Piper Alderman

Law reform in Victoria: making lawyers more accountable

Dispute Resolution Partner, Andrew Stops, and Lawyer, Melissa Gerada, discuss the overhaul of the civil justice system that aims to simplify the legal process and resolve disputes quicker by way of the introduction of the Civil Procedure Bill 2010 in Victoria.

The introduction of the Civil Procedure Bill 2010 (Bill) into Parliament on 22 June 2010 aims to reform and modernise the law, practice and processes relating to the resolution of civil disputes which may lead to civil proceedings and appeals in the Supreme, County and Magistrates' Courts.

The Bill is intended to commence operation on 1 June 2011.

Attorney-General Rob Hulls MP noted in the second reading speech of the Bill on 24 June 2010 that *"the proposed changes are the first major attempt at civil law reform in Victoria in over 20 years."*

"For too long, well-resourced litigants have been able to use their financial power to play tactical games and draw out litigation until the other party is forced into an unfair settlement or withdraws. The current cost of litigation has reached a point where access to the civil courts is beyond the reach of most Victorians," said Mr Hulls.

To assist in the early resolution of disputes, the Bill provides judges and magistrates with legislative assistance to proactively manage cases by promoting the overarching purpose of the courts.

Overarching purpose

The Bill provides overarching obligations of legal practitioners, any person who is a party, any law practice acting for or on behalf of a party and any person who provides financial assistance or other assistance to any party, including insurers and litigation funders.

The Bill intends to:

- make civil justice accessible, organised, timely, fair and affordable
- simplify the language relating to civil procedure
- improve the standards of conduct in litigation
- facilitate the resolution of disputes before civil proceedings are commenced
- enhance case management powers of the courts, including regarding discovery of documents
- reform of the law relating to summary judgment
- clarify sanctions available to the courts regarding contravention of discovery obligations.

Pre-litigation processes

Litigants will be encouraged to engage in alternative dispute resolution (ADR) to avoid the need of going to court. The Bill provides a framework for lawyers and parties through pre-ligation processes to encourage early settlement with a view to the courts only being involved in cases where ADR has failed. In those cases it is hoped that the ADR processes have assisted in narrowing down the issues in dispute.

The pre-litigation processes are not applicable to civil disputes to which the Corporations Act or ASIC Act apply.

Overarching obligations

In achieving the overarching purpose of the Bill, overarching obligations are imposed on persons involved in litigation.

The overarching obligations do not override any duty or obligation of legal practitioners to the court or a client whether arising under common law or statute to the extent that those duties and obligations and the overarching obligations can operate consistently.

A person to whom overarching obligations apply must not make a claim or a response in a civil proceeding that is frivolous, vexatious, an abuse of process, has no proper basis, engage in misleading or deceptive conduct or likely to mislead or deceive, and must use reasonable steps to resolve a dispute by agreement between the parties or at least narrow the issues in dispute.

Mr Hulls said,*"the overarching obligations are aimed at curtailing game-playing and delaying tactics, correcting power imbalances between litigants, and reining in lawyers' excessive advocacy. They place an obligation on parties to ensure costs are reasonable and proportionate, to only take points that are relevant to the dispute and are not frivolous or vexatious, to cooperate and act honestly, to minimise delay, to attempt to resolve the dispute using appropriate dispute resolution processes, to narrow the issues in dispute and to disclose relevant documents."*

"These standards will make all litigants, including those who fund litigation such as insurers, accountable for their actions and enable courts to impose penalties on those who breach these obligations. The legislation would also empower judges to set time limits on barristers' submissions, including leading evidence and cross-examining witnesses, and limiting the number of witnesses."

Conduct of civil proceedings

The Bill requires each party personally certify that they have read and understood the overarching obligations. On filing a party's first substantive document legal practitioners will be required to certify that on the factual and legal material available each allegation of fact and denial in the document has a proper basis.

