When it comes to the crunch!

Introduction

The recent decision by the Supreme Court of Queensland delivered 15 March 2013 involving A & B Grains Pty Ltd (plaintiff) and Launcells Feedlot Systems Pty Ltd (defendant) acts as a reminder for the need to have a solid case before getting involved in legal proceedings. In this case, the plaintiff sued the defendant for the cost of unpaid grain ordered and delivered to the defendant’s feed lot.

The defendants counter-claimed alleging that the defendant incurred financial losses in the buying and selling of grain (through forward contracts), supposedly based on the defendant’s reliance on advice given by the plaintiff. This newsletter explains why the plaintiff was not liable on the counter-claim despite the fact that the defendant considered that the plaintiff did give advice. The case has implications for the supply of products, other than grain.

Facts

Mr McKerrow was a grain representative of the plaintiff and was particularly conversant with the defendant’s supply needs as a feedlot operator and at best, was influential in ensuring that the defendant, represented by a Mr Sturrock, a director, was actively supplied with current grain prices. Mr Sturrock started to enter into forward grain contracts and for contracts between February 2006 onwards, Mr McKerrow would contribute his predictions about the price direction of various grain varieties in the market to Mr Sturrock. The primary objective of Mr Sturrock’s entry into forward grain contracts was to take advantage of the ability to purchase large quantities of grain where the payment and delivery obligations were some time into the future i.e. six months or more.

Mr McKerrow acted as a grain trader in his relationship with Mr Sturrock, primarily selling Mr Sturrock bulk quantities of grain needed for the feedlot. The evidence given by Mr McKerrow was that he did not advise Mr Sturrock to enter into forward grain contracts. The extent of any so called ‘advice’ given by Mr McKerrow to Mr Sturrock related to pricing information and

Mr McKerrow’s predictions about future prices of particular grain types in the market. Mr Sturrock said that he relied on Mr McKerrow’s “advice” and he believed that losses made on the defendant’s forward grain contracts should be recoverable from Mr McKerrow’s employer (the plaintiff). As a result, the defendant’s counter-claim relied on negligence and a breach of section 51A of the Trade Practices Act (misrepresentations).

Outcome and reasons

The counter-claim was dismissed by the trial judge based on the finding that Mr McKerrow did not act as an adviser to Mr Sturrock and no duty of care was owed to him or to his company. Additionally, with respect to the Trade Practices Act claim, the trial judge held that the defendant did not establish it had relied on conduct by Mr McKerrow in making decisions on forward grain contracts which were not profitable. The trial judge found that both the defendant and plaintiff were commercial operators dealing in contracts for the purchase and sale of grain in the course of their separate businesses, and both were aware of the risks associated with transactions arising from the fluctuation of the market prices for grains. It certainly appeared to be the case that Mr McKerrow’s price predictions were offered because Mr McKerrow considered Mr Sturrock should have regular information on grain prices and their market direction as an incident to keeping up with the supply needs of the feedlot. The defendant’s counterclaim therefore failed.
Lessons learned

In this particular case, the counter-claim may have been a strategy ultimately to gain an offset against the plaintiff’s claim based on debt recovery for unpaid grain delivered. The legal reasons for why the counter-claim failed centred on the fact that Mr McKerrow was a salesman, not an adviser. Further, the price predictions did not constitute advice and there was no evidence that Mr Sturrock relied on the predictions when he entered into formal grain contracts.

In this particular case, the counter-claim of the defendant was always going to be difficult to prove. However, the case indicates that “salesmen” are always at risk if their statements are misinterpreted by their customers. However, for any sales person having the joint role of both selling and advising customers about products, the case acts as a caution never to make representations without reasonable grounds. To do so could expose the maker of such representations or misrepresentations to liability at the instance of the recipient if the maker had an advisory role and if the representation was relied on them to his/her detriment.

The “take away” message from this case is be careful what you say to your customers.

1 Now the Competition and Consumer Act.

Special Counsel joins Corporate team

Carter Newell is pleased to welcome Matt Couper to the firm as Special Counsel in the Corporate team.

Matt joins Corporate Partner Tony Stumm and brings almost 10 years experience advising public and private companies and government entities in relation to mergers and acquisitions, strategic investments, joint ventures, structuring, due diligence and general corporate and business issues.

Prior to joining Carter Newell, Matt spent over six years in the Corporate team of a top tier National firm and worked in London as a corporate lawyer in a magic circle firm and as in-house counsel in the investment and merchant banking division of an international investment bank. Matt combines this experience with commercial acumen and a thorough understanding of his clients’ business and their attitude to operational and financial risk to provide targeted and commercially driven legal advice.

In addition to regularly advising clients across a number of industry sectors on asset and share acquisitions and disposals, Matt specialises in corporate transactional work including acting for investors and target entities in relation to strategic investments and exits, providing advice in relation to corporate restructures and undertaking due diligence investigations. Matt has a particular interest in setting up business structures, including establishing incorporated and unincorporated joint ventures and drafting and negotiating shareholders agreements.

Matt is also experienced in drafting and negotiating significant commercial contracts, including supply and distribution agreements, service agreements, consultancy agreements and general procurement contracts for clients in the mining services and energy industries.