The New Zealand Court of Appeal on the cross-border application of New Zealand consumer and fair trading legislation

The New Zealand Court of Appeal has just released a judgment on the cross-border application of New Zealand consumer and fair trading legislation (*Body Corporate Number DPS 91535 v 3A Composites GmbH* [2023] NZCA 647). The Court held that local consumer legislation – in the form of the Consumer Guarantees Act 1993 (CGA) – applies to foreign manufacturers. It also clarified that fair trading legislation – in the form of the Fair Trading Act 1986 (FTA) – applies to representations made to recipients in New Zealand. The decision is of particular interest to New Zealand consumers and manufacturers of goods that are supplied in New Zealand, as well as traders advertising their products to New Zealanders. More generally, the judgment provides a useful analysis of the interrelationship between statutory interpretation and choice of law, and lends weight to the proposition that product liability is properly governed by the law of the place of supply (or injury).

Facts

The defendant, 3A Composites GmbH (3AC), was a German manufacturer of a cladding product installed on the plaintiffs' buildings. The plaintiffs alleged that the product was highly flammable because it contained aluminium composite panels with a polyethylene core. Panels of this kind were the main reason why the fire at Grenfell Tower in London had spread so rapidly. The plaintiffs brought proceedings against 3AC, as well as the importers and distributors of the cladding in New Zealand. They alleged negligence, breach of s 6 of the CGA and breaches of the FTA. In response, 3AC protested the New Zealand court's jurisdiction.

The High Court

The High Court upheld 3AC's protest in relation to the CGA and FTA causes of action, on the basis that they fell outside of the territorial scope of the Acts: *Body Corporate Number DP 91535 v 3A Composites GmbH* [2022] NZHC 985, [2022] NZCCLR 4.

In relation to the CGA, the plaintiffs claimed that 3AC's cladding was not of acceptable quality in accordance with the statutory guarantees in the CGA. Section 6 of the CGA provides for a right of redress against a manufacturer where goods supplied to a consumer are not of acceptable quality. The Court held that the Act did not apply to 3AC because it was a foreign manufacturer.

Referring to the Supreme Court's decision in *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300, the Court concluded that there was "neither express language nor any necessary implication which would lead the Court to interpret the CGA as being intended to have extraterritorial reach" (at [45]). The CGA therefore did not apply to an overseas manufacturer like 3AC that did not have a presence in New Zealand (see [38]-[47]). The Court pointed to the definition of the term "manufacturer" in s 2 of the Act, which includes "a person that imports or distributes" goods that are manufactured outside New Zealand where the foreign manufacturer does not have an ordinary place of business in New Zealand. According to the Court, the clear inference to be drawn from this definition was that the Act did not have extraterritorial effect, because otherwise there would be no need to impose the obligations of the manufacturer's statutory guarantee upon a New Zealand-based importer of goods (at [42]-[44]).

In relation to the FTA, the plaintiffs argued that 3AC had engaged in misleading or deceptive conduct by making available promotional material on their website that was intended to have global reach and that specifically contemplated New Zealand consumers (at [107]), and by authorising publication of promotional and technical information through their exclusive distributor in New Zealand (at [108]).

The Court held that the Act did not apply to 3AC's allegedly misleading or deceptive conduct. It referred to s 3(1), headed "application of Act to conduct outside New Zealand". The section extends the Act to conduct outside New Zealand by any person carrying on business in New Zealand to the extent that such conduct relates to the supply of goods in New Zealand. It was clear that 3AC had never engaged in carrying on business in New Zealand (at [117]). Moreover,

there was no evidence to show that 3AC had made any representations to the plaintiffs relating to supply of their product in New Zealand (at [120]).

The Court of Appeal

The Court of Appeal, in a judgment by Goddard J, disagreed with the High Court's conclusion that the claims fell outside of the territorial scope of the Acts. In relation to the CGA, it held that the Act applies "to an overseas manufacturer of goods that are supplied in New Zealand" (at [61]). This interpretation was "consistent with [the] text and purpose [of the Act]", with "broader principles of private international law" and "with the approach adopted by the Australian courts to corresponding legislation" (at [61]). The relevant "territorial connecting factor", or "hinge", was the supply of goods in New Zealand (at [64], [65]).

