Non-specific gender

Joanna Davidson reports on *Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

Does the NSW Registrar of Births, Deaths and Marriages, on receipt of an application by an unmarried person who has undergone a sex affirmation procedure whose birth has not been registered in NSW,[1] have power to register the person's sex as 'non-specific'? On 2 April 2014, the High Court (comprising French CJ, Hayne, Kiefel, Bell and Keane JJ) unanimously held that the registrar's power to register a person's 'change of sex' did extend so far; but did not extend to registering further categories such as transgender, androgynous or intersex.

Background

Norrie was born in Scotland with male reproductive organs. In 1989 she underwent a 'sex affirmation procedure' within the meaning of s 32A of the *Births, Deaths and Marriages Registration Act 1995* (NSW).[2] Such a procedure is defined as 'a surgical affirmation procedure involving the alteration of a person's reproductive organs carried out: (a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or (b) to correct or eliminate ambiguities relating to the sex of the person'. Norrie gave evidence below that she undertook the surgery to eliminate the ambiguity in relation to her sex.[3] She was of the view that the surgery had not resolved that ambiguity.

On 26 November 2009, Norrie applied to the registrar under s 32DA of the Births, Deaths and Marriages Registration Act for her sex to be registered as 'non-specific'.[4] Section 32DA imposes five conditions on an application to the registrar 'for the registration of a person's sex': an applicant must be 18 years or over; be an Australian citizen or permanent resident; live in NSW and have lived in this state for at least a year; have undergone a sex affirmation procedure; not be married and be a person whose birth is not registered under the Act or a law of another state providing for the registration of births.[5] Under s 32DC(1), '[t]he registrar is to determine an application under section 32DA by registering the person's change of sex or refusing to register the person's change of sex.' Neither sex nor 'change of sex' is defined in the Act.

Despite the discrepancy between the language of ss 32DA and 32DC as to what is to be registered, it was not disputed that these provisions provide for a first registration in NSW of an applicant's sex differing from an earlier record (outside NSW) of the applicant's sex.[6] Norrie's application was accompanied by statutory declarations from two medical practitioners stating that she had undergone a sex affirmation procedure, in accordance with the requirements of s 32DB.[7] The registrar approved Norrie's application in February 2010 and issued a Recognised Details (Change of Sex) Certificate. In March 2010, the registrar wrote to Norrie advising her that this certificate was invalid.[8]

Norrie applied for review of the decision by the Administrative Decisions Tribunal, which held that it was not open to the registrar to register Norrie's sex as 'non-specific'.[9] The tribunal's Appeal Panel dismissed Norrie's appeal.[10] Norrie's further appeal to the Court of Appeal was upheld, the court remitting the matter to the tribunal for consideration of whether Norrie might be registered using a specific category of sex not confined to male or female, e.g., intersex, transgender or androgynous.[11] The High Court dismissed the appeal but set aside the Court of Appeal's order remitting the matter to the tribunal. A Gender Agenda Inc was granted leave to appear amicus curiae. Its written submissions concerning classification of persons as 'intersex' indicate the challenges of future legislative reform in this area.[12]

Construction of the Act

The High Court recognised that the ordinary usage of language referring to the opposite sex invokes the contrasting categories of male and female. Nevertheless, the Act's reference to 'ambiguities relating to the sex of the person' and the context in which the relevant provisions were enacted enabled the court to find that the Act recognised that 'the sex of a person is not … in every case unequivocally male or female'.[13]

The High Court construed the Act by reference to the purpose of the register and the limited role of the registrar. The registrar's role under s 32DC is confined to recording information provided by community members and does not involve 'moral or social judgments' or the making of decisions about the outcome of any surgical procedure.[14] While accepting

While accepting the registrar's submission that the Act recognises only male and female as registrable classes of sex, the court also accepted Norrie's submission that the register's purpose is to state the truth about matters recorded therein, so far as possible.

the registrar's submission that the Act recognises only male and female as registrable classes of sex, the court also accepted Norrie's submission that the register's purpose is to state the truth about matters recorded therein, so far as possible. Classifying Norrie in the register as male or female would involve recording misinformation, because her sex remained ambiguous.[15]

The court had regard to the existing state of the law at the time ss 32DA–32DD were introduced into Pt 5A of the Act in 2008. Part 5A was inserted in 1996, by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW). That amending Act introduced definitions of 'recognised transgender person' and 'transgender person' into the *Anti-Discrimination Act 1977* (NSW). The definition of 'transgender person' for the purposes of the Anti-Discrimination Act includes both a person 'who identifies as a member of the opposite sex' and 'who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex'.[16] While Pt 5A of the Act does not use the term 'indeterminate sex', the High Court found that the provisions of Pt 5A are to be applied in the context of express legislative recognition of the existence of persons of indeterminate sex.[17]

These aspects of the statutory context, together with the reference to 'ambiguities' in the definition of 'sex affirmation procedure', were sufficient to enable their Honours to conclude that it was open to the registrar to register Norrie's change of sex pursuant to s 32DC by recording a change in classification from male to non-specific.[18] The judgment does not address the registrar's submission that identification of two categories of sex is a fundamental principle or at least assumption of the general system of law.[19]