The intention of the Bill is to encourage judicial intervention. The Bill provides courts with discretion to sanction party's representatives with the other party's costs for failing to comply with pre-litigation processes and overarching obligations.

Mr Hulls said *"these changes will ensure judges are in control of their courts and can determine when a matter is going on too long. While most lawyers do the right thing, there are still some who love the sound of their own voices and think they are treading the boards rather than helping the court resolve disputes. Time is money, and by limiting the time barristers are unnecessarily addressing the court, judges will be able to limit the costs of civil disputes."*

Discovery

A person to whom overarching obligations apply must comply with the rules of discovery.

Disclosure by each party to the other party/s of the existence of all documents that are or have been in that party's possession, custody or control which that party is aware and considers or ought to reasonably consider are critical to the resolution of the dispute.

Disclosure must occur at the earliest reasonable time after the party becomes aware of the documents or at such other time that the court may direct.

A court may order or give directions that:

- discovery occur in separate stages
- require discovery of specified classes of documents prior to the close of pleadings
- expand a party's obligations to provide discovery
- require a list of documents be indexed or arranged in a particular way
- relieve a party of the obligation to provide an affidavit of documents
- modify or regulate discovery of documents in any other way the court thinks fit.

Case management

A court may case manage civil proceedings by:

- giving directions to ensure that the civil proceeding is conducted promptly and efficiently
- identifying at an early stage the issues involved in the civil proceeding including any issues that have not been resolved in accordance with the pre-litigation processes
- deciding the order the issues in dispute in the proceeding are to be resolved
- controlling the progress of the civil proceeding including fixing timetables, dealing with as many aspects as it can on the same occasion and dealing with the proceeding without the parties needing to attend court
- limiting the time for the hearing or any other part of the proceeding including limiting the number of witnesses at the hearing, the time for examination or cross-examination of witnesses, limiting the issues the subject of examination or cross-examination.

A court may give summary judgment if it is satisfied that a claim, defence or counterclaim or part thereof has no real prospect of success.

Contravention of orders

If a party to whom a direction has been given or an order made contravenes the direction or order, the court may do one or more of the following:

- dismiss the proceeding, generally, or in relation to a particular cause of action, or in relation to the whole or part of the claim
- strike out or limit any claim made by the plaintiff
- strike out or limit any defence or part of a defence filed by a defendant and give judgment accordingly
- strike out or amend any document filed either in whole or part
- disallow or reject any evidence
- direct the person to pay the whole or part of the costs of another party
- make any other order or give any other direction that the court considers appropriate.

The Bill is the first stage of a major reform program scheduled to continue until 2013. The second stage will focus on reviewing the rules of litigation regarding costs and the role of expert witnesses.

The impact of the Personal Property Securities Act's enforcement provisions on secured parties

In the third of a series of articles that examine the impact of the Personal Property Securities Act 2009 on specific business sectors, Corporate Lawyer, Llon Riley, deals with the impact of the PPSA's enforcement provisions on secured parties.

With less than 12 months before the Personal Property Securities Act 2009 (Cth) (PPSA) is scheduled to apply, it is vital for secured parties to understand how the PPSA will impact on their current practices of enforcing security interests. The PPSA's enforcement provisions will apply to secured parties (including retention of title suppliers, lessors and creditors) who seek to enforce their security interests.

The PPSA is expected to apply from 1 May 2011.

What is the PPSA?

The PPSA creates one national regime for security interests over personal property. The national regime will be made up of the PPSA, including the regulations, and the Personal Property Securities Register (PPS Register). The PPSA also introduces substantial changes to the current laws that govern security interests, especially the requirements for enforcing those interests.

The PPSA governs security interests in tangible and intangible personal property. Personal property is any kind of property other than land, fixtures, water rights and certain licenses and authorities granted under Commonwealth, State or Territory laws. Common examples of personal property include motor vehicles, equipment, consumer goods, business inventory, trade debts, intellectual property and company shares.