As a matter of statutory interpretation, the Court of Appeal considered that "[o]n its face the Act applies, and there is no good reason to read it more narrowly" (at [76]). The concept of extraterritoriality was irrelevant in this context (at [70]). In particular, it was inaccurate "to describe the availability of relief in respect of a supply of goods to a consumer in New Zealand against a person outside New Zealand as an 'extraterritorial' application of the Act" (at [64]). The Act imposed strict liability, in relation to the products supplied in New Zealand to New Zealand consumers, and did not depend on the conduct of the supplier or manufacturer in New Zealand (at [71]).

In relation to the definition of "manufacturer", the Court accepted that its purpose was to provide a New Zealand consumer with the option of seeking redress against an importer or distributor of goods manufactured outside New Zealand, in light of the potential difficulties faced by a consumer when suing an overseas manufacturer (at [66]). However, this did not mean that the manufacturer should be excused from liability (at [67]). The Act essentially provided for concurrent liability on the part of the overseas manufacturer and the New Zealand-based importer or distributor (at [69]), which was consistent "with the focus of the legislation on providing meaningful remedies to consumers of goods supplied in New Zealand" (at [69]). This approach was consistent with Australian authority (at [72]).

The application of "established private international law choice of law principles"

led to the same result (at [77]). For claims in tort in relation to goods that have caused personal injury, the relevant choice of law rules favoured application of the law of the place of injury. Applying the law of the place of manufacture "would produce the unsatisfactory result of different products on the same shelf" being governed by different liability regimes (at [77], referring to *McGougan v DePuy International Ltd* [2018] NZCA 91, [2018] 2 NZLR 916 at [59]). There was "broad support for a similar approach to product liability claims (at [77]). Thus, there was "a strong argument that the applicable law, where a consumer brings a product liability claim in respect of goods supplied in New Zealand, is New Zealand law" (at [78]), which included the Consumer Guarantees Act.

The Court left open the question whether a different approach might apply where an overseas manufacturer did not know its products were being sold in New Zealand, or where it had consciously chosen not to sell its products here. These concerns did not arise on the facts of the case, so the Court did not need to determine "whether such a result would go beyond the purpose of the Act, or whether private international law principles provide a solution to any apparent injustice in such a case" (at [80]).

In relation to the FTA, the Court accepted that the relevant issue was whether 3AC engaged in conduct in New Zealand that breached the Act, so the fact that s 3 (on the extraterritorial application of the Act) did not apply was not decisive (at [103]). The Act applied to false and misleading conduct in New Zealand, "regardless of where the defendant is incorporated and where it carries on business" (at [102], referring to *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754). This included communications made from outside New Zealand to recipients in New Zealand.

Comment

The Court of Appeal's judgment is to be welcomed. The principle of extraterritoriality has been responsible for causing considerable confusion in the past (see Maria Hook "Does New Zealand consumer legislation apply to a claim against a foreign manufacturer?" [2022] NZLJ 201). In treating the principle as irrelevant to this case, the Court laid the path for a clear and nuanced analysis of the issues. Not only did the Court refuse to adopt the lens of extraterritoriality, it

was also prepared to rely on general choice of law rules, in addition to statutory interpretation, and treated both as relevant.

Courts often approach statutory interpretation and choice of law as exclusive methodologies. At the outset of the case, they identify whether the issue is one of statutory interpretation or choice of law, and then proceed with their analysis accordingly. Here, in relation to the CGA, the Court of Appeal applied both methodologies and found that the relevant connecting factor was the place of supply, regardless of which methodology applied. The implication seemed to be that there was a shared rationale for the place of supply as the most appropriate connecting factor and that, if the two methodologies had pointed in different directions, this *might* have been evidence that things had gone awry.

In this way, the judgment lends support to the proposition that statutory interpretation and choice of law are not engaged in any kind of "competition". There is a reason why product liability is typically governed by the law of the place of injury (or the place of supply, where liability is for pure economic loss). Why should this reason not also be determinative for claims under the CGA specifically? The more difficult question would be whether a statute should be given a wider scope of application than it would receive under bilateral choice of law. But here, too, it would be unhelpful to think of the conflict of laws as a kind of jilted discipline. The goal should be to identify the cross-border considerations that bear upon the scope of the particular statute, when compared to the rationale underpinning the choice of law rule that would otherwise be applicable. How else can a court decide whether a statute is intended to fall outside of general rules of choice of law? Statutory interpretation, and characterisation, are necessarily intertwined. It remains to be seen whether future courts will build on the Court of Appeal's judgment to engage more explicitly with the interrelationship between statutory interpretation and choice of law.