Effect of registration of change of sex

The High Court noted the registrar's acknowledgement that registration of a person's sex as 'non-specific' would not leave a person in 'no-man's land' to the extent that other state laws are premised on a binary male/female division of the sexes.[20] This is because the deeming effect of s 32J, which recognises a person whose change of sex is registered under Pt 5A as being of the registered sex for the purposes of other NSW laws, operates subject to 'any law of NSW'. The High Court rejected the registrar's submission that the recognition of more than two categories of sex would generate unacceptable confusion with only a brief discussion, noting that with the exception of marriage 'for the most part, the sex of the individuals concerned is irrelevant to legal relations'.[21]

Conclusion

The decision removes the prospect that the potential categories of registration of sex under the Act are indeterminate. Registrable classifications of sex under Pt 5A are confined to male, female and non-specific. The judgment provides an example of the consideration of statutory context in the first instance for purposes of construction, in circumstances where references to any category of sex other than male and female in the Act and relevant extrinsic material were limited.

Endnotes

1. Or under a 'corresponding law': *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32DA(1)(e).
2. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [9].
3. *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [6].
4. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [11].
5. See the definition of 'corresponding law': *Births, Deaths and Marriages Registration Act 1995* (NSW), s 4.
6. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [17].
7. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [13].
8. *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [8].
9. *Norrie v Registry of Births, Deaths and Marriages* [2011] NSWADT 102 at [54].
10. *Norrie v Registrar of Births, Deaths and Marriages* [2011] NSWADTAP 53 at [20].
11. *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [204]-[205] per Beazley ACJ, [279] per Sackville AJA, [288]-[290] per Preston CJ (LEC).
12. Cf the provision for the registration of intersex persons in Pt 4 of the *Births, Deaths and Marriages Registration Act 1997* (ACT).
13. *AB v Western Australia* (2011) 244 CLR 390 at [23].
14. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [16], [38].
15. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [30], [32].
16. *Anti-Discrimination Act 1977* (NSW), s 38A.
17. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [18].
18. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [40].
19. See *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA Trans 36.
20. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [43].
21. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [42].

Submissions on sentencing ranges

Brin Anniwell reports on *Barbaro and Zirilli v The Queen.*

Introduction

In *Barbaro v The Queen; Zirilli v The Queen*[1] (*Barbaro*), the High Court dismissed two appeals from the Victorian Court of Appeal on sentences imposed on Mr Barbaro and Mr Zirilli (the applicants) who had both pleaded guilty to serious drug offences and were sentenced to life and 26 years imprisonment respectively. The High Court held that the prosecution is not permitted or required to make any submission on sentencing ranges.

The decision carries serious implications for prosecutors when making submissions on sentencing, and legislative reform of the court's decision has been recommended. However, the Federal Court has recognised that the decision does not prohibit the court from taking into account the submissions of the parties as to the agreed penalty amount in civil penalty proceedings.

The facts

The applicants each pleaded guilty to three counts charging offences against laws of the Commonwealth *Criminal Code 1995*, namely conspiracy to commit an offence of trafficking a commercial quantity of a controlled drug (MDMA)[2]; trafficking a commercial quantity of a controlled drug (MDMA);[3] and attempting to possess a commercial quantity of an unlawfully imported border controlled drug (cocaine)[4].[5]

Before the applicants indicated to the Commonwealth director of public prosecutions that they would plead guilty to certain charges, there were discussions between the lawyers for the applicants and the prosecution for the purpose of reaching plea agreements. During those discussions, the prosecution informed the applicants' lawyers of the 'sentencing range' that would apply to each applicant.

In the Supreme Court of Victoria, King J sentenced Mr Barbaro to a total effective sentence of life imprisonment and a non-parole period of 30 years was fixed. Mr Zirilli was sentenced to a total effective sentence of 26 years' imprisonment with a non-parole period of 18 years. The head sentences imposed on each applicant were greater that the 'sentencing range' expressed by the prosecutor.

During the sentencing hearing, King J made it clear to the prosecutor and the defence that she did not intend to ask any party what sentencing range the sentences to be imposed should fall within. Counsel for Mr Zirilli informed King J what the prosecution had said was the sentencing range for his client. Counsel then appearing for Mr Barbaro did not. The prosecutor made no submission about what range of sentences could be imposed on either Mr Barbaro or Mr Zirilli.

On appeal, the Supreme Court of Victoria Court of Appeal[6] held that King J committed no error of law in refusing to entertain a submission from the Crown on sentencing range and that the effective sentences and the non-parole periods imposed were not manifestly excessive.

The High Court appeal

The grounds of appeal before the High Court were, first, that the sentencing hearing was unfair because the sentencing judge refused to hear submissions from the prosecution about what range of sentences she could impose. Secondly, that by not hearing submissions on range of sentences, her Honour precluded herself from taking into account a consideration relevant to sentencing.

