AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 15 December 2023

Weekly Banking Law Review

Selected from our Daily Bulletins covering Banking

Search Engine

Click here to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (One Minute Read)

Anderson v Canaccord Genuity Financial Ltd (NSWCA) - High Court authority required the conclusion that two employees had owed fiduciary obligations to their employer - they had breached that duty, and two other companies had provided knowing assistance

Property Holdings Group Pty Ltd v Rosehill Panorama Pty Ltd (Administrators Appointed) (NSWSC) - deed granted charge to secure payment of a development fee under that deed - development fee did not become payable due to Panorama's breach - charge did not secure obligation to pay damages - equitable maxims do not have a simple at large operation

In the matter of West Homes Australia Pty Ltd (VSC) - company that had failed to comply with a statutory demand was refused leave to oppose winding up on the grounds of solvency and the existence of a genuine dispute about the debt

Re Haidi Holdings Pty Ltd (VSC) - Court refused application to set aside statutory demand based on unpaid present entitlements between related trustee companies, where one of those companies was now under the control of liquidators

HABEAS CANEM

McGregor wishes you a happy and peaceful holiday season

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

Summaries With Link (Five Minute Read)

Anderson v Canaccord Genuity Financial Ltd [2023] NSWCA 294
Court of Appeal of New South Wales
Gleeson, Leeming, & White JJA
Fiduciary duties - Anderson was the assignee of claims by the liquidator of two companies within the Ashington group of companies - those companies conducted a business involving acquiring, redeveloping and selling high-end residential/commercial/retail properties, with the aim of generating large returns for substantial investors - Garrett was the Head of Funds Management at Ashington and Renauf was the Head of Acquisitions at an Ashington company - Anderson contended that Garret and Renauf and others had taken away the business of the Ashington group by engineering the replacement of Ashington companies as trustee or manager of each of a number of superannuation trusts - the primary judge held that (1) Garrett and Renauf had acted dishonestly and fraudulently against their employer, but that they did not owe fiduciary duties; (2) if the dishonest breaches of duty had been breaches of fiduciary duty, none of the other defendants had knowingly assisted in those breaches; (3) although Garrett and Renauf's conduct had caused a particular capital raising to fail; the damages of compensation payable was nil - Anderson appealed - held: on binding High Court authority, employees are an accepted category giving rise to fiduciary duties - the scope of the fiduciary obligation must be separately considered in each case - in this case Garrett and Renauf had breached their fiduciary duties - their fiduciary obligations extended to the performance of the capital raising that had failed, where they had to act in the interests of the Ashington companies, and could not act self-interestedly to remove the existing trustee and manager, to be replaced by entities in which they had an interest - there will be knowing assistance where, but for the action or inaction of the third party, the breach of fiduciary duty would not have occurred, and there may also be assistance where the third party has facilitated a breach of fiduciary duty that would have occurred in any event - an act done when an employee is on a "frolic" of his or her own will not fall within the vicarious liability of the employer, but this does not answer the relevant question when considering whether an employer assisted in a breach of fiduciary duty, which is whether the conduct and especially the knowledge of the employee is to be imputed to the employer - in this case, the employee was acting within the scope of his actual or apparent authority when initial meetings took place that were critical to the effectuation of Garrett and Renauf's purpose - to the extent there is a fraud exception for the imputation of knowledge which applies in a claim for knowing assistance, it did not disentitle Anderson from imputing to the employer the knowledge of the employee at least at those early meetings, because the employee was acting within the scope of his actual or apparent authority - even at that early stage it should have been clear to the employee that Garrett and Renauf were engaged in a dishonest and fraudulent breach of fiduciary duty - the relevant employers had knowingly assisted the breach of fiduciary duty - regarding equitable compensation, when valuing a lost opportunity, it is necessary to have regard to future possibilities, even possibilities which are unlikely to eventuate, so long as they are not so vanishingly improbable that they may be ignored - the primary judge had erred by relying on an expert opinion to conclude that the value

of the lost opportunity was nil - a court when called upon to assess the value of an opportunity which is subject to multiple contingencies may assess those contingencies on a global basis, or by assessing each contingency separately - here a global approach was appropriate - Anderson was entitled to judgment for about $1.59 million against Garrett, Renauf, and the two companies who had knowingly assisted the breach of fiduciary duty, plus interest of about $1.4million - no respondent had suggested liability to pay equitable compensation for breach of fiduciary duty of a dishonest and fraudulent kind, or for knowing involvement in those breaches, was an apportionable claim for the purposes of the proportionate liability legislation - appeal allowed.
View Decision
[From Benchmark Monday, 11 December 2023]

