DWFoxTucker Lawyers

DWFT Report

Issue 15

Detmold Group Rises to the Occasion.

inside this issue

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CLIENT PROFILE

Detmold Group

South Australian Paper & Packaging group calls on long history of innovation to contribute to the COVID-19 response.

In what is regarded as one of the world's best responses to the COVID-19 pandemic, Australian federal and state governments reached out to local innovators and manufacturers to help meet the drastically increased need for various items of personal protective equipment (PPE). Here in South Australia, the quest to procure sufficient quantity of surgical grade face masks led the state health department to put in a call to Detmold Group … a home-grown multinational pioneer in paper and board packaging solutions, since 1948.

But before we get into what Detmold Group is doing for Australia's response to the pandemic, we take a step back and ask Tom Lunn, group general manager and dedicated Detmold innovator of 15 years, what the company's core business is? Precisely what does 'paper and board packaging solutions' mean in everyday terms?

"Well, for a start, if you've held any fast food wrapping, cups or takeaway bags anywhere in the southern hemisphere, there's a high likelihood it's ours. For example, we're proud to be the biggest supplier in the region for Uber Eats packing. Detmold is also highly regarded for paper carry bags used by retail outlets, with household-name brands like Witchery on board, and we have a big presence at the industrial end of the supply chain too, producing packaging for commodities such as flour and sugar."

Established in Brompton, South Australia, as C.P. Detmold Pty Ltd by founder Colin Detmold in 1948, the Detmold Group now has locations across Australia, New Zealand, Singapore, Indonesia, Malaysia, Philippines, Thailand, China, Hong Kong, South Korea, Taiwan, India, South Africa, United Arab Emirates, Netherlands, and the USA. That's an incredible story of growth and longevity, so we asked Tom if he could share the secret behind this staying power.

"Last year was our 70th anniversary", replies Tom, *"a big milestone and an endorsement of the way we do things. You see, we're still a privately owned company, with members of the Detmold family still in key positions, so the decisions we make and the directions we take are not driven by the need to deliver short-term returns to shareholders. Everything we do is about the long-term success of the company. So, there is nothing more important than*

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fostering lasting relationships with our clients, while making sure we have very talented, happy staff who come to work every day committed to keeping us at the competitive edge of our market place. Put simply, entrepreneurial innovation and top-shelf customer service are at the core of our culture and continued success."

Bringing the conversation onto Detmold's contribution in the COVID-19 response, Tom continues, *"In fact, it was this 'have a go' attitude in all that we do which set us apart in our ability to deliver the required number of surgical masks. When SA Health asked if we could help, I don't mind saying we were hesitant at first, but after we'd looked closely at what was involved and conducted feasibility studies, we realised that we were actually incredibly well placed to assist on a number of levels."*

"To start with, we realised that the safety and quality standards required to make surgical masks are not dissimilar to that of our food packaging, and the two production systems have very closely aligned cultures. For example, we are well versed in food safety audits, with more than 50 external audits every year, plus our cleanliness and production standards were already high enough, ticking key corporate social responsibility boxes like the origins of raw materials, traceability and disposal of wastewater."

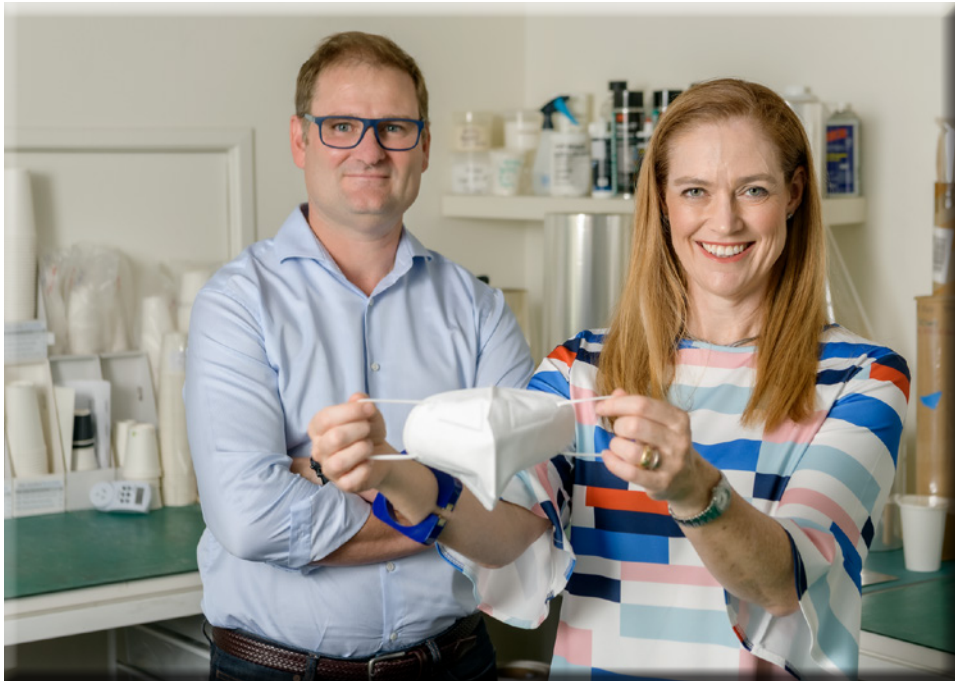
"And when we realised the logistical obstacles that current mask manufacturers were experiencing in scaling up, literally finding themselves unable to source extra materials or ramp up the existing supply chain, we started to feel almost like it was our responsibility to get involved. With our broad global networks and agile, international procurement team we could source materials and reinvent the required supply chains, Detmold Group was perfectly placed to join the effort and make a real difference to the state's COVID-19 response capability."

Detmold Group sets standards in physical distancing

As an undisputed innovator with around 800 team members based in China, the original epicentre of the virus, it's perhaps not surprising that Detmold Group also led the way in safe, progressive physical distancing procedures. Their first coronavirus response meeting was held in January, and they had all the appropriate hygiene and workforce separation policies in place, ready to implement after Chinese New Year.

Tom expands on the details, *"With such a large footprint in China, we were very close to the workplace protocols their government had adopted after the outbreak in Wuhan, so we were well ahead of the curve. Hand sanitisers, temperature checks, shift separation and isolation, cross over changing rooms, hygiene high-risk areas. We had all manner of procedures in place before most manufacturers had even begun to take it seriously. Then, on seeing our ability to perform in the 'new normal', many businesses around the world adopted our ways of working."*

"As an established operator throughout Asia for many years, overcoming supply challenges



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is nothing new to us," adds Tom, *"We've had to adapt our trade patterns to SARS, MERS and Bird Flu in the past, but it's true what they say, COVID-19 is indeed unprecedented, and our proven agility in dealing with unknown situations like this continues to attract big brands."*

Post-virus plans to keep innovating

It's not just virus-driven catastrophes which inspire Detmold Group's many innovative brains to put their thinking caps on, in fact for years the group has had its own customer-facing R&D and prototyping subsidiary, 'Launchpad'. So, we ask Tom, what was Launchpad working on before COVID-19 came along, and what are you looking forward to focussing on after the virus is contained?

"Given the nature of our business, obviously sustainability is a key driver in all that we do, and we're committed to making sure we stay at the forefront of eco-responsibility. We support the Ellen McArthur Foundation and the Australian Government's 'Towards 2025' sustainability drive, and our 'revolution in cups' is tracking really well. Food delivery is also an ever-evolving space in terms of packaging, it's always been a strong focus for us but, as you can imagine, the need for enhanced safety, efficiency and volume has just exploded."

"Above all else", concludes Tom, *"Launchpad and the Detmold Group as a whole is about answering our customers' questions, solving specific problems through first-class innovation, taking the time to gain an intimate understanding of their challenges, delivering value beyond cost and priceless insight which helps ensure comprehensively safe and successful operations."*

DW Fox Tucker is proud to have counted Detmold Group as a valued client for many years. We're really looking forward to seeing what ideas and innovations they come up with in the future, as they continue to meet the needs of their customers in challenging, ever-evolving marketplaces.

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DETMOLD GROUP

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DISSECTING DECISIONS | **By Ben Duggan**

Last Chance to Avoid Casual Worker "Double-Dipping" Disaster

Leave entitlements to be challenged in the High Court after the Federal Government's epic fail in Federal Court

The High Court has granted special leave to WorkPac, a labour-hire company, to challenge a landmark court ruling that accepted some casual workers are entitled to permanent employee leave entitlements. In *WorkPac vs Rossato*[1] the Federal Court held - for a second time - that it was unable to set off a casual loading against permanent employee entitlements where the true nature of the employment relationship of an employee engaged and paid as a casual was found to be permanent.

