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CommBar News

THE COMMERCIAL BAR ASSOCIATION

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EDITOR

Cornelia Fourfouris-Mack
cmack@iprimus.com.au

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Forthcoming Events and Updates

Building Dispute Practitioners Society

1 August 2012

Annual Dinner

Guest speaker Charlie Pickering

19 September 2012

AGM & Discussion Evening

Guest speaker, the Attorney General, Robert Clark

Details at www.bdps.com.au

President's Report

I have only a short report at this stage of the year.

CommBar commends Caroline Kirton SC who, ably assisted by David McAndrew, Ken Oliver, Suzanne Kirton and Tony Horan, all CommBar Members, and Roger Young (a former CommBar Member), have worked extensively on the Victorian Bar's recent Submission to the State Government in response to *The Victorian Domestic Building Consumer Protection Framework Public Consultation Paper*.

CommBar is always keen to provide such input to the Victorian Bar, Government and related agencies.

CommBar also congratulates the Honourable Greg Garde AM RFD on his appointment to the Supreme Court of Victoria and as a Head of Jurisdiction to VCAT. CommBar wishes His Honour well in his most important new role.

I hope all Members are prospering and encourage them to raise with me or the Executive of CommBar, any issues and/or suggested areas in which they believe CommBar could better serve its Members, at any time.

G. John Digby QC
President
CommBar
July 2012

Corporations and Securities

Case Notes by Roslyn Kaye

Recent cases on winding up on the 'just and equitable' ground

In recent months, her Honour Justice Ferguson has handed down two decisions in applications to wind up companies under the 'just and equitable' ground in section 461(1)(k) of the *Corporations Act 2001*. In each case, her Honour ordered that the respective companies be wound up.

Warner v Global Pacific Aerospace Pty Ltd *[2012] VSC 291*

In *Warner v Global Pacific Aerospace Pty Ltd*, the company in question had purchased a helicopter, which had been repossessed by the company's financer after it failed to make loan installment repayments. The financier subsequently resold the helicopter. One of the company's directors, Warner, made allegations that the helicopter was resold by the financier at an undervalued price. He claimed that his co-director, Beckerath, had arranged the undervalued sale as he was involved with the company that purchased the helicopter.

In turn, Beckerath made allegations that Warner had not conducted the company properly, and had excluded him from all material decisions pertaining to the company's management.

Beckerath applied to wind up the company on the basis that it was just and equitable to do so (section 461(1)(k) of the *Corporations Act 2001*). Warner opposed the application.

Justice Ferguson ordered that the company be wound up, as there was deadlock at both director and shareholder level.

In making that decision, her Honour took into account the following:

- The company did not have an ongoing business (as the helicopter was its principal venture);
- There was a proceeding afoot in the County Court in relation to the shortfall owed to the financier;
- The directors' relationship had broken down irretrievably.

Her Honour held that, in those circumstances, it was preferable for an independent liquidator to investigate the various allegations made by each director, including the allegation that the helicopter was

sold at an under value.

Giacobbe v Giacobbe *[2012] VSC 285*

The case of *Giacobbe v Giacobbe* concerned a family business in which two sides of the family had become estranged. The company in question was the trustee for the family business. The business had not operated since 2003 and the only trust assets at the time of trial were three properties in Victoria. Notwithstanding that, there was evidence that the company had ongoing expenses of approximately $17,000 per year, in respect of rates, land tax, maintenance costs, registration fees and accounting fees.

One of the company's two directors sought an order that the company be wound up on the just and equitable ground. The other director opposed the making of such an order, and he sought an order that the State Trustees replace the company as trustee of the family business.

Her Honour ordered that the company be wound up, for the following reasons:

- it had become untenable for the company to continue to operate while its directors were estranged, as one of the shareholders would not agree to a director remaining in that position;
- there was a high degree of antagonism and distrust between the two families, such that there was no prospect of holding a constructive shareholders meeting to appoint new directors;
- the properties owned by the company did not generate income, and expenses continued to accrue;
- a liquidator would be in a good position to investigate allegations made in relation to inappropriate payment of monies, and would be an independent investigator.

