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CommBar News

THE COMMERCIAL BAR ASSOCIATION

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President's Report

I can report to Members that CommBar Executive has been busy working on advancing CommBar Members' interests I can and also report that there is a good deal which CommBar has happening in the last quarter of 2011.

CommBar Membership has substantially increased to 495 members spread across the 15 CommBar Specialist Sections and is growing on a weekly basis.

Reporting on CommBar activities since the last Newsletter I note that CommBar hosted a successful Dinner for the Honourable David Byrne QC in August 2011. Ian Percy, CommBar's Treasurer, should in particular be commended as the driving organisational force of this event.

I am hopeful that CommBar Members have accepted their invitation to attend the CommBar Annual Social Event, to be held in the Victorian Supreme Court Library, on Thursday 6 October 2011, commencing at 5.00 pm. The Attorney General for the State of Victoria, the Chief Justice of Victoria, many Justices and Judges, Solicitors, Corporate Solicitors and others in the legal fraternity have already accepted invitations.

CommBar Members should also note that on 20 October 2011, CommBar's Asia Practice Section is holding a conference at the Monash Law School Chambers, 555 Lonsdale Street Melbourne commencing at 1.30 pm. entitled "2nd Engaging the Asian Economies Law & Practice Conference – Working with Asia" at which the Victorian Attorney General and the Chief Justice of Victoria, and a number of other notable persons are speaking.

During the last several months CommBar has engaged the contribution of two Consultants to work with CommBar's Executive to develop and implement marketing strategies and a program of actions for CommBar to assist its Members in developing their practices and to make CommBar more effective in the same regard. Both Consultants have now provided a Report to CommBar and CommBar's Executive met on 28 September 2011 to work on implementing these recommendations. I shall report on the progress of this project from time to time in the near future.

CommBar has enlisted the services of its skilled Member, Mr. David Sanders as CommBar's new Webmaster and David Sanders is now helping to upgrade CommBar's excellent Webpage.

Finally, I note that as well as the ongoing work by assisting CommBar's 15 Sections to advance the interests of their specialised Members and to, inter alia, provide input to the Victorian Bar CPD program, CommBar's specific subcommittees are all working on tasks to assist CommBar Members and to assist CommBar to be effective for its membership.

John Digby QC
President

Photographs from the dinner for the Honourable David Byrne QC

Construction Law

Case Note by Ken Oliver

Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd [2011] VSC 477, 23 September 2011, Macauley J

Litigation Privilege –s 119 *Evidence Act* - documents prepared for "show cause" notices and adjudication under *Building and Construction Industry Security of Payment Act 2002*

The Supreme Court of Victoria has upheld a claim for "litigation" privilege in respect of documents generated for the purpose of an adjudication under the *Building and Construction Industry Security of Payment Act 2002* ("Security of Payment Act") and for documents related to the preparation of "show cause" notices under a building contract.

Background

The plaintiff ("Dura") and the defendant ("Hue") were in dispute arising from a contract for the construction by Dura of 29 residential apartments in Richmond on land owned by Hue. Hue had served a series of "show cause" notices on Dura, claiming that Dura was in breach of the contract. Hue then took the works out of the hands of Dura and retook possession of the site. In the course of the litigation, Dura sought access to documents produced in answer to subpoenas issued at its request. Hue objected to the access on the ground of privilege, including "litigation" privilege which is covered by s 119 of the *Evidence Act 1958*.

The two main categories of documents over which Hue claimed privilege were:

(a) documents brought into existence for the purpose of adjudication under the Security of Payment Act; and
(b) documents which relate to the preparation of the "show cause" notices, including drafts of those documents.

The documents the subject of the challenge to the claim for privilege were those documents which did not otherwise attract the "advice" privilege; that is, they were not prepared for the dominant purpose of a lawyer providing legal advice to Hue.

The "adjudication" documents

The primary argument by Dura was that the adjudication documents were not privileged because they did not qualify for the protection afforded by s 119 of the *Evidence Act 1958* which provides, relevantly, that evidence is not to be adduced if it would result in disclosure of confidential documents prepared…

> " for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding

before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party."

Dura claimed that the adjudication process was not "an Australian or overseas proceeding". That expression is defined in the *Evidence Act* as "a proceeding (however described) in an Australian court or a foreign court".

"Australian court" is defined in the *Evidence Act* as:

(a) the High Court; or

(b) a court exercising federal jurisdiction; or

(c) a court of a State or Territory; or

(d) a judge, justice or arbitrator under an Australian law; or

(e) a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence; or

(f) a person or body that, in exercising a function under an Australian law, is required to apply the laws of evidence.

Dixon J. considered the nature of the adjudication procedure under the Security of Payment Act and concluded that an adjudicator was authorized to hear, receive and examine evidence and that documents prepared for that purpose were therefore privileged.

The "show cause" notices

Dura argued that documents relevant to the preparation of the "show cause" notices were in the category of documents which merely constitute or evidence transactions such as contracts, conveyances and the like.

Dixon J. upheld the claim for privilege, finding that the "show cause" notices were "assertions of contractual wrongdoing which are the very foundation of the issues in dispute". His Honour found that, at the time the notices were prepared, litigation was reasonably anticipated.

Morris v Riverwild Management Pty Ltd & Ors [2011] VSCA 28, 22 September 2011, Court of Appeal

Case Notes by Ken Oliver

Costs following settlement of multi-party litigation – double recovery - issue estoppel

The Victorian Court of Appeal has dismissed an appeal from a judgment of Pagone J. in *Morris v Riverwild Management Pty Ltd* [2009] VSC 439 but overruled His Honour's finding that some proportion of the settlement amounts received by claimants from certain respondents to VCAT proceedings were referable to, and received in part as, the costs which had been incurred in pursuing the VCAT proceedings against the appellant.

Facts

The appellant, Michael Morris, sought to prevent parties in a VCAT proceeding from enforcing an order for costs made by VCAT on 8 April 2008.

The costs order arose out of the settlement of a multi-party piece of litigation in VCAT in which Mr. Morris, an architect in a development of residential apartments at Falls Creek, and others had been sued by the developer (Bilbarin Nominees Pty Ltd) and the owner of the one of the apartments. A second claim was made in VCAT by Riverwild Management Pty Ltd ("Riverwild"), the owner of the common areas. Riverwild was substituted as applicant in the first proceeding following an assignment by Bilbarin.

On 16 July 2004 Mr. Morris served an offer of settlement upon the applicants and cross-applicants in the VCAT proceedings ("the claimants"), offering to pay them $1.4m plus party and party costs to be taxed on the Supreme Court scale of costs. That offer was accepted. Other settlement agreements were entered into by the claimants with other respondents as follows:

- the certifying engineer ("Mr. Holland") and his company agreed to pay $1.5m in settlement of all claims "including any and all claims for costs";
- AMP General Insurance Ltd agreed to pay $175,000 "all in" to Riverwild;
- the building surveyor, Mr. Lorenzini, agreed to pay $1.8m "inclusive of interest and costs"; and
- Mr. Huggard, the structural engineer, agreed to pay $150,000 inclusive of interest and costs upon the basis that the obligation could be discharged by paying the reduced sum of $79,188.

Only Mr. Morris was left to pay costs of an unspecified amount. On 13 September 2004 VCAT made orders giving effect to the settlement.

Bills of costs totalling $2,104,599.16 were served on Mr. Morris in accordance with the orders made by VCAT on 13 September 2004. The bills of costs contained items of costs incurred by the claimants in pursuing not only Mr. Morris but also other respondents in the VCAT proceedings, ie common costs. The taxation of costs was finalised on 8 April 2008 when the parties consented to an order that the party and party costs of the claimants in VCAT be assessed in the sum of $1.8m.

Mr. Morris sought to prevent the claimants from recovering the costs ordered on the basis of double recovery, in that some (or all) of the costs had already been recovered by the claimants pursuant to the other settlements.

The Judgment below

Pagone J. found that the claimants settled against all of the VCAT respondents on a basis by

which some proportion of the proceeds of settlement were referable to, and received in part as, the costs which had been incurred in pursuing the VCAT proceeding, including costs incurred in common with the claims pursued against Mr. Morris. The claimants, therefore, should not be permitted to recover all of the costs sought against Mr. Morris to the extent that those costs were referable to, and were part of, the costs comprised in settlements with the other respondents in the VCAT proceeding. His Honour referred to the "well established" principle against double recovery referred to in *Boncristiano v Lohmann* [1998] 4 VR 82, 88.

