NEWSLETTER

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Commercial Litigation Newsletter

Welcome to our May Commercial Litigation Newsletter

This quarter we have included news on:

- the High Court's decision regarding proportionate liability in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10
- the first judicial consideration of the bid-rigging and cartel provisions of Australia's competition and consumer legislation
- the National Disability Insurance Scheme
- security for costs
- subpoenas.

Please don't hesitate to contact us if you would like more information on any topic, whether covered in this newsletter or not. We hope you find the newsletter informative and useful.

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High Court clarifies the reach of proportionate liability provisions: *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10

The recent decision of the High Court of Australia in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10 involved the interpretation of proportionate liability provisions in the *Civil Liability Act 2002* (NSW) (**Act**), which is largely representative of equivalent provisions in other Australian state jurisdictions. While the apportionment of liability is a matter of judicial discretion and therefore difficult to predict, this decision has the potential to diminish the ability of a plaintiff to argue that a professional should be wholly responsible for its loss or damage even in circumstances where it is the professional's duty to protect a client from that loss. While this decision concerns a lawyer's duties, we consider that it will be applicable more broadly to professional advisers such as accountants, auditors, valuers and others.

Key facts

Mr Caradonna and Mr Vella commenced a business venture promoting a boxing match. In the course of this venture, Mr Caradonna obtained possession of certificates of title belonging to his business partner, and used them as security in order to fraudulently obtain loans from Mitchell Morgan Nominees Pty Ltd. In order to perpetrate that fraud, Mr Caradonna forged Mr Vella's signature on loan and mortgage documents. He was assisted by Mr Flammia (a solicitor and his cousin), who dishonestly certified that he had witnessed 'the borrower' sign all loan and mortgage documents.

Hunt & Hunt were the lawyers engaged to prepare the loan and mortgage agreements by Mitchell Morgan Nominees Pty Ltd. Hunt & Hunt were negligent in failing to prepare a mortgage containing a covenant to repay a stated amount, and their negligence was solely regarding an error in drafting a mortgage that purported to secure the debt by reference to the loan agreement (which was then found to be void), rather than by reference to a sum of money. The mortgage therefore secured no debt and was liable to be discharged.

Procedural history

The trial judge, Young CJ, held that Mitchell Morgan's claim was an apportionable claim pursuant to the Act, and that Mr Caradonna and Mr Flammia (the fraudsters) were concurrent wrongdoers with Hunt & Hunt Lawyers in that they were independently of each other or jointly, responsible for the loss or damage claimed by Mitchell Morgan. His Honour apportioned the liability 12.5% to Hunt & Hunt, 72.5% to Mr Caradonna and 15% to Mr Flammia.

In making the apportionment of 12.5% to Hunt & Hunt Lawyers, his Honour Chief Justice Young was persuaded by the reasoning of Palmer J in *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463 that a judge 'must make a comparison of the culpability and of the acts of the parties causing damage and, thus, to the relative blameworthiness and the relevant causal potency of the negligence of each party'.

Young CJ was also guided by two unreported cases where the respective liability under the apportionment legislation of a fraudster and a solicitor were considered. In *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60, Hoeben J had to deal with a case where, essentially, his Honour found that the proper apportionment was 90% to the fraudster and 10% to the solicitor. An almost identical result was reached by Bryson AJ in *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24.

The appeal against the primary judgment was allowed in the Court of Appeal on the basis that the fraudsters did not cause the same loss as Hunt & Hunt and therefore the provisions of the Act did not apply. The Court of Appeal held that in order to cause the same loss, it is necessary for the acts of one wrongdoer to contribute to the wrongful actions of another wrongdoer.

Hunt & Hunt appealed the Court of Appeal decision, and the reasons of the High Court (by a 3:2 majority of French CJ, Hayne and Kiefel JJ) restored the decision of the primary judge and stated:

1. '[i]n the context of economic loss, loss or damage may be understood as the harm suffered to a plaintiff's economic interests';
2. while the causes of action were different against Hunt & Hunt (negligence) as opposed to Caradonna and Flammia (fraud/dishonesty), the loss or damage was the same. Loss or damage is the inability to recover the monies the plaintiff advanced;
3. the actions of the fraudsters and Hunt & Hunt both caused the inability to recover the monies advanced by Mitchell Morgan Nominees Pty Ltd in the sense that they both materially contributed to the inability to recover the loss;
4. on that basis, the claim against Hunt & Hunt was an apportionable claim under the Act

The High Court made no decision on the appropriate apportionment between the concurrent wrongdoers because this was not in issue before the court. The trial judge's apportionment was restored.

