



## Précis Paper

### Claims against Accountants for Investment Advice

This is a discussion about a recent case in the NSW Supreme Court which examined the liability of accountants for investment advice and issues relating to partnership law and insurance contracts.

#### **Discussion Includes**

- Background and material facts
- Claims of breach of contract, negligence, and misleading and deceptive conduct
- Vicarious liability of partners
- Holding out
- Effect of prior bankruptcy
- Application of insurance policy

## Précis Paper

### Claims against Accountants for Investment Advice

1. In this edition of BenchTV, Mark Sneddon (Barrister, Queens Square Chambers, Sydney) and Ian Benson (Solicitor, AR Conolly & Company) discuss the recent decision of the NSW Supreme Court in *Ritchie v Woodward* [2016] NSWSC 1715.

#### Background and Material Facts

2. The plaintiffs in the proceedings had invested money into a series of investments and transactions relating to hotels, ventures that were ultimately unsuccessful. The case involved allegations of professional negligence by Mr Anthony (Tony) Woodward (the third defendant), a chartered accountant who carried on practice in partnership under the name "BP Woodward & Associates". The plaintiffs claimed that Tony Woodward was guilty of professional negligence as an accountant in failing to carry out due diligence in relation to the investments. They also claimed that he had breached the retainer and engaged in misleading and deceptive conduct.
3. The first and second defendant were sued on the basis that they were vicariously liable for the conduct of Tony Woodward as his partner in the practice of BP Woodward & Associates. The first defendant was Mary-Ann Woodward, sued in her capacity as legal personal representative of her late father, Mr Brian Woodward. She was also the second defendant in her own right. Tony Woodward was the son of Mr Brian Woodward. Cross-claims were also brought against the insurer seeking indemnity.

#### Causes of Action Alleged

4. The claim for breach of contract related to the failure of the third defendant to provide due diligence. The judge found that there was no liability in terms of breach and causation was not established. This was because third party due diligence reports were obtained from reputable hotelier valuers. Moreover, the investment had performed badly because of the intervention of the NSW lockout laws, combined with the effects of the global financial crisis, and therefore causation could not be established.
5. The claim in negligence was founded upon similar claims, namely that the third defendant had failed to perform due diligence and obtain security. Both of these claims were also dismissed by Emmett AJA. In relation to the failure to obtain security, the trial judge found that this had not occasioned any loss.

6. Finally, a claim was also brought for misleading and deceptive conduct under s 18 of the *Australian Consumer Law*. The alleged misrepresentations related to claims about the anticipated success of the business ventures. For a misleading and deceptive claim, it is not necessary to establish intent; rather a plaintiff must show that a misrepresentation was made and that objectively, someone in the position of the plaintiff would have relied upon it. Emmett AJA found that there were reasonable grounds for the representations in question to have been made, and therefore no misleading and deceptive conduct was established on the facts.

#### The Vicarious Liability of Partners

7. Between the first, second and third defendants, there was dispute as to the nature of the third defendant's actions. If the third defendant had been held liable in negligence or for breach of contract, the first and second defendant denied that his conduct occurred in the ordinary course of the partnership, thus negating their vicarious liability.
8. In addition, the second defendant denied, as a matter of fact, that she was a partner of the accountancy firm at the relevant time. Whether someone is or is not a partner is a question of fact (see s 1(1), *Partnership Act 1982* (NSW)). In this case, the letterhead that was being sent out still had the second defendant listed as a partner of the firm. However, after an analysis of the facts, Emmett AJA concluded that the second defendant was not still a partner in the firm at the relevant time.
9. Partners are vicariously liable for the contractual or tortious conduct of other partners. However, the conduct in question must occur within the ordinary course of the business partnership. If the partner is acting outside of the ambit of the partnership, the other partners are not vicariously liable.
10. Ultimately, as no breach of duty or conduct was found, the vicarious liability of the first and second defendants, as alleged partners of the third defendant, was not in issue. However, had this been in issue, the first and second defendant had submitted that ordinarily, accountants do not provide investment advice, so Tony Woodward's conduct was outside of the ambit of the partnership.

#### Effect of Prior Bankruptcy

11. An issue as to bankruptcy arose as the third defendant had a sequestration order made against him some years prior. The bankruptcy was subsequently discharged, but the issue was whether the bankruptcy prevented any cause of action being raised against the third defendant.

12. The Court considered whether the claims against the third defendant fell within s 82(2) of the *Bankruptcy Act 1966* (Cth), which provides that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy. Emmett AJA held that there was no question that the claims could be characterised as unliquidated damages, however the issue was whether they arose because of a contract or promise. The Court ultimately found that an analysis of the substance of the claim as pleaded indicated that the claim for unliquidated damages arose by reason of a contract, and was therefore not provable in bankruptcy.

#### The Insurance Policy

13. A cross-claim was brought against the insurers, claiming a right to indemnity. However, the plaintiff's claim related to investment advice given by the third defendant. Investment advice was carved out of the insurance policy in an exclusion clause, and therefore the insurer was not required to indemnify the defendants.

## **BIOGRAPHY**

Mark Sneddon

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Mark Sneddon was called to the Bar in early 2002. He specialises in appellate advocacy, commercial law, company law and equity, with a specialty equity practice in real property, trusts and wills and probate. Mark has appeared in many significant cases in his specialty practice areas.

Ian Benson

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Ian Benson is a solicitor at AR Conolly and Company and holds a first class honours degree in law.

## **BIBLIOGRAPHY**

Focus Case

*Ritchie v Woodward* [2016] NSWSC 1715

Judgment Link

<http://www.austlii.edu.au/au/cases/nsw/NSWSC/2016/1715.html>

Legislation

*Australian Consumer Law*

*Partnership Act 1982* (NSW)

*Bankruptcy Act 1966* (Cth)