

The respondent, Mrs Young, and her husband, purchased an organised European holiday package from the appellant, Insight Vacations Pty Ltd. Mrs Young fell and was injured when the bus on which she was travelling between Prague and Budapest (as part of the organised tour), suddenly braked. Mrs Young successfully sued Insight Vacations in the District Court for damages for her injuries on the basis of a breach of contract; in particular, a failure to comply with the warranty implied by s74 of the *Trade Practices Act* to render services with due care and skill. Applying s16 of the *Civil Liability Act*, Mrs Young was awarded $11,500 for non-economic loss. In the District Court, Mrs Young also succeeded in obtaining an additional award of damages of $8,000 for the disappointment and distress resulting from breach of a contract for the supply of services for enjoyment.[3]

In *Insight Vacations Pty Ltd v Young*,[4] the NSW Court of Appeal set aside the damages for disappointment and distress. The Court characterised these damages for as damages for non-economic loss to which the *Civil Liability Act* applied. Mrs Young was not entitled to a separate award for damages for distress and disappointment.

The High Court granted special leave on the question whether the balance of Mrs Young's damages award – for breach of the implied warranty to render services with due care and skill – should be set aside. The appellant argued that the liability exclusion clause in the travel contract applied to the circumstances in which Mrs Young was injured. It further argued that this liability exclusion clause was authorised by s5N of the *Civil Liability Act*. Finally, the appellant submitted that s5N was picked up as 'surrogate federal law' by s74(2A) of the *Trade Practices Act*, thereby limiting the operation of s68, which made void terms of contracts inconsistent with the implied warranty in s74. In a single joint judgment, a five-member bench of the High Court unanimously rejected all steps of the appellant's argument.

RECREATION PROVISIONS IN *CIVIL LIABILITY ACT*

Section 74(2A) of the *Trade Practices Act* provided that where the s74 implied warranty is breached and the law of a state or territory is the proper law of the contract, the law of the

state or territory 'applies to limit or preclude liability for the breach, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability and recovery of a liability, for breach of another term of the contract'. It was submitted by the appellant that s5N of the *Civil Liability Act* was a law of NSW that was picked up by s74(2A) and applied to exclude liability.

The High Court held that s5N of the *Civil Liability Act* was not picked up and applied by s74(2A) of the *Trade Practices Act* because it does not itself limit liability. Rather, it allows the parties to contract to exclude liability. The High Court contrasted s5N with other provisions in the *Trade Practices Act* that do limit the operation of the general avoiding provision in s68; in particular, ss68A and 68B. Whereas ss68A and 68B of the *Trade Practices Act* operate directly upon the terms of a contract, s5N does not. Section 5N 'does no more than permit the parties to certain contracts to exclude, restrict or modify certain liabilities and limit the operation of any other part of the written law of NSW that would otherwise apply to avoid or permit avoidance of such a term'.[5]

GEOGRAPHICAL LIMITATION OF THE *CIVIL LIABILITY ACT*

The High Court noted that there is no express provision in the *Civil Liability Act* seeking to extend the operation of the Act outside NSW.[6] While the absence of such a provision 'may be reason enough to read s5N as subject to a geographical limitation,[7] the more fundamental reason for why the High Court held that s5N(1) should be read down so as to apply only to recreation services supplied in NSW lay in the proper construction of Part 1A of the *Civil Liability Act*.

Whether a geographical limitation should be inferred from the words of an Act and, if so, how that limitation should be applied, depends upon the purpose of the statutory provision under consideration. The High Court held that s5N was 'directed to limiting liability for negligence in relation to recreational activities'.[8] More generally, Part 1A of the *Civil Liability Act* has liability for negligence as its central focus.[9] There are references within Part 1A that indicate that it applies to 'places' (for example, s5K) but not places outside of, NSW. The High Court inferred that when s5N is construed in its proper statutory context, it applies to contracts where the place of the recreational activities are within NSW. In the case of a contract for the supply of recreation services, s5N will be capable of application only to contracts where the recreational services are to be supplied in NSW. The contract between Mrs Young and Insight Vacations was not a contract to which s5N could have applied, because it was a contract for the supply of recreation services in Europe.

LIABILITY EXCLUSION CLAUSE DID NOT APPLY

Finally, the High Court held that, as a matter of proper construction of the travel contract, the particular clause that purported to exclude liability did not apply to the circumstances in which Mrs Young was injured. It could have applied only when Mrs Young was seated. At the time of the accident that caused her injuries, Mrs Young was not seated but was in fact standing up, attempting to retrieve an object from her bag in the overhead shelf above her seat.

IMPLICATIONS OF THE HIGH COURT'S JUDGMENT

The judgment in *Insight Vacations v Young* has implications for the new Commonwealth consumer protection regime. Section 275 of the *Australian Consumer Law* is in almost precisely the same terms as s74(2A) of the *Trade Practices Act*. There is no reason to think that s275 should be construed any differently from the way in which the High Court approached the construction of s74(2A). It is therefore most unlikely that s5N of the *Civil Liability Act* is a law that can defeat the operation of s64 of the *Australian Consumer Law* – the equivalent to s68 of the *Trade Practices Act* (which makes a term of a contract void where it is inconsistent with the implied warranty for services to be rendered with due care and skill).