Fair Work (casual loading offset) Regulation

Earlier, on 18 December 2018, in response to the first WorkPac decision,[2] in which a similar set off argument was unsuccessful, the Morrison Federal Government had varied the Fair Work Regulations 2009 to give statutory effect to the ability to set off.

The purpose of the casual set off regulation (Regulation 2.03A) was identified in the *Explanatory Memorandum* as being to prevent the 'double dipping' of entitlements by a casual as set out in the first WorkPac decision.

An employer was, under the casual set off regulation, able to set off in response to claims made by a casual as long as the worker satisfied all of the following criteria:

- a person is employed by an employer on the basis that the person is a casual employee (subregulation 1(a)).
- the employer pays the person an amount (the *loading amount*) that is clearly identifiable as an amount paid to compensate the person for not having one or more relevant NES entitlements during a period (the *employment period*) (subregulation 1(b)).
- during all or some of the employment period, the person was in fact an employee other than a casual employee for the purposes of the National Employment Standards (subregulation 1(c)).
- the person makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements (subregulation 1(d)).

Regulation 2.03A applies to employment periods that occurred *before*, on or after 18 December 2018.

1 *WorkPac v Rossato* [2020] FCAFC 84.
2 *WorkPac* v *Skene* [2018] FCAFC 131.

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Background of the second WorkPac decision

WorkPac employed Mr Rossato under six contracts of employment to work at mines operated by Glencore in Australia in the period between 28 July 2014 and 9 April 2018.

WorkPac engaged and paid Mr Rossato as a casual employee throughout the period of his employment with the company.

A short time after Mr Rossato's retirement in April 2018 he wrote to WorkPac claiming that he was incorrectly classified as a casual employee and made a demand for the following permanent entitlements:

1. A payment for 22.3 weeks of untaken annual leave.
2. A payment in respect of personal/carers leave and compassionate leave that Mr Rossato took from early March 2018 when his partner became ill and was hospitalised.
3. A payment for public holidays, Christmas Day, Boxing Day and New Year's Day, on which Mr Rossato did not work.

In response, WorkPac made an application to the Federal Court seeking a declaration that Mr Rossato was a casual employee and not entitled to these permanent employee entitlements.

Rossato found to be a permanent employee of WorkPac

WorkPac - which was faced with a similar factual situation to the first Workpac decision - argued that Rossato was a casual because of the absence of a 'firm advance commitment' as to the duration of his employment or the days and hours of work.

A determination as to whether there was a 'firm advance commitment' should be assessed, it was argued, by reference to the presence or absence of such a commitment in the parties' written contract of employment.

In response, the Court in holding that the parties description of the nature of their relationship as casual was relevant but not a conclusive consideration, rejected the argument founded upon the 'primacy' of the contract.

The Court considered all of the circumstances of the relationship, including a range of factors about the manner in which the contract was performed in practice, as follows:

- The duration of Rossato's employment with WorkPac.
- Whether Rossato's employment was regular or intermittent.
- Whether Rossato's employment was predictable.
- The ability for WorkPac not to offer work to Rossato.
- The ability for Rossato to decline an offer of work.

All three members of the Full Bench found that Rossato was not a casual employee[3] because *'...the parties had agreed on employment of indefinite duration which was stable, regular and predictable such that the postulated firm advance commitment was evident in (all) contracts.'*

Further, the Court found that Rossato was not a casual employee for the purpose of WorkPac's enterprise agreement indicating in doing so that the circumstances of his employment could not be distinguished in a material way to those of Skene.[4]

3 At common law or for the purposes of the Fair Work Act.
4 being the employee in the first WorkPac decision.

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Rossato was therefore found to be entitled to the entitlements that he claimed under the FW Act and WorkPac's enterprise agreement.

In response, WorkPac sought to argue that it was entitled to either restitution or to 'set off' against these permanent employee entitlements, payments (in particular the casual loading) that it had made under the contracts of employment.

The casual set off Regulation

WorkPac sought, amongst other set off arguments,[5] to rely upon the casual set off Regulation, Regulation 2.03A.

The Federal Government which had introduced the casual set off Regulation in response to the first WorkPac decision supported the reliance upon Regulation 2.03A.

Rossato, through his union the CFMEU, had identified various issues with Regulation 2.03A including a submission that it was 'invalid'.

Justice White, with whom the other members of the full bench agreed, provided the Court's rationale for the rejection of WorkPac's reliance upon the casual set off Regulation in his judgment.

His Honour noted that for the Regulation to apply the four conditions specified in subregulation 1 (i.e. subregulation 1(a) to subregulation 1(d) of Regulation 2.03A, as set out above) must all exist.

Justice White then considered whether the fourth of these conditions (subregulation 1(d)) was satisfied in the circumstances, as follows:

- the person makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements.

His Honour then made observations about the character of the claims made by Rossato:

1. Untaken annual leave: the claim for annual leave is for payment of annual leave being the entitlement 'bestowed by section 90(2) of the FW Act'.

2. Personal/Carers Leave: the claim with respect to paid personal/carers leave is for payment 'in accordance with the NES for which section 96 and section 99 provide...'[6]

3. Public Holidays: the payment for public holidays is for payment for which 'the NES in section 116 of the FW Act applies.'

None of Rossato's claims were found to be directed towards a payment *'in lieu'* of an entitlement under the NES:

> 'To the contrary, Mr Rossato seeks payment of the entitlements *conferred*[7] by the NES.'[8]

The Court's characterisation of the claims as being the payment of permanent employee entitlements 'conferred' by the NES, rather than a payment 'in lieu' of such entitlements, meant that the condition in subregulation 1(d) was not satisfied.

The Court rejected WorkPac's argument that Rossato was making a claim to be paid an amount 'in lieu' of relevant NES entitlements.

In short, the Court found, for technical legal reasons, that the set off regulation, Regulation 2.03A, '... cannot provide a basis for a claim for set off and need not be considered further.'

Rossato was ultimately found to be entitled to the permanent employee entitlements that he claimed under the NES.

The future

No doubt the Federal Government will welcome the High Court's decision to grant special leave for the second WorkPac decision.

The High Court will now proceed to hear the substantive appeal which will, amongst other things, decide the effectiveness of the Federal Government's casual set off regulation in the coming months.

We will keep you informed of future developments.

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5 None of which were successful.

6 The claim for payment of Compassionate Leave which was taken was found to be of the same character

7 Our emphasis.

8 Paragraph 943 of the second WorkPac decision.

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NEWS & VIEWS | **By Joanne Cliff**

Family Law Court Initiatives

It is a well recognised fact, amongst lawyers and the community, that family law claims can be expensive and take a long time to resolve. However, there are two recent Court initiatives which are aimed at reducing legal costs and delivering a resolution of property settlement claims in a timely manner.

Family Law Financial Cases

The Family Law (Priority Property Pools under $500,000.00) Financial cases initiative is being tested in Brisbane, Paramatta, Adelaide and Melbourne Registries of the Federal Circuit Court of Australia.

The initiative is aimed at separated couples with modest assets amounting to $500,000.00 or less including superannuation and who cannot agree on how to divide it.

The first court date is held before a registrar and allows for less documentation to be filed, thereby saving legal costs (e.g. the long and detailed affidavit in support of an application for financial division is not required to be filed). The Court is likely to refer the claim to mediation or other alternative dispute resolution at the earliest opportunity to try to resolve the matter expeditiously. The aim is for the matter to be complete within 90 days.

Suppose the matter cannot be resolved through mediation or other forms of dispute resolution. In that case, a less adversarial trial or even just a hearing on the filed documents can take place.

To qualify for this process, the asset pool cannot include any family trusts, companies or self-superannuation funds which may require valuation or expert investigation. This process cannot be used where parenting orders are sought or other property orders such as spousal maintenance, child support, contravention applications or enforcement applications.

The emphasis is on resolving the matter at an early stage to save costs and time.

Arbitration

Arbitration, which is essentially the hiring of a private Judge, has been available in Family Law for a couple of decades but not often used. The Courts are now pushing for arbitration to be adopted to resolve matters in an efficient and timely manner. The arbitrators are usually family lawyers or retired Judges who have undertaken specific training as arbitrators.

Arbitration is only an option for property cases, not parenting cases, and can only happen if both parties agree.

The benefits and advantages of using the arbitration process are many, such as:

- The parties can choose the arbitrator themselves while there is no choice in selecting the person who will hear court matters.
- It allows flexibility to nominate a time and place for arbitration.
- You have substantial control over the timing and the degree of formality involved in the arbitration process. There can be an agreement between the parties on how the process for preparing documents etc will happen and how much documentation will be provided to the arbitrator. The arbitration may proceed on documents alone without the parties giving evidence, which can lead to a reduction in costs.
- It is confidential and private and avoids the need for filing sensitive documents which may contain financial matters. The hearing is conducted

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in private and is not open to the public. It can even be done with online videoing conferencing facilities.

