

DAMAGES - contract - loss of bargain - rule in *Bain v Fothergill*.

Precision Fabrication Pty Ltd v Roadcon Pty Ltd, (Mildren J) 12/8/91
The defendant was in breach of its contract to sell land to the plaintiff. The deposit was returned and the plaintiff sued for the difference between the true value of the land at the date of the contract and the contract price.

It also sued for conveyancing and legal costs incurred less those which it would have incurred had the sale proceeded.

Argued that the rule in *Bain v Fothergill* (1874-5) LR 7HL 158 precluded recovery of damages (rule per Lord Chelmsford: if vendor has no title to property purchaser can't get damages beyond expenses incurred). Review of authorities on rule and exceptions. One exception is where the vendor can make good title but fails to use its best endeavours to do so: *Day v Singleton* [1899] 2 Ch 320. Here defendant had not done all it could do to perfect end transfer its title.

The rule only applies when the defect in the defendant's title was without any fault on its part.

West v Read (1913) 13 SR (NSW) 575 is not good law.

Review of authorities recommending abolition of the rule.

Damages assessed from the date of breach.

Valuation principle in *Spencer v Commonwealth* (1907) 5 CLR 418 at 432 applied.

Consideration of differing valuations from valuers called by each party.

Held: plaintiff entitled to recover difference between value in 1987 and price for which it was sold. Also entitled to difference between plaintiff spent on conveyancing and solicitors costs and what it would have spent had the contract gone through smoothly.

Plaintiff not entitled to refund of stamp duty from Commissioner because contract repudiated, not "rescinded, cancelled or annulled" (*Taxation (Administration) Act* s56A(1)).

Where plaintiff gets loss of bargain damages, it is not entitled to interest on deposit, only on the damages. In-

Supreme Court Notes

by Cameron Ford, Barrister at Law

terest at 12 per cent.

Counsel: J Waters, plaintiff, instructed by David Francis and Associates; J McCormack, defendant, instructed by Ward Keller.

REAL PROPERTY - caveat - removal - principles - Real Property Act s 191 IV

EVIDENCE - parol evidence rule
State Bank of Australia v Driver, (Mildren J), 16/8/91.

Defendant caveated title to protect interest under contract to purchase.

Plaintiff bank was equitable mortgagee prior to caveat; applied to remove caveat.

Consideration of applicable principles: akin to those on summary judgment application, ie show that the caveator will not be able to make out a ground for relief.

The fullest opportunity should be given for the matter to be fully litigated. Argued that contract uncertain as to identity of land: rejected.

Argued that error in solicitor's attestation to caveat rendered caveat void: rejected - court has power to amend caveat on normal principles of amendment.

Caveator must proceed with due diligence to assert his rights.

Application dismissed and directions given for institution of proceedings by defendant.

Counsel: P Smith, plaintiff, instructed by Loftus and Cameron; T Coulehan, defendant, instructed by D Winter.

SENTENCING - Stated Case - breach of home detention order - suspended sentence revoked - which court deals with sentence - release on security under s5(1)(b) Criminal Law (Conditional Release of Offenders) Act? - non-parole period under s4 Parole of Prisoners Act?
O'Brien & Crellin v Brogan (Mildren J), 1/8/91.

Defendant sentenced to 12 months' imprisonment, suspended and placed on a home detention order.

Breached order by being convicted of being in possession of cannabis leaf under *Misuse of Drugs Act*.

Case stated as to whether s19F(6) *Criminal Law (Conditional Release of Offenders) Act*, on imprisonment for breach of order, excludes s405(2) *Criminal Code*, s5(1)(b) *Criminal Law (Conditional Release of Offenders) Act* and s4 *Parole of Prisoners Act*.

Held: where suspended sentence revoked under s19F(6), the sentence which was suspended is effected (not that of the revoking court).

Also, offender shall be imprisoned for original period regardless of period served under home detention order.

The court revoking the suspension commits the offender in execution of the original sentence.

The backdating of the sentence by the original court does not mean that the offender serves less time than if the sentence had not been suspended.

The revoking court has no choice but to imprison unless s19F(7) applies. Time spent in actual custody is deducted from the sentence.

A revoking court cannot order that the imprisonment be deemed to have commenced on another day under s405(2).

R v Baird CCA 9/5/91 unreported should be confined to its special facts. Neither can a revoking court release the offender on security under s5(1)(b). A court suspending a sentence cannot fix a non-parole period.

A revoking court must.

A revoking court cannot suspend the sentence when it is revoked, but it can suspend any sentence it imposes other than the suspended sentence.

Counsel: C Rowntree, informant, Solicitor for the NT; R Coates, defendant, Legal Aid Commission.

