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Précis Paper

Assessing Damages for Misleading and Deceptive Conduct

A discussion of the decision in *Weatherill v Bartlett* [2017] NSWCA 175 which concerned an appeal to the NSW Court of Appeal regarding awarding damages for misleading and deceptive conduct.

Discussion Includes

- The facts
- Main legal issues raised
- Court of Appeal findings
- Claims of misrepresentation under s 18 of the ACL
- Key takeaways

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Awarding Damages for Misleading and Deceptive Conduct

In this edition of BenchTV, Richard Gration (Barrister – 9 Selborne Chambers, Sydney) and Dean Groundwater (Principal – WMD Law) discuss the NSW Court of Appeal case *Weatherill v Bartlett* [2017] NSWCA 175, focusing upon the legal issues the Court of Appeal had to consider when determining whether or not to allow an appeal regarding the award damages for misleading and deceptive conduct under section 18 of the Australian Consumer Law, found in sch 2 of the *Competition and Consumer Act 2010* (Cth).

The facts

1. This case concerned the purchase of an aircraft by the plaintiff, Dr. Weatherill. The first defendant in this case was a private company, Bilyara Aviation Services Pty Ltd, which was owned by Garth Bartlett, the second defendant. At the time the case commenced, Bilyara Aviation was in liquidation.

2. Dr. Weatherill, the Plaintiff, was referred to Bartlett by a friend who had been assisted by Bartlett with the acquisition of an aeroplane. Bartlett and his business Bilyara Aviation, both repaired aircraft and assisted in the importation of aircraft from overseas to Australia. Dr. Weatherill sought Bartlett's expertise to assist him in importing an aircraft from the United States.

3. Dr. Weatherill decided upon purchasing a Cessna C 400 and made inquiries throughout Australia, but found that they were in very limited supply. He did test drive an aircraft in South Australia but that was not for sale for any less than $500,000, which was more than he was prepared to pay. He then sourced aircraft out of the United States, where they are manufactured, and eventually found a suitable aircraft in Santa Rosa, California.

4. Dr. Weatherill then had Bartlett organize a pre-purchase report, to determine the mechanical worthiness of the aircraft, and following that, Dr. Weatherill asked Bartlett to assist Dr. Weatherill in importing the plane from the United States to Australia. Dr. Weatherill ruled out having the plane flown over the Pacific Ocean. The other option was to have the plane disassembled in California, and then shipped over to Australia by boat, and reassembled by Bartlett at his Bankstown workshop. Bartlett had not imported a C 400 before and mentioned this to Dr. Weatherill. Bartlett then proceeded to obtain quotations from a contractor in the United States about disassembling the aircraft, and put together a fee estimate for Dr. Weatherill which came to $52,000. Dr. Weatherill proceeded with this quote and asked Bartlett to make arrangements to import the aircraft.

5. When the aircraft was being disassembled in Santa Rosa, there were some difficulties. Then, upon arrival to Australia, it was more difficult than anticipated to reassemble it, and ultimately the plane had a number of mechanical issues and service bulletins to comply with, meaning there was quite a bit more work to be done in Australia to get the plane registerable by the Civil Aviation Safety Authority.

6. The ultimate cost of disassembly, transportation and reassembly of the plane in Australia to be flightworthy was $120,000, not the estimated $52,000. The plane was purchased for $370,000 US Dollars. In total it cost Dr. Weatherill $490,000 to purchase and import the C 400 aircraft into Australia.

Main legal issues raised

7. The first appeal was brought by Bartlett to the Supreme Court of NSW. The primary issue was whether the magistrate had applied the correct legal principles in calculating the damages. In the local court, the magistrate had found as facts that Dr. Weatherill had paid $490,000, but he had expected, or hoped, to pay $438,000. It was on this basis that the magistrate determined that Dr. Weatherill had made a $52,000 loss.

