NEWSLETTER

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Corporate & Commercial Newsletter

Welcome to our February Corporate & Commercial newsletter

This month we have included news on:

- contracting out of the ACL: *Lane Cove Council v Davies & Associates*
- reverse takeover does not necessarily result in change of control
- ASX finalises enhanced disclosure rules for mining and oil and gas companies
- *Andrews v Australia and New Zealand Banking Group Limited* [2012] HCA 30

We hope you find the newsletter informative and useful. Please contact us should you require further information on any topic, whether covered in this newsletter or not.

Ian Sinclair
Partner
Phone (direct) **+61 3 9608 2166**
Mobile **+61 412 906 896**
Email **i.sinclair@cornwalls.com.au**

*Click on image to view Ian's profile

Contracting out of the ACL: *Lane Cove Council v Davies & Associates*

Background

In *Lane Cove Council v Davies & Associates*, the Supreme Court of New South Wales recently affirmed the limiting effect of contractual terms on s82 *Trade Practices Act 1974* (**TPA**) and consequently s236 *Australian Consumer Law* (**ACL**). It was held that while parties could not contract out of obligations under the TPA (such as misleading and deceptive conduct under s52), they could modify procedural limits by placing temporal restraints on the operation of the limitation period set out in s82.

Case summary

The issue in the proceedings related to corrosion damage within the Lane Cove Aquatic Leisure Centre to both the ceiling space and the structural steel façade of the building. The Council brought claims regarding design and construction deficiencies against:

- the architectural firm Michael Davies Associates Pty Ltd (**MDA**), which provided architectural and contract administration to the Council and acted as superintendent

under the building contract between the council and the builder;

- the builder of the centre, Dubel Pty Ltd; and
- the engineering firm, Hyder Consulting, which provided mechanical engineering services regarding the Centre.

The Council's claims were dismissed for the following reasons:

- there was no breach of s52 because the alleged representations did not amount to express or implied representations;
- in the event that there was a breach of s52, the 6 year limitation period in s82 meant that the claim was statute barred; and
- clause 17 of the contract acted as a contractual limitation on the TPA and made the claim time barred.

The key point in the judgment is that, while contracting parties are unable to contract out of the obligations of the TPA (now the ACL), they are able to impose procedural limits.

The contract – clause 17

The case provides an interesting example of how the court may construe the intention of parties as merely being an imposition on the temporal and monetary limits on damages that may be awarded – rather than an attempt to contract out of the TPA.

Clause 17 of the contract stated:

> *MDA's liability in respect of the services whether under law of contract, in tort or otherwise shall cease after the expiration of one year from the date of the invoice of the final amount claimed pursuant to clause 1, 2 and 3, the date of Practical Completion or the date of termination of the architectural services whichever is the earlier.*

Sackar J concluded that clause 17's operation included liability under statute (such as s52 TPA) because this was the only way to give credence to the ordinary meaning of the words within the clause. In this respect, his honour affirmed the decision in *Owners SP 62930 v Kell & Rigby Pty Ltd*, where the operation of a similar clause was considered to include causes of actions that might arise under the TPA. This was because not including the TPA within the scope of the clause would be 'an artificial and non commercial construction'. Similarly, the phrase 'or otherwise' in its ordinary meaning was wide enough to pick up liability under statute.

The effect of this construction of the clause was that the Council was time barred from making claims pursuant to the contract against MDA after 22 September 2002, because practical completion in all respects occurred on 21 September 2001.

Conclusion

The judgment in *Lane Cove Council v Davies & Associates* has far reaching implications regarding the modification of procedural limits on the operation of statutes such as the ACL. While parties may not contract out of statutory duties due to fundamental public policy concerns, the Supreme Court of New South Wales has indicated that there is scope for some variation of statutory obligations. Consequently, when entering a contract, parties should consider the possibility of placing temporal limits on the ACL.

Reverse takeover does not necessarily result in change of control

In its most basic form, a reverse takeover occurs when a bidding company makes an offer for a company larger than itself, offering shares in the company as consideration. Until recently, reverse takeovers were considered an important means of facilitating takeovers that would otherwise fail on account of shareholder dissent. However, as a result of the Takeover Panel's review of the 2009 Gloucester/Whitehaven transaction and the court's decision in IOOF Holdings Ltd (**IOOF**), it appears that if a reverse takeover would result in a change of control of the bidder, the transaction should be conditional on approval by the bidder's shareholders.

In 2009 IOOF acquired Australian Wealth Management Limited (**AWM**) by way of an all-scrip scheme of arrangement. Before the transaction, Bendigo and Adelaide Bank Ltd was IOOF's only substantial shareholder with a 13.2% stake, and AWM had a 2.1% stake in IOOF.

Following the reverse transaction:

- 70% of the enlarged share capital of IOOF was held by former AWM shareholders; and
- Bendigo and Adelaide Bank's stake was diluted to 7.8% and a former AWM shareholder held 12.11%.

