

Carter Newell **LAWYERS**

Professional and Management Liability Gazette



3rd edition

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- **2006** Winner BRW Client Choice Award for Best Law Firm in Australia (open to firms with revenue under \$50M per year)

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From the Partner



The Professional and Management Liability Gazette 3rd edition is designed to provide useful, practical and current information to the insurance industry in relation to recent cases.

Our Financial Lines team, led by partners Michael Gapes, Michael Bath and myself, acts in many industries and has specific

experience with respect to:

- Company directors and officers, with respect to side A, B and C cover;
- Financial institutions and financial professionals such as banks, financial and investment advisers, fund managers, accountants and mortgage brokers;
- Design and construction professionals including engineers, architects, surveyors, town planners and building certifiers;
- Other professionals such as lawyers, medical professionals, valuers, business and insurance brokers, trustees for representative bodies, real estate agents and insolvency practitioners; and

- Employment practices liability claims.

Of particular note, in this edition, is the Queensland District Court decision *Davan Developments Pty Ltd v HLB Mann Judd (SE Qld) Pty Ltd* [2015] QDC 121 in which Carter Newell successfully defended an accountant in a professional negligence claim.

As a premier legal practice with one of the largest insurance practices in Australia, with teams in both Brisbane and Sydney, we are confident that this edition of the Professional and Management Liability Gazette will be a useful resource for our readers.

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Case Note

Gadens Lawyers Sydney Pty Limited v Symond [2015] NSWCA 50

Appropriate assessment of damages in case of negligent tax restructuring advice.

Facts

In 2003, founder of Aussie Home Loans John Symond (**Symond**) engaged Gadens Lawyers (**Gadens**) to advise on the tax consequences of a revised ownership structure of his business. A primary driver behind the restructure was that Symond required capital to construct his home at Point Piper.

Gadens provided advice and a restructure was effected in 2003 and 2004. Part of the restructure included a mechanism whereby Symond could withdraw funds from the Aussie Home Loans Group by redeeming preference shares issued to him by the new corporate vehicle, AHL Holdings Pty Ltd (**Holdings**). During the financial years ending 30 June 2004, 2005 and 2006, Symond withdrew approximately \$57 million.

The manner in which Symond was drawing the funds caught the Australian Tax Office's (**ATO**) attention. The ATO audited Symond's affairs which led to a deed of settlement between him and the Commissioner of Taxation in December 2007. The settlement involved Symond paying a sum of \$7,018,864 (comprising tax, penalties and interest). As part of the settlement,

Holdings agreed to forfeit the amount of \$5,014,286 from its franking account.

In 2009 Symond instituted proceedings against Gadens seeking damages in negligence, breach of contract and for contraventions of the *Trade Practices Act 1974* (Cth). Gadens argued that Symond had suffered no loss because the benefit of the restructure as implemented exceeded the amount paid by Symond under the settlement and related expenses. The 'benefit' of the restructure was said to arise because profits from 2005 and 2006 were not distributed to Symond and accordingly tax was not paid by him on those profits, whereas if Symond had pursued the alternative structure that he alleged should have been recommended, profits in the 2005 and 2006 years would have been distributed and subject to taxation.

The primary judge rejected the 'no loss' argument and found in favour of Symond, awarding \$4,979,800 in damages.



Issues

Gadens appealed the decision on three separate grounds, arguing the primary judge erred by:

1. Concluding that Symond had suffered loss when comparing his financial position in the events that transpired under the restructure with the financial position he would have been in if he had received and followed competent advice (scenario 2), with a particular issue being the period over which the respective positions were assessed;
2. Concluding that Symond had suffered a loss as a consequence of the forfeiture of the franking credits in Holdings' franking account; and
3. His determination in regard to the amount of pre-judgment interest to be included in Symond's damages.

Decision

Issue 1 – Had Symond suffered loss?

The primary judge calculated the difference in Symond's position under the restructure and scenario 2 for the period 2004 to 2011. Gadens argued that the correct comparison was between the actual costs to Symond of receiving the redemption amounts of \$57 million from Holdings in 2004 to 2006 as a consequence of the restructure as implemented, with the hypothetical cost of receiving the same amount under scenario 2 in 2004 to 2006.

The court disagreed, finding that by confining the relevant comparison of Symond's financial position to the 2004 and 2006 years, as Gadens suggested, there could be no recognition of the loss incurred due to the tax, penalties, interest and expenses related to

the settlement with the ATO. In choosing a period ending on 30 June 2011, thereby allowing significant dividends paid in 2007 and 2012 to be considered, the Court of Appeal did not believe the primary judge erred in undertaking the comparison of Symond's financial position in terms of tax, penalties, interest and expenses imposed over the 2004 to 2011 years.

Issue 2 – Did Symond suffer loss by losing franking credits?

Firstly, Gadens argued that Holdings' franking account balance would have been greater under the restructure and the settlement than under scenario 2, with the consequence that there could be no loss to Symond as a result of a reduction in available franking credits due to the settlement.

A second argument raised was that at all times there was sufficient franking credits in the account, even if it was assumed that sufficient dividends would have been declared to use up one half of the available franking credits including the forfeited credits, an assumption for which there was no evidence. It was argued there was more than enough franking credits in Holdings' franking account to fully frank such dividends with the consequence that Symond would not have incurred any additional top-up tax and, accordingly, suffered no loss.

Symond argued that notwithstanding Gadens' submission, expert evidence provided that there are other ways in which a shareholder might enjoy franking credits even in the absence of a distribution of current year profit, such as by selling shares back to the company.

The Court of Appeal found for Gadens on this question, holding that the true question was whether Symond could demonstrate a loss as a consequence of Holdings

'The court found that by confining the relevant comparison of Symond's financial position to the 2004 and 2006 years, as Gadens suggested, there could be no recognition of the loss incurred due to the tax, penalties, interest and expenses related to the settlement with the ATO.'

forfeiting the franking credits in circumstances where there was no evidence of any loss in the value of his shares. The court was of the opinion he could not, and ordered Symond reimburse Gadens \$1,581,888.50 awarded at first instance for this loss.

Issue 3 – Was there a correct calculation of interest?