8. The first issue was whether this was the correct way to calculate damages when it comes to misleading conduct. It was found by the magistrate that Bartlett had engaged in misleading conduct within the meaning of the Australian Consumer Law, found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

9. The Supreme Court of NSW held that the magistrate's calculation of damages, by stating the loss was the difference between the amount paid and the amount expected to pay, was incorrect. In delivering this judgement, the Supreme Court referred to the authority in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; [1998] HCA 69 which provides that when looking at the losses that flow from misleading conduct, what is relevant is looking at what loss you have suffered as a result of the change of position in reliance on that misleading statement.

10. Dr. Weatherill paid $490,000 but the aircraft was worth more than $500,000. So, as a result of the misleading conduct he did not suffer a loss, but ended up getting something that was more than what he actually paid. In these circumstances, where you have been misled but you haven't actually suffered any loss, then you have not made out your cause of action.

Court of Appeal findings

11. Dr. Weatherill then appealed to the NSW Court of Appeal. The first issue that was to be considered was whether the appeal was properly brought. Section 101 of the *Supreme Court Act 1970* (NSW) provides that there has to be a quantum of at least $100,000 in order to have an appeal as of right. As Dr. Weatherill initially brought his appeal as of right, the NSW Court of Appeal Practice Note (2009) and the *Uniform Civil Procedure Rules 2005* (NSW) require that if the respondent in the appeal considers that the appeal is incompetent, then there is an obligation on the respondent to file a notice of motion within 28 days, challenging the competency of the appeal. The penalty for not raising that issue earlier, is that even if you are later successful in proving the appeal is not competent, then ordinarily you won't be entitled to any of your costs because you ought to have raised those concerns immediately. Bartlett filed the necessary notice of motion which challenged the competency of the appeal. That was then met by a second summons being filed by Dr. Weatherill, this time seeking leave to appeal, as an alternative.

12. The issues the Court of Appeal had to determine were whether leave was required, and if that was correct, whether leave ought to be granted pursuant to the second summons that had been filed.

13. Dr. Weatherill's argument was that he did not need leave to appeal because his aircraft was worth at least $490,000, therefore being over the $100,000 threshold requirement. However, the Court of Appeal have said on many occasions that this is not the test. The test is the difference in the value to you if the appeal was successful.

14. The actual judgement that Dr. Weatherill received from the magistrate in the local court was a damages award of $25,000, reduced from the original $52,000 that the magistrate held as a loss. The reduction was due to the consideration of various things such as currency conversion rates, inflation and the fact that Dr. Weatherill has had use and enjoyment of the aircraft since purchase. This was then overturned in the Supreme Court of NSW, where Dr. Weatherill received nothing. On appeal to the Court of Appeal, Dr. Weatherill was seeking to not only reinstate the $25,000 damages, but increase it to the full $52,000.

15. The Court of Appeal held, in applying the well-established threshold question of reaching the $100,000, is not the value of the aeroplane itself, but is the value of what change in position you might enjoy if the appeal was successful. At most, in this case, the value of the change could not exceed $52,000 and is therefore below the $100,000 threshold.

16. The Court of Appeal had to consider whether the costs at first instance, where you have a double appeal, form part of that threshold amount. However, the case of *Condensing*

Vaporisers Aust Pty Ltd v FDC Construction & Fitout Pty Ltd (No 2) (2014) 86 NSWLR 360; [2014] NSWCA 95, provides that where there is a double appeal, the costs of the first instance judgement do not form part of the amount in issue for the purpose of the second appeal.

17. The next issue the Court of Appeal had to consider was the second summons. If leave is required, should the Court nevertheless grant leave to appeal? In deciding whether to grant leave to appeal, the Court will consider if there is something manifestly wrong or whether there has been an erroneous application of principle beyond something that is merely arguable, to something that is self-evidently wrong. The Court of Appeal also looks at the value of the issue and how much the parties have spent. Where the actual amount in question is small, and costs have swamped the quantum that is actually in issue, this is a factor that counts against leave being granted.

