Dan Star QC Federal Court Judgments

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Numbers in square brackets refer to a paragraph number in the judgment.

MARCH

BANKRUPTCY – PRACTICE AND PROCEDURE

Duties of represented parties and their lawyers in proceedings against litigants in person

In *Kimber v The Owner Strata Plan No 48216* [2017] FCAFC 226 (22 December 2017) the Full Court allowed an appeal against the primary judge's summary dismissal of application for review of a decision of Registrar not to set aside bankruptcy notice. The successful ground of appeal that was the subject of leave to the Full Court was that the primary judge erred in failing to consider whether the appellant had reasonable prospects of success in claiming that a bankruptcy notice was invalid having regard to s 41(5) of the *Bankruptcy Act* 1966 (Cth).

The material of the appellant litigant in person was generrally deficient in form thorughout the litigation process. The Full Court (Logan, Kerr and Farrell JJ) stated at [60]:

> "The review application and the 30 May 2016 Affidavit are difficult documents. They do not comply with the Rules, they are repetitive and they contain complaints about Court staff and members of the executive committee of the Owners Corporation, the strata managers and Grace Lawyers which are personal and some are plainly scandalous. Her oral and written submissions are no less challenging. The exact nature of many of Ms Kimber's complaints is hard to establish. Many of the matters she raises are either outside the scope of the Court's jurisdiction on an application to set aside a bankruptcy notice … or misconceived … She has plainly struggled as a litigant in person, both with accepting the limits of the Court's jurisdiction and the disciplines imposed by the FCA Act and the Rules designed to ensure fairness to all parties."

The primary judge did not identify the question of whether a ground based on s 41(5) of the *Bankruptcy Act* had any reasonable prospect of success even though there was an explicit reference to s 41(5) in some of the appellant's material (at [64]). There was no evidence that the primary judge understood that the appellant relied on s 41(5) to claim that the bankruptcy notice was invalidated (at [68]). The Full Court rejected the appellant's submissions that the primary judge should identified her claim from her voluminous material (at [69]).

However, the Full Court held that where a represented litigant brings an application for summary dismissal of an

application made by a litigant in person, it is the duty of the applicant party to assist the Court to understand the claims made by the litigant in person and what might be the evidence called in aid of those claims (at [70]). Logan, Kerr and Farrell JJ stated at [73]:

> "In our view, the proper observance of the represented party's duty to the Court encompasses telling the Court what may be the weaknesses of their summary judgment or summary dismissal application as well as making the case for it. To use an old expression, if summary judgment is claimed, it must be a 'clean kill'. Otherwise, justice demands that the issues raised by the litigant in person's application be tried."

The Full Court noted that the whole focus of the Owners Corporation's submissions to the primary judge was on matters of form and compliance with the Rules, not to the substance of the appellant's claims (at [74]). The Full Court held that it was for the Owners Corporation to make the primary judge aware of the s 41(5) issue and the relevance of the materials in the appellant's material which bear on it (at [75]). In the view of the Full Court, the legal representatives for the Owners Corporation were in a position to understand the nature of appellant's claims concerning the s 41(5) issue stating at [80]:

> " ... the Owners Corporation and its solicitors have not satisfied that duty to the Court imposed by s 37N of the FCA Act. The failure to identify a ground based on s 41(5) raised by Ms Kimber and therefore to consider whether it has reasonable prospects of success is an error not of the primary judge's making but that failure is nonetheless an error which vitiates her Honour's decision. If only in relation to the s 41(5) ground, a triable issue existed. Justice demands that the appeal be allowed."

CONSUMER LAW

Whether comparative advertising campaign misleading or deceptive or likely to mislead or deceive

In *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser (Australia) Pty Limited (No 2)* [2018] FCA 1 (8 January 2018) the Court determined a business' claim that by a comparative advertising campaign a competitor engaged in misleading and deceptive conduct in contravention of s 18 of the Australian Consumer Law (ACL) and made false representations in contravention of s 29(1)(a) and (g) of the ACL.

The applicants (together, Glaxo) were the marketers and sellers of a suite of over-the-counter (OTC) pain relief medications under the product name 'Panadol'. The active ingredient in all Panadol products is paracetamol. The respondent (Reckitt) also marketed and sold a brand of OTC pain relief medication under the product name 'Nurofen'. The active ingredient common to all Nurofen products is ibuprofen. In August 2015, Reckitt commenced a comparative advertising campaign in which it compared Nurofen and ibuprofen with Panadol and paracetamol.