Justice Ferguson rejected the alternative option – to appoint State Trustees as trustee – as that would not resolve what was to happen to the company.

Rather than appoint the liquidator who had been nominated by the applicant, her Honour ordered the appointment of an independent liquidator nominated by the Prothonotary.

Hickory Developments Pty Ltd v Brunswick Retail Investment Pty Ltd *[2012] VSC 224*

Guarantee and indemnity – variation of principal contract – application of Ankar *principles*

In this case, his Honour Justice Vickery had to determine whether a variation to a construction contract affected the liability of a guarantor of that contract such that the guarantee was discharged. His Honour held that the guarantee was not discharged.

The original contract between the parties was that one party would provide a cash retention of $1,320,000 in order to secure its performance under the contract. The director of the recipient of the cash retention provided an indemnity in respect of its return upon completion of the project. Some

months after the entry into the contract, the companies' respective directors agreed to swap half of the cash retention for a bank guarantee. Consequently, the cash retention provided thereafter was in the sum of $660,000.

Upon completion of the project, the cash retention was not returned and the director refused to pay the outstanding sum. He argued that, in accordance with the principles in *Ankar Pty Ltd v National Westminster Finance Australia Ltd* (1986) 162 CLR 549, his obligation as surety was discharged as his rights were altered without his consent in a not unsubstantial manner.

Justice Vickery agreed that the variation to the principal contract did have the effect of altering the surety's rights in a not unsubstantial way.

However, his Honour ultimately held that the *Ankar* principle did not apply, so the director was not discharged from his indemnity. Justice Vickery held that the director had consented to a variation in respect of his indemnity, because he knew that the variation to the principal contract, which he had arranged, would affect his obligations as guarantor.

Further, his Honour also held that a clause in the indemnity document, which provided that the director "shall not be released nor shall any liability under this Deed be effected or discharged by:…as a result of any breach, default or other event or occurrence which under the law relating to sureties would but for this provision have the effect of releasing [the director] from the obligations under this Deed" had the effect of excluding the application of the *Ankar* principles and operated to preserve the director's liability under the guarantee.

Consequently, judgment was entered against the director, pursuant to the guarantee and indemnity, for the amount outstanding in respect of the cash retention.

Sports Law

Case Note by Ian Percy

Christopher Charles Humphries v Southern Cross Ski Club **[2012] VSC 232; Judd J, 25 June 2012**

H, an architect and builder, was a member of an incorporated ski club. H's firm did work for the club the cost of which was treated as a loan to the club in return for which H was granted a right of exclusive occupation of a self-contained suite at the club's premises. The formal agreement prepared by the club's solicitor, provided that the right of exclusive occupation continued for as long as H remained a member and complied with its provisions. If H demanded repayment of any part of the loan, the club was entitled to terminate the agreement and resume possession of the suite. However, there was no provision in the agreement to the effect that if the club repaid the loan the arrangement would be at an end.

The parties had a falling out and the club wished to terminate the arrangement. It sent various letters to H and sought to engage in discussions to resolve the dispute. In the committee's view, the arrangements were not in the interests of the club as a whole. H failed to engage or respond satisfactorily to their concerns. Accordingly, the club resorted to rule 15 of its constitution which provided that, in substance, if a member was guilty of conduct which in the opinion of the committee was unbecoming or prejudicial to the interests of the club, the committee had the power to expel them from the club. The club relied on H's failure to respond to correspondence or to meet with it to attempt to resolve the impasse as constituting relevant offending conduct within the meaning of rule 15. The club also relied on allegations that H had failed to pay his share of club expenses, had made unauthorised additions to the suite and allowed non-members to occupy it when he was not present.

H was given notice of, and invited to attend, the meeting of the committee at which the resolution for expulsion was to be considered. It is not clear from the reasons whether H attended the meeting, however the resolution to expel him as a member was purportedly made by the committee and H was advised as much by letter. H did not exercise rights given to him under the constitution to challenge that expulsion at a general meeting of members.