18. The $25,000 that was in issue in this case, compared to the, at that stage, $400,000 or so in legal costs that had been expended, White J said he would not have granted leave based just on that principle alone, given the total disproportionality between the legal costs expended and what was at issue. The Court of Appeal concluded that Dr. Weatherill did require leave, and that he should not be granted leave, for the reasons discussed above.

Claims of misrepresentation under s 18 of the ACL

19. On the issue of the misrepresentation claim that was brought against Bartlett under s 18 of the Australian Consumer Law found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), the local court magistrate took the view that Bartlett did misrepresent the position to Dr. Weatherill insofar as he provided an estimate that was inaccurate. Bartlett had also provided an assurance to Dr. Weatherill that his estimate was 'reasonably accurate'. The local court judgement held that a reasonable estimate would have been $86,000.

20. The magistrate took some consideration of the fact that there are unknown unknowns that cannot possibly have been known to Bartlett at the time he provided the estimate, but in dealing with those vicissitudes, the magistrate took the view that those unknown unknowns must only add some percentage to the estimate. The Magistrate held that the estimate at $52,000 was too low to be reasonably accurate.

21. Bartlett's legal team made the decision that in this case, it simply was not necessary to attack the finding of misleading conduct under section 18 in order to be able to win the appeal they put forward to the Supreme Court. This is a good example of where you need to pick carefully the battles you want to fight when you go on appeal. It is necessary to make pragmatic decisions, realising it may not be necessary to bring forward all things you are unhappy about in a finding.

22. The Supreme Court and the Court of Appeal made the point that in order to establish a cause of action under the Australian Consumer Law you must establish whether or not there has been any misleading or deceptive conduct (which was established in this case), and whether or not that misleading or deceptive conduct has caused, or that person has suffered by reason of, misleading or deceptive conduct. Dr. Weatherill failed to establish that the misleading conduct resulted in any loss on his part.

23. Under the *Local Court Act 2007* (NSW), if you wish to bring an appeal as of right, you are limited to questions of law only. As soon as you want to go into mixed fact and law, then you need the leave of the Court to seek an appeal. This means that in this case, if Bartlett wanted to bring an appeal in regards to the misrepresentation claim, he would have required the leave of the Court because it is a question of mixed fact and law. Given the small amount in issue, a mere $25,000, it is possible that the Supreme Court would not have granted leave to appeal for such a small amount.

24. There was a cross appeal in the Supreme Court by Dr. Weatherill arguing that the magistrate was wrong in finding that the aircraft was worth at least $500,000, alleging he should have calculated the damages in a different way. The only question of law that could be argued in relation to the value of the aircraft, is what is called colloquially the 'no evidence basis'. This is where the party argues not that the magistrate made a wrong finding of fact, but simply that there was no evidence whatsoever of which he could have made that finding of fact. This ground of appeal can only succeed if there is literally no evidence at all that would have supported the finding.

25. In this case, there was not extensive evidence, but there were pieces of evidence that were before the magistrate that had enabled him to make that finding. The Supreme Court had to look at the much narrower question of, 'was there any evidence at all on which the magistrate could have made this finding?' Dr. Weatherill's appeal to the Supreme Court would have required leave to argue the sort of points he wanted to argue.

26. Dr. Weatherill then tried, unsuccessfully, in the Court of Appeal, to say that if the leave to appeal had been granted, then he wanted to adduce further evidence to try and establish that the real value of the aeroplane was less than $500,000. However, the Court of Appeal said that where you make a tactical decision to limit yourself to errors of law in the Supreme Court, you can't then, on an appeal from that decision, then seek to reopen errors of fact because that was not something that was in issue before the court.

27. The tactical decision that was made by Bartlett's legal team to limit the appeal to simply the application of legal principles damages, and to leave the misleading conduct aside was an

important tactical decision that left the finding as it stood. Many judges have stated that what is far more persuasive in an appeal is to have a small number of carefully thought out appeal points, and then stick with those appeal points. Once you start distracting from the strong points with tenuous points and things that have no merit, it undermines the confidence the Court of Appeal will have in whether or not your appeal is worthwhile.

