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Précis Paper

Implied Exclusivity in Commercial Agreements

A discussion of the recent case of *Rehau Pte Ltd v AAP Industries Pty Ltd [2018]* NSWCA 96.

Discussion Includes

- Key Facts
- Supreme Court decision
- Issues on Appeal
- Takeaways for practitioners

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Implied Exclusivity in Commercial Agreements

1. In this edition of BenchTV, Michael Zammit (Barrister – Sir Martin James Chambers, Sydney) and Julia Park (Solicitor- AR Conolly & Company Lawyers, Sydney) discuss the recent case of *Rehau Pte Ltd v AAP Industries Pty Ltd [2018]* NSWCA 96.

Key Facts

2. AAP Industries and Rehau entered into a supply agreement where AAP agreed to manufacture and supply Rehau with 9 specified plumbing articles.
3. The agreement was entered into in 1999 and although the term of the contract was expressed to be one year, the provisions allowed for the contract to continue from year to year unless either party gave notice 3 months before the expiry of any term.
4. From 1999 to July 2013 AAP continued to manufacture and Rehau continued to purchase the same articles.
5. In July 2013, without giving notice Rehau purchased the 9 articles from a different supplier.
6. AAP took the view that it was a repudiation of the agreement and that they were entitled to damages.
7. AAP claimed that although the agreement did not expressly state that it was an exclusive agreement, having regard to all the terms of the agreement and as a matter of construction, it was an exclusive agreement. Therefore, during the term of the agreement which had not been terminated pursuant to the agreement, Rehau was not entitled to purchase those articles from anybody else
8. Rehau claimed that it was not an exclusive agreement and therefore it could purchase from anywhere it decided.
9. AAP commenced proceedings and the Court found that as a matter of construction, it could be implied from the express terms that it was an exclusive agreement and as such damages flow to AAP.

Supreme Court decision

10. The decision from *Electricity Generation Corporation v Woodside Energy Ltd [2014]* 251 CLR 640; [2014] HCA 7 established that in constructing an agreement, one must look at the express terms of the contract in order to determine what the parties intended and further, whether or not the contract would make commercial sense without the implication.
11. His Honour looked at all the express terms of the contract in the present case and noted the following:
    a. The agreement began by stating that Rehau *shall* purchase the 9 articles;

b. That there was an express term that AAP would reserve its own production capacity for the purpose of ensuring it could meet Rehau's needs;
c. Another term noted that if AAP could not manufacture and supply the goods, Rehau was entitled to get those goods from another supplier;
d. There was also a clause which obliged AAP to keep a buffer stock of two months' worth of goods for Rehau;
e. There was a provision in the agreement which provided that notice was required before termination;

12. His Honour held that from the express terms of the contract, as a matter of construction, the contract obliged Rehau to only order the articles from AAP and not from any other supplier.
13. His Honour found that in view of his conclusion of construction, it was not necessary to deal with AAP's alternative argument that the exclusivity term should be implied in the contract as a matter of business efficacy on the principles of *Codelfa Constructions Pty Limited v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337. Nonetheless His Honour concluded that the requirements for implying a term of exclusivity were satisfied.
14. If the implied term was not in the agreement, the agreement as a whole would be ineffective as AAP would have obligations to Rehau, where Rehau would have none.
15. His Honour found that as a matter of construction and on the basis of *Codelfa,* the contract was an exclusive agreement.

Issues on Appeal

16. On appeal, Rehau argued that His Honour had erred in His decision and the agreement was nothing more than an agreement as to how the parties should regulate themselves *if* Rehau decided to purchase from AAP.
17. On the day of Appeal and in oral submissions only, Rehau brought another point of appeal.
18. Rehau submitted that the parties had not agreed on a price for the products in the original Contract and therefore there could not be exclusivity in a Contract which was not complete.
19. The Court of Appeal noted that at the Court below, both parties had proceeded on the basis of a concluded contract.
20. Further, the words used in the Contract itself had pointed to the fact that a price had been agreed and as per the decision in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] 251 CLR 640; [2014] HCA 7, as a matter of common sense, there was no other way to approach the agreement than on the basis that prices had been agreed.
21. The Court of Appeal then looked at ways an implication could be made in a contract and noted that in line with the decision in *Brambles Holdings v Bathurst City Council* (2001) 53 NSWLR 153, implications in an agreement may be contained in the express words of the agreement, or from considerations of business efficacy, or from the "nature of the contract itself", or from usage.

22. The Court of Appeal found that having regard to the express terms of the contract Rehau was obliged to purchase its requirements exclusively from AAP. In view of this conclusion he Court of Appeal did not find it necessary to consider whether the Primary Judge was correct to conclude that the exclusivity term should be implied in the contract on the principles in *Codelfa*.

Takeaways for practitioners

23. Practitioners should not be blinded by the fact that a contract does not have an express term which one party is relying upon.
24. Practitioners should be careful not to make a conclusion that a term does not apply to an agreement, simply because it is not an express term.
25. Practitioners need to look at the complete agreement, the circumstances the agreement was entered into and the express terms to determine whether as a matter of construction, the term one party is seeking to rely upon applies.
26. The terms of an agreement should be looked at as a matter of construction, rather than looking at whether that provision is expressly provided in the agreement.
27. The case also makes it clear that pursuant to the case of *Electricity Generation Corporation v Woodside Energy Ltd [2014]* 251 CLR 640; [2014] HCA 7, the question that needs to be considered is whether or not it makes commercial sense to include a particular term in an agreement.

BIOGRAPHY

Michael Zammit

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Michael has a broad commercial practice with particular emphasis in the areas of contract, equity and corporations. In the context of corporations law, Michael's practice focuses on director's duties, insolvent trading and members remedies, including remedies for oppression on the minority. Prior to being called to the bar Michael practiced as a solicitor at Allen, Allen and Hemsley. In addition to practicing as a full time barrister, Michael lectures the Law of Associations course for the Law Extension Committee at the University of Sydney. Michael is also the co author of *Corporations and Associations Law: Principles and Issues* 6th Edition LexisNexis 2015.

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Julia graduated from the University of Sydney with a double degree in Law and Commerce. Julia's career in law started in 2009 at A R Conolly & Company, followed by various litigation work in commercial and personal injury. Julia tutored Business Law at the University of Sydney.

BIBLIOGRAPHY

Focus Case

Rehau Pte Ltd v AAP Industries Pty Ltd [2018] NSWCA 96

Cases

Electricity Generation Corporation v Woodside Energy Ltd [2014] 251 CLR 640; [2014] HCA 7

Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] HCA 24; (1982) 149 CLR 337

Brambles Holdings v Bathurst City Council (2001) 53 NSWLR 153