Gadens disputed his Honour's approach to calculating the award of interest. It believed that he erred by applying the court rates of interest to the payments made by Symond for professional fees and the settlement, but only Holdings' (much lower) internal rate of interest to the benefits of the restructure as implemented. The argument was that the court's rate of interest is to be paid on the damages awarded to a plaintiff which in the context of the present case involved a net concept.

The court disagreed, and held the primary judge was correct in his assessment of interest. They were of the view that the benefits of the restructure were an entirely different type of payment to the money actually paid in the settlement and related professional fees. The latter involved actual payments while the former were only theoretical payments, so it was appropriate to treat these differently.

John Grant

Special Counsel

John has more than 30 years experience in the area of construction and engineering and his postgraduate studies centered around insurance and construction industry-related insurance issues with an emphasis on professional liability in the construction industry and alternative dispute resolution techniques.

For a number of years John has practiced exclusively in all aspects of building and construction litigation. He has advised principals, contractors, major sub-contractors and their suppliers, engineers and architects.

John has continued to develop his long standing interest in alternative dispute resolution techniques.



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Case Note

Baguley v Lifestyle Homes Mackay Pty Ltd [2015] QCA 75

Timing of assessment of damages for breach of contract.

Facts

The plaintiffs, Mr and Mrs Baguley, agreed to sell their Mackay property (**property**) to Lifestyle Homes Pty Ltd, the defendant, for \$400,000 on 6 August 2010.

The date for settlement was to be 15 October 2010 however the defendant failed to settle on that date.

On 2 August 2011 the plaintiffs commenced proceedings for breach of contract, claiming damages, interests and costs.

The property was resold on 17 October 2012 for \$300,000.

At the hearing to assess damages:

- The plaintiffs submitted that damages should be assessed at \$99,000, based on the value of the property at the date of resale less the \$1,000 deposit received in the original sale.
- The defendant submitted that damages should be assessed at \$49,000, based on the value of the property at the date of breach less the \$1,000 deposit.

The primary judge agreed with the defendant and awarded judgment for \$49,000 plus interest and costs.

The plaintiffs wished to appeal the decision but were out of time. They therefore sought an order to extend time in which to appeal under rule 748 of the *Uniform Civil Procedure Rules 1999* (Qld).

Issues

In deciding whether rule 748 should be enlivened, the court considered the following:

1. The length of the delay;
2. The adequacy of the explanation of the delay; and
3. The merits of the proposed appeal.

Decision

Length of delay

The court did not consider the plaintiffs' delay of 127 days to be excessive. It was significant too that the delay did not cause any prejudice to the defendant. Gotterson JA took the view that the length of the delay was less important than the explanation for the delay.



Explanation of delay

One of the explanations for the delay offered by the plaintiffs was that they were awaiting the costs decision before appealing. They further submitted that they were under the impression that the costs decision would be handed down relatively quickly. The court viewed this as a deliberate decision to not appeal within time. The plaintiffs would have known that the costs decision would not be delivered within 28 days because their written submissions on costs had not even been filed at that time. In any event the court found the arguments to be unpersuasive owing to the fact that the appeal did not involve the issue of costs.

Although the court found the plaintiffs' delay did not in itself warrant a refusal of an extension of time, it did find that their deliberate postponement of the filing of a notice to appeal had the same impact as the comparable decision in *Spencer v Hutson*,¹ that is the plaintiffs had to demonstrate a substantial injustice would result if the extension of time was not granted. This issue required consideration of the merits of the proposed appeal, specifically, the assessment at first instance of the loss of bargain component of damages.

Correct assessment of the loss of bargain

A major factual issue to be decided was whether or not, at the time of the resale, the property was included in the National Rental Affordability Scheme (NRAS). Expert evidence suggested that inclusion in the scheme would increase the value of the property, and was therefore highly relevant to the valuation.

There was little evidence that the property was a part of NRAS at the time of the resale. The court relied on the fact that no contract of sale, apart from the original, had any clauses which implied that NRAS approval was current at the date of the contract. There was

little other probative evidence offered and the court was satisfied that the primary judge had not erred in concluding that there was no NRAS approval at the time of the subsequent sale.

In regard to the appropriate date to assess the damages for breach of contract, the starting point is the rule as stated in *Johnson v Perez*,² which provides that in a contract for sale of land, the relevant date of assessment is the date of the breach, unless a departure from that date is necessary to properly compensate the plaintiffs. The onus is on the plaintiffs to prove factual circumstances which would justify a departure from that date to compensate properly.

The plaintiffs failed to argue any basis to depart from the rule. Gotterson JA did consider evidence of why and how the NRAS approval lapsed, and particularly that if the defendant had caused the approval to lapse in any way, it may have been sufficient to depart from the rule.

The plaintiffs made repeated references to the reasonable efforts made to resell the property between the date of the breach and the effective resale, and argued that since they had made those efforts, the later date should be adopted. The court disagreed, noting that the proposition was irreconcilable with the rule in *Johnson*.

Ultimately the task for the plaintiffs was to prove that the extension of time to appeal was necessary to prevent a substantial injustice. As there were no prospects of success for any of the grounds they wished to rely on in the proposed appeal, they had failed in that task and the application to extend the time upon which to appeal was denied.

.....
¹ [2007] QCA 178.

² (1998) 166 CLR 351.

Case Note

Smith v Lucht [2014] QDC 302

Whether a claim may be dismissed as an abuse of process in circumstances where the costs involved in litigating a matter would be wholly disproportionate to any potential award of damages.

Facts

The plaintiff (a solicitor) alleged that the defendant referred to him as '*Dennis Denuto*', a reference to the fictional character in the Australian film '*The Castle*'. The plaintiff alleged that this was defamatory of him because Dennis Denuto was portrayed in the film as an incompetent lawyer.

The defendant argued that the publication was very limited and included only the plaintiff's relatives (who were unlikely to have had their opinions changed) and perhaps a few other people.

The defendant applied to the court to have the action stayed on that basis that it was an abuse of process. He argued the resources required to litigate the matter would be wholly disproportionate to the nominal damages that would be recoverable, in the event the plaintiff was successful.