Pagone J. overcame the difficulty of determining by what proportion the costs ordered should be reduced by determining that the bulk of the settlement sums were from three "camps", Mr. Morris, Mr. Holland and Mr. Lorenzini. His Honour apportioned the common costs equally between these three camps as to 90% of the claim, leaving 10% as attributable to Mr. Huggard. It followed that there was a 70% reduction in the amount of common costs payable by Mr Morris on the basis that 30% of the common costs have been recovered by settlement from each of Mr. Holland and Mr. Lorenzini, and 10% from the others.

Another difficulty in determining how much of the $1.8million ordered was to be regarded as common costs was resolved by Pagone J. finding that the agreement between the parties that the costs in issue were, in quantum, to be identified as $1.8m without dissection or further apportionment should be regarded as if they were wholly common costs to be apportioned in the way His Honour had previously indicated. That would result in Mr. Morris being required to pay 30% of $1.8m, namely $540,000.

Issue estoppel

The problem for Mr. Morris, however, was that Pagone J. found that the issue of double recovery raised by him was finally determined against him by the decision of Senior Member Walker on 17 February 2007 following submissions by the parties. That decision, which was not appealed, created an estoppel and His Honour therefore dismissed Mr. Morris' proceeding.

The appeal

Mr. Morris claimed that the judge at first instance erred in holding that he was estopped by the VCAT decision. Riverwild contended in the alternative that if Mr. Morris was not estopped by the VCAT decision, the judge at first instance erred in holding that some proportion of the settlement amounts received from the other respondents to the VCAT proceeding were referable to, and received in part as, the costs which had been incurred in pursuing the VCAT proceeding against Mr. Morris.

The Court of Appeal's decision

The Court of Appeal found that, notwithstanding that Mr. Morris sought the declaration and injunction from VCAT (which Senior Member Walker ultimately refused to grant), VCAT lacked jurisdiction to grant the injunction and declaration sought and Mr. Morris could not be estopped by a decision which was, in effect, a nullity.

The Court of Appeal also found, however, that the judge erred in holding that some proportion of the settlement amounts received from the other respondents to the VCAT building proceeding were referable to, and received in part as, the costs which had been incurred in pursuing the VCAT building proceeding against Mr. Morris.

Nettle and Redlich JJA, with whom Weinberg JA agreed, found that it was impossible to construe the terms of settlement as by necessary implication requiring that each settlement sum be prorated between damages and costs. The Appeal Justices found that there was no risk of double recovery, as Riverwild's claim was for $8.65 million plus $1.8 million costs, in effect a

total of $10.45 million. After getting in all amounts agreed to be paid by the defendants under the various terms of settlement, Riverwild's total recovery would be only $6,875,000.

The Court of Appeal noted that where several defendants are severally liable for parts of a plaintiff's claim, the general principle is that one such defendant is not entitled to credit in respect of payments made by other defendants unless and until the total of payments made by the other defendants exceeds the difference between the plaintiff's claim and that part of the claim for which the defendant seeking credit is liable.

Impact

The case highlights the difficulties of drafting offers of settlement in multi-party litigation on questions of costs.

Gunnersen v Henwood [2011] VSC 440 7 September 2011, Dixon J.

Case Notes by Ken Oliver

Negligence – duty of care – pure economic loss - expert evidence – causation -whether preventive expenditure is claimable as damages

The Supreme Court has dismissed a negligence claim by plaintiffs who expended in excess of $1 million as remediation of an escarpment adjacent to their property.

Facts

The factual background is somewhat complicated, but in essence consists of the following: the plaintiffs (Gunnersens) own a house on land at Davey's Bay in Mount Eliza, Victoria. Their land enjoyed clifftop frontage above the Davey's Bay Yacht Club. The fourth defendant (referred to by the trial judge as "the Henwoods") owns land adjoining the Gunnersens' land. During 1999 and 2000 the Henwoods constructed a residence on their land.

In 2005 a landslip occurred entirely on land owned by the Yacht Club immediately below the corner of the Henwood land near its common boundary with the Gunnersen land. The slip caused damage to the Yacht Club and its property and sharply focussed the attention of the Gunnersens on the risks to their property due to the fragile nature of the escarpment.

The Gunnersens claimed that the landslip occurred because of the negligence of the Henwoods in failing to take any steps to prevent, detect or repair a leaking irrigation pipe.

The Henwoods responded to the landslip by instructing a geotechnical engineer and carrying out remediation works to the escarpment.

In 2008 further stress in the escarpment was noted and the Gunnersens decided to carry out more extensive works on the escarpment at a cost to them of $1 million.

The decision

Dixon J., in a 160 page judgment, made a number of findings and observations. Relevantly, His

Honour found that:

(a) the Henwoods had failed to exercise reasonable care in maintaining and operating the irrigation system;
(b) the discharge of water from the irrigation system was a cause of the 2005 landslip and remained a causative factor of the 2008 ground movement;
(c) the Henwoods did not owe a duty of care to the Gunnersens to avoid the loss claimed by them (defined as "pure economic loss") because the Gunnersens were not "vulnerable" because they had ample means of protecting themselves, and did protect themselves, from that risk;
(d) the expense incurred by the Gunnersens was not caused by Henwood's negligence, but was a preventive measure due to the naturally occurring condition that rendered the escarpment fragile; and
(e) the expenditure, being preventive expenditure to avoid death, injury, damage or loss being sustained at some future time, is not claimable as damages because such expenditure is not "harm" as that expression is defined in Part X of the *Wrongs Act*.

The judgment contains extensive discussion of the principles relevant to the existence of a duty of care in cases of pure economic loss, the nature of the loss claimed, the standard of care, causation, the admissibility of expert evidence and the benefits of concurrent expert evidence ("hot tubs") in litigation.

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Insolvency Law

Case Note by Sam Gifford

Woodcroft-Brown v Timbercorp Securities Limited & Ors [2011] VSC 427

The class action brought by investors in the failed Timbercorp Group's horticultural and forestry managed investment schemes produced a judgment that is significant not only in clarifying the law relating to corporate disclosure but in its discussion of the conduct and management of large class action suits of this kind.

Background

On 1 September 2011, Justice Judd handed down a judgment finding in favour of the Timbercorp defendants in the class action suit brought by investors in the Group's agribusiness investment schemes. The class action was brought pursuant to Part 4A of the *Supreme Court Act 1986* (Vic).

The Timbercorp schemes were managed by Timbercorp Securities Limited, the Responsible Entity under Part 5C.2 of the *Corporations Act 2001* (Cth) throughout the relevant period. Timebercorp Finance, the fifth defendant, was an incorporated subsidiary of Timbercorp with the purpose of providing loan finance to scheme investors.

The named plaintiff, Mr Woodcroft-Brown, was an investor in three of the Timbercorp schemes in 2007 and 2008.

On 30 December 2008, Timbercorp lodged its audited accounts, audit review and directors' statements with ASIC. They reported an increase in total Group revenue, sustained growth in annuity income, and an increase in net assets. The Group announced a net profit for the financial year ending 30 September 2008 of $44.6 million. By 23 April 2009, however, Korda Mentha were appointed administrators of the Timbercorp Group, and on 29 June 2009 the creditors resolved to wind up the companies.

Outstanding loans issued by Timbercorp Finance to investors at that point totalled over $477.8 million. Liquidators had commenced or threatened proceedings against investors to recover the balance of those outstanding loans. It was recognised that in addition to seeking damages, it was also an objective of the plaintiffs to avoid those loan obligations.[1]

At its simplest, the plaintiff's case at trial was that Timbercorp Securities had failed to adequately disclose to investors significant risks faced by the Group (and by extension the various schemes) arising from the structure of the Group, and from certain 'adverse matters' that occurred in 2007 and 2008.

