

## LEGAL BITES

## BARRISTER CONNECT

24.11.06

## 1. EMPLOYEE LIABILITY FOR DECEPTIVE AND MISLEADING CONDUCT

Gleeson CJ and Callinan J have granted special leave to appeal to the High Court to two employees of a website design company. The appeal will hopefully clarify the extent to which company directors can be held personally liable for their employees.

The employees are challenging a Federal Court ruling which made them personally liable for deceptive and misleading conduct. The Federal Court decided that employees of a company can be found to have been engaged in deceptive and misleading conduct and can be held liable for it. However, liability can only be established if the deceptive and misleading actions were carried out within the confines of their authority.

The High Court transcript of *Houghton & Anor v Arms* [2006] HCATrans 411 (4 August 2006) can be found at: <http://www.austlii.edu.au/au/other/HCATrans/2006/411.html>

The Federal Court judgment can be found at:  
<http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/46.html>

2. [LeafbustersPtyLtdvFourSeasonsGutterProtectionPtyLtd](#) CTH17/8/200616/8/2006[2006] FCA 1056

Court Provided Information: INTERLOCUTORY INJUNCTION – copyright injunction

Ref: 060817CA-0862

CORAM: HEEREY J

I conclude there is a serious issue to be tried for infringement of copyright in relation to the documents in [3] (a)(i), (ii) and (iv) above. It is not necessary to consider the claim for disclosure of confidential information.

Balance of convenience

18 Four Seasons' use of the allegedly infringing documents will give it an advantage and a headstart compared with the time and expense that would be taken to develop such documents from scratch. There must be a finite number of franchises which can be sold. As the network of Four Seasons franchises and its market share increases, there will be a consequent increase in the value of the franchise and its commercial attraction to prospective franchisees. It would be problematic, and expensive, to quantify the loss suffered by Leafbusters.

19 Four Seasons did not put on any evidence as to uncompensable (or indeed any) hardship they might suffer were an injunction to be granted. In substance the only discretionary argument put was that of laches.

20 Four Seasons' solicitor Dr Charles Birch deposed that by letter dated 13 October 2005 Leafbusters' solicitors made the same assertions in relation to Four Seasons' "2005 Four Seasons Franchise Opportunity Folder" which contained very similar documents to those in the 2006 version.

21 Dr Birch said in a letter dated 14 October 2005 that he would seek a copy of the Four Seasons Specifications Book from his clients and compare it with that of Leafbusters. (There was also correspondence at this time about the Disclosure Statement, but as this will not be the subject of injunctive relief no more need be said.)

22 By a letter dated 3 November 2005 Dr Birch forwarded a copy of the Four Seasons Specification Book to Leafbusters' solicitors, but it is said they made no complaint until the service of the present notice of motion on 13 July 2006. It appears the 2006 Four Seasons Franchise Opportunity Folder came into possession of Leafbusters in late May/early June 2006.

23 Dr Birch's forwarding of the Four Seasons Specification Book, in contrast to his forwarding of the Disclosure Statement on 2 November 2005, was not subject to a stipulation that Leafbusters' solicitors not release it to this client.

24 Nevertheless, while delay is a relevant factor for the exercise of a discretion it is not conclusive. I take into account also:

the blatancy of Four Seasons copying;

the lack of any assertion of hardship by this application being brought now rather than last November; and

the fact that at an earlier hearing in this litigation on 17 September 2004 counsel for Four Seasons stated that his clients "immediately agree to cease using any copyright material of Leafbusters that could be accurately identified".

Orders

25 There will be an order for an interlocutory injunction in the terms indicated above

26 There will be an order that the costs be reserved. Although Leafbusters complain, with some justification of Four Seasons' departures from its earlier assurances, the fact remains that this is an interlocutory hearing and final rights have not been determined.

### **Churche v Australian Prudential Regulation Authority (No**

**2)**CTH17/8/200615/8/2006[2006] FCA 1054

Court Provided Information: PRACTICE AND PROCEDURE – leave to appeal – interlocutory judgment – whether sufficient doubt attended decision – whether substantial injustice would be caused if leave were not granted – statutory construction – existence of pre...

