Oceana appeals: more bad news

ACCC v Oceana Commercial [2004]FCAFC 174 and Quinlivan v ACCC [2004] FCAFC 175

By Michal Horvath

The Federal Court recently handed down the two appeals in the Oceana saga. The original action involved purchasers who bought investment units on the Gold Coast. The allegation was that two-tier marketing was used to sell the units to interstate investors. The ACCC brought a claim against the marketers, conveyance solicitors and even the banks alleging predominantly misleading and deceptive conduct. The claim was largely unsuccessful.

Quinlivan was one of the marketers and was found to be knowingly concerned in the contravention of the *Trade Practices Act*. He appealed and was successful.

The Full Court of the Federal Court in its judgment regarding Quinlivan analysed the interaction between sections 52, 51A and 78B (of the TPA). To paraphrase, the sections say:

- s52 – a corporation is not to engage in misleading and deceptive conduct in trade or commerce;
- s51A – if a corporation does not have a reasonable ground for making the representations about 'future matters', then any such representation is misleading and deceptive (and the onus of showing a reasonable ground is on the corporation); and
- s78B(c) – a person can be knowingly concerned in a contravention of the Act (referred to as 'accessorial liability').

In a unanimous decision, the court held that:

1. a person's knowledge for the purposes of s78B(c) has to be actual; constructive knowledge was not enough;
2. the reverse onus in s51A did not apply to the person; and
3. if a corporation shows a reasonable ground for a representation, there can be no accessorial liability as there has been no contravention of the Act by the corporation.

The second, much longer, appeal was brought by the ACCC on a number of grounds. The first was against the court's rejection of the evidence of the only valuer in the case as to the market values of units at the time each was first sold; this evidence being critical to establishing that the units were overpriced. Almost half of the appeal judgment is devoted to this issue. Ultimately the court held that the valuer had misunderstood the test in *Spencer v Commonwealth*,[1] a decision of the High Court, which defined the term 'market value', and that the trial judge had not erred in rejecting his evidence despite it being uncontradicted.

In the judgment at first instance, the conduct of the conveyancing solicitor was referred to the Law Society for investigation. The judge, however, was not prepared to find that the solicitor had breached s38 of the *Fair Trading Act* (the Queensland equivalent of s52 of the *TPA*) on the grounds that she did not have jurisdiction to make findings under the State Act.

On appeal, the court pointed out that the pleadings alleged breaches of duty rather than a breach of s38. Putting that aside, the court doubted whether the purchasers were 'consumers' within the meaning of the Act when they were purchasing units and using a solicitor to do so. Further, the court held that the ACCC does not have power under the TPA to enforce the State Act; nor did it have standing regarding State Act issues. If that was not enough, given that the declarations sought by the ACCC were discretionary, the court would not have exercised the discretion in the ACCC's favour.

The final ground involved the bank. At trial the allegations were misleading and deceptive conduct and unconscionable conduct on the basis of 'the alleged asymmetry of knowledge between the [purchaser] and the bank'. Only the second was pressed on appeal. To succeed, it needed a finding that the units were overpriced, which could not be proved due to the court's failure to accept the evidence of the valuer. 'In fairness to the bank', the court dealt with the unconscionability issue anyway. The main allegation was that the bank had a valuation saying the unit was worth $100,000 while it knew that the purchasers were paying $164,900. The valuation expressly said that the purchase price included expensive marketing costs. The winning point for the bank was that one of its conditions of finance said that the bank would be getting a valuation but would not be providing a copy to the purchaser. The court held that there was no asymmetry of information as the purchasers could obtain their own valuation, and that the bank owed no fiduciary duty to the purchaser and was under no obligation to advise the

purchaser that its valuation was much lower.

The appeal against the refusal to grant injunctions preventing the marketers from making further predictions about future values also failed, on the grounds that the court found no error in the exercise of the judge's discretion to refuse the injunctions at first instance. ■

Note: **1** *Spencer v the Commonwealth* (1907) 5 CLR 418.

Michal Horvath *is a barrister and currently Secretary of the Queensland Branch of the Australian Lawyers Alliance.*
PHONE *(07) 3221 7000* **EMAIL** *horvath@starmist.com.au*

Filshie Clip Failure

Gentile & Gentile v Ferri [2004] WADC 144

By Bill Madden

BACKGROUND

This medical negligence claim came before Judge Macknay in the District Court of Western Australia in late November 2003, with judgment delivered on 26 July 2004.

The plaintiffs, Mr and Mrs Gentile, brought an action against Dr Ferri, an obstetrician, arising from the performance of a laparoscopic sterilisation by application of filshie clips in May 1997.

Despite that procedure, Mrs Gentile subsequently conceived and gave birth to a son, Anthony.

The judgment is of interest for its consideration of the medical issues in these not uncommon claims, and its consideration of a 'voluntary services' claim by the parents.

MEDICAL ISSUES

Investigations after Anthony's birth disclosed that the clip applied to the right fallopian tube had dislodged and was resting lower in the abdomen in an open position.

The plaintiffs argued that the clip could not have dislodged unless it had been incorrectly applied and/or inadequately inspected after being placed.

Pathology testing showed a lack of scarring of the right fallopian tube which, it was said, demonstrated that the clip had either never been properly applied or had fallen off quite early after application.

The court observed:[1]

'If one then compares the three competing inferences, non-closure is unlikely and mechanical failure as a likelihood is also not supported, but there is support for a lammes closure and subsequent failure…'

The court went on to hold[2] that the defendant did not observe incomplete closure of the clip in circumstances where it was observable. There was an implication thereafter[3] that the defendant placed undue reliance upon 'feel' as opposed to the need for a careful visual inspection of the clip and tube, especially so as to observe the latch under the catch.

Interestingly, a videotape of the procedure was available which enabled at least one of the experts to comment that the defendant's inspection following application was only cursory and, by itself, inadequate.

The defendant, by his own admission, was unaware of the need to examine the clip and tube at right angles where possible.

LEGAL ISSUES

The court applied the High Court decision in *Cattanach v Melchior*.[4]

The plaintiffs were allowed modest compensation for general damages ($20,000), past and future costs associated with rearing the child (approximately $77,000) and special damages (approximately $8,000).

However, the plaintiffs also made a claim for voluntary services, being a claim based on the commercial costs of paying someone to discharge the parents' duty of bringing up the child.

That claim failed:[5]

'Whatever the position might be in a case where a claim of this kind was made on some other basis, with evidence to support that, I am of the view that the plaintiff's claim here for the notional value of voluntary services provided or to be provided to Anthony does not as put, accord with existing legal rules, is contrary to what was said in Cattanach, and ought not be allowed.' ■

Notes: **1** Para 142. **2** Para 144. **3** Para 146. **4** (2003) 77 *ALJR* 1312. **5** Para 181.

Bill Madden *is a partner specialising in professional negligence at Slater & Gordon, Sydney.* **PHONE** *(02) 8267 0600*
EMAIL *wmadden@slatergordon.com.au*