AUTlaw

NEWS FROM AUT LAW SCHOOL
AUTUMN 2017

CENTRE FOR NON-ADVERSARIAL JUSTICE

In March a symposium was held to mark the official launch of the AUT Centre for Non-Adversarial Justice – the first of its kind in New Zealand. Theories of non-adversarial justice, arising from many different but interconnected law-related disciplines, offer contrasting perspectives to legal problem-solving and, over the three days of the symposium, speakers and delegates explored ways in which concepts such as restorative justice, collaborative law, therapeutic jurisprudence and alternative dispute resolution can provide innovative approaches and more effective frameworks for the resolution of legal disputes.

The symposium's opening keynote address was given by Australian QC, Dr Ian Freckleton who, as well as having a thriving legal practice, holds the position of Professorial Fellow of Law and Psychiatry at the University of Melbourne (Ian is also an Adjunct Professor in the School of Public Health and Psychosocial Studies at AUT). In a compelling lecture, *Learning from the Pitfalls of Adversarialism*, Ian looked at two Australian case histories to highlight some of the downsides of adversarial justice. The first provided a captivating examination of the legal challenge surrounding William Dobell's controversial painting of Joshua Smith, "Portrait of an Artist", which in 1943 won the Archibald Prize for the best portrait of a man or woman distinguished in art, letters, science or politics. The second case involved the more harrowing story of Oshin Kiszko and his parents' battle against court-ordered chemotherapy. At times sobering, but always entertaining, Ian's talk graphically brought home the human need to "find techniques – and harness them – to facilitate sensible resolution of disputation with a legal component".

On the final day of the symposium a very successful event was brought to a fitting close with the Director of the Centre for Non-Adversarial Justice, Professor Warren Brookbanks, giving his inaugural professorial address. Warren is a leading academic and has published extensively in the areas of criminal law and mental health law. He is a founding trustee of the Odyssey House Trust for the rehabilitation of drug addicts, and between 2001 and 2005 was President of the Australia and New Zealand Association of Psychiatry, Psychology and Law. Warren has had a long-standing interest in non-adversarial justice and part of the attraction of joining AUT as Professor of Criminal Law and Justice Studies in 2015 was the opportunity which that gave to set up the Centre.

The subject of Warren's lecture was the criminalisation of medical manslaughter, a highly evocative concept which covers liability for a broad range of medical errors resulting in patient deaths. While historically numbers of convictions in this area have been small, there has been an increase in successful prosecutions recently, most notably in England and Wales, and a correspondingly greater use of imprisonment as a sanction. Warren's thesis was that the trend towards criminalisation may well have implications for New Zealand medical professionals generally and, utilising the lens of therapeutic jurisprudence, his fascinating discussion explored possible alternative approaches to the management and sanctioning of medical errors resulting in the deaths of patients.

Other highlights of the symposium included keynote addresses by Judge Lisa Tremewan, Dr Liz Richardson and Judge Phil Recordon who spoke about the challenges which mental illness and alcohol and other drug addiction present for the criminal justice system and the advantages which specialised courts provide in dealing with those issues.

Professor Warren Brookbanks with Dr Ian Freckleton and top celebrating his inaugural lecture with family and friends.

GOODWILL HUNTING: YOUR NAME, YOUR REPUTATION – BUT WHERE'S THE GOODWILL?

"A solicitor celebrated for his or her expertise may enjoy the highest possible reputation and this will be personal, attaching only to that individual. But reputation alone cannot form the basis of an action for passing off, no matter how high the wattage of celebrity." *Bhayani v Taylor Bracewell LLP* [2016] EWHC 3360 (IPEC) at [28]

Having recently subscribed to Netflix I have been busy catching up with episodes of The Good Wife. At the end of season 5 Diane Lockhart leaves Lockhart, Gardner and Canning to join Florrick, Agos & Associates. Assume for the sake of argument that Lockhart, Gardner and Canning retains the firm's name (in the series the firm rebrands itself as LG). It is likely that Diane's exit package will include some recognition of her contribution to the goodwill of the firm but if, for some reason, that is not the case (perhaps because she is leaving as a result of misconduct), the question that arises is whether she has any claim in respect of the continued use of her name into the future by Lockhart, Gardner and Canning?

