HIGH COURT OF AUSTRALIA

11 May 2011

INSIGHT VACATIONS PTY LTD T/AS INSIGHT VACATIONS v YOUNG
[2011] HCA 16

Today the High Court unanimously dismissed an appeal by a tour company against a decision of the Court of Appeal of the Supreme Court of New South Wales upholding the liability of the company for damages for breach of an implied contractual warranty that its services, supplied in this case in Europe, would be rendered with due care and skill.

In 2005, Mrs Young purchased a European tour package from Insight Vacations Pty Ltd ("Insight"). The contract between Mrs Young and Insight stated that it was to be governed by the law of New South Wales. The contract contained a clause exempting Insight from liability for claims arising from any accident or incident where a passenger occupied a motor coach seat fitted with a safety belt if the safety belt was not being worn. While travelling by coach between Prague and Budapest, Mrs Young got out of her seat to retrieve something from the overhead shelf. The coach braked suddenly, causing Mrs Young to fall and suffer injury. Mrs Young sued Insight for damages for breach of a contractual warranty, implied by s 74(1) of the *Trade Practices Act* 1974 (Cth) ("TPA"), that services supplied under the contract would be rendered with due care and skill.

At trial in the District Court of New South Wales, Insight argued that it could rely on the exemption clause in the contract as an answer to Mrs Young's claim, notwithstanding s 68 of the TPA, which relevantly provided that any term of a contract purporting to exclude, modify or restrict liability for breach of the implied warranty is void. Insight's argument was based on s 74(2A) of the TPA, which provided that where an implied warranty in a contract was breached and the law of a State was the proper law of the contract, the law of the State applied to limit or preclude liability for that breach. Insight argued that s 74(2A) had the effect of picking up and applying s 5N of the *Civil Liability Act* 2002 (NSW) ("Civil Liability Act"), which provided that "a term of a contract for the supply of recreation services may exclude, restrict or modify" liability resulting from breach of an implied warranty. Insight submitted that the exemption clause was thereby given effect.

That argument was rejected in the District Court. Mrs Young's claim was successful and she was awarded $22,371 in damages with costs. Insight's appeal to the Court of Appeal of the Supreme Court of New South Wales against the quantum of damages was allowed by all members of that Court, and the damages reduced, but Insight's appeal against liability was dismissed by majority. By special leave, Insight appealed to the High Court, advancing the same contentions as it had raised at first instance.

Today the High Court unanimously dismissed the appeal. The Court held that s 74(2A) of the TPA picks up and applies, as surrogate federal laws, State laws that apply to limit or preclude liability for the breach of an implied warranty, but that s 5N of the Civil Liability Act is not picked up because it does not meet that description. Section 5N does not itself apply to limit or preclude liability, but only permits parties to certain contracts to exclude, restrict or modify certain liabilities.

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The Court further held that, even if s 5N had been picked up by s 74(2A), it would not have engaged with the facts of Mrs Young's claim. The reference in s 5N(1) to "a term of a contract for the supply of recreation services", while expressed in general language, should be read as subject to a geographical limitation deriving from the context and subject matter of the Civil Liability Act. The relevant geographical limitation is the place of supply of the recreation services. Therefore, s 5N applies only to contracts for the supply of recreation services in New South Wales. Section 5N did not apply to the contract between Mrs Young and Insight because that contract was for the supply of recreation services outside New South Wales.

Moreover, the Court held that the exemption clause itself would have had no application to Mrs Young's claim. On its true construction, the exemption clause could apply only when a passenger occupied a seat on a motor coach, not when the passenger had left his or her seat to move about the coach as passengers were permitted to do under the contract. Because Mrs Young was not sitting in her seat when she fell, the exemption clause could not apply.

Insight was ordered to pay Mrs Young's costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*