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Piper Alderman Legal Update

Vines v ASIC: The obligation of care and diligence of company officers

Lisa Farrand

Dispute Resolution lawyer, Lisa Farrand, reviews the New South Wales Court of Appeal decision in *Vines v ASIC*

Introduction

As identified by Santow JA, the matter of *Vines v ASIC* is significant in the following respects:

> It is a rare instance of a senior executive officer who is not a director being held to account for what was said to be a failure in the degree of care and diligence required, and implicitly skill, under the statutory standard.

> The executive officer concerned was held to account principally for relying on another senior executive to report to him on a critical financial matter, where that other officer had operational responsibility with respect to the particular subject matter of his reporting.

> There was no suggestion of dishonesty on the part of the Chief Financial Officer.

> Shareholders were seeking to be informed as to whether or not to accept a takeover offer and did not want to be forced to sell "on the cheap".

Facts

The Appellant, Geoffrey Vines, was a chartered accountant and auditor. He commenced work as Chief Financial Officer of GIO Australia Holdings Limited ("**GIO**") in 1995.

On 25 August 1998, a takeover bid for the shares in GIO was announced by another insurance company, AMP Limited ("**AMP**"). This was a hostile takeover bid and was resisted by the Board of GIO.

As required by the *Corporations Law*, GIO on 16 December 1998 published its Part B Statement. That Part B Statement contained a profit forecast for the year 1998 to 1999 which included a forecast profit of AUD$80 million for GIO Re, the reinsurance division of GIO Insurance Limited, a subsidiary of GIO. The profit forecast was of considerable significance in the context of a hostile takeover battle.

GIO Re was exposed to significant claims as a result of Hurricane Georges which struck Puerto Rico and the United States Virgin Islands, moved into the Gulf of Mexico and made land fall in Mississippi in the period from 21 to 28 September 1998. This was about a month after the takeover bid had been announced and occurred during the period in which GIO was preparing its Part B Statement.

ASIC originally commenced civil penalty proceedings against Mr Vines and two other executive directors (Mr Robertson and Mr Fox) in 2001 in connection with the Part B Statement. ASIC alleged breaches of section 232(4) of the *Corporations Law* (the precursor to section 181(1) of the *Corporations Act* 2001 (Cth)) by Mr Vines and the two other executives. The case was largely concerned with the reasonableness of including GIO Re's $80 million profit forecast in light of the claims exposure following Hurricane Georges.

Mr Vines appealed from the Judgment of Austin J in which he was found to have contravened section 232(4) of the *Corporations Law*. Mr Vines also sought relief from liability under section 1317JA or section 1318 of the *Corporations Law*, which provide a discretion in the Court to relieve a person from liability where the person has acted honestly, and in the circumstances of the case ought fairly to be excused. Austin J rejected these defences in a Second Judgment. In a Third Judgment Austin J considered penalty and made 11 declarations of contravention. He imposed a fine of $100,000 and disqualified Mr Vines from acting as a director for three years.

Issues on appeal

The Court constituted Spigelman CJ, Santow and Ipp JJA. Spigelman CJ and Ipp JA made up the majority, with Santow JA dissenting in part.

Standard of Care

Mr Vines submitted to the Court that the degree of negligence that must be established to constitute a contravention of section 232(4) is higher than that which would support a claim of negligence at Common Law. Mr Vines submitted that in this statutory scheme the failure to act with care and diligence must be "gross enough to become a matter of public concern, to interest the State by reason of its gravity".

The Court examined the history of the general law and legislation and considered the statutory scheme as a whole, and confirmed Austin J's conclusion that the standard of care applicable to the statutory duty set out in section 232(4) does not call for a higher order of negligence to be established than the equivalent duty under the general law.

The Court therefore rejected this ground of appeal.

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Summary of findings

The Court upheld, in part, Austin J's earlier findings. In particular, it found that Mr Vines had contravened his duty of care on three occasions when he:

> signed a management sign-off on a due diligence report without taking positive steps to advise GIO's due diligence committee ("**DDC**") of the basis of the assumptions underlying the $80 million profit forecast ("the Fourth Contravention");

> informed the DDC that he was comfortable with the integrity of the GIO profit forecast ("**the Fifth Contravention**"); and

> failed to give attention to whether the GIO Re profit forecast would be achieved in the period after the Part B Statement was issued, but before the takeover process ended ("**the Seventh Contravention**").

The Court did however overturn four other contraventions contended by ASIC, reversing, in part, Austin J's decision. The Court said that Mr Vines did not contravene his duty of care when he:

> made an unqualified statement of management confidence in the GIO Re profit forecast to the Board on 9 November 1998 ("**the First Contravention**"); and

> failed to provide information about the basis on which the profit forecast was calculated in:

a report that was the basis of a media release on 17 November 1998 reporting on the company's profit ("**the Second Contravention**"); and

an email sent to the DDC on 22 November 1998 ("**the Third Contravention**").