The statutory implied warranty – which is found in s60 of the *Australian Consumer Law* – will therefore continue to apply in NSW to contracts for the supply of recreation services, unaffected by s5N of the *Civil Liability Act*. The only exception is s139A of the *Competition and Consumer Act* – the equivalent to s68B of the *Trade Practices Act*. Section 139A applies to contracts for the supply of recreational services. Like s68B, s139A is much narrower in scope than s5N of the *Civil Liability Act*. Section 139A defines 'recreational services' to mean sporting activities or any other activities that are undertaken for recreation enjoyment or leisure and involve a significant degree of physical exertion or physical risk. By contrast, s5K of the *Civil Liability Act* defines 'recreational activity' much more broadly to include not only sporting and physical activities but other pursuits that may not involve any physical activity at all. On the facts in Mrs Young's case, s68B did not apply. The relevant activity (bus travel) was not a 'recreational service within the meaning of s68B. The position would be no different under the new s139A.

In any event, s139A also differs from s5N in that it does not permit avoidance of the implied warranty of due care and skill in relation to liability for death or physical or mental injury. Further, it does not permit liability to be avoided where significant personal injury is suffered as a result of the reckless conduct of the supplier of recreational services.

The geographical limitation imposed by the High Court on s5N of the *Civil Liability Act* was a second reason for why s5N did not apply to the travel contract between Mrs Young and Insight Vacations. It was unnecessary for the High Court to impose the geographical limitation in circumstances where it had also held that s5N was not picked up by s74(2A) because it did not operate directly the travel contract. So, for example, had the contract between Mrs Young and Insight Vacations been for the supply of recreation services in NSW rather than Europe, the clause limiting liability would still have been unenforceable, because s5N was not picked up by s74(2A) and s68B did not otherwise apply.

>>

The geographical limitation on s5N of the *Civil Liability Act* is nevertheless important. It is a recognition of the fact that Part 1A of the *Civil Liability Act* (of which s5N forms a part) is essentially concerned with liability in negligence.[10] The common law choice of law rule for negligence actions is the law of the place of the tort (the *lex loci delicti*) which will govern all matters of substance including matters affecting the existence, extent or enforceability of rights.[11] The geographical limitation on s5N helps to avoid tension that may arise between the contracting parties' choice of law for the contract and the *lex loci delicti*. Such a tension may have arisen in Mrs Young's case, had s5N applied. The contract provided for the law of NSW to be the proper law of the contract, whereas the *lexi loci delicti* was arguably the law area of the site in Europe where Mrs Young was injured. Had s5N been picked up and applied by s74(2A), liability under the contract may have been excluded for breach of the implied warranty to render services with due care and skill. This outcome may have been different from the outcome in tort.

The geographical limitation imposed by the High Court on s5N may also affect the way in which other provisions in Part 1A of the *Civil Liability Act* are construed. Section 5O of the *Civil Liability Act* concerns the standard of care in relation to the supply of services by professionals such as lawyers, doctors, engineers and architects. Arguably, the geographical limitation that applies to the supply of recreation services should also apply to the provision of professional services. Professionals who undertake work in NSW and other states and territories may be subject to different standards of care, depending upon the law that applies where the services are being supplied. This may be so irrespective of contractual provisions that purport to apply the law of another particular law area. ■

Notes: **1** *Insight Vacations Pty Ltd v Young* [2011] HCA 16. **2** At [27]. **3** See *Baltic Shipping Co v Dillon* (1993) 176 CLR 344. **4** *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137. **5** At [26]. **6** At [28]. **7** *Ibid.* **8** At [34]. **9** At [33]. **10** *Ibid.* **11** *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

Andrew Naylor *is a barrister at Maurice Byers Chambers in Sydney. He was counsel for Mrs Young before the High Court and appeared with Michael Joseph SC. While the views expressed in this casenote are necessarily those of Mr Naylor, he nevertheless gratefully acknowledges the assistance of Mr Joseph in its preparation.*
EMAIL *a.naylor@mauricebyers.com.*

Defences are limited when challenging enforcement of foreign arbitral awards

Altain Khuder LLC v IMC Mining Inc & Anor (No. 2) [2011] VSC 12 (3 February 2011)

By Marian Wheatley

A dispute that began in a windswept corner of Mongolia's Gobi-Altai region, 1,200 km southwest of Ulaanbaatar City, found its conclusion in a Melbourne courtroom of the Supreme Court of Victoria.

This case and its predecessor, *Altain Khuder* (No. 1),[1] affirm the non-discriminatory nature of the *NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 1958 (the NY Convention) and make it clear that Australian courts will ensure that such awards are