Issues

The principal issue for determination was whether it is an abuse of process for a plaintiff to pursue a cause of action in circumstances where – liability issues aside –

the costs involved in litigating a matter would be wholly disproportionate to any potential award of damages

Decision

The court was referred to the single judge decision of *Bleyer v Google Inc* (2014) 311 ALR 529 in the Supreme Court of New South Wales, in which it had been found that the court had power in an appropriate case to stay or dismiss an action on the ground that the resources required of both the court and the parties to determine the claim are out of all proportion to the interest at stake.

McGill SC DCJ in this case found the authority of *Bleyer* to be unpersuasive because:

1. There was no statutory foundation to the proportionality proposition in Queensland, because the *Uniform Civil Procedure Rules 1999* (Qld) does not contain provisions analogous to:
 - a. Section 60 of the *Civil Procedure Act 2005* (NSW), which makes reference to proportionality and which was relied on in *Bleyer*; or



- b. The relevant provisions in the *English Civil Procedure Rules* (referred to in *Bleyer*), regarding proportionality of the amount of money involved, the importance of the case, the complexity of the issues and the parties' respective financial positions;
- 2. The defence of 'triviality' is available under s 33 the *Defamation Act 2005* (Qld) and provides a complete defence where a defendant can demonstrate that the circumstances of the publication were such that that the plaintiff was unlikely to suffer any harm;
- 3. The defendant has the option to apply for summary judgment in circumstances where a plaintiff's case is demonstrably hopeless;
- 4. The defendant could nevertheless obtain some measure of costs protection by making offers to settle under the rules; and

- 5. Recent developments in Queensland's defamation laws¹ are pointing towards higher damages in defamation cases, making it impossible for his Honour to come to a conclusion that the case before him would result in only nominal damages.

Consequently, his Honour found that there was no requirement in Queensland for proportionality in relation to costs or expense either for the parties or for the community. Instead, a plaintiff who has a good cause of action according to the law in Queensland is entitled to pursue it, regardless of the damages at stake.

.....
¹ *Roberts v Prendergast* [2013] QCA 47 and *Cerutti v Crestside Proprietary Limited* [2014] QCA 33.

Case Note

James v The State of Queensland [2015] QSC 65

Amendment to a pleading after limitation period lapses.

Facts

The plaintiff paramedic claimed damages for personal injuries allegedly suffered during his employment due to a number of traumatising calls he attended over a three month period.

The plaintiff alleged that:

1. His employer knew or ought to have known he was exposed to a risk of the psychiatric injuries that he sustained;
2. The system the defendant had in place to ameliorate the risk was inadequate and not a sufficient response to the risk; and
3. The defendant had failed to provide and maintain a safe system of work, or provide appropriate assistance and support following the incidents.

Conversely, the defendant asserted that it had implemented a counselling and peer support system, called Priority One (**PO**), offering support, counselling and debriefing or other psychological intervention to employees who experienced traumatic events.

The defence also raised other incidents which may have materially contributed to the illness which were

not in the original statement of claim. One of these instances was where the plaintiff while attending a training exercise at Mount Isa, experienced heavy criticism from a Clinical Support member of his attempt at a chest auscultation technique. He claimed he felt belittled and humiliated in front of his peers as a result (**training episode**).

The plaintiff sought to file an amended statement of claim which introduced the occurrence of the training episode and alleged that it should have caused the defendant to initiate the procedures under PO.

Issues

The limitation period of three years had expired at the time of the proposed amendments. The court however does have the power to give leave to a party to amend a claim and pleading pursuant to s 16 *Civil Proceedings Act 2011* (Qld), however, rule 376 of the *Uniform Civil Procedure Rules 1999* (Qld) only allows an amendment which includes a new cause of action to be made when the court considers it appropriate, and the new cause of action arises out of the same facts or substantially the same facts as a cause of

action for which relief has already been claimed in the proceeding.

The issues the court sought to determine were:

1. Whether the training episode amounted to a new cause of action; and
4. If it was a new cause of action, whether it arose out of the same or similar facts as the cause of action already pleaded in the original statement of claim.

Decision

Was the addition of the training episode a new cause of action?

Henry J considered the authorities on what constitutes a new cause of action and applied Keane JA's 'rule of thumb' from *Wolfe v State of Queensland*:¹ if the plaintiff sought to lead evidence of the new allegations, would the defendant be surprised?

On the issue of the introduction of the PO allegation, Henry J found that there would be no surprise to the defendant on the basis that the PO was the only relevant system operated by the defendant and the defendant in fact referred to it in its own defence.

As to the introduction of the training episode allegation, the court found that it did in fact amount to a new cause of action, because it was founded by a different pathway to liability than had been previously pleaded.

Did the new cause of action arise out of the same or similar facts as had been previously pleaded?

The court granted leave for the amendments to be made, finding that:

1. It was inherent within the allegations in the original pleading that the defendant should have known the plaintiff's circumstances called for the provision of assistance and support; and
5. Ultimately the matters had an integral connection with, and formed part of, the same continuum of developments relevant to the onset of and cause of the plaintiff's illness and the adequacy of the defendant's support.

¹ [2009] 1 Qd R 97.



Case Note

Mineral Resources Engineering Services Pty Ltd as Trustee for the Meakin Investment Trust v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia [2015] QSC 62

Whether a cause of action can be added to pleadings after limitation period lapses.

Facts

The plaintiffs in these related proceedings were borrowers from the defendant bank under a margin loan. Critical to the agreement was the comparison at any time between what was described as the current loan to security ratio and the margin call loan to security ratio. If at any time the former came to exceed the latter, then the borrowers could be required by the bank to eliminate the excess either by altering the amount of the loan, the security, or both.

Among the original causes of action pleaded were a number of charges of unconscionable conduct in contravention of the *Australian Securities and Investments Commission Act 2001* (Cth) or the *Trade Practices Act 1974* (Cth), and in equity.

After expiration of the relevant limitation period the borrowers sought to make amendments to the pleading, which involved further unconscionable

conduct claims divided into seven different elements. Not all of these were contested by the bank, however elements 2, 3, 4, 6 and 7 were disputed on the grounds they introduced new causes of action not based on previously pleaded facts as required by rule 376(4) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**). The elements were described as follows:

1. Element 2: '*Allowing Prepayment of Interest and Extension of Credit Limit*';
2. Element 3: '*Continued Approval of High Gearing Against Funds*';
3. Element 4: '*Failure to Address Buffer Status Adequately or at All*';
4. Element 6: '*Enforcement of Margin Calls*';
5. Element 7: This element was not titled as the others were, the argument was essentially that the bank had acted unconscionably by giving priority to the



maintenance of a business relationship with Storm Financial (a financial advice company).