The principles relating to leave to appeal from an interlocutory judgment were discussed in *Decor Corporation Pty Ltd and Anor v Dart Industries Inc* (1991) 33 FCR 397 at 398-9. The Court there accepted that the major considerations in determining whether leave should be granted are: 1) whether the decision is attended by sufficient doubt to warrant its being reconsidered; and 2) whether substantial injustice would result if leave were to be refused, supposing the decision to be wrong. However, the Court in *Decor* added (at 399-400):

'However, there will continue to be cases raising special considerations, and the court should not regard its hands as tied in any case beyond this; that by s 24(1A) the legislature has evinced a policy against the bringing of interlocutory appeals except where the court, acting judicially, finds reason to grant leave. When the court comes to exercise its discretion on a particular application, an important distinction to be observed is that between the common interlocutory decision on a point of practice -- concerning which the High Court has given (see *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177) a strong warning that "a tight rein" should be kept on appeals -- and an interlocutory decision determining a substantive right -- where leave will more readily be granted.'

### **3. New South Wales v NatWest Markets Australia No 2 Pty**

**Ltd**NSW18/8/200628/7/2006[2006] NSWSC 751

Court Provided Information: CONTRACTS - construction and interpretation of contracts - whether particular provisions of contract gave rise to entitlement to payment of a profit or gain - no entitlement to benefit arises LIMITATION OF ACTIONS - contracts - when cause of action arises - peri...

Ref: 060818CA-5489

CORAM: WINDEYER J

#### **The second question.**

31 Once the claim for specific performance fails, there is no equitable relief available. The claim is a claim for damages for breach of contract for failure to pay break benefits. This is a claim in contract. As such breach gives entitlement to nominal damages and as the claim is in the Equity Division it is not unusual to have a question of damages dealt with separately by a Judge or an Associate Judge.

32 The cause of action for damages for breach of contract arises on breach. In this case the breach, if any, occurred on failure to make payments under clause 2.3. The second swap transaction took place on either 27 December 1991 or 2 January 1992. The limitation period in respect of this transaction therefore expired, at the latest, on 2 January 1998 or perhaps a few days later. The third swap took place on 30 September 1994. The limitation period expired on 30 September 2000. At least so far as the second swap is concerned, the State in October 1998 had notice of a possible claim. It is, however, an accepted principle in contract claims that it is a breach which gives rise to the cause of action and not knowledge of breach.

33 To overcome this general proposition, the plaintiff relies upon some passages in the judgment of Deane J in *Hawkins v Clayton* (1987) 164 CLR 539 and particularly at page 589 et seq. That was a case for damages for negligence, a majority finding that the defendant's solicitors were negligent in failing to inform the executor named in a will which they held of the existence and contents of the will. At page 589 His Honour said in discussing a Limitation Act defence:

There is a more general answer to that defence. Its basis is to be found in the circumstance that, in the present case, the negligent failure of the firm to inform Mr. Hawkins of the existence and contents of the testatrix's last will not only caused the damage which was sustained by him in the capacity of executor of the testatrix's estate but also effectively concealed from him, for so long as he remained unaware of the contents of the will, the existence of the cause of action in negligence against the firm. It is inevitable that a Statute of Limitations will, on occasion, lead to injustice in the special circumstances of particular cases. Such injustice, when it occurs, is an unavoidable cost of the benefits involved in ensuring that plaintiffs act promptly and that defendants are not subjected to the litigation of stale claims. The present case falls, however, in an anomalous category where the applicability of a limitation provision such as s.14(1) would invariably involve prima facie hardship and injustice and where any compensating public benefit, apart from protecting the courts from being required to determine issues of distant fact, is absent. If a wrongful action or breach of duty by one person not only causes unlawful injury to another but, while its effect remains, effectively precludes that other from bringing proceedings to recover the damage to which he is entitled, that other person is doubly injured. There can be no acceptable or even sensible justification of a law which provides that to sustain the second injury will preclude recovery of damages for the first. It would, for example, be a travesty of justice and common sense if the law provided that a cause of action lay for damages for false imprisonment but then went on to provide that that cause of action would be lost if the false imprisonment continued for six years after the cause of action first accrued. Likewise, it would be a travesty of justice and common sense if the law imposed a duty upon a solicitor to take positive steps to inform a third person of the contents of a document of which the solicitor was alone aware and then provided that any cause of action against the solicitor for damage caused by a negligent failure to perform that duty would be lost if the negligence continued for six years. It is arguable that the notion of unconscionable reliance upon the provisions of a Statute of Limitations which provides the foundation of the long-established equitable jurisdiction to grant relief in a case of concealment of a cause of action until after the limitation period has expired (cf. s.55(1) of the Limitation Act) should, by analogy, be extended to cover cases such as these where the wrongful act at the one time inflicts the injury and, while its effect remains, precludes the bringing of an action for damages. It seems to me, however, that the preferable approach is to recognize that it could not have been the legislative intent that the effect of provisions such as s.14(1) of the Limitation Act should be that a cause of action for a wrongful act should be barred by lapse of time during a period in which the wrongful act itself effectively precluded the bringing of proceedings. On that approach, the reference in s.14(1) of the Act to the cause of action first accruing should be construed as excluding any period during which the wrongful act itself effectively precluded the institution of proceedings.