Property Holdings Group Pty Ltd v Rosehill Panorama Pty Ltd (Administrators Appointed) [2023] NSWSC 1492
Supreme Court of New South Wales
Robb J
Equity - PHG had options to acquire properties a residential and commercial development, and was negotiating for the purchase of another property - by a deed of assignment, PGH assigned the options and its position as prospective purchaser to Panorama, and Panorama was required to lodge a development application generally in accordance with a scheme prepared by ADS, pursue that application with Council, and pay a development fee to PHG - Panorama's development application varied significantly from the ADS scheme - Council refused consent - the development fee was not payable as Panorama had not lodged an application generally in accordance with the ADS scheme - PHG claiming that the deed granted it an equitable charge over the properties to secure an amount equal to the development fee - held: Panorama had breached the deed, because it failed to lodge and pursue a development application generally in accordance with the ADS scheme - if Panorama had complied with the deed, it would probably have gained development consent in the form of the an amended scheme substantially in accordance with the ADS scheme - PHG was entitled to damages to compensate it for the loss of opportunity to be paid the development fee - a clause in the deed explicitly created a charge pending payment of the development fee on options, contracts to purchase properties, and purchased properties - the obligation secured by the charge was the obligation to pay the development fee, and not the obligation to pay damages - the equitable maxim that equity regards as done that which ought to be done, and the common law principle, followed by equity, that a party to a contract will not be permitted to take advantage of its own wrong, do not operate at large - regarding the maxim that equity regards as done that which ought to be done, the actual doctrine in equity underpinning the validity of the charge was that an assignment for value of future property binds the property itself when it is acquired, automatically on the happening of the event, without any further act on the part of the assignor, and is not merely a right in contract - however RPG wanted to create a fiction that Panorama should be treated as if it had performed its contractual obligation to enliven the obligation to pay the development fee, that is, for the equitable doctrine to create both the charge and the debt - where a contract to assign or charge is supported by consideration, equity assumes that the

assignment has been made or the charge created when the property vests in the assignor or chargor, where the only thing left to be done is the formal assignment or creation of the charge, and the performance of that obligation is not conditional on events that have not occurred - where the performance of that obligation is conditional on events that have not occurred, equity does not go further and assume that those events have occurred - as to the principle that a party to a contract will not be permitted to take advantage of its own wrong, there is no substantive principle that, in all cases where the effect of a breach of contract is that a state of affairs is not established that would entitle the innocent party to some benefit, that the innocent party will be entitled to that benefit because the defaulting party's wrong disentitles it from relying on the absence of the necessary state of affairs - where the innocent party is entitled to a benefit that depends upon an event that the contract requires the defaulting party to achieve, the wrong of the defaulting party does not automatically entitle the innocent party to the benefit in specie, as opposed to damages for breach of the contract - PGH was entitled to damages, but not to enforce the charge to secure those damages.
View Decision
[From Benchmark Monday, 11 December 2023]

In the matter of West Homes Australia Pty Ltd [2023] VSC 732
Supreme Court of Victoria
Irving AsJ
Corporations - the plaintiff applied to have West Homes Australia Pty Ltd wound up after failure to comply with a statutory demand - West Homes sought leave to oppose the winding up application, as it disputed the existence and quantum of the debt West Homes also asserted that it was solvent - held:s495 of the *Corporations Act 2001* (Cth) provides that, on an application for a company to be wound up in insolvency on the basis of failure to comply with a statutory demand, the company may not, without leave of the Court, oppose the application on a ground that the company relied on for the purposes of an application by it for the demand to be set aside; or that the company could have so relied on, but did not (whether it made such an application or not) - further, the Court is not to grant leave unless it is satisfied that the ground is material to proving that the company is solvent - in considering whether to grant leave, the Court must give preliminarily consideration to the company's basis for disputing the debt, examine the reason why the issue of indebtedness was not raised in an application to set aside the statutory demand and the reasonableness of the party's conduct at that time, and investigate whether the dispute about the debt is material to proving the company is solvent - the Court must be provided with the 'fullest and best' evidence of solvency, and unaudited accounts and unverified claims of ownership or valuation are not ordinarily probative in this regard - nor are mere assertions of solvency arising from a general review of the accounts, even if made by qualified accountants who have detailed knowledge of how those accounts were prepared - West Homes was presumed insolvent unless it could prove that it is able to pay its debts as and when they become due and payable - West Homes was not trading, it was clearly not a dormant company - in October 2023 it was a plaintiff in Supreme Court proceedings in which interlocutory costs orders were made against it - the financial reports provided to the Court