The alleged failures of disclosure grounded not only claims that Timbercorp had failed in respect of its statutory obligations to disclose under s 1013D and Part 6CA of the *Corporations Act* but also claims that they had engaged in misleading and deceptive conduct contrary to the *Corporations Act,* the *ASIC Act* 2001 (Cth) and the *Fair Trading Act 1999* (Vic). It was also alleged that the Product Disclosure Statements (**PDS**) issued during the relevant period were defective under s 1022A(1) of the *Corporations Act.*

[1] *Woodcroft-Brown v Timbercorp Securities Limited (in liq) & Ors* [2011] VSC 427 (1 September 2011), [3].

Failure to disclose Structural Risks

In its pleadings, the plaintiff alleged that there were risks inherent in the structure of the Group that should have been disclosed to existing and potential scheme investors. This structural risk (as pleaded) related to the financial structure of the Group. It alleged that the Group was dependant on Timbercorp Securities being able to maintain a sufficient cash flow through scheme contributions and external debt, and as such, the potential failure of funding from those sources presented a material risk to the viability of the various schemes. His Honour described this as the '*cash flow risk*'.[2]

Included in this was the concept of the '*renewal risk*'. His Honour characterised this as the risk that bankers may not continue their support for the Group.[3] The short-term nature of the Groups' borrowings meant that significant amounts of debt required negotiation every few years, exposing the Group to changing interest rates as well as renewal costs. The plaintiff alleged that this carried with it inherent uncertainty and risk requiring disclosure.

The feature of this structural (or cash flow) risk that the plaintiff relied upon was that it presented a threat to the ability of Timbercorp Securities to perform its obligations as manager of the various schemes. This was described as constituting the '*performance risk*'.[4]

At trial, though, His Honour concluded that the plaintiff had recast the nature of the structural risk it relied upon in a manner different to that set out in its pleadings. The structural risk advanced at trial was one that focused on the Group's dependency on new capital – in the form of both debt and equity – and its ability to sell assets in a timely manner. The risk that the Group faced then was that it was unusually vulnerable to adverse changes in capital markets. This was described by His Honour as the '*financing risk*' or the '*fragile business model risk*'.[5] The ramifications of this perceived shift is discussed further below.

Failure to disclose Adverse Matters

The plaintiff pleaded the occurrence of a number of matters (or events) that it alleged required disclosure to scheme investors. His Honour noted that these events were initially pleaded as stand-alone risks requiring disclosure in their own right, which were prominent in the plaintiff's case, but later were emphasised instead as events that heightened the financing risk, and required disclosure on that basis.

The adverse matters advanced by the plaintiff were:

1. **The tax announcement:** in February 2007, the ATO announced that that it would no longer allow upfront deductions to be claimed in respect of investments in non-forestry managed investment schemes.
2. **Global financial crisis:** the deterioration in global credit and financial markets in late 2007. The plaintiff alleged that this materially limited the ability of Timbercorp to raise capital, restricted the availability of credit, and prevented the Group from either refinancing or extending its existing loan facilities.
3. **2008 near-insolvency event:** the plaintiff alleged that in early 2008 the Group was nearing insolvency and there existed a significant risk that it would not be able to manage the schemes through to completion.
4. **2008 Breach of loan covenants:** By September 2008, the Group was in breach of number of loan covenants in respect of certain of its banking facilities.

[2] Ibid [28].
[3] Ibid [340].
[4] Ibid [50].
[5] Ibid [28].

5. **Going concern doubts:** In the 2008 Annual Report for Timbercorp Limited, its auditors expressed uncertainty about the company's ability to continue as a going concern.

The plaintiff submitted that these matters all required disclosure by Timbercorp, either as risks in their own right, or because of their capacity to significantly heighten the structural risks already advanced.

Misleading and Deceptive Conduct allegations

The alleged failures to disclose also founded claims of misleading and deceptive conduct by the plaintiff. Those claims were brought under s 1041H of the *Corporations Act*, s 12DA of the *ASIC Act,* and s 9 of the *Fair Trading Act*. The plaintiff also alleged a number of other misrepresentations:

1. **Scheme contributions representations:** the plaintiff alleged that the Group represented in the various PDS documents that investor scheme contributions were sufficient to fund the relevant scheme, and would only be applied to fund that relevant scheme;
2. **The March 2008 representations:** On 5 March 2008, the directors of Timbercorp Securities passed resolutions declaring that during the financial half year ending 31 December 2007, there had been no significant change in the state of affairs of the schemes.
3. **The September 2008 representations:** On 12 September 2008, the directors of Timbercorp Securities passed similar resolutions with respect to the financial year ending 3 June 2007.

The latter two representations were said to be misleading in their failure to disclose the adverse matters that had arisen during the relevant financial years.

What was held?

In a lengthy judgment, Judd J dismissed the totality of the plaintiff's claims against Timbercorp. In the process, he directed a number of criticisms towards the manner in which the plaintiff's case had shifted at trial from its originally pleaded form, and also to the manner in which witness statements were prepared and used, and the use of expert evidence to support the plaintiffs case.

Each of these is addressed below.

Structural risk case

As noted earlier, His Honour found initially that the nature of the structural risk allegations had altered by the time of trial, morphing from the '*cash flow risk*' into the '*financial risk*' or '*fragile business model risk*'.

He held that such a change of direction should not be permitted without leave, and that leave had not been sought and would not have been granted in any event. The evidence, he held, "*was not directed to establish or meet a case based on Timbercorp's critical dependency on capital and debt markets and its particular susceptibility to the occurrence of adverse conditions in those markets."*[6]

As such, the plaintiff was confined to the case as pleaded, consisting here of the disclosure claims based on the failure to disclose the '*cash flow risk*'. His Honour noted further that even had the plaintiff been permitted to advance his later theory, the evidence nonetheless did not

[6] Ibid [39].

support it.

His Honour held that the joint opinion of the experts was a "*complete answer*" to the structural risk case as pleaded.[7] It was a complete answer in that it concluded that "*as long as the group's bankers continued support of the groups' operations there was no significant risk that the group would not have had the financial capacity to manage any of the schemes through to their contemplated completion*".[8]

The risk therefore, was not a material (or significant) one, necessitating disclosure either under s 1013E of the *Corporations Act*, or as part of the Groups' continuing disclosure obligations, as long as the Group maintained the support of its bankers.

His Honour did conclude, however, that the *performance risk*, as defined above, was a significant risk requiring disclosure in the PDS documents. In his view, that disclosure obligation had been met by Timbercorp.[9] His Honour drew attention to statements of this nature contained in the PDS document as identifying the performance risk:

"Anything that affects our ability to meet our obligations under the Almond Lot Management Agreement and the Sub-leases, and the ability of the Land Owner to meet its obligations under the Sub-lease, could also constitute a risk to Growers."

Ultimately, His Honour found that the directors of Timbercorp Group were not aware of a material risk of failure, that would likely impact on scheme investors, until it became apparent that certain assets could not be sold at a reasonable price. This was long after the publication of the last PDS. As such, there was no failure to disclose material under the *Coporations Act*.

Adverse matters

His Honour concluded that by the time of trial, the adverse matters "*only really achieved a status as events that heightened the financing risk*".[10] That is, the plaintiff was no longer advancing them as standalone risks. Whether considered standalone events, or as risks, or as events that escalated the structural risk, the adverse matters were not held to require disclosure in the form alleged by the plaintiff. His Honour articulated a number of bases for this conclusion:

- They had no independent status as risks.
- Information about the performance risks was disclosed in any event.
- The adverse matters, insofar as they were events requiring management, were in fact managed by the Group.

In a more general sense, His Honour summarized his conclusion with respect to the adverse matters as follows:

"The adverse matters, as events, and their impact on the Group, did not require disclosure. That is because they were events of the kind that management is required to grapple with on a day-to-day basis. The range of such events confronting businesses is difficult to define…. In my opinion, it was not until management realised that an event may not be capable of successful management to avoid the crystallisation of the performance risk, that Timbercorp Securities was under an obligation to inform investors in the schemes pursuant to its continuing disclosure obligation."[11]

[7] Ibid [37].
[8] Ibid [36].
[9] Ibid [56] – [57].
[10] Ibid [60].
[11] Ibid [67] – [69].

It was further noted that information about the adverse events (particularly the global financial crisis) was generally available information in any event, and as such did not require separate disclosure.