Issues

The court was required to determine which of the above elements satisfied the requirement that they be based on already pleaded facts, in accordance with rule 376(4) of the UCPR.

The relevant sections of rule 376 of the UCPR provide the following:

'(1) This rule applies in relation to an application, in a proceeding, for leave to make an amendment mentioned in this rule if a relevant period of limitation, current at the date the proceeding was started, has ended.

...

(4) The court may give leave to make an

amendment to include a new cause of action only if—

(a) the court considers it appropriate; and

(b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.'

Decision

Ultimately, none of the amendments were allowed on the grounds that they did not arise from the same or substantially the same facts as a cause of action originally pleaded. The court's reasoning on each element was as follows.

Element 2

The borrowers pleaded that the bank's conduct, in allowing their current loan to security ratio to exceed their base loan to security ratio, was inconsistent with the bank's general policy on margin lending, and that the bank had therefore exposed them to the risk of further losses by doing so.

Although the conduct of the bank was not pleaded in their earlier claim, the borrowers contended that there were no substantial new facts because the previous pleadings did set out the terms of the buffer policy.

The court held that although the terms of the policy were pleaded, this was a complaint about the bank's conduct which was quite distinct from anything that had previously been pleaded. It could not have been said to simply be an addition of details to a complaint which had already been made.

Element 3

It was further pleaded that the bank conditionally increased the borrowers' borrowing limit against the security of investments to 80% of the value of the security. The conditions of that increase included things which were to happen between the bank and Storm Financial. It was alleged that those conditions were not fulfilled because the bank *'failed to'* cause those things to occur, such as the receipt of monthly reports from Storm Financial.

The borrowers' submission went no further than to say 'such matters are consistent with and connected to' certain allegations in the previous pleadings. They referred to paragraphs in the original statement of claim which were not at all similar to the new allegations and the Judge found the pleadings were not based upon the same or substantially the same facts as earlier pleaded.

'Ultimately, none of the amendments were allowed on the grounds that they did not arise from the same or substantially the same facts as a cause of action originally pleaded.'

Element 4

This complaint centered around the fact that at no time did the bank warn the borrowers that their current loan to security ratios exceeded their base loan to security ratio, i.e. the period in which the loan was *'in buffer'*.

The court found that there was no previous complaint of the failure to notify the borrowers that the loan was in buffer. The borrowers believed that this was just an extension of the previous allegation that the bank failed to notify the borrowers that the loan had reached the wrong side of the certain threshold. The court

disagreed, and held that element 4 went further than adding some detail to that complaint, and that as the bank's failure to notify customers was a different complaint entirely, this element did not arise from the same or substantially the same facts.

Element 6

This element involved a complaint from the borrowers that the bank should have sold their securities earlier to prevent their loss. The borrowers relied on the original statement of claim which had complained that the securities were sold by the bank without notice to the borrowers. The court found that this was quite a different complaint and did not arise from the same or substantially the same facts as a cause of action originally pleaded.

Element 7

The borrowers' argument on this point was that Storm Financial's involvement and connection with the bank was already pleaded in the original statement of claim. The issue the Judge took with this however is that it never had been put forward that Storm's relationship with the bank had compromised its dealings with its own customers or that it had acted unconscionably towards them. This amendment was not allowed.

Dee Wood

Senior Associate

Dee has many years experience working in insurance related matters including professional indemnity, directors' & officers', commercial and property damage. Initially admitted in New South Wales, Dee worked as a Judge's Associate in the Dust Diseases Tribunal of NSW. She then spent four and a half years practicing in general insurance, reinsurance and professional indemnity litigation at Hextall Erskine and Elborne Mitchell in London. On her return to Australia, she spent five years at a national firm in the insurance and corporate risk litigation team and joined Carter Newell in October 2009.

Dee's experience has included various aspects of insurance litigation including acting for Lloyd's syndicates and the company market, and acting in the defence of, building certifiers, valuers, building inspectors, project managers, engineers, architects, solicitors, barristers, accountants, financial advisers, medical facilities, property developers, real estate agents, travel agents, directors & officers and veterinarians both in Australia and abroad.



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Case Note

Davan Developments Pty Ltd v HLB Mann Judd (SE Qld) Pty Ltd [2015] QDC 121

Considering an accountant's duty in relation to the correct treatment of company assets.

Facts

Davan Developments Pty Ltd (**Davan**) purchased two adjoining parcels of land in East Brisbane in 2004.

The land was subdivided into three residential allotments, which were transferred to Mr Pearse (a director of Davan), Mr Kearney and Mr Collins.

The agreement between the parties was oral and there was a draft joint venture agreement but it was never executed. In any case, the plaintiffs alleged that it did not properly express their intent. Particulars of the oral agreement pleaded by the defendant detailed the terms of the agreement which included that each participant to the agreement had 'a first right of refusal' over the lot designated to them.

Davan was audited by the Australian Tax Office (**ATO**) in December 2011. The ATO determined that it was likely the three lots had been treated as part of Davan's enterprise rather than as part of a private arrangement as the plaintiffs contended.

A major reason for the ATO coming to this conclusion was the lack of documentation of the intention of the parties to the agreement, and also due to their

accountants, HLB Mann Judd (**HLB**) including the land as an asset of Davan.

Davan alleged that HLB had breached its duty of care in its provision of accounting services and breached the terms of its retainer by failing to apply the correct accounting and taxation treatment of the land. Davan claimed that as a result of these breaches, it suffered loss as a result of the ATO's adverse findings, including the penalties imposed and the consequential costs of the investigation.

Issues

Dorney QC DJC was presented with the following issues:

1. Was a trust created concerning the land;
2. Did HLB negligently breach a duty it owed to Davan;
3. If HLB was negligent, did that cause any loss to Davan; and
4. Was there any contributory negligence on Davan's part.



Decision

Was there a trust?

Davan claimed it held the land on trust for Mr Pearce, Mr Kearney and Mr Collins for their allocated lots.