H brought proceedings challenging the expulsion and seeking declarations that his expulsion was invalid and a permanent injunction requiring the club to re-enter his name on the register of members. The club counterclaimed for a declaration that the agreement had been terminated, alternatively an injunction to

restrain alleged breaches by H of the agreement and damages.

On the threshold issue of whether H had standing, Judd J said that it has long been held that a member unjustly expelled from an unincorporated association may obtain an injunction if the member could establish that the purported expulsion was contrary to natural justice, contravened the rules of the association or was not bona fide.[1] His Honour noted the traditional additional requirement, that the plaintiff establish a proprietary right[2], has become less rigid with the recognition of an implied negative stipulation in the contract[3] as a sufficient basis to support an injunction.[4]
Judd J noted that H's submission that the expulsion was beyond power or not made in good faith *was only faintly resisted by the club.* His Honour was of the view that it was manifestly clear that the resolution was made for the purpose of inducing H to negotiate with the club to diminish his rights under the agreement. This was not a purpose for which the power conferred by rule 15 might properly have been exercised. His Honour went as far as to say that it was an attempt at *commercial extortion*, or an *attempt to bully* H. Further, his honour found that the conduct relied upon was incapable of constituting conduct unbecoming, according to the ordinary and natural meaning of those words.

His Honour went on to deal with the club's allegation that it was entitled to bring the agreement to an end by repaying the loan amount. This right was not expressly given by the agreement. The club contended that a term should be implied to the effect that the club could repay the loan at any time upon which the agreement would come to an end. His Honour determined that such an implication would be inconsistent with the express terms of the agreement, including the provision that if H was to demand repayment, the club may terminate. Having considered all relevant provisions of the agreement, his Honour came to the view that the club had no corresponding right to terminate the agreement by repaying the loan. His Honour went on to deal with and dismiss each of the other alleged breaches relied on by the club.

On the issue of relief, the club contended that specific performance and injunctive relief were not appropriate, contending that H was only entitled to damages. The club submitted that H's right of occupation was a purely contractual licence and thus equity would not assist with an order for specific performance. Judd J noted that there were two relevant contracts; the first being between H and the club, and the second being the relevant agreement. His Honour rejected the club's reliance on *Cowell v Rosehill Racecourse Co Ltd*[5] and *Graham H Roberts v Maurbeth Investments Pty Ltd*[6] His Honour noted that in each of those cases the licence was granted in aid of the subject matter of the contract whereas in the present case, the licence *is* the subject matter of the contract. In *Sigma Constructions (Vic) Pty Ltd v*

[1] Dawkins v Antrobus (181) 17 ChD 615; Meagher, Heydon & Leeming *Equity Doctrines and Remedies* [21-285]
[2] Rigby v Connol (1880) 14 ChD 482, 487
[3] The implied negative stipulation in the agreement between members under the constitution to the effect that the club would not expel a member otherwise than for sufficient reason in accordance with the constitution, bona fide and in accordance with the principles of natural justice; see reasons [63]
[4] Meagher et al op cit [21-305]
[5] (1937) 56 CLR 605
[6] [1974] 1 NSWLR 93

Maryvell Investments Pty Ltd[7] the Court of Appeal accepted that cases can be found where an injunction was granted in favour of the licensee to prevent the licensor from revoking the licence. The rationale being that *in every contractual licence there is an implied negative stipulation by the licensor not wrongfully to revoke the licence*.[8]

After considering possible formulations, his Honour settled on declarations to the effect that the purported expulsion was invalid and of no legal force and effect; a declaration that the agreement between the club and H had not been terminated and remains in force; and an order restraining the club and its committee from acting upon or giving effect to the purported expulsion. Having failed to establish any breaches of the agreement, the club's counterclaim was dismissed.

[7] [2004] VSCA 242
[8] 2004] VSCA 242 at [31] referring to Meagher, Gummow & Lehane*: Equity Doctrines and Remedies*

Construction Law

Victorian Bar's submission in response to Domestic Building Consumer Protection Consultation Paper

The Victorian Bar has made a submission in response to the Victorian Government's Domestic Building Consumer Protection Framework public consultation paper. Members of the Construction Law Section who prepared the submission were Caroline Kirton SC (who co-ordinated the submission), Roger Young, Ken Oliver, Suzanne Kirton, David McAndrew and Tony Horan. A copy of the submission can be obtained on the Victorian Bar's website.