His Honour Judge Hacon of the England and Wales Intellectual Property Enterprise Court (IPEC) had to deal with a very similar scenario at the end of last year in *Bhayani v Taylor Bracewell LLP* [2016] EWHC 3360. The defendant was law firm Taylor Bracewell which had employed Ms Bhayani as a salaried partner for three and half years. Prior to that Ms Bhayani had been practising in another firm for over 20 years and had built up a reputation especially in the employment law area. When she joined Taylor Bracewell it was agreed that her services would be offered under the name "Bhayani Bracewell" (the firm also registered a UK Trade Mark for the words BHAYANI BRACEWELL in stylised form).

In October 2014 Ms Bhayani left Taylor Bracewell following a finding of gross misconduct. However, for some time following her departure, the firm continued to offer services relating to employment law under the "Bhayani Bracewell" name. Inter alia, Ms Bhayani claimed that by using that name, Taylor Bracewell had misrepresented that she was still involved in offering those services and was thus passing off its services as being those of Ms Bhayani. Taylor Bracewell applied for summary judgment with respect to that (and other) claims.

The purpose of a passing off action is to vindicate the plaintiff's exclusive right to business goodwill and to protect it against damage. In *Reckitt & Colman Products Ltd v Borden Inc* ([1990] 1 WLR 491 (the *Jif Lemon* case)) Lord Oliver, in his oft quoted passage, set out the three elements of the action. First, His Lordship said, "[the plaintiff] must establish a goodwill or reputation attached to goods or services" (at 499). The further elements to be satisfied are that there must be a misrepresentation and that misrepresentation must cause damage to the plaintiff, but it is the first requirement that concerns us here.

On the face of it, Lord Oliver's statement might suggest that "goodwill" and "reputation" are interchangeable. There are certainly many other judicial statements where the two concepts are linked in cases involving passing off – and there are situations too where reputation is tantamount to goodwill. In the extended passing off cases, for example, the "perceived distinctive quality" of products such as champagne (*J Bollinger v Costa Brava Wine Co Ltd* [1960] RPC 116), advocaat (*Erven Warnink BV v J Townend & Sons* [1980] RPC 31), Swiss chocolate (*Chocosuisse Union des Fabricants Suisses de Chocolat v Cadbury Ltd* [1999] RPC 826) and vodka (*Diageo North America Inc v Intercontinental Brands (ICB) Ltd* [2010] EWCA 920) has effectively been held to constitute the goodwill which the plaintiff has sought to protect.

But even in this context the passing off action doesn't serve to protect bare reputation; there must be what Somers J expressed in *Dominion Rent a Car v Budget Rent a Car* ([1987] 2 NZLR 395 at 420) as "an invasion of that intangible right of property compendiously described as goodwill".

The concept of goodwill was considered recently by the UK Supreme Court in *Starbucks (HK) Ltd v British Sky Broadcasting Group plc* ([2015] UKSC 31 at [21]) where it approved the observations of Lord Macnaghten in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* ([1910] AC 217 at 223-224):

What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom.

Reputation can subsist by itself and in appropriate contexts might be protected through actions in defamation, slander of title or invasion of privacy. Goodwill, on the other hand, depends on there being a connection in business. As Lord Diplock said in *Star Industrial Co Ltd v Yap Kwee Kor* ([1976] FSR 256 at 269), goodwill "has no independent existence apart from the business to which it is attached".