Use of witness statements

Witness statements – notably those of the lead plaintiff Mr Woodcroft-Brown and of sub-group representative Mr Van Hoff – were of particular importance to the plaintiffs case in establishing reliance on Timbercorp's disclosures. It was claimed by the plaintiff that his decision to invest in the various schemes was in reliance on the disclosures contained the various PDS documents.

The evidence of both witnesses in this regard was rejected by Justice Judd. Indeed, he went so far as to declare that "*the statements prepared for the plaintiff and Mr Van Hoff discredited their evidence as a whole*".[12] His Honour held that not only had the plaintiffs not relied on the PDS documents when making the decision to invest and to continue to pay their loans, the information in the PDS documents was "*quite incidental to their investment decisions*".[13] His Honour found that of far more concern to the plaintiffs was the tax benefit derived by them from their investment in the schemes.

Noting that the statements of both men contained "*striking similarities*" and showed signs of being "*overworked*", His Honour stated that "*where issues such as reliance are raised, witness statements are often an unsatisfactory form of evidence in chief*".[14]

He went on to state, in a fashion that should provide caution to lawyers preparing such documents, that "*overworked witness statements discredit the witness, embarrass legal practitioners involved in their preparation and undermine the trial process*".[15] His Honour concluded that the case "*confirms the danger in the overuse of witness statements.*"[16]

Expert evidence

His Honour also reserved some criticism for the expert witness for the plaintiff, again in a fashion that will be instructive for lawyers in future cases. He was particularly critical of Mr Dicks, the expert for the plaintiff, declaring his evidence "*suffered from a failure to become acquainted with important material before making his judgments and expressing opinions*." According to His Honour, Mr Dicks was "*all too willing to accept a limited body of material made available to him by the plaintiff's solicitors*" and "*became the plaintiff's advocate, too willing to accept the plaintiff's thesis. He set out to justify the thesis rather than to investigate and express properly grounded opinions*."[17]

While at first glance this might seem criticism directed squarely at Mr Dicks himself, it should be noted that His Honour recognised that the questions put to him were "*plainly difficult to answer*". He stated that questions formulated for answer by Mr Dicks "*were almost wholly inappropriate*".[18]

[12] Ibid [277].
[13] Ibid [77].
[14] Ibid [569].
[15] Ibid [572].
[16] Ibid [277].
[17] Ibid [398].
[18] Ibid [249].

Pleadings

As already discussed, His Honour made much of what he perceived to be a shift in the way the plaintiff's case was pleaded, to the way it was advanced at trial. He described two important aspects in which he thought the plaintiff's case at trial diverged from the manner in which it was pleaded and particularised:

1. the diminished importance of the adverse matters as "stand alone risks". Instead, they were argued at trial as achieving their significance from the financing risk;
2. the transition from the structural risk as pleaded (which His Honour characterised as the 'cash flow risk'), to the financing risk.

His Honour was of the view that this was undesirable for the conduct of the trial, but also that it was counter-productive to the plaintiff's own case.

In terms of the conduct of the case at trial, His Honour described the plaintiff's case as pleaded as a "*scatter gun approach to litigation*", accusing the plaintiff of attempting to "*cover every possible combination or permutation of fact and law*".[19] With respect to the pleadings, His Honour expressed particular concern about the statement of claim, and "*the difficulty it presented as a useful document to inform the court of the central issues in the case*".[20]

In terms of the impact on the plaintiff's own case, His Honour concluded that much of the evidence of the plaintiffs themselves, as well as the evidence of the plaintiff's expert Mr Dicks – presumably having been prepared in advance - was directed at the plaintiff's case as pleaded, rather than the manner in which it was advanced at trial.

Conclusions

It should be noted that the plaintiff is considering an appeal in the matter, and any conclusions are of course subject to any such appeal and subsequent rulings.

The case concluded that only the '*performance risk*' was requiring of disclosure to retail investors. That is, the risk that Timbercorp, as Responsible Entity, would be unable to perform its functions as manager of the schemes – this carrying with it a risk of failure of the schemes themselves. That risk was found to be adequately disclosed in the PDS documents. Other risks – the '*structural risk*' in terms of cash flow, and the 'adverse matters' - did not require disclosure until they in fact crystallised into *actual* risks. These guidelines should provide assistance and clarity for directors in determining the extent of their disclosure obligations.

There is significance, too, in the emphasis placed by His Honour on the need to directly prove reliance in such matters. Any suggestion that the American doctrine of 'fraud on the market' might be accepted in securities class actions in Australia (such as were advanced in the *Aristocrat*[21] class action) appears to have been quashed by Justice Judd's decision. As such, if the same approach is adopted in future matters, plaintiffs in these matters will need to focus their attentions early to evidence of <u>actual</u> reliance by investors on any representations and disclosure made by a company.

Clearly, in matters where reliance is a key issue, lawyers should be extremely careful in the preparation and use witness statements. Whether or not reliance evidence would be more

[19] Ibid [82].
[20] Ibid [276]. It should be noted that despite these difficulties, His Honour was quick to acknowledge the "*high degree of cooperation*" between counsel, and the fact that the case "*was presented efficiently and within a shorter time frame than initially anticipated*" [273].
[21] *Dorajay Pty Ltd v Aristocrat Leisure Limited* (ultimately settled).

appropriately led viva voce will be a decision made on a case-by-case basis, but in the event such evidence is led through statements, practitioners ought be conscious of His Honour's concerns about "*overworked'* statements, and the impact that can have on a witness's general credibility.

His Honour's comments regarding the failure of the plaintiffs' pleadings to narrow the issues for trial are also instructive. Aside from the impact such pleadings can have on the efficient conduct of a trial, it also appeared that one result of the shift in the plaintiff's case was that much of the evidence led by the plaintiff was 'off point', in the sense that it was directed at the case as argued at trial, not as pleaded.

HIH CLAIMS SUPPORT LIMITED v INSURANCE AUSTRALIA LTD (2011) 280 ALR 1

The High Court on 22 August 2011 handed down its decision in *HIH Claims Support Ltd v Insurance Australia Ltd* ('*HIH Claims Support*') which clarifies the availability of equitable contribution, particularly in respect to double insurance.

After the collapse of the HIH Group of insurance companies in 2001, the Commonwealth Government set up scheme whereby HIH Claims Support was to manage a trust whose objects were to provide assistance to individuals and small businesses who had HIH policies of insurance for 'hardship relief' subject to the satisfaction of certain criteria including the satisfaction of a means test to demonstrate 'genuine hardship'. A condition for relief was that the policy holder would assign his or her rights under the policy (including rights to claim against a third party) to HIH Claims Support. If the criteria were satisfied, the policy holder would receive 90 percent of what was otherwise payable under the HIH policy.

The scheme was not a means by which HIH policies were assigned to a third party. Rather, it was a funded mechanism whereby persons who satisfied the criteria were able to obtain the limited Commonwealth relief available.

In 1998 Mr Steele's business was sub-contracted to erect scaffolding at Albert Part for the Grand Prix. Unfortunately one of the scaffolds he erected fell down and damaged the "jumbotron" screen operated by Screenco. Screenco issued proceedings in the NSW Supreme Court. Mr Steele applied for and was granted relief by HIH Claims Support for his defence costs and ultimately his liability to pay damages.

Mr Steele also had a policy with SGIC. Initially, having received payment under the scheme, he then sought an indemnity under the SGIC policy in the Supreme Court of Victoria. Whilst he was successful at first instance, the Court of Appeal found in favour of SGIC on the basis that it was not obliged to indemnify Mr Steele in circumstances where his liability had already been discharged almost entirely by HIH Claims Support. Ashley JA said that, at its highest, there may be a claim for equitable contribution by HIH Claims Support if its liability was co-ordinate with that of SGIC, but, his liability having been discharged, he had no claim for indemnity against SGIC.[22] The High Court refused Mr Steele's application for special leave.

This inevitably led to HIH Claims Support bringing a claim for equitable contribution against SGIC.

