



Hamel-Smith

ATTORNEYS-AT-LAW, TRADEMARK & PATENT AGENTS

FORUM

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CONSUMER PROTECTION AND THE LAW

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and

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We are all consumers of the goods and services. Whether as consumer or provider, we should be aware of consumers' rights.

In Trinidad and Tobago, several pieces of legislation provide consumer protection. The basic concept of a consumer, as used in the legislation, is a person who does not enter into the contract in the course of a business, where the other party makes the contract in the course of business and the goods passing are of the type ordinarily supplied for private use or consumption.

In addition, there are common law remedies for negligence which go as far back as the famous 1932 case of *Donaghue vs. Stevenson* which established the duty to take reasonable care not to cause damage to others. That was the case in which the consumer, after drinking ginger beer, discovered a decomposed snail at the bottom of the opaque bottle.

The Consumer Protection and Safety Act

The Act establishes the Consumer Guidance Council which monitors the implementation of the Consumer Policy and advises Cabinet on matters relating to policy implementation. It addresses several means of protection of consumers, namely:

- Adverse Trade Practices;
- Conduct detrimental and unfair to the interest of consumers; and
- Consumer Safety.

Adverse Trade Practices

What is a Consumer Trade Practice?

Any practice carried on in connection with the supply of goods and services to consumers, specifying the terms and conditions of such supplies, the manner in which the terms are communicated, promoted, method of salesmanship, packaging and methods of demanding or securing payment.

What is an Adverse Trade Practice?

Basically this is a practice which can be considered misleading, oppressive or inequitable to consumers. On the recommendation of the Director, the Minister of Trade and Industry and Consumer Affairs has power to make Orders to prohibit the continuance of adverse trade practices which affect consumers. The Adverse Trade Practice Order 2000 builds on the rights under the Act as well as the Unfair Contract Terms Act to enhance consumer rights regarding trade practices which can be considered misleading, oppressive or inequitable to consumers.

The Order requires contracts with consumers to include all the terms and conditions, representations, warranties or guarantees under which the goods are sold. It also requires advertisements of sale of goods at VAT exclusive prices to include the VAT in

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RISKS AND DUTIES OF ARRANGERS

Christopher Hamel-Smith

The Judgment of the English Commercial Court dated November 21st 2006 in *IFE Fund SA v Goldman Sachs International* is of considerable interest and relevance to investment bankers and other participants in the capital markets. It provides guidance on the extent to which the Courts will find that an arranging bank has made implied representations, or owes a duty of care, to the other financial institutions who participate in the facility. More generally, it offers insight into the attitude of the Courts towards transactions between sophisticated parties and thus illustrates how banks, and other parties, can use proper legal risk management techniques to effectively define and limit their liabilities when transacting with other sophisticated parties.

Goldman underwrote a bond facility issued by its client, Autodis. IFE bought some of the bonds from Goldman. The Information Memorandum which Goldman supplied to IFE began with an "Important Notice" (some three pages long) which included statements to the effect that Goldman:

- Had not independently verified the information;
- Made no representation and accepted no responsibility as to its accuracy or completeness; and
- Did not undertake to review the financial condition, status or affairs of the issuer or any of its affiliates or to advise any participant of any information coming to its attention.

After the circulation of the Information Memorandum but prior to IFE's purchase of the bonds, Goldman received further information which caused it to have reason to doubt the accuracy of the picture painted by the Information Memorandum. However, Goldman did not correct or qualify the information it had provided to IFE which purchased the bonds based on that information.

IFE sued Goldman alleging negligent misrepresentation or negligent misstatement. On its negligent misrepresentation case, IFE argued that:

- Goldman had impliedly represented that it was not aware of any facts which showed that the relevant statements made in the Information Memorandum were or might be inaccurate; and
- This was a continuing representation which IFE was entitled to consider remained true up until it purchased the bonds.

On its negligent misstatement case, IFE argued that Goldman owed it a duty of care to inform it if Goldman became aware of information which showed that the Information Memorandum was or might be inaccurate in a material way.

In rejecting IFE's claims, the Judge was clearly heavily influenced by the fact that the Information Memorandum was not a document issued to the general public but only to financially sophisticated entities. In this context, he emphasised that *there is everything to be said for leaving the participants to determine the respective responsibilities and risks of the sponsors, the debtor, the arranger and the investors, and for respecting their decisions.*"

In deciding that no implied representation of the type alleged by IFE had been made by Goldman, the Judge relied on the express language in the Information Memorandum to the effect that Goldman did not undertake to review the

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CHAMBERS GLOBAL RANKS HAMEL-SMITH #1

We are pleased to announce that Hamel-Smith has been ranked in the #1 band in the 2006 Chambers & Partners Global survey of law firms. Chambers Global is the "Gold Standard" in directory appraisals of lawyers worldwide. The Chambers' review considers the reputation and standing of law firms based on research and interviews with persons with whom the firms have worked during the previous year.