The applicants did not contend that King J made a factual or legal error in sentencing; it was not argued that the sentences imposed were manifestly excessive. However, the applicants argued that the prosecutor should have been permitted to submit to the sentencing judge that the sentences should be fixed within a range because plea agreements had been made and the matters had been 'settled' on the basis of what the prosecution had said to be its views of the available sentencing range for each applicant. Further, it was submitted that the applicants could have used these views to their advantage in the course of the sentencing hearing had the prosecution been permitted to put them forward.

The High Court granted special leave but dismissed the appeals[7], finding that the applicants were not denied procedural fairness because the sentencing judge would not receive statements of what the prosecution considered to be the bounds of the available sentencing ranges. Not receiving such a statement was not a failure to take account of some material consideration.[8]

The reasoning in the plurality judgment (French CJ, Hayne, Kiefel and Bell JJ) may be distilled into three key issues.

The distinction between judge and prosecutor

The High Court held that a statement by the prosecution of the bounds of an available range of sentence might lead to an erroneous view about its importance in the process of sentencing. As a consequence, there would be a blurring of what should be a sharp distinction between the role of the judge and the role of the prosecution in that process.[9]

In *R v MacNeil-Brown*[10], a majority of the Victorian Court of Appeal held[11] that 'the making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the court'. Accordingly, a sentencing judge could reasonably expect

the prosecutor to make a submission on sentencing range if either 'the court requests such assistance' or, 'even though no such request has been made, the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range unless such a submission is made'.[12]

In *Barbaro*, the court observed that the practice that had developed from *MacNeil v Brown* assumed that the prosecution's submission on the bounds of the available range of sentences would assist the sentencing judge to come to a fair and proper result. It depended on the prosecution acting not only fairly but as a 'surrogate judge'[13], which was not the role of the prosecutor.

Consistency and the use of sentencing statistics

The High Court distinguished the setting of bounds to the available range of sentence from the proper and ordinary use in submissions of sentencing statistics and other material indicating what sentences have been imposed in other comparable cases.[14] The court acknowledged that in seeking consistency, sentencing judges must have regard to what has been done in other cases and those cases may well establish a range of sentences which have been imposed. The court noted that consistency of sentencing is important, however, what is sought is consistency in the application of relevant legal principles, not numerical equivalence[15].

Statement of opinion, not a submission of law

The plurality held that, contrary to the Victorian Court of Appeal's view in *MacNeil v Brown*, a prosecutor's submission about the bounds of an available range of sentence is a statement of opinion, not a submission of law.[16] It purports to identify the points at which conclusions of manifest excess and inadequacy arise, giving rise to an inference of appellable error in the sentencing discretion but without otherwise identifying such an error. Accordingly, a statement of bounds states no proposition of law.

Interestingly, Gaegler J found that a submission on the bounds of the available sentencing range was a submission of law, not opinion. His Honour held that:

> [i]t is a submission that a sentence within that range would or would not meet a limiting condition of the discretion conferred on the court to sentence for the offence and therefore would or would not fall within the limits of a proper exercise of the sentencing discretion. In the specific context of sentencing for a federal offence, it is a submission that a sentence within that range would or would not answer the specific statutory description in s 16A(1) of the Act of a sentence that is of a severity appropriate in all the circumstances of the offence.[17]

Practical implications

While a prosecutor is not permitted to proffer his or her view about an available range of sentence, the High Court has made it clear that the sentencing judge should be properly informed about comparable sentences. To that end, the High Court has distinguished a submission setting bounds to the available range of sentences (which impermissibly assumes responsibility for the judicial exercise of sentencing discretion) from the proper and ordinary use in a submission of sentencing statistics and other material indicating what sentences have been imposed in more or less comparable cases (which assists the judge in determining the appropriate range).[18]

The permissible scope of the prosecution's sentence submissions following *Barbaro* is that, beyond facts and comparative sentence information, the prosecutor must confine itself to addressing the relevant sentencing principles that should be applied by the court in exercising its discretion rather than making submissions as to the sentencing range that may be appropriate in the case at hand. The practical outcome of this limitation is that an accused may not rely on any agreement with or representation from the prosecutor as to the available upper range that may be put to the court when making a decision as to whether to enter a guilty plea.

The New South Wales Bar Association considers that, for a number of reasons, the judgment of the High Court will produce an unsatisfactory situation in sentencing proceedings. The Bar Association has written letters to the attorneys-general of the Commonwealth and New South Wales submitting that the decision will preclude the prosecutor, a party to sentencing proceedings, from making a submission as to the ultimate outcome of those proceedings; will limit the assistance that the prosecutor can provide to the sentencing court to avoid appealable error; is inconsistent with the guidance provided to prosecutors in Rule 93 of the *New South Wales Barristers' Rules*; and will preclude the encouragement of pleas of guilty which might result from plea negotiations where the prosecutor agrees to make a submission as to a specified sentencing range.

The Bar Association has recommended that Part 3 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and s 16A of the *Crimes Act 1914* (Cth) be amended so as to permit a prosecutor (and the offender) to make a submission as to the penalty to be

imposed for an offence and to require the court to have regard to that submission in determining the appropriate sentence.