> Austin J had also found that Mr Vines had contravened his duty of care when he made statements to the Auditor of GIO representing that GIO was not aware of any event which would lead GIO to believe that the forecast was incorrect or misleading, and that full disclosure had been made to the Auditor ("**the Sixth Contravention**"). However, the Court found that this finding was outside of the pleaded case.

> The reasons for the Court's decision in respect of each of the contraventions are more fully explained below.

Contraventions upheld by the Court

The Fourth Contravention – The Management Sign-Off

Included in the Part B Statement was a statement signed by Mr Vines dated 8 December 1998 headed "Management Sign-Off".

The Court confirmed that Mr Vines was required by the terms of the management sign-off to take personal responsibility.

One of the elements under consideration for the purposes of determining the profit forecast for GIO Re was the possibility of GIO Re obtaining a policy with another reinsurer, known as a "retrocession policy", which would enable it to assert, relevantly for accounting purposes, that it had transferred the risk of its exposure to Hurricane Georges. GIO duly entered into an agreement with American Re. This was referred to as the "American Re agreement". Until 7 December 1998, GIO had proceeded on the basis that the American Re agreement would effectively limit Hurricane Georges' losses in the 1999 year, but on that day PricewaterhouseCoopers, GIO's auditors, refused to agree that the American Re agreement was a retrocession agreement which could be given the accounting treatment required to support the profit forecast.

The Court confirmed that before or in the course of giving his management sign-off on 8 December 1998, Mr Vines failed to ensure that the DDC was properly informed of all material aspects of the maintenance of the reinsurance profit forecast. Mr Vines failed to inform the DDC that the achievement of the $80 million profit forecast was improbable, given the unavailability of the American Re agreement.

The Court dismissed the appeal from this finding of contravention.

The Fifth Contravention – Advice to the DDC

In the minutes of the meeting of the DDC of 8 December 1998 the following statement appeared:

"In relation to the forecast Nick Steffey and Geoff Vines confirmed to the meeting that each of them was comfortable with the integrity of the forecast result of $250 million as set out in the forecast in the draft takeover response booklet."

A component of the $250 million was the $80 million profit forecast for GIO Re.

The Court confirmed that a reasonable person in like position to Mr Vines, acting with care and diligence in a corporation in GIO's circumstances, would not have given the kind of unqualified assurance about the group forecast in circumstances where real doubts had emerged about a material component of that forecast, without making accurate and complete disclosure of all the material circumstances that had led him to believe that, on balance, the group forecast could still be achieved and should be adopted.

The level of confidence in the profit forecast was also affected by recognition that GIO reserves as at 30 June 1998 may be able to be released. Mr Vines had prepared what is called an "unders and overs" analysis as at 30 June 1998.

Given the existence of substantial doubts emerging from the unavailability of the American Re agreement, the need to rely on unders and overs, and the need for judgment to be exercised, the responsibility of Mr Vines was to ensure that the DDC had before it the information necessary for it to make the appropriate judgment, rather than to make his own assessment and then give the DDC his conclusions without the judgmental steps in his reasoning process.

The Court dismissed the appeal from this finding of contravention.

The Seventh Contravention – Conduct After 8 December 1998

On 9 December 1998 AMP announced that it was increasing its bid. As the takeover battle for GIO proceeded, no correction to the profit forecast made in the Part B Statement was made.

The Court of Appeal confirmed that after 8 December 1998, Mr Vines failed to give direction to ensure that monitoring arrangements were continuing at the divisional level, and that the results were brought forward promptly to the appropriate senior corporate officer, so that an assessment could be made about further disclosure to the market.

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The Court said that on the basis of facts Mr Vines knew or ought to have known the achievement of the $80 million profit forecast was improbable. The position on 8 December 1998 required particular attention be given to the extent of exposure to Hurricane Georges for the period the takeover process continued. It was not given.

The Court dismissed the appeal from this finding of contravention.

Contraventions Overturned by the Court

The First Contravention – The Profit Forecast of 9 November 1998

On 9 November 1998 at a meeting of the directors of GIO, the Appellant tabled a report containing the following statement:

> *"Claims arising out of Hurricane Georges have been assumed to be $25 million based on our average historical market share of such catastrophes. Management remains confident the full year forecast business profit of $80 million can be met."*

The Court of Appeal noted that the mode in which this contravention was committed was in a report to the Board. There was no suggestion that this report would be the basis of any kind of media release, and the Part B Statement, although in preparation, was some way off.

There were differences that had emerged in regard to the $80 million profit forecast between two other directors. However, Mr Vines was aware that Mr Lange, the non-executive director of GIO who had particular responsibility for the reinsurance figures and that component of the profit forecast, was himself aware of the differences that had emerged between those two directors. Austin J did not refer to that consideration in his analysis of the breach of duty. The Court of Appeal found that it was a significant aspect of the alleged contravention.

