

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

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SELF-INCRIMINATING EVIDENCE: SECTION 128 CERTIFICATES

By Justin Conomy

In *Song v Ying* [2010] NSWCA 237, the New South Wales Court of Appeal clarified in what circumstances a certificate under s.128 of the Evidence Act (NSW) is available in civil proceedings. The central issue was whether such a certificate was available when a person wished to give that evidence in chief, rather than being compelled to give it under cross-examination.

Before this decision, there was a difference in approach between:

1. those who favoured the availability of certificates for evidence in chief following on from *Ferrall v Blyton* [2000] FamCA 1442 ; (2000) 27 Fam LR 178, such as Brereton J in *Chao v Chao* [2008] NSWSC 584, Campbell J in *Ollis v Melissari* [2005] NSWSC 1016, and Rein J in *Sheikhholeslami v Tolcher* [2009] NSWSC 920; and
2. those who favoured the narrow approach that no certificate was available when the witness was not compelled to give the evidence. This view was derived from the obiter comments of the High Court in *Cornwell v R* [2007] HCA 12 ; (2007) 231 CLR 260, and was followed by Hall J in *Reliance Financial Services NSW Pty Ltd v Sobbi and Anor* [2009] NSWSC 1375 and Ward J in *Ying v Song* [2009] NSWSC 1344.

The issue was resolved in *Song v Ying*. In giving the leading judgment, Hodgson JA (with whom Giles and Basten JJA agreed) held that construction of s.128 of the Evidence Act should be approached by reference to the pre-existing common law as to whether a given witness is compellable to give evidence, and the terms of s. 12 of the Evidence Act, despite there arguably being no need for such an interpretation.

The effect of applying such an approach is to generally restrict the availability of s.128 certificates in civil cases to evidence in cross-examination, on the basis that in those circumstances, a witness is compelled to answer. However, a witness' decision to give evidence in chief, in their own case, is not by compulsion so no certificate is available.

For further information on the implications of the decision, and a possible work-round under s.87 of the Civil Procedure Act for witnesses who are parties to litigation (as referred to by Brereton J in *Vaughan Constructions Pty Ltd v Alan Luong* [2008] NSWSC 1033 and Rein J in *Sheikhholeslami v Tolcher* [2009] NSWSC 920), see J. Conomy and N. Bilinsky, Statutory Mechanisms Available for Protection Against Self-incrimination (2010) 48(10) LSJ 54.

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DEFAMATION – QUALIFIED PRIVILEGE: *Aktas v Westpac Banking Corporation Ltd* [2010] HCA 25

The common law defence of qualified privilege is engaged if it can be established that the occasion on which the defamation was published was 'privileged', that the defamation was related to the occasion, and that there was no malice. This High Court decision relates to the first element.

Mr Aktas, a company shareholder and director, was the counter-signatory on 30 trust account cheques which were wrongly dishonoured by Westpac and endorsed with 'Refer to Drawer'. That term is a well known phrase meaning that there were insufficient funds to meet the cheque.

It was established that Westpac had published defamatory matter. The issue in the High Court was whether the occasion attracted the defence of qualified privilege.

The majority of the High Court (French CJ, Gummow and Hayne JJ; Heydon and Kiefel JJ dissenting) concluded that the giving of notice of a dishonoured cheque should not be viewed as an occasion of qualified privilege. The alternative would not be conducive to accuracy on the part of banks faced with the decision to pay or dishonour a cheque.

By Jennifer Beck

SUCCESSION - FAMILY PROVISION – Adult Son: *Hastings v Hastings* [2010] NSWCA 197

Hastings claimed \$140,000 from his mother's \$700,000 estate. White J dismissed his claim. He unsuccessfully appealed to the Court of Appeal.

The Court said it was "open to doubt" whether there was any generally held social view as to the existence of a moral or natural obligation to adult able bodied children sufficient to deprive a parent of the unfettered right of testamentary disposition.

Hastings's slight contact with the deceased, his criminal conduct as a drug runner and his financial need being partly caused by his own criminal conduct were sufficient to warrant a dismissal of his claim.

By Therese Catanzariti

EMPLOYEE RESTRAINTS OF TRADE: *Hanna v OAMPS Insurance Brokers Ltd* [2010] NSWCA 267 ("*Hanna*"); *Ross v IceTV* [2010] NSWCA 272 ("*IceTV*")

The NSW Court of Appeal has in 2 recent cases upheld the validity of post-employment restraints of trade. In each case the court found a 12 month restraint was reasonable, given the employer's legitimate interest in protecting its connection with

clients from its former employees. In *Hanna* (referred to with approval in *IceTV*) the Court held that there is no legally mandated test for determining the reasonableness of the duration of the restraint. It is a matter for the Court to evaluate the evidence about the employer's connection with the clients and assess what is required to protect reasonably this connection.

Also in *Hanna*, the Court held that a "cascading" restraint clause was not void for uncertainty even though the provision contained no mechanism for the selection of which clause was to operate. That was because the "cascading" restraints were several individual covenants and although overlapping they were not inconsistent. They were all capable of being understood and complied with without breach of any other.

By Nicholas Newton

TORT – CIVIL LIABILITY ACT: *Woolworths Ltd v Strong* [2010] NSWCA 282 ("*Strong*"); *Kempsey Shire Council v Baguley* [2010] NSWCA 284 ("*Baguley*")

Two recent decisions of the NSW Court of Appeal have highlighted the need for trial judges to make findings consistent with the elements set out within the *Civil Liability Act 2002*.

In *Strong*, the Plaintiff, who was on crutches, slipped and fell heavily when the tip of her right crutch came in contact with either a chip on the floor or grease from the chip. The trial judge found for the Plaintiff.

The Court accepted that S.5D(1) now sets out what must be established to conclude that negligence caused particular harm. It is only if the "necessary condition" test in S.5D(1)(a) is satisfied that there can be causation within the meaning of S.5D(1).

The Court found that the trial judge did not, as the statute required, decide what it was that Woolworths had failed to do, that the taking of reasonable care required it to do, and then whether that failure was a necessary condition of the occurrence of the particular harm that the Plaintiff sustained. His conclusion could not stand.

In *Baguley*, the Court of Appeal considered the application of S.5B and 5C *Civil Liability Act 2002* where a Plaintiff fell into a pit at a rubbish tip controlled by the Council. The trial Judge found the Council negligent in failing to erect a wall or a fence. The Judge's finding was overturned on the evidence that the erection of a fence or wall around the pit would simply have substituted one risk for another.

By Stuart Kettle

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