The court concluded that no trust existed, based on the following:

1. There were no written documents suggesting a trust existed;
2. Money was not kept in separate accounts;
3. There was no mention of a trust by any of the parties during the ATO investigation;
4. There was evidence from Mr Kearney that he had *'purchased'* his lot from Davan;
5. The terms of the agreement between the parties included a *'first right of refusal'* over their designated lots, which was entirely inconsistent with the existence of a trust.

Did HLB breach its duty?

His Honour found that insufficient information had been disclosed to HLB to put it on notice to make further enquiries. Further, Mr Pearce did not correct any misunderstandings when it would have been obvious to him, upon assessing HLB's treatment of the land in the relatively uncomplicated accounts of Davan.

Did HLB cause the loss (if negligence was found)?

In coming to their conclusion on the investigation into Davan, the ATO rejected the argument that a private arrangement had ever existed. Along with the adverse documentation (partly due to the treatment of the land as trading stock by HLB), the ATO also found that a lack of contemporaneous documentation suggested that no private arrangement had existed.

The court considered the ATO would have come to the same conclusion even if a private arrangement had in fact existed.

The majority of the damage suffered due to the ATO investigation was on the basis that Lot 2 was transferred from Davan to Mr Pearce for \$1.6 million, an amount the ATO considered an undervalue. Nothing flowing from a breach by HLB would have upset this finding and the expert evidence concluded that the amount of tax payable by Davan would have been equal to that assessed by the ATO.

Contributory negligence

The court found that Davan had contributed to its own loss because Mr Pearce ought to have known that the land had been included in relevant financial documents and income tax returns.

Although no apportionment figure was given in light of the finding on breach, in obiter the court indicated Davan would have been responsible for a major part of the loss.

Case Note

Selig v Wealthsure Pty Ltd [2015] HCA 18

Consideration of apportionment of liability under the Corporations Act in respect of a failed investment.

Facts

Mr and Mrs Selig (**Seligs**) suffered loss and damage when their investment in Neovest Limited (**Neovest**) failed as a result of Neovest's insolvency. The Seligs invested in Neovest in reliance on the advice of the second defendant, David Bertram (**AR**), who was an authorised representative of the first defendant, Wealthsure Pty Ltd (**Wealthsure**).

The Seligs claimed against Wealthsure and the AR for breach of contract and duty and on the basis of contravention of a number of provisions of the *Corporations Act 2001* (Cth) (**Corps Act**) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) including s 1041H which prohibits misleading and deceptive conduct in relation to financial services. Wealthsure and the AR argued that the claim was an 'apportionable claim' and as such Neovest and two of its directors, Mr Townley and Mr Norton (**Directors**), were concurrent wrongdoers and liable for a portion of any loss suffered by the Seligs.

The decision at first instance

At trial, the Seligs were successful in their claims

against the Wealthsure, AR, the Directors and Neovest for breach of contract, duty, the Corps Act and the ASIC Act. The court ordered them liable to the Seligs for damages of \$1,716,680.

Wealthsure and the AR were unsuccessful in their argument that the claim was an apportionable claim, and as such, they should only be liable for the loss and damage caused by their conduct.

Wealthsure and the AR appealed.

The decision of the Full Court of the Federal Court

The Full Court allowed the appeal, finding that the claims were apportionable and that Wealthsure and the AR were only liable for 60% of the Seligs' loss, with the Directors apportioned the remaining 40%.

The Seligs appealed to the High Court.

Issues

The High Court was required to determine the proper construction and scope of the proportionate liability provisions in Division 2A (**DIV 2A**) of the Corps Act.



The court also took the opportunity to consider whether the non-party insurer of Wealthsure and the AR (**Insurer**) should be liable for the Seligs' costs.

Decision

The appropriate construction of DIV 2A

Proportionate liability may only be claimed in proceedings involving an '*apportionable claim*', the definition of which is found in s 1041L of the Corps Act (and the corresponding section of the ASIC Act).

Section 1041L is contained in DIV 2A, '*Proportionate liability for misleading and deceptive conduct*' and provides that:

*'(1) This division applies to a claim (an **apportionable claim**) if the claim is a claim for damages made under section 1041I for:*

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in contravention of section 1041H.

(2) For the purposes of this Division, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).'

Section 1041I relevantly permits an action to be brought with respect to conduct which contravenes ss 1041E, 1041F, 1041G or 1041H.

The High Court held that the word '*claim*' had the same meaning in both sub-section (1) and (2) of section 1041L, and refers to a claim for damages under s 1041I for damage caused by conduct '*in contravention of section 1041H*' (misleading and deceptive conduct).

Importantly, the High Court held that the true purpose of s 1041L(2) was not to complete the definition of '*apportionable claim*', but rather provides that damages based upon a contravention of s 1041H are to be apportioned by reference to a notional single claim so long as the loss or damage claimed is the same.

The High Court noted that contraventions of the other three provisions in s 1041I involve a higher level of moral culpability than the conduct referred

to in section 1041H. Further, and in contrast to s 1041H, ss 1041E-1041G constitute offences, an element of which is knowledge or recklessness.

The High Court concluded that an '*apportionable claim*' is based upon a contravention of s 1041H, and does not extend to claims based upon conduct of a different kind. As the Seligs were also successful on causes of action other than misleading and deceptive conduct, the High Court found proportionate liability did not apply and ordered that Wealthsure, the AR, and the Directors were liable to the Seligs for the whole of their loss.

Costs order against the Insurer

The Seligs sought an order that the Insurer pay the Seligs' costs of the appeals in both the High Court and the Federal Court, despite the Insurer not being a party to the litigation.

The High Court does have discretionary power to make cost orders against non-parties where '*the interests of justice require that to be made*'.¹

The insurance policy in question provided cover to a limit of \$3 million per claim (inclusive of costs and expenses). By the time the matter was appealed to the High Court, the limit had already been eroded by legal costs.

The High Court also noted that the Insurer's decision to appeal put the Seligs to further significant legal expense, and had the effect of reducing the amount available to meet the order for costs (and any orders on future appeals) in favour of the Seligs as it eroded the limit of cover.

