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

Federal Court judgments

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Corporations law

Conduct giving rise to contraventions re personal advice, best interests obligations, misleading or deceptive conduct, statutory unconscionable conduct and requirements to act efficiently, honestly and fairly

In *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation)* (No 3) [2020] FCA 208 (26 February 2020) the Court determined the liability phase of the proceeding in which ASIC alleged contraventions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).

The complicated facts were summarised by Beach J at [1]: "The present proceeding concerns the activities of the first defendant (AGM), the third defendant (OT) and the fifth defendant (Ozifin) and the promotion of derivative instruments. From the latter part of 2017 until the middle of 2018, each of the three defendants operated separate businesses in Australia that offered over-the-counter (OTC) derivative products being contracts for difference (CFDs) including margin foreign exchange contracts (FX contracts) to retail investors in Australia. They provided retail investors an online platform on which to invest in those products and also provided financial product advice to them by telephone and email (the financial services). That advice was provided by account managers (AMs) who were engaged on behalf of the defendants, but who were based overseas. The AMs engaged on behalf of AGM were based in Israel. The AMs engaged on behalf of OT were based in Cyprus and later the Philippines. And the AMs engaged on behalf of Ozifin were based in Cyprus."

The Court's judgment primarily focused on the alleged "investor contraventions" (at [99]-[486]) but then dealt with alleged "compliance contraventions" (at [487]-[530]). The "investor contraventions" were argued to fall within four categories:

- that the defendants, by the AMs, gave or directed personal advice to the investors within the meaning of s766B(3) of the *Corporations Act* despite not being licensed or otherwise entitled to do so (at [102]-[104]; decided in ASIC's favour at [182]-[196])
- that the AMs in making their advice statements contravened s961B of the *Corporations Act* by failing to take the steps necessary to ensure that the advice that they provided to the investors was in each of the investor's best interest and contravened s961G by providing advice to the investors that it was not reasonable to conclude was appropriate to those clients (at [105]-[106]; decided in ASIC's favour at [201]-[243])
- that the AMs made statements to various investors that constituted various

misrepresentations constituting misleading or deceptive conduct under s1041H of the *Corporations Act* and/or s12DA of the *ASIC Act* and/or the making of false or misleading representations in contravention of s12DB of the *ASIC Act* (at [107]-[112]; decided in ASIC's favour at [257]-[356])

- that the defendants engaged in unconscionable conduct towards certain investors in contravention of s12CB of the *ASIC Act* (at [113]; decided in ASIC's favour at [394]-[460]).

In addressing the principles about "personal advice" (s766B of the *Corporations Act*), Beach J analysed and discussed aspects of the judgment of the Full Federal Court in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 373 ALR 455; [2019] FCAFC 187: see at [164]-[179]. As an aside, the writer notes that on 24 April 2020, the High Court granted Westpac special leave to appeal from the Full Federal Court's decision, and the High Court appeal is still to be heard.

In relation to the best interests and appropriate advice obligations (ss961B and 961G of the *Corporations Act*), the Court rejected the defendants' submissions that Division 2 of Part 7.7A of the *Corporations Act* only applies in relation to the conscious or intentional provision of personal advice to a person and the relevant statutory obligations were not intended to catch situations where persons who provided general advice may have unwittingly strayed into personal advice also (at [206]-[211]). Beach J also construed s961Q to reject the defendants' arguments to restrict the contraventions to the AMs and not OT and the Ozifin (at [212]-[217]).

The Court set out the principles as to unconscionable conduct applicable to ss12CB and 12CC of the ASIC Act (at [358]-[392]). This included reference to the High Court decision of Australian Securities and Investments Commission v Kobelt (2019) 368 ALR 1; [2019] HCA 18. Beach J discussed at [384]-[392] the concepts of "system of conduct" and "pattern of behaviour" in s12CB(4)(b) which states: "This section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour". The Court held there was unconscionable conduct by the defendants towards 21 investors (at [396]-[412]). Further, the Court held that the defendants also engaged in a system of conduct or pattern of behaviour that was in all the circumstances unconscionable (at [413]-[460]).

With respect to the conduct constituting the investor contraventions, the Court held the conduct undertaken by OT and Ozifin was to be considered to be conduct undertaken by those defendants on behalf of AGM (at [463]-[479], with reference to s769B(1) of the Corporations Act and s12GH(2) of the ASIC Act). However, Beach J did not accept ASIC's case that AGM was knowingly involved in, or aided, abetted, counselled or procured, the investor contraventions by OT and Ozifin (at [480]-[486]).