Key takeaways

28. Between the local court, the Supreme Court and the Court of Appeal, the parties spent, between them, roughly $500,000 in legal costs, fighting over a small amount of $25,000. It is important for practitioners to have a clear regard to the requirements under the *Civil Procedure Act 2005* (NSW) for costs to be proportionate to the facts in issue. This case displays the importance of not being blinded by a case which has what seems to be good prospects on liability, but forget about damages.

29. It is important for clients to understand that there is always a prospect of appeal, which may mean that costs can jump exponentially. It is important to think very carefully at the beginning of the case about what points are necessary to run in order to succeed, and to try to really focus on the essentials of the case. Here, although Bartlett was fortunately able to point to some small pieces of evidence that enabled the magistrate to find that the aircraft was worth at least $500,000, with the benefit of hindsight it is possible to say that Dr. Weatherill should have turned his mind to this issue. Dr. Weatherill did not seem to consider how much the plane he actually received was worth, instead focusing on the fact that he paid $52,000 more than he had hoped to pay.

30. Another key takeaway from this case is how important it is for practitioners to make early offers of compromise. Making offers of compromise is something that all practitioners should look at right from day one, particularly where you have relatively low value claims in the local court, where if they are fully contested and go to a hearing, the costs are likely to exceed the claim amount. Even with your best efforts with a $25,000 claim, the costs are very likely to exceed $25,000, particularly if, for reasons beyond your control, it stretches out over two or three days.

31. As a defendant, if you have the view very early in the proceedings that the plaintiff is feeling very confident and not at all willing to compromise, you can afford to make quite a high offer. For example, if the plaintiff is claiming $60,000, and you think they are feeling confident and unlikely to compromise, you can afford to make an offer of $50,000, knowing it will not be accepted. This gives you a large buffer down the track once the plaintiff realises their $60,000 claim is highly unlikely to eventuate. Making a good offer early is beneficial as it

gives you very strong cost protection, as you know that if the case does run to trial, regardless of the outcome you will almost certainly get your costs paid.

BIOGRAPHY

Richard Gration

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Richard was admitted as a solicitor in 2000 before being called to the NSW bar in 2009. Richard previously worked at HWL Ebsworth Lawyers as a Partner in the commercial litigation group. In 2013, Richard received a graduate Diploma of Military Law (ANU) to practice in areas concerning military operations law, military administrative law and military discipline law. From 2011, Richard has also been involved as a Reserve Legal Officer in the RAFF Specialist Reserve.

Dean Groundwater

Principal – WMD Law

Dean is an accredited specialist in commercial litigation and leads WMD Law's Commercial Group. Dean completed a Commerce Degree majoring in accountancy at the University of New South Wales in 1991, a Law Degree at the University of Technology, Sydney in 1994 and a Masters Degree in Law from the University of New South Wales in 2000, specialising in Corporate and Commercial Law. Dean commenced employment with WMD Law in 1995 and joined the firm as a partner in 1996. He has been a director of the Southern Sydney Business Enterprise Centre since 2007 (a not for profit organisation aimed at assisting local businesses).

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Weatherill v Bartlett [2017] NSWCA 175

Benchmark Link

Weatherill v Bartlett [2017] NSWCA 175

Judgment Link

Weatherill v Bartlet#t [2017] NSWCA 175

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Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494; [1998] HCA 69

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Legislation

Competition and Consumer Act 2010 (Cth) sch 2 ('Australian Consumer Law')

Supreme Court Act 1970 (NSW)

Civil Procedure Act 2005 (NSW)

Uniform Civil Procedure Rules 2005 (NSW)

Other

Supreme Court of NSW, Practice Note No. SC CA 1, *Court of Appeal*, 27 March 2009