The Court held that in the circumstances, it was not necessary for an officer in Mr Vines' position to disclose at that time the existence of divergent views within management, or even that some issues had arisen about the profit forecast. No conduct based on the profit forecast was, at that time, likely to occur before the disagreement was addressed.

The Court allowed the appeal against this finding of contravention.

The Second Contravention – The Report and Media Release of 17 November 1998

On 17 November 1998, GIO issued a media release which was entitled "GIO Post $88 million pre-tax profit for the first four months of 98/99". Of particular relevance was the statement in this media release that:

> *"GIO Re's insurance business achieved a sound profit despite exposure to events such as the Swiss Air Crash and Hurricane Georges."*

The Court found that in the circumstances as they existed as at 17 November 1998, on the findings of Austin J, Mr Vines had in mind two considerations, either of which could be such as to overcome the then known exposure to Hurricane Georges. The first was the state of Mr Vine's belief about the efficacy of the American Re agreement. The second was his understanding that there were substantial excess reserves.

In neither respect was there a finding that the belief was negligently held.

The Court held that notwithstanding the significance of the media release, Mr Vines' conduct did not fall below that to be expected of a person in his position at the relevant time.

The Court allowed the appeal against this finding of contravention.

The Third Contravention – The Email of 22 November 1998

On 22 November 1998 Mr Vines forwarded to members of the DDC an email which contained what was described as the "Latest Forecast". It projected a profit for both reinsurance and corporate of $69 million, which was based on the original assumption of the $80 million profit by reinsurance.

The Court found that with respect to the uncertainty surrounding the American Re agreement, the consequences of the representation made in the email of 22 November 1998 were not such as to require further disclosure pursuant to the duty of care and diligence.

The Court allowed the appeal against this finding of contravention.

The Sixth Contravention – Advice to the Auditor

In a document signed by Mr Vines, statements were made to PwC Securities representing that GIO was not aware of any event which would lead GIO to believe that the forecast was incorrect or misleading, and that full disclosure had been made to PwC.

The Court found that the pleaded allegation was not, in terms, an allegation of a failure to make appropriate enquiries of other directors and officers. It did appear from the declaration that was actually made in this respect that Austin J regarded that as the relevant contravention. Austin J's finding in this respect was therefore outside of the pleaded case.

The Court allowed the appeal against this finding of contravention.

The 'Honesty Defence'

Austin J had rejected Mr Vines' claim for relief from liability under section 1317JA and section 1318 of the Corporations Law with respect to each of the contraventions that Austin J found to have occurred. It was necessary for the Court of Appeal to consider Mr Vines' appeal from Austin J's Judgment with respect to each of the contraventions that the Court had upheld, namely the Fourth, Fifth and Seventh Contraventions.

The Court upheld Austin J's decision in respect of the Fourth, Fifth and Seventh Contraventions to deny Mr Vines relief from liability. The Court said that the obligation upon directors with respect to the making of profit forecasts, particularly in the context of a Part B Statement in a contested takeover, are of considerable significance for a fully informed market.

Spigelman CJ said that the Board adopted, in this present case, an entirely appropriate and high level of due diligence standard for the formulation of the profit forecast. The Board depended to a substantial degree upon the performance by Mr Vines of the responsibilities it conferred upon him for the preparation of the forecast.

Those responsibilities required Mr Vines to be proactive. Mr Vines was obliged to ensure that the most up-to-date

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information with respect to the extent of exposure to Hurricane Georges was obtained and, by reason of the particular responsibilities imposed upon him, it was not sufficient for him to act on the assumption that he had in fact been given the most up-to-date information, unless he had expressly put in place reporting arrangements that had ensured that he had. He had not. Mr Vines' responsibilities continued in the period after the Part B Statement was issued, at least for such time as the takeover was proceeding on the basis of the information contained in the Part B Statement.

Spigelman CJ said that it is not correct for directors to maximise forecast profits. Directors are obliged to produce forecasts which they regard as appropriate.

Following the issue of the Part B Statement the objective of the exercise was not to determine what an appropriate profit projection was, but to protect the original projection.

Spigelman CJ referred to the American Re agreement and said that directors, and especially a chief financial officer with high level accounting qualifications and experience, cannot engage in manipulation of the accounts so long as an auditor is prepared to sign off on the process. This is not conduct which the Court should accept, let alone encourage.

Penalty

The Court ordered that directions be made for further written submissions on the issue of penalty.

Each party was ordered to bear its own costs of the appeal.

The Court will consider an appropriate penalty for Mr Vines' contraventions later this year.

