LEGAL FOCUS

Johannesburg, South Africa: consumers in the country will soon have new rights when it comes to product liability

Deadline for change to consumer rights in South Africa nears

BEFORE you know it, October 24 will be here and consumers in South Africa will be able to exercise their rights under the no-fault product liability provisions of the Consumer Protection Act for all goods supplied on or after April 24, 2010, writes Donald Dinnie, a director at Deneys Reitz Inc.

Consumers will have the choice of the producer, importer, distributor or retailer of goods to sue.

The common-law hurdle of proving negligence or other fault is removed, making product liability claims that much easier.

A causal link between the defective goods and the harm suffered still needs to be established on a balance of probabilities and the consumer remains at risk of an adverse costs' order if they are unsuccessful in the litigation. Of course, the consumer also has to bear the costs of instructing their own attorneys and counsel to prosecute any recovery and inevitably the costs of the appropriate experts.

As with any litigation, the question of funding may, whatever the merits of the recovery may be, constitute a significant practical hurdle to any recovery.

It is in that regard the provisions of the act that essentially allow for class actions and for a role to be played by consumer protection groups will be significant.

The act now allows, among other things, for a person acting as a member of, or in the interest of, a group or class of affected persons or a person acting in the public interest to approach a court, the tribunal or the National Consumer Commission (NCC) where a consumer's rights in terms of the Act have been infringed, impaired or threatened or prohibited conduct has occurred or is occurring.

The act allows not only individuals, but relevant consumer watchdogs to provide consumer complaints or reports of product failures, defects, hazards, personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect or hazard to the NCC.

That in turn may trigger a peremptory product recall initiated by the NCC.

Those provisions appear to contemplate, at least indirectly, the ability of those categories of person to institute a class action in respect of the product liability provision of the act. Each claimant will still have to prove their own damages.

Certainly, the courts are provided by the act with the power to award proved damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions the court considers just and equitable and suitable to achieve the purposes of the act.

Those purposes include the promotion and advancement of the social and economical welfare of the consumer in South Africa by providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

In dealing with any matter brought before the court in terms of the act the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally: that will include our common law in respect of access to the courts and class actions.

While the Act provides for resolution of consumer complaints by the NCC, Tribunal, Ombud or Consumer Court none of those appear to be appropriate forums with the relevant jurisdiction and power to resolve product liability claims under the Act and it is our civil courts that will be given that task.

The NCC may co-operate with, facilitate and otherwise support consumer protection groups that provide consumer advice and education activities, consumer-related publications, promote of consumer rights and advocacy of consumers interests and represent consumers, either specifically or generally in court.

Accredited consumer protections groups may initiate a complaint regarding, or seek to enforce, any rights in terms of the act.

There are relatively onerous provisions regarding the form and content of the agreement, and settlement and review of the settlement agreement by the court.

So, product liability claims will be facilitated by removal of the fault requirement from claims, the ability to institute class action in one form or another with the assistance of a consumer protection group, and the ability to enter into contingency fee arrangements.

Tax relief schemes falter as investors attempt to recover

SINCE 1997, a number of tax reliefs have been introduced, designed to encourage investment in particular areas of British industry, report Julian Miller, a partner, and Tom Pangbourne, a solicitor at Beachcroft LLP.

These include investments in software, technology and British films. The tax reliefs available spawned a small industry, with organised investment schemes allowing individuals to pool resources to obtain the reliefs.

Investors would typically pay from their own resources a proportion of the sums required for the relevant investment, raising the balance by way of a bank loan. Although the investor would only have contributed 20% of their own funds, with a bank loan for the remaining 80%, a claim for tax relief on the full amount of the investment was made.

Despite the best intentions of the government, some of the schemes have proved to be highly artificial, with investors having no real interest in the underlying technology. Such schemes have been tax driven, with negligible prospects of commercial success.

HM Revenue & Customs (HMRC) has taken a close interest in the workings of the schemes. This has led to tax relief being disallowed in a number of high-profile cases. A particular focus has been on whether investors should be allowed relief on the 100% investment or only their own 20% investment.

In 2003, the government introduced legislation reducing the availability of tax relief for investments in technology. Inevitably, investors who were denied relief have looked to the accountants and lawyers advising the schemes, as well as their own independent financial advisers and the lending banks, to seek recovery of their investments and the reliefs to which they consider they should have been entitled.

For more than five years, Beachcroft has been involved in defending numerous tax relief claims against professional advisers. There is no end to these claims in sight. Two of the more notorious schemes have ended up in court, with broad implications for professionals and their insurers.

Tower MCashback

The Tower MCashback partnerships were formed to purchase software licences, and claimed capital allowances tax relief. Loans were entered into by the partnerships to finance the purchase on very favourable terms.

These were interest free with only limited recourse to the partners. HMRC opened inquiries into the relevant tax returns and issued "closure notices", reducing the tax relief to nil. This was challenged, with the case decided in February 2010 when the Court of Appeal resolved two issues.

The first was whether HMRC was permitted to raise additional grounds for denying tax relief other than as set out in the closure notice. At first instance, HMRC was permitted to raise additional grounds, but this was later reversed on appeal. Allowing HMRC to proceed on grounds outside the initial closure notice was deemed to be unfairly prejudicial to the taxpayer.

The other issue related to whether the partnerships had actually incurred expenditure on the software that would permit claims for tax relief. HMRC argued expenditure had not been incurred since the borrowing was on un-commercial terms and the expenditure by the partnership was not "real".

The court found, because the partnership had acquired the full rights to the software and was therefore able to use it to generate income, expenditure had been incurred and the tax reliefs should be allowed.

As a result of this decision, it is likely HMRC will seek to exercise greater rigour in tax inquiries from an early stage, and serve more detailed closure notices, to ensure it leaves more options open to itself when challenging tax returns.

This is likely to have a knock-on effect on taxpayers involved in such schemes and those advising them. In the present financial climate, leniency on the part of HMRC is especially unlikely.

Little Wing Films

A recent example of investors denied tax relief and seeking to recover their losses from professional advisers involved a film investment scheme known as Little Wing Films.

Litigation was commenced against a firm of accountants and tax counsel in 2008 by 75 investors in relation to alleged negligent advice relating to the failed film scheme, resulting in a £22m ($33.7m) liability to HMRC in disallowed tax and interest.

The success of the investment scheme did not depend on the films being profitable. The scheme depended on the tax relief, rather than the film, to generate a return. In this case, the scheme was not permitted the anticipated tax treatment.

The accountants and tax counsel, whose remuneration was based on the size of the investment made in the films, were sued by investors. The case attracted the media's attention when a trial took place in July 2008, but the matter was settled before the trial came to an end.

Future concerns

The future holds significant uncertainty for professionals advising investors in such schemes and those insuring them. The combined effect of HMRC's critical approach to such tax reliefs and the judgment in Tower MCashback means those who have already invested in such schemes may be susceptible to investigation.

Tax enquiries and closure notices are likely to become lengthier and fuller. Where investors are denied relief, or relief is clawed back, their losses may include interest and penalties payable to HMRC.

Advisers will inevitably come under scrutiny for schemes that fail. In some cases, claims are being pursued with the benefit of conditional fee agreements or after-the-event insurance which has the potential to exacerbate insurers' exposure. Insurers should ensure they make themselves aware of their insured's involvement in such areas and take this into account at renewal. Insurers should also keep a keen eye on notifications, since the schemes tend to involve significant sums of money and commensurately large claims.

HMRC HQ, Westminster: the body has been taking a close interest in the workings of tax relief schemes