Gotta love the Dame

THE RECENT CASE IN THE AFTERMATH OF DAME KIRI TE KANAWA AND JOHN FARNHAM'S FAILED BID TO STAGE A SERIES OF COMBINED CONCERTS IS A STUDY IN TWISTED KNICKERS OR THE ONGOING DANGERS OF ORAL CONTRACTS IN THE ENTERTAINMENT INDUSTRY WRITES **WILLIAM MULHOLLAND**

A recent decision in March 2007 by Justice Patricia Bergin of the New South Wales Supreme Court in the case of *Leading Edge Events Australia Pty Ltd v Kiri Te Kanawa & Ors* [2007] NSWSC 228 (*Leading Edge*) has explored a number of issues relating to the way the modern entertainment industry conducts itself.

Not the least was a consideration by the court of the tantalising question of the formation of a legally binding contract given extensive oral negotiations and electronic communications between the parties. The court also heard submissions for a claim by the plaintiff for compensation on the grounds of both restitution and equitable estoppel for expenses it had incurred in relation to organising a proposed series of concerts involving the renowned singer Dame Kiri Te Kanawa and John Farnham called *Two Great Voices*.

Despite Dame Kiri's now highly publicised concerns about "middle-aged Antipodean women tossing under garments" at John Farnham from footage of his recent concerts, Justice Patricia Bergin concluded that the main reason why Dame Kiri ultimately chose not to perform in the concerts was a decision based on the fact that Dame Kiri "just did not want to perform" and that the company representing her had not been entirely truthful as to these grounds.

The *Leading Edge* case has implications for the formation of contract and also issues relating to a successful claim for restitution based on the expenses that the plaintiff incurred in relation to organising the concerts. In light of the findings of the court that no binding contract had been entered into between the parties, one is reminded of the application of the timeless quote by the famous American movie producer Samuel Goldwyn that "an oral contract is not worth the paper it's written on".

The plaintiff in this case was Leading Edge Events Australia Pty Ltd (LEE) describing itself as a promoter of events in the entertainment industry. On 9 November 2005 it commenced proceedings against Dame Kiri, theatrical agent Nick Grace Management Limited (NGM), NGM director Nick Grace and Dame Kiri's company Mittane Limited.

The plaintiff's main cause of action was for breach of contract by Dame Kiri, which it claimed it had entered into with her service company known as Matani Ltd (later referred to as Mittane). It was alleged that Mittane agreed to provide the services of Dame Kiri to perform at the concerts in Sydney and Melbourne in February 2005. In addition, the plaintiff made a claim for expenditure it incurred in relation to the concerts on a *quantum meruit* basis arguing an application of both restitution and equitable estoppel doctrines.

From the outset, the plaintiff conceded that it was difficult to give the court any clear indication as to the time when the alleged contract was actually made. Based on extensive submissions by the plaintiff, the court's task of ascertaining when the alleged contract was actually entered into was heavily dependent upon a detailed analysis of communications, both oral and written, between the parties during two main periods from June 2003 to April 2004. The court considered that an analysis of these submissions also shed light on determination of the plaintiff's other claims in estoppel and for misleading or deceptive conduct.

The court also commented on the nature of the entertainment industry as part of its judgment. It likened the entertainment industry and the business of promoters as similar to other entrepreneurial commercial enterprises where commercial risks are taken in the pursuit of profit. However, one clearly distinguishing feature in relation to the entertainment industry is that the risk taken by promoters in many instances is reliant on the performance of one individual alone to achieve that profit.

The use of written contracts in the entertainment industry received some interesting albeit mixed attention in the judgment. Although not a party to the proceeding, Glen Wheatley (Farnham's manager) referred in his evidence to that fact that Tom Jones (who was brought in at the last moment to replace Dame Kiri) did not sign his contract until 'after he left the country'. Wheatley also made the point earlier in his evidence that in the 25 years he has been managing Farnham "he has not had a written contract". This appeared to be in contradiction with claims made by Paul Gleeson, a promoter who looked after Dame Kiri's interests, that in a conversation with Wheatley on 15 April 2004 he had said:

Gleeson: "[it] was also a pity that the meeting in Auckland with John Farnham could not take place."