The Court determined by way of separate questions whether there had been any contravention of the ACL by the advertising campaign and the nature and form of any relief. A key question was whether Reckitt engaged in conduct which was misleading or deceptive or likely to mislead or deceive or made false representations by its comparative advertising campaign in which it claimed that Nurofen provided faster and more effective relief from the pain caused by common headaches than Panadol (at [36]; cf [133]-[135]).

The applicable legal principles were not in dispute (at [46]-[55]). Of significance, the Court accepted Reckitt's submission that where claims are made of a scientific nature, proof that there is no scientific foundation or no adequate scientific foundation for those claims may be sufficient to establish that the claims are misleading (at [49]). This was relevant in the present case where the circumstances were:

1. Only one clinical trial suggested that Nurofen did provide faster and more effective pain relief for common headaches than Panadol.

2. Two other studies conducted subsequently did not replicate the results of the one positive clinical trial.

3. The authors of three meta-analyses concluded that no authoritative comparison was possible in the present state of scientific knowledge.

After considering the relevant science (see from [144]), the Court (Foster J) concluded that it is misleading or deceptive or likely to mislead or deceive consumers in Australia for Reckitt to claim that ibuprofen (Nurofen) provides faster and more effective relief from pain caused by common headaches including TTH than does paracetamol (Panadol) (at [207]). The Court proposed to grant declaratory and injunctive relief (at [210]). Glaxo had previously abandoned any claim for corrective advertising (at [7] and [211]).

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INDUSTRIAL LAW

The effect of declarations on defaulting and non-defaulting respondents – course of conduct principle and s 557 of the Fair Work Act 2009 (Cth)

In *Fair Work Ombudman v Lohr* [2018] FCA 5 (12 January 2018) the Court allowed the regulator's appeal from the Federal Circuit Court (FCC). The case of the regulator (FWO) was that certain companies in the security industry had paid employees at a flat rate of pay, without regard to their entitlements under the *Security Services Industry Award* 2010 (Cth), being a modern award under Part 2-3 of the *Fair Work Act 2009* (Cth) (FW Act), with the consequence that the employees were underpaid (mostly casual loadings, allowances, penalty rates and overtime). The underpayments were alleged to constitute contraventions of the civil penalty provisions in the FW Act requiring compliance with those award terms. Mr Lohr was alleged to be involved in, and thereby to have committed, the same contraventions.

The FCC made declarations in relation to contraventions by the corporate employer who did not file a defence (at [4]). An issue arose in the FCC as to whether a default judgment entered against one or more respondent is binding on a respondent who is not in default (at [8]). On appeal, the Court (Bromwich J) held that the FCC erred in treating declarations made in the proceedings as a consequence of default by a respondent by non-compliance with orders, as not being binding on a non-defaulting respondent, by reason of the terms of rls 13.03A(2) and 13.03B(2)(c) of the *Federal Circuit Court Rules 2001* (Cth) (at [19]-[24]).

Further, Bromwich J held that the FCC erred in treating twelve (which on appeal the FWO regarded should be nine) classes of contraventions, which had already been 'grouped' by the operation of s 557 of the FW Act by reference to separate award requirements, as a single contravention with a single maximum penalty (at [25]-[34]). The matter was remitted to the primary judge to determine the appropriate penalty in accordance with the Court's reasons.

TORTS

Misfeasance in public office – Bias

In *Giddings v Australian Information Commissioner* [2017] FCAFC 225 (21 December 2017) in the context of a freedom of information dispute, the Full Court considered the appellant's 'malfeasance' claim (which was assumed to be reference to misfeasance in public office) (at [35]-[49]). The Full Court (Collier, Flick and Charlesworth JJ) upheld the primary judge's rejection of any claim for damages for the tort (at [49]). The insurmountable difficulty for the appellant was the intentional element of misfeasance. It was stated at [46]:

> "On the facts of the present case, there was no evidence to make out any claim that the conduct of any of those involved in resolving Mr Giddings' claim for access to documents pursuant to the Freedom of Information Act was pursued either with the knowledge that such conduct was in excess of the powers being exercised or with any reckless indifference to whether such conduct was in excess of power; or any malice."