Analysis

While the relevant provisions of the *Wrongs Act 1958* (Vic) have been in operation since 1 January 2004, the *Hunt & Hunt* decision has given further weight to the purpose of the proportionate liability scheme and provided a framework to each state's statutory provisions. The High Court's decision that the analysis of the character of the damage suffered by a plaintiff is paramount, to be followed by an assessment of whether another wrongdoer caused that damage (independently or jointly), arguably broadens the scope of proportionate liability provisions in Australia.

The High Court disagreed with the reasoning of the Court of Appeal and held that a wrongdoer's acts can be completely separate and independent of those of another wrongdoer, and yet still cause the

same damage and therefore fall within the proportionate liability provisions.

In particular, the decision will be welcomed by professionals who fail to adequately protect a client whom they are engaged to protect against risk or adverse consequences (such as lawyers, financial advisers, insurance brokers and valuers), because they may be able to avoid complete liability where another wrongdoer has contributed to the client's loss.

In deciding to what degree a professional will be able to avoid liability, a court will have regard to the degree to which the professional has departed from the standard of care expected of him (or her) compared to the culpability of a concurrent wrongdoer, and the relative causal effect of the respective culpabilities. In practical terms, the moral blameworthiness of a wrongdoer (such as a fraudulent counter-party in a commercial transaction or a rogue employee speculatively engaging in foreign exchange transactions) will be balanced with the failure of a professional to discharge the duty to protect a client, and the scope of that duty.

However, given the inherently subjective nature of the decision as to how to apportion liability between concurrent wrongdoers, and the diverging judicial opinion on this issue (a 3:2 majority in the High Court overturning a unanimous NSW Court of Appeal decision), there is no doubt that further judicial consideration will be given to this issue. The weight that a court will give to a professional's duty to protect a client's interests will differ depending on the profession in which they are engaged and the duties owed to that client, and professional services firms will be watching closely for any developments in this area.

Authored by: Alex Nicol & **Leneen Forde**, Cornwall Stodart

The wolf in sheep's clothing: a first look at bid-rigging and the cartel provisions

Background

The cartel provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**) were judicially considered for the first time by the Federal Court of Australia in *Norcast S.ár.L v Bradken Limited (No 2)* [2013] FCA 235 (19 March 2013). The case involved collaborative bidding where the vendor was ignorant of the collaboration, and highlighted that certain conduct may breach the new cartel provisions even where no market in Australia is affected.

Facts

The facts of the case are as follows:

Norcast S.ár.L (**Norcast**) is the holding company of Norcast Wear Solutions (**NWS**), a Canadian mining consumables company ultimately held by a private equity fund, Pala Investments Limited (**Pala**). Norcast sought to sell NWS, acutely aware of the confidentiality exposure of the sale process and the incidence of 'fishing expeditions' by competitors generally and specifically by Bradken Limited (**Bradken**), an Australian based mining consumables company. Norcast and Bradken, as competitors, share a colourful history. UBS was engaged to run the sale process. UBS contacted potential buyers, but not Bradken.

Upon learning of the sale, Bradken contacted **Castle Halan**, a New York based private equity fund and 50% shareholder of Australian Mezzanine Partners Pty Ltd (**CHAMP**). Castle Halan entered the sale process, keeping Bradken's involvement secret with a view to executing a back-to-back sale of NWS, where Bradken would pay Castle Halan a premium for the trouble. Castle Halan and co-pilot Bradken were successful with a winning bid of USD190 million, with Castle Halan on-selling to Bradken for USD212.4 million. In fulfilling its public company disclosure obligations, Bradken then announced the acquisition of NWS, sparking Norcast's claim of cartel conduct by engaging in bid-rigging and misleading or deceptive conduct.

Of note, during the sale process Norcast expressed a view that Castle Halan should be made to sign a non-disclosure agreement (**NDA**) that was sufficiently tight so as to preclude Bradken from receiving the information memorandum, only made available to candidates at an advanced stage of the sale process to facilitate a thorough due diligence. Castle Halan had the NDA amended to permit disclosure to its 'representatives', additionally removing the obligation to disclose the identity of its advisers, allowing Bradken to enter the bid process through the back door.

The decision

Having established a sufficient nexus between Australia and the conduct complained about, the court sought to determine the status of the arrangement between Bradken and Castle Halan by applying the cartel provisions of the CCA. In determining the arrangement, the court had to consider:

1. whether there had been a request for bids;
2. whether the parties were likely to be in competition;
3. whether there had been a contract, arrangement or understanding; and

4. whether the arrangement had the requisite purpose of eliminating competition.