[22] See *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq) & Anor* (2007) 18 VR 528, particularly at [151] – [159]

This was not strictly a case of double insurance because HIH Claims Support was not an insurer; it was not providing indemnity under an insurance policy. The critical issue for the High Court was whether the appellant in granting relief to Mr Steele had discharged a burden that was 'in substance' the same burden shared by the respondent.[23]

Whilst the HIH policy may have been co-ordinate with the SGIC policy, the High Court unanimously held that HIH Claims Support could not claim equitable contribution. The plurality (Gummow ACJ, Hayne, Crennan, and Kiefel JJ) emphasised the need for a 'common burden', not merely a common interest if equity is to intervene to order contribution. In this case, had Mr Steele originally claimed on the SGIC policy, he would be *ineligible* to claim hardship relief under the HIH Claims Support scheme and he would not have entered into the contractual arrangement whereby he assigned his rights under the HIH policy to it. Equally, SGIC would not have been able to claim contribution from HIH Claims Support. Thus:

> '[SGIC's] ability to claim the benefit of satisfaction based on [HIH Claims Support's] payments in respect of Steele, when sued by Steele in the first Victorian proceeding, is not sufficient to demonstrate a common burden on [SGIC] and [HIH Claims Support]. A "community of interest" between obligors is not a sufficient condition for the operation of an equity to contribute in circumstances where the obligations in question are qualitatively different, as they are here'.[24]

Heydon J similarly held that it was essential that there be 'mutuality' of a right to contribution.[25] The High Court's decision is in a sense straightforward. Equity intervenes to grant a right of contribution in order only to prevent the unfairness of one insurer having to bear the burden of indemnity simply because the claimant has claimed on one policy when he could equally have claimed on another. Because SGIC would have had no right to equitable contribution from HIH Claims Support, it follows that HIH Claims Support could not have a right to equitable contribution against SGIC.

Effect on Extended Contribution Principle

One question that arises, however, is whether the 'extended' contribution principle for double insurance is affected by the High Court's decision. This most often arises where a worker brings a common law proceeding under a motor vehicle insurance policy or, alternatively, makes a workers' compensation claim based on the negligence of the driver (or his fellow employee as the case may be). The worker is not insured under two policies. Rather, two policies respond to his claim, and indeed there may even be two separate potential defendants. Complications can arise if one of the potential defendants (whether or not through its insurer) settles the worker's claim.

In *Zurich Australian Insurance Ltd v GIO General Ltd* [2011] NSWCA 47[26] ('*Zurich*'), Mr McClellan sued Carrinbah, the owner of a bus coach and its trailer after he injured his shoulder when lifting the heavy tailgate. He claimed damages under the *Motor Accidents Compensation Act 1999* (NSW) on the basis that the tailgate was 'defective' because it was too heavy to operate safely. He did not sue his employer Tiger Tours because he could not prove a whole person impairment of 15 percent under the NSW *Workers Compensation Act*.

The motor vehicle insurer (Zurich) sought equitable contribution for its liability to Mr McLellan from the workers' compensation insurer (GIO). The NSW Court of Appeal unanimously held that Zurich had a right to contribution because the policies covered the same substantive risk,

[23] (2011) 280 ALR 1 at [32]
[24] (2011) 280 ALR 1 at [55]
[25] (2011) 280 ALR 1 at [66] – [68]
[26] The decision was handed down on 10 March 2011, almost 6 months prior to the High Court's decision in *HIH*.

namely the injury to Mr McLellan as a result of the defect in the trailer.

One of the many complexities in *Zurich* was that GIO's liability to Mr McClellan was only to make weekly payments, whereas Zurich's liability was to pay damages. There is a mechanism under the *Motor Accidents Compensation Act* to reduce damages to be awarded to take account of the damages that would otherwise be awarded under a common law claim against an employer (in Mr McLellan's case, nil).

In light of the High Court's decision *HIH Claims Support*, one can envisage that an insurer in GIO's position will argue that, as the worker could never have satisfied the 15 percent whole person impairment threshold, he or she would never have been able to bring a common law claim against his employer. Accordingly, there would not be the requisite mutuality of contribution, and equitable contribution should not be granted.

As such, one can expect that *HIH Claims Support* will be relied upon as clarification of the outer limit of insurers' rights to claim equitable contribution based on the extended contribution principle.

Arbitration and ADR

Case Note by Daniel Bongiorno

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248

The Court of Appeal's recent judgment in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*[27] concerns the enforcement of a foreign arbitral award under Pt II of the *International Arbitration Act 1974 (Cth)* (the "IAA"), which largely implements the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (the "New York Convention"). It overturns Croft J's decision in the Trial Division,[28] entitling the award-debtor to enforce a Mongolian arbitration award.

Facts

Altain Khuder LLC ("Altain") is a Mongolian mining company. Altain contracted with IMC Mining Inc ("IMC Mining"), a British Virgin Islands company, for the provision of certain engineering services. IMC Aviation Solutions Pty Ltd ("IMC Solutions"), an Australian company related to IMC Mining, was not a party to this contract. It was, however, used by IMC Mining to perform some of the relevant engineering services.

A dispute arose under the contract and Altain commenced arbitration in Mongolia against IMC Mining only. IMC Solutions was neither a party to the contract nor to the arbitration. No IMC Solutions personnel attended the arbitration.[29] Notwithstanding this, the Arbitral Tribunal's award, in its terms, was enforceable against both IMC Mining and IMC Solutions.[30]

A local Mongolian court subsequently verified the Arbitral Tribunal's award.[31] IMC Solutions did not participate in this proceeding either.

Altain sought to enforce the award against IMC Solutions in the Supreme Court of Victoria under ss 8 and 9 of the IAA.[32] In this context, IMC Solutions objected to its enforcement. Each ground of objection arose, in one way or another, out of IMC Solutions' lack of privity to the agreement under which the arbitration was conducted.

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[27] [2011] VSCA 248 (the "CoA Judgment").
[28] *Altain Khuder LLC v IMC Mining Inc and IMC Mining Solutions Pty Ltd* [2011] VSC 1 (the "Trial Division Judgment").
[29] This matter had been decided differently in the Trial Division. See CoA Judgment [11]; [22] – [23] (Warren CJ); [201] – [230] and [238] – [256] (Hansen JA and Kyrou AJA).
[30] CoA Judgment [13].
[31] CoA Judgment [14].
[32] As informed by *the Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Vic)*, Ch II, R 9.04; see also *Practice Note No 2 of 2010 (Arbitration Business)*.

Legislative Background

Two provisions of the IAA are relevant here, both of which derive from the New York Convention.[33]

First, s 8 of the IAA provides for the enforcement of a "foreign award"[34] as if it were a judgment of an Australian court.[35] Importantly, s 8(1) provides:

> Subject to this Part, a foreign award is binding by virtue of this Act for all purposes *on the parties to the arbitration agreement in pursuance of which it was made*. (Emphasis added)

Section 8 also provides for certain confined bases upon which an Australian court may refuse enforcement.[36] These grounds of refusal are exclusive.[37]

Secondly, in the context of this enforcement process, s 9 prescribes how an applicant proves the award; namely, by producing to the Court:[38]

a) the duly authenticated original award or a duly certified copy; and

b) the original arbitration agreement under which the award *purports to have been made* or a duly certified copy. (Emphasis added)

The Court of Appeal's judgment concerns, among other thing, the interaction between these two provisions.

Stage One: The IAA's Threshold Requirements

As a threshold issue, IMC Solutions submitted that, to enforce an award, the award-creditor must at the outset establish that a valid foreign award exists binding *on the parties to the arbitration agreement in pursuance of which it was made* (s 8(1) of the IAA). This requirement was a threshold requirement to be established *before* considering those confined grounds for refusal in s 8(5) and (7) of the IAA. IMC Solutions submitted that, not being a party to the agreement between Altain and IMC Mining, no agreement existed in pursuance of which the relevant award was made.

The Trial Judge, after an extensive review of foreign authorities on this aspect of the New York Convention,[39] rejected this argument. Rather, "having complied with section 9 of the IAA, the plaintiff faces no onus to establish that a foreign award exists binding on the parties to the arbitration agreement in pursuance of which it was made; either under the provisions of s 8(1) of the IAA or as a result of the application of corresponding provisions of the New York Convention."[40]

[33] See the New York Convention, Articles IV and V.
[34] Defined as "an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia..." See the IAA, s 3.
[35] The IAA, s 8(1)-(3).
[36] The IAA, s 8(5) and (7).
[37] The IAA, s 8(3A).
[38] The IAA, s 9(1).
[39] Trial Division Judgment [40]-[60].
[40] Trial Division Judgment [60].