The High Court noted that in deciding to appeal the Insurer was seeking to better its own position, as if the argument regarding the apportionability of liability was successful, the liability of Wealthsure and the AR would be reduced to 60% of the judgment sum.

The High Court therefore found in the circumstances that it was appropriate for the Insurer to pay the Seligs' costs for both appeals.

¹ *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 193.

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Case Note

In the matter of Vault Market Pty Ltd [2014] NSWSC 1641

Consideration of carrying on a business without Australian Financial Services Licence in contravention of the Corporations Act.

Facts

The defendants (Vault Market Pty Ltd (**Vault**) and its director, Mr Amin) carried on a business of providing foreign exchange trading services to retail clients through an on-line trading system.

Neither of the defendants held an Australian Financial Services Licence (**AFSL**), or were authorised to provide financial services on behalf of an AFSL holder.

Between June 2013 and July 2014, Vault attracted more than 800 clients who deposited almost \$1.1 million with it for the purpose of engaging in foreign exchange trading.

ASIC contended that Vault had repeatedly contravened ss 911A, 911C and 1041H of the *Corporations Act 2001* (Cth) and that Mr Amin was involved in those contraventions for the purposes of s 79.

In summary, the alleged contraventions were that Vault:

1. Carried on a financial services business without holding an AFSL: s 911A(1);

2. Held itself out that it held an AFSL when that was not the case: s 911C(a); and
3. Engaged in conduct, in relation to a financial product or a financial service, that was misleading or deceptive or was likely to mislead or deceive: s 1041H(1).

The defendants admitted the contraventions alleged and the parties approached the court to make declarations and banning orders agreed between them.

For the purposes of ensuring the public interest was served, the court elected to exercise its own discretion as to penalty.

Issues

The court was required to determine:

1. Whether the contraventions as alleged/agreed were substantiated; and
2. The appropriate penalties for the defendants.

Decision

As to s 911A(1) (carrying on business without an AFSL), Brereton J found there was little doubt that a financial service was being provided by the defendants because the service provided by Vault was both a 'derivative' within s 761D(1) and (2) and 'making a market' under s 766D.

As to s 911C (holding an AFSL), Brereton J found that although Vault's documentation (on its website) did not expressly state that it held an AFSL, it made a number of other statements which together conveyed the representation that Vault did in fact have the requisite AFSL to carry on its business, bearing in mind the target audience of 'mums and dads' and 'small time' investors.

As to s 1041H(1) (misleading or deceptive conduct), Brereton J found the various representations alleged by ASIC were substantiated because:

1. Vault did not hold any requisite licence or authority from ASIC to carry on its business;
2. The funds deposited by Vault's clients were not kept in a trust account;
3. The managing director was fictional; and
4. Vault was not a bank.

Brereton J however declined to make a finding that there had been 'repeated' contraventions of each of the above sections, finding instead that there had been three continuous contraventions.

Consequently, Brereton J made declarations that:

1. Vault carried on a financial services business without an AFSL, in contravention of s 911A(1);
2. By the various documents published on its website, Vault held itself out as having an AFSL when that was not the case, in contravention of s 1041H(1); and
3. Mr Amin was an officer of Vault when it committed each of those contraventions and failed to take reasonable steps to prevent them.

Mr Amin was disqualified from managing corporations for 5 years and Vault and Mr Amin were restrained from carrying on a financial services business for eight years.



In reaching his determination about penalties, Brereton J had regard to the following factors:

1. Mr Amin knew Vault was misrepresenting itself to gain trust and credibility and that such representations were calculated to persuade unsophisticated investors to part with their money;
2. Mr Amin had acted at the direction of a third party;
3. There was no evidence of any client in Australia having suffered any loss;
4. Mr Amin cooperated with ASIC, did not contest the proceedings, and agreed to orders proposed by ASIC;
5. Mr Amin had no previous convictions for similar matters and the risk of future misconduct was remote;

Brereton J made the following comment on the question of the parties' collaboration about the declarations and penalties, which was somewhat prescient in view of the High Court's recent decision in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors* [2015] HCA 46:

'While, if I were considering this matter in the absence of the agreement of the parties, I might have imposed a disqualification and restraint of shorter duration than those proposed, it is as I have said important to give weight to the agreement of the parties, acknowledging that it is likely to have involved some elements of compromise, not all of which will be known or evident to the Court. One that is evident here is that whereas ASIC would almost certainly have been entitled to a costs order, none is sought, and in that respect Mr Amin is receiving significant leniency. I am satisfied that the proposed disqualification is justified, and that the restraints are not inappropriate, having regard to the public interest.'

Case Note

Summerdowns Rail Ltd v Stevens [2015] NSWSC 321

Consideration of unauthorised payments and breach of statutory duties of company directors.

Facts

Summerdowns Rail Ltd (**Summerdowns**) intended to establish a rail terminal. Summerdowns engaged Management Skills Alliance Pty Ltd (**MSA**) to provide services necessary to incorporate and to raise investment funds for its business plans including the preparation of an information memorandum.

Summerdowns commenced proceedings against Andrew Stevens (**Stevens**), Lance Blackbeard (**Blackbeard**) and Lionel Barden (**Barden**) for breaches of the civil penalty provisions in ss 180, 181 and 182 of the *Corporations Act 2001* (Cth) (**Corps Act**). At the time of the alleged wrongful conduct Stevens was the company secretary of Summerdowns, while Blackbeard and Barden were both directors. Blackbeard and Barden were also directors and principals of MSA.

At the relevant times Summerdowns had two other directors, Phillip Imrie (**Imrie**) and John McMahon (**McMahon**).

Summerdowns was incorporated on 7 July 2011. Relevantly, the constitution did not displace the replaceable rule in s 248C of the *Corps Act* regarding

the provision of notice of meetings to directors. On 26 and 27 July 2011, the directors approved a '*flying resolution*' whereby a Westpac bank account was opened and two signatories of an executive director and a non-executive director or company secretary would be required to engage in transactions on behalf of Summerdowns.

On 4 August 2011, a meeting was attended by McMahon, Blackbeard, Barden and Stevens. Imrie was not provided notice of the meeting as he was overseas. The meeting was convened regarding McMahon's personal trust accounting issues. The conduct upon which Summerdowns' claim was founded was a payment, also agreed at the meeting, of \$38,500 from Summerdowns' account in favor of MSA, to accelerate MSA's preparation of the information memorandum so Summerdowns could seek investment capital.