It was because of this that His Honour Judge Hacon held that Ms Bhayani was unable to succeed. While he recognised that over the years she had built up a reputation in her area of work, His Honour concluded that Ms Bhayani had *"no realistic prospect of establishing that in law she owns goodwill on which to base a case of passing off"*. In accordance with the general rule, the Judge considered that any goodwill which might have been generated as a result of Ms Bhayani's reputation while she was at Taylor Bracewell vested not in her but in the firm as her employer:

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...the public are well aware that a solicitor, whether employed or an equity partner is not a free agent. His or her performance will be both assisted and constrained by the terms of employment or partnership and by the advice and pressure exerted by colleagues. Ultimately, the quality of services of any individual solicitor is guaranteed by the firm. If the quality falls short, any compensation is available from the firm, not the individual solicitor. The goodwill generated by a solicitor's work qua solicitor vests in the firm (at [43]).

Where an employee or a person under contract undertakes work which falls outside the scope of the employment or the obligations under the contract, it is possible for any goodwill generated in relation to that work to vest in the individual if there is a separate business. In *Irvine v Talksport Ltd* ([2002] 1 WLR 2355), the Formula 1 racing driver, Eddie Irvine, brought an action in passing off arguing that a manipulated photograph of him on the cover of a brochure falsely represented that he was endorsing the defendant's radio station. It was held that the business conducted by Mr Irvine in the field of endorsement was quite separate from his business as a racing driver and that the goodwill generated in relation to the former activity belonged to him. Referring to *Irvine* in the context of the present case, His Honour Judge Hacon said, "[T]here was no separate business, of the Irvine endorsement type, which could be characterised as Ms Bhayani's own" (at [42]).

When Diane Lockhart departed she might have taken her reputation (and a number of lucrative clients) with her but any goodwill created during her time at Lockhart, Gardner and Canning stayed with the firm.

Mike French

WELCOMING LIDA AYOUBI

Lida joined AUT law school as a lecturer in 2016 after completing her PhD. We asked her about her background and interests.

Q Tell us about your interest in human rights and IP:

A: I was born and grew up in Teheran – in a family which is hugely interested in politics and international news. Atrocities always make headlines so I think that probably initially sparked my interest in human rights. I studied undergraduate law in Iran and completed a Masters of Law at Lund University in Sweden. While there, I worked at the Raoul Wallenberg Institute – named after the Swedish diplomat who saved many thousands of Hungarian Jews at the end of the Second World War. One of the projects I was involved with was "the right to the internet" which advocates that everyone should have access to the way of life and culture that the internet can provide – a similar theme to my doctoral research.

Q What brings you to New Zealand and AUT Law School?

A: I arrived in New Zealand in 2012 when I enrolled in a PhD at Victoria University. My research was concerned with investigating ways to improve access to copyright material for blind or visually impaired persons. I enjoy academic life so I was very pleased when the lecturing opportunity at AUT came up. My colleagues are fantastic people to work with and I am really excited to be part of this vibrant and progressive law school. Along with teaching, research and scholarship are of the essence of what we do as a law school and I am especially delighted to be working with Allan Beever in putting together a programme of lectures and seminars under the auspices of the Centre for Private Law.

Q And speaking of your teaching . . . ?

A: My primary teaching interest at the moment is in Intellectual Property. IP is dynamic and its impact is ubiquitous. Students can see the relevance of the subject brought to life in their laptops, their apps and the music they listen to; and they are always interested in the IP disputes which involve celebrities or well-known corporates. It is also fascinating for students to discover that IP rights are constantly being applied in new contexts; for example, it was only in the 1990s that courts recognised the misappropriation of indigenous culture and knowledge. I enjoy incorporating my research into my teaching and I am currently looking at the impact of harmonising intellectual property law on indigenous rights and their traditional cultural expressions which is particularly relevant in the New Zealand context.

Q What do you get up to outside work?

A: I really love living in Auckland. It isn't as busy as Teheran but I like Auckland's laid back lifestyle and what it has to offer with its restaurants, museums and art galleries. New Zealand is the perfect place to pursue my passion for hiking and within a short drive (or a ferry ride) from where I am living there are some fantastic walks – the Kitekite Track, the Hillary Trail and the Rangitoto Summit walk to name a few.

