



Précis Paper

Proof of Title of Thoroughbred Horses

This is an entertaining examination of proof of title of thoroughbred horses by two of the country's leading lawyers on the subject.

Discussion Includes

- The application of the Australian Rule of Racing to thoroughbred ownership and racing in Australia
- What should prospective co-owners of a racehorse do to protect themselves?
- The importance of documenting agreements as to the co-ownership of a racehorse and the terms that such an agreement should include
- Is the promotion of the syndicated ownership of a racehorse a managed investment scheme under the *Corporations Act 2001 (Cth)*?
- Misleading and deceptive conduct cases and when plaintiffs might have difficulties proving their case

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Proof of Title of Thoroughbred Horses

1. In this edition of BenchTV, Robert Angyal SC (Barrister) and Tony Fleiter (Solicitor) present on the NSW Supreme Court's (Bergin CJ in Eq) decision in *Capogreco v Rogerson [2015] NSWSC 1371* which involved a claim of misleading and deceptive conduct in relation to the sale of a horse and a question of who actually owned it. Mr Angyal SC and Mr Fleiter represented the first defendant, Graeme Rogerson, in the Supreme Court action.

Material Facts Giving Rise to the Claims

2. The race horse, in relation to which the dispute arose, was initially purchased for \$1.55 million by the first defendant Mr Rogerson from Mr Harvey in 2006. Subsequently, interests in the horse were purchased by third parties, including the plaintiffs, Mr and Mrs Capogreco and Mr and Mrs Pirrello, who acquired a combined 25% stake.
3. The plaintiffs and all owners relied on Mr Rogerson to perform the dual functions of trainer and manager on their behalf. He had control of the horse and was responsible for entering the horse in races, with any significant management decisions to be made on the basis of "majority rule" – not an uncommon arrangement. At all times, Mr Rogerson conducted himself in that manner, acting in the wishes of the majority of the owners.
4. Importantly, there was no evidence led by the plaintiffs of any complaints they had as to the management of the horse during the 5 years whilst it was racing. The other owners gave evidence that they were both happy and satisfied with the manner in which Mr Rogerson had trained and managed the horse during this period.
5. It was expected that the horse would be successful in significant "Group 1 races" as a result of the horse's excellent pedigree (blood lines) and since Mr Rogerson and Mr Harvey, both high-profile racing figures, continued to be involved with the horse,. Were it to have been successful in such races, it was further expected that the horse's value would substantially increase with the possibility of using the horse for a siring purpose.
6. Unfortunately, the great expectations for the horse were never realized with the horse never winning any Group 1 races, which limited the price the owners could have expected from re-sale.
7. In April 2012, the first defendant entered the horse at auction on the agreement of all the owners. However, there was a purported private sale or transfer of ownership to the second defendant, Mr McHugh, for the sum of \$60,000, prior to the auction. All owners other than

the plaintiffs (i.e. amounting to 75% of the interests in the horse) had agreed to both the private sale and the auction, with the plaintiffs only having agreed to the auction.

8. The plaintiffs claim that they were neither advised of the offer made to purchase the horse privately nor were they informed of the purported sale or transfer to the second defendant. They claim that they did not authorise or consent to this sale or transfer of their respective ownership interests in the horse. Indeed, the plaintiffs claimed that they had intended on taking the opportunity to purchase the horse outright for themselves, at the expected auction.
9. Following the sale, they refused to accept any of the monies gained and initiated proceedings against the manager, Mr Rogerson, who had carried out the purported sale, as well as the purported purchaser, Mr McHugh.
10. The primary claim was an action in misleading and deceptive conduct against Mr Rogerson in relation to the plaintiffs' initial purchase of the horse. If successful, the plaintiffs would have been entitled to compensation for the full purchase price which they had paid for their interest in the horse.
11. In the alternative, if they had not been misled into buying the horse and the initial purchase was legitimate, the plaintiffs contended that the sale of the horse to the second defendant was invalid, at least in so far as it purported to transfer their combined 25% interest. If successful in this claim, they sought an account of equal profits from the new owner, the second defendant, for any winnings made from racing. This claim was advanced notwithstanding the contention of the second defendant that the horse was actually running at a loss.