Construction Law

Case Note by Ken Oliver

Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd [2012] NSWCA 184
(21 June 2012) (Bathurst CJ, Macfarlan and Meagher JJA)

Whether "completion" means "practical completion" – availability to the repudiating party of recovery on a quantum meruit – relevance of probability that rectification work will not be carried out to measure of damages

The New South Wales Court of Appeal has dismissed appeals against a decision of a single judge (*Cordon v Lesdor* [2010] NSWSC 1073) who dismissed the respective claims of the builder and the owner for damages following the termination of a joint venture agreement to develop a property in Miranda, New South Wales.

Facts

In 2002 the plaintiff (Cordon) and the defendant (Lesdor) entered into a joint venture agreement to redevelop land then owned by Lesdor. Cordon, a builder, was to refurbish an existing commercial building on the land and construct a new building comprising carparking, commercial office space and residential units. Cordon was to be responsible for the costs of the construction of the project and would be reimbursed for such costs and be entitled to a profit out of the proceeds of sale of the 25 residential

units to which Cordon was entitled under the agreement. The project would be financed on an ongoing basis by a loan ($8,252,000) from a lending institution obtained by Cordon, drawn down from time to time to meet the ongoing costs of construction.

The agreement required Lesdor to execute the Strata Plan and deliver it to Cordon "forthwith upon request." The agreement also required Cordon to register the Strata Plan as expeditiously as possible following "completion" of the building works. The parties fell into dispute when Lesdor refused to sign the Strata Plan which was necessary to enable the sale of the units to be completed and for Cordon to thereby receive its contractual consideration.

At the time of the refusal by Lesdor to execute the Strata Plan, the local council had issued an "occupation certificate". Lesdor refused to execute the Strata Plan because the works were not completed, there being aspects of the construction which were defective and did not comply with the plans and specifications.

On 7 August 2006 Lesdor terminated the agreement. Cordon asserted that this amounted to repudiation by Lesdor and commenced the proceeding in the Court.

The decision

The Court found that the obligation on Lesdor to deliver a signed Strata Plan only arose after the completion of the building works. "Completion", said the Court, meant completion in accordance with the plans and specifications. It did not mean "practical completion" or "substantial completion".

The Court of Appeal considered the doctrine of substantial performance under "entire contracts" in which courts have been reluctant to construe complete performance of the works as an essential pre-condition for payment (eg *Hoenig v Isaacs* [1952] 2 All ER 176). In circumstances where there has been substantial performance, a court would sometimes regard the failure to complete as a breach of a non-essential term of the contract, entitling the proprietor to raise as a setoff the cost of completing the works or rectifying the defects.

The Court of Appeal noted, however, that the question is always one of construction of the relevant agreement and held that, in the present case, there was no room for the doctrine of substantial performance because the obligation to complete the works was a condition precedent to the obligation of Lesdor to sign the Strata Plan – it was not a pre-condition of Cordon's entitlement to receive the contractual consideration.

How, asked the trial judge, is the Court to assess the sufficiency of performance necessary to trigger Lesdor's obligation to sign the Strata Plan? What shortfalls in performance will leave Lesdor compelled to perform its obligation? The trial judge found that Cordon's submission invited the Court to rewrite the parties' bargain.

The Court of Appeal supported the trial judge's further conclusion that Cordon had not even achieved substantial performance, there being 5 significant defects in the works.

Quantum meruit

The Court of Appeal rejected Cordon's claim for a quantum meruit. Cordon had argued that, notwithstanding that it had repudiated the contract, it was entitled to maintain a claim for the value of the work done based on a quantum meruit because Lesdor had sued for damages. The Court of Appeal held that the passages from *Hudson's Building and Engineering Contracts* (11th ed at 476 [4.007]) and *Tan Hung Nguyen v Luxury Design Homes Ltd* [2004] NSWCA 178 at [52] cited by Cordon did not support Cordon's proposition.

