

## BRIEF NOTE

### Recent Developments and Practical Tips for Lawyers

#### ISSUE 1: SPRING 2006

##### **CONTRACTS ILLEGAL UNDER THE TRADE PRACTICES ACT: THE HIGH COURT DECIDES**

by Tom Brennan

The High Court recently held that the principles for dealing with contracts made illegal by the Trade Practices Act differ from general law principles.

It had appeared well settled, at least since the decision of the Full Court in *News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410* that general law principles for dealing with contracts, entry into which was illegal, were to be applied where the illegality arose under the Trade Practices Act. Those principles were:

1. Where a statutory provision provides that entry into a contract is contrary to law, the contract is void unless the repugnant clauses of the contract can be severed.
2. The repugnant clauses of a contract can be severed only if the severance of the clause does not materially change the intent of the contract.

In *SST Consulting Services Pty Limited v Rieson and Anor* [2006] HCA 31 the High Court by majority held that the principles that apply to contracts entry into which is illegal by reason of contravention of the Trade Practices Act fundamentally differ. The relevant principles are:

1. Where a provision of the Trade Practices Act provides that entry into a contract is contrary to law, the contract is valid except for the repugnant clauses.
2. The repugnant clauses of a contract must be severed in so far as they contravene the Trade Practices Act.
3. Other provisions of the contract are to be given full force, even where the repugnant clause which is severed constituted consideration for the promise sought to be enforced or was an important and inseparable element in the contract.

The decision adds a significant dimension to the risks to be managed in drafting contractual documents. Drafters should consider including a clause which would enable a party to avoid any promise made in consideration of a clause which might contravene the Trade Practices Act.

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## **TRUSTS – ASIC v Carey (No 6) (2006) 58 ACSR 141: Power to appoint receivers to property held under discretionary trusts**

In proceedings related to the winding up of the Westpoint Group companies, *Carey (No 6)* concerned an application by ASIC under s 1323 of the Corporations Act 2001 (Cth) ('the Act') for the appointment of receivers to property held by third parties on discretionary trusts for the benefit of the defendants.

His Honour Justice French found that the respective interests of the defendants under the trusts in question were of such a proprietary character as to fall within the extended definition of 'property' under s 9 of the Act – consequently making the property held under the discretionary trusts amendable to the receiver orders sought by ASIC.

*Carey (No 6)* also contains a discussion on the important distinction between exhaustive and non-exhaustive discretionary trusts.

**By Benjamin Kasep**

## **INDUSTRIAL RELATIONS – Unfair contracts: Industrial Relations Act s 106**

The Industrial Relations Amendment Act 2005 (NSW), which commenced on 9 December 2005, confirms the Industrial Relations Commission's jurisdiction under s 106 of Industrial Relations Act to vary or avoid contracts which do not themselves lead directly to the performance of work in an industry in NSW, subject to:

- a) it being related to a contract whereby the person performs work in an industry; and
- b) the performance of the work is a significant purpose of the contractual arrangements made by the person.

In doing so it reverses in part *Solution 6 Holding Ltd v Industrial Relations Commission of NSW & Anor* (2004) 60 NSWLR, which was recently upheld by the High Court in *Fish v Solution 6 Holdings Limited* [2006] HCA 22.

Accordingly, it is likely that parties will continue to resort to s 106 in a wide range of contract disputes.

**By Nicholas Newton**

## **COSTS - Cost Agreements on a conditional basis: Legal Profession Act s 324**

Under the Legal Profession Act 2004, it is no longer possible to charge an "uplift" on contingency fee arrangements in claims for damages: s 324(1). Where a cost agreement purports to charge some sort of uplift, or is

interpreted as doing so, it may render the entire cost agreement void and render the fees irrecoverable: s 327.

Cases on similar legislation in other jurisdictions include *Equuscorp v Wilmoth* (No4) [2006] VSC 28 and *Casey v Quabba* [2006] QCA 187. Whether such a strict approach will be taken in New South Wales remains to be seen.

**By Christopher Wood**

## **TORT - Obvious risk: C G Maloney Pty Ltd v Hutton-Potts & Anor [2006] NSWCA 136**

Unless a plaintiff proves on the balance of probabilities that the plaintiff was not aware of an "obvious risk" the plaintiff is presumed to have been aware of the risk: s 5G of the Civil Liability Act 2002.

The plaintiff slipped on unbuffered polish on a recently polished wooden floor. His Honour Justice Bryson rejected the proposition that this was an obvious risk. The risk which matured needed to be analysed with the appropriate level of precision. Here, the harm was caused not merely by the recent polishing of the floor, but by the fact that there was polish on the floor which was not visible and had not been removed. To find that the risk which caused the injury was an obvious risk would have involved attributing to the reasonable person in the plaintiff's position discernment, as an obvious matter, that there may (even with a low degree of probability) be polish on the floor which was not visible. Such analysis would require not only advertence to what the cleaner was doing, but advertence to the risk that it was not being done properly.

**By Gary Doherty**

## **PRACTICE POINTS**

### **Property (Relationships Act) - Costs**

In the light of *Vollmer v Hauber Davidson* [2006] NSWCA 79 it is suggested that practitioners keep in mind the following in relation to costs in Property (Relationships) Act proceedings:

- The general rule is that costs follow the event.
- However, it cannot be assumed that the plaintiff will be awarded costs merely because the plaintiff obtains an order for property adjustment.
- A plaintiff or cross claimant would be well advised to frame his or her claims for relief realistically and/or to make a realistic offer of settlement at an early stage.

**By Edmund Finnane**

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