made no reference to the costs order, and contained no historical information to explain when and in what circumstances West Homes ceased trading - West Homes had not discharged its burden of proving solvency such as to displace the presumption of its insolvency - it was therefore not strictly necessary to decide whether there was a genuine dispute about the existence or quantum of the debt - however, the Court was not satisfied that there was such a genuine dispute, even on a preliminary basis - there was no dispute between that the statutory demand had been served on West Homes at its registered address - there was some dispute about whether the *Masri* principle remained good law, that is, the principle that, where the directors of a company did not become aware of the existence of the statutory demand until after the expiration of the 21-day period for filing of an application to set aside a statutory demand, and they acted reasonably with respect to the collection of mail within their registered office, fairness requires the company be permitted to raise a ground available to challenge the demand - in the Court's view, the *Masri* principle was no longer good law and, even if it were, on the facts of this case the mail collection system at the registered office was not reasonable - leave to oppose the winding up application on the asserted grounds refused.
In the matter of West Homes Australia Pty Ltd
[From Benchmark Tuesday, 12 December 2023]

Re Haidi Holdings Pty Ltd [2023] VSC 739
Supreme Court of Victoria
Hetyey AsJ
Corporations - Haidi Holdings Pty Ltd and Tesoriero Investment Group Pty Ltd (in liq) were related entities, having a common director and shareholder - they were both trustees of different trusts - Tesoriero Investment Group was wound up in insolvency - Tesoriero Investment Group, now under the control of liquidators, served a statutory demand on Haidi in respect of two unpaid present entitlements distributed by Haidi as trustee of the John Tesoriero Family Trust to Tesoriero Investment Group, but not yet paid - Haidi sought to have the statutory demand set aside on the bases of a genuine dispute under s459H(1)(a) of the *Corporations Act 2001* (Cth), two offsetting claims under s459H(1)(b), and "some other reason" under s459J(1)(b), including that it was an abuse of process and had not been withdrawn on request - held: s459E(1) of the *Corporations Act* relevantly provides that a creditor may serve on a company a statutory demand relating to a debt or debts owed by the company, which are "due and payable" - a debt is due and payable once it is ascertainable, immediately payable and presently recoverable or enforceable by action - s459H(1) provides that the Court may set aside a statutory demand if satisfied that there is a genuine dispute as to the amount of the debt, or that the company has an offsetting claim - for a dispute to be genuine, it must be bona fide and truly exist in fact - a genuine offsetting claim means a claim on a cause of action advanced in good faith, for an amount claimed in good faith - s459J(1)(b) provides that the Court may set aside the statutory demand if satisfied there is "some other reason" why it should do so - aside from the general complaint that Tesoriero Investment Group has not obtained a judgment to support the debt, Haidi did not actually suggest it lacked the status of creditor and only had equitable rights in respect of the unpaid present entitlements - nor did Haidi argue that Tesoriero Investment

Group's absolute entitlement to payment of the unpaid present entitlements was subject to some contingency or condition found in the trust deed for the Family Trust, or the underlying resolutions of Haidi as trustee - the genuine dispute contention failed - in the case of both alleged offsetting claims, there was an absence of mutuality in the identity or capacity of Tesoriero Investment Group as creditor who served the demand, and Haidi who asserted the alleged offsetting claim - Haidi had not identified any nexus between itself and Tesoriero Investment Group in respect of the asserted transactions - both offsetting claims lacked sufficient particularity to enable the Court to determine they were not fanciful - the offsetting claims contention failed - Haidi could not allege that there was "some other reason" to set aside the demand on the basis of abuse of process and a refusal to withdraw it, as these contentions were not identified expressly, or by reasonable inference, in the affidavits filed in support of Haidi's application within the 21 day statutory period to make such application - further, there was no evidence that Tesoriero Investment Group's liquidators sought to invoke the statutory demand procedure as a means of obtaining an advantage for which it was not designed or some collateral advantage beyond what the law offers - application to set aside statutory demand dismissed.