Which security interests will the enforcement provisions apply to?

The enforcement provisions of the PPSA will apply to all security interests (eg. security interests granted under general security agreements, mortgages, charges, finance leases, retention of title provisions and flawed asset arrangements), except:

- a transfer of an account or chattel paper that does not secure payment or performance of an obligation (including a security interest incidental to the account or chattel paper)
- a PPS lease (ie. a lease or hiring agreement for more than 1 year or 90 days if the personal property is goods that must be described by serial number) that does not secure payment or performance of an obligation
- a commercial consignment that does not secure payment or performance of an obligation.

Current methods of enforcing security interests

Under the current law, secured parties enforce their security interests in accordance with the rights and powers granted to them under the relevant security agreement and any applicable legislation (eg. the *Property Law Act 1974 (Qld)* and the *Corporations Act 2001 (Cth)*). For example, a secured party who has been granted a mortgage over personal property like a motor vehicle will usually have the power to take possession and sell the motor vehicle when the mortgagor defaults under the mortgage.

While the PPSA will not diminish the enforcement powers that secured parties are granted under the various types of security agreements, secured parties will need to understand how these powers will operate and can be exercised in the new PPSA environment.

Specific enforcement provisions of the PPSA which secured parties should be aware of

Enforcement provisions do not apply to receivers appointed over corporate grantors

The PPSA's enforcement provisions will not apply to a person who is a receiver, receiver and manager or controller (as these terms are defined and understood under the Corporations Act) appointed by a secured party over goods of a corporate grantor. In this circumstance, the receiver, receiver and manager or controller will have the powers granted to them in the relevant security agreement and the obligations and powers of enforcement specified in the Corporations Act.

Despite receivers, receivers and managers and controllers appointed over corporate grantors being excluded from the PPSA's enforcement provisions, these provisions will apply to receivers and receivers and managers of personal property where the grantor of the security interest is an individual.

Contracting out of the enforcement provisions

Where collateral is not used predominantly for personal, domestic or household purposes, parties to a security agreement in relation to the collateral may contract out of certain enforcement provisions. Some of the enforcement provisions that can be contracted out of include:

- the obligation to dispose of or retain collateral after seizure
- the restrictions and conditions on secured parties being able to purchase collateral after they have seized it
- the obligation to give notice to the grantor if the secured party proposes to dispose of the collateral
- the obligation to give notice to the grantor if the secured party proposes to retain the collateral.

The ability to contract out of the PPSA's enforcement provisions gives secured parties some flexibility in determining how they will enforce their interests in the event of default. For example, a secured party will normally retain its powers to seize, dispose of and retain collateral. However, a secured party can contract out of the obligations to give certain notices to the grantor, the obligation to choose between disposing of or retaining collateral when the collateral is seized and the restrictions and conditions on a secured party purchasing the collateral. A secured party cannot contract out of the obligations owed to persons who are not parties to the relevant security agreement.

If secured parties do not take advantage of the right to contract out of the enforcement provisions they will need to comply with all of the enforcement provisions of the PPSA.

Specific rules relating to seizure, disposal and retention of collateral

The PPSA introduces a number of requirements and obligations in relation to the powers of seizure, disposal and retention of collateral. In term of seizing collateral, a secured party:

- can only seize intangible property by giving notice to the grantor
- must dispose of or retain the collateral after the collateral is seized (unless the parties contract out of this provision)
- must, if given notice by another secured party with a higher ranking security interest (despite the fact the secured party may have title to the goods), give possession of the goods to the higher ranking secured party.

Regarding the disposal of collateral, a secured party:

- may dispose of collateral by private or public sale, by lease (if the security agreement allows) or, if the collateral is intellectual property, by licence,
- can only purchase the collateral itself if it has given notice to all other secured parties of their proposal to acquire the collateral and they receive no objection from the other secured parties,
- must give notice to the grantor and certain secured parties at least 10 business days before the secured party proposes to dispose of the collateral. The notice must comply with the PPSA,
- must obtain market value or the best price reasonably obtainable at the time the collateral is disposed,
- must give a statement of account to the grantor for the disposed collateral which complies with the PPSA.