The Misleading and Deceptive Conduct Claim

12. In order to successfully establish the plaintiffs' preferred claim in misleading and deceptive conduct under the *Competition and Consumer Act 2010* (NSW) and the *Fair Trading Act 1987* (NSW), they had to prove that the defendant made misleading or deceptive representations that created an expectation in the plaintiffs which they then detrimentally relied on in purchasing their interests in the horse.
13. Her Honour, Bergin CJ in Eq, dismissed the plaintiffs' claim that their initial purchase was vitiated by misleading and deceptive conduct at [92]-[118]. Her judgment emphasized the experience of Mr Capogreco in purchasing similar race horses and was partial to the first defendant's contention at [117] that he had not represented that "it did not matter if the horse won a race or not because his bloodlines made him a valuable stud prospect after his racing

career was over". The plaintiffs' experience was particularly damning to their claim because their previously purchased horses were also largely unsuccessful and no similar claims had been brought against the relevant trainers, so the question was why they had been brought here and not there. Accordingly, her Honour accepted, based on this past experience or otherwise than from Mr Rogerson's representations, that the plaintiffs, as well as all the other owners, had reasonably appreciated the potential of the horse, and also the possibility that the value generated by a subsequent re-sale would be limited were the horse unsuccessful in races.

14. In circumstances where the details of the transaction or attendant discussions had never been recorded, it was very difficult for the plaintiffs to prove that the representations were made, that they induced the necessary expectation and that there was detrimental reliance, to the requisite standard of the balance of probabilities.

Contract Claim

15. The plaintiffs' secondary claim essentially queried whether Mr Rogerson required the plaintiffs' express consent to sell the horse or whether a 50% majority was sufficient to authorise the sale.
16. As aforementioned, the plaintiffs had agreed to the sale of the horse via an auction. Therefore, the terms and conditions of sale bound the plaintiff. The defendant contended that the terms and conditions authorised both the sale at auction AND the sale via private offer.
17. Her Honour, deciding on the correct construction of the sale agreement, found that the terms and conditions did not provide the right to sell privately prior to auction. Therefore, Mr Rogerson had not sold the plaintiffs' 25% interest for lack of consent, which they retained over the second defendant. The plaintiffs were held to be continuing owners of their interest in the horse and the second defendant was liable to account for profits to them.

Implications

18. Ultimately, the plaintiffs were unsuccessful in their preferred course of attempting to get their money back from the purchase of the horse, however they did successfully retain their 25% share.
19. In order to avoid disputes such as those arising here it is necessary for a detailed co-ownership agreement to be prepared between all of the co-owners. This should clarify between them what consent is required and from whom when making important decisions

in managing a horse. It is particularly necessary to ensure mechanisms for working through important decisions about the management of the horse where there is a dispute as to the appropriate course.

20. As mentioned, there are substantial difficulties involved with running a case in relation to transactions that occurred several years ago that were not documented. Therefore, it is often necessary to go into what was said by whom and to whom, who knew what and when, and what was reasonable for parties to believe based on their prior experience. Proper documentation of a sale protects all parties, particularly where it discloses any representations relied on and whether any veterinary checks have been delivered. Unless you are an experienced purchaser in the thoroughbred industry, accustomed to buying and selling horses, then ensure your transaction is documented.
21. As an aside, the plaintiffs claimed they would have purchased the horse at auction for \$120,000. The second defendant notes that he would have re-sold the horse for that sum had he been offered it shortly after purchasing it for \$60,000. It was alleged by the defendants that the plaintiffs had therefore failed to mitigate their loss by purchasing the horse subsequently. Ultimately, this was not decided because the plaintiffs were unsuccessful in their misleading and deceptive conduct claim and were found to retain their interest following the sale to which they did not consent.

BIOGRAPHY

Robert Angyal SC

Robert Angyal SC was first admitted in NSW in 1974, before a stint as an attorney in the United States. He was called again to the NSW Bar in 1989 and appointed Senior Counsel in 2004. He was a foundation member of both the Dispute Resolution Committee of the Law Society of NSW, and the Mediation Co

Tony Fleiter

Tony Fleiter was admitted as a Lawyer in 1976 and currently holds practicing certificates in NS

BIBLIOGRAPHY

Focus Case

Capogreco v Rogerson [2015] NSWSC 1371

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_18-09-2015_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/55f9ea57e4b01392a2cd0d6a>

Legislation

Competition and Consumer Act 2010 (NSW)
Fair Trading Act 1987 (NSW)