The appellant's appeal on the basis of reasonable apprehension of bias by the primary judge was summarily rejected (at [50]-[56]).

APRIL

ADMINISTRATIVE LAW

The penalty privilege – Whether available in AAT proceedings

In *Migration Agents Registration Authority v Frugtniet* [2018] FCAFC 5 (30 January 2018), the Full Court considered whether the privilege against exposure to a penalty (penalty privilege) was available to a respondent in his Administrative Appeals Tribunal (AAT) proceedings.

In an AAT review, the conference registrar made procedural directions including that Mr Frugtniet give the AAT and the Migration Agents Registration Authority (MARA) witness statements, documents and a statement of facts, issues and contentions. A deputy president rejected Mr Frugtniet's objection to these orders on the basis of the penalty privilege. The deputy president also affirmed the decision of the MARA to cancel Mr Frugtniet's registration as a migration agent.

Mr Frugtniet sucessfully appealed to the Federal Court (see [2017] FCA 537). The primary judge (Kenny J) overturned the deputy president's final decision on the basis that the penalty privilege was available to Mr Frugtniet in the AAT. The primary judge also found that the possibility of a different outcome, had the penalty privilege claim been upheld, could not be excluded.

The MARA's appeal to the Full Court was successful. Justices Siopsis, Roberston and Bromwich held that the primary judge erred in concluding that the penalty privilege applied to Mr Frugtniet's AAT proceedings.

The outcome of the appeal turned on the interpretation of High Court authority (relevantly, *Sorby v Commonwealth* (1983) 152 CLR 281, *Pyneboard Pty Ltd v TPC* (1983) 152 CLR 328, *Police Service Board v Morris* (1985) 156 CLR 397, *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 and Rich v ASIC (2004) 220 CLR 129): at [6]-[44]. Having reconciled those authorities, the Full Court concluded (at [53]) the:

> " … penalty privilege is not even a substantive rule of law of a kind that must be found not to apply or be abrogated in a non-curial setting, but, rather, a protection that must have a foundation for applying in the first place as a matter of statutory construction. In this case, that requires consideration of the relevant provisions of the Migration Act 1958 (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act)."

The Full Court explained the distinction between the privilege against self-incrimination and the penalty privilege at [77]:

> "Following *Sorby*, the starting point for the privilege against self-incrimination is that it exists and applies unless abrogated. However, that is not the starting point for penalty privilege, which is not, following *Daniels and Rich*, a substantive rule of law, let alone an important and fundamental common law immunity, having, as it does, a very different origin and history. In each setting where penalty privilege is claimed, the opening question is whether that privilege applies in the first place, not whether it has been abrogated … "

The Full Court held there was nothing in the relevant provisions of the *Migration Act* or the *AAT Act* to support the conclusion that the penalty privilege applied to Mr Frugtniet's proceedings before the AAT (at [82]).

The Full Court emphasised that its decision was limited to the application of the penalty privilege to the AAT proceedings and excluded consideration of non-federal intermediate appeal courts decisions that dealt with the issue in the context of non-federal tribunals, which it said had a very different legislative and constitutional context (at [7], also [74]).

Note: Mr Frugtniet has sought special leave to appeal to the High Court of Australia.

COSTS

Lump sum costs orders

The Federal Court is encouraging of lump sum costs orders instead of taxation of costs. So much is apparent from the Court's practice notes: see Central Practice Note: National Court Framework and Case Management (CPN-1) at [17] and the Costs Practice Note (GPN COSTS) (Costs Practice Note). Indeed the Costs Practice Note states at [4.1] that other than for interlocutory orders *"the Court's preference, wherever it is practicable and appropriate to do so, is for the making of a lump-sum costs order."*

There are now many judgments that allow or reject the making of lump sum costs orders in the exercise of the Court's broad discretion on costs in the circumstances of the case. Although there is often no or limited utility in focusing on the result of other costs judgments, it can be helpful to see the Court's general approach.

In *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser (Australia) Pty Limited (No 3)* [2018] FCA 183 (28 February 2018) Foster J declined to make a lump sum costs order. The Court usefully summarised the key principles for consideration in determining whether to make a lump sum costs order (at [54]-[65]). The leading Full Court guidance on lump sum costs orders is *Paciocco v Australia and New Zealand Banking Group Ltd (No 2)* [2017] FCAFC 146 at [13]-[20] (Allsop CJ, Besanko and Middleton JJ).