Quantum

Lesdor claimed damages for defective, incomplete and non-conforming work in the sum of $364,956.90.

In *Bellgrove v Eldridge* (1954) 90 CLR 344 the High Court found that the measure of damages recoverable by a building owner for breach of a building contract is the difference between the contract price and the cost of making the work conform to the contract, subject to the qualification that the rectification work undertaken must be necessary to produce conformity with the contract and be a reasonable course to adopt. In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 the High Court held that the test of unreasonableness would only be satisfied in fairly exceptional circumstances.

In *Cordon* the trial judge disallowed such part of Lesdor's claim as was referable to common property. In dismissing Lesdor's cross-appeal, the Court of Appeal found that the combination of (a) the lack of intention to carry out the rectification work, (b) the transfer of the property from Lesdor to the owners corporation and (c) the absence of any evidence that the defects were affecting the use and occupation of the building or the common property led to the conclusion that it would be unreasonable to carry out the work.

Comment

This is one of the rare cases in which the innocent party is unsuccessful in obtaining damages for the future cost of rectifying defective work. It was significant that the property the subject of the disallowed claim had been transferred by Lesdor to the owner's corporation and there was no evidence of any complaint or threat by the owner's corporation to sue; nor was there any evidence of an intention by the owner's corporation to carry out the work. Although the question of a plaintiff's intention to carry out the rectification work is not of significance in itself, it may be relevant to the question of reasonableness.

Insolvency Law

Case note by Tiphanie Acreman

Wimpole Properties Pty Ltd v Beloti Pty Ltd (No 3) [2012] VSC 219

CORPORATIONS – Winding up in insolvency – Corporate delinquency – *Corporations Act 2001* (Cth) ss 459A, 461(1)(k) – Application not an abuse of process – Winding up order made.

Background

Wimpole Properties Pty Ltd (Wimpole) commenced a proceeding to wind up Beloti Pty Ltd (Beloti) on the ground of insolvency, or on the just and equitable ground (a further ground, oppression, was not pressed at the hearing). The application was part of a series of proceedings brought by the two companies against each other (and others) as a result of the breakdown of a partnership formed for the subdivision and sale of leaseholds at four holiday park properties.

There was no dispute that the partnership had been dissolved. A separate trial had determined what constituted partnership property with a receiver appointed to realise that property.[9] In June 2011, the Court appointed a special referee to determine what entitlement the two companies had to profits under the partnership agreement, what each partner's contributions to and receipts from the business of the partnership were, and the amounts that should properly stand as debits or credits to the partnership loan accounts.

After some delays, the special referee was to deliver his report in March 2012. However, while the special referee was still conducting his investigations, Wimpole commenced this application to wind up Beloti.

The application

Wimpole's primary ground for winding up was insolvency. It made the application on the basis that Wimpole was a creditor as a result of a judgment debt and costs owed to it by Beloti from a proceeding in the Magistrates' Court. The debt was not disputed. It also sought winding up on the just and equitable ground, relying on acts of 'commercial immorality'. Wimpole argued that it was in the public interest that Beloti be wound up to prevent unsecured creditors receiving preferential payments; to prevent further breaches of statutory obligations; to prevent insolvent trading; to protect the public revenue; and to

[9] *Wimpole Properties Pty Ltd v Beloti Pty Ltd (No 2)* [2011] VSC 85.

protect future creditors.

To this end, Wimpole's evidence was directed to demonstrating that Beloti was hopelessly insolvent, with no real prospect of assistance from other companies in the group. Wimpole also alleged that Beloti had disregarded its corporate and statutory responsibilities by failing to lodge business activity statements and income tax returns with the Commissioner of Taxation for the financial years 2009 to 2011, and failing to pay water and council rates. It was also alleged that Beloti had transferred substantial funds arising from the operation of businesses at partnership properties to other entities controlled by a director of Beloti, thus denying Wimpole and other creditors' access to the funds.