34 As Powell JA pointed out in *Walmsley v Cosentino* [2001] NSWCA 403 it is not altogether clear what weight of authority should be given to this passage as the other two judges in the majority based their decision on the limitation question by determining that the cause of action did not arise until a grant of probate was made because until that time there was nobody in a position to take any action.

35 For obvious reasons judges of lower courts, when considering limitation questions, at least where the claim is for damages for negligence, would proceed on the basis that the reasoning of Deane J is correct. Damage is an integral component of actions on the case in tort. Damage is assumed in actions for breach of contract. It could never be said that there was any obligation on one contracting party to inform the other contracting party of the first party's breach. This is entirely different from the case in *Hawkins* where the negligent act was the failure of the defendant firm of solicitors to inform Mr Hawkins of the existence and contents of the will in circumstances where it was this failure which caused the damage to Hawkins in his capacity as executor.

36 Counsel for the plaintiff in written submissions, referred to various passages in other judgments in support of his argument that the observations in Deane J in *Hawkins* should be followed and applied in this case. Those cases were: *Sampson v Zucker* (NSWCA 11 December 1990, BC9606395); *Downey v Bruce* (unreported Supreme Court of South Australia 17 December 1992); *Cheney v Duncan* [2001] NSWCA 197; *Pittaway v W H Tutt & Quinlan* [2003] QCA 365; *Gorton v Commonwealth of Australia* [1992] 2 Od R 603 at 607; *Grundy v Lewis* (1995) 62 FCR 567 at 576; *Pace v Westpac Banking Corporation* [2001] QSC 415 at paragraph [46]; *GMU Australia Pty Limited v Davidson* [2003] NSWSC 311 at 197.

37 Two of these cases included claims both in negligence and for misleading conduct under the *Trade Practices Act*. Apart from *Downey v Bruce* the others dealt with limitation defences raised to actions for negligence, for the most part, professional negligence. *Downey v Bruce* was a claim for damages for negligence and breach of contract. It was an appeal to the full court from a decision of a Master. The judgment of Mulligan J proceeds on the basis that the observations of Deane J in *Hawkins* apply to claims both in contract and in tort. It was, however, not necessary for His Honour to decide that: he said at BC9200157 at 11 "It is not the negligence or breach of contract of the respondent, assuming negligence or breach of duty for that purpose, which effectively precludes the appellants from bringing proceedings. There was no relevant representation or conduct of the respondent which caused the appellants failure to institute the action on time". While I do not consider that the passage in the judgment of Deane J could bear on limitation periods in contract claims, if it does it cannot I think do so unless there is a requirement to advise when a particular obligation under a contract falls due. It may be that failure to provide a statement under clause 2.1 of the PIA could form a peg upon which to found an argument based on the *Hawkins* passage; without there being any such obligation, the cause of action arose on breach. The *Limitation Act* defence succeeds.