Extension to civil penalty proceedings?

The High Court's decision in *Barbaro* has broader implications. Present practice and authority recognises a clear role for civil regulators to assist the court through submissions on the appropriate penalty. The Full Court of the Federal Court has recognised in cases such as *NW Frozen Foods Pty Ltd v ACCC*[19] (*NW Frozen Foods*) and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Ltd*[20] (*Mobil Oil*) (decisions which continue to be regarded as binding authority[21]) that a regulator and respondent could jointly propose specific penalty amounts to the court and that there was a strong public interest in imposing that penalty, even if the court may otherwise have selected a different figure for itself. The court has recognised that it will be assisted by the views of the specialist body set up to protect the public interest on whether a proposed penalty will be sufficient to deter particular conduct.

Recently, Middleton J considered the application of the High Court's decision in *Barbaro* to civil penalty proceedings in *Australian Competition and Consumer Commission v Energy Australia Pty Ltd*[22]. His Honour did not consider that the High Court's decision went so far as to prohibit the court from taking into account the submissions of the parties as to the 'agreed' penalty amount in civil penalty proceedings, or that the High Court's decision implicitly overruled *NW Frozen Foods* or *Mobil Oil*.[23] His Honour noted the important differences between the criminal sentencing context and the civil penalty context, and the position of the crown prosecutors and regulators, including that a regulator does not have, and is not expected to have, the independent role and characteristics of the prosecutor.[24]

His Honour disagreed with the approach taken by Logan J in *Australian Competition and Consumer Commission v Flight Centre Limited* (No 3)[25] who assumed the correctness of the application (by analogy) of *Barbaro* to the civil penalty proceeding before him and did not take into account the ranges of penalty referred by the parties in those civil penalty proceedings.[26]

McKerracher J agreed with the reasoning of Middleton J in *Australian Competition and Consumer Commission v Mandurvit Pty Ltd*[27] accepting that parties' joint submission on the quantum of penalty addresses the primary object of civil penalties under the *Australian Consumer Law* so that the parties have informed the court of the penalty that they regard as having appropriate deterrent effect, and the reasons for that conclusion.[28]

Endnotes

1. [2014] HCA 2.
2. Contrary to ss 11.5(1) and 302.2(1) of the Criminal Code (Cth).
3. Contrary to s 302.2(1) of the Criminal Code.
4. Contrary to ss 11.1(1) and 307.5(1) of the Criminal Code.
5. Mr Barbaro admitted his guilt in respect of three further Commonwealth offences and, pursuant to s 16BA of the *Crimes Act 1914* (Cth) asked that the further offences be taken into account in passing sentence on him for the offences to which he pleaded guilty and for which he was convicted.
6. *Barbaro v The Queen; Zirilli v The Queen* [2012] VSCA 288.
7. His Honour Gageler J joined in the orders granting each application for special leave to appeal and dismissing each appeal. However, his reasons for doing so differed from the majority.
8. *Barbaro* [2014] HCA 2 at [50].
9. *Barbaro* [2014] HCA 2 at [33].
10. (2008) 20 VR 677. The first appellant in that case applied for special leave to appeal to the High Court but the application was refused: [2008] HCATrans 411.
11. (2008) 20 VR 677 at 678 [2].
12. (2008) 20 VR 677 at 678 [3].
13. Endorsing observations of Buchanan JA in McNeil-Brown at [128].
14. Barbaro [2014] HCA 2 at [40].
15. Hili (2010) 242 CLR 520 at 535 [48]-[49].
16. Barbaro [2014] HCA 2 at [42].
17. Barbaro [2014] HCA 2 at [59].
18. Para 40.
19. (1996) 71 FCR 285.
20. (2004) ATPR 41-993.
21. *Australian Competition and Consumer Commission v AGL Sales* [2013] FCA 1030 per Middleton J at [12]-[44].
22. [2014] FCA 336.
23. [2014] FCA 336 at [115].
24. [2014] FCA 336 at [140].
25. [2014] FCA 292.
26. [2014] FCA 292 at [56].
27. [2014] FCA 464.
28. [2014] FCA 464at [70].

Priority of the liquidator's lien

Melissa Tovey reports on *Stewart v Atco Controls Pty Ltd (In Liquidation)* [2014] HCA 15

Introduction

In *Stewart and Anor v Atco Controls Pty Ltd (In Liquidation)*, the High Court has re-affirmed the well-established principle that voluntary administrators,[1] provisional liquidators[2] and official liquidators[3] are entitled to an equitable lien in respect of remuneration and expenses properly incurred in preserving and realising the company's assets, and that such lien will take priority over a secured creditor's claim on a fund realised by the insolvency practitioner.

Background

Newtronics was a wholly owned subsidiary of Atco. Atco provided financial support to Newtronics and took a fixed and floating charge over its assets. Between 1993 and 2001, Atco provided financial support to Newtronics, including letters of support promising to provide funds to allow it to meet Newtronics' trading obligations, and further promising that it would not call upon the debt owed within the relevant period to the detriment of unsecured creditors (the representations). As at December 2001, prior to Newtronics being wound up, it was indebted to Atco in the sum of $19 million.