Wheatley: "What I can't work out Paul is why Frank Williams went ahead and produced the expensive launch artwork and gifts and made other significant financial commitments without a signed agreement. It seems absurd."

Gleeson: "I agree."

Like other areas of commercial endeavour, conduct of the entertainment industry is not without its own contradictions.

THE PROCEEDINGS

The court considered in a detailed analysis extending over 167 paragraphs, the history of the communications between the parties in relation to whether or not a binding agreement had been entered into. The court considered two major periods in the history of negotiations including extensive exchange of emails: the first between June 2003 to December 2003, the second from January to June 2004. Over this timeframe the basic details and proposed commercial arrangements relating to the concerts via emails was discussed including draft budgets, the dates of the concerts and artist's fees.

The court noted these communications also included an exchange of draft contracts between the parties where the main issues of contention centred on whether Dame Kiri would sign any contract personally and the provision by the plaintiff of an irrevocable letter of credit in Dame Kiri's favour to secure her performance fee.

The court considered a number of key dates and events in the first period. By 8 December 2003 in an email between the parties it appeared that Dame Kiri's management was "basically happy" with an initial form of the contract for the concerts. However, Dame Kiri gave evidence in the hearing that on 24 November 2003 she had viewed a DVD of one of Farnham's performances observing he had a very relaxed conversational style and women's lingerie being thrown onto the stage with Farnham collecting it and holding it during the performance on the basis, she thought, as some sort of trophy. It was not until 9 December 2003 that Dame Kiri raised this matter with Grace, indicating that she would never want to be part of "that kind of entertainment" and to express her concerns and seek some re-assurances.

In addition to the issue relating to lingerie throwing, Dame Kiri also gave evidence that she remained concerned about the clash of different musical styles between herself and Farnham and she thought it was imperative that she meet Farnham to establish a rapport with him and agree on an artistic program for the concerts.

On 15 December 2003 Grace sent an email to Williams of LEE enclosing a first draft agreement, which took the form of a letter, for the provision of services of Dame Kiri by Mittane Ltd with regard to the 2005 concerts (Mittane Letter). This letter had been preceded on 22 August 2003 by a letter of intent from Mittane in respect of the concerts and in the meantime, in the absent of any executed agreement, the plaintiff proceeded in preparing promotional material for a sponsor's launch which was to occur in early 2004.

By late 2003 the plaintiff had consulted with its solicitor in relation to the Mittane Letter. On 22 December 2003 the plaintiff's solicitor forwarded to its client a further amended agreement. These amendments introduced Talent Works as a joint contracting party with the plaintiff and added a series of other changes, most noticeably deleting any requirement of an irrevocable letter of credit from the plaintiff in favour of Dame Kiri.

The court then considered key events in the second period. In early January 2004 there were discussions between the parties in relation to various matters and questions were raised in relation to the irrevocable letter of credit, which was contained in the draft contract, the commitment to three concerts as opposed to two, the attendance of Dame Kiri and Farnham at a press conference and a proposed meeting between Dame Kiri and Farnham to occur in Auckland at the end of February.

Evidence was submitted by the plaintiff that on 22 January 2004 Grace was notified that the launch of the concerts was to be held in Melbourne on 9 March 2004 and confirmation that Farnham was able to meet with Dame Kiri personally on Sunday 29 February 2004 at Auckland Airport Hotel.

On 10 February 2004 Grace on behalf of Dame Kiri sent an email to the plaintiff in response to the amendments to the Mittane Letter as proposed by the plaintiff. This communication re-iterated Dame Kiri's position that an irrevocable letter of credit would be required for the contract to proceed.

On 12 February 2004 the plaintiff met with its solicitor in relation to Grace's response to the plaintiff's suggested amendments. The solicitor sent a further draft to Eileen Newbury of the plaintiff by email dated 12 February 2004 with amendments that reflected some of the changes that Grace had requested, but most noticeably it did not include any re-instatement of the requirement for an irrevocable letter of credit.