The Court of Appeal disagreed. Rather, Hansen JA and Kyrou AJA held:[41]

> [A]t stage one, the award creditor must satisfy the Court, on a *prima facie* basis, of the following matters before the Court may make an order enforcing the award:
>
> (a) an award has been made by a foreign arbitral tribunal granting relief to the award creditor against the award debtor;
>
> (b) the award was made pursuant to an arbitration agreement; and
>
> (c) the award creditor and the award debtor are parties to the arbitration agreement.

In the vast majority of cases, "[w]here an award expressly states that it has been made in favour of the award creditor against the award debtor pursuant to an arbitration agreement and that agreement names the award creditor and the award debtor as parties, upon production of the arbitration agreement and the award in accordance with s 9(1), the award creditor would, by virtue of s 9(5), establish its *prima facie* entitlement to an order enforcing the award."[42]

However, "where, on the face of the arbitration agreement and the award, the person against whom the award was made was not a party to the arbitration agreement," further evidence is required to invoke the Court's jurisdiction under s 8 of the IAA.[43] In such a case, the matter should proceed *inter partes*[44] - not *ex parte* as the Trial Judge had done.[45]

In this case, IMC Solutions were held liable under the award. Notwithstanding this, it was not a party to the agreement pursuant to which the award was made. Accordingly, absent other evidence, Altain had failed to discharge its onus to satisfy the Court of the matters (a) – (c) set-out above.[46]

Stage Two: Objecting under s 8(5) and (7) of the IAA

Once the award-creditor has satisfied the IAA's threshold requirements, the award-debtor bears the legal onus to establish one of the matters in ss 8(5) or 8(7) of the IAA,[47] thereby empowering the Court to refuse to enforce the award.

The Trial Judge held that an award-debtor should, in challenging an award under ss 8(5) or 8(7) of the IAA, "provid[e] the court with clear, cogent and strict proof in relation to the exhaustive grounds listed [in those sections]" without "re-litigat[ing] the issues which have been decided by the Arbitral Tribunal, and which have subsequently been verified by the courts of [the arbitral seat]."[48] So much comports with the New York Convention's "pro-enforcement" policy, lest award-creditors be required to re-litigate their dispute in a multiplicity of courts hearing their applications for enforcement.[49]

[41] CoA Judgment [135] (Hansen JA and Kyrou AJA); see also [38] – [43] (Warren CJ).
[42] CoA Judgment [137].
[43] CoA Judgment [138].
[44] CoA Judgment [143] and [196] – [200].
[45] Trial Judgment [15] – [19].
[46] CoA Judgment [260].
[47] CoA Judgment [145] and [173]; Trial Judgment [64].
[48] Trial Judgment [64].
[49] Trial Judgment [69].

The Court of Appeal eschewed this analysis.[50] Rather, the IAA is silent as to the appropriate standard of proof and, given the civil nature of the proceedings; the requisite onus should be the balance of probabilities.[51]

In this case, the Court of Appeal held that, even if Altain had discharged its onus with respect to the IAA's threshold requirements, IMC Solutions discharged its onus under s 8(5)(b) of the IAA,[52] empowering the Court to refuse to enforce the award.

Section 8(5)(b): The Arbitration Agreement is Not Valid under the Law Expressed in the Agreement

Section 8(5)(b) empowers the Court to refuse to enforce an award if the agreement in pursuance of which it was made was not valid under the law expressed in that agreement (in this case, Mongolian law).

It is under this heading an award-debtor may complain that an award should not be enforced because the award-debtor was not privy to the arbitration agreement (put more simply, a complaint that the Arbitral Tribunal acted beyond jurisdiction). [53]

With respect to IMC Solution's complaint that the Arbitral Tribunal acted beyond jurisdiction, the Trial Judge deferred to:

a) the Arbitral Tribunal, in its view that it had jurisdiction over IMC Solutions; and

b) the Mongolian court, in its verification of the Arbitral Tribunal's award under Mongolian law.

The Trial Judge also preferred Altain's expert evidence on Mongolian law. Accordingly, the Trial Judge held that IMC Solutions had not discharged its onus of satisfying him that the Arbitral Tribunal lacked jurisdiction over it.[54]

The Court of Appeal disagreed. Rather, Hansen JA and Kyrou AJA endorsed the judgment of Mance JSC in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan ("Dallah")*:[55]

> The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the [award debtor] at all…

And that of Saville JSC in the same case:[56]

> The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The

[50] CoA Judgment [192] – [195].
[51] CoA Judgment [192] – [195].
[52] CoA Judgment [261]. Note that IMC Solutions attacked the Trial Judge's conclusions under ss 8(5)(b)(c) and 8(7)(b). In a shorter analysis, Hansen AJA and Kyrou AJA found that these grounds were established on the facts. CoA Judgment [303] – [306].
[53] CoA Judgment [171] – [172].
[54] Trial Judgment [98].
[55] [2010] UKSC 46; [2011] 1 AC 763, 812-13 [28], [30].
[56] [2010] UKSC 46; [2011] 1 AC 763, 850 [160].

> findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself.

Hansen JA and Kyrou AJA conclude:[57]

> [T]his Court can determine for itself not only whether the Tribunal made crucial findings of fact that enabled it to exercise jurisdiction over [IMC Solutions], but also whether the Tribunal had jurisdiction over [IMC Solutions].

Their Honours then considered the expert evidence regarding when, under Mongolian law, a non-signatory to an arbitration agreement can be bound by an award under that agreement.[58] They held that no circumstances in this case justified the Aribitral Tribunal's assertion of jurisdiction over IMC Solutions under Mongolian law. Accordingly, IMC Solutions' complaint under s 8(5)(b) had been established.[59]

Their Honours' conclusion arose, to some degree, out of the paucity of the Arbitral Tribunal's reasons.[60] Clearly, if the Arbitral Tribunal had properly articulated a basis on which IMC Solutions was made the subject of the award, this would be something an enforcing Court could consider. However, in the absence of such an articulation, their Honours drew inferences against the award's enforceability.[61]

Estoppel

The Trial Judge held that IMC Solutions was issue estopped from challenging the award's enforceability because it failed to participate in proceedings in the Mongolian courts, which had verified the award.[62]

The Court of Appeal disagreed. Hansen AJA and Kyrou AJA endorsed the view of Mance JSC in *Dallah*:[63]

> [T]he argument based on issue estoppel was always doomed to fail. A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement.

Accordingly, notwithstanding IMC Solutions' failure to participate in Mongolian court proceedings verifying the award, it was not estopped from now challenging the award's enforcement.[64]

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[57] CoA Judgment [270].
[58] CoA Judgment [274] – [278].
[59] CoA Judgment [288] – [297] and [301].
[60] See especially CoA Judgment [280] – [284].
[61] See especially CoA Judgment [286].
[62] Trial Judgment [70].
[63] CoA Judgment [319]; *Dallah* [2010] UKSC 46; [2011] 1 AC 763, 810 [23].
[64] CoA Judgment [320].

Concluding Remarks

The Court of Appeal's approach may appear like a marked departure from the "pro-enforcement" approach employed in the Trial Division. The judgment has attracted some criticism due to its perceived departure from the New York Convention as applied in other jurisdictions.[65] As the Court of Appeal recognized, there are reasons supporting both approaches.[66] That said, in the vast majority of cases, the difference in approaches will not yield a different outcome. For this reason, in many instances at least, the two approaches may turn on a distinction without a difference.

[65] See, eg, Gary Born, *International Commercial Arbitration* (2009), 2705 - 2707; *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [12] (re England & Wales); cf *Dallah* [2010] UKSC 46, [12]; *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd and Another* [2006] 3 SLR(R) 174, [17] and [33] – [44] (re Singapore); *Fertilizer Corp of India v IDI Mgt Inc* 517 F.Supp. 948, 950-51 (re USA).

[66] CoA Judgment [169].