Satisfied there had been a request for bids and 'but for' a bid-rigging arrangement, whereby Castle Halan would bid for NWS and Bradken would not, they were 'likely' to have been in competition. Unsurprisingly, the court saw through thinly veiled code names and call signs in establishing a bid-rigging arrangement, albeit informal and unenforceable. The court assessed Norcast's loss and damage at US$22.4 million, equivalent to the premium paid by Bradken to Castle Halan.

Conclusion

This decision is a timely reminder to remain vigilant of NDAs and ensure they are carefully drafted, as well as serving as notice of the CCA's potential application to cross-border transactions, in which an Australian company is a party.

The case is currently on appeal.

Authored by: Joshua Hawes & **Leneen Forde**, Cornwall Stodart

The *National Disability Insurance Scheme Act 2013* – An Overview

The *National Disability Insurance Scheme Act 2013* (Cth) (**Act**) was passed through federal parliament with several amendments on 21 March 2013.

The purpose of the Act is to give effect to Australia's obligations as a party to the United Nations *Convention on the Rights of Persons with Disabilities* and to support the independence and social and economic participation of Australians with a disability.

What does the Act do?

The Act provides for the National Disability Insurance Scheme (**NDIS**), which has been renamed DisabilityCare Australia. It also establishes the NDIS Launch Transition Agency (**Agency**), which will implement the scheme from 1 July 2013 in the Barwon region of Victoria, South Australia, Tasmania and the Hunter Valley in New South Wales. The Agency will also be responsible for faciliting innovation and best practice in the disability sector as well as increasing awareness of disability in the community.

What is the function of the NDIS?

When fully implemented, the NDIS will adopt a nationally consistent approach in the provision of:

- referral services and activities for people with disabilities;
- funding for individuals or entities to enable them to assist people with disabilities to participate in economic and social life; and
- individual plans under which reasonable and necessary supports will be funded for scheme participants.

The operation of the scheme is supported by administrative provisions in the Act, which will include provisions relating to children, nominees, confidentiality, the review of decisions and the treatment of compensation.

To participate in the scheme, a potential participant must meet various requirements regarding age, place of residence and either disability or early intervention.

How will it be funded?

The provision of support under the NDIS will not replace existing entitlements to compensation. The Act enables the Agency to conduct legal proceedings on behalf of persons with disabilities and to recover costs funded by the NDIS prior to a compensation claim being settled.

The NDIS will take an insurance-based approach, informed by actuarial analysis, to the funding and provision of support.

It is estimated that the first stage of the scheme will have a cost to the Commonwealth of $1 billion over a four year period.

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Security for costs: a sword and a shield

If you thought that all costs in a proceeding would be dealt with at the end of a trial, think again. A defendant to a proceeding can apply to the court seeking an order for security for costs. This is an order that the plaintiff, whether an individual or a company, pay an amount estimated to cover the defendant's costs should the defendant be successful at trial. It is generally used to ensure that the defendant is not left without an avenue to recover costs if the plaintiff is not successful at trial.

Factors

The power to order security for costs is at the discretion of the court. The court weighs up the injustice caused to the plaintiff if prevented from pursuing a claim against the injustice to the defendant if no security is ordered and, at trial, the defendant

succeeds but is unable to recover costs from the plaintiff. The court takes into consideration certain factors, including:

1. whether the application for security has been brought promptly by the defendant;
2. the plaintiff's prospects of success;
3. whether the defendant's application for security is oppressive and only made to prevent a plaintiff, who is short of funds, from litigating;
4. whether the plaintiff's lack of funds has been caused by the defendant;
5. whether the plaintiff's proceeding is being supported by a litigation funder.

Companies in liquidation

Where a company is in liquidation, the court makes a distinction between proceedings brought by a company by its agent, the liquidator, and a proceeding brought by a liquidator personally. In proceedings brought by the company, the court may order it to pay security because if the company is ultimately unsuccessful, the liquidator is not required to personally pay the costs of the defendant. However, where the proceeding is brought in the name of the liquidator, if the proceeding fails, they will be personally responsible for paying an adverse costs order and as such are generally not required to give security for costs.

Paying security

If the court ultimately decides that security for costs should be paid, the amount is also at the court's discretion. The defendant will ordinarily put evidence before the court as an estimate of their costs, which the court will use as a guide to decide the amount to be paid.