Dissenting Judgment

Santow JA agreed with Spigelman CJ and Ipp JA that the First, Second, Third and Sixth Contraventions contended by ASIC be overturned. However, his Honour said that with respect to the remaining contraventions, namely the Fourth, Fifth and Seventh Contraventions, he would also overturn these contraventions.

Santow JA's decision ultimately turned on whether Mr Vines was in breach of the statutory standard of care and diligence in continuing to rely on Mr Fox on and from 7 December 1998 to quantify the loss from Hurricane Georges and report on it to Mr Vines. Santow JA said that Mr Vines was not required to have taken more proactive steps himself to ascertain the position.

Santow JA held that Mr Vines had a supervisory role, not an operational role, so far as the reinsurance division was concerned. He had no reason to have any suspicion that Mr Fox, as executive director of GIO Re, had failed in his responsibility to provide a proper estimation of the extent of loss from Hurricane Georges. As Mr Vines saw the situation, there was simply no need to make further personal investigations. He was entitled to rely on Mr Fox to report to him any important information as and when it appeared, and assumed in the meantime that whatever process had been adopted to analyse Hurricane Georges' claims, would proceed without his involvement.

Santow JA also found that even if he were wrong in deciding that the Fourth, Fifth and Seventh contraventions should also be overturned, Mr Vines ought fairly to be excused for those contraventions. His Honour said that Mr Vines ought to be excused because there was no dishonesty, simply an error of judgment on the part of Mr Vines. The majority shareholders who accepted the AMP takeover bid and GIO itself, suffered no detriment.

Implications

Company officers need to ensure that any information given to shareholders and on which they make investment decisions is accurate and complete in all material respects.

Practically, where a company officer has reason to believe that information to be given to shareholders may be incomplete or inaccurate, they have a duty to:

- maintain the accuracy and completeness of the information under review;
- advise others relying on the information of any concerns regarding the accuracy or completeness of the information; and
- not provide any assurance regarding the accuracy or completeness of the information.

Barley Export Single Desk to be abolished

Simon Venus

Debate surrounding monopoly grain marketing or 'single desk' arrangements and the controversy centred on AWB following the Cole enquiry has put grain export in the spotlight. Corporate partner, Simon Venus, looks at recent deregulation of the bulk barley export market in South Australia. New legislation in the form of the Barley Exporting Act 2007 will remove the single desk for barley export operated by ABB (the former Australian Barley Board) and put in place a transitional licensing regime to be administered by the Essential Services Commission

Following the December 2006 report of the Barley Marketing Working Group and its seven key recommendations, the bulk barley export market in South Australia is to be fully deregulated at the end of a three-year transition period beginning 1 July 2007.

This will bring the state broadly into line with Victoria, New South Wales, Queensland and Western Australia, each of which has deregulated its single desk authorities.

The Working Group was charged with developing alternative models for the export barley market in the state. It took submissions from industry and growers and considered numerous options ranging from maintaining the status quo to immediate and full deregulation. It concluded that a phased transition to deregulation of the single desk was the most appropriate model.

One of the drivers for the reform of the single desk was the requirement for the state government to meet its obligations under the National Competition Policy. South Australia's failure to reform the barley marketing arrangements to comply with the NCP has cost the state $9 million in competition reform payments over the period from 2002 to 2005.

The new *Barley Exporting Act 2007* establishes a three year licensing scheme for barley export in South Australia. The

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legislation was assented to in April 2007 and will come into operation on 1 July 2007. It will expire on 1 July 2010, after which barley exporting will become fully contestable.

The new Act repeals the *Barley Marketing Act 1993* which has regulated the export of bulk barley from the state through the single desk operated by ABB Grain Export Ltd, a subsidiary of ABB Grain Ltd. The effect of the legislation will be to allow growers to deliver bulk barley to the exporter of their choice.

The general regime created by the new *Barley Exporting Act* centres around a prohibition on the export of barley unless authorised by a licence issued by the Essential Services Commission. The maximum penalty for export without a licence is $500,000 for a first offence and $1 million for a subsequent offence.

The Act applies only to export of barley from a South Australian port to a destination outside Australia. It will not apply to barley packed in bags or containers capable of holding not more than 50 tonnes. Among other provisions, the new Act also mandates that the relevant Minister must establish a committee with a mix of knowledge and experience to advise on the administration of the licensing scheme. The Minister must also cause a review of the Act to be undertaken within the first two years of operation.

The new Act declares the exporting of barley to be a regulated industry for the purposes of the Essential Services Commission Act. Accordingly, the Commission, perhaps better known for its role in regulating prices for gas and electricity in South Australia, is the body responsible for administering the licensing scheme during the transitional period.

When the Commission recently released its Advisory Bulletin No 5 relating to the new licensing arrangements, it said that the new Act was "*designed to give barley growers time to improve their risk management and grain marketing skills, and to ensure a proper prudential assessment of barley exporters before full market liberalisation.*". Together with the advisory bulletin, the Commission has also released an application form and model licence.