Issues

Summerdowns alleged the payment did not have the authority of a validly constituted meeting of the board because there was no intention for the meeting to be

a board meeting, because Imrie was not notified of the meeting and the meeting did not comply with the board's 'flying resolution'.

It alleged that the conduct of each of Barden, Blackbeard and Stevens constituted a breach of their duties:

1. To act with reasonable care and diligence (s 180(1));
2. To act in good faith and for a proper purpose (s 181);
3. Not to use their position for an advantage for themselves (s 182).

Summerdowns sought compensation referable to the amount of the payment, pursuant to s 1317H of the Corps Act.

Decision

The court accepted that the directors believed accelerating preparation of the information memorandum was an essential step in securing the investment Summerdowns required to implement its business plan.

Validity of the meeting

The court found that the directors who attended the meeting intended that it constitute a meeting of the board of directors because the matters discussed were significant issues concerning the conduct of Summerdowns' affairs.

Notice

However, the court held that reasonable notice of the meeting was not provided to Imrie. Furthermore, the court stated that the matter did not contain exceptional circumstances to justify not providing notice

(notwithstanding he was not readily contactable). Accordingly, the meeting was not a duly constituted meeting of the board of directors for the purpose of s 248C of the Corps Act, and the resolution passed concerning payment to MSA was not valid.

Compliance with the flying resolution

The court stated that the liability of Stevens and Barden for breach of statutory duties depended upon the intended purpose of the flying resolution. The court noted that the flying resolution did not establish a constitutional rule of the company. Instead it was a standing resolution concerning funds. The court interpreted the object of the flying resolution as protecting the financial interests of the company. However, this did not prevent a director from authorising payments to be made in different ways.

Breach of duties

The court held that Stevens and Barden had not breached their statutory duties. Stevens and Barden did not act in bad faith or an improper purpose within the meaning of s 181(1). Further, the court found that they did not use their position improperly for the purposes of s 182(1). The court considered that Stevens and Barden agreed to accelerate the payment to MSA in order to gain Summerdowns a greater advantage. It was not a failure to act with reasonable care and diligence given the urgency and the belief that the three directors could secure ratification of the resolution.

The court acknowledged that there are circumstances where actions of a board of directors that are in contravention of the company's constitution that do not warrant restoring the company to the position had the actions not been taken. Furthermore, the court commented that directors do not necessarily breach their duties by acting in accordance with resolutions which are found in contentious circumstances to be invalid.

Damages

The court held that Summerdowns failed to establish that it suffered damage. Even if the director's duties were breached, the company had not proven that it was entitled to compensation pursuant to s 1317H of the Corps Act. The effect of the conduct was, at its highest, to accelerate the payment to MSA which it would always have been entitled upon completion of the agreed work.



Case Note

Matton Developments Pty Ltd v CGU Insurance Limited (No 2) [2015] QSC 72

Considering an insurer's duty of good faith in the case of a declinature of cover.

Facts

The plaintiff was in the business of providing a crane and operator to third parties for hire and held a Contractors and Plant insurance policy with the defendant insurer (**policy**).

On 1 February 2009 there was an incident that caused the crane to be damaged beyond economical repair.

The plaintiff submitted a claim under the policy, which the insurer denied on the basis that the damage was not '*accidental, sudden and unforeseen*' and therefore not covered by the policy.

There were two competing versions of the incident:

1. On the plaintiff's version, '*the boom of the crane collapsed because of a failure of the heel weld joints that resulted from a structural pre-existing weakness near the boom heel weld joints on the right-hand side of the boom. At the time of the collapse the crane was stationary, level and on level ground.*'
2. On the insurer's version, '*the boom of the crane collapsed due to structural overload as a*

consequence of a side load induced by the crane operating on a 7 degree slope.'

Issues

There were numerous issues in dispute, the following four of which were the most important:

1. What caused the boom of the crane to collapse?
2. Did the policy respond to the plaintiff's claim?
3. Did the insurer breach the duty implied by s 13 of the *Insurance Contracts Act 1984* (Cth) (**ICA**) by undertaking its own investigations rather than merely relying on the insured's version of events; and
4. Does s 13 of the ICA (properly construed) impose a statutory duty of utmost good faith on the insurer over and above the implied contractual duty?

Decision

Cause of the collapse

His Honour, Flanagan J, accepted the insurer's evidence that the crane was not on even ground during the lift and was instead on an angle of about 7 degrees because a rubble ramp had not compacted as much as the operator anticipated it would. It was held that the lifting capacity had been significantly reduced when the crane was operating on an angle, which was the ultimate cause of the collapse.

The decision to decline cover

Insured damage was defined in the policy as 'accidental, sudden and unforeseen' loss or damage to the crane caused while the crane was used in the manner it was designed to be used. The definition of 'accident' adopted by a large number of insurance cases is 'an unlooked for mishap or an untoward event which is not expected or designed'. The court found the words 'sudden' and 'unforeseen' added no meaning to the definition.

His Honour considered that a deliberate action with unexpected or unintended results could be regarded as an 'accident' for the purposes of a policy. The court however found the damage in this case was not accidental as the crane operator knew that the crane should not be operated on an angle.

Implied contractual duty of utmost good faith

The insured submitted that the insurer breached its duty of utmost good faith in relying on the conclusions drawn by its own experts rather than accepting the evidence of the insured's witnesses.

His Honour stated that the 'utmost good faith' requirement implied pursuant to s 13 of the ICA required an insurer to act in accordance with commercial standards of decency and fairness, with due regard to the insured's interests, but does not require the insurer to put the insured's interests above its own.

His Honour therefore found the insurer had given careful consideration to all of the information available at the time (which included its own investigations) and that its decision to decline cover did not constitute a breach of its implied duty of utmost good faith.



A statutory duty?

The insured submitted that s 13(1) of the ICA also imposes a statutory duty of utmost good faith upon the insurer.

This is significant because breach of a statutory duty is a tort, and as such, potentially gives rise to a claim for all damage that was *reasonably foreseeable*, as opposed to a claim for breach of contract which would sound in damages that were within the *reasonable contemplation* of the parties when they made their agreement.