In January 2002, Atco appointed receivers to Newtronics after it was ordered to pay damages of $8.9 million to a former customer, Seeley International Pty Ltd (Seeley). The receivers sold the business of Newtronics to another subsidiary of Atco for $13 million, paid by way of a loan account adjustment against the funds advanced by Atco to Newtronics, such that no amount was actually received by Newtronics.

In February 2002, Newtronics was wound up on the application of Seeley; James Stewart was appointed as liquidator. The liquidator obtained funding, pursuant to an indemnity agreement with Seeley, to bring proceedings against Atco alleging that it was not entitled to the loan account adjustment or to enforce its security, as a result of the Representations.

Initial proceedings

In 2006 Newtronics commenced proceedings against Atco and later that year joined Atco's receivers, alleging they had been improperly appointed and had therefore converted Newtronics' property. Newtronics succeeded against Atco at trial but failed against the receivers. Atco brought an appeal against the trial judge's decision; on the day that appeal was to be heard the receivers settled with Newtronics and agreed to pay it $1.25 million (the fund). The appeal otherwise proceeded and the trial judge's decision was overturned, the Victorian Court of Appeal holding that Atco's security was valid.

In September 2009, the liquidator of Newtronics received the fund from the receivers and proceeded to pay the fund to Seeley, as a reimbursement to Seeley of funds it had provided the liquidator pursuant to the indemnity agreement.

Atco demanded that the fund be paid to it as it was an asset of Newtronics that was caught by Atco's charge. The liquidator refused to pay the fund to Atco, claiming an equitable lien over it which operated to defeat Atco's charge, at least in relation to the fund.

Proceedings below

Atco brought proceedings under s 1321 of the *Corporations Act* as a person aggrieved by the liquidator's decision. The proceedings were initially heard by an associate judge, who upheld Atco's claim and ordered the liquidator to pay the fund to Atco.[4] On an appeal from the associate judge's decision, Davies J found for the liquidator.

Atco appealed to the Victorian Court of Appeal, which reversed the decision of Davies J, ordering Newtronics to pay the fund to Atco. The court held that no equitable lien arose in favour of the liquidator over the settlement sum, finding in particular that the liquidator, in bringing the proceedings against Atco and its receivers, was acting at all times in the interests of a third party and against the interests of Atco, and more specifically, Atco's security, which was a relevant consideration as to whether it would be unconscientious of Atco to claim the settlement sum.

The High Court

The principal issue for determination was whether the well-established and recognised equitable lien that arises in favour of insolvency practitioners, enunciated by Dixon J (as his Honour then was) in *In re Universal Distributing Co Ltd (In Liq)*,[5] applied to the fund so as to allow the liquidator to assert a lien in priority to the secured claim by Atco.

The principle in *In re Universal* is that where a secured creditor participates in a winding up in order to discharge the relevant security, the secured creditor is entitled to receive principal and interest in priority to the general costs and expenses of the liquidation – but the costs of realising the assets, by the liquidator in this case or another practitioner generally, must be borne by the assets themselves. Put another way: a secured creditor should not get the benefit of having assets of the company realised in order to pay out the security, without that creditor having to pay the cost of that realisation.

The court was of the view that the *Universal Distributing* principle should apply to the facts of this matter and in coming to that view addressed the arguments advanced by Atco to the

Court of Appeal. The principle argument put by Atco below was that as the proceedings that realised the assets (which had resulted in the creation of the fund) had not been in Atco's interests, it would be unconscientious for the liquidator to retain the fund to meet his claim for an equitable lien.

The High Court identified three main grounds upon which Atco relied in the Court of Appeal to distinguish this matter from one to which the *Universal Distributing* principle should apply:[6]

- that a challenge to Atco's security was involved;
- that the proceedings were not brought to pursue Atco's interests as a secured creditor; and that the proceedings were in fact in the interests of Seeley.

In accepting those submissions, the Court of Appeal came to the view that the appropriate test was whether Atco would be acting unconscientiously if it were to receive the fund without meeting the costs of its creation.[7] The Court of Appeal accepted Atco's submission that it had not willingly participated in the creation of the fund and that it had not 'come in' to the liquidation by proving and surrendering its security, factors which should distinguish *Universal Distributing*.

The High Court found that the reference to 'com[ing] in' in *Universal Distributing* is not a technical term and simply means a secured creditor who makes a claim against a fund created by the actions of a liquidator in realising assets.[8] Moreover, the subjective intention of a liquidator in bringing proceedings to recover an asset is not relevant in applying the *Universal Distributing* principle.[9] Accordingly, Atco's resistance to, and lack of participation in the creation of the fund was not relevant to the application of the principle.