Licence applicants must provide the Commission with information to enable it make an assessment of the suitability of the applicant to hold the licence. The minimum information requirements include:

> corporate and legal information to identify the legal entity which is seeking to be licensed, the status of that entity and its capacity to be subject to legal action in Australian courts;

> technical and human resource information to demonstrate that the applicant has or will acquire sufficient operational resources to carry out the activities authorised by the licence;

> financial and prudential information to satisfy the Commission that the applicant has the financial resources to carry out its operations and meet its financial commitments;

> regulatory information to satisfy the Commission that the applicant will be able to meet its fundamental regulatory obligations imposed under barley export licences.

The Commission's role is to assess the application against the backdrop of its mandated legislative functions, including the protection of long term interests of consumers of barley export services, namely South Australian barley growers, with respect to the price, quality and reliability of those services. Key criteria for assessment include whether the applicant is a suitable person to hold a licence and whether it will be able to meet its obligations under export contracts.

The Commission will look at an applicant's experience in trading and exporting barley or other grain or commodities. The Commission will also consider whether the applicant, its officers and major shareholders have in the past shown in their commercial dealings competence, diligence, honesty, integrity and judgment. The Commission will also have regard to the resources available to the applicant.

Prospective applicants should note that the Commission will publicly release a copy of the application and any confidential information should be clearly identified as such when it is lodged with the Commission. Upon receipt of an application the Commission will instigate its statutory consultation process, inviting comment from the public, government, industry and consumer groups and it may also seek independent advice.

There are review and appeals procedures in place to review a decision of the Commission to refuse to issue a licence.

The Intellectual Property Rainbow: Cadbury edges closer to its pot of gold

Tom Griffith
Elizabeth McGill

Dispute Resolution senior associate Tom Griffith, and law clerk Elizabeth McGill, observe that Cadbury appears to be closer to protecting its colour purple from Darrell Lea after the Full Federal Court remitted the litigation for a new hearing on the basis that the trial judge erred in rendering inadmissible expert evidence

At trial, Cadbury sought to rely on expert evidence from an Associate Professor of Marketing and Behavioural Science, a Senior Lecturer in the School of Economics, Finance and Marketing and from the managing director of a branding and design consultancy firm. The evidence was held to be inadmissible. The evidence detailed the common consumer errors of:

> misidentification (consumers wish to purchase Cadbury but mistakenly purchase Darrell Lea);

> miscuing (consumers use purple as a cue to decision making);

> misinference (consumers mistakenly infer a corporate relationship between Cadbury and Darrell Lea);

> misassociation (consumers mistakenly associate Cadbury with Darrell Lea and vice versa).

Pursuant to these common consumer errors, the experts Cadbury sought to rely on concluded that Darrell Lea's use of purple allows it to exploit Cadbury's reputation and positive associations. They concluded that this could potentially inflict considerable damage on Cadbury.

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The trial judge had excluded the evidence on the basis that it merely constituted general knowledge and thereby did not qualify as specialised knowledge under the Evidence Act. Further, the evidence was highly speculative and not founded on personal research conducted by the experts.

The Full Court held that this approach was erroneous as it ignored the language of the Evidence Act which does not incorporate the former common law rule which rejects opinion evidence based on common knowledge. Given that the court had accepted the expertise of those who provided the affidavits, it was incorrect to deny admissibility of evidence merely by virtue of the information being generally known.

The Court held that even in the absence of an exclusive right bestowed on Cadbury to use the colour purple, the common law offence of passing off and a contravention of Part V of the Trade Practices Act may still be proven. This is because exclusivity is not the core issue; rather the offences hinge on whether Cadbury can demonstrate that Darrell Lea's use of purple is likely to mislead or deceive customers into thinking that there is a relationship between the two companies.

Given that the Court could have been influenced in this regard by the expert affidavits, the Full Court was unable to declare that no miscarriage of justice had occurred in holding the evidence inadmissible. The Full Court reiterated that it could not be sure that the decision would not have been different had the evidence been admitted at first instance.

Notwithstanding this position, the Full Court recognised the discretionary power to reject evidence under the Evidence Act if the risk of wasting court time outweighs the probative value of the evidence. However, in light of the history of the proceedings and the potential value of the evidence the Full Court held that it was unlikely that this provision could be invoked successfully by Darrell Lea.

Healy v Luke: Circumstances in which a party to proceedings against an insured may sue the insurer direct

Dispute Resolution lawyer, John Zerilli, comments on a recent application of section 6 of the Law Reform (Miscellaneous Provisions) Act where Justice Austin considered circumstances in which a party, suing an insured, may be allowed to sue the insurer direct

Before setting out the facts, it is useful to paraphrase the salient parts of Section 6:

> Section 6(1) provides that, in cases where a person is insured against liability, a charge arises on all insurance monies that are or may become payable in respect of that liability on the happening of the event giving rise to the claim for damages or compensation against the insured.