The review recognised Hamel-Smith's experience in the specialist areas of Banking & Finance and Energy & Tax, as well as its Dispute and Risk Management Practice Group; and described the Firm as "...knowledgeable, responsive, everything you want in outside counsel". Six of our Partners have received Chambers rankings.

Please visit www.chambersandpartners.com for the full text of the Chambers Global review of law firms in Trinidad & Tobago.

THE ENVIRONMENTAL MANAGEMENT AUTHORITY AND NATURAL JUSTICE

Peter A. Rajkumar

While it is widely known that there exists an Environmental Management Authority (EMA), less widely known is the fact that decisions of that Authority may be reviewable by the Environmental Commission (the Commission) which is established by the Environmental Management Authority Act, 2000 and designated a superior court of record.

In Environmental Appeal No. 2 of 2006, the Environmental Commission was recently seised of an appeal against the denial of an application to the EMA for certain information not to be placed on the EMA's National Register because it was a trade secret or confidential business information and because of national security concerns.

The Environmental Commission made findings that the EMA:

- (a) Had a policy with respect to applications for confidentiality made by the appellant corporate entity;
- (b) Took factors into consideration without communicating them to the appellant and thereby failed to give the appellant an opportunity to be heard; and
- (c) Failed to fully consider all of the appellant's security concerns before arriving at its determination.

Operating a Policy and Natural Justice

The Commission found that the evidence given at the hearing disclosed that, unknown to the appellant, there existed a policy which was applied by the EMA in dealing with applications similar to the one in the instant case with similar results in each case. The Commission found that the EMA was quite entitled to have a policy with respect to how it dealt with certain applications before it. However, it ruled that the Authority should have made known to an applicant the terms of any such policy and allow for an opportunity to respond.

The Commission emphasised that: *"It is incumbent on a decision maker that he should make known to the person the basis upon which he would be arriving at his conclusion so that that person has an opportunity to comment."*

Accordingly, they ruled that the EMA erred in failing to give the appellant an opportunity to respond and was in breach of natural justice.

Applying a Test and Natural Justice

The EMA had rejected the appellant's claim for confidentiality because it claimed that it did not possess any independent economic value. However, neither that criterion nor a second criterion which was apparently used by the EMA, namely, *"whether the information had been the subject of efforts that were reasonable under the circumstances to maintain its secrecy"*, was communicated to the appellant, who was therefore unaware that these were to be the yardsticks used in making a determination on the confidentiality of the information. The Commission found that the EMA's determination that there was no independent economic value to the information (for which confidentiality was claimed) was a unilateral one and that the appellant was denied the opportunity to comment on or respond to these tests.

The Commission emphasised that it was the responsibility of the decision maker to ensure that an applicant be made aware or given an opportunity to respond to any criteria that may be applied to an application before final determination and insisted that *"fairness and natural justice demand no less"*.

Conclusion

- (1) The Environmental Commission in the exercise of its appellate jurisdiction from decisions of the EMA will insist that natural justice be afforded by the EMA to applicants, whether for claims to confidentiality or otherwise, and will require reconsideration of any decision not so arrived at.
- (2) Natural justice comprises many elements, one of the most fundamental of which is the right to be heard and the various permutations thereof. If, for example, a policy is being applied, this must be communicated to an applicant. Similarly, if criteria are used for the application of a test, then these criteria must be made known to an applicant.

CONSUMER PROTECTION AND THE LAW (cont'd)

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money terms in figures and letters of the same size and prominence as the price of the goods. Publication of false or misleading information is a criminal offence punishable with fines ranging from \$5,000.00 to \$10,000.00 and imprisonment from four months to two years.

Conduct Detrimental and Unfair to the Interest of Consumers

A public officer is designated the Director of Consumer Guidance. His duties are to review the commercial activities relating to supply of goods and services with a view to ascertaining circumstances which may adversely affect the economic interests of consumers and to determine whether any consumer trade practice adversely affects such interest.

Where the Director has reasonable grounds for concluding that a person has in carrying on his business persisted in a course of conduct detrimental to consumers' interests, he shall use his best endeavours to obtain written assurances from such person that he will refrain from that course of conduct. Failure to give satisfactory written assurance to the Director can result in summary criminal proceedings.

Consumer Safety

The Act gives the Minister of Consumer Affairs the power to make Safety Regulations which contain provisions for the purpose of securing that goods are safe and that inappropriate information is not provided in respect of goods.

Safety regulations may contain provisions that address such matters as:

- The composition, contents, design or packaging of the goods;
- Requiring the goods to conform to a particular standard;
- The testing or inspection of goods; and
- The requirement of a warning or instructions or other information relating to goods to be marked on or to accompany the goods.