CENTRE FOR PRIVATE LAW

In February, Professor Jason Neyers from Western University, Ontario, Canada, visited the law school as a guest of the Centre.

Professor Neyers is one of the world's foremost academics in the area of private obligations. He has published in many of the leading law journals and has authored or contributed to a number of books (including the Hart publications, *Understanding Unjust Enrichment* (2004), *Emerging Issues in Tort Law* (2007), *Exploring Contract Law* (2009) and *Tort Law: Challenging Orthodoxy* (2013)). Professor Neyers' views have been considered in the upper courts of most common law jurisdictions. He has held posts as a visiting scholar at Harvard, Melbourne, and Sydney law schools and has been invited to speak at numerous prestigious international conferences.

In a public lecture, *Public Nuisance in the Twenty-First Century*, Professor Neyers reflected on the fact that the tort of public nuisance is infrequently taught and seldom litigated. This, he pointed out, is despite the tort covering "a multitude of sins"; it can be used to recover damages for personal injuries, to protect private property interests, to enjoin those who invade public rights, and to recover pure economic loss — provided, in all cases, that the plaintiff can prove that he or she suffered 'special damage'.

In an engaging talk which distilled and developed arguments he has presented in a number of recent publications including a forthcoming article in the Cambridge Law Journal, Professor Neyers articulated three important perspectives concerning the tort of public nuisance. First, he contended that the orthodox conceptualisation of the tort is flawed, since it is both in violation of basic private law principles related to privity and the actionability of crimes and, if taken seriously, would mandate that the tort be abolished (as torts protect private not public rights). Secondly, he considered that public nuisance nevertheless deserves to be accorded respect in tort law courses and textbooks because it presents a coherent cause of action centred on the privately actionable rights to pass and repass on public highways and to fish in public waters. And, finally, he argued that, if the tort is reconceptualised in this way, it can make sense of a special damage rule that is generally thought arbitrary or impenetrable and the general intuition that the recovery of damages for pure personal injuries and property damage is best left to other torts.

During his visit Professor Neyers also held a seminar for law school staff where he examined damage as the gist of deceit. He considered two questions in relation to the tort of deceit posed by the eminent jurist Edward Jenks in 1910: namely, what right the tort of deceit protects and why the mental element of fraud remains important. Examining these issues through the lens of the requirement of damage, Professor Neyers' position is that the tort of deceit protects us from the dispossession of our rights by ensuring that the purported transfer is not binding because, as a consequence of the fraud, the parties lack the necessary consensus ad idem. Thus, according to Professor Neyers, the common law is correct in making damage the gist of the tort of deceit, so long as 'damage' is understood to be the dispossession of a right.

Professor Jason Neyers (left) with Professor Allan Beever, Director of the Centre for Private Law.

WILLIAM DOMNARSKI

At the end of March, the Centre for Private Law was delighted to welcome William Domnarski, US attorney and author, who spoke about his recently published biography, *Richard Posner*. Posner, who is a judge in the US Court of Appeals, has a reputation as one of the most important jurists and legal theorists of the last hundred years. He has had an unrivalled influence as an academic, public intellectual, and judge and is renowned for the pragmatic, economic analysis of law which he expounds both in his opinions from the bench and in his extensive extra-judicial writing.

In preparing for this first biography of Posner, William held extensive discussions with the Judge, had access to his rich archive at the University of Chicago and interviewed over two hundred friends and acquaintances who have known and worked with Posner over the years.

William was invited to visit the Law School when he responded to a review of his book which our colleague Leonid Sirota posted on his blog *Double Aspect*.

The Centre for Private Law periodically hosts internationally recognised academics, judges and practitioners as a way of promoting research and stimulating debate across the spectrum of private law issues. If you would like to be advised of forthcoming events you can join our mailing list by contacting the Centre at privlaw@aut.ac.nz.


William Domnarski (right) with Leonid Sirota.