Beloti asserted that it was not insolvent yet inherently accepted its own impecuniosity. It argued that its impecuniosity was caused by Wimpole failing to distribute profits and making inappropriate and unauthorised charges against the partnership. Beloti contended that an outcome favourable to it in the related proceedings, in which it claimed more than $6 million against Wimpole, would restore its financial position.

Beloti also alleged Wimpole's application was oppressive and an abuse of process, sought for the purpose of obtaining a collateral advantage in the related proceedings. In response to the allegation that it had disregarded its corporate and statutory obligations, Beloti stated that it had not been possible to prepare the relevant statements for the Commissioner because of the unresolved dispute between it and Wimpole, and that it had entered payment arrangements with its creditors on the basis that it was 'good business' to do so, not because it was in financial difficulty.

The court's decision

Judd J accepted that Beloti's ability to negotiate accommodation with its creditors was a relevant consideration when examining the company's position as a whole. It was also relevant to consider the capacity of other members of the group to provide assistance to Beloti. However, the extent to which Beloti had supported other members of the group was also relevant.

His Honour held that, "[w]hether viewed as a member of the … group of companies, or as a standalone entity, [Beloti's] future is bleak". Beloti's level of debt was such that, even if it ceased providing funds to other entities in the group, it would not generate sufficient income to meet its expenses. No support was likely to come from other entities, with some appearing to be reliant on Beloti for cash, and the assets of the group heavily mortgaged. Although Beloti established loan accounts to record advances within the group, the fact that those loans were likely to be irrecoverable meant that Beloti's practice of diverting cash to other members of the group amounted to a denial to its creditors of access to the funds.

Although Beloti's ability to generate funds from existing and contingent assets was relevant to an assessment of its solvency, the mere existence of those assets without a credible plan to realise them

provided little comfort to creditors and therefore did not assist.

Beloti's failure to lodge BAS and tax returns, make superannuation contributions or maintain proper accounts were all held to be matters of public interest, providing support for the order to be made.

Beloit's contention that a favourable outcome in related proceedings would restore its financial position did not negate the necessity for the order to be made. The winding up application was not a trial of the issues in the related proceeding. While Beloti was held to have an arguable case, his Honour noted that it is for the liquidator to decide whether and to what extent that proceeding should be pursued.

His Honour rejected Beloti's allegation that the application was an abuse of process. Beloti's argument rested on an assumption that the liquidator may not prosecute its claims, and that any wrongdoing by Wimpole would not be exposed thereby producing a collateral advantage. However, the liquidator would be free to prosecute Beloti's claims if it was appropriate to do so. Wimpole had standing to bring the application because a judgment debt was due to it from Beloti and that debt was uncontested. Therefore there was no abuse of process.

The court "is concerned with more than just the interests of Wimpole". Where Wimpole had discharged its burden of proof, the public interest in winding up Beloti to protect present and future unsecured creditors and bring to an end its corporate delinquency was a sufficient basis for the order to be made.

Case Note by Alexandra Golding

Rian Lane v Dive Two Pty Ltd [2012] NSWSC 104

Background

1. The plaintiff claimed damages against the defendants (Dive Two Pty Ltd and Mr Todd) in respect of injuries he suffered when a boat driven by Mr Todd collided with a boat from which the plaintiff was fishing.

2. The defendants claimed indemnity from their insurer (**Liberty**), or in the alternative if Liberty was not obliged to indemnify them, damages from their broker (**Horsell**).

3. At the time of the collision, Mr Todd was the sole director of Dive Two Pty Ltd, which carried on a scuba diving business called "Dive One" and owned a 7.45m aluminium dive vessel, which was also called "Dive One"

4. On the day of the collision Mr Todd had taken a party out scuba diving in the morning in Dive One. He returned the divers and collected his passengers for the afternoon, who were his wife and 2 other couples.

5. Dive One collided with another vessel during that trip and the plaintiff, who was on the other vessel sustained serious injuries.

6. Mr Todd was charged with 1 count of dangerous navigation occasioning grievous bodily harm in breach of the *Crimes Act* 1900 to which he pleaded guilty.

The Policy

7. Dive Two was an insured under a policy issued by Liberty to PADI Asia Pacific and its members (**the Policy**).

8. The Policy provided cover for legal liability incurred by way of compensation as a result of claims and/or damage in connection with the Insured's Business.