Preceding this, in 2006 IOOF was party to a share sale and purchase agreement under which IOOF acquired ownership of Perennial Investment Partners Ltd (**PIPL**). The PIPL vendors were entitled to an accelerated payment if a 'change of control' of IOOF occurred.

PIPL argued that a change of control had occurred as a result of the reverse takeover of AWM, despite the fact that no single shareholder or group of shareholders had control of IOOF before or after the reverse takeover. The court rejected the argument that AWM and Voting Members were associates. The court concluded that 'the various Voting Members were separately pursuing their own interests (acquiring a stake in IOOF) which interests coincided with those of the other Voting Members and those of AWM'.

The court's decision in IOOF confirms that not all reverse takeovers result in a change of control of the bidder. There will only be a change of control if a shareholder – either alone or with 'associates' – is able to control the bidder going forward. Moreover, it is incorrect to say that former target shareholders are able to control the bidder simply because, in aggregate, they hold more than 50% of the shares in the bidder. Rather, there needs to be a target block of shareholders who, going forward, intend to assert control over the bidder's affairs.

The court's decision is consistent with that of the Takeovers Panel in 2009 relative to the decision in the Gloucester/Whitehaven transaction.

ASX finalises enhanced disclosure rules for mining and oil and gas companies

Market sensitive information

ASX has introduced new listing rules that impose reporting obligations on ASX-listed mining and oil and gas exploration and production companies. The changes will take effect on 1 December 2013, with a 12-month transition period. The enhanced disclosure rules are a result of two rounds of extensive consultations between ASX-listed resources companies, JORC, investor groups, industry professionals and ASIC.

The new listing rules will enhance reserves and resources reporting and are part of a wider series of initiatives by ASX aimed at ensuring the Australian market remains globally competitive and attractive to companies and investors.

The enhanced disclosure rules promote greater investor confidence, support efficient capital formation for ASX-listed resources companies, and improve the consistency and transparency in reporting. The rules also aim to align Australia's reporting framework with other major markets.

The new rules will be supported by an updated version of the JORC Code, meaning mining companies will be required to report in accordance with the 2012 JORC Code, expected to be released in mid-December 2012.

Mining companies will be required to provide additional information regarding exploration results, mineral resources, ore reserves and production targets. The new rules also provide the ability for companies to report historical or foreign estimates of mineralisation.

Oil and gas companies will be required to provide additional information on estimates of reserves, contingent resources and prospective resources. There will also be a requirement for oil and gas companies to report in accordance with the Society of Petroleum Engineers – Petroleum Resources Management System.

Obligations imposed on both mining and oil and gas companies, include the requirement of a mineral resources and ore reserves statement or a petroleum reserves statement in the annual report.

The updated ASX Listing Rules are available at: http://www.asxgroup.com.au/compliance-downloads.htm

ASX Guidance Note 31 concerns reporting by mining companies from 1 December 2013 at: http://www.asxgroup.com.au/media/PDFs/guidance_note_31_reporting_on_mining_activities.pdf

Andrews v Australia and New Zealand Banking Group Limited [2012] HCA 30

Background

The High Court in *Andrews v ANZ* recently rejected the traditional view that a clause requiring payment was only a penalty where the trigger was a breach of contract by one party. Instead, as part of an ongoing class action brought by a group of ANZ customers, the High Court held that fees charged by ANZ otherwise than upon breach of contract may be penalties. The court said that fees were 'exception fees' for honouring unauthorised debits and other irregular transactions.

The *Andrews* decision is significant because it opens up the possibility that a wider range of fees – not only in banking contracts, but potentially also in other financial, shipping and construction, transport and franchise agreement contracts – may be found to constitute penalties and thus be refundable. There is now greater scope for fees to be challenged on the basis that their payment was not triggered by a breach of contract.

The decision

The question of whether a fee was a penalty in *Andrews v ANZ* involved an inquiry into the construction of the contract, based on substance rather than form. If the sum of the fee exceeded or was not a genuine pre-estimate of the damage likely to be suffered by the other party, the fee was likely to be a penalty. Traditionally, penalties in customer contracts are void or unenforceable.