Equity Section

Case Note by Jonathan Wilkinson

HIH CLAIMS SUPPORT LIMITED v INSURANCE AUSTRALIA LIMITED

JUDGES: GUMMOW ACJ, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

DATE OF JUDGMENT: 22 AUGUST 2011

CITATION: [2011] HCA 31

Equity – Doctrine of contribution

Facts

Ronald Steele was sub-contracted to erect a scaffold at Albert Park, Melbourne for the purposes of the 1998 Australian Grand Prix. At all material times, Steele was insured under a general liability insurance policy issued by a company in the HIH Group. In turn, the Australian Grand Prix Corporation and its contractors and sub-contractors, one of which was Steele, were insured under an insurance policy issued by SGIC General Insurance Limited ("SGIC"). At the Australian Grand Prix held on 3 March 1998, a scaffold erected by Steele collapsed, causing damage to a large and valuable video screen, which was operated by Screenco Pty Limited ("Screenco"). Three separate proceedings arose out of this event.

First proceeding

In the first proceeding, Screenco sought damages from Steele in the Supreme Court of New South Wales. Steele made a claim under the HIH policy for indemnity. However, before the proceedings commenced, HIH collapsed and was placed in liquidation. Steele applied for assistance under the Scheme instituted by the Commonwealth Government to assist policy holders.[67] Having determined that Steele was eligible for assistance under the Scheme, HIH Claims Support Limited[68] paid 90% of the judgment sum awarded to Screenco at the conclusion of the New South Wales proceedings, as well as 90% of the costs of all other parties which Steele had been ordered to pay.

Second proceeding

In the second proceeding related to the event, HIH claimed equitable contribution from the respondent[69] in respect of HIH's indemnification of Steele in the New South Wales proceeding.

[67] The Scheme was established under the *Appropriation (HIH Assistance) Act* 2001 (Cth). Under the Scheme, public funds were made available to certain policyholders affected by the HIH collapse. Notably, the focus of the Scheme was on "hardship relief"- it was not directed to co-insurers in respect of the HIH companies' insurance policies. Nor was it intended as a replacement insurance policy, in fact the notes to the scheme instructed applicants to "seek alternative cover immediately if your insurance cover is still with an HIH company" – at [14].

[68] As the official administrator of the Scheme.

[69] Initially the respondent was SGIC, later to be replaced by Insurance Australia Limited.

Steele, on the other hand, claimed an indemnity in respect of the damages and costs he had been ordered to pay, including sums paid by the appellant. In its defence, the respondent argued that its obligation to indemnify Steele had been discharged by the payments made by the appellant. HIH and Steele were successful at first instance,[70] but the Court of Appeal subsequently allowed the respondent to appeal the decision.[71] Steele's application to appeal that decision was refused.[72]

Third proceeding

The third proceeding related to the event was commenced by the appellant in the Supreme Court of Victoria, with the purpose of obtaining equitable contribution totalling half of all the benefits it had paid in respect of Steele. The appellant failed both before the primary judge and on appeal to the Court of Appeal. Hollingworth J held that Steele's assignment to the appellant of his rights under the HIH policy did not constitute an assignment by HIH of its legal obligations under that policy, and that the appellant's liability to indemnify Steele arose solely from the independent contract it formed with Steele. Accordingly, her Honour found that the respective liabilities of the appellant and respondent were not co-ordinate as they did not co-exist at the "relevant date".[73]

In upholding the finding of the primary judge, the Court of Appeal added that the appellant was not entitled to contribution for several other reasons. These included, first, that the liabilities for which the parties indemnified Steele were different; secondly, that the principles of the doctrine of contribution did not require the intervention of equity on the facts of the case; and thirdly, that Steele would not have had "equal or substantially equal recourse" to both the appellant and the respondent, as required by the doctrine of contribution – since, if Steele had been paid under the SGIC policy, no contract of indemnity would have come into existence between him and the appellant as "there would have been no occasion for him to make a claim on the Scheme."[74] Following this decision, the appellant was granted leave to appeal to the High Court.

Issues

Before the High Court, the appellant contended that the Court of Appeal had erred in concluding that the liabilities between the appellant and Steele and between the respondent and Steele were not co-ordinate. The appellant characterised the case as one of double insurance[75] on the basis that the HIH policy and the SGIC policy involved co-ordinate liability. Hence, the appellant argued, it would be inequitable for the respondent to escape liability to contribute just because the appellant had assumed responsibility for the insolvent insurer. The argument raised two principal issues for (re-)consideration by the Court, namely the nature of the insurance liabilities involved, and whether equity could properly be applied in the context of the case.

Decision

In a majority judgment,[76] the Court commenced its reasoning process by observing that "equity would only recognise and enforce a duty to contribute if a co-insurer, against whom such relief was sought, were solvent."[77] Further to this, the Court explained that the rationale for equitable contribution arose out of a *common interest* of two or more obligors[78] - hence, it did not apply

[70] *HIH Casualty & General Insurance v Insurance Australia Ltd* (2006) 14 ANZ Insurance Cases 61-685.
[71] *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (In liq)* (2007) 18 VR 528.
[72] *Steele v Insurance Australia Ltd* [2008] HCA Trans 210.
[73] *HIH Claims Support Ltd v Insurance Australia Ltd* (2009) 15 ANZ Insurance Cases 61-824 at 77, 841 [127]-[128].
[74] *HIH Claims Support Ltd v Insurance Australia Ltd* (2010) 16 ANZ Insurance Cases 61-863 at 78, 501-78, 502 [23].
[75] Referring to *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342; [1969] HCA 55.
[76] Gummow ACJ, Hayne, Crennan and Kiefel JJ, with Heydon J agreeing in a separate judgment.
[77] At [32], referring to *Mahoney v McManus* (1981) 180 CLR 370 at 376.
[78] Citing Eyre LCB in *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 322-323.

between obligors "where one of them is, in fact, a surety for a surety rather than a co-surety."[79] The Court's subsequent analysis of case law confirmed this finding.[80]

Turning to the question of co-ordinate liabilities, the Court drew on a number of decisions[81] to extract the applicable principles. These included the proposition that the search for a common obligation should not be defeated by too technical an approach; that it is possible to have a common obligation where the obligation of each of the two obligors has a different source;[82] and that "the doctrine is not enlivened merely because the claimant's payment operates to the financial benefit or relief of the other party."[83] In summarising the findings of other cases, the Court noted that

> The authorities show that no court has departed from the requirement that the equity to contribute depends on obligors bearing a common burden, the basis for co-ordinate liabilities in respect of the one loss. A proposition upon which the appellant wishes to rely – namely, that equity looks to substance rather than form – has never been invoked successfully to achieve a departure from, or modification of, that requirement.[84]

Applying the law to the case before it, the Court held that the nature of the Scheme implemented by the government was such as to preclude double indemnification that could give rise to equities. This was because the assignment of the insured's rights, central to the Scheme, "did not place the appellant in the same position as HIH either effectively or 'in substance' as contended on behalf of the appellant."[85] Rather, the Court said, "the appellant stepped into the shoes of Steele, who had assigned his rights to the appellant, thereby entitling the appellant as assignee creditor to lodge a proof of debt in HIH's liquidation."[86] The Court held that this assignment did not create a common burden between the appellant and the respondent, because if the respondent had paid Steele, then Steele would not have been eligible for assistance under the Scheme. Furthermore, the Court pointed out, since the appellant "undertook no enforceable obligations under the Scheme until a payment or the first in a series of payments was made, the respondent would never have had an opportunity to bring a claim for contribution against the appellant."[87]

Finally, the Court held that since the offer of assistance under the Scheme was conditional upon Steele's assignment of his rights under the HIH policy, it "could not be said that the appellant's contract to indemnify Steele… and the respondent's contract of insurance covering Steele were… the 'one insurance.'"[88] In turn, a 'community of interest' between obligors was not "a sufficient condition for the operation of an equity to contribute in circumstances where the obligations in question are qualitatively different, as they are here."[89]

Orders

Appeal dismissed with costs

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[79] At [37].
[80] At [46].
[81] *Commercial and General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 CLR 374; *Mahoney v McManus* (1981) 180 CLR 370; *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* (1987) SLT 345; *Friend v Brooker* (2009) 239 CLR 129.
[82] At [39].
[83] At [45], citing *Friend v Brooker* (2009) 239 CLR 129 at 161 per French CJ, Gummow, Hayne and Bell JJ.
[84] At [47].
[85] At [50].
[86] Ibid.
[87] At [53].
[88] At [54].
[89] At [55].

The author acknowledges the Supreme Court research officer's contribution to this case summary.

