

## BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

### ISSUE 5: SPRING 2007

#### INSURANCE – AVOIDANCE FOR NON-FRAUDULENT NON-DISCLOSURE

By David Davies SC

In *Davis v Westpac Life Insurance Services Ltd* [2007] NSWCA 175 the New South Wales Court of Appeal clarified the operation of section 29(3) Insurance Contracts Act. Section 29 governs the rights of the Insurer in relation to life insurance where there has been a misrepresentation or non-disclosure. In the case of a non-fraudulent misrepresentation or non-disclosure the Insurer may, within three years after the contract was entered into, avoid the contract provided that the Insurer would not have been prepared to enter into a contract of life insurance with the Insured on any terms if the duty of disclosure had been complied with or the misrepresentation had not been made.

When completing his application for income protection insurance (a form of life insurance) Mr Davis failed to disclose to the insurer that he was suffering from sleep apnoea. He had only been told he had the condition shortly before he entered into the Contract of Insurance and tests in relation to the condition had not then been completed. When the Insurer found out about the sleep apnoea (within 3 years of the Contract of Insurance being made) it purported to avoid the Policy. In the letter doing so the Insurer said that if it had known of the referral to a specialist it would not have accepted the application on any terms and it would have not considered the application until the test results and treatment were known.

The question for the Court of Appeal's consideration was whether the decision had to be an unequivocal decision not to enter into the Contract of Insurance at the time the Insurer in fact entered into the Contract. The Insured argued that all that had happened in the present case was a decision to postpone the decision pending the outcome of the studies and the treatment which was not a compliance with the section.

The Court followed the majority view in the Queensland Court of Appeal's decision in *Schaffer v Royal & Sun Alliance Life Assurance Australia Ltd* (2003) 12 ANZ Ins Cas 90-116 holding that an Insurer is entitled to use information it acquired after the Contract date to come to a view about what it would have done if the true information had been disclosed to it at the time of entry into the Contract of Insurance.

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**Barristers**

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**INSOLVENCY: - Pooling: Corporations Amendment (Insolvency) Act 2007**

The Corporations Amendment (Insolvency) Act will commence by 20 February 2008. It makes several reforms, including the creation of two new routes to “pooling” of insolvent corporate groups. The provisions apply where 2 or more companies are in liquidation and, either:

- the companies are related bodies corporate;
- they are jointly liable for one or more debts;
- they jointly own or operate particular property in connection with a business or undertaking carried on jointly by companies in the group;
- or
- one or more of the companies own such property.

In such a case, the liquidator(s) of the companies may make a “pooling determination”, whereby, in essence, inter-company debts are eliminated and the companies are taken to be jointly and severally liable for each other’s debts. This will take effect if approved by the creditors of each company, with the requisite majority being 50% by number and 75% by value. Alternatively, the liquidator(s) may apply for, and the court may grant, a pooling order.

As to other routes to pooling in insolvency, see Finnane, 19(3) CLQ 34.

**By Edmund Finnane**

**FAMILY LAW – Anti-suit injunctions: *Lederer and Hunt* (2007) FLC ¶93-311; *Christie & Christie* [2007] FamCA 125**

Two recent decisions articulate the extensive power of the Family Court of Australia to restrain third parties from commencing or carrying on proceedings against parties to a marriage in another Australian court.

In *Lederer*, the Full Court identified s 34 of the Family Law Act 1975 (‘the Act’) and the inherent (or implied) jurisdiction of the court as two sources of power to grant an anti-suit injunction.

In restraining a number of persons from carrying on proceedings in the Supreme Court of Victoria, Cronin J in *Christie* relied on the express power conferred by s 90AF of the Act, the constitutionality of which was upheld at first instance in *Hunt v Hunt* (2006) 36 Fam LR 64.

**By Benjamin Kasep**

**CORPORATIONS – Directors’ Penalty Notices and s 1318: *Deputy Commissioner of Taxation v Dick* [2007] NSWCA 190**

The NSW Court of Appeal has overturned the decision of Johnstone DCJ (see Brief Note Issue 4) and concluded that section 1318 of the Corporations Act does not apply to a failure by a

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director to comply with section 222AOB of the Income Tax Assessment Act 1936 (ITAA).

The principal basis of each of the judgments of Spigelman CJ, Santow JA and Basten JA was that s 1318 and the directors’ penalties provisions were impliedly inconsistent. The ITAA provisions constituted an exhaustive code which left no room for the operation of the section 1318 discretion. Spigelman CJ was also of the opinion that in its application to statutory provisions, section 1318 could only be exercised with respect to defaults or breaches under the Corporations Act itself.

The decision is the subject of an application to the High Court for special leave to appeal.

**By Andrew Bouris**

**PLEADINGS – Part 5 of Civil Liability Act 2002 – requirement to plead s 42: *Port Stephens Council v Theodorakakis* [2006] NSWCA 70**

Part 5 of the Civil Liability Act 2002 concerns civil liability of public and other authorities. Section 42 states certain principles which apply in determining whether a public authority has a duty of care or has breached a duty of care.

In refusing an application for leave to appeal in a “trip and fall” case, the NSW Court of Appeal (Bryson JA) observed that a public authority relying on s 42 must indicate its reliance in its pleading, and must give particulars of the facts which are said to give rise to consideration of s 42.

**By Gary Doherty**

**COSTS - Interlocutory costs orders in the Federal Court: *Fastlane Australia Pty Ltd v Nolmont Pty Ltd* [2007] FCA 492**

Jessup J considered Order 62 Rule 14 of the Federal Court Rules which concerns the effect following final order of costs orders obtained at an interlocutory stage of proceedings.

His Honour held that the rule should be construed as obliging the beneficiary of interlocutory costs orders to bring those orders into account at the point where final orders are made or entered.

If that is not done, the party who obtained the interlocutory costs order will be unable to enforce it unless leave to reopen the proceedings is obtained.

In finalizing any proceedings in the Federal Court (or Federal Magistrates Court) care should be taken to refer in any final costs order to interlocutory costs orders upon which a party intends to rely.

**By Tom Brennan**