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Piper Alderman Legal Update

Is a Disciplinary Board Exercising the Powers of a Court?

Lisa Farrand

Dispute Resolution lawyer, Lisa Farrand, reviews the High Court of Australia's decisions in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board, Gould v Magarey and Visnic v ASIC.*

Introduction

Two proceedings, *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board, and Gould v Magarey*, were heard together by the High Court on 24 May 2007 because they each raised the same issue.

At issue was whether the power of the Companies Auditors and Liquidators Disciplinary Board (**the Board**) under section 1292 of the Corporations Act 2001 (Cth) (**the Act**) to cancel or suspend the registration of a liquidator involved the exercise of the judicial power of the Commonwealth.

Under Chapter III of the Australian Constitution, the judicial power of the Commonwealth must be vested in a court, whose members are judges, and not exercised by a legislative or executive officer, body or tribunal. Any exercise of judicial power by the Board (an executive body) would, therefore, be unconstitutional.

Visnic v ASIC raised a very similar question, and was heard by the High Court concurrently with the above cases. At issue in Visnic was whether ASIC's power under section 206F of the Act to disqualify a person from managing corporations for up to 5 years involved the exercise of judicial power of the Commonwealth.

The Facts & History - Albarran v The Board and Gould v Magarey

Vanda Russell Gould and Richard Albarran were each registered liquidators under the Act.

On 15 July 2001, ASIC applied to the Board for an order suspending Gould's registration as a liquidator.

On 21 December 2004, the Board made an order that the registration of Gould be suspended for 3 months.

On 6 January 2005, ASIC applied to the Board for an order that Albarran's registration as a liquidator be suspended.

On 23 December 2005, the Board ordered that the registration of Albarran be suspended for 9 months.

The Board determined that in each case, the registered liquidator had failed within the meaning of section 1292 to carry out or perform adequately and properly the duties and functions required of a registered liquidator.

The Board's orders against each of Gould and Albarran were stayed by the Administrative Appeals Tribunal pending the outcome of these proceedings.

Gould and Albarran appealed to the Full Federal Court, which dismissed each proceeding with costs. The liquidators then appealed to the High Court.

The Facts & History – *Visnic v ASIC*

On 24 January 2006, ASIC served upon Milan Visnic a notice stating that he had been disqualified from the time of service of the notice for a period of 5 years from managing corporations without the leave of ASIC.

Visnic had been a director of 14 companies which had been wound up with the appointment of liquidators. ASIC was satisfied, within the meaning of section 206F of the Act, that Visnic had been an officer of 2 or more companies within the immediately preceding 7 years and that, whilst he was such an officer or within 12 months of him ceasing to be an officer, each corporation had been wound up and the liquidator had lodged a report under section 533 of the Act.

Section 533 of the Act is concerned with corporations that might be unable to pay their unsecured creditors more than $0.50 in the dollar by way of dividend.

ASIC determined that Visnic was not fit to manage corporations, as he had demonstrated a lack of responsibility towards his duties and responsibilities to creditors, to the detriment of those creditors.

Visnic's appeal to the Full Federal Court was heard concurrently with the appeals by Gould and Albarran. The Full Federal Court dismissed Visnic's appeal with costs and Visnic appealed to the High Court.

The High Court

The High Court unanimously dismissed each appeal by Gould, Albarran and Visnic.

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Gould and Albarran

Gould (whose submissions were adopted by Albarran) argued before the Court that the Board, in making the determinations and orders that it did, exercised judicial power because:

1. The orders made by the Board involved an adjudication of the question whether the liquidators had a right to be registered; and

2. The orders made by the Board constituted a public punishment. The orders impinged substantially on their economic freedom, particularly their capacity to earn a livelihood. The orders also diminished their reputations. In that sense the orders were 'punitive'.

The Court rejected the liquidators' submissions. The Court held that the Board was not exercising judicial power when it determined that Gould's and Albarran's registration be suspended. This was because:

1. the Board lacks the power to enforce its own decisions. The Board's decisions are subject to facilities of administrative review, of which the liquidators had availed themselves;

2. the Board does not settle disputes about existing rights and liabilities;

3. there was no determination by the Board of whether Gould or Albarran had committed any offence whether under the Act or otherwise;

4. the members of the Board include those appointed from panels nominated by professional accountancy bodies and from the general business community. The function of the Board is not to ascertain or enforce any existing right or liability in respect of an offence. It is to assess whether someone should continue to occupy a statutory position involving skill and probity, having regard to that person's professional duties;

5. no "punishment" in the sense of the authorities dealing with the judicial power of the Commonwealth was inflicted by the determinations and orders made by the Board.