With respect to retaining collateral, a secured party:

- must give notice to the grantor and certain secured parties that it proposes to retain the collateral. The notice must comply with the PPSA and be given at least 10 business days before the secured party takes steps to retain the collateral,
- can only retain collateral if it has given notice of its proposal to retain the collateral to the grantor and certain other secured parties and receives no objection from the other secured parties,
- will acquire the collateral free from all security interests if it retains the collateral in accordance with the provisions of the PPSA.

There are also specific provisions relating the seizure, disposal and retention of collateral that are crops and livestock.

Distribution of proceeds

If a secured party disposes of collateral, the PPSA sets out the priority in which the proceeds must be applied. Before a secured party can apply the proceeds of the disposal to the amounts owed, it must apply the proceeds in the following order:

- first, to a person who holds an interest (other than a security interest) in the collateral which has a higher priority than the secured party's security interest
- second, to the reasonable expenses incurred by the secured party in relation to the enforcement of security interests against the collateral
- third, to a person who holds a security interest in the collateral that has a higher priority than the secured party's security interest.

General obligations

The PPSA imposes a general obligation to act honestly and in a commercially reasonable manner upon secured parties who enforce their security interests.

Litigation for groups in liquidation

Law clerk, Myles Engelen, discusses the decision of the Supreme Court of New South Wales, in McGrath & Anor re HIH Insurance Ltd approving a proposal to use excess assets of some members of the group to fund claims by the group members.

The HIH collapse in March 2001 was Australia's largest and arguably most infamous insolvency. The Australian Prudential Regulatory Authority was lambasted for it, a Royal Commission was set up to deal with it, while shareholders and creditors still stand to lose billions of dollars because of it. Less than a year earlier HIH had $900 million of net assets on its balance sheet. However, just prior to its provisional liquidation, it operated at a loss of $800 million over the six months to 31 December 2001. Since then, liquidators estimate HIH has lost $5.3 billion.

In October 2005, Justice Barrett of the Supreme Court of New South Wales approved a proposal by the liquidators of certain asset-poor HIH group companies in liquidation (claimant companies) to use the excess assets of certain other HIH group companies in liquidation (funding companies) to fund the claimant companies' litigious claim against a third party that, according to His Honour, "*if made out, might be expected to yield substantial awards of damages*".

The proposal

Under the proposal, if the litigious claim was either settled by compromise or found in favour of the claimant companies, the funding companies were to receive:

- the amount provided in funding the litigation
- interest on the amount provided in funding the litigation calculated with reference to the prescribed Court rates
- a "*funding premium*" of one half the balance of settlement or damages remaining.

The proposal was controversial in that it had the opportunity to create wealth for creditors if the claim was successful but also a risk of destroying residual wealth for creditors if the claim was not. That said, one key creditor benefit of funding litigation from within the HIH group was that this sizeable funding premium was not lost to external funders but rather retained for creditors.

Approval required

It is important to note that the proposal would not have been fully performed within three months after its execution. Approval of the Court was therefore required under section 477(2B) of the *Corporations Act 2001* (Cth) (Act) despite the approval of the committees of inspection and creditors being received. In determining whether to grant leave, it must be shown that it was within the powers and duties of the liquidators and satisfy the balancing test enunciated by Justice Austin in *Re ACN 076 673 875 Ltd*.

The test assesses and weighs the nature and complexity of the cause of action; the amount of costs likely to be incurred in the conduct of the action and the extent to which the financier is to contribute to those costs; the extent to which the financier is to contribute towards the costs of the defendants in the event that the action is not successful, or towards any order for the defendant; the extent to which the liquidator has other funding options; the level of the financier's premium; the risks involved in the claim; and the liquidator's consultations with the creditors of the company.

