

FINANCIAL LINES UPDATE JANUARY 2012

LATEST NEWS ON PROFESSIONAL INDEMNITY

NSW Supreme Court finds accountant not liable for silk's investment losses

(Tomasetti v Brailey [2011] NSWSC 1446)

The plaintiff was a senior counsel experienced in commercial transactions and investments.

Between 2000 and 2004, he acted on his accountant's advice to invest in agricultural managed investment schemes, to reduce his tax burden. He received prospectuses for these investments, but was too busy to read them and instead relied on the accountant's investigations and recommendations. He ultimately borrowed heavily to buy woodlots, almondlots, citruslots and grapelots.

When the Global Financial Crisis hit and the schemes began to fold, the plaintiff went into financial distress. He ultimately lost about \$4.5 million from the investments. He sued the accountant for negligence and contravention of the Trade Practices Act, amongst other things.

There were major problems with the negligence claim:

- (1) The plaintiff's case did not clearly articulate what he says the accountant should have done to discharge his duty.
- (2) During the trial, the case narrowed to an allegation that the accountant did not properly assess the prudence of the investments. The difficulty was that the plaintiff could not demonstrate that any such failure (even if proven) actually caused his loss.

- (3) The expert evidence on liability ended up of little use, because it was based on factual assumptions that were not ultimately found by the court.

Ultimately, the court found that the investments achieved the purpose they intended, and were not shown to be unsound or imprudent. To the extent they were risky, the plaintiff was a sophisticated investor and was sufficiently informed of these risks by having access to the prospectuses. The other claims for relief also failed.

Two aspects of this case deserve closer attention:

- (1) It is part of a general trend of the NSW Supreme Court to require plaintiffs in negligence claims to identify with greater precision what the defendant ought to have done in order to discharge the duty of care alleged. Although R.A. Hulme J in this case approached this issue in terms of the common law principles, and does not mention the *Civil Liability Act*, recent Court of Appeal decisions such as *RTA v Refrigerated Roadways* [2009] NSWCA 263 have demanded a more rigorous analysis of breach in line with section 5B of that Act.
- (2) The imprecision in the plaintiff's case may have contributed to the problems in his expert evidence. That expert evidence relied upon a narrow set of factual assumptions which were rejected. The importance of setting out provable assumptions in expert reports, especially where joint expert reports are used, has been the subject of a recent paper by Garling J, see: (http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/)

NSW Supreme Court sheds light on the operation of the Torrens Assurance Fund

(Pedulla v Panetta [2011] NSWSC 1386)

The plaintiff lived in an Italian convent. She also owned a house in Sydney worth \$3.8m, and allowed her brother to live there with his partner.

The brother forged a power of attorney in her name, giving himself the power to dispose of the house. Using this forged document, he managed to get the certificate of title and transferred the house to himself and his partner. For a few years they used the house as security to borrow money, but eventually sold the house, paid off the creditors and fled the country with the leftovers. By the time the plaintiff found out it was too late.

She sued for compensation under the Torrens Assurance Fund, and also brought a common law claim against the solicitor for negligence. The Registrar General brought his own “cross claim” against the solicitor. Into this mix were thrown arguments about the R-G’s right of subrogation under the *Real Property Act*, issues about apportionment under the *Civil Liability Act*, and insurance issues arising from the solicitor’s professional indemnity policy. It was, in short, a messy state of affairs.

There was never any doubt that the plaintiff would be compensated. The real issue at trial was how the web of statutory provisions would operate to determine who pays what. Pembroke J’s judgment provides some desperately needed guidance on how the compensation scheme works, including the potential for plaintiffs to recover both compensation under the scheme and common law damages against a negligent solicitor (or his PI insurer).

From a PI insurer’s perspective, the judge’s findings on the conduct of the solicitor make interesting reading (at [30]-[33]).

BOS International (Australia) Ltd v Babcock & Brown International Pty Ltd [2011] NSWSC 1382

This case is the latest instalment in the fallout from the collapse of Babcock & Brown.

One of the creditors to Babcock’s previous multi-billion-dollar facility wished to gain access to a copy of Babcock’s D&O policy at the time of the collapse. Under the agreement Babcock was required to provide information about its assets.

The issue at trial was whether a potential claim by Babcock against its current and former directors, under the D&O policy, could be categorised as an “asset”. If so, the next issue was whether the D&O policy itself could be categorised as “information about an asset”.

The court held that underlying an insurance policy is a bundle of rights. This could be categorised as an asset, even if those rights were contingent upon subsequent events. The D&O policy itself was a document that provided information about that asset. Babcock was therefore required to provide it to the creditor.