- It can be used for limited issues such as spousal maintenance or determination of competing valuations.
- Arbitrations can be arranged quickly, and decisions can be available within very short periods of time (usually no later than one month after the hearing). The arbitrator is required to provide an opinion within a specified number of days after the hearing and is not paid in full until a written decision is provided.

If a matter has already commenced in Court, a Judge can refer the matter to arbitration at the request of both parties. Once the arbitrator has provided a decision, an arbitration award can be registered with the Court and has the effect of an order made by the Court.

The decision from an arbitrator can be appealed.

As a result of many trials being vacated due to COVID-19 and the inevitable delay to other claims once the courts open again and re-list trials, it makes perfect sense to use arbitration for a speedy resolution of financial matters.

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NEWS & VIEWS | **By Brendan Golden**

Debt Recovery and Maximising Costs Recoveries

No business wants the cashflow interruption or the diversion of attention that having to chase a debt brings.

Almost inevitably, though, businesses at some point will be faced with the prospect of having to spend resources to recover a debt. There is a range of options for debt collection, and much will depend on past communications with the debtor and whether or not the debt is disputed.

If the decision is made to commence a debt recovery proceeding, maximising the costs recovery should be a focus at an early stage. Far too often, parties to a litigation turn their minds properly to costs only after they have spent significant sums on legal fees. By that time, it can be too late to resolve a matter, and the only alternative is a contested, and expensive, trial.

Whilst the courts have always encouraged parties to resolve matters without the use of court resources, the *Uniform Civil Rules*, introduced in May 2020, brings this into much sharper focus.

Rule 61 of the *Uniform Civil Rules* makes it very clear that the courts have placed an increased emphasis on attempts to resolve matters before the filing of a claim.

The principle, now codified by the *Uniform Civil Rules*, is that the time and costs incurred in a litigation should be proportionate to the amount in dispute. So how do the *Uniform Civil Rules* achieve this?

Before an action is commenced, Rule 61 requires a written settlement offer to be made. The written offer must provide a breakdown of the calculation of the claim and, importantly, it needs to include an

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estimate of the costs of the proceeding. This is new.

Ensuring that the parties have turned their minds to the potential total costs, at an early stage, improves the chances of resolving claims without utilising the court's resources or spending large amounts on legal fees that may ultimately not be recovered.

A settlement offer, at almost any time in a proceeding, is also the mechanism for maximising the costs recovery. This is because costs are usually recoverable only in line with the relevant court's costs "scale". The amounts that can be recovered are usually substantially less than the costs that a party has actually incurred. Not allowing parties, even successful ones, to recover all of their costs, has been a traditional way in which the courts have encouraged parties to resolve matters before expending money on legal fees.

The *Uniform Civil Rules* reinforce the pathway to improving the costs recovery.

Rule 132 provides that when an offer is made, that is not accepted and judgment that is no less favourable than the offer is obtained, indemnity costs may be awarded from the date of the offer. In those circumstances, the costs recovery will be significantly more than the amount recovered on the court scale and much more like the amount that has actually been spent.

A party will need to have clear advice about the prospects of success at trial when setting the offer amount if they are to maximise the effectiveness of the offer. A prudent party, with the encouragement of the *Uniform Civil Rules*, will make that assessment early.

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INSIGHT | **By John Tucker**

Onus of Proof in Tax Disputes

For taxpayers engaged in matters with the Australian Taxation Office (ATO) where facts are in dispute, the ATO will point out that the taxpayer bears an onus to prove facts it asserts.

This onus is well established through case law, the most often referenced being the Full High Court decision in *Federal Commissioner of Taxation (FCT) v Dalco* (1990) 168 CLR 614 (Dalco).

The ATO have seen themselves as able, in audits where documentary evidence corroborating a taxpayer's explanation of the source of receipts is not available, to rely on Dalco to treat the receipts as income from unexplained sources or, as in Dalco, as attributable to an individual, not an entity claimed to have derived the amounts, and consequently to add the receipts to the assessable income of the individual. This simply on the basis that the individual has been unable to discharge their onus to prove the receipts not to be assessable income of theirs.

The application of this decision has recently been considered in the context of a dispute where the taxpayer sought to rely on the evidence of company financial statements by the Full Court of the Federal Court of Australia (Full Court) in *FCT v Cassaniti* [2018] FCFCT 213 (Cassaniti).

In Cassaniti, the taxpayer proffered in evidence company financial statements and sought to rely on them as supporting proof of his claims concerning the amounts they reported and their characterisation. In support of his position, the taxpayer relied on section 1305 of the *Corporations Act 2001* (Cth) which provides that a book kept by a company under a requirement of that Act is considered prima facie evidence of its contents.

The Commissioner, while not evidencing grounds for doing so, in submissions disputed the authenticity or the veracity of the financial statements and relied on Dalco to assert that the taxpayer had failed to discharge their onus of proof.

The Commissioner's claim was rejected by the Full Court. In particular, the Full Court:

- rejected the notion that a taxpayer can be required to undertake a sisyphean

"rejected the notion that a taxpayer can be required to undertake a sisyphean task of recreating and corroborating individual transactions or components of transactions ..."

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task of recreating and corroborating individual transactions or components of transactions to prove amounts recorded in financial statements or evidenced by a recipient.

- held that, for transactions such as loans recorded in the financial statements, it should suffice for them to have been shown as such in the financial statements and verified as such by the recipient.

Cassaniti is important because prior to this decision the onus resting on the taxpayer was thought to include an onus to prove the authenticity and veracity of the taxpayer's financial records in any case that came before the Court. Cassaniti makes it clear that, in the absence of a challenge based on more than mere submissions of the Commissioner, the Court should accept the taxpayer's financial records which have apparently been kept pursuant to the *Corporations Act 2001* (Cth) as, for all intents and purposes, authentic.

In other words, the Commissioner cannot make out his case merely by asserting that he does not accept the evidence of the taxpayer, as supported by the taxpayer's financial records, as either true or authentic.

In this regard Steward J, at [65], followed what was concluded by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Limited* (No 1) (2012) 207 FCR 448, at [92], that the provenance of a document could be inferred from its contents.

In addition, he held, following the observation of Heerey J in *Guest v Federal Commissioner of Taxation* [2007] FCA 193; 65 ATR 815 at [25], that business records may be admitted and used as proof of the truth of any facts they recite without the need to identify the author of the document.

With respect to authenticity, Steward J held that the terms of s 69(2)(a) of the *Evidence Act 1995* (Cth) do not suggest that it is an essential precondition of admissibility that the "person" in question be identified. The ordinary meaning of the language is that it is sufficient that the person who made the representation, whoever he or she is, had or might reasonably be supposed to have had, personal knowledge of the asserted fact. The policy behind the provision was clear enough, that routine business records, made before any legal proceeding arises or is contemplated, have an inherent likelihood of reliability which outweighs the common law's aversion to hearsay evidence where the maker of a statement cannot be tested by cross-examination. The utility of s 69 would be greatly diminished if it were necessary to locate among large organisations, perhaps over a long period of time, persons who made representations, often in circumstances where the practical needs of the organisation did not require any identification at the time the representations were made.

Cassaniti accordingly tells us that if authenticity is not challenged then, absent evidence to the contrary, veracity should be assumed.

Both the Judge at first instance and the Full Court accepted the veracity of the financial records because of the authenticity of the documents and the fact that the Commissioner did not seek to challenge the financial statements other than to make a submission that there was insufficient proof by the taxpayer of the veracity of the documents.

First published in the Law Society Bulletin.

"... prior to this decision the onus resting on the taxpayer was thought to include an onus to prove the authenticity and veracity of the taxpayer's financial records in any case that came before the Court."

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INSIGHT | **By John Tucker**

No Thanks! Effective Disclaimer of a Trust Entitlement

Attempts to disclaim an entitlement to trust, income or capital have arisen in various contexts for various reasons. The contexts often include receipt of an unexpected and unwanted income tax assessment, perhaps by reason of the beneficiary being a member of a class of default beneficiaries.

Issues have arisen as to how a disclaimer must be made, when, from when it will operate, in particular, can it operate retrospectively, and what must be disclaimed for it to be effective.

The recent decision of the Full Federal Court in *Carter and O's v FCT*[1] is the latest in a line of cases where the effectiveness of disclaimers by trust beneficiaries was an issue.