The reasoning behind the proposal's approval remained confidential until May this year, by which time the litigation had reached a conclusion and parties to the litigation accepted that there was no longer a basis for maintaining confidentiality.

Powers of liquidators

Under the Act, liquidators have the power to "*do all such things as are necessary for winding up the affairs of the company and distributing its property*". In the present case, as part of a corporate group, each funding company is a creditor of the claimant companies to whom it was proposed that they give financial assistance. This provision was therefore interpreted widely by Justice Barrett so as not to disallow the proposal as being unnecessary. It was also held to be supported by the power to dispose of the property of the company and the power to obtain credit under the Act.

Responsibilities of liquidators

It is commonly accepted that liquidators are in a "*fiduciary relationship*" with the company in liquidation. A fiduciary was defined in the case of *Bristol & West Building Society v Mothew* per Lord Millett as "*someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*". One such duty owed by a fiduciary is that of avoiding actual or perceived conflicts of interest. Further, according to the case of *Walker v Wimborne*, these fiduciary duties are owed to individual companies within a group rather than to the group as a whole. Therefore the liquidator of the claimant companies is to ensure that the assets of the claimant companies are protected, while the liquidator of the funding companies is to ensure that the assets of the funding companies are protected.

The consequence of the proposal gives rise to a potential conflict of interest and breach of fiduciary duties. Approval of the Court was sought again and after wide consideration, Justice Barrett stated that he was "*prepared to accept that the Court has an inherent power (likely to be exercised only rarely) to authorise a Court-appointed liquidator to cause a company in liquidation to undertake a transaction that would otherwise entail breach of fiduciary duty by that liquidator*".

Advantages and disadvantages

Some advantages of the proposal for the funding companies were:

- potential increased return is likely to be significantly higher in the event of all claims being successful compared to the current investment strategy (of the funding companies' assets)
- the avenues of returns to HIH (both for the proposed and future litigation if a test claim is successful) are increased
- the chance of pre-trial settlement (by increasing the resources available to the claimant companies)
- fair and reasonable premium for funding
- no due diligence is required because the funding companies are familiar with the facts and circumstances surrounding the claims
- the prospect of having past funding (expended as legal costs) returned is increased.

Some disadvantages of the proposal for the funding companies were:

- uncertainty of litigation, in terms of outcome, defendants capacity to pay and allocation of proceeds
- possible time taken to settle litigation (and its effect on funds available to invest).

Some advantages of the proposal for the claimant companies were:

- creditors may forego a sizeable return if the major claims are not pursued due to lack of funding
- little or no financial risk borne
- fair and reasonable remuneration for the funding companies.

Outcome

Applying the weighting test from *Re ACN 076 673 875 Ltd*, the Court found that the litigation risk was "*not great*" and that "*a positive and beneficial outcome of that kind is much more likely than any negative outcome*". The Court therefore granted leave to the liquidators to undertake the proposal.

Watch this space

Subject to showing that the likelihood and extent of advantages of funding of the claims of an asset-poor group company by another group company with excess assets outweighs the likelihood and extent of the disadvantages, the decision suggests that the Court may grant leave for such a proposal to be authorised.

Another consequence of this decision may be that liquidators of corporate groups looking to fund litigious claims may first have to consider other companies in the group before external litigation funders because of their fiduciary duties to the individual companies, being creditors of the other group companies.

Given the spate of recent corporate group collapses, this decision may be relied upon in major insolvency decisions over the next couple of years.

Piper Alderman litigation prompts Share Register Regulations reforms.

The Federal Government has recently announced reforms to the Corporations Act 2001 (Cth) (Act) which are designed to neutralise the effect of the decision of the Full Court of the Federal Court of Australia in AXA Asia Pacific Holdings Ltd v Direct Share Purchasing Corp Pty Ltd. Dispute Resolution Graduate lawyer, Sebastian Hartford-Davis, examines the reforms.