9. The Insured's Business was stated in the scheduled to be "*Scuba Diving*". "*Scuba Diving*" was a defined term in the Policy.

10. The Policy relevantly excluded indemnity for:

    (a) Any watercraft which exceeds 12 m in length;

    (b) *Any alleged or actual fraudulent, dishonest, malicious, wilful or criminal act or omission of the Insured*..

Were the Defendants' Activities Covered by the Policy?

11. The first issue for determination was whether the activities engaged in by Mr Todd at the time the collision occurred were "*in connection with the Insured's Business*".

12. Mr Todd had given evidence at trial that the trip, which was a sightseeing trip on the Myall River, was a business promotion trip. Therefore, his counsel submitted that it was "*in connection with his business*".

13. The judge accepted Liberty's submission that two requirements needed to be met for the insuring clause to be enlivened:

    (a) The activity must be in some way related to recreational scuba diving; and

    (b) It must be "*in connection with the Insured's Business*".

14. His Honour considered the use of the word "Business" to be relevant to the construction of the insuring clause, despite the fact that the actual business was a defined term in the policy.

15. His Honour was of the view that a trip on the Myall River conducted for private purposes which are unconnected with the business does not fall within the insuring clause.

16. This threshold would have been met if the judge had been satisfied that the purpose of the trip was promotion of Dive Two's scuba diving business.

17. However, his Honour was not satisfied that the trip was such a trip. His Honour considered that the first statement given by Mr Todd to police shortly after the accident, made at a time when he was not conscious of the need for the trip to have been in connection with his business for insurance purposes, to have been the true state of affairs. Namely "*this was a private function, it was my wife on board and four of her friends...*".

Did Mr Todd's Dangerous Navigation Trigger the Exclusion Clause?

18. Despite his finding on coverage, his Honour went onto consider the exclusion clause.

19. The evidence suggested the collision occurred because Mr Todd could not see through the windscreen clearly due to it being "salted" from the morning's activities and had not been cleaned. There was no evidence that the collision was anything but an accident. Mr Todd's conduct, although criminal, was not intentional.

20. The acts referred to in the exclusion, other than "*criminal*", required intent.

21. His Honour applied rules of construction to conclude that because the words "*criminal*" appeared at the end of a list where the preceding words have in common an element of intention, only intentional criminal acts were to be excluded from cover.

22. Further, it was immaterial that the degree of lack of care exhibited by Mr Todd was greater than mere negligence.

Was the Broker Liable to the Defendants?

23. The question of Horsell's liability arose because the judge had found that Liberty did not have to indemnify the defendants.

24. His Honour considered that the evidence established that the relationship between PADI and its members on the one hand and Horsell on the other was sufficient to create a contract of retainer and impose a duty of care. PADI had engaged Horsell to advise it and its members on appropriate insurance cover, and by implication, warn it and its members where cover was inadequate or doubtful.

25. Horsell had sent Dive Two a fax stating "*Please note we have not quoted Liability for the vessel as the PADI watertight policy provides coverage for liability for vessels up to 12 meters in length for activities associated with Diving, Swimming, Sight Seeing, Whale Watching and Fishing*".

26. His Honour considered that the fax effectively advised Dive Two that there was no need for a public liability policy for the vessel. There was no warning that the activities had to be "in connection with the insured's business". The Policy itself also contained similar statements.

27. His Honour did not consider it necessary that expert evidence be lead as to the standard to be expected of a reasonably competent insurance broker as the matter was obvious.

28. His Honour held that:

    (a) A reasonably competent insurance broker should have warned Dive Two that the Policy did not cover all activities undertaken in the boat;

(b) A policy was available that would have covered Dive Two for the circumstances of the collision;

(c) The other policy was commercially available at similar cost;

(d) The broker should have advised Dive Two accordingly; and

(e) Had Mr Todd been so advised, he would have taken out the available policy.

Conclusion

29. This decision is a salutary reminder for insurance brokers to carefully consider all aspects of the insurance requirements of their clients.