Flanagan J found that s 13(1) does not create a private right of action in the event of a breach. The reasoning behind this finding included:

1. The provision is too general for there to be an inference that it creates a private action for breach of statutory duty;
2. It is expected that if parliament intended to create new rights and liabilities that would engage Chapter III of the Constitution, it would clearly state that (it did not);
3. The class of those persons protected by a statutory duty would be too wide, encompassing all insurers and insureds. It would therefore not be a '*limited class*' of the public, which is a requirement of a private cause of action for breach of statutory duty;
4. Section 13(1) cannot properly be said to protect the class of persons of which the insured is a member (i.e. insureds), any more than the provisions are designed to protect insurers.

Case Note

Sims v Chong [2015] FCAFC 80

Legal professional attempts to rely on advocates' immunity in the face of a statutory cause of action.

Facts

The defendant legal practitioner acted for the plaintiff in an intellectual property claim against Suda Ltd (**Suda**), seeking damages of \$3.8 million.

The claim was summarily dismissed after the defendant failed to prepare a satisfactory statement of claim after five attempts.

The plaintiff subsequently commenced proceedings against the defendant alleging negligence, breach of fiduciary duty and contract, unconscionability and misleading and deceptive conduct by asserting a competence to act.

At first instance the judge found that the claim against the practitioner was an abuse of process, as it involved a determination of whether the plaintiff had a claim against Suda, effectively re-litigating the matter, and was inconsistent with the goal of finality that litigation seeks to achieve.

The judge also found the defendant was protected by the advocates' immunity as the complaint was about the failure to prepare an adequate statement of claim, and although this was work done outside of court, it led to a decision which affected the conduct of the case in court and was covered by the immunity.

This decision was appealed to the Full Federal Court of Australia.

Issues

For the plaintiff to succeed in this appeal he had to have both of the reasons of the primary judge set aside, on the basis:

1. The primary judge erred in deciding that the claim was an abuse of process; and
2. It was wrong to summarily dismiss the claim based on advocates' immunity.

Decision

Was there an abuse of process?

This ground of the appeal was dealt with swiftly, with the defendant's counsel acknowledging that the primary judge should not have dismissed the claim on this basis.

The allegations brought against the defendant extended beyond the claim pleaded against Suda (that is, one based solely in contract). Although the



plaintiff, being self-represented at the time, was unable to adequately express those claims, there was a clear assertion in the appeal that his claim against the defendant was that there was no advice given about, and were no claims made against, Suda for unjust enrichment, restitution or for a form of quantum meruit.

Advocate's immunity

On the issue of advocates' immunity, the court was asked to decide whether:

1. The doctrine of advocates' immunity applies to enable a claim to be dismissed summarily where there had been no trial and therefore no final determination on the merits of the claim against Suda;
2. The doctrine of advocates' immunity applies to statutory causes of action, namely ss 18 and potentially also 20 and 21 of the *Australian Consumer Law 2010* (Cth) (**ACL**); and
3. Whether the immunity would extend to misrepresentations concerning the advocates' ability to conduct the claim.

Finality

A major policy reason for the existence of advocates' immunity is the public interest in having finality in court-resolved controversies and the resulting confidence in the justice system. It was therefore necessary to determine whether the registrar's decision to strike out the underlying claim was '*final*'.

The court found the registrar's decision to be interlocutory in nature, the order seeking only to dismiss the claim because it did not disclose a reasonable cause of action. The order did not preclude the plaintiff from bringing a fresh proceeding against Suda with an adequate statement of claim.

In addition, the plaintiff was suing the practitioner for failing to advise any potential claim against Suda for misappropriating his intellectual property or for quantum meruit, and for representing she had competence to act in the matter despite having no experience in litigating intellectual property matters. The court found that maintaining those assertions did not necessarily involve a collateral attack on the decision of the registrar, and therefore did not '*provoke any lack of confidence in the administration of justice*'.

The court ultimately found that the primary judge erred in ordering the summary dismissal of the plaintiff's

claim against the defendant as an abuse of process. The court had regard to the standard required for a case to be summarily dismissed and concluded that it was not sufficiently clear that the interlocutory order disposing of the underlying claim had the character of a final judicial quelling of the controversy and it should not have been summarily dismissed.

Statutory liability and immunity

The court considered whether it was sufficiently clear that advocates' immunity extends to statutory causes of action, such as actions under the ACL.

Although the High Court has not determined the issue, there seems to be a general acceptance of the proposition that conduct by advocates the subject of s 18 claims for misleading or deceptive conduct can be covered by advocates' immunity. There has not however, been the same consideration applied to the other statutory cause of action identified, such as unconscionable conduct.

The court was of the view that there may be different public policy considerations when determining this and their application involved complex questions of law which are more appropriately determined at a trial.

Misrepresentation as to expertise

The court held that the representation made by the defendant to the effect she had the requisite expertise to conduct the claim when allegedly she did not, arguably fell outside of the scope of advocates' immunity as it was not conduct intimately connected with court work.

This uncertainty meant that this was not an appropriate case to enter summary judgment. The plaintiff's appeal was therefore allowed and the orders from the Federal Court decision were set aside.

¹ *Nikolaidis v Satouris* [2014] NSWCA 448.

Carter Newell presentations



AILA Sir Ninian Stephen Masterclass in Insurance Law 2016 - Brisbane

20 May 2016

Brett Heath, Special Counsel, will be presenting 'Indemnity Clauses and Insurance Clauses' at the upcoming AILA Sir Ninian Stephen Masterclass in Insurance Law 2016.

This session will consider the effect of indemnity and insurance clauses in contracts entered into by insured, which are often difficult and prone to ambiguity, and the potential ramifications for the insurer.

Akolade Contract Law Fundamentals – Brisbane

21 June 2016

Mark Kenney, Special Counsel, will be joining a panel discussion on 'Contract Selection, Default Clauses and Due Diligence' at the upcoming Akolade Contract Law Fundamentals conference.

The panel will examine the importance of selecting the right contract for your needs, the importance of clearly defining default clauses and why it's more important than ever, given the nature of Australia's transitioning economy, to ensure you do your due diligence before signing on the dotted line.

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