COMMERCE COMMISSION SAYS NO

On 23 February the New Zealand Commerce Commission released its highly anticipated decision on the proposed merger of Sky Network Television and Vodafone New Zealand (coined "Skodafone") declining to grant clearance.

The Commerce Act 1986 prohibits mergers and acquisitions which have the effect, or would be likely to have the effect, of substantially lessening competition. The Commission administers a voluntary clearance regime where parties can apply for clearance of a proposed merger, the effect of which is to immunise it from legal challenge by the Commission or third parties under the Commerce Act (provided the transaction is completed within 12 months of the date clearance is granted).

The vast majority of clearance applications in New Zealand are approved. In the case of more complex applications which raise serious competition concerns, the Commission typically issues a Letter of Unresolved Issues (LOUI) and the clearance process can take between 6 to 12 months. The Commission's clearance rate for complex mergers which proceed to the LOUI stage is about 50 percent.

Skodafone was the Commission's most contested clearance process to date: it received an unprecedented 65 submissions and expert reports over the course of its 9-month investigation process. Opponents of the merger included Spark, 2degrees, TUANZ, Trustpower, TVNZ, Freeview, Fetch TV, InternetNZ and the Coalition for Better Broadcasting.

To grant clearance, the Commission must be satisfied that a proposed merger would be unlikely to substantially lessen competition in any market. If the Commission is uncertain as to whether a substantial lessening of competition is likely to occur, it cannot be satisfied and it must decline clearance.

Vertical mergers (Sky and Vodafone currently operate in separate pay-TV and telecommunications markets) are typically less problematic than horizontal mergers of direct competitors. However, in the context of digital convergence and rapidly evolving telecommunications markets (featuring UFB roll-out, increasing viewing of video content over broadband and mobile networks and increasing take-up of bundles including mobile/broadband and content) the competition assessment in this case was complex.

Opponents argued that Sky enjoys a monopoly position in premium sports content by virtue of its ownership of exclusive rights, and the merged entity could leverage that market power into broadband and mobile telecommunications markets to the detriment of consumers (i.e. Sky/Vodafone could offer consumers bundles of telecommunications services and premium sports content that no other provider could match).

The applicants, on the other hand, took a static view arguing that relevant telecommunications markets are currently highly competitive and the proposed merger would do nothing to change that. They denied the "must have" nature of Sky's premium sports content and argued that consumers were unlikely to be interested in triple-play (broadband, fixed telephony and television) and quad-play (broadband, fixed and mobile telephony and television) bundles.

The Commission's competition concerns were set out in a LOUI published on 31 October 2016. In summary:

- The merged entity would have substantial market power by virtue of its portfolio of premium live sports content (rugby, cricket, netball, NRL);
- The merged entity would have an incentive and ability to make buying Sky on a stand-alone basis relatively less attractive than buying it in a bundle (with mobile and/or broadband) offered by the merged entity, resulting in customers switching to the merged entity;
- The merged entity would have less incentive to enter into reselling arrangements (than Sky would absent the merger), meaning rivals would be unable to offer bundles with Sky and mobile/broadband services or offer bundles as attractive as those offered by the merged entity;
- As a result of the above one or more rivals may lose customers to such an extent that they no longer provide an effective constraint in a telecommunications market, allowing the merged entity to profitably raise prices of telecommunications services above levels that would prevail without the merger.

The Commission's decision turned on whether it could be satisfied there was no real chance that the merged entity would be able to leverage Sky's premium sports content to such an extent that it would over time reduce competition in retail telecommunications markets (broadband and mobile). In declining the merger, the Commission said that subsequent submissions did not resolve the concerns identified in the LOUI and the Commission could not exclude the real chance that the merger would substantially lessen competition. According to Commission Chair, Dr Mark Berry:

To clear the merger we would need to have been satisfied that it was unlikely to substantially lessen competition in any relevant market. The evidence before us suggests that the potential popularity of the merged entity's offers could result in competitors losing or failing to achieve scale to the point that they would reduce investment or innovation in broadband and mobile markets in the future. In particular, we have concerns that this could impact the competiveness of key third players in these markets such as 2degrees and Vocus.