Visnic

Visnic put several arguments in addition to those put by Gould and Albarran. Visnic's main submission focused on the fact that sections 206C, 206D and 206E of the Act confer on a Court curial powers of disqualification. In exercising those powers a Court is exercising, validly, judicial power of the Commonwealth. Alongside these sections is section 206F of the Act, which confers powers of disqualification not on a Court, but on ASIC.

Visnic argued that the power conferred on ASIC under section 206F of the Act is essentially the same as the judicial power conferred on a Court under sections 206C, 206D and 206E of the Act.

The Court rejected that submission, holding that the criteria stipulated for the exercise of power by ASIC and by the courts differ, and do so to a significant degree. Section 206F of the Act empowers ASIC to determine that a person is not fit to manage corporations by reference to criteria including the public interest. There is no determination of guilt with respect to any offence provision.

Kirby J, while agreeing with the other members of the Court, expressed his conclusion narrowly, resting it on the essential disciplinary character of the powers committed to ASIC by section 206F of the Act.

Conclusions

The High Court held that the Board and ASIC did not exercise judicial power of the Commonwealth when those bodies made determinations and orders adverse to the liquidators and Visnic respectively.

Although the result in each of the proceedings may be considered unremarkable by some, the High Court's decisions serve to highlight some important issues, as follows:

> The protection of shareholders, creditors, employees and the community depends on the integrity of officers of corporations and, where such corporations fail, of their liquidators. One obvious mode of securing the protection of such interests is by disqualification and deregistration.

> Orders that deprive liquidators of the entitlement to exercise their powers are public determinations having potentially serious consequences for their earning rights and reputation.

Alternatively,

> Regulatory bodies such as the Board and ASIC in making determinations such as these may bypass the courts completely, thereby depriving the officer concerned of an independent and impartial decision maker, the laws of evidence, and the provision of effective appeal rights in respect of decisions of considerable economic and reputational importance.

> The executive government regulator becomes the effective decision maker of its own accusation.

Beware of the Bitter Aftertaste: *the High Court's Defamation Ruling in Fairfax v Gacic*

Elizabeth McGill

Much ink has been spilt over the recent High Court decision of *John Fairfax Publications Pty Ltd v Gacic*. Pronouncements of the "death of free speech" have even resounded but Dispute Resolution law clerk, Elizabeth McGill, explains that the decision is about the powers of Appeal Courts to over jury's findings and change verdicts.

Section (3) of *The New South Wales Supreme Court Act* states that "where it appears to the Court of Appeal that upon the evidence the plaintiff or the defendant is, as a *matter of law, entitled to a verdict*…the Court…may direct a verdict and give judgment accordingly". The High Court litigation considered the roles of the judge and jury in defamation proceedings and the power of the Court of Appeal to intervene.

Facts

Colourful and trenchant in his criticism, *Sydney Morning Herald* restaurant reviewer, Matthew Evans, described the now-defunct Coco Roco Restaurant as "unpalatable" and "a bleak spot on the culinary landscape". The critique was clearly contrary to the restaurant's desired status as "Sydney's most glamorous restaurant". The owners of the restaurant sued the publisher of the Sydney Morning Herald, John Fairfax Publications Pty Ltd, claiming business defamation.

Prior to the jury hearing, the NSW Supreme Court found that the article may convey that the owners of Coco Roco:

a) sell unpalatable food;

b) charge excessive prices;

c) provide some bad service;

d) are incompetent because they employ a chef who makes poor-quality food.

At trial, the jury found that (b) and (d) could not be imputed to the article and that although the review did convey (a) and (c), these were not defamatory.

On appeal, the Court of Appeal found that (a) and (c) were conveyed and that no reasonable jury could find that these were not defamatory. The Court held that the jury had been misled regarding the meaning of defamation in a business context, both by counsel's address and the trial judge's failure to clarify. The Court of Appeal remitted imputation (d) to reconsideration by a jury.

It is the exercise of those powers that was at issue before the High Court.

Findings

The High Court dismissed the appeal (6:1), holding that the Court of Appeal had properly exercised the power by correcting the unreasonable jury verdict.

The majority stressed the need for a liberal construction to equip the Court of Appeal with sufficient flexibility to adequately respond to the wide range of issues at play in an appellate court.

Consistent with the objectives of expediency and efficiency which underlie defamation legislation in NSW, the majority rejected the appellant's call for a re-trial with a jury. They argued that this would be inconsistent with the plain meaning of the Court's power to give a verdict where a plaintiff is *entitled* to the verdict, as a matter of right.

Further, the majority rejected the proposition that community standards must shape defamation proceedings. They held that business competence is distinct from personal reputation, and therefore defamation should not be defined by the impact perceived by the community.

It is in defence of this argument that Kirby J, in dissent, stated that "[a]stonishing as it may seem, judges may occasionally lack a sense of irony or humour. Some may undervalue 'free speech' or sometimes even feel hostility to a 'free press'". Kirby J's statement recognises the special functions of juries in determining community standards.