> Section 6(4) provides that every such charge is enforceable by way of action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured, *provided the court gives leave*. The court will not grant leave in any case where the court is satisfied that the insurer is entitled under the policy to disclaim liability.

In short, one can choose either to sue a negligent person or their liability insurer provided, of course, the insurer is liable under the policy to its insured. A plaintiff must address two questions in order to satisfy a court that leave should be granted in any particular case:

1. Whether the plaintiff has an arguable case that the insurer may be liable in respect of the claim.

2. Whether there are sufficient reasons for the plaintiff to sue the insurer direct.

Basically, the plaintiff must prove that the defendant-insured's policy responds.

In *Healy*, the plaintiff sued the defendant for damages (including aggravated and exemplary damages) for negligence, breach of contract and breach of statutory duty arising (it was alleged) out of the plaintiff being assaulted at the Salisbury Hotel on 6 August 2003.

The relevant defendant was, in fact, the second defendant, who had the care, control and management of licensed premises at Percival Road, Stanmore, trading as the "Salisbury Hotel" (and was, therefore, owner/occupier of the premises).

The first defendant was employed by the second defendant as a manager and to provide security at the premises.

The plaintiff alleged the first defendant assaulted the plaintiff using excessive force and failing to take any or any adequate precautions against the harm which befell the plaintiff. The Statement of Claim asserted various failures to take adequate precautions amounting to negligence and breach of contract and breach of statutory duty under the Liquor Act 1982, further contending the second defendant was primarily and vicariously liable for the assault.

Solicitors for the defendant's insurer, Trenwick International Ltd wrote to the plaintiff's solicitors on 25 January 2007, declining to consent to the orders sought in a Notice of Motion which the plaintiff had filed in the hope of obtaining leave to proceed against Trenwick direct. To shield itself from suit, Fenwick asserted that it had granted only limited indemnity to the defendant with respect to the claim and, moreover, that the liability policy did not cover an award of aggravated or exemplary damages nor an assault or personal injury occasioned by the insured, unless the insured directed the assault to occur for the purpose of preventing or eliminating danger to persons or property for which, presumably, evidence existed.

On that basis, Austin J was satisfied the first question above had been adequately addressed by the plaintiff, that is, there was an arguable case by the plaintiff that the insurer would be liable in respect of the claim.

In respect of the second question, it is clear the court has greater latitude. Citing relevant authorities in both the Supreme Court and the Federal Court, Austin J approved comments which had been made in an earlier case that a plaintiff has only to show that there are reasonable doubts about its obtaining the proceeds of a claim, if successful, from the real defendant. Apparently, a letter from the liquidators of the second defendant adduced by the plaintiff revealed that the second defendant company had "a small amount of funds remaining, certainly by comparison to the likely damages should the

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[plaintiff's] claim be successful". Austin J read the liquidator's letter as evidence creating, at the very least, "substantial doubt as to whether the second defendant would be able to meet judgment for damages against it". Austin J held:

> *"If the action were to continue against the second defendant and judgment were to be entered against that company, the plaintiff might then be faced with the need to commence proceedings against the insurer to test the applicability of the exemption, with all the additional cost and delay that a second action would involve. This seems to me the kind of case where it is entirely appropriate to grant leave under s 6(4)."*

His Honour said that to do so is in accordance with the legislative purpose of the Act, which is to allow direct access to the insurer "*in those cases where enforcement might be frustrated unless such direct access were available*".

Lewis v Hoskin, Pieroz and Hoskin & Associates: When do property agents step over the line?

Nick Prove

Property & Projects associate, Nick Prove, explains the recent decision of the Queensland Commercial and Consumer Tribunal which explored the sale of property to a real estate agent retained to sell the property

The applicants owned a residence located at Birkdale, a bayside suburb east of Brisbane. Mr Lewis placed the property for sale with Harcourts Wellington Point. The Lewis' dealings were with Cranage, the then manager of Harcourts.

Within days of the listing, a number of Harcourts sales staff, including Pieroz, inspected the property in line with the agency's usual practice to obtain a "team approach" to the marketing and sale of the property. Later that day, Cranage advised Mr Lewis that one of the agency's staff had offered $400,000 to buy the property and provided a written offer of Pieroz and her husband. After being informed by Mr Lewis that the offer of $400,000 was too low, Cranage telephoned Pieroz and the offer was increased to $410,000. This offer was accepted and an unconditional contract was signed (the "**Pieroz Contract**").