INDUSTRIAL LAW

The right of entry regime – The 'act in an improper manner' test in s 500 of the *Fair Work Act 2009* (Cth)

In *Australian Building and Construction Commissioner v Construction, Forrestry, Mining and Energy Union (Castlemaine Police Station Case)* [2018] FCAFC 15 (12 February 2018) the Court allowed the regulator's appeal which principally concerned the meaning of the requirement in s 500 of the *Fair Work Act 2009* (Cth) (FW Act) that a permit holder not 'act in an improper manner'.

Mr Tadic, an organiser of the union who held an entry permit under Part 3-4 of the FW Act, inspected a construction site with a colleague (also a permit holder), the site manager and a WorkSafe Victoria inspector appointed under the *Occupational Health and Safety Act 2004* (Vic). The proceedings concerned whether Mr Tadic had acted in an improper manner by his conduct during the inspection to the WorkSafe inspector.

The Full Court overturned the primary judge's decision and →

made a declaration that Mr Tadic had acted in an 'improper manner' within the meaning of s 500 of the FW Act by his conduct with the WorkSafe inspector. The Full Court addressed at [38]-[41] the key principles for determining the assessment of propriety (in particular, the established test from *R v Byrnes & Hopwood* (1995) 183 CLR 501 at 514-515).

Justices Dowsett, Tracey and Charlesworth rejected an argument by the respondents that a permit holder would only contravene the 'improper manner' limb of s 500 if the impugned act had a practical and adverse impact on the performance of the inspector's statutory duties (at [31] and [48]). The Full Court explained (at [49]):

> " ... The determination of whether somebody has acted in an improper manner by making statements of the kind which Mr Tadic did cannot depend on the reaction of the person or persons to whom the action is directed. Possible reactions would range from complete capitulation to overbearing conduct on the one hand, to unconcern and dismissiveness on the other."

The Full Court dismissed other grounds of appeal to the effect that the trial judge denied procedural fairness to the Commissioner by certain adverse findings in the judgment about the Commisisoner's conduct in the course of a compulsory examination of the WorkSafe inspector (see [35]-[36] and [57]-[85]).

The proceeding was nonetheless remitted to a different single judge to determine the question of penalty following the declared contravention of s 500 of the FW Act.

MAY

CONTEMPT OF COURT – PRACTICE AND PROCEDURE

The Harman obligation

In *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* [2018] FCAFC 38 (20 March 2018) the Full Court considered the interaction between the statutory power conferred on the Commissioner of Taxation (Commissioner) under s 353-10 of Sch 1 to the Taxation *Administration Act 1953* (Cth) (TAA 1953), which includes a coercive power to require the production of documents, and the general law obligation commonly referred to as 'the Harman obligation' (see *Harman v Secretary of State for Home Department* [1983] 1 AC 280).

The Harman obligation was described by the plurality of the High Court in *Hearne v Street* (2008) 235 CLR 125 at [96] as follows:

> "Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence."

The issue before the Federal Court (in its original jurisdiction that was being exercised by a Full Court) was whether the Harman obligation constrained the operation of s 353-10(1)(c) of the TAA 1953. That provision provides power to the Commissioner to require the recipient of a notice in writing to the relevant effect to produce documents in the custody or control of the recipient.

Justices Kenny, Robertson and Thawley held that the Harman obligation does not prevent or excuse a person owing that obligation from complying with a valid notice issued under s 353-10(1)(c) of the TAA 1953 (at [56]). Further, the Harman obligation did not prevent the Commissioner or taxation officers receiving documents the subject of a Harman obligation from using those documents in the lawful exercise of the powers and functions vested in the Commissioner (also at [56]).

Their Honours noted at [42] in relation to *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 453:

> "We do not think it correct to equate the Harman obligation to the common law right to legal professional privilege. Daniels concerned the question of whether the common law right to legal professional privilege was abrogated by statute. That is not the question which arises here."