The relevant principles applicable to a disclaimer were largely explained by the Full Federal Court in *FCT v Ramsden*[2]. The Full Court in Carter approved the summary of those principles made by the Administrative Appeals Tribunal in its decision appealed from[3] as follows:

a. until disclaimed, a beneficiary's entitlement to income under a trust remains effective and attracts the operation of s 97 of the 1936 Assessment Act from the moment it arises even if the beneficiary is unaware of it;[4]

b. an effective disclaimer of a gift or an entitlement:

   i. operates by way of avoidance, not disposition,[5] and

   ii. defeats the donor's intention to give the relevant property to the donee, or create an interest in that property in favour of the donee, on the terms of the donor intended;[6]

c. because of (b), a beneficiary may disclaim an entitlement on becoming aware of it, with the effect that the disclaimer operates retrospectively as if the entitlement never arose, and not as an acceptance and disposition at the time of the disclaimer;[7]

d. there must be a complete rejection of the gift or entitlement for the disclaimer to be effective because a qualified disclaimer may be seen as or constitute a form of acceptance of or assent to the gift or entitlement,[8] and in this regard, it becomes necessary as a matter of construction to identify what the relevant gift is;[9]

e. a periodical (usually annual) appointment or distribution of income or capital from a discretionary trust by reason of exercise of discretionary powers to do so is a stand-alone gift, or creation of an entitlement, when the power is exercised;[10]

f. each appointment or distribution being an independent gift or creation of an entitlement, an object of a discretionary trust is entitled to accept or reject a discretionary appointment or discretion of either income or capital, and may accept one or more and disclaim others;[11]

g. an entitlement as a taker in default of appointment is a vested interest liable to be divested by exercise of a discretion, and is a gift or entitlement that arises by operation of the terms of the trust separate from any gift or entitlement that might arise upon exercise of a discretionary power of appointment or discretionary power to distribute;[12]

h. an entitlement of a taker in default of appointment can also be disclaimed;[13]

i. one gift or entitlement having the same general origin, in the sense of coming from the same trust estate, can be retained and another disclaimed, and the fact of retention of an earlier one does not automatically prevent future disclaimers of later gifts or entitlements.[14] However, the retention of one type of

1 [2020] FCAFC 150, Jagot, Davies and Thawley JJ, 10 September 2020 (Carter)
2 [2005] FCAFC 39, Lee Merkel and Healy JJ, 15 March 2005 (Ramsden)
3 *The Trustee for the Whitby Trust v C of T* [2019] AATA 5637
4 Ramsden at [30]
5 Ramsden at [45]
6 Ramsden at [45]
7 Ramsden at [30]
8 Ramsden at [31]
9 Ramsden at [31]
10 Ramsden at [35] and [36]
11 Ramsden at [36]
12 Ramsden at [37]
13 Ramsden at [40] and [61]
14 Ramsden at [37]

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gift or entitlement may have an impact on assertions as to knowledge of the relevant trust and entitlements, and whether there has been a delay in disclaiming that prevents a subsequent disclaimer operating to avoid the gift or entitlement.[15] It follows that disclaimer of one gift or entitlement would similarly not automatically prevent a future disclaimer of a different gift or entitlement, but would have the same effect on assessment of relevant knowledge going to whether there has been delay and whether a subsequent disclaimer operates to avoid the gift or entitlement;

j. to disclaim a gift or entitlement as a taker in default of appointment, it is necessary to disclaim the entirety of the gift or entitlement, namely the gift or entitlement created by the terms of the trust, and not the annual manifestation of it arising upon a failure to appoint elsewhere. An attempt to disclaim year by year without disclaiming the gift or entitlement in a manner that disclaims it entirely and permanently is ineffective;[16]

k. a beneficiary loses the right to disclaim the gift or entitlement if it is accepted;[17]

l. a gift or entitlement can be accepted by overt conduct;[18] and

m. failure to disclaim within a reasonable period of becoming aware of a gift or entitlement can, having regard to the circumstances of the case, be treated as tacit or inferred acceptance of the gift or entitlement.[19] It is necessary to look at all of the circumstances and the time that has elapsed to see whether acceptance of the gift or entitlement should be inferred from the absence of dissent;[20] and

n. a beneficiary of a gift is fixed with knowledge of the gift and its basis vicariously on the basis that the knowledge of an adviser, which may be the only source or repository of relevant knowledge.[21]

15 Ramsden at [37]
16 Ramsden at [42]
17 Ramsden at [51] and [52]
18 Ramsden at [53]

The issue in Carter was that the trustees of the Whitby Trust had made resolutions to distribute the income of the trust which the ATO, on a later audit, challenged as ineffective. The result was that assessments issued as to 80% of the net income of the trust to the trustee under section 99A of the ITAA 1936 and as to 20% to the default income beneficiaries who comprised four adult and one minor sibling.

19 Ramsden at [53] and [55], *Lewski v Commissioner of Taxation* (2017) 254 FCR 14 at [141]
20 Ramsden at [55]
21 Ramsden at [59]

The assessments covered the years 2001 to 2013 (**the First Period**) and 2014 (**the Second Period**). The four adult beneficiaries had executed Deeds of Disclaimer in June 2014 (**the First Disclaimers**) in respect of the income for the First Period, in November 2014 (**the Second Disclaimers**) in respect of the income for the Second Period and in September to October 2016 (**the Third Disclaimers**) in respect of all entitlements from the trust. The Second Disclaimers were in the same terms as the First Disclaimers, but the ATO decided the Second Disclaimers were ineffective and, as a result, the Third Disclaimers were executed.

The Full Federal Court was only concerned with the assessments with the 2014 year, it upheld the AAT's adverse finding that the net income of the trust had not been validly appointed to the other beneficiaries and hence fell to the default beneficiaries but overturned the AAT's decision that the default

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"... the Court noted that the tax consequences of a disclaimer are determined by reference to the general laws and not by reference to legal relationships then in existence."

beneficiaries had not validly disclaimed their entitlement to the income for the Second Period.

Before the AAT the Commissioner had not challenged the Third Disclaimers as effective to disclaim the applicants' interests under the Trust Deed. The Full Court considered this correct. The issue which the AAT decided against the applicants was that the entitlements to income had nevertheless been implicitly accepted by then. It inferred that by their conduct in executing the First and Second Disclaimers before executing the Third Disclaimers, the applicants had tacitly accepted the entitlements. This finding was made in the face of evidence given by all the applicants that in executing these disclaimers they intended to disclaim all entitlements to the interests, as the Third Disclaimers were effectively worded to do on their execution.

The Full Court held that in this finding the AAT had operated on an unstated erroneous premise that an ineffective disclaimer of a gift, as a matter of principle, necessarily involved a tacit acceptance of the gift, rather than determining that issue by reference to the relevant facts and circumstances.

The AAT had also asserted that the applicants delay in disclaiming in effect necessarily meant that income could not be effectively disclaimed. The Full Court, however, confirmed that the relevant issue is "whether in all the circumstances acceptance of the gift should be inferred from the absence of dissent from the donee, and the passage of time".[22] It rejected the existence of any principle, as apparently assumed by the AAT, that a delay in disclaiming necessarily involves a tacit acceptance of a gift.

Where there was no express acceptance of a gift, implicit or tacit acceptance is a matter of inference and presumption on the particular facts.[23] On the facts here, the Full Court held that there was only one conclusion reasonably open, the applicants' conduct was consistently directed to the one end of rejecting any right to any income from the trust.

The Commissioner had also contended for confirmation of the AAT decision on the grounds that the Second and Third Disclaimers did not have retrospective operation for the purposes of s97 of the ITAA 1936. This was rejected on the basis that the disclaimers operated by way of avoidance, rather than by way of disposition.[24] Once the entitlements were held to have been disclaimed the consequence was that s97 was not engaged because it fixed liability on a beneficiary only where the beneficiary had a present entitlement to income under a trust and, while that entitlement was operative for s97 from the moment it arose, on disclaimer the general law extinguished it as initio and the Commissioner was bound to treat the beneficiaries as not entitled to the income for the purposes of s97. In holding this, the Court noted that the tax consequences of a disclaimer are determined by reference to the general laws[25] and not by reference to legal relationships then in existence.[26]

While it has been argued that effecting a valid trust interest disclaimer is out of the reach of the average taxpayer by reason of the demands of the onus of proof, requirements for positive, timely, unequivocal and intentional action, premised on actual knowledge of the entitlements, when the tax consequences of the entitlement is mostly not known when that knowledge is gained[27], the Full Court judgement in Carter does recognise some circumstances where a disclaimer can be[28] effective.