At the time of writing, detailed reasons for the Commission's decision are yet to be released but its key concerns were summarised in a media briefing at the time the decision was issued as follows:

- One telecommunications provider would own all premium sports content;
- Around half of all households in New Zealand have Sky and a large number of those are Sky Sport customers;
- The merged entity would entice non-Vodafone customers to

switch to the merged entity by offering attractive bundles;

- This could produce competition in the short term, but rivals may not be able to match the merged entity's offers;
- Over time the loss of customers would reduce revenue of those rivals and their ability to innovate and invest in telecommunications markets.

Dr Berry was clear that the decision turned on Sky's monopoly over premium sports content – if the merger had not included Vodafone acquiring all key premium sports content, the Commission would likely have cleared it.

Unlike most other developed jurisdictions New Zealand does not have a behavioural undertakings regime which means that it could not accept an undertaking from Sky/Vodafone to resolve the vertical foreclosure concerns by, for example, agreeing to provide wholesale access to premium sports content on an open access, non-discriminatory basis.

Another interesting aspect of the proceedings is that, prior to the Commission's decision being released, Spark, 2degrees and InternetNZ successfully obtained urgent interim orders in the High Court at Auckland to delay completion of the transaction had clearance been granted to give opposing parties time to review the Commission's decision and decide whether they wanted to pursue a legal challenge.

On 21 March Sky and Vodafone filed papers in the High Court appealing the Commission's decision to decline clearance in order to preserve their position while awaiting the release of the Commission's written reasons.

Dr Ross Patterson (Partner) and Kristel McMeekin (Senior Associate), MinterEllisonRuddWatts

MinterEllisonRuddWatts acted for 2degrees and Television New Zealand in opposing the merger. Dr Ross Patterson was New Zealand's telecommunications regulator and a member of the Commerce Commissioner between 2007 and 2012.

WELCOME KHYLEE QUINCE

Khylee is from the iwi of Ngapuhi and Ngati Porou. She joined the AUT law school at the beginning of the year as a senior lecturer and Director of Māori and Pacific Advancement. We asked Khylee about her background and interests.

Q What got you into the law?

A: I am a born and bred Aucklander and an alumna of Mt Roskill Grammar School. I decided I wanted to be a lawyer when I was 11 years old. If I am honest, it was LA Law that seduced me. At the time, I thought law was all glamour and red convertibles! Anyway, dad rang the Law Society and told them he had an 11 year-old who was keen to be a lawyer. He asked whether they could recommend a graduate his daughter could meet with to discuss her aspirations and dad and I ended up having lunch with a young graduate from Russell McVeagh. Fast forward a few years – I completed my law degree at the University of Auckland, graduated in 1997 and practised in general practice for three years. However, after a year, a Māori academic at the University of Auckland asked me to join with her to create a Māori legal community there. Initially I worked 50/50 at the university and in practice but I absolutely loved teaching and in 2000 I became a full time academic.

Q What areas of the law in particular push your buttons?

A: My teaching and research interests are around criminal law and youth justice. In fact, Alison Cleland and I developed the first youth justice course in a law school in 2009 and we co-authored the first comprehensive text to deal with the subject in New Zealand. In addition to teaching on the compulsory Criminal Law paper and a Youth Justice elective, I am introducing a new elective, Māori Legal Issues, next semester where we will consider Māori Custom law, the Treaty and other ways in which law and policy respond to Māori in contemporary New Zealand

Q Why the move to AUT?

A: I am thrilled to be part of AUT Law School. I am a passionate advocate for social justice, and the preparation of students for careers where they can affect transformative change and two things in particular convinced me that AUT is where I wanted to be. First, it is the university's vision of taking law out to South campus. After 18 years at the University of Auckland, I was very aware of the geographical difficulties many Māori and Pacific students face. But it's not just geography – a lot of our communities lack good infrastructure and so it's a big and positive statement that they can study for a professional degree in their own community. Second, AUT has a reputation for being student focused with small group teaching which enables lecturers to develop strong relationships with students – and that is my core kaupapa. I am really looking forward to making a positive contribution in these and other areas.