Finally, in relation to the "investor contraventions", the Court held that AGM failed to take the steps necessary to discharge its obligations under s912A(1)(a) of the Corporations Act to do all things necessary to ensure that the financial services it provided under its AFSL were provided efficiently, honestly and fairly, and under various other provisions of ss912A(1) and 961L to do those things necessary to properly supervise its representatives, which included both Ozifin and OT and the AMs engaged by AGM, Ozifin and OT (at [487]-[530]). Beach J summarised the relationship between the words "efficiently, honestly and fairly" found in s912A(1)(a).

The Court is to hear from the parties on the precise form of the declaratory relief and other relief (penalties and non-party compensation orders).

Administrative law and corporations law

Judicial review of decision of Australian Government Takeovers Panel – allegation of apprehended bias against president of the Panel

In Aurora Funds Management Ltd v Australian Government Takeovers Panel (Judicial Review) [2020] FCA 496 (17 April 2020) the Court dismissed an application for judicial review of a decision of the Australian Government →

Takeovers Panel (Panel). The applicant had sought judicial review of the Panel's finding that the applicant and another listed entity (Keybridge Capital Ltd (Keybridge)) were "associates" within the meaning of s12(2) of the Corporations Act 2001 (Cth) and its determination that there were unacceptable circumstances under s657A of the Corporations Act 2001.

An additional ground raised was a reasonable apprehension of bias in relation to the sitting president of the Panel, Mr Ian Jackman SC. The issues before the Panel were the extent to which the applicant and Keybridge were "associates" and whether the degree of influence exercised over them by a Mr Bolton was itself a separate basis for concluding that there were "unacceptable circumstances". It was based on events largely between October 2016 and June 2017. Many years earlier, Mr Bolton was involved in a commercial dispute that led to a proceeding in the Supreme Court of New South Wales (the Supreme Court proceeding) against a number of defendants over the affairs of a unit fund on the ASX, the Brookfield Prime Property Fund (the fund). This had nothing to do with the parties or persons before the Panel, however Mr Bolton was a common integer in both. In 2015, a company associated with Mr Bolton commenced the Supreme Court proceeding against a number of defendants over the affairs of the fund including its trustee, Brookfield Multiplex Capital Management Ltd (Brookfield). Brookfield retained King & Wood Mallesons (KWM) to act on its behalf in the Supreme Court proceeding and in November 2015 they delivered a first brief in the proceeding to Mr Jackman SC. The Court found that Mr Jackman SC in fact did no work on the first brief (at [69]-[70]). Mr Jackman SC was contacted by the Panel in late May 2017 to see if he would be available to form part of a panel. Mr Jackman's evidence was that the Supreme Court proceeding simply did not cross his mind in May 2017 when the Panel contacted him (at [74]). The Panel's decision was on 14 June 2017 (at [76]) and its decision effectively rejected sworn evidence of Mr Bolton (at [85]). In February 2019, KWM delivered a fresh second brief in the Supreme Court proceeding to Mr Jackman SC and he performed work pursuant to that retainer (at [81]). On the facts as Court assumed them to be, Mr Jackman was briefed for Brookfield in the Supreme Court proceeding while serving on the Panel but he had never done any work on the brief and he had no knowledge of the role or company associated with Mr Bolton in that proceeding (at [86]).

The Court applied the accepted principles, in particular the test from Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337 (at [87]-[88]). The Court held that the test for apprehended bias in Ebner was not satisfied. Perram J stated at [98]: "The result of the Panel's deliberations could have no impact on the issues in the Supreme Court Proceeding and Mr Jackman SC had no knowledge either that Mr Bolton would be called in the Supreme Court Proceeding or any proposal to traduce his credit should he do so. Consequently, an apprehension of bias does not arise".

Appeal and tort law

Principles that guide appellate review of findings of fact

In Jadwan Pty Ltd v Rae & Partners (A Firm) [2020] FCAFC 62 (9 April 2020) the Full Court dismissed an appeal challenging the trial judge's dismissal of the appellant's applications against the respondent solicitors seeking damages for alleged professional negligence. The appellant had sought damages against its former solicitors for alleged professional negligence arising out of the revocation of its approval under the National Health Act 1953 (Cth) as a Commonwealth-funded nursing home by a delegate of the Minister for Health and Family Services.