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22 Ramsden at [55]
23 *JW Bloomhead (Vic) Pty Ltd (in Lia) v JW Bloomhead Pty Ltd* [1985] VR 891 at 930-931
24 The Paradise Motor Co Ltd [1968] 2 All ER 625
25 *C of T v Thomas* [2018] HGA 31; 264 CLR 382 at 407-8[54] per Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ; 417 [93] for Gageler J.
26 *Cf Smeaton Grange Holdings Pty Ltd v CSR* (NSW) [2016] NSWC 1954 at [146] per Sackville AJA
27 Frederick Mahar, Present entitlement and the dissenting beneficiary, Taxation in Australia Vol 53(ii), June 2019 600 at 604
28 Contrast the AAT decision in The Beneficiary and Commissioner of Taxation (Taxation) [2020] AATA 3136 26 August 2020

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DISSECTING DECISIONS | **By Debra Lane**

A Win for Women in Pelvic Mesh Class Action - for the Moment …

GILL v ETHICON SÁRL & ORS (NO 5) [2019] FCA 1905

This was a representative proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cth) concerning nine uro-gynaecological devices developed and manufactured by two foreign companies, Ethicon Sárl and Ethicon Inc (the Ethicon entities), both part of the Johnson & Johnson Group of Companies- which devices were marketed and sold by a related Australian company, Johnson & Johnson Medical Pty Ltd (J&J).

The decision of Katzmann J was handed down on 21 November 2019 and found in favour of the applicants (and the group).

The devices were made from polypropylene mesh and were used to treat women suffering from two common complications of childbirth, pelvic organ prolapse or stress urinary incontinence.

The three applicants commenced proceedings against the two Ethicon entities and J&J on behalf of themselves and the other women in the group, all of whom suffered complications following the implantation of the devices, alleging that the respondents had contravened various provisions of the *Trade Practices Act 1974* (Cth) and the *Competition & Consumer Act 2010* (Cth) and were also liable for damages in negligence.

At the commencement of the trial, there were approximately 700 members in the class; however, in her decision, Katzmann J acknowledged that the group could be much larger as not only was the class open, but more than 90,000 Ethicon devices had been supplied in Australia.

The applicants alleged that the devices had caused various complications to recipients, including chronic inflammation, extrusion or erosion of the mesh into surrounding organs, infection, chronic pain, pain during sexual intercourse, urinary incontinence, recurrence of prolapse and damage to surrounding organs and nerves.

Whilst the respondents did not dispute that the complications could be caused by the devices -or that the complications were clinically significant; however, the dispute in the proceedings turned on the magnitude and gravity of the risks and the obligations of the respondents to disclose those risks.

Katzmann J considered reams of medical literature and detailed expert evidence on the topic of the various complications pleaded and ultimately found that the respondents had failed to adequately disclose the risks associated with the devices, in that they had not provided adequate warnings about all risks, had not provided adequate information about the possibility of the risks arising nor the seriousness of the risks.

The applicants' case in negligence was based on the allegation that whilst each of the devices could cause several potentially serious complications, the Ethicon entitles failed to:

- undertake adequate pre or post-market evaluation of safety and efficacy of the devices; and/or
- provide adequate information

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about the risks associated with the use of the devices or the level of evaluation.

On the first issue, Her Honour agreed that the respondents' pre and post market evaluation of the devices were insufficient to discharge their duty of care.

On the second issue relating to the adequacy of the information provided (although conscious of the possibility the applicants' evidence could be tainted by hindsight) Her Honour found that, but for the respondents' failure to warn of the pleaded potential complications and extent of evaluation, each applicant would not have consented to implantation of the device and instead would have pursued other treatment options for her condition.

As manufacturers, the Ethicon entities were found to have a duty to take reasonable care in the design, testing, evaluation, supply and marketing of the devices and that duty extended to the provision of accurate information about the performance and safety of the devices, and included the giving of warnings about contra-indications to use and potential complications thereof.

Her Honour also found this duty was not confined to the period prior the devices being made or placed on the market. The obligation to evaluate the safety of the devices and keep abreast of information about the nature and extent of potential complications was continuing, as was the obligation to provide further accurate information to patients.

Although J&J did not manufacture the devices, it was in the same corporate group as the Ethicon entities, promoted and supplied the devices to Australian doctors and hospitals and was the 'Sponsor' of products for the purposes of the *Therapeutic Goods Act 1990* (Cth), which gave rise to an obligation to properly understand the risks associated with the use of the devices.

J&J's duty of care did not extend to undertaking clinical evaluation of the devices but otherwise its duties were co-extensive with those of the Ethicon entities.

The fact that the medical practitioners who implanted the devices also owed their patients a duty of care was found not to absolve the Ethicon entities, (as manufacturers), from informing prospective patients (whether directly or indirectly) of the nature and extent of the potential risks associated with the devices. This meant that the respondents were required to take into account the possibility that the treating doctors might fail to inform their patients of the associated risks. Significantly, it was found that compliance with applicable regulatory requirements, was not sufficient to discharge the Ethicon entities' duty of care.

Her Honour found the evidence established that the associated risks were not insignificant, were foreseeable, and could result in serious harm which led to the conclusion that the exercise of reasonable care would require warnings to be provided to prospective users (including the applicants and their treating doctors as well as to the hospitals to which devices were distributed) about the potential complications of the devices.

Given that the applicants made statutory claims under both the TPA and the CCA the Court also had to consider the application of the TPA and CCA to foreign corporations.

Her Honour rejected the respondents' submission that the statutory causes of action did not apply to the two Ethicon respondents as they were incorporated overseas and neither had a place of business in Australia. This was on the basis the legislation applied to conduct engaged in within Australia by a corporation, and this condition was met because supply of the Ethicon

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"... to the extent the device is known or believed to have side-effects (especially serious ones), the supplier of the device must provide medical practitioners with information or warnings sufficient to permit balanced, cautious and informed judgments to be made."

devices took place in Australia. The devices were received in Australia by an Australian company (J&J), delivered to Australian hospitals and doctors and implanted in women in Australia.

The basis of the applicants' claims under the TPA/CCA was threefold:

- firstly, that the devices were defective;
- second, that they were not reasonably fit for the purpose for which they were required and,
- third, that they were not of merchantable or acceptable quality.

It was common ground that if the devices were found to be defective, the second and third statutory claims would also succeed.

Her Honour was of the view that where a medical device exposes consumers to a risk of significant harm, the device will have a defect unless accompanied by warnings sufficient to alert patients to that risk.

The applicants submitted that the following circumstances should be taken into account in determining whether the Ethicon devices were defective:

- The allegation that the devices caused the pleaded complications;
- The availability of alternative forms of treatment, which were at least of comparable safety and efficacy;
- The allegation that the respondents failed to warn of the extent of clinical evaluation of the devices;
- The fact that neither condition (stress incontinence nor prolapse) was life-threatening; and
- That the device implantation surgery was elective.

In considering the question of the level of safety which a person is entitled to expect, Her Honour held that the same standard applies for medical devices intended for permanent implantation in the body as applies to a drug; that is to say, to the extent the device is known or believed to have side-effects (especially serious ones), the supplier of the device must provide medical practitioners with information or warnings sufficient to permit balanced, cautious and informed judgments to be made (see *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) 184 FCR 1 at [917]).

Although Katzmann J accepted the proposition that the law does not require goods to be absolutely free from risk, she found that the safety of the devices did not meet the standard that patients are entitled to expect and accordingly decided that each device had a "defect" within the meaning of the TPA and the CCA (ACL) respectively, having regard to her findings regarding the nature and extent of the risks associated with the devices, the deficiencies of the warnings that were provided and the way in which the devices were marketed.

She went on to find that the applicants had each suffered damage that was caused by the failure to provide adequate warnings, and that the Ethicon entities and J&J were jointly and severally liable to compensate the applicants (and the other group members) who had suffered injury because of that failure.

NB. It was reported in April of this year that the respondents had lodged an appeal against the November 2019 decision of Katzmann J.

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DISSECTING DECISIONS | **By Patrick Walsh**

All for One and One for All!

South Australian Employment Tribunal finds that all members of a group under a licence of self-insurance are equally and severally liable for suitable employment obligations imposed by section 18 of all group members.

In a recent ruling Her Honour Deputy President Judge Kelly of the South Australian Employment Tribunal in *McCormack v ASC Shipbuilding Pty Ltd and Others* [2020] SAET 200 has found that section 129(12) of the *Return to Work Act 2014* (SA) ('**the RTW Act**') has the effect of making the nominated employer (of the group of employers holding a self-insured licence) the **pre-injury employer** for the purposes of section 18 of the RTW Act.