AUCKLAND MEETINGS

At the first meeting on 29 February 2004 a discussion took place in relation to the finalisation of the contract and any outstanding issues. At this meeting it was submitted that Dame Kiri's policy was never to sign a contract personally preferring the use of her service entity to execute documents on her behalf. There was further discussion in relation to the irrevocable letter of credit, and it was indicated by the representatives for the plaintiff that at no stage would they agree to such a clause as a term of the contract with Dame Kiri. Other issues were discussed in relation to the concerts, including artwork and promotional material, which would be given away as part of the sponsorship launch that was planned for Melbourne.

The second meeting on 29 February 2004 took place at Auckland Airport. Representatives of the plaintiff brought along advertising and marketing material, including the sponsorship package and a champagne flute which was shown to Dame Kiri. Wheatley telephoned Dame Kiri's representatives and indicated that neither he nor Farnham could attend because of poor weather. Farnham's apologies were

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communicated to Dame Kiri who made her disappointment known to all present. This meeting and the lack of Farnham's attendance was later regarded by Her Honour to be very important in Dame Kiri's decision to withdraw from the concerts.

THE PLAINTIFF'S CONTRACT CLAIM

The court considered the question of the plaintiff's claim but "found it difficult to ascertain with any precision the true claim the plaintiff makes in respect of its alleged contract with Mittane". In the particulars to its pleadings, the plaintiff based its assertion of the existence of an agreement on a series of telephone calls, emails and a draft written contract claiming loss and damages of $600,000 for an agreed management fee plus $147,349.26 for expenses and wages plus a quarter share of the net profits from the concerts. Prior to the receipt of the Mittane Letter, the plaintiff claimed that an oral agreement was on foot between the parties, evidenced by the nature of the emails providing for "every contingency and every exigency that would be required under the contract".

The main stumbling block raised by Her Honour in light of the volumes of material produced by the plaintiff was whether or not there had been a "meeting of the minds" between the parties. The plaintiff admitted that this was not a case where it was possible to actually identify offer, acceptance or the precise time of meeting of the minds. Counsel went further and argued that it was not appropriate to apply an offer/acceptance analysis but rather relied on authority that supported an approach of "building things up" in relation to ascertaining a binding agreement.

Counsel for the defendants submitted that the Mittane Letter merely reflected the terms and conditions that the parties had actually agreed on and even by the meeting in Auckland, no agreement had yet been reached on the issues of: the irrevocable letters of credit and whether Dame Kiri would sign an inducement or "side" letter (also a matter which Grace was going to discuss with Mittane).

The plaintiff relied on the conduct of the parties after December 2003 in support of its argument that an agreement had been reached and claimed that Dame Kiri's participation in a sponsorship launch scheduled for 9 March 2004 went to establishing this point. This included the release by Dame Kiri of her signature, which was to be used on invitations to potential sponsors to attend the launch. Dame Kiri's response as put in evidence was that she had no idea that her signature was to be used for such purposes. Other matters were also put to the court in relation to draft budgets and related correspondence but the central question to be determined was whether or not there was a contract.

WAS THERE A CONTRACT?

The court considered the vexed question of whether a contract existed in light of the prevailing circumstances of the case, which it summarised to be: a letter from Mitani of July 2003; a request by the plaintiff to Grace of the defendants to "prepare contracts"; communications on 11 August 2003 with respect to "confirming dates" for the concerts; a letter of intent from Matani to the plaintiff dated 21 August 2003 (Her Honour wryly observed that the frequent use of such letters in the commercial world "can create more uncertainties than an absence of such a letter"); the use of words in the letter of intent such as "provisionally holding" and "possible concerts", which the court observed were carefully worded; the Mittane Letter; and an observation by the court that on 24 November 2003 Newbury of the plaintiff "joined the quest for a contract" and that communication from her which suggested that the contract had to be "finalised" and "signed off".

The court further considered the significance of the irrevocable letter of credit in the context of the overall contractual negotiations and noted that:

"[t]he method and timing of payment for the optional Concert(s) was once again by irrevocable bank letter of credit payable within 7 days of the confirmation of the optional Concerts by the plaintiff. This term was a fundamental and essential term of the proposed contract. The signing of the contract was the trigger for the provision of the letter of credit and was a fundamental and essential requirement before the plaintiff became liable to deliver it to Mittane."

