

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

ISSUE 12: SUMMER 2009/10

PROPORTIONATE LIABILITY

By David Parish

In *St George v Quinerts* [2009] VSCA 245, the Victorian Court of Appeal recently discussed who a defendant may name as a concurrent wrongdoer to invoke the benefits of the apportionment provisions of the nationally consistent proportionate liability scheme. (In NSW the provisions are found in Part IV of the *Civil Liability Act 2002*.) The result in *Quinerts* is at odds with the New South Wales Supreme Court decision of *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505.

In both cases, a lender retained a firm to protect it from a specific risk (a valuer to ensure sufficient equity in a secured property *Quinerts*; a solicitor to draft a fraud proof mortgage in *Vella*). When that risk eventuated and loss caused by the defendant's negligence ensued, the lender commenced proceedings against the firm for breach of duty of care. The defendant in each case subsequently named the source of the risk (the defaulting borrower in *Quinerts*; the fraudsters in *Vella*) as concurrent wrongdoers.

To be a concurrent wrongdoer, a party's acts or omissions must have caused "*the loss or damage that is the subject of the claim.*"

In *Vella*, Young CJ in Eq. seems to have come to the conclusion that the fraudsters were concurrent wrongdoers with the solicitors because "*the loss or damage the subject of the claim*" was the lender's money and both, albeit in different ways, caused that loss.

In *Quinerts*, the Victorian Court of Appeal held that the loss or damage caused by the named concurrent wrongdoer must be the *same damage*. Because the damage caused by the borrower's failure to repay the loan was different to the damage caused by the valuer's failure to undertake a proper valuation, the borrower had not caused the same damage the subject of the negligence claim and he was therefore not a concurrent wrongdoer.

Had the *Quinerts* interpretation been applied in *Vella*, the solicitor would not have had the benefit of the apportionment provision as "*nothing done or omitted to be done by the fraudster caused the solicitors to fail to draw [an effective] mortgage.*"

The effect of the interpretation in both cases is best understood borrowing an analogy from *Quinerts*: can a bank's insurance broker who negligently fails to renew the insurance policy then benefit from naming the thief as a concurrent wrongdoer when the bank cannot recover on the policy after a robbery? The Supreme Court of NSW would say yes; the Victorian Court of Appeal would say no.

Clerk: Paul Walker

**Barristers
(alphabetically):**

Jennifer Beck
Andrew Bouris
Tom Brennan
Kim Burke
Despina Christofis
Gary Doherty
Jason Downing
Edmund Finnane

Simon Gregory
Adrian Gruzman
Philip Hallen SC
Rhonda Henderson
Colin Hodgson
Matthew Hutchings
Sydney Jacobs
Ramena Kako
Benjamin Kasep
Stuart Kettle

Izaz Khan
Christina King
Gregory Laughton SC
David Liebhold
William McManus
Michael Meek SC
Nicholas Newton
David Parish
Andrew Reoch
Andrew Robins

Patrick Rooney
Geoffrey Rundle
James Thomson
Martin Watts
David Weinberger
Julie Wilcsek
Craig Wilson
Michael Windsor SC
Christopher Wood
Steven Woods

SUCCESSION – STATUTORY WILLS: Fenwick Re: Application of J R Fenwick and Re Charles [2009] NSWSC 530

For the first time in NSW, the Supreme Court has exercised its power under the *Succession Act 2006* (NSW), s18, to authorise a statutory will for a person lacking testamentary capacity.

The application was made by the brother of a 60 year old man (“R”). R had previously made a will in 1987, and lost capacity 4 months later. The 1987 Will might have led to an intestacy, with the estate vesting in the Crown as bona vacantia. The Plaintiff sought a court authorised codicil to avoid this consequence. The proposed codicil provided that if the Plaintiff and his two cousins predeceased R, a trustee company would be appointed executor and there would be a gift over in favour of the children of the two cousins.

Palmer J granted leave to the Plaintiff to bring the application (s19) and made an order authorising the proposed Will (s18). His Honour gave a useful analysis of the tests to be applied for the purposes of determining whether the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if s/he had testamentary capacity, as required by s22(b).

By Ramena Kako

(Michael Meek SC and Ramena Kako appeared for the Plaintiff in this case.)

CORPORATIONS – MISLEADING OR DECEPTIVE CONDUCT – OPINION ON A MATTER OF LAW: ASIC v Fortescue Metals Group Ltd (No 5) [2009] FCA 1586

Section 1041H of the Corporations Act 2001 (Cth) prohibits misleading or deceptive conduct in relation to financial products or services. The company made public statements to the effect that it had entered into three binding agreements with certain companies to build, finance and transfer a railway, port and mine. The statements were held to be conduct “in relation to a financial product”, namely the company’s shares.

ASIC alleged that the “agreements” did not have the effect represented. Indeed, the main purport of these “agreements” was to require the parties to work together to determine such things as the scope of works, the price, and the terms of an agreement to be entered into for the works.

Without finally determining the legal effect of the agreements, Gilmour J held that the conduct was not misleading and deceptive: “An assertion as to the meaning and legal effect of an agreement is necessarily the product of an opinion formulated to that effect”. In his Honour’s view, a reasonable

reader of the statements would expect the company to have a genuine and reasonable basis for making them. His Honour decided that, in the circumstances of that case (which included the involvement of the company’s legal advisers), the company honestly and reasonably held the represented opinion, and was therefore not liable. The decision is under appeal.

By Edmund Finnane

APPREHENDED BIAS: *British American Tobacco Australia Services Limited v Laurie & Ors* [2009] NSWCA 414

In this case, the Court of Appeal upheld a decision by Curtis J of the Dust Diseases Tribunal, in which he refused an application by British American Tobacco (“BATA”) that he disqualify himself from further hearing or determining certain proceedings brought by Mrs Laurie, in circumstances where his Honour had earlier made an interlocutory finding in other Dust Diseases Tribunal proceedings that BATA had fraudulently destroyed certain prejudicial documents in order to prevent them from being used as evidence in anticipated litigation. In the Laurie proceedings, the applicant also alleged that BATA had intentionally destroyed documents for that purpose.

The Court of Appeal found that Curtis J had not erred in not disqualifying himself on the grounds of apprehended bias, emphasising that the earlier determination was made on an interlocutory basis, that the Dust Diseases Tribunal permitted re-agitation of the same issue which had not been determined on a final basis and that the earlier determination was not accompanied by any objectionable or emotive language so as to suggest a decision of absolute finality had been reached. The Court of Appeal also held that in determining whether apprehended bias had been established, it was relevant to look at any earlier statements by Curtis J which might indicate prejudgment and any subsequent withdrawal or qualification of such statements.

By Jason Downing

ANNOUNCEMENTS

Returning Member, New Licensee

The Floor welcomes back **Steven Woods**, who has completed his term as Deputy Solicitor-General for the Solomon Islands.

The floor also welcomes our new licensee, **Jennifer Beck**.

Publications

Corporations Legislation 2010 with Key Section Annotations by **Edmund Finnane**, published by Thomson Reuters, is now in print.

To receive this newsletter by email, or to cease receiving it, please contact paulwalker@13wentworthselbornechambers.com.au It is also published on the floor’s website www.13wentworthselbornechambers.com.au.

Important: This newsletter is not advice. You should not act solely on the basis of the material contained in this newsletter. The contents of this newsletter may have been superseded by changes in the law.