The appeal judgment is lengthy and deals with numerous issues. There was a dispute between the parties concerning the principles applicable to the review on appeal of the findings of fact made by the trial judge that were challenged by the appellant (at [402]-[415]). The Full Court considered the relevant well-known authorities such as, among many others, Devries v Australian National Railways Commission, Fox v Percy and Robinson Helicopter Company Inc v McDermott. Bromwich, O'Callaghan and Wheelahan JJ observed that statements of principle in appellate

judgments about these matters (such as non-interference of fact findings in the absence of "incontrovertible facts or uncontested testimony") should not be treated as if they were provisions of a statute (at [411]).

Costs

Maximum costs order under rule 40.51

In Houston v State of New South Wales [2020] FCA 502 (17 April 2020) the Court dismissed an interlocutory application seeking a maximum costs order under r40.51 of the Federal Court Rules 2011 (Cth). Rule 40.51(1) provides: "A party may apply to the Court for an order specifying the maximum costs as between party and party that may be recovered for the proceeding". The applicant sought an order that the maximum party and party costs which the applicant and respondent could recover from the other is nil.

The relevant principles guiding the exercise of the Court's discretion under r40.51 were not in dispute (at [17]). Griffiths J said at [19]: "It has been acknowledged in various cases relating to r40.51 that the principal purpose of the provision (and its predecessor, order 62A) was not so much a desire to limit the exposure of a respondent to an adverse costs order in complex and lengthy commercial litigation, but rather with concerns as to access to justice, public interest, and a desire to limit the costs of all parties, particularly in less complex and shorter cases . . ."

In dismissing the application, the Court discussed the concept and relevance of whether the litigation was in the public interest (at [22]-[30]).

Representative proceedings

Application for production of respondent's insurance documents

In Evans v Davantage Group Pty Ltd (No 2) [2020] FCA 473 (9 April 2020) the Court refused the applicant's application for production of various insurance documents that may respond to any of the applicant's and group members' claims made against the respondent. The applicant relied on ss33ZF(1), 37M and 37P of the Federal Court of Australia Act 1976 (Cth) (FCA Act). The insurance documents were sought for laudable objectives, in particular so that the applicant better inform himself on a range of issues such as whether it was commercially viable to prosecute the group proceeding to judgment and whether it was appropriate to settle the matter and if so for what quantum.

The Court refused the application. Beach J explained (at [4]): ". . . resort to the mantra of contemporary case management theory and the innovative properties of s33ZF(1) do not justify my acceding to the applicant's application. As to the latter, there has recently been a set back in the evolutionary development of s33ZF(1). As to the former, case management practices of the type encouraged by ss37M and 37P are designed to produce litigation which is run efficiently and fairly in the interests of all parties. But such provisions are not designed to distort the playing field so as to confer an asymmetric commercial advantage in favour of one party at the expense of another . . . The protective role reflected in provisions such as s33ZF(1) is there to ensure that each group member's claim, given their non-party and presumed absent status, is litigated and resolved as well as or as close to as well as if they had been a named applicant with their own legal representation. Further, the protective role is to be viewed in the context of the pursuit of a grouped procedure to the advantage and efficiency of all. By 'all', I mean the applicant, the group members, the respondent and the Court. But the protective role is not designed to put a respondent at an asymmetric commercial disadvantage. It is not designed to give a group member any greater rights vis-a-vis a respondent, other than ones that necessarily flow from the grouping of multiple claims per se, than they would have had if they had separately pursued individual proceedings against that respondent. Recourse to the protective role is not to be applied like some thick layer of varnish to gloss over the flawed substratum of the applicant's arguments."

The Court held it had the power to order production of the documents under s23 of the FCA Act but declined to exercise its power to do so (at [5], [16] and [111]-[112]). →

The judgment contains reference to legal principles establishing that insurance policies are not normally discoverable where they are not relevant to the determination of a fact in issue (at [46]) and that case management principles of themselves do not justify an order for production of an insurance policy that was not otherwise discoverable in accordance with the Rules of Court (at [77]-[80] and [95]-[97]). ■

Endnotes

Reflections on the recent High Court decision in *Love Commonwealth of Australia* [2020] HCA 3 The *Constitution*, Indigenous rights and immigration law (pages 16-19)