AXA Asia Pacific Holdings Limited (AXA) had sought to charge Direct Share Purchasing Corp Pty Ltd (Direct Share) an exorbitant fee for a CD-Rom copy of its share register, to which Direct Share was entitled by s 173(3) of the Act to have access. The Act required the payment of a "reasonable amount that does not exceed the marginal cost to the company of providing a copy". AXA charged a fee of $17,195.39, on the basis that this amount had been charged to AXA by its Share Registry Manager, ComputerShare, pursuant to the Registry Services Agreement it had negotiated with AXA. The evidence, however, indicated that the cost of producing the copy in real terms would have been in the vicinity of $150. Direct Share successfully argued at trial, and before the Full Federal Court on appeal, that the amount charged by AXA did not represent a "reasonable amount". The Full Federal Court held:

> *"The fee charged by AXA bore no relation to the marginal cost to Computershare of the labour and materials involved in providing a copy of the register. The program and any other infrastructure necessary for producing a copy must have been in place already. The evidence showed that the cost to Computershare of preparing a copy of the AXA register involved the cost of somebody's time to do the report, the cost of the system time to do the data extraction, the cost of downloading the report and the cost of purchasing and putting the report onto a CD Rom."*

The Commonwealth Government has now moved to reverse the effect of the decision of the Full Federal Court.

The reform was announced on 20 May 2010 by the Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP. The draft Bill enables companies to refuse to hand over copies of their member registers where the copy is not being sought for a proper purpose. Genuine takeover bids will not be subject to the new regime, which will also reduce compliance costs by establishing a tiered fee structure for those seeking to access the register.

High Court returns serve in White City Tennis Club constructive trust case.

The High Court has handed down a decision concerning the always thorny issues of constructive trusts, fiduciary relationships and unconscionability. Unfortunately, the facts and procedural history of this case are as difficult to master as any of those complex legal minefields, as Dispute Resolution Partner, Tom Griffiths explains.

Tennis NSW owned land in Paddington known as the White City Land, on which there are various facilities including grass tennis courts. For some time, Tennis NSW wished to sell the White City Land. This dispute concerned a particular part of the White City Land known as the "Option Land".

Various groups have from time to time occupied parts of the White City Land, or have used the facilities, or have sought to acquire an interest in the White City Land. Those groups include White City Tennis Club (Club), Sydney Maccabi Tennis Club (Maccabi), the Trustees of Sydney Grammar School (SGS) and John Alexanders Clubs Pty Ltd (JACS).

In 2004, each of the Club, Maccabi, SGS and JACS negotiated extensively with Tennis NSW in respect of the ongoing use and enjoyment of the White City Land and the facilities. JACS and the Club entered into a Memorandum of Understanding on 28 February 2005 (Memorandum of Understanding) which contemplated an option to purchase the Option Land by a third party entity. Tennis NSW later transferred the White City Land to SGS on 30 June 2005. SGS on-sold part of the White City Land to Maccabi.

SGS entered into a series of agreements with JACS, the Club and another tennis club under which JACS (or its nominee) was granted an option to acquire the Option Land. The last agreement (Agreement) provided that the Memorandum of Understanding would continue but that the Agreement would prevail to the extent of any inconsistency. There was no condition in the Agreement for the option granted under it to JACS (or its nominee) be exercised on behalf of the Club or the third party entity contemplated under the Memorandum of Understanding.

On 12 April 2006, JACS purported to terminate the Memorandum of Understanding on the basis of repudiation by the Club. JACS nominated its associated company "Poplar Holdings" (Poplar) as the third party who would exercise the option to purchase the land. On 27 June 2007, Poplar exercised the option as JACS' nominee and became registered proprietor of the Option Land. Walker Corporation (Walker) financed Poplar's purchase and held an unregistered mortgage over the Option Land and a floating charge over Poplar's assets as security.