If a court makes an order requiring the plaintiff to pay security for costs, the form the security will take is also at the discretion of the court. Usually, it is paid into the court in the form of a cheque or bond. Depending on the amount, the court may order that it be paid in a single sum or over a number of instalments.

In practice

As soon as a defendant is served with a statement of claim, it is good practice to undertake an asset search of the plaintiff by way of company search and/or property search. It is commercial to seek the agreement of the plaintiff to pay security. If agreement cannot be reached, the defendant should make an application to the court to determine the issue.

Authored by: **Leneen Forde** & Rena Solomonidis, Cornwall Stodart

Understanding: for fast, effective relief of subpoena related stress

A basic understanding of your rights and obligations will help alleviate the symptoms associated with being served with a subpoena and may prevent long term legal headaches. This one-off treatment is quick and non invasive – simply read the article below. If symptoms persist, consult your lawyer.

Subpoenas

For those unfamiliar with litigation, being served with a subpoena can be daunting. Intimidated by the threat of being found to be in contempt of court for unlawful non-compliance, many people panic and provide documents or evidence they may not be required to give – something that can cause commercial and legal complications down the track.

Put simply, subpoenas are a means of ensuring that evidence is available to help the court determine issues in a proceeding. They are formal court orders requiring individuals or entities to produce documents and/or give evidence in court by a certain date.

Subpoenas may be issued against parties to a proceeding, but they are more commonly issued against non parties (who are often dragged unwillingly into a dispute in which they have no interest).

What to do

Remain calm.

Do not be frightened by the deadline stated in the subpoena. You are entitled to seek an extension of the time for compliance stated in the subpoena. Courts are usually sympathetic to such requests (particularly if the requested documents are not readily accessible). However, take action or seek advice early – extension applications must be issued prior to the expiry of the deadline to avoid being in contempt of court.

You may also be entitled to object to the production of the documents listed in the subpoena. The most common grounds of objection are:

1. **Relevance.** A subpoena is defective and may be set aside if it seeks the production of documents that are not relevant to the issues in dispute in the court proceeding.
2. **Confidentiality**. A subpoena may require the production

of documents that are confidential (such as documents containing trade secrets or commercially sensitive information). Application may be made to the court to limit access to subpoenaed documents and prevent disclosure of sensitive information.

3. **Privilege.** Documents containing legal advice may be privileged, and you may object to their production (even if they are relevant to the issues in dispute in the court proceeding).
4. **Vague or broad terms.** A subpoena that is in vague or broad terms is open to objection.
5. **Abuse of process**. A subpoena may be set aside as an abuse of process if it is:
   (a) issued for an ulterior purpose (eg to obtain documents for use in an unrelated proceeding); or
   (b) used for the purpose of obtaining discovery or further discovery from another party or non-party.

Subpoenas may also be set aside on a variety of technical grounds.

You are entitled to claim your reasonable costs of complying with a subpoena. This may include archival and copying fees, as well as the costs of obtaining legal advice and representation in relation to the subpoena.

Subpoenas are serious and must not be ignored. However, next time you are served with one, take a deep breath and consider your options. If you have any concerns, we recommend that you contact your lawyer for advice.

Authored by: Lachlan Currie, Cornwall Stodart

Contact: **Leneen Forde**, Cornwall Stodart

Cornwalls' Litigation Team Member Profile

Paul Buitendag, Partner, Head of Commercial Litigation, Head of Reconstruction & Insolvency

Paul is experienced in large scale commercial disputes, with a focus on reconstruction and insolvency, and engineering/construction disputes.

Before joining Cornwall Stodart in January 2008, for 14 years Paul was the Principal of his own firm in South Africa, where he practised in commercial law. His clients value his depth of expertise in dispute resolution and his ability to deliver commercial outcomes.

Paul's expertise extends to advising liquidators, administrators, banks and creditors on proof of debt claims, as well as enforcing securities, unfair preferences, receiverships, commercial transactions, deeds of company arrangement and insolvent trading.

In 2011 Paul became a co-editor of three chapters in the *Lexis Nexis Australian Corporation Law – Principles & Practice (External Administration)*. He edited chapters 5.4 (Winding up by the Court), 5.6 (Winding up Generally) and 5.8 (External Administration Offences) of this loose-leaf volume on a quarterly basis.

Paul has extensive international experience in engineering/construction and complex technological legal issues. He has successfully led teams in large technical engineering disputes, giving him a unique 'big picture' perspective in dealing with these matters. He is renowned for identifying cost-effective and commercially sound alternatives to litigation.

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