Re Haidi Holdings Pty Ltd

[From Benchmark Friday, 15 December 2023]

Executive Summary and (One Minute Read)

Minnesota v Torgerson (MINSC) - Odor of marijuana on its own without other facts did not constitute probable cause for warrantless search of vehicle

Summaries With Link (Five Minute Read)

Minnesota v Torgerson 995 N.W.2d 164 (2023)
Supreme Court of Minnesota
Gildea CJ, Anderson, & McKeig JJ
A motor vehicle was stopped by the police because it had too many lights mounted on the grill. When the driver gave his license to the police, the officer stated that he smelled marijuana emanating from the vehicle. When questioned, the driver denied possessing marijuana. After conferring with a second officer, the police ordered the driver and passengers out of the vehicle and conducted a search. In the course of the search, the police discovered a canister of what was later found to be methamphetamine. At trial, the defendant sought to suppress the evidence obtained from the vehicle search on the grounds that there did not exist requisite probable cause for the search. The trial court suppressed the evidence and dismissed the matter. This was affirmed by the Minnesota Court of Appeals. The Minnesota Supreme Court stated that both the US and Minnesota Constitutions protect against unreasonable searches and seizures. Warrantless searches are *per se* unreasonable unless one of the exceptions to the warrant requirement applies. One of these exceptions is the automobile exception which permits the police to search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence. The Court said that probable cause requires more than suspicion but less than the evidence necessary for conviction. A warrantless search must be based on objective facts and not the subjective good faith of the police. The Court noted that both industrial hemp and medical cannabis were lawful in Minnesota and the possession of a small quantity of marijuana was a petty misdemeanour and not a crime. The Supreme Court stated that, while the odour of marijuana can be a fact that supports probable cause, it is insufficient on its own because of the lawful right to possess medical cannabis under certain circumstances. As there was nothing else to support probable cause, the facts were insufficient to establish a fair probability that the search would yield evidence of criminal conduct. The suppression order was affirmed.
Minnesota

Poem for Friday

In Memoriam, (Ring out, wild bells)

By: Alfred, Lord Tennyson (1809-1892)

Ring out, wild bells, to the wild sky,
The flying cloud, the frosty light:
The year is dying in the night;
Ring out, wild bells, and let him die.

Ring out the old, ring in the new,
Ring, happy bells, across the snow:
The year is going, let him go;
Ring out the false, ring in the true.

Ring out the grief that saps the mind
For those that here we see no more;
Ring out the feud of rich and poor,
Ring in redress to all mankind.

Ring out a slowly dying cause,
And ancient forms of party strife;
Ring in the nobler modes of life,
With sweeter manners, purer laws.

Ring out the want, the care, the sin,
The faithless coldness of the times;
Ring out, ring out my mournful rhymes
But ring the fuller minstrel in.

Ring out false pride in place and blood,
The civic slander and the spite;
Ring in the love of truth and right,
Ring in the common love of good.

Ring out old shapes of foul disease;
Ring out the narrowing lust of gold;
Ring out the thousand wars of old,
Ring in the thousand years of peace.

Ring in the valiant man and free,

The larger heart, the kindlier hand;
Ring out the darkness of the land,
Ring in the Christ that is to be.

Alfred, Lord Tennyson was born on 6 August 1809, in Somersby, Lincolnshire, England. *Ring Out, Wild Bells*, was part of *In Memoriam,* written to Arthur Henry Hallam, who died at 22. The poem was published in 1850, the year Tennyson was appointed Poet Laureate. The poem is inspired by the English custom to have the ring of bells, muffled to ring out the old year, and then, with muffles removed, to ring in the new year. *Ring Out, Wild Bells,* has been set to music including by Charles Gounod and Percy FletcherAlfred, Lord Tennyson died on 6 October 1892.

Ring Out, Wild Bells, Gounod, sung by the Mormon Tabernacle Choir
https://www.youtube.com/watch?v=TVEAt8v7b_g

Ring Out, Wild Bells, from The Passing of the Year by Jonathan Dove, Andrew Hon, conductor, sung by the Yale Glee Club
https://www.youtube.com/watch?v=yPIqqvOM8Og

Bell Ringing in the Belfry at Great St. Mary's, Cambridge
https://www.youtube.com/watch?v=KNMFvNZIsCM

Click Here to access our Benchmark Search Engine