The High Court emphasised that the proper, and perhaps only, enquiry which flows from the *Universal Distributing* test is whether the remuneration the subject of the asserted lien was generated in the getting in or realisation of the assets which in turn create the fund.[10]The High Court also rejected an argument by Atco that no lien could have arisen at equity at the time of creation of the fund as the liquidator had been paid his costs and expenses under the indemnity agreement by Seeley. The court held that that argument ignored the obligation of the liquidator, under the indemnity agreement, to repay to Seeley any amount paid by it under that agreement. Similarly, Atco's argument that a clause in the indemnity agreement purporting to engage s 564 of the Corporations Act (which provides a court with power to make orders regarding the distribution of property which has been recovered under an indemnity for costs of litigation that give the creditors providing the indemnity an advantage over others, in consideration of the risk assumed by them) was held not to prevent a lien arising, because it was inapplicable to the interests of third party creditors.[11]

Ultimately, the High Court emphasised that the nature and purpose of an action brought by a liquidator to get in or realise assets, which in turn create a fund, is irrelevant to the determination of whether an equitable lien will arise in priority to a secured creditor's claim.

The liquidator's statutory duty to get in and realise assets is one which exists independently of, and is not subject to, the wishes or demands of any one or more creditors, secured or otherwise. Even to the extent that proceedings may be said to be in the interests of one creditor only (here Seeley), that *per se* will be insufficient to prevent an equitable lien arising.[12]

It remains the case that secured creditors who wish to challenge the priority of a liquidator's equitable lien will have to establish that the work carried out by the liquidator was not referable to the getting in or realisation of the assets which ultimately create the fund against which the secured creditor makes a claim. It similarly remains the case that a secured creditor laying claim to a fund created by the actions of a liquidator in realising assets will be 'coming in' to the liquidation within the meaning of *Universal Distributing*, regardless of the creditor's attitude to the conduct of the liquidator in getting in the fund.

Endnotes

1. Section 443F of the *Corporations Act 2001* (Cth) creates a statutory lien over the company's assets generally for the balance of their remuneration and properly incurred costs and expenses, but that statutory lien is subject to the priorities specified in s 556 of the Corporations Act.
2. *Shirlaw v Taylor* [1991] FCA 415.
3. *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 at 174.
4. *Atco Controls Pty Ltd v Stewart (in his capacity as liquidator of Newtronics Pty Ltd (In Liq))* unreported, Supreme Court of Victoria (Commercial and Equity Division), 20 April 2011.
5. (1933) 48 CLR 171 at 174.
6. *Stewart and Anor v Atco Controls Pty Ltd (in liq)* [2014] HCA 15 at [29].
7. Ibid., at [30].
8. Ibid., at [37].
9. Ibid., at [40].
10. Ibid., at [41].
11. Ibid., at [56].
12. Ibid., at [61].

Withdrawals under a managed investment scheme

James Willis reports on *MacarthurCook Fund Management Limited v TFML Limited* [2014] HCA 17.

In *MacarthurCook Fund Management Limited v TFML Limited* [2014] HCA 17, the High Court considered whether the redemption of certain interests in a managed investment scheme constituted 'withdrawal' from the scheme within the meaning of Part 5C.6 of the *Corporations Act 2001* (Cth) (the Act). The High Court held, in a unanimous decision, that a member does not 'withdraw' from a scheme, for the purposes of Part 5C.6 of the Act, merely by reason of the responsible entity performing an obligation to redeem, which arises under the terms of issue of a class of interests, if that obligation is required by those terms to be performed independently of any act on the part of the member.

Background

RFML Ltd (RFML) was, at the relevant time, the responsible entity of an unlisted unit trust which was a registered managed investment scheme pursuant to Chapter 5C of the Act (the trust). RFML was later replaced as the responsible entity of the trust by the respondent, TFML Limited.

In late 2007, the appellant in the proceedings (being MacarthurCook Fund Management Limited) subscribed for, and was issued, 15 million 'subscription units' in the trust, at an issue price of $1 per unit. The subscription units constituted a separate class of units and the appellant was the only holder of these units. The terms of issue of the subscription units contained a provision in the following form:

Subject to compliance with any requirements under the Corporations Act and the Constitution, during the Subscription Period [being 12 months from the date of subscription], subscription units held by MacarthurCook must be redeemed by [RFML] for their Issue Price, using funds received by the trust as a result of accepted applications under the [public offer], such redemptions commencing six months from the Subscription Date.

By 29 September 2008, the trust had received funds totalling $12,347,079 as a result of accepted applications under a public offer. On that date, RMFL gave notice that it had suspended all 'withdrawals' from the trust until further notice (which, relevantly, purported to include the redemption of any subscription units).

The appellant brought proceedings in the New South Wales Supreme Court where it argued that Part 5C.6 of the Act, which regulates the circumstances in which a responsible entity is permitted to allow a member to 'withdraw' from a scheme, was not applicable as the redemption of the subscription units did not constitute a 'withdrawal'. Both the primary judge and, on appeal, the Court of Appeal held that Part 5C.6 of the Act applied in respect of the redemption of the subscription units.

The High Court gave some guidance as to what type of conduct would and would not constitute 'volition' for the purpose of Part 5C.6.