Corporations and Securities

Case Note by Roslyn Kaye

Australian Securities and Investments Commission v Healey (No 2) [2011] FCA 1003

Company directors – *Corporations Act* contraventions – applications for relief from liability – disqualification – pecuniary penalties

On 31 August 2011, Justice Middleton handed down judgment in respect of the questions of penalty and relief from liability in this proceeding. His Honour had earlier, on 27 June 2011, decided that various former non executive directors, the former company CEO and the former company CFO, were liable for breaches of their directors' duties under the *Corporations Act 2001* in their roles as directors of the Centro group of companies (see CommBar newsletter of August 2011 for a summary of that June judgment).

In brief, Justice Middleton found that it was appropriate to make declarations of contravention against each of the non executive directors, the former CEO (Mr Scott) and the former CFO (Mr Nenna) (in other words, their application for relief from liability under sections 1317S and 1318 were rejected). Further, his Honour imposed on Mr Scott a pecuniary penalty in the sum of $30,000, and his Honour disqualified Mr Nenna from being a company director for a period of two years from 10 October 2011.

Justice Middleton's reasons for decision emphasise strongly the importance of the principle of general deterrence, and that principle was clearly at the forefront of his Honour's mind in making the various orders and declarations. Importantly, his Honour found that the directors all acted honestly in carrying out their duties, however other factors, and particularly the seriousness of the breaches of the Act, militated against the grant of relief from liability. The seriousness of the breaches is evidenced by the large and significant difference, in dollars, between the purported and actual classifications of the liabilities in the Centro group's records. Further in that respect, the Court noted that the provision of information to shareholders and the market is one of the fundamental purposes of the requirements of the *Corporations Act* that financial statements and reports must be published.

The Court declined to disqualify Mr Scott and the non executive directors from acting as directors in the future, having regard to the circumstances of the contraventions and the past and future contributions of the individuals in question to the corporate world. However, Justice Middleton did disqualify Mr Nenna for a period of two years, due to the seriousness of the contraventions and his position in the companies. His Honour considered that the following four factors are of primary importance to a court in considering whether to order disqualification: the nature and seriousness of the contraventions, protection of the public, retribution and deterrence, and mitigating factors. Further, Justice Middleton held that the consequences of the

contravention are relevant to the determination of the period of the disqualification.

As to the issue of pecuniary penalties, his Honour considered that the principle of totality should be used as the aggregate penalty (taking into account both pecuniary penalty and disqualification) for each director must be 'just and appropriate'.

In favour of the directors, the Court took into account the fact that once the errors came to the attention of the board, it took swift action to initiate an independent investigation into the matter. Further, his Honour appreciated that the publicity surrounding the ASIC prosecution had attracted much publicity and therefore had caused both embarrassment and reputation damage to each of the directors. Additionally, the Court recognised the genuine contrition expressed by each of the directors. In particular, in the case of Mr Scott, the Court also took into account his dedication to his role as CEO and the growth of Centro between 1997 and 2007. In assessing the responsibility of each of the non executive directors for the present purposes, Justice Middleton did not differentiate between them, as although they had different backgrounds, the parts played by each of them, as pleaded by ASIC, was the same.

Finally, in respect of costs, Justice Middleton ordered that the defendants would all share in paying ASIC's costs, and that Mr Nenna would bear a smaller share given that he had not contested liability. The parties agreed upon the costs orders which were made. His Honour noted that given the fact that the defendants were insured, the fact of the costs order against the directors was not an important consideration in respect of the appropriate penalties in this case.

Property and Probate

Case Note by James Catlin

Wood & Anor v McLean & Anor [2010] VSC 550 (8 December 2010)

ADMINISTRATION AND PROBATE – Deceased transferred property to daughter during his lifetime – Deceased's other children claim transfer was unconscionable – Other children are not beneficiaries – Other children have issued separate proceedings seeking provision under *Administration & Probate Act 1958* (Vic) Pt IV – power to set aside inter vivos gift in order to replenish an estate.

The strict jurisdictional limits of Part IV (Family Provision) of the Victorian *Administration & Probate Act*, 1958 to property in the estate at death continues to stand in stark relief to those in New South Wales where transfer of property by a testator up to three years prior to death can be tipped back into the estate for distribution.

The New South Wales *Family Provision Act* 1982 has long given NSW Courts the power to undo inter vivos attempts to thwart judicial capacity to make adequate and proper provision for those whom, a deceased had a moral obligation to provide. Its statutory successor the *Succession Act* 2006 continues to do so.

In *Wood v Mclean* the Plaintiff sought to rely on unconscionability to achieve the NSW statutory effect of notional estate and failed.

The decision was being appealed but has settled.

Background

The plaintiffs were two of the children the deceased who died on 18 September 2009. Prior to his death and on 18 February 2008, the deceased transferred a property in Croydon to his youngest daughter, the second defendant. The Property was the deceased's largest asset.
The deceased's last will dated 24 March 2009 made no provision for the Plaintiffs.

The Plaintiffs sought to impugn the pre-death gift on two grounds. Firstly that the deceased was so enfeebled at the time of the gift that the second defendant could not conscionably hold on to it. The second ground was that the gift had been directed to thwarting the proper claims of legitimate beneficiaries, namely the Plaintiffs under a Part IV claim.

The Plaintiffs sought that the transfer of the Property to Elizabeth should be set aside with the

consequence that it would become is an asset of the deceased's estate and available for distribution. The Defendants sought to strike out the claim on the basis that it was hopeless.

The Plaintiffs claim was also attacked on the grounds of an absence of standing. Their claim that they were contingent beneficiaries by reason of a possibly positive future outcome in their Part IV claim was rejected by Sifris J. This case note is not concerned with that element of the application.

This second ground relied essentially sought to duplicate the operation of the "notional estate" provisions of the *Succession Act* 2006. These provide that the Court may make a "notional estate order" designating property transferred before death as notional estate of a deceased person.

The first threshold requirement is that full valuable consideration has not been given for the transfer of the property. The second is that the order is being made as part of a Family Provision proceeding. The third is that the deceased left no estate or if such estate exists it is insufficient for proper family provision.

If the inter vivos transfer was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased person for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order it can in effect be set aside if it occurred three years or less before the death of the deceased.
If the transfer was entered into when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education or advancement in life of any person who is entitled to apply for a family provision order which was substantially greater than any moral obligation of the deceased person to enter into the transaction sought to be set aside then the Court can overturn the transaction if it occurred one year or less before death.

There are a number of checks on the Court's power. The Court must not designate as notional estate, property that exceeds that necessary, in the Court's opinion, to allow the provision that should be made, or, if the Court makes an order that costs be paid from the notional estate, that necessary to pay the costs.

> Further the Court must not make a notional estate order unless it has considered the following:
> (a) the importance of not interfering with reasonable expectations in relation to property,
> (b) the substantial justice and merits involved in making or refusing to make the order,
> (c) any other matter it considers relevant in the circumstances."

However the power once exercised is significant. The effect of notional estate order is that a person's rights are extinguished to the extent that they are affected by a notional estate order: S 84.
In *Wood's* case, in the absence of a Victorian equivalent the Plaintiffs had to take a more convoluted route.

The Victorian Court of Appeal in *Wood & Anor v McLean & Anor* [2011] VSCA 37 comprised of Mandie and Redlich JJA considered the question of standing might be further heard on appeal. It is unclear whether the claim to set aside the inter vivos gift might have also been considered. Now it will not be.
In the meantime, the NSW Supreme Court made 10 notional estate orders between February 2010 and May 2011. In the years before 2010 the number is in the hundreds. Its notional estate jurisdiction remains unique in Australia.
The breath of the notional estate powers including the powers are wide in the extreme as

demonstrated by their application to joint tenancies and superannuation (nomination of, or failing to nominate, the recipient of superannuation death benefits may result in the superannuation death benefit being designated notional estates: *Kembrey v Cuskelly* [2008] NSWSC 262). The power possessed by NSW Courts is also possessed by English Courts under the *Inheritance Provision for Family and Dependants Act* 1975. English Courts can set aside transactions that occurred up to 6 years prior to death: s.10. The absence of these powers in Victoria remains a curiosity or alternatively a reflection of a purer belief in this state in the sanctity of those property rights inherent in the principles of freedom of testation.