Background

Mr Rory McCormack was employed by ASC Shipbuilding Pty Ltd ('**ASC Shipbuilding**') and sustained a work injury during the course of his employment.

At the time that Mr McCormack sustained his injury, ASC Shipbuilding was a member of a group of companies that held a licence for self-insurance pursuant to section 129 of the RTW Act. The other members of the group were ASC Pty Ltd ('**ASC**') and Australian Naval Infrastructure Pty Ltd (formerly ASC Engineering Pty Ltd) ('**ANI**'). ASC was the nominated employer of the group for the purpose of section 129(12) of the RTW Act.

On 17 November 2014 Mr McCormack sustained an injury to his left ankle, as a consequence of which he had claims accepted for weekly payments and medical and like expenses pursuant to the *Workers Rehabilitation and Compensation Act 1986* (SA) and then the RTW Act.

On 13 November 2018 Mr McCormack's employment was terminated due to redundancy.

On 14 December 2018, BAE Systems Australia Ltd ('**BAE**') acquired the business of ASC Shipbuilding and became the sole shareholder of ASC Shipbuilding. As a consequence of this, ASC Shipbuilding no longer operated under the licence for self-insurance with ASC and ANI.

Following the termination of his employment, but after 14 December 2018, Mr McCormack made applications, pursuant to section 18 of the RTW Act, for the provision of suitable employment to ASC Shipbuilding, ASC, and ANI.

The issue before Her Honour was whether any of ASC Shipbuilding, ASC, and/or ANI were the "*pre-injury employer*" pursuant to section 18 of the RTW Act.

The worker's submissions

Mr McCormack's counsel placed emphasis on section 129(14) of the RTW Act, which makes all members of the self-insured group equally and severally liable for the **liabilities** of any member of the group under the Act.

It was submitted that, on a plain reading of section 129(12) and 192(14), the nominated employer is to be treated as the employer for all workers in the group and that each member of the group is equally and severally accountable for meeting the obligation to provide suitable employment pursuant to section 18 of the RTW Act.

The employers' submissions

Although no longer a member of the group, ASC Shipbuilding supported the submissions of ASC and ANI.

Counsel for ASC and ANI argued that Section 129(12) creates a statutory fiction, namely that the nominated employer is the employer of all the worker's in the group.

ASC and ANI submitted that as section 129(12) is a "legal fiction", this provision must be construed strictly and only for its intended purpose. It was argued that the

"... it will fundamentally change the manner in which the nominated employer of a group of self-insured employers will need to respond to any application pursuant to section 18."

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"... if a decision is made to decline to provide suitable employment on the basis that it is not reasonably practicable to provide the employment, the relevant employer will need to be able to establish that it is not reasonably practicable to provide the requested suitable employment in respect of each member of the group."

purpose of section 129(12) was not to extend the obligation to provide suitable employment to all members of the group of companies.

In addition, ASC and ANI raised further arguments that:

- ASC was no longer the "nominated employer" in respect of ASC Shipbuilding, pursuant to section 129(12), at the time that Mr McCormack made his application as ASC Shipbuilding was not part of the group of companies; and
- Section 129(14) relates to "liabilities" of the group, and section 18 imposes a "duty".

Decision

Her Honour went on to find that the words "*for the purposes of the Act*" in section 129(12) of the RTW Act deem the nominated employer as the employer for **all** purposes of the RTW Act.

By extension, Her Honour found that section 129(14) of the RTW Act creates a collective responsibility across all members of the group.

As such, an application pursuant to section 18 of the RTW Act directed at the nominated employer can relate to all members of the group.

Implications of the decision

Should Her Honour's decision be upheld, it will fundamentally change the manner in which the nominated employer of a group of self-insured employers will need to respond to any application pursuant to section 18.

Firstly, any worker seeking the provision of suitable employment will be entitled to direct their application to the nominated employer, or any other employer that is included under the licence for self-insurance, which will not necessarily be the other party to the worker's contract of employment.

In responding to a request for suitable employment, the relevant employer will be required to consider the availability of the requested suitable employment across the whole group.

In particular, if a decision is made to decline to provide suitable employment on the basis that it is not reasonably practicable to provide the employment, the relevant employer will need to be able to establish that it is not reasonably practicable to provide the requested suitable employment in respect of each member of the group.

In articulating a decision to decline to provide suitable employment on the basis that it is not reasonably practicable, the relevant employer will need to take a similar approach to that set out for a genuine redundancy in section 389 of the *Fair Work Act 2009* (Cth) ('**the FW Act**'). As section 389(2) of the FW Act requires an employer to consider whether it would be reasonable to redeploy a person within the enterprise of an associated entity of the employer, it can be expected that the Tribunal will take a similar approach as that taken by the Courts to section 389(2) in determining whether it is reasonably practicable for an associated entity to provide suitable employment.

While there is some similarity between the approach taken by Kelly DPJ in *McCormack v ASC Shipbuilding Pty Ltd and Others* and the obligation to consider redeployment to an associated entity under section 389(2) of the FW Act, this approach is likely to be problematic for some employer groups and local government groups in which the members of the group operate independently of one another.

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DISSECTING DECISIONS | **By Joseph De Ruvo & Jack Davis**

Building and Construction Contracts: The Importance of Good Contract Administration

Adelaide's landscape is constantly changing. Although the COVID-19 pandemic has stymied the growth of many industries, the State Government's Renew Adelaide project and home-builder grants have ensured that there is no shortage of building and construction works being carried out in the CBD and greater Adelaide. With ever more construction works being carried out, a corresponding increase in building and construction disputes of various kinds is inevitable.

Against this backdrop, the recent decision of His Honour Judge O'Sullivan in *Crea v Bedrock Construction Pty Ltd*[1] provides a timely reminder of the importance of proper contract administration for builders and building owners alike.

The facts

In January 2016, the Applicant, a local restaurant owner (**Owner**), entered into a Simple Works contract with the Respondent builder (**Builder**) for the renovation and fit-out of his premises (**Works**). The Works were to be completed within 10 weeks or by 12 March 2016. A well-regarded interior designer was appointed to the role of architect pursuant to the contract (**Architect**), whose role was to administer and supervise the contract.

The terms of the contract provided for weekly progress payments and, following the completion of the works, the Builder was entitled to make a final claim for payment of the balance of the contract sum owing (plus any agreed changes to the contract sum for variations, prime cost items or delay).

On 22 April 2016, the Owner took possession of the Premises despite the Works not yet having been completed. Shortly after, the Owner gave notice that he intended to terminate the contract on the basis that the works were substantially defective in that they had departed in several areas from the contract drawings. The Builder then issued a final claim for payment of the balance of the contract sum plus unpaid variations.

The Owner issued proceedings for breach of contract, alleging that the Builder was liable to meet the cost of rectifying the Builder's defective Works. The Builder

1 [2020] SADC 124 (*Crea*).

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issued proceedings for payment of agreed variations to the Works, alleging that the Owner and the Architect had given oral instructions to vary certain aspects of the Works from the original contract drawings. The two proceedings were subsequently joined and were heard together in the District Court.

The Builder's case, upon which this article will focus, was based upon two claims:

1. firstly, that the Builder was entitled to be paid for variations pursuant to the contract; and

2. alternatively, that the Builder was entitled to payment for variations by virtue of an implied promise to pay.

Contractual v restitutionary remedies

The Builder's primary claim was based on the building contract as agreed between the parties. Contrary to a restitutionary remedy, an award of damages for breach of contract is intended to reflect the contractual bargain struck between the parties, and is generally limited to the value of the contract (or to the portion of the contract that has been performed).

On the other hand, the Builder's alternative claim for payment of variations by virtue of an implied promise to pay drew from the decision of Chief Justice Griffiths in *Liebe v Molloy*[2]. His Honour held that where a contractor has carried out additional building work at the instruction of the owner or principal, and where the contractor has a reasonable expectation of payment for that work, an implied promise to pay for that work will be presumed. Absent such a promise, and the consequent right to restitution, the owner would be unjustly enriched to the detriment of the builder.

So sound was the judgment of the Chief Justice and the principle that he posited, that it has remained largely undisturbed for over 100 years.

The award of a restitutionary remedy is generally intended to protect the interests of a disadvantaged party where there is no applicable contract or where an applicable contract no longer governs the relationship between the parties. The latter may occur when the contract is repudiated by one party, which may leave the other with no basis upon which to claim remuneration for work done. The classic example of a restitutionary claim is a claim in *quantum meruit*, for the value of services provided.

In the case of building contracts, the award of a restitutionary remedy is intended to prevent the building owner from being unduly enriched at the expense of the builder.