THE FAIR TRADING ACT AND BRANDS THAT TOUCH PEOPLE'S POCKETS

In the last issue of AUTlaw we anticipated the 30th anniversary of the Fair Trading Act 1986 (FTA) which came into force back in 1987 and reviewed some of the more recent court decisions dealing with misleading conduct. You might recall, as part of our discussion of the penalties under the FTA, we considered the decision of Edelman J in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424. The defendant in that case, (RBA), was fined a total of $1.7 million for conduct, regarding its Nurofen specific pain range, which it admitted contravened s 33 Australian Consumer Law (ACL).

There have been two significant developments in relation to this story which we thought would be of interest to you. First, the Australian Competition and Consumer Commission (ACCC) has successfully appealed against the civil penalty of $1.7 million imposed by Edelman J. In its judgment delivered in mid-December, *(Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181) the Full Federal Court (Jagot, Yates and Bromwich JJ) increased the fine to $6 million.

To recap on the essential facts, the packaging for Nurofen Migraine Pain, Nurofen Tension Headache, Nurofen Period Pain and Nurofen Back Pain respectively stated that the products "targeted" the specific pain identified when that was not the case; each of the products contained the same active ingredient and each worked identically to the other products in the range. RB's website also contained a number of statements and a product comparison page which gave the overall impression that the products were separately formulated (or had a special mechanism or active ingredient) to target and relieve specific types of pain rather than pain generally. In addition, it was found that there was no material difference between these products and the cheaper standard Nurofen.

The Full Federal Court (FFC) differed from the primary judge in a number of respects. Crucially it took issue with the position adopted by Edelman J that any attempt to quantify profits from the impugned conduct would be "either an impossible task or so speculative as to be useless" given the difficulty of establishing the counterfactual and the lack of evidence concerning the likely behaviour of consumers had there been no contravening conduct. Conversely the FFC considered that, *"the only reasonable inference available on the evidence was that a substantial number of the sales of the purported specific pain range products was caused by the contravening conduct but for which . . consumers would have purchased a standard Nurofen product at half the price"* (at [94]). Given that 5.9 million packages of the impugned products had been sold, the FFC concluded that something in the order of $22.5 million "had been lost to consumers as a result of Reckitt Benckiser's contraventions" (at [98]).

While making clear that it would have reached a different conclusion, the FFC took the view that it was open for Edelman J to characterise the courses of conduct as two in number – one relating to the packaging and one to the webpages. However, it disagreed with the weight which the primary judge had given to that factor in determining the penalty, pointing out that "the misleading character of the representations operated as contraventions each and every time a consumer saw the packaging" (at [145]).

Having regard to the objective of the penalty imposed, the FFC had this to say:

If it costs more to obey the law than to breach it, a failure to sanction contraventions adequately de facto punishes all who do the right thing. . . . This is not to give license to impose a disproportionate or oppressive penalty, which cannot be done,

CRYPTIC CORNER

WIN A BOTTLE OF CHAMPAGNE

Here is the cryptic for this issue:

Reasons why a Yorkshire lad gets into a jam over liquid assets could be **provided by fear of Ms Lockhart**. Alternatively, in this case, damnum sine injuria was reason enough.

What is the name of the case? [3, 5, 2, 8, 1, 7]

Email your solution to mike.french@aut.ac.nz by 4pm on Wednesday 17 May. All correct entries received by the deadline will go into the draw to win a bottle of champagne.

LAST ISSUE

In the last issue we asked you to name the case provided by the following cryptic clue:

School hoons oft clamber over vege garden; tort on? Once sorted, maybe. McMullin J in the (old) Supreme Court thought an actionable nuisance or cause of action in negligence might be arguable although not the rule in *Rylands v Fletcher*.