The Minister may also make Prohibition Orders preventing the supply or possession for supply of unsafe goods described in the Order.

The Director of Consumer Affairs also has the power to arrange for the publication of:

- Information and advice expedient to consumers in Trinidad and Tobago; and

- The names of recalcitrant traders (persons who in the course of their business have engaged in conduct which is detrimental to the interests of consumers).

The Trade Descriptions Act

This Act aims at encouraging high standards of truthfulness in describing goods and services, and applies only to suppliers in the course of trade or business. The Act states that any person who, in the course of a trade or business:

- Applies a false trade description to any goods; or
- Supplies or offers to supply any goods to which a false trade description is applied will be guilty of an offence.

What is a Trade Description?

A Trade Description is an indication of any of the following matters with respect to any goods or parts of goods:

- Quantity, size or gauge;
- Method of manufacture, production, processing or reconditioning;
- Composition;
- Fitness for purpose, strength, performance, behaviour or accuracy;
- Any other physical characteristics);
- Testing by any person and results thereof;
- Approval by any person or conformity with a type approved by any person;
- Place or date of manufacture, production, processing or reconditioning;
- Person by whom manufactured, produced, processed or reconditioned;
- Other history, including previous ownership or use.

The Act applies only where the trade description forms part of an advertisement.

What is a False Trade Description?

A statement can be technically false but if no one is misled by the information, no offence will be committed. However, an offence will be committed in the following circumstances:

- A statement which is literally true but is taken by an average person to be misleading;
- A statement which does not amount to a trade description but which is likely to be taken by the average man to be an indication of a trade description;
- An indication that any goods comply with a standard specified or recognized by any person or implied by the approval of any person when there is no such person or standard so specified, recognized or implied.

CONSUMER PROTECTION AND THE LAW (*cont'd*)

(*cont'd from page 4*)

When is a Trade Description applied to goods?

A person applies a trade description to goods if he:

- Affixes or annexes a trade description to, or marks it on or incorporates it with the goods themselves or anything in, on or with which the goods are supplied;
- Places the goods in, on or with anything which the trade description has been affixed, annexed to, marked on or incorporated with or places any such thing with the goods; or
- Uses the trade description in any manner likely to be taken as referring to the goods.

What are some of the offences created under the Act?

- Publishing an advertisement of any good to be

supplied in the course of trade or business which fails to comply with an Order made by the Minister of Consumer Affairs requiring that information or an indication by which it may be obtained be included in advertisement of the specified goods;

- Making false or misleading indications as to the price of goods;
- Making false statements in the course of a business as to the nature, location, time or manner of the provision of any services, accommodation or facilities.

In subsequent issues we will focus on the protection offered to consumers by the Sale of Goods Act, the Unfair Contract Terms Act and the Hire Purchase Act.

RISKS AND DUTIES OF ARRANGERS (*cont'd*)

(*cont'd from page 2*)

financial condition, status or affairs of the issuer or any of its affiliates or to advise any participant of any information coming to its attention. In these circumstances, he found that the implied representation made by Goldman was limited to a representation that it was acting in good faith in supplying the information to IFE. However, no allegation was made that Goldman had not acted in good faith and, accordingly, it was not in breach of this representation.

In deciding that Goldman did not owe IFE the duty of care which the latter had alleged, the Judge stated that the Courts should be slow to superimpose obligations beyond those which had been carefully defined in the contractual documentation and emphasised that Goldman was not acting as IFE's adviser or carrying out any professional service for IFE, as was made clear by the Information Memorandum.

The Judgement provides some level of comfort to arranging banks and other parties who wish to manage their legal risks and liabilities when dealing with sophisticated parties. It shows that the Courts expect such sophisticated parties to look after their own interests and will generally resist invitations to imply representations,

or to impose duties of care, which are at odds with express provisions in the relevant documentation.

At the same time, the Judge's finding that there was an implied representation of good faith should be carefully noted. Thus an arranger does need to give careful thought to exactly what information it ought to disclose to potential investors in order to comply with its obligation to act in good faith, particularly since the issue of whether it did so may be judged with the benefit of perfect hindsight.

This case illustrates the critical value of proper legal risk management, particularly in significant transactions between sophisticated parties. Of course, legal risk management involves much more than the inclusion of boilerplate language in the transaction documents. Ultimately, the Courts will pay more attention to the substance than the form of the transaction so there will be no real value in including language in the documents if the parties then act in a manner which is inconsistent with what they have documented. Accordingly, it is essential that a transaction should be structured, documented and implemented in a consistent manner so as to achieve the parties' commercial objectives while identifying and allocating their respective responsibilities and risks.

Please Circulate

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