Contractual risk allocation – Mann v Peterson Constructions

The judgment of His Honour Judge O'Sullivan in *Crea*, whilst not putting into question the principle set down by the High Court in *Liebe v Molloy*, considered the recent judgment of the High Court in *Mann v Paterson Constructions*[3] in order to delineate the circumstances in which it is appropriate for restitutionary remedies to be awarded in disputes concerning building and construction contracts.

Mann was concerned with a similar scenario to that in *Crea*, namely a dispute concerning a builder's request for payment for variations directed by the owner of the property. In coming to its ultimate conclusion, the majority was required to consider the interplay of contractual and restitutionary remedies in the context of building disputes.

In considering the dispute, the majority concluded that where there is a contractual right of payment which has not been displaced (either by rescission or some other means), then there can be no basis for the award of a restitutionary remedy that is inconsistent with the terms of the contract.[4]

Although the factual matrix and result of Mann were not considered, the *obiter* of Chief Justice Kiefel and Justices Bell and Keane was drawn upon by His Honour Judge O'Sullivan, who posited the following summary of the interplay between contractual and restitutionary claims:[5]

> "*In my view, if there is an instruction for a Variation which comes within the provisions of the Contract … then there is no room for the principle in Liebe v Molloy to override the contractual provisions that then follow. To do so is to ignore the agreement between the parties and in particular the agreed risk allocation. If, on the other hand, there is an instruction to do work which does not come within*

2 (1906) 4 CLR 437.

3 [2019] HCA 32 (*Mann).*
4 *Mann, 19.*
5 Crea, [170].

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the contractual framework for Variations, then depending on the facts as I find them, it may well be that [the Builder] is entitled to claim the cost of carrying out the Variation albeit classified as an "Extra", on a restitutionary basis or applying Liebe v Molloy *on the basis of an implied promise to pay*."

Variation or extra?

In order to understand the delineation of circumstances in which it would be appropriate for the Court to order restitution, it is first necessary to understand the distinction between an extra and a variation in respect of a building contract.

On the one hand, extras are works which do not fall within the scope of the owner or superintendent's power to order an addition or additions to the works under the relevant building contract and, as such, cannot properly be considered to be governed by the contract.

Variations, on the other hand, are generally confined to changes or alterations to the works as defined within the contractual documents. As such, what exactly is defined as a variation will depend on the specific contract.

Compliance with the contract

In his reasons, His Honour sets out in detail the contractual mechanism for claiming, and in doing so becoming entitled to payment for, variations under the particular contract in that case.

The process required written correspondence between the Architect and the Builder in order to confirm that a variation was approved and, importantly, that the variation was to be reflected in the contract price.

There was no power under the contract for the Owner to direct a variation. Accordingly, His Honour found that whenever the Owner directed the Builder to carry out Works, those works were to be considered "Extras," and the Builder was therefore entitled to a restitutionary remedy.

Where the work was requested by the Architect, or suggested by the Builder, the Builder's failure to comply with the contractual regime for adjusting the contract price would be fatal to his claim for payment for those Works.

His Honour considered each of the 22 variations claimed by the Builder individually. In doing so, it was necessary to determine whether each variation was actually an Extra or a Variation and, if the latter, whether the Builder had complied with the contractual regime for payment.

Ultimately, largely as a result of his non-compliance with the contractual regime, the Builder was only entitled to payment for 10 of the 22 variations claimed.

Conclusion

In summary, the decision in *Crea* makes clear that where a contractual mechanism exists for claiming payment for variations to contract works, strict compliance with that contractual mechanism is required in order for a claim for that payment to be valid. To rely upon extra-contractual means of enforcement is wholly inconsistent with the contractual allocation of risk between the parties and subverts the inherent purpose of the contract – to set out the rights and obligations of the parties.[6]

It is not enough to rely upon the goodwill of either party – a handshake and a promise; both builders and building owners alike must understand the terms and requirements of the contracts in place between them and ensure that they are compliant with those requirements. Where the contract requires that consent or direction for a variation be given in writing, it is incumbent upon *both* parties to ensure that this is provided to avoid disappointment down the line.

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6 NB. An Appeal to the Full Court has since been commenced.

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DISSECTING DECISIONS | **By Marianna Danby**

King Reigns All: High Court Decides Holding Companies May Be Held Accountable for Subsidiary Company Actions

The High Court of Australia decision broadens section 9 of the Corporations Act 2001 interpretation, meaning that potentially anyone can be considered an Officer of a Company if they have the capacity to affect significantly the financial standing of that Company.

On 11 March 2020, the High Court of Australia provided its final judgment for the matter of *Australian Securities and Investments Commission v King & Anor* (2020) HCA 4 "**ASIC v King"**.

ASIC v King explicitly dealt with the question of whether a director of a parent company could be considered as an 'officer' for one of its subsidiaries under section 9 of the *Corporations Act 2001* (Cth).

Mr King

MFS Ltd was the parent company of the MFS Group of companies (**the MFS Group**). Mr King was CEO and executive director of MFS Ltd. Additionally, Mr King had previously held the office of director for one of MFS Ltd's subsidiaries, the MFS Investment Management Pty Ltd (**MFSIM**).

Although his role as director for MFSIM ceased on 27 February 2007, it was alleged that he was personally responsible for the misuse of MFSIM funds that occurred on the 27 November 2007.

The transaction

On 27 November 2020, MFSIM and senior personnel of the MFS Group, including Mr King, arranged for $150million to be drawn down from a Royal Bank of Scotland (**RBS**) loan facility.

Of that amount, there was a redraw in the amount of $130million from a loan facility between MFSIM (in its capacity as the responsible entity for its subsidiary, Premium Income Fund (**PIF**) and the Royal Bank of Scotland (**Transaction**). This Transaction was the subject of the Court's decision.

The Transaction funds were paid to MFS Adminis ent tration (the treasury company of the MFS Group) without consideration or agreement for its repayment. From this amount, MFS Administration used $103million to pay an outstanding debt in the MFS Castle Pty Ltd (**MFS Castle**) (a wholly-owned subsidiary of MFS Ltd) to a third party, Fortress Credit Corporation (Australia) II Pty Ltd.

PIF's money was used to pay the debts of MFS companies for which PIF was neither actually nor contingently liable.

No agreement had been reached by which MFSIM received any consideration for this payment, nor was there any promise of repayment or security for the Transaction. As such, MFSIM had breached its duties as PIF's responsible entity and thereby contravened s 601FC(1) of the Corporations Act 2001 (Cth) ("the Act").

"reference to the facts of the relationship between an individual and a corporation in relation to the affairs of the corporation."

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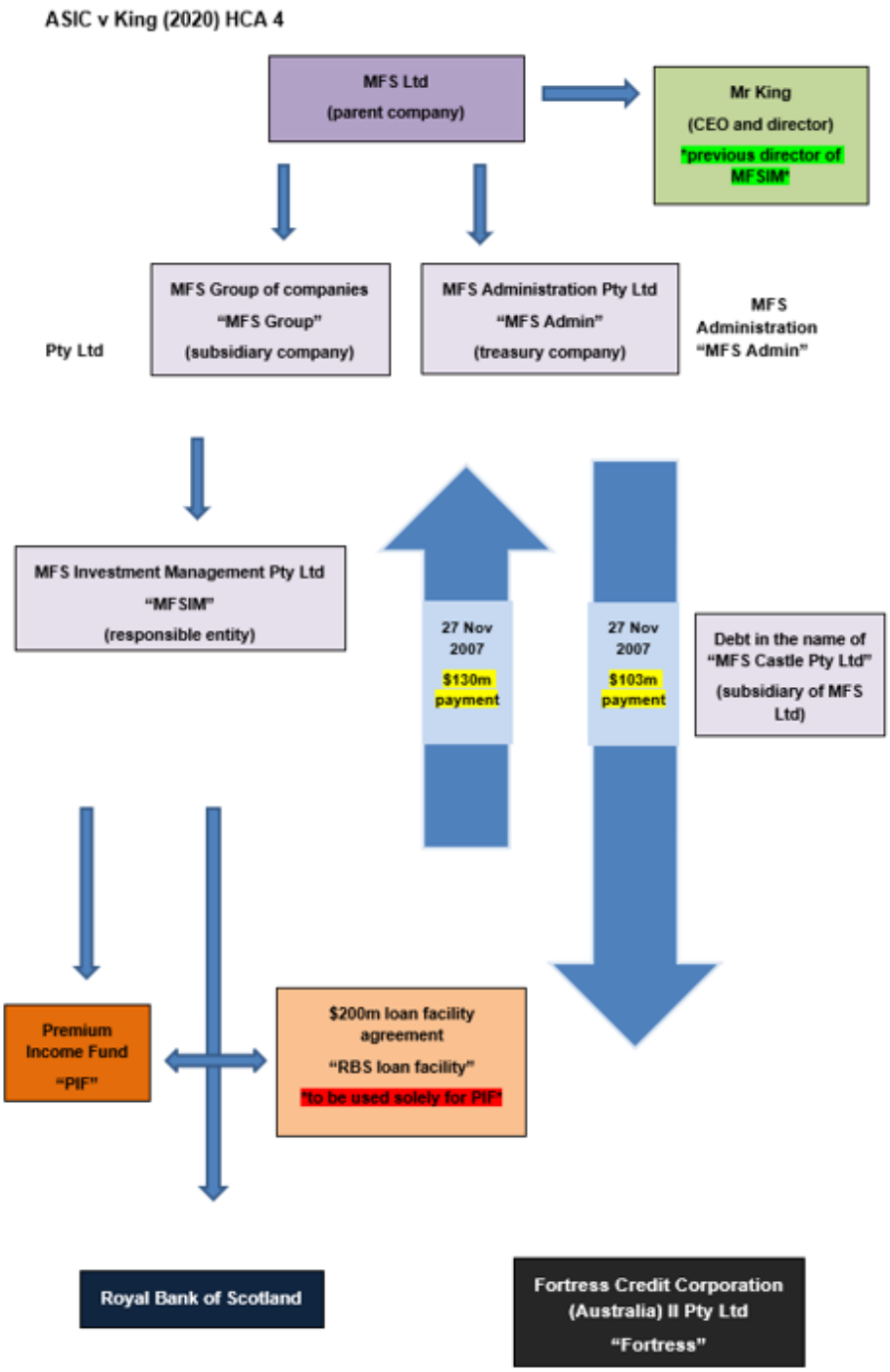
"... the High Court relied on judgments from Grimaldi and Shafron, where it was found that a person who satisfied subsection 9(b) of the definition of "officer" 'is likely to be acting in an office (or position) for the purposes of section 9, irrespective of whether they were formally appointed to that role."