On that same day, Mrs Lewis signed a written acknowledgement in the approved form under the *Property Agents and Motor Dealers Act 2000* ("the **Act**"), stating that she was aware and consented to Mr and Mrs Pieroz obtaining an interest in the property. The Pieroz Contract settled on 31 July 2003. Mr and Mrs Lewis did not pay any commission to Harcourts in relation to the sale. The following day, Mr and Mrs Pieroz placed the property for sale, with Harcourts.

The Pierozes entered a contract to sell the property on 9 August 2003, for $485,000 (the "**Nickols Contract**").

Mr Lewis made a claim against the Claim Fund established under the Act. The Queensland Office of Fair Trading investigated the claim without resolution and the claim was transferred to the Tribunal for determination.

The relevant provisions of the Act entitle a person to make a claim against the Claim Fund if the person has suffered financial loss because of contraventions of the Act, in circumstances where property has been placed for sale with a real estate agent. Those contraventions include where the engaged agent or other sales person employed by the agency, obtains a beneficial interest in the property.

However, the agent or sales person does not contravene the Act if:

> *"The agent/sales person:*

i) *before a contract of sale of the property is entered into, obtains the client/vendor's written acknowledgment in the approved form that the client/vendor:-*

A) *is aware that the agent/sales person is interested in obtaining a beneficial interest in the property; and*

B) *consents to the agent/sales person obtaining the interest; and*

ii) *acts fairly and honestly in relation to the sale; and*

> *no commission or other reward is payable in relation to the sale; and*

> *the client is in substantially as good a position as the client would be if the property was sold at fair market value."*

Under the Act, the Tribunal may allow the claim against the Fund only if satisfied on the balance of probabilities that the aforementioned contravention had happened, and that the claimant suffered financial loss because of that contravention. In order to determine whether there was a contravention of the Act by Pieroz, the Tribunal considered the following issues:

> whether before the Pieroz Contract was entered into, Pieroz obtained the written acknowledgement and consent of Mr Lewis in the approved form (given that Mrs Lewis had signed the approved form);

> whether Pieroz acted fairly and honestly in relation to the sale; and

> whether Mr Lewis was in substantially as good a position as he would have been if the property had been sold at fair market value.

The provisions of the Act are strictly interpreted, in particular the requirement for the approved forms to be executed prior to the entry of a contract for the sale of property. Whilst it was accepted that Mr Lewis knew Pieroz was a sales person at Harcourts and in signing and settling the Pieroz Contract, Mr Lewis was consenting to Pieroz obtaining the interest, this was not sufficient to satisfy the precontractual consent requirements of the Act.

The Tribunal found that Pieroz accordingly contravened this provision of the Act.

The statutory requirement that a agent act fairly and honestly in acquiring a beneficial interest in a client's property was held to reflect the fiduciary relationship between agent and principal. The Tribunal commented that the concept of loyalty was at the heart of that relationship, and restated the notion that "the shepherd must not become a wolf".

Evidence was submitted that Mr Lewis was under pressure to sell the property, as a result of acrimonious family law proceedings with Mrs Lewis. The effect of those proceedings

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was that Mr Lewis was entitled to any surplus settlement funds after discharge of the mortgage (the loan balance being approximately $335,000) and payment of $50,000 to Mrs Lewis. Mr Lewis claimed to have advised Cranage prior to his entering the Pieroz Contract, that he was obliged to submit any written offer to Mrs Lewis and that she would pressure him to sell the property, as long as the offer was sufficient for her to receive the $50,000 payment. The Tribunal was not satisfied on the evidence that Pieroz knew that Mr Lewis would be under pressure from Mrs Lewis to accept any offer over about $385,000. Accordingly, the contention that Pieroz knew this and took advantage of this was rejected.

However, the Tribunal was satisfied that both Pieroz and Cranage thought the property was worth more than the sums offered by Pieroz. Whilst both were aware that the local property market was experiencing record growth, neither recommended Mr Lewis to seek independent advice on the actual value, nor did they suggest he seek independent legal advice with respect to entering a contract with one of Harcourts' staff. In failing to market the property to independent purchasers, to advise Mr Lewis that Pieroz' offers were in their opinion, below market value, to advise Mr Lewis that the local property market was "on fire", as stated in the evidence of a valuer, and to advise Mr Lewis to get independent professional advice about the market value of the property and entry into the Pieroz Contract, before the property was marketed, Harcourts, and in particular Pieroz, failed to act fairly and in Mr Lewis' interests.

The Tribunal accepted on the issue of fair market value, that at the relevant time the property was valued between $441,750 and $455,700. Taking into account commission that would have been payable to Harcourts, Mr and Mrs Lewis would have received a net amount of between approximately $421,000 and $443,000. In receiving a net amount of $410,000 under the Pieroz Contract, Mr Lewis was not in substantially as good a position as he would have been if the property had been sold at fair market value.

