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Legal Update
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Liability of company directors for damages in deceit - useful lessons from *Inter Export LLC v Townley and Anor*

Background

In 2012, Inter Export LLC, a supplier of sunflower oil registered in Ukraine, entered into a contract to sell oil to a UK-based company. In so doing, the supplier relied upon continuing representations made by a director of the purchasing company that the company would be able to pay for the oil. The oil was duly supplied, but not paid for.

Against a background of administration, followed by liquidation, of the purchaser in 2015 – 2016, Inter Export brought the present proceedings against the purchaser's directors for damages in deceit arising out of the representations made.

In March 2017, the first instance judge upheld the claim against Ms Lasytsya but dismissed it against the other director. Ms Lasytsya, as director of the purchaser, was held to be liable for damages in deceit, which were assessed on the basis of the market value of the oil obtained by the purchaser.

In its 21 September 2018 decision,[1] the Court of Appeal dismissed Ms Lasytsya's appeal submissions that:

1) the factual findings at first instance were inadequate and unsupported by sufficient reasons; and

2) the correct measure of damages was not the market value of the commodity sold.

The issues before the Court of Appeal – inadequate findings and reasons for findings

In considering Ms Lasytsya's grounds of appeal, the Court of Appeal noted that Ms Lasytsya formulated "the issues almost as if an appeal were a construction summons to determine the meaning of the judgment and which particular evidence supported which particular finding. This is not the appeal process".

It was Ms Lasytsya's task to persuade the Court that the first instance judge did not find that the director had made the representations relied upon, or if the judge did make such findings, that they were against the weight of the evidence.

Taking these points in turn, the Court of Appeal held that the first instance judge had undoubtedly found that Ms Lasytsya had made the representations in July 2012 that the purchaser had sufficient funds to pay for the oil. The reasons for those findings were adequately described and open to the judge on the facts. The Court also rejected Ms Lasytsya's arguments that the reassurances as to the purchaser's availability of funds:

1) would not be continuing representations unless it was shown that Ms Lasytsya was aware that they were continuing representations; and

2) were mere statements of intention, which would not be actionable, and not statements of existing facts.

1 *Inter Export LLC v Jonathan Townley and Yaroslavna Lasytsya* [2018] EWCA Civ 2068

The Court held that the judge was entitled to find that the representations were continuing and that Ms Lasytsya had a continuing responsibility in respect of their accuracy. Inter Export was found to have relied upon the July 2012 representations not only at the time the contract of sale was concluded in September 2012, but right up until the point the oil was released to the purchaser in October 2012.

The Court also found that the judge was entitled to treat Ms Lasytsya's representations that the purchaser had sufficient funds to pay for the oil as statements of existing fact, rather than mere statements of intention.

The issues before the Court of Appeal – the measure of damages

The parties agreed that the correct measure of damages in the tort of deceit was an award which put the claimant in the position it would have been in if the deceit not been perpetrated.[2]

However, there was a dispute between the parties as to how that test should be applied on the facts of this case:

1) Ms Lasytsya argued that if the deceit not been perpetrated, the seller would not have incurred the expense that it did in purchasing, processing and transporting the sunflower seed. In her submissions, the seller was only entitled to be compensated for the reliance expenses, which it appeared to the Court were incurred after the contract was concluded in September 2012; and

2) Inter Export argued that the first instance judge was right to conclude that its loss was to be measured by the market value of the sunflower oil because the misrepresentations were continuing up until the time the oil was dispatched in late October 2012.

2 *Smith New Court Securities Ltd v Citibank NA* [1997] A.C. 254 and *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158

The Court of Appeal concluded that because Ms Lasytsya's representations were continuing representations, the loss could properly be assessed when the supplier relied on them, namely when it failed to take any steps to stop the oil being dispatched in October 2012. As the supplier submitted, if at that point Ms Lasytsya had corrected the representations, the supplier would have been able to mitigate its loss in the normal way. The Court held therefore that the first instance judge had reached the correct conclusion as to the measure of damages.

Comment

The Court of Appeal's judgment acts as useful reminder of (a) the potency of pre-contractual representations, (b) the considerations applicable to assessing damages where continuing representations have been made and (c) the ongoing responsibility upon the makers of pre-contractual statements to ensure they are and remain accurate.

Company directors, who make such representations, should bear in mind their potential personal liability in this regard, in particular where a period of time elapses between the making of representations and the conclusion of contracts or later reliance upon the representations.

If you have any questions or comments in relation to the above, please contact Mark Stefanini or Catherina Yurchyshyn, or your usual Mayer Brown contact.

Mark Stefanini
Partner, London
E: mstefanini@mayerbrown.com
T: ++44 20 3130 3704

Catherina Yurchyshyn
Associate, London
E: cyurchyshyn@mayerbrown.com
T: +44 20 3130 3962