The answer was *Matheson v Northcote College Board of Governors* and our congratulations go to Alex Crow who won the draw for the bottle of champagne. Alex is a solicitor with BSA Law in Auckland.

but rather to recognise that proportionality of penalty is measured in the wider context of the demands of effective deterrence and encouraging the corresponding virtue of voluntary compliance (at [152]).

According to the FFC, having regard to these and the other matters discussed, the penalty of $1.7 million imposed by Edelman J could not be viewed as either substantial or as an effective deterrent. On the contrary, it said, *"we consider that the penalty would reinforce a view that the price to be paid for contraventions was an acceptable business strategy, and was no more than a cost of doing business"* (at [164]).

The second development to arise concerns the proceedings brought by the New Zealand Commerce Commission against Reckitt Benckiser (New Zealand) Ltd (RBNZ). As highlighted in our earlier article, one of the consequences of having an increasingly global market for goods and services with identical or similar branding and advertising strategies being employed both across the Tasman and here, is that offences by multinationals under the ACL are often mirrored by similar prosecutions under the corresponding provisions in the FTA.

In December 2015, following the institution of the proceedings in Australia, RBNZ entered into Court Enforceable Undertakings with the Commission under s 46A of the FTA and agreed to amend the packaging and advertising in relation to its Nurofen products here. In September 2016, the Commission laid ten charges against RBNZ under the FTA, alleging that the company misled the public about "the nature, characteristics and suitability of its Nurofen Specific Pain Range products". Eight of the charges related to the packaging and promotion of the products; the other two charges related to the advertising of the products on RBNZ's website.

RBNZ did not contest the charges and, on 3 February in the Auckland District Court ([2017] NZDC 1956), Judge Jelas imposed a fine totalling $1.08 million. By New Zealand standards, this represents quite a hefty penalty – particularly given that around 50% of the offending conduct occurred before June 2014 when the maximum penalty for a body corporate breaching the FTA was raised from $200,000 to $600,000 for each contravention.

Judge Jelas accepted the Commission's submission in setting a starting point of $1,650,000 but, in arriving at her final sentence, allowed a total of 35 percent credit for mitigating factors. What we find interesting is that, first, this included a 25 percent credit for "early acknowledgement of wrongdoing" and, secondly, that the Judge could find no aggravating factors to warrant the starting point being increased. We accept that the prompt guilty pleas would have resulted in "considerable savings to the criminal justice system and the Commission's resources", however in our view RBNZ might consider that it got off very lightly given its conduct.

It's all very well playing the mea culpa card once the game is up but, on both sides of the Tasman, the company was severely criticised for "carelessly" (we might say cynically) ignoring "warnings" from various consumer groups, medical professionals and commentators which clearly indicated that RB was contravening the legislation in the respective jurisdictions. In 2011, for example, the Herald on Sunday (15 May 2011) ran an article in which pharmaceutical and marketing experts slammed RB's "targeted pain relief" packaging and website representations as both misleading and potentially unsafe.

As Judge Jelas emphasised (at [37]):

RBNZ continued with its misleading advertising despite events which it would have been aware of that made it blatantly apparent that it was in breach of its lawful obligations to the New Zealand consumer. . . Positive steps to remedy the misleading statements only occurred after the Commission commenced its investigation.

As a postscript – and a further indication of RB's general attitude to its consumers perhaps – we should note that last June, when proceedings were well underway in Australia and New Zealand, the UK Advertising Standards Authority, following complaints about the marketing of the company's products, considered it necessary to ban a TV advertisement which graphically depicted Nurofen targeting a woman's back pain.

And, it is hard to credit RBNZ's argument in the District Court that "the purpose of the product line was to educate the consumer on the different types of pain the specific products could treat". In our view that just doesn't stack up – with no material difference between these products and the cheaper standard Nurofen, the so called "education", as Australia's Choice Shonky Award pointedly noted in 2010, is nothing but a "pain in the hip (pocket)".

Suzanne McMeekin and Mike French

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