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Extension of section 9

Section 9 of the *Corporations Act 2001 (Cth)* provides that ***"officer"*** of a corporation means:

a. a director or secretary of the corporation; or

b. a person:

i. who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

ii. who has the capacity to affect significantly the corporation's financial standing; or

iii. in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or

c. a receiver, or receiver and manager, of the property of the corporation; or

d. an administrator of the corporation; or

e. an administrator of a deed of company arrangement executed by the corporation; or

f. a liquidator of the corporation; or

g. a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

"activities which involve policy and decision-making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation"

Crucially, ASIC v King has resulted in an extension of previous interpretations of section 9 regarding the definition of an 'officer' within a corporation.

New interpretations of section 9 are no longer confined to individuals who hold a position ***within*** a company but can also include persons who "play some part ***in the management*** of the corporation".

This extension will allow persons to be considered as 'officers' without requiring them to hold a formal office within the corporation.

Going forward, the key test for a person will be defined as an 'officer' will be whether it can be shown that they had the "***capacity*** *to affect significantly the financial standing of the company*".

The rationale behind ASIC v King

In making its decision, the High Court relied on judgments from *Grimaldi and Shafron,*[1] where it was found that a person who satisfied subsection 9(b) of the definition of ***"officer"*** 'is likely to be acting in an office (or position) for the purposes of section 9, irrespective of whether they were formally appointed to that role.

1 *Grimaldi v Chameleon Mining NL* (No 2) (2012) FCAFC 6; *Shafron v ASIC* (2012) 88 ACSR 126.

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"he was also shown to have both participated in the business of MFSIM and had an integral role in the redraw of funds from the loan facility that were used to inappropriately pay the debt of another MFS subsidiary"

Instead, the relevant factors should consider:

- the persons' capacity and participation in investment and financial decisions; and
- the nature of the persons' participation in the control and direction of the affairs of the corporation.

Additionally, the High Court referenced the legislative history and conceptualisation of ***management*** which relates to *"activities which involve policy and decision-making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation"*.

Subsection 9(b) also contains a language change in contrast with earlier subsections of section 9. This was argued to show an intention by the Commonwealth Parliament to extend the interpretation of **'officer'** to include *"reference to the facts of the relationship between an individual and a corporation in relation to the affairs of the corporation."*

Facts that held Mr King as an 'officer'

Several factors persuaded the court to define Mr King's relationship with MFSIM as qualifying for the definition of 'officer'.

The two most persuasive of these were evidence that:

1. he acted as the 'overall boss of the MFS Group' and appeared to assume 'overall responsibility for MFSIM'; and
2. he was also shown to have both participated in the business of MFSIM and had an integral role in the redraw of funds from the loan facility that were used to inappropriately pay the debt of another MFS subsidiary.

Evidence was provided to the High Court, which showed Mr King's influence over the deal and the acting authority he had over the decision.

While he did not have a formal office within the company, it was found that his ***capacity*** to affect the financial standing of MFSIM significantly was enough to classify him as an **'officer'** for the purpose of section 9.

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SUITS OFF | **Staff Profile**

Our Commercial Property ‘go-to’, William Esau, on COVID-19, Fast Bikes & French Love Affairs

William Esau Director

William Esau is one of the firm’s founding directors, with several long-established and well-known love affairs running concurrently in his life. Motorbikes got him first at the age of 16, starting with a Vespa and graduating to a 900cc Ducati SuperSport by the time he reached university. And in later years his grandchildren have stolen his heart, along with the “marvellous” city in which they live, Paris.

When the COVID-19 response ramped up across Australia, William was doing one of those things he loves, riding a big bike with friends across picturesque countryside. *“We were on our way to the Grampians,”* recalls William, *“really looking forward to a great trip, but the coronavirus response escalated quickly, and the border closed, so we turned back after one night.”*

Like so many millions of families around the world, COVID-19 travel restrictions have effectively separated William and his grandchildren living overseas. *“My daughter Annabelle lives in Paris and works as a lawyer, keeping the family tradition going,”* smiles William, *“She and her husband live in the 7th arrondissement, near the Eiffel Tower, which is a lovely area and the city as a whole is just marvellous. They have just had my second grandchild, so it’s been especially difficult dealing with the fact that I won’t be able to be with them again any time soon. But it’s important to remember that we are very lucky in comparison to many others. We have FaceTime to keep in touch, and thankfully Annabelle is teaching my first grandchild very good English, so they don’t have to deal with my terrible French!”*

COVID-19 and working from home

William is the head of our property team, and their workload has risen in some areas due to the legal knock-on effects of COVID-19 restrictions, especially around commercial leasing. *“While some commercial activity has slowed down, we’ve been busy with increased activity relating to leasing and COVID-19 rent relief regulations, which have moved*

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very quickly. I'm very pleased to say that in my experience, clients who own commercial properties have been sensible and responsible in their approach to tenancies. They see the long game, and they want to ensure that businesses are kept viable, which is the right way to go."

And what about the practicalities of working from home (WFH) and other aspects of the business under this 'new normal'? How have you found it, and do you have any WFH experiences to share? *"Again, I'm one of the lucky ones, in that I was already used to working from home, so there were no unpleasant surprises or difficulties for me. On the occasions I have been popping into the office, without the usual day-to-day activity, I'm finding that I'm more efficient getting things done. Plus, being completely honest, I'm really enjoying being able to wear casual attire to the office!"*

Natural-born lawyer

When asked what he might be if not a lawyer, or what his alternative pipe dream might be if life-changing luck should come his way, William is one of those rare breeds who says, *"I can't really imagine doing anything else."* As he explains, it's been that way all his adult life, *"I started studying law, and there were some early moments where I felt I 'got it', and knew what I wanted to do. There is a tremendous variation in the commercial work I do. Literally, each day is different. I'm honoured with the opportunity to be part of my clients' commercial team delivering outcomes, and that they trust me to solve problems on their behalf. It's incredibly satisfying; I'm definitely in my dream role already."*

The post-COVID 'to-do' list?

"Well, obviously I am hanging out for international travel to resume so I can see my Paris family and, who knows, maybe find time for some skiing and hiking in the French Alps. However that seems a long way off at the moment, so for the shorter term, I've set my sights on the next bike ride. We're off to a deserted township called Radium Hill, just out of Broken Hill, formerly a thriving uranium mine township back in the 60s, since abandoned. It is remote country. The last time we were there was on trailbikes, riding through ancient creek beds. It's eerily beautiful."

We wish William all the fun in the world when he is able to get to Paris again. In the meantime, there is plenty to keep him and his talented property team busy, with some large property transactions underway, and their continued first-class care for our clients on the frontline of COVID-19 rent relief regulations.

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