Motor Accidents (Compensation) Act - reference to Tribunal impossible in time - jurisdiction to receive out of time

Taylor v TIO (Mildren J) 19/8/91

Applicant injured in motor vehicle accident.

Applied to TIO under *Motor Accidents (Compensation) Act*.

General Manager made determination. Referred to Board which gave adverse determination.

No reference to Tribunal in time.

Applicant argued that Tribunal was not constituted at the time.

The Tribunal was to be a judge appointed by the Chief Justice and none was appointed, although the Tribunal sat in that period.

Held: a condition precedent to the jurisdiction of a tribunal cannot be dispensed with.

If the condition is impossible the jurisdiction fails.

But where something can be done to comply and all reasonable efforts are made, non-compliance is excused and jurisdiction is conferred.

Here where there were no rules made, all the applicant had to do was make the most informal approach to the Acting Chief Justice and there would have been sufficient compliance with the Act.

That not being done, there is nothing to excuse on the ground of possibility.

Counsel: J Reeves, applicant, instructed by Cridlands; P Bracher, respondent, instructed by Ward Keller.

CRIMINAL LAW - s154(1) Criminal Code - "public" - actually or potentially endangered - evidence

R v Ashley (Kearney J) 21/8/91

Ruling during trial. Driver with one passenger ramming car with car with five passengers.

Question whether or not the passengers were "public" under s154(1) and if Crown had to show someone actually in danger or if necessary to show someone may have been if had been there.

Held: "'public' includes all persons who would have been clearly foreseen by an ordinary person, in similar circumstances to the accused, to have

been within the ambit of the danger created by the alleged act, because their presence in the vicinity at that time might be reasonably anticipated." Crown would normally have to show what was going on in the vicinity at the time.

The passengers were the public here. Jury directed accordingly.

Counsel: R Wallace, Crown, Director of Public Prosecutions; R Davies, accused, NT Legal Aid Commission.

ADMINISTRATIVE LAW - natural justice - ministerial decisions - forfeiture of vehicle under Liquor Act

Wulain Association Inc v The Minister for Racing and Gaming (Asche CJ, Kearney and Angel JJ) 13/9/91
Appeal from Martin J.

Association's vehicle used to carry alcohol onto restricted area seized by police.

Application by association to minister for release of vehicle rejected.

Users of vehicle convicted and vehicle automatically forfeited to the Crown.

Argued that minister's refusal to release vehicle wrong because denied natural justice to association.

As his refusal was wrong, the vehicle should have been released and should not have been automatically forfeited on conviction.

Asche CJ: agreed that natural justice denied but that did not mean that forfeiture was wrong.

Vehicles in police custody are forfeited even where they are there because of an erroneous decision of the minister.

The release must be established, not the the validity or otherwise of the refusal to release.

Application for release must be made before the criminal trial.

If not, the right to apply is lost.

If it cannot be made in time, an adjournment of the trial should be sought.

A declaration doing nothing more than arming a party with a weapon for use in negotiations with some statutory body or government will not be granted.

Expressly declined to give views on the policy of the Act.

Kearney J: agreed with Asche CJ. Added views on policy of the Act and detailed history of forfeiture (pp14-34).

Angel J: agreed with Asche CJ and expressly declined to give views on policy of the Act.

Appeal dismissed.

Counsel: C McDonald, appellant, instructed by Cridlands; D Trigg, respondent, instructed by Solicitor for the Northern Territory.

**COSTS - substantive matter settled
LEGAL PROFESSION - "conflict" - breach of confidence/fiduciary duty**

Desert Springs Country Club Estate Pty Ltd v Winnleah (sic) Pty Ltd (Martin J) 17/9/91

Defendant had acted for plaintiff in commercial matter.

Incidental matter became litigious.

Defendant acted for other side to plaintiff for whom it had also acted in the commercial matter.

Plaintiff said defendant had agreed not to act for either should the matter become litigious.

Defendants refused to cease to act but, after some time, agreed to submit to ruling of President of Law Society. Plaintiff maintained ruling not sufficient and needed court adjudication. Plaintiff commenced these proceedings for injunction and declarations. After proceedings commenced Law Society ruled defendant should cease to act, which it did.,

There was therefore no need for the proceedings.

Both sought costs of the proceedings. Held:" not appropriate for court to determine merits of the action.

The acceptance by the defendant of the Law Society's ruling does not constitute an admission; there was no "event" entitling plaintiff to costs in the ordinary course.

Neither party was blameless.

No order as to costs.

Counsel: G Watkins, plaintiff, instructed by Buckley and Stone; J Waters, defendant, instructed by Poveys.