While this continued to be a point of negotiation between the parties, after reviewing the submissions and evidence before her, Justice Bergin concluded that "the real reason why Mittane ceased negotiations was that Dame Kiri did not want to perform at these Concerts". Her Honour concluded said she was satisfied that the plaintiff and Mittane had not concluded a binding agreement by 16 December 2003 as pleaded and as a result the plaintiff's contract claim failed.

> It was Dame Kiri's resentment at Farnham missing an appointment to meet with her in Auckland that was the major factor in her decision to change her mind about her willingness to attend the concerts

CLAIM FOR EXPENSES

The plaintiff also made a claim under the principles of both restitution and equitable estoppel for the expenses it incurred. It asserted that the defendants made representations by words, writings and conduct to the plaintiff and "in so doing created and fostered the belief, assumption and understanding of the plaintiff that [Dame Kiri] would perform at the Concerts." The plaintiff submitted that the facts of its case fitted neatly with the 'principle' found in Sheppard J's judgment in *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880 at 902-903:

[W]here two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interests of the two parties, which work he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution, if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party.

Following a consideration of the law of restitution and relevant authorities, Her Honour concluded that Mittane's decision to withdraw from negotiations had nothing to do with the plaintiff. Her Honour pointed towards a finding that it was Dame Kiri's resentment at Farnham missing an appointment to meet with her in Auckland was the 'major factor in [her] decision to change her mind about her willingness to attend the launch and perform at the Concerts. In this regard the case was not distinguishable from *Sabemo*. Her Honour concluded that the matters put before her including the budget discussions provided a 'reasonable basis' for the plaintiff to assume that Mittane would enter into a contract despite the fact that negotiations were still on foot. The court found that there was a joint assumption that a contract would be concluded however there was also "an understanding that until a contract was signed one party may withdraw but not for any reason pertaining to its own position". Justice Bergin also found that Dame Kiri had received a 'benefit' from the provision of the plaintiff's services, which included showing off some promotional materials at a private party and a helicopter trip. Her Honour found that the plaintiff was entitled to recover most of its expenses, which came to a total of $128,063.21 based on an application of quantum meruit principles.

By contrast, Her Honour agreed with the defendant that the plaintiff had failed to make its claim on the grounds of equitable estoppel for wasted expenditure by considering Justice Brennan's six-step analysis from *Waltons Stores (Interstate) Ltd v Maher* (1988). In her view the plaintiff was not able to establish the second limb of the first of step: that the plaintiff assumed a particular legal relationship existed and that a defendant would not be free to withdraw from such an expected legal relationship. Her Honour found that the parties were in fact still in negotiations and that either party could have withdrawn. This view was qualified by the fact that expenditure had been incurred and that a *Sabemo* type of claim was arguably allowable as submitted by the plaintiff.

Her Honour considered the plaintiff's other claims under the *Trade Practices Act* and *Fair Trading Act* that Dame Kiri had engaged in deceptive and misleading conduct. However, these claims were not sustainable as Her Honour held that the "quagmire" of emails, letters and conversations did not amount to any such representations (including the sending of a draft contract) and the proviso that Dame Kiri would perform was always "subject to the finalisation of the contract between Mittane and the plaintiff".

Her Honour observed that Dame Kiri made clear her concerns about Farnham's style (as referred to in her comments about the Farnham DVD) and that the engagement of two highly successful performing artists would pose a challenge to management "so that their respective needs were met". In light of the absence of a finalised written agreement and the events that transpired between the parties this case clearly highlights the need for written contracts to be drafted, agreed to and executed at the earliest possible time. While the plaintiff did succeed in recovering some of its expenses, it quite clearly failed on its contractual claim despite providing the court with ample documentary evidence in support of its position that such an agreement was actually on foot. Although from the transcript of proceedings it was never actually raised by the defendants, they may well have drawn some comfort from Goldwyn's age-old maxim that appears to be just as applicable today to the entertainment industry and beyond – that oral contracts continue not to be worth the paper or the emails for that matter, that they are written on. ■

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