An Order was made that Mr Lewis be paid nearly $60,000 from the Claim Fund, being the difference between the sale price under the Nickols Contract ($485,000) less commission, and the amount of $410,000 paid under the Pieroz Contract. A further Order was made against Pieroz and Harcourts as the persons liable for Mrs Lewis' financial loss, to reimburse the Claim Fund for the amount.

ASIC update

Craig Yeung

Corporate senior associate, Craig Yeung, discusses the latest news from the corporate regulator

ASIC recently released a consultation paper outlining its proposed policy on providing licensing relief for trustees of wholesale equity schemes.

A wholesale equity scheme refers to an unregistered managed investment scheme that invests primarily in unlisted securities and whose members are all wholesale clients. A form of this is typically used in the venture capital industry where the manager will establish the scheme by way of multiple trusts with separate corporate trustees that are related bodies corporate of the manager, investing in a number of unlisted companies.

ASIC states that under the Corporations Act, each of the trustees will likely be required to hold an Australian Financial Services Licence (AFSL) for providing dealing and custodial and depository services.

To assist in the consultation process, ASIC has given interim conditional licensing relief to such trustees in Class Order [CO07/74] until 31 December 2008. The Class Order relief may be available if the manager of the scheme, as an AFSL holder, accepts responsibility for financial services provided by the trustees by applying for a variation of its own licence, with the effect that the trustees under the scheme are treated as if they were the manager's representatives.

ASIC intends the licensing relief to remove hurdles and restrictions to venture capital businesses by removing unnecessary regulatory burdens. ASIC will be accepting comments on the proposal until 15 August 2007.

ASIC has also issued a Class Order [CO07/447] *Temporary extension of time for SOA delivery*, to assist financial advisers in providing advice to retail investors in the period leading up to 1 July 2007 when the new superannuation arrangements commence.

ASIC has indicated that it is aware many retail investors are consulting licensed advisers about decisions they may need to make before 30 June 2007. As a result of the number of retail investors and the rush to obtain financial advice before 30 June 2007, industry participants have indicated to ASIC that the financial advisers will have difficulties in providing financial advice in these time-critical situations unless the normal period for providing a Statement of Advice (SOA) is changed.

ASIC has responded by extending the time in which a written SOA must be given in the circumstances set out in the Class Order from 5 days to 30 days.

Under the Class Order, ASIC requires advisers relying on the Class Order to give written disclosure to the client to let them know that they may not receive a written SOA in time to help with other decisions they may need to make, such as the exercising of their cooling off rights. In addition, the client is required to have expressly instructed the adviser to provide the advice urgently before 1 July 2007 and that the advice is in fact provided before 1 July 2007.

ASIC has stressed however, that despite extending the time allowed for SOAs to be provided, all the other rules about giving advice remain unchanged.

Testamentary Capacity in Queensland: Recent developments

Alison Blyth

Corporate lawyer, Alison Blyth, reviews recent developments in the Queensland case law about the signing of wills and comments that those decisions bring the law in Queensland into line with the rest of the country

Recent Queensland case law has considered the formal requirements in Queensland to execute a will and resolved that if there is clear evidence of a testator's intention, despite lack of substantial compliance, the court can find a will to be valid: a

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decision which brings Queensland case law on the signing of wills up to speed with other states.

The removal of the need for "substantial compliance" is a departure from previous case law, which required near faultless compliance, and often resulted in wills being found to be invalid.

The removal was made possible by Queensland's *Succession Amendment Act 2006* which took effect from 1 April 2006, amending the *Succession Act 1981*, to provide that:

> a will must be in writing; and

> signed by the will maker or another person in the will maker's presence at the direction of the will maker; and

. witnessed and signed by at least two witnesses (both present at the same time) in the presence of the will maker (or the other person signing on behalf of the will maker); and that

> the court can dispense with signing requirements where it is satisfied that the testator intended the document to be their last will.

In *Stephens v Stephens the testator*, Anthony Stephens, whose estate was worth some $26 million, executed his will in 1988 then three years later amended that will by codicil which was informally prepared and witnessed by only one attesting witness.

Justice Philippides found on the facts that the codicil bore "the hallmarks of testamentary intent" as it was clearly witnessed and "plainly dispositive in nature", the provisions within "not in any way unusual or exceptional", being "clear and sensible".

This being the circumstances of *Stephens*, the 1988 will and the amending sheet two of the codicil were ordered to be admitted to probate, as they reflected the testator's testamentary intention.

In Re: *Hodge*, the testator, who committed suicide in his campervan following depression from chronic pain, wrote words on a Do-It-Yourself will kit form which had been signed by himself but not witnessed.

The form was similar in content to other wills the testator had made and also stated "this will may not be deemed legal by people who mean nothing to me but I hope it's respected because these are my wishes".

Justice Moynihan held the unwitnessed Do-It-Yourself will kit form to be a valid will as it reflected the testator's clear intention, despite not complying with the law's formal requirements.

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