1. The case was two consolidated special cases (*Love v Commonwealth* and *Thoms v Commonwealth*) which were referred to the Full Court to be argued together
2. (1992) 175 CLR 1.
3. http://www.gunggaripbc.com.au/gunggari-country/
4. Visas are mandatorily cancelled if a person is sentenced to a period of imprisonment of 12 months or more: *Migration Act 1958* (Cth) section 501(3A). The person is then required to show reasons why that mandatory cancellation should be revoked, if the person chooses to do so: *Migration Act 1958* (Cth) section 501CA.
5. *Migration Act 1958* (Cth) section 474. Although, as explained in *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, the Commonwealth Parliament cannot oust the jurisdiction of the High Court to issue the remedies listed in section 75(v) of the Constitution which are aimed at challenging decisions on the basis that they are affected by jurisdictional error.
6. An unlawful non-citizen is a non-citizen who does not have a visa and is present in the migration zone: *Migration Act 1958* (Cth) s 14(1).
7. *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26 (Brennan Deane and Dawson JJ).
8. This was most clearly expressed by Nettle J: *Love* at [285]. See also, *Acts Interpretation Act 1901* (Cth) section 15A.
9. Bell, Gordon, Nettle and Edelman JJ; Kiefel CJ, Gageler and Keane JJ dissenting.
10. (1992) 175 CLR 1 at 70 (Brennan J).
11. The most obvious example of how this is exercised is the conferring or granting of Australian citizenship under the *Australian Citizenship Act 2007* (Cth).
12. *Love* at [50] (Bell J); at [236] (Nettle J); at [311] (Gordon J); and at [395] (Edelman J).
13. (1982) 151 CLR 101.
14. (1988) 165 CLR 178 at 183.
15. *Love* at [74] (Bell J) (footnotes omitted). Gordon J (at [333]) also expressed that Aboriginal Australians occupy a unique or 'sui generis' position in Australia.
16. Written submissions of the plaintiffs filed 2 April 2019 at [44] < https://cdn.hcourt.gov.au/assets/cases/02-Brisbane/b43-2018/Love_v_Cth_B43-2018-Thoms_v_Cth_B64-2018_-_Joint_Pltfs_subs.pdf>.
17. *Love* at [364].
18. *Love* at [466].
19. *Love* at [280].
20. *Love* at [25] (Kiefel CJ), and at [197] (Keane J).
21. *Love* at [25] (Kiefel CJ).
22. Keane J at [197].
23. The ratio in Love is probably best expressed by Bell J at [81] 'I am authorised by the other members of the majority to say that although we express our reasoning differently, we agree that Aboriginal Australians (understood according to the tripartite test in *Mabo [No 2]*) are not within the reach of the "aliens" power conferred by s 51(xix) of the Constitution'.
24. Australian citizenship is automatically conferred on a child of an Australian citizen or Australian permanent resident: *Australian Citizenship Act 2007* (Cth) section 12.
25. *Love* at [75] (Bell J).
26. *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 at [197] (noting comments of Bell J in *Love* at [80]).
27. Nettle J, however, could not be satisfied on the facts that Mr Love met the tripartite test (at [287]-[288]).
28. *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83 at [153] (Basten JA) (regarding the meaning of 'Aboriginal child' for the purposes of the *Adoption Act 2000* (NSW)).
29. *Love* at [272]
30. *Love* at [277].
31. There is a line of authority to this effect in Canada, starting with *Guerin v The Queen* (1984) 2 SCR 335.
32. *Mabo* (1992) 175 CLR 1 at 96-97.
33. *Mabo* (1992) 175 CLR 1 at 31. (See also, Love at [356] (Gordon J)).
34. *Love* at [356].
35. Since the adoption of the *Constitutional Alteration (Aboriginals) 1967* the only two references to Aboriginal people in the constitution were (properly, in the context of those sections) repealed.
36. See for example, Final Report of the Referendum Council, 30 June 2017, *Uhm, Statement from the Heart*, at p i. <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf> accessed 19 May 2020.

COVID-19: The encroach of technology into human rights (pages 28-29)

1. Luke Michael, 'Human rights at risk during COVID-19 response' on Pro bono Australia (15 April 2020) <https://probonoaustralia.com.au/news/2020/04/human-rights-at-risk-during-covid-19-response/>.
2. Parliament of Australia, 'BILLS DIGEST No.98 - Privacy Amendment (Public Health Contact Information) Bill 2020' on (12 May 2020) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/summary/summary.w3p;query=AuthorSpeakerReporterId%3A284130>.
3. David Crowe, 'Privacy advocates raise new concerns with COVIDSafe app' on The Sydney Morning Herald (11 May 2020) <https://www.smh.com.au/politics/federal/privacy-advocates-raise-new-concerns-with-covidsafe-app-20200511-p54rwb.html>.
4. Pauline Wright, 'Privacy protections must be built into

COVID-19 tracking app' on Law Council of Australia (20 April 2020) <https://www.lawcouncil.asn.au/media/media-releases/privacy-protections-must-be-built-into-covid-19-tracking-app>.