The Club brought proceedings in the New South Wales Supreme Court contending that the Memorandum of Understanding gave rise to a fiduciary duty on the part of JACS to exercise the option solely on behalf of the Club and that JACS had breached that duty. The Club also argued that Poplar held its interest in the Option Land on a constructive trust for the Club. The Club also alleged equitable fraud, unconscionability and a breach of the *Trade Practices Act*.

At trial, the Club was denied an interest in the land. An appeal was allowed and the Club was declared to be a beneficiary of the land under a constructive trust, and the New South Wales Court of Appeal held that it would be unconscionable for Poplar to deny the Club any entitlement to an interest in the Option Land, and that the Memorandum of Understanding gave rise to a fiduciary relationship.

One of the bases of the New South Wales Court of Appeal's decision appears to have been the principle encapsulated in the following example: if there were two bidders at an auction, and Bidder A agreed with Bidder B not to bid on the basis that Bidder B would bid for and acquire the property and later transfer the property to Bidder A, and then Bidder B was later successful at auction but refused to make the transfer to Bidder A, then Bidder B would hold the property on trust for Bidder A, on the basis of a constructive trust, Bidder A having abandoned its right to bid in reliance on Bidder B's promise.

Before the High Court JACS successfully argued that the Club's position was significantly different from that of Bidder A in the example above.

In its unanimous judgment on 26 May 2010, the High Court overturned the New South Wales Court of Appeal's decision and restored the Trial Judge's decision.

The High Court decided that Poplar's exercise of the option granted under the Agreement did not amount to equitable fraud, unconscionability or breach of fiduciary duty. The High Court held that JACS was under no obligation to exercise the option granted under the Agreement in favour of the Club, and that Poplar did not hold the Option Land on constructive trust for the Club.

The High Court decided no fiduciary relationship existed between the Club and JACS. There was no more vulnerability or reliance by the Club than that between ordinary contracting parties.

The High Court took into consideration the injustice to Walker if a constructive trust was imposed and also the fact that the Club had not sought to avail itself of other potential causes of action such as breach of contract and instead sought relief in equity.

In summarising its position on the allegations of equitable fraud, unconscionable conduct and breach of fiduciary duty at paragraph 101, the High Court cited *James Baird v Gimbel Bros Inc:*

> *"In commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves and where interpretations, strained or otherwise will not help, assistance to those persons by a strained application of equitable ideas does not promote justice either. The Club's defence of the orders in the Court of Appeal creates an unacceptable amount of strain of these kinds".*

The decision is a reminder of the challenges facing those who seek equitable relief from the Courts in circumstances where they have not elected to pursue other available legal avenues.

Loss of a chance: *Gett v Tabet*

In April 2010, the High Court of Australia upheld the NSW Court of Appeal decision affirming that the common law in Australia should not be modified to allow an award for damages for loss of a chance of a better medical outcome where the defendant's act or omission has deprived the injured party only of the possibility, but not the probability, of the better medical outcome. Dispute Resolution lawyer, Stephen Morrissey explains.

At 6 years old, Reema Tabet was suffering from headaches, nausea and vomiting and was admitted to hospital on 11 January 1991 under the care of the Dr Gett. She was recently recovering from the chickenpox. On admission, Tabet underwent two separate neurological examinations, both of which showed nothing ominous. Dr Gett's provisional diagnosis was post chickenpox viral encephalitis and he arranged for testing of this diagnosis by a lumbar puncture. An initial lumbar puncture was attempted that day, but Tabet was too distressed to allow the procedure to be completed.

Dr Gett examined Tabet again on 12 January 1991. His diagnosis of post chickenpox viral encephalitis did not change. Dr Gett decided to defer a further lumbar puncture for at least 24 hours due to Tabet's distressed state. Further neurological examinations performed on 12 January 1991 were normal.

