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Five Key 2020 Decisions for Businesses

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Despite the pandemic defining much of 2020, five key decisions were released last year of lasting impact to businesses and commercial dealings.

Expanding the Duty of Honest Performance

In *C.M. Callow Inc. v. Zollinger, 2020 SCC 45*, the Supreme Court of Canada expanded the duty of honest performance, holding that it requires that parties to a contract must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This duty is breached where a right under a contract was exercised (such as a termination right), or an obligation under the contract was performed, dishonestly. Dishonesty is evaluated contextually: outright lies, half-truths and even omissions may qualify. While the duty of honest performance is not to be equated with a positive obligation of disclosure, where a contracting party lies to or knowingly misleads another in relation to contractual performance, a lack of a positive obligation of disclosure does not preclude an obligation to correct a false impression created through that party's statements or conduct.

Limiting Manufacturers' Liability for Pure Economic Loss

1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2020 SCC 35 revisits the issue of when a duty of care arises to protect against economic loss. Leading up to the Court's decision, absent a contractual or statutory right, recovery for pure economic loss was limited to three categories where such a loss occurs: (1) negligent misrepresentation or performance of a service; (2) negligent supply of shoddy goods or structure; or (3) relational economic loss. *Maple Leaf* refined that analysis by holding that the focus should not only be on how the loss arose, but on whether the parties were in a sufficiently proximate relationship at the time of the loss. Proximity may be established with reference to the three traditional categories of loss. However, it is now clear that proximity always arises from a relationship deemed to bear the requisite qualities of closeness and proximity – not from particular forms of loss.

Furthermore, the Supreme Court found that manufacturers do not owe a duty of care in tort for pure economic loss merely by supplying shoddy goods. Rather, the defective product must pose an imminent, real and substantial danger and that danger cannot be averted by simply discarding the product. Even where such a duty arises, damages will not extend to loss of profit or the cost of purchasing replacement parts, but rather to the cost of averting the danger.

Arbitration Clauses in Contracts of Adhesion

In *Uber Technologies Inc. v. Heller, 2020 SCC 16*, the Supreme Court clarified the test for unconscionability and, in so doing, underscored limits to arbitration terms in standard form consuming contracts. Specifically, the Court settled that there are only two elements to the doctrine of unconscionability: inequality of bargaining power and an improvident transaction. Contracts of adhesion may indicate inequality of bargaining power, particularly where the signee is not a sophisticated commercial actor. Terms providing for Uber drivers to have disputes arbitrated in the Netherlands were found improvident, as the costs of arbitrating in the Netherlands were so prohibitive as to negate the practical enforceability of rights under the contract. We previously wrote about this case in July 2020. To read our article, click here.

Anti-SLAAP Test

In *1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22*, the Supreme Court interpreted the test under Ontario's anti-SLAAP statute for limiting defamation suits against public participants. First, the moving party must satisfy the judge that the proceeding arises from an expression relating to a matter

of public interest. The burden then shifts to the respondent to show (i) that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and (ii) that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. The "weighing" stage is the most significant part of the analysis – the stronger the suit and the more tied the expression to the public interest, the more heavily the analysis will weigh in favour of one side or the other.

Interpreting Material Adverse Effect Provisions

Fairstone Financial Holdings Inc. v. Duo Bank of Canada, 2020 ONSC 7397 provides guidance for interpreting "material adverse effect" ("MAE") clauses in transaction agreements. The Ontario Superior Court applied Delaware law to hold that an MAE occurs where three elements are present: (i) an unknown event; (ii) a threat to overall earnings potential; and (iii) durational significance. The Court further settled that a civil standard of balance of probabilities applies to proving a MAE has occurred. While the COVID-19 pandemic satisfied the test, the specific MAE clause in issue excluded MAEs caused by (i) emergencies, (ii) failure to meet financial projections or (iii) general market changes within the industry The Court determined all three carve outs were triggered.

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