5. Denham Sadler, 'No modelling on 40% trace target: Health 'on InnovationAus (6 May 2020) <https://www.innovationaus.com/no-modelling-on-40-trace-target-health/>.
6. Attorney-General's Department, 'Legislation for COVIDSafe App Privacy Protections' on Australian Government (4 May 2020) <https://www.attorneygeneral.gov.au/media/media-releases/legislation-covdsafe-app-privacy-protections-4-may-2020>.
7. Parliament of Australia, 'Privacy Amendment (Public Health Contact Information) Bill 2020' on Parliament of Australia (2020) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6556>.
8. OHCHR, 'International Covenant on Civil and Political Rights' on OHCHR (2020) <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
9. Attorney-General's Department, 'Privacy and reputation' on Australian Government (2020) <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Privacyandreputation.aspx>.
10. Australia Privacy Foundation, 'Human Rights Protections' on Australia Privacy Foundation (5 March 2017) < https://privacy.org.au/policies/human-rights/>.
11. Australian Human Rights Commission, 'Permissible limitations on rights; on Australian Human Rights Commission (6 June 2013) <https://humanrights.gov.au/our-work/rights-and-freedoms/permissible-limitations-rights>.
12. UN Human Rights Committee, 'CCPR General Comment No. 16' on refworld (8 April 1988) <https://www.refworld.org/docid/453883f922.html>.
13. Michael Caplan et al., 'Location, location, location! – data, privacy and coronavirus' on Gilbert & Tobin (19 April 2020) <https://www.gtlaw.com.au/insights/location-location-location-data-privacy-coronavirus>.
14. Anthony Hallal, 'International human rights law and Australia's COVIDSafe app' on International Law Association (14 May 2020) <http://ilareporter.org.au/2020/05/international-human-rights-law-and-australias-covidsafe-app-anthony-hallal/>.
15. Mitch Bennett, "…all others bring data' - the use of data and technology in public health amid the COVID-19 pandemic' on Lexology (31 March 2020) <https://www.lexology.com/library/detail.aspx?g=ff4a94ee-70db-4a94-88d8-d8f12dbbe451>.
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20. Dara Macdonald, 'The Biggest Issue With COVIDSafe: Incompetence' on Institute of Public Affairs (7 May 2020) <https://ipa.org.au/publications-ipa/the-biggest-issue-with-covidsafe-incompetence>.
21. Adrian Rollins, 'COVID tracing app cyber security concerns raised' on The Canberra Times (28 April 2020) <https://www.canberratimes.com.au/story/6736678/decision-to-launch-tracing-app-without-testing-criticised/>.
22. Michelle Falstein, 'Statement: Mobile device tracking of COVID-19 infected persons' on NSWCCL (1 April 2020) <https://www.nswccl.org.au/statement_mobile_device_tracking_of_covid_19_infected_persons>.
23. Department of Health, 'Privacy policy for COVIDSafe app'' on Australian Government (12 May 2020) <https://www.health.gov.au/using-our-websites/privacy/privacy-policy-for-covidsafe-app>.
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25. Paul Karp, 'Government releases draft legislation for Covidsafe tracing app to allay privacy concerns' om The Guardian (4 May 2020) <https://www.theguardian.com/australia-news/2020/may/04/government-releases-draft-legislation-for-covidsafe-tracing-app-to-allay-privacy-concerns>.
26. Leon Spencer, 'Gov't publicly releases COVID-19 tracking app source code' on ARN (10 May 2020) <https://www.arnnet.com.au/article/679571/govt-publicly-releases-covid-19-tracking-app-source-code/>.

Employer Super Guarantee Amnesty expires soon (pages 36-37)

1. See https://www.ato.gov.au/Business/Business-bulletins-newsroom/Employer-information/Superannuation-guarantee-amnesty/
2. See https://www.ato.gov.au/Business/Business-bulletins-newsroom/Employer-information/Superannuation-guarantee-amnesty/
3. See https://ministers.treasury.gov.au/ministers/jane-hume-2019/media-releases/extending-superannuation-guarantee-amnesty-reunite-members
4. See https://www.industrysuper.com/media/greg-combet-dont-delay-the-superannuation-increase/