Implicit in this lies an understanding of the express parliamentary reservation of trial by jury in the *Defamation Act* (NSW) despite the tendency for juries to come to different conclusions than judges. Kirby argued, therefore, that if the jury were found to have acted unreasonably, it would be preferable to conduct a new jury trial rather than for the Court of Appeal to pronounce a verdict. Kirby J reasoned that the Court's powers must be fettered by the need to respect "free speech" and a "free press".

Implications

This decision has caused ripples in the press and within the public who have perceived it as a threat to civil liberties. Those concerns should be tempered by the fact that the litigation is still pending. The merit of the defamation claim regarding imputation (d), is yet to be decided.

Disclosure of Discovered Documents to a Litigation Funder: No General Licence to Disclose

Anne Freeman

Dispute Resolution partner, Anne Freeman, reviews the recent Federal Court of Australia decision of *QPSX v Ericsson Australia*, in which Justice French was faced with an application to disclose discovered documents to the applicants' litigation funder.

In litigation, there is an implied undertaking by solicitors that documents discovered in the proceedings will not be used for any purpose unconnected with the proper conduct of the proceedings, without the leave of the Court.

The applicants sought the leave of the Court to disclose all of the respondent's discovery to their litigation funder on the basis that the funder had a legitimate interest in the conduct of the litigation.

Interestingly, the same issue in respect of the same funder came before Justice Finkelstein of the Federal Court last year in Cadence Asset Management v Concept Store. In that case, his Honour held the funder was not a "stranger to the action" and had sufficient interest in the action to be provided with copies of discovered documents or, at least, such discovered documents required for it to assess the merits of the litigation.

Justice French took a less liberal view, finding that the general disclosure of discovered documents to a funder raises concerns not answered by the interest the funder has in the litigation. His Honour explained:

> *"the generic risk associated with the wider disclosure of the discovered documents is something which the party discovering those documents is entitled to take into account and be concerned about. It is entitled to seek specificity as to the documents to be disclosed and the purpose for which they are to be disclosed. This is particularly so given that the litigation funder, as in this case, does not have an interest in the cause of action nor any right to direct or control the conduct of the proceedings."*

Justice French ultimately refused the applicants' application. However, it does appear that this was largely because the applicants had taken a "broad brush" approach to the application, seeking to disclose all the discovered documents to the funder, rather than to identify specific documents that they considered necessary to show the funder, and to explain the need to do so.

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The result of the decision does place a significant burden on the funded party to specify in a detailed way the documents sought to be disclosed to the funder and to demonstrate that the funder needs access to those documents to consider the ongoing merits of the action. Given the apparent commercial sensitivity of the documents discovered by Ericsson in this case, this decision may well be restricted to circumstances where there are obvious confidentiality concerns about the disclosure of the documents.

ENT Pty Ltd v Sunraysia Television Ltd: Director Obligations to make Adequate Disclosure to Shareholders

Marc Scardilli

Dispute Resolution lawyer, Marc Scardilli, comments on a decision of Austin J of the New South Wales Supreme Court to award an injunction preventing a shareholders' meeting on the basis of the adequacy of the information disclosed to shareholders.

The ASX listing rules provide that before an entity disposes of its main undertaking, the entity must get the approval of shareholders. On this basis Sunraysia Television Ltd (Sunraysia) sent notices convening the meeting to shareholders, along with an explanatory memorandum, for approval of the Board's unanimous recommendation to sell all the issued capital in Swan Television & Radio Broadcasting Pty Ltd (Swan TV).

The facts of the case were:

> Sunraysia and PBL Media Pty Ltd (PBL Media) entered into a sale agreement whereby PBL Media would acquire Swan TV. Swan TV operated Sunraysia's main undertaking, the Channel 9 television station in Perth.

> The sale was to be the first step in a two-step process – the second step involving a share buy-back where the shares of accepting shareholders would be cancelled in return for a cash payment.

> ENT Pty Ltd (ENT) was a shareholder in Sunraysia with a 26.7 per cent holding. ENT's ultimate holding company is WIN Corporation Ltd. Companies associated with the WIN Group held 44.6 per cent of the issued shares in Sunraysia. Chairperson of Sunraysia, Eva Presser, held the voting power of approximately 49.7 per cent through her personal, and various other companies', shareholdings.

> ENT sought an injunction preventing the shareholders' meeting going ahead on the grounds that the directors of Sunraysia had not complied with their fiduciary duty of full and fair disclosure to their shareholders through their explanatory memorandum.

> Ancillary to the allegations that the directors breached their disclosure duties, ENT claimed that the documentary disclosure that had been made was misleading or deceptive.

Austin J held that Sunraysia did not disclose adequate explanatory materials which an ordinary shareholder would require in making a decision as to whether to vote in favour, or abstain from voting, on the sale of Swan TV. An injunction was granted.