The meaning of 'withdraw'

On appeal to the High Court, the appellant contended that the redemption of the subscription units by RFML was not a withdrawal by the appellant from the trust within the meaning of Part 5C.6 of the Act.

In discussing the operation and scope of Part 5C.6 of the Act, the High Court held that:

- Part 5C.6 6 regulated the exercise of a member's 'right to withdraw', which is not limited to a right of a nature which would require the existence of a correlative obligation; and
- the act of 'withdrawal' must involve some act of 'volition' on the part of the member.[1]

Accordingly, the High Court found that no withdrawal will occur, for the purposes of Part 5C.6, where there is no 'volition' on the part of the member but the responsible entity is merely exercising a power, which it was obliged to exercise under the terms of issue of an interest, to redeem the interest of a member. For this reason the court unanimously upheld the appeal on the basis that the terms of the subscription units required RFML to redeem the units and there was no exercise of a right or 'volition' on the part of the appellant.

In coming to this conclusion, the High Court had regard to the purpose of Part 5C.6[2] and found that Part 5C.6 operates to address problems associated with investors exercising choice to exit the scheme, particularly when the scheme is not liquid, rather than problems associated with investors exiting a scheme otherwise than through the exercise of choice, even when the scheme is not liquid.[3]

What constitutes 'volition'?

The High Court gave some guidance as to what type of conduct would and would not constitute 'volition' for the purpose of Part 5C.6. Relevantly, the court held that:

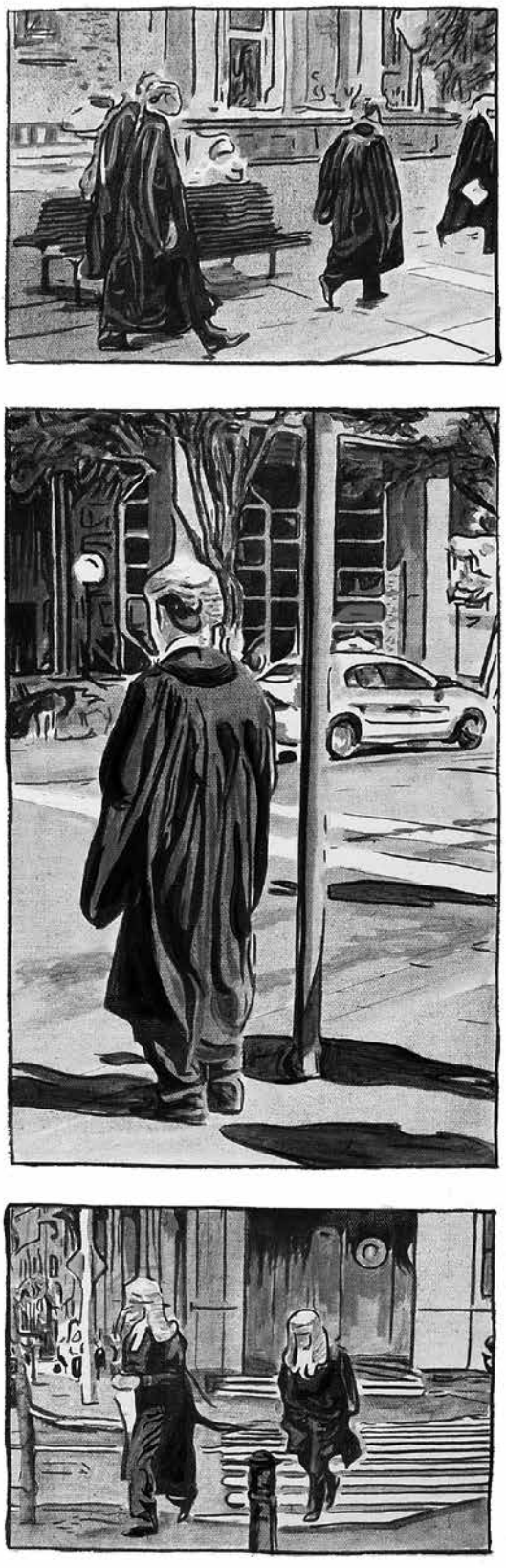
- the volition necessary for there to be a withdrawal by a member is not to be found merely in the choice to

become a member by subscribing to units on the terms on which they are issued (even in circumstances where those terms were the subject of prior arrangement between the responsible entity in the putative member);[4]

- the volition relevant to withdrawal by a member could not be found merely in the choice of the member to sue or not to sue to enforce the terms of the issue of the interest in the managed investment scheme;[5] and
- there is a 'real difference' between the creation of a separate contractual obligation for a responsible entity to redeem an interest, and the creation of an obligation for the responsibility to redeem as part of the terms of issue of the interest. Accordingly, it may be the case that the requisite volition can be found in the terms of a separate contractual obligation on the responsible entity.[6]

Endnotes

1. [2014] HCA 17 at [23].
2. Which the High Court noted was considered extensively by the *Australian Law Reform Commission and the Companies and Securities Advisory Committee* in a joint report published in 1993; [2014] HCA 17 at [24] – [27].
3. [2014] HCA 17 at [28].
4. [2014] HCA 17 at [31].
5. [2014] HCA 17 at [31].
6. [2014] HCA 17 at [31].



