Judge excluded the defence under s.377(8) from the jury's consideration, and the plaintiff received $4,000 damages.

The Full Court of the Supreme Court of Queensland allowed an appeal by the North Queensland Newspaper Company; found that the defence under s.377(8) should have been left to the jury, and that on the evidence, Judgment should have been entered for the first respondent.

The plaintiff appealed against the Full Court finding, and on 17 November 1993, the appeal was dismissed by the majority of Mason C J, Brennan, Deane, Dawson, Toohey and Gaudron J J with McHugh J dissenting.

The majority in their joint judgment considered that s.377(8) gave rise to two principal questions:

"(1) Is the protection under that sub-section for comment which is fair only available when the facts on which the comment is based are indeed true and stated, referred to or notorious to those to whom the matter is published?

(2) Is it an essential element of the defence when pleaded in relation to the publication of another's comment that the publisher hold the opinion expressed in the comment".

In answering the first of those two questions, the Court approved the approach of Sugerman J in *Rigby -v- Associated Newspapers Limited* and held that reference in s.377(8) to "fair comment" does not require that the facts upon which that comment is based to be true, provided that, at the time the comment is published the publisher does not hold a belief that such facts are untrue. The Court commented:

"When the paramount policy interest manifest on the face of s.377(8) is the encouragement and protection of freedom of discussion on a matter of public interest for the benefit of the public, it would be inappropriate to construe that sub-section as requiring that a person wishing to participate in the discussion of such a matter by way of comment on the facts stated on a privileged occasion, when that discussion is for the public benefit, should firstly satisfy himself or herself the truth of those facts before commenting upon them".

Further, it was held that it was not necessary that there be a statement of the facts on which the comment is based in the publication, provided that the jury is satisfied that such facts are sufficiently indicated or notorious to enable persons to whom the defamatory matter is published to judge for themselves the fairness or otherwise of the comment.

In relation to the second question, the Court held that it was not an essential element of the defence that the publisher of another's comment hold the opinion expressed in the comment, and held that "it is sufficient if the publication is objectively fair and the plaintiff does not prove that the defendant publisher was actuated by malice". The Court cited with approval the comments of Dickson J in his dissenting judgment in *Cherneskey -v- Armadale Publishers Ltd* a decision of the Supreme Court of Canada:

"It does not require any great perception to envisage the effect of such a rule upon the position of a newspaper in the publication of letters to the editor. An editor receiving a letter containing matter which might be defamatory would have a defence of fair comment if he shared the views expressed, but defenceless if it did not hold those views. As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of censorship, antithetical to a free press".

In applying s.337(8) to the present case, the Court found that the statements made in Parliament constituted a sufficient substratum of fact upon which to base the publication; that the comment was fair, and that there was no evidence to suggest that anyone connected with the first respondent believed the contents of the advertisement to be untrue.

A submission by the appellant that the manner and extent of the publication exceeded that that was reasonably sufficient for the occasion because the first respondent's Newspaper circulated in an area which extended outside the Johnston Shire was described as "... utterly without merit" and rejected on the basis that the administration of the Johnston Shire was a matter of public interest to persons resident outside the Shire, including ratepayers of the Johnston Shire who reside outside the shire, and that there was nothing to suggest that placing the advertisement in another publication would have succeeded in bringing the matter sufficiently to the attention of the ratepayers and residents of the shire.

Noel Greenslade is a solicitor with Gallens Crowley & Chamberlain in Canberra

Interconnection and the dominant market position in New Zealand

John Mackay and Jane Trethewey report on the recent decision in Clear Communications Limited -v- Telecom Corporation of New Zealand and Ors.

On 17 December 1993, the New Zealand Court of Appeal handed down its judgment on the application of s.36 of the *Commerce Act* 1986 to negotiations between New Zealand Telecom and Clear Communications for the interconnection of Clear's network to Telecom's network. Section 36 (the New Zealand equivalent of s.46 of the *Trade Practices Act 1974*) proscribes the use of a dominant position in a market for the purpose of restricting the entry of a person into a market, preventing or deterring a person from engaging in competitive conduct in a market or eliminating a person from a market.

Clear (which was formed in 1990 to compete in the newly deregulated telecommunications market in New Zealand) wished to establish local telephone services to business subscribers. Access to Telecom's network was essential to enable Clear's and Telecom's customers to call one another. After protracted negotiations, the parties could not agree on the terms for interconnection. Telecom's conduct and the stance adopted by it in the negotiations were alleged to contravene s. 36.

It was accepted that Telecom was in a dominant position in the relevant market, being the national market for standard switched telephone services, as the majority of the Court held in *Telecom Corporation of New Zealand Ltd -v- Commerce Commission.*

The Facts

Telecom effectively refused to deal on the terms suggested by Clear and instead proposed terms which included an access code and an access levy as a contribution to Telecom's network infrastructure costs, including its "cross-subsidy burden" (constraints on pricing for residential telephone services retained by the Government when Telecom was privatised in 1990). Clear objected strongly to the access code and levy.

Clear had successfully tendered for the supply to the NZ Justice Department of telephone services on the basis that it would be fully interconnected with Telecom's network and that there would be no access code. Under its contract with the Justice Department, Clear was subject to substantial penalties if it could not provide the service by the required time. When it became clear that the negotiations were not proceeding quickly enough, Clear applied to Telecom for a standard DDI service to enable it to meet its obligations to the Justice Department. Telecom refused the permit for the service.

The parties subsequently agreed on an interim arrangement for the Justice Department contract and negotiations continued on the final arrangements for interconnection. Telecom put forward a new proposal which included passing on to its customers any charges by Clear for calls onto Clear's network, an access code only if Clear made such charges, charges for calls onto Telecom's network at Telecom's standard PABX call rates and a monthly charge for the interconnection (an access levy). The figures were calculated by reference not to overhead costs, but to the opportunity cost to Telecom representing revenue lost by Telecom to Clear. Clear objected to being charged for calls as a PABX customer and to the access code and levy.

The High Court found that Telecom had breached s.36 in not accepting Clear as an ordinary DDI customer and that Clear was entitled to damages. The Court also held that Telecom had breached s.36 in treating Clear as a PABX customer rather than a network operator, requiring the access code and for charging excessive prices for connection to the loop. However, the Court found that Clear had not suffered loss. The delays in negotiations were not in themselves in breach of s.36 nor was the proposed opportunity cost pricing mechanism.

The Court of Appeal

The main issue considered by the Court of Appeal was whether the proposed pricing mechanism contravened s.36. Telecom argued that the opportunity cost method of pricing the provision of interconnection services was consistent with what would be done in a competitive environment.

The Court held that this pricing mechanism was anti-competitive and in breach of s.36 as it included monopoly profits, effectively requiring the competitor to indemnify the monopolist against any loss of custom. The Court rejected the argument that any monopoly rents would be eliminated over time through the competitive process, through a price review mechanism, pointing out that this mechanism was at best imperfect, allowing Telecom to exploit the margin until the next review, and at worst may constitute a further barrier to entry because of the transaction costs involved. The Court also rejected the submission that persistent monopoly rents could be dealt with by regulation, including the price control provisions of the Commerce Act. This was said to be unrealistic in view of the Government's policy of a "light-handed" approach to telecommunications industry regulation.

The access code requirement was also held to be anti-competitive, as it was unnecessary for charging purposes or to enable customers to differentiate between the networks and would impose a major competitive disadvantage on Clear. The Court also found that Telecom's refusal to issue a DDI permit was in breach of s.36. The Court said that, taken together as a package, Telecom's terms for interconnection were more onerous than could have been insisted upon in a fully competitive environment and prevented Clear from entering the market.

The Court inferred anti-competitive purpose and rejected submissions that Telecom's conduct was due merely to inexperience and reliance upon expert advice in a complex commercial arrangement.

The Court gave a declaration that the terms for interconnection set by Telecom in its various proposals contravened s.36 of the *Commerce Act*, refusing to give more detailed orders given that the parties were still in negotiation. The award of damages for the refusal to grant a DDI permit was upheld. Clear's claim for damages flowing from breach of s.36 in relation to the terms for interconnection was rejected because Clear had not established that the parties would have been likely to reach agreement but for the breach.

The Court gave guidance as to the appropriate pricing mechanism for interconnection focusing on the incremental costs of providing the service, including fixed and common costs such as the cost of its obligations to residential users, plus a reasonable return for providing the services.

The Court also suggested that both parties re-evaluate their approach to the negotiations - Clear should accept that Telecom is entitled to charge a line rental to recover proper incremental costs and a reasonable return for the provision of interconnection services, while Telecom should not treat Clear as equivalent to a PABX customer and should change its attitude to reciprocity.

Comment

This judgment illustrates the difficulties in determining appropriate terms for interconnection where there is little or no legislative guidance. In contrast to the New Zealand policy decision to rely on little regulation and primarily upon market forces for the development of competition, the Australian *Telecommunication Act 1991* regulates the carriers in significant ways: prohibitions on anti-competitive conduct; carriers are given the right to interconnect with the networks of other carriers and to request the provision of telecommunications services and necessary supplementary services; in the event of a failure to agree terms of interconnection the parties can submit the matter to AUSTEL for arbitration; the terms of the interconnection agreement are subject to AUSTEL's scrutiny in the process of registration; and the prices which Telecom may charge for interconnection are regulated.

If NZ Telecom and Clear are unable to reach agreement on the terms of interconnection, the carriers may need to arbitrate or may face Government regulation in a similar form to that which the carriers face in Australia. The longer the parties take to reach agreement the greater the benefit to Telecom from the delay in Clear entering the market.

John Mackay and Jane Trethewey are solicitors at Blake Dawson Waldron