Consumer Guarantees Act is a big risk for B2B: an example

June 2014

Speed read

This is the fifth article in our special series on the big B2B and B2C law changes from 17 June.

We include a check list to help reduce liability under the CGA in the B2B context.

Carter Holt faces a very large CGA claim based on use of its cladding sheets and systems, even though the supply is entirely B2B. The context is watertight claims where cladding manufactured by Carter Holt has been used in multiple schools. Carter Holt is potentially liable as manufacturer to the Ministry of Education in relation to those schools, the CGA having been drafted so that a non-consumer user of cladding has a claim against Carter Holt as manufacturer. Worse, the manufacturer may well not be able to contract out of the CGA liability for this multi-million dollar exposure.

The changes to the CGA on 17 June 2014, make it even more difficult to contract out of the Act for B2B transactions, render suppliers even more exposed. In that regard, see our article, New law from June 2014: Reducing exposure under NZ B2B supply contracts.[1]

For suppliers and manufacturers the CGA is not just about the intended target: B2C deals. They can be exposed to major liabilities in B2B transactions too.

Action steps include:

- Analyse whether the company "*manufactures*" goods (note: the definition of manufacturer is artificially wide) and whether customers are "consumers" (again this is artificially wide)
- If yes, take steps to reduce the risk;
- Revisit B2B contract forms between suppliers and customers (and forms used for both B2C and B2B), including those with existing s 43 CGA carve outs, to check if they are still compliant beyond 17 June 2014 with the CGA changes;
- Have processes to deal with the above matters.

In our article, New law from June 2014: Reducing exposure under NZ B2B supply contracts,[2] we explained how the CGA has been amended so that, from 17 June 2014, suppliers cannot contract out merely by agreeing to do so in writing, as was the case in the past. Like contracting out of parts of the FTA, they must show that contracting out is reasonable. This is a major change. All suppliers should closely review their B2B contracts and processes to optimise their positions: otherwise they might end up with limitations of liability that don't work as well as additional obligation.

There is already wide potential liability for B2B transactions even before the Act was changed, as a High Court claim by the Minister of Education and others against Carter Holt Harvey shows.[3] Carter Holt manufactures cladding sheets which were supplied to building contractors via wholesalers, who used them to construct numerous school buildings.

Consumer Guarantees Act is a big risk for B2B: an example

So, the claimants had no direct contract with Carter Holt. The claimants allege that the cladding and systems were inadequate to stop water entering the buildings.

Carter Holt applied to strike out the various heads of claim such as in relation to negligence. They didn't succeed. Here we deal with one ground: liability under the CGA. The court decided that Carter Holt:

- was not a "*supplier*" under the CGA and so could not be liable under the consumer guarantees in that way;
- could be a "*manufacturer*" as defined in the Act.

Various remedies are available to a "*consumer*" against a "*manufacturer*", under s 25.

The claimants may be "*consumers*" under the relevant definition:

- They are acquiring from a supplier (eg the building contractor) "*goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.*"; and
- The carve out for resupplying in trade, consuming them during manufacture, etc, does not apply.

Such cladding may be used ordinarily for personal domestic or household purposes, and therefore the claimants may be "*consumers*" even though they are not what we ordinarily regard as consumers.

The ability to contract out of the CGA in B2B transactions applies only to suppliers and not manufacturers. Therefore, Carter Holt could have the best possible limitation of liability in its contract with wholesalers, but that won't work to stop liability to the claimants.

The court did not accept the argument that Carter Holt could be a "*supplier*" as it was contractually removed from the claimants.

So the claim was not struck out and it can go to trial. (The case also involved issues around whether the cladding was part of the real estate at relevant times, so that the CGA would not apply, but this article does not deal with that).

1. http://www.wigleylaw.com/assets/Uploads/New-law-from-June-2014-Reducing-exposure-under-NZ-B2B-supply-contracts.pdf

2. http://www.wigleylaw.com/assets/Uploads/New-law-from-June-2014-Reducing-exposure-under-NZ-B2B-supply-contracts.pdf

3. [2014] NZHC 681

Wigley+Company
PO Box 10842
Level6/23 Waring Taylor Street, Wellington
T +64(4) 472 3023 E info@wigleylaw.com
and in Auckland
T +64(9) 307 5957
www.wigleylaw.com