The limits of purposive statutory construction

Victoria O'Halloran reports on *Taylor v The Owners of Strata Plan 11564* [2014] HCA 9.

On 2 April 2014 the High Court delivered its judgment in *Taylor v The Owners of Strata Plan 11564* determining that s 12(2) of the *Civil Liability Act 2002* (NSW) does not limit a claim for damages under the *Compensation to Relatives Act 1897* (NSW).

The case is important for two reasons. First, it defines the intersection between the Civil Liability Act and the Compensation to Relatives Act. Secondly, it clarifies the High Court's approach to the limits of purposive statutory construction.

The case is important for two reasons. First, it defines the intersection between the Civil Liability Act and the Compensation to Relatives Act. Secondly, it clarifies the High Court's approach to the limits of purposive statutory construction.

Facts

The husband of the appellant, Susan Joy Taylor, was killed in December 2007 when an awning outside a chemist shop in Balgowlah on Sydney's northern beaches collapsed on him. Mrs Taylor commenced proceedings in the Supreme Court of New South Wales claiming damages pursuant to ss 3 and 4 of the Compensation to Relatives Act for the loss of financial benefits that she and her children had hoped to receive had her husband not been killed.

Prior to his death, Mr Taylor was a successful land surveyor in private practice. The central issue to be determined in this case was whether s 12(2) of the Civil Liability Act operated to limit Mr Taylor's gross weekly earnings and thereby limited the damages which his family was entitled to receive for the loss of expectation of financial support under the Compensation to Relatives Act.

The Civil Liability Act

Section 12 of the Civil Liability Act relevantly provides:

> This section applies to an award of damages:
>
> for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; or
>
> for future economic loss due to the deprivation or impairment of earning capacity; or
>
> for the loss of expectation of financial support.
>
> In the case of any such award, the court is to disregard the amount (if any) by which *the claimant's* gross weekly earnings would (but for the injury or death) have exceeded an amount that is three times the amount of average weekly earnings at the date of the award [emphasis added].

In the Supreme Court proceedings it was accepted by the parties that Mr Taylor's income would have substantially exceeded three times the amount of average weekly earnings. On this basis, the parties agreed to the preliminary determination of the question of whether an award of damages to Mrs Taylor and her children under the Compensation to Relatives Act was limited by the operation of s 12(2) of the Civil Liability Act.

The primary judge in the Supreme Court found that s 12(2) of the *Civil Liability Act 2002* did limit the claim for damages for loss of an expectation of financial support to three times gross average weekly earnings.

The New South Wales Court of Appeal found that the literal interpretation of s 12(2) did not apply to the deceased's gross weekly income and so would not limit the award of damages. However, while the Court of Appeal unanimously concluded that the literal meaning of s 12(2) does not apply the limitation to the gross weekly earnings of the deceased, the majority of the Court of Appeal found that the court could construe the provision as if it contained additional words to give effect to its evident purpose to limit the award of damages in respect of high earning individuals.

Mrs Taylor appealed and ultimately, the question before the High Court was whether the s 12(2) limitation was to be construed as applying to the deceased's gross weekly earnings.

The High Court's decision

The majority of the High Court (French CJ, Crennan and Bell J; Gageler and Keane JJ dissenting) found that s 12(2) of the Civil Liability Act did not limit Mrs Taylor's claim for damages pursuant to the Compensation to Relatives Act because s 12(2) did not require the court to disregard the amount by which Mr Taylor's gross weekly earnings would have exceeded three times the average weekly earnings, but for his death.

The High Court found that damages awarded in a Compensation to Relatives Act action are personal injury damages within Part 2 of the Civil Liability Act. However, the claimant in a Compensation to Relatives Act action does not have the same meaning as 'claimant' in s 12 of the Civil Liability Act. In a Compensation to Relatives Act claim the claimant is usually the spouse or child of the deceased. In a Civil Liability Act claim

the claimant is the person who has suffered loss or damage. The Civil Liability Act looks to the gross weekly earnings of the claimant to determine whether their entitlement to damages is limited. This is not the case in a Compensation to Relatives Act action, where the claimant's income is generally not relevant and the deceased person's gross average weekly earnings is not capped by reference to s 12(2) of the Civil Liability Act.

The majority expressed the view that the purpose of s 12 of the Civil Liability Act was to limit the component of an award of damages that is determined by reference to a claimant's high earnings in a claim for personal injury damages brought by or on behalf of high-earning individuals.

On no view in this case could the deceased, Mr Taylor, be considered to be the 'claimant' and as such no limitation should be applied to the deceased's gross weekly earnings.

Purposive statutory construction

Mrs Taylor argued that the NSW Court of Appeal had erred by not giving s 12(2) of the Civil Liability Act its ordinary grammatical meaning.

The majority of the High Court agreