

Casenote: **ATECO Automotive Pty Ltd V Business Bytes Pty Ltd**

Nick Abrahams and Liong Lim review a recent decision of the New South Wales Supreme Court which provides some valuable insights for technology customers.

On 31 March 2003, Justice McClellan of the New South Wales Supreme Court handed down his judgement in *Ateco Automotive Pty Ltd v Business Bytes Pty Ltd* [2003] NSW SC197. Although the case involves relatively common contractual claims for breach and non-payment of invoices, the facts of the case and the Court's statements are instructive for technology suppliers and their customers.

The Court's holding in the case was that Business Bytes Pty Ltd (*Business Bytes*) was entitled to recover amounts totalling \$222,552 in respect of unpaid bills plus legal costs. Although the system delivered by Business Bytes proved to be faulty, Justice McClellan found that the loss suffered by Ateco Automotive Pty Ltd (*Ateco*) was caused primarily by its failure to communicate its needs to Business Bytes.

THE FACTS

The relevant facts are as follows:

- Business Bytes and Ateco were in an existing service relationship for the provision of technology support and maintenance services. In 1997, Ateco decided to upgrade its computer systems, prompted by two factors:
 - Ateco was alerted to the Y2K or "Millenium Bug" problem and became concerned that its existing computer systems would malfunction when the date 1 January 2000 arrived.
 - Ateco had succeeded in winning a franchise to import Alfa Romeo cars and parts throughout Australia. This contract necessitated a significant upgrading and expansion of Ateco's existing systems.
- In January 1998, Mr Maurice Villari, the principal of Business Bytes, provided Ateco with advice and recommendations with respect to the acquisition of a new hardware platform to effect the desired upgrade. In February 1998, Mr Villari's advice

and recommendations were accepted by Ateco and Business Bytes was engaged to provide the desired system.

- In several discussions commencing from March 1999, Mr Villari met with the Managing Director of Ateco, Mr Neville Crichton to discuss Ateco's requirements. Business Bytes alleged that it had repeatedly requested Ateco for a Requirements Analysis in order to properly determine Ateco's technology requirements and estimated costs of meeting those requirements. Ateco's failure or unwillingness to deliver this information, according to Business Bytes, prevented the company from performing the services efficiently and cost effectively.
- Several subsequent developments required Ateco reassess its technology and system requirements:
 - around December 1999, Ateco decided to take on the franchise for the provision of parts to Kia Motor Vehicles, the franchise arrangement to take effect from 1 March 2000;
 - the Federal Government passed legislation implementing the GST, requiring businesses to be compliant by 1 July 2000; and
 - in June 2000, Ateco decided to establish a warehouse in Perth for its parts.
- Business Bytes claimed that Ateco failed to inform Business Bytes of its changing technology needs brought on by these developments.

THE CLAIMS

Justice McClellan heard two actions. The first claim was brought by Business Bytes against Ateco for breach of contract for non-payment of its fees. The second claim was an action brought by Ateco against Business Bytes claiming damages on three bases:

- for breach of contract, on the basis that Business Bytes had failed to deliver the computer system promised;

- for negligence on the basis that Business Bytes had not exercised a reasonable level of care in implementing the computer system; and
- for breach of the Trade Practices Act on the basis that Business Bytes had engaged in misleading and deceptive conduct.

Ateco's Claim

(a) *The claim that the system was inadequate*

This claim was rejected by the court. Although Justice McClellan conceded that there were problems with implementing the new system, in His Honour's view "the magnitude of the changes made this inevitable". His Honour went on to state that the system, while problematic, could not be described as inadequate. In His Honour's words:

"The system as implemented was Y2K compliant and performed many of the required functions in an appropriate manner. There were undoubtedly problems in relation to parts, some of which may be assumed of real concern, but I could not find that Ateco did not receive significant value for the work which was done."

The court was careful to distinguish the facts of the case from circumstances where a customer loses the benefit of a product due to an inherent defect in the item sold. In this case, Justice McClellan accepted Business Bytes' version of the facts that many of the problems and costs associated with the system implementation could have been avoided by the application of appropriate resources by Ateco and the clear communication of its business requirements. As such, it was the lack of communication which led to many of the problems in the system, rather than the system itself.

(b) *The claims for negligence and breaches of the Trade Practices Act*

Justice McClellan based his decision on the version of the facts offered by Business Bytes and dismissed Ateco's claims that Business Bytes was negligent or that the

company had breached the *Trade Practices Act*.

His Honour was of the view that, although the ultimate charges invoiced to Ateco were well in excess of original estimates, a significant part of the cost was due to Ateco's failure to provide adequate instructions and resources, particularly in light of numerous changes to Ateco's system requirements.

Business Bytes' Claim

The claim by Business Bytes was successful and the court held the company was entitled to recover amounts totalling \$222,552 in respect of unpaid bills plus legal costs.

Justice McClellan accepted the version of facts put forward by Business Bytes that

the work performed was reasonable given the significant new demands placed on the system. His Honour noted that the rates charged by Business Bytes for the work performed were consistent with rates previously charged by Business Bytes.

In addition, His Honour felt that if there was any unnecessary or additional work performed by Business Bytes, they were due in large part to Ateco's failure to provide Business Bytes with adequate instructions and a timely requirements analysis, particularly in the early stages of implementation.

CONCLUSION

While *Ateco Automotive Pty Ltd v Business Bytes Pty Ltd* is a useful

example of a technology dispute, it is difficult to draw any overarching principle of law from the court's judgment. It is very clear from Justice McClellan's discussion that the decision turned very much on His Honour's willingness to accept Business Bytes' version of the facts.

Nonetheless, the case is an important illustration of the importance for technology customers to co-operate and communicate with their suppliers. Ateco's failure to keep Business Bytes informed of its system requirements led to increased expense and delay, the cost of which it was ultimately required to pay.

Nick Abrahams is a partner and Lionel Lim is a lawyer in the Digital Industries Group at Deacons.

The Spectre of Change in Spectrum Management

Tom Reid and Niranjan Arasaratnam discuss the Federal Government's proposal to merge the ACA and the ABA in light of some responses from industry and interest groups.

The next time you're watching the English Premier League highlights on your mobile phone, you might like to consider what effect they're having on your cultural identity as an Australian. Are the video clips just a fun diversion, incidental to your 3G mobile phone service, or are they more important than that? Do they warrant applying the sorts of rules that govern what you watch on television, for example?

Submissions have recently closed on the August 2003 discussion paper *Proposal for New Institutional Arrangements for the Australian Communications Authority and the Australian Broadcasting Authority (2003 Paper)*. The 2003 Paper was issued by the Department of Communications, Information Technology and the Arts (*DCITA*), and concerns the proposed merger of the Australian Communications Authority (*ACA*) and the Australian Broadcasting Authority (*ABA*). It follows on from the August 2002 discussion paper *Options for Structural Reform in Spectrum Management (2002 Paper)*.

The proposal to merge the two regulators has been prompted largely by technological development. The 2002

Paper cites issues such as the growth in internet take-up, and (in the long term) the possible freeing-up of spectrum with the advent of digital television, as examples. To this, the 2003 Paper adds the recent launch by Hutchison 3G Australia of 3G mobile phone services, which offer the potential for broadcasting-type services direct to a user's handset. As a result, spectrum management is said to be becoming increasingly complex, resulting in a greater need for consultation and cooperation between the ACA and the ABA. This in turn results in increased transaction costs, which are passed on to industry and ultimately to consumers.

DIFFERENCES IN APPROACH

However, the proposal to merge the two authorities involves more than merely deciding where the new headquarters will be. The ABA and the ACA work from fundamentally different bases when managing spectrum, differences that principally arise out of the different objectives of the statutes under which each authority obtains its powers. Broadly speaking, while both authorities are required to manage spectrum in the public interest, the ACA does this by maximising revenue from spectrum

licensing, while the ABA is more concerned with maintaining the availability, quality and diversity of broadcast content. This difference in approach may have considerable consequences for how broadcasters and telecommunications companies operate.

The ABA took over from the former Australian Broadcasting Tribunal and exercises powers under the *Broadcasting Services Act 1992 (BSA)*. It is responsible for managing spectrum in the Broadcasting Services Bands (*BSBs*), parts of the spectrum which are set aside for broadcasting under section 31 of the *Radiocommunications Act 1992 (RA)* and referred by the Minister to the ABA for planning. The BSBs are used by both free-to-air television and AM and FM radio services. In administering BSB licences, the ABA is guided by the objects of the BSA, which emphasise the importance of considerations such as:

- diversity in content, including the coverage of matters of both public and local interest;
- quality and innovation in content, including adherence to community standards and the protection of children from exposure to harmful content;