A director's duty of disclosure requires a director to disclose the basis upon which they have formed their opinion as to the "fairness or adequacy of the price, and the basis of their decision to commit the company to the share proposal and to recommend it for the approval of shareholder". Austin J found that this did not require directors to obtain an independent or external report as to the value of its undertaking in Swan TV. However, if the sale was to proceed without an independent report, the directors were obliged to disclose the basis upon which they made their decision.

Sunraysia argued that the decision to sell Swan TV was in the best interests of shareholders, especially when considered in light of their expired program supply agreement with the Nine Network and that a new agreement had not been finalised. Austin J noted that if the directors regarded these factors as material for the shareholders to take into account whilst considering the sale proposal, then the directors ought to have disclosed the materials in the explanatory memorandum.

Austin J reasoned that whilst certain documents, such as ASX announcements and half-yearly consolidated financial statements are accessible by investors, they are not necessarily read by shareholders and that "directors cannot exclude material disclosure to shareholders simply on the ground that the information has already been disclosed to the ASX".

The required level of disclosure from directors is influenced by the nature of the decision that the shareholders are required to make. Directors are not required to provide all possible information relevant to the making of a decision, rather the directors' obligation is to provide information material to the question.

Austin J relied upon *Fraser v NRMA Holdings Ltd* in suggesting that "the adequacy of the information provided in documentation is to be assessed in a practical, realistic way having regard to the complexity of the proposal". Further, the adequacy of the disclosure must be assessed by reviewing the materials as a whole.

ENT contended that by virtue of the directors failing to notify shareholders whether they had formed an opinion as to whether the sale price reflected a "fair price" (and that if they had, what that opinion was and the basis for it) the directors breached their duty of disclosure. Austin J agreed stating that in the present case (a two-stage proposal involving a sale proposal and a cash distribution) such opinions are "vitally important", "highly material" and "fundamental" to shareholders' decisions.

The question of whether directors ought to disclose negotiations with other potential bidders, as well as other alternatives to the proposal that they have put to shareholders, is complicated. Austin J stated that directors' duties required them to investigate alternatives, and weigh up ways of achieving their objectives. However, disclosure would once again depend on the question which the shareholders must decide. For example, disclosure of alternative offers and proposals would be required if shareholders were required to decide on the best possible structure of Sunraysia. This was not the question put to the shareholders and therefore was not required to be disclosed.

Set-offs and Annulling Bankruptcy Orders

Mitch Coidan

Dispute Resolution associate, Mitch Coidan, discusses the case of *Rigg v Baker* which explored the power of the Court to annul a bankruptcy where it considers that a sequestration order should not have been made.

Mrs Baker was the sole beneficiary of her husband's estate which included the marital home. It was agreed that Mrs Baker would transfer the land on which the home was located to her nephew and, in return, he agreed to allow Mrs Baker to live in the home rent free.

Mrs Baker's nephew defaulted on a loan secured by the land on which Mrs Baker's home was located and the bank instituted proceedings to obtain possession of the land.

Mrs Baker commenced an action against her nephew impugning the transfer on the basis of undue influence and unconscionable conduct. Mrs Baker lost that action and was ordered to pay her nephew's costs.

The bank exercised its power of sale and Mrs Baker was forced to vacate her home.

Mrs Baker's nephew by reason of his aunt's inability to pay the Cost order obtained bankruptcy orders. Mrs Baker appealed the bankruptcy seeking orders annulling her bankruptcy, and setting aside the sequestration orders on the basis that she had a claim against the nephew that he had breached the agreement that she be allowed to remain in the home.

Justice Wilcox at first instance held that the bankruptcy order should not have been made, and subsequently annulled Mrs Baker's bankruptcy on the basis that her nephew *"was liable to pay damages to Mrs Baker in an amount that would undoubtedly exceed the amounts which she owed…at the date of sequestration"*.

Mrs Baker's nephew appealed the decision to the Full Court of the Federal Court. Spender, French and Cowdroy JJ allowed the appeal and set aside the annulment with costs.

The Full Court found that Wilcox J had erred in concluding that the sequestration order ought not to have been made. The Full Court commented that:

> *"There was no evidence of the quantum of the claim which Mrs Baker would have had against [her nephew] for breach of his covenant under the deed or any basis for concluding that it would exceed the amount of the costs ordered in his favour and the six unsuccessful actions … in the circumstances, it was not open to His Honour [Wilcox J] to conclude that a sequestration order ought not to have been made … his conclusion that, the Registrar apprised of the full facts would have realised it was not clear that Mrs Baker was a net debtor to Mr Rigg, was not supported by the facts having regard to the costs order in favour of [her nephew]. In the circumstances, there was no basis for concluding that the sequestration ought not to have been made"*.

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