COMPETITION LAW

Appeal from judgment finding price fixing and market sharing arrangement in contravention of the Trade Practices Act 1974 (Cth)

In *Prysmian Cavi E Sistemi SRL v Australian Competition and Consumer Commission* [2018] FCAFC 30 (13 March 2018) the Full Court (Middleton, Perram and Griffiths JJ) dismissed Prysmian's appeal from having been found to have contravened s 45 of the *Trade Practices Act 1974* (Cth) (TPA).

The litigation concerned allegations that Prysmian entered

into an arrangement with other companies involving market sharing and price fixing in the cable market (the A/R Cartel Agreement). One of the procedures envisaged by the A/R Cartel Agreement was alleged to involve an initial agreement between two sets of companies as to which of these groups would be allotted a given tender or project, followed by a subsequent agreement within the allotted group to determine which company within that group would be allotted the tender or project. The alleged contraventions of the TPA were said to flow from a particular instance in which the A/R Cartel Agreement was given effect through this procedure, namely an instance in which Prysmian was allocated a tender as a member of the R Group (the Snowy Hydro Project Agreement).

The trial judge (Beach J) found that, in making the Snowy Hydro Project Agreement, Prysmian contravened ss 45(2)(a)(i) and (ii) of the TPA and gave effect to the A/R Cartel Agreement in contravention of s 45(2)(b)(ii) of the TPA. Further, the trial judge found that Prysmian gave effect to the Snowy Hydro Project Agreement in contravention of ss 45(2)(b)(i) and (ii) of the TPA and gave effect to the A/R Cartel Agreement in contravention of s 45(2)(b)(ii) of the TPA.

The Full Court rejected Prysmian's arguments on appeal that the trial judge's findings were inconsistent with the Australian Competition and Consumer Commission's (ACCC) case or gave rise to a denial of natural justice to it by reason of the departure from the case run by the ACCC (at [39]-[73]). The Full Court referred to the *"relevant guidance on the principles applicable to due process in this regard ... provided by the Full Court in Betfair Pty Ltd v Racing New South Wales (2010) 189 FCR 356 at [50]-[52] (this aspect of the matter was not taken on appeal to the High Court)."*

Various other grounds of appeal by Prysmian were also rejected (at [74]-[95]).

PRIVILEGE

Whether waiver of legal professional privilege

In *University of Sydney v ObjectiVision Pty Ltd* [2018] FCA 393 (16 March 2018) the Court (Burley J) made a ruling on the fourth day of a trial as to whether certain documents that fell within the respondent's notice to produce to the applicant were covered by legal professional privilege and, if so, whether that privilege had been waived. The proceedings concerned a dispute between ObjectiVision and the University of Sydney (University) about whether certain intellectual property licence agreements had been validly terminated, and copyright and breach of confidence claims.

Relevantly, the disputed documents were (1) emails from Mallesons, the solicitors for the University (KWM letter) (including the 22 November email); and (2) notes of the meeting at Mallesons (including Mallesons' file notes) (KWM file notes).

The key dispute was ObjectiVision's contention that privilege had been waived by the provision of the documents to two people who are not employees of the University (Mr Ken Coles and Dr Chris Peterson) because the disclosure was inconsistent with the maintenance of privilege: see the test for waiver in *Mann v Carnell* (1999) 201 CLR 1 at [29].

The Court held that ObjectiVision had not made out that there had been a waiver of legal professional privilege that applied to the disputed documents. Mr Coles was the president of an institute of the University (SSI) that became a complying institute within it. Dr Peterson was appointed to the SSI board. The Court stated at [36]:

> "In the present case, Mr Coles and Dr Peterson formed part of an advisory board that was instrumental in assisting SSI and Sydnovate in relation to the University's dispute with ObjectiVision. I am comfortably able to infer that it was desirable or necessary for the University to have the benefit of the knowledge of each of these individuals in considering the 22 November email. In this regard, I note, in addition to the matters concerning their respective roles identified above, that ObjectiVision's pleaded case in relation to the breach of the Technical Assessment Agreement and the Training Sessions Agreement is that both individuals attended the technical and training assessments on behalf of the University that were said to have failed to satisfy the University's obligations under those agreements. Further, as I have noted, Mr Coles attended the mediation. Both Mr Coles and Dr Peterson were in a position to contribute knowledge to the decision making process of the University. Accordingly, I find that the presence of Mr Coles and Dr Peterson at the meeting on 30 November 2010 did not serve to waive legal professional privilege in the KWM file notes."