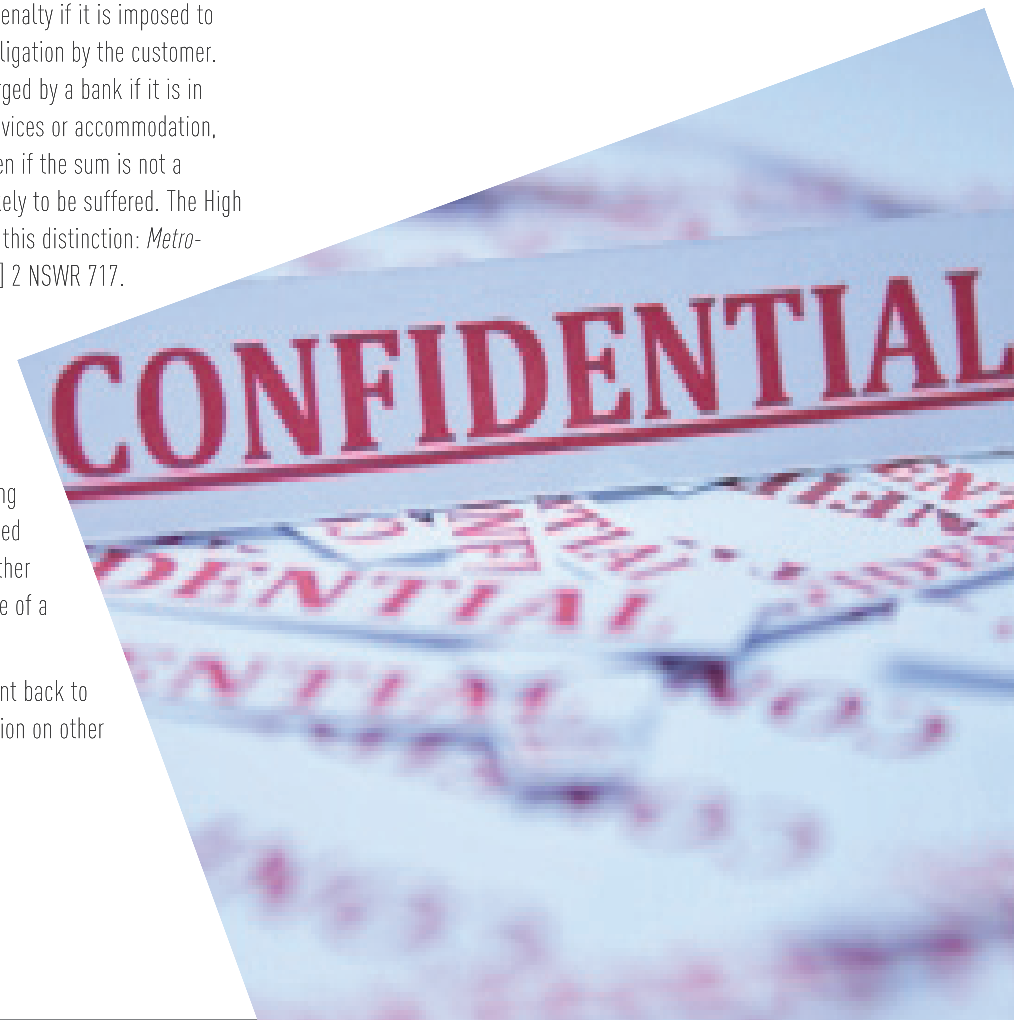
If the sum of the fee is a genuine pre-estimate of the damage likely to be suffered by the other party as a result of a breach of contract, it is likely the fee is not a penalty.

The High Court did however draw a distinction between fees that are penalties and fees that are for the performance of additional services. A fee charged by a bank is a penalty if it is imposed to secure the performance of a primary obligation by the customer. A fee, however, can be legitimately charged by a bank if it is in return for performance of additional services or accommodation, and will not be classed as a penalty even if the sum is not a genuine pre-estimate of the damage likely to be suffered. The High Court approved the decision supporting this distinction: *Metro-Goldwyn-Mayer Pty Ltd v Greenham* [1996] 2 NSWR 717.

Impact

Companies that currently impose fees such as 'late payment fees' and 'service fees' may need to review the enforceability of such clauses, evaluating whether the additional fees being charged are in return for the performance of further services or rather to secure performance of a primary obligation.

The case is ongoing, with the matter sent back to the Federal Court to make a determination on other remaining questions.



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Corporate & Commercial team member profile

Levent Shevki, Partner

Corporate & Commercial

Levent has extensive Australian and international legal and business experience representing public and private clients in corporate and commercial matters. His clients value his ability to deliver efficient and commercial outcomes.

His experience and expertise create value for major organisations in many different industries, including the extractive industry, construction, energy and resources, and sports and entertainment.

Levent also heads the firm's Blue Sky team and in that capacity uses his business skills and international networks to assist clients in product development and to break into key overseas markets.

Levent is also a director of Twenty3 Sport and Entertainment Pty Ltd, a sports and entertainment consultancy.

In articles appearing in *The Australian* on 3 September 2010, Levent was named as one of the nation's best lawyers, along with three other partners in our firm – John Hutchings, Louise Houlihan and Nicole Stevens-Warton. In the same articles, Cornwall Stodart was acknowledged as walking among the giants of the legal industry and was placed ahead of some top-tier and/or international firms. To see our Media Release and the full articles, please click here.

Update: New Building Code 2013

The Federal Parliament has announced that the new Building Code 2013 is to be effective from 1 February 2013. The Code replaces the existing Implementation Guidelines for the National Code of Practice for the Construction Industry. Peter Macnish and Louise Houlihan can be contacted for further details on **+61 3 9608 2000**.

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Mid-tier lawyers join the A-team and Level playing field as smaller firms push into top rankings (p 33), Ron Pol, The Australian, 3 September 2010

Cornwalls Lawyers Pty Ltd Level 10, 114 William Street, Melbourne VIC 3000, Australia
Phone +61 3 9608 2000 Fax +61 3 9608 2222 **enquiry@cornwalls.com.au** **www.cornwalls.com.au**