Tabet's condition deteriorated noticeably on 13 January 1991, where she was observed to be staring and unresponsive. Dr Gett immediately ordered that a lumbar puncture be carried out. When Tabet's condition deteriorated further on 14 January 1991, Dr Gett arranged for an urgent CT scan.

The CT scan subsequently revealed that Tabet had a brain tumour with secondary hydrocephalus. An intraventricular drain was inserted to relieve intracranial pressure caused by the hydrocephalus and the tumour was partially removed. Miss Tabet then underwent chemotherapy and radiotherapy, but sustained irreversible brain damage.

Tabet commenced proceedings against both Dr Gett and a Dr Mansour, who had treated her in December 1990 and diagnosed her with the chickenpox. Tabet, through her tutor, alleged that each had been negligent in failing to diagnose and treat the tumour earlier.

At trial, evidence was adduced by Tabet to the effect that had a CT scan been performed earlier, various treatment options were available which may have been able to prevent the deterioration in her condition.

Justice Studdert did not think Tabet had proved, on the balance of probabilities, that she would not have suffered the brain damage if she had undergone the treatments. Notwithstanding this finding, applying the reasoning in *Rufo v Hosking*, Justice Studdert found that it was probable that Tabet's decline contributed to her ultimate disabilities and assessed that contribution to be no greater than 25% of her damage. He then assessed that her loss of a chance of a better outcome (ie avoiding the damage which was referable to the deterioration) was 40%. Consequently, Justice Studdert found that Tabet was entitled to 40% of 25% of the damages to which she would have been entitled if all of her brain damage was caused by Dr Gett's negligence. The other 75% of the brain damage was attributed to the surgery required to remove the tumour, and the chemotherapy and radiotherapy that followed.

Dr Gett appealed to the NSW Court of Appeal seeking leave to argue that the decision of the Court in *Rufo* should be overturned and the Victorian Court of Appeal decision in *Gavalas v Singh* not be followed.

The NSW Court of Appeal upheld the Dr Gett's appeal, finding that the loss of a 40 per cent chance of a better medical outcome did not constitute the required "damage" for a cause of action in negligence. As such, Tabet had not proved, on the balance of probabilities, that the negligence of Dr Gett caused her damage and he could, therefore, be held liable.

The NSW Court of Appeal came to its conclusion on the basis that to allow plaintiffs to recover damages for loss of a chance of a better medical outcome was a departure from a number of conventional principles. These included the fact that the loss of chance doctrine does not form part of a recognised line of authority, no clear limitations had been considered or formulated for the application of the new doctrine and setting the law of torts on a new path for proof of causation based on the creation of a risk is a matter of considerable significance that should be left for the High Court.

Tabet sought and was granted special leave to appeal to the High Court.

Tabet argued that a loss of a chance of a better medical outcome should be considered as "damage" giving rise to a cause of action in negligence. The High Court rejected this argument and held that to allow a plaintiff to recover compensation in negligence actions for only the loss of a chance of a better medical outcome would diminish the requirement for a plaintiff to prove on the balance of probabilities that his or her damage was caused by the negligence of the defendant and extend liability too far in medical negligence cases. The appeal was dismissed with costs.

The leading judgment was delivered by Justice Kiefel, who first reviewed the present state of the law in Australia, the UK, Canada and the United States. Her Honour noted that the loss of chance doctrine has been rejected in other common law countries such as Canada and England in favour of the conventional approach of causation being required to be proved on the balance of probabilities.

Her Honour went on to reaffirm the standard of proof required by the Australian common law for establishing causation, which is that a court must be persuaded that the relevant act or event was the probable, and not only a possible, cause of the harm that suffered by the plaintiff:

> *"All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm."*

It is now clear that the common law of Australia does not recognise an action for recovery of the loss of a possible, but not probable, chance of a better medical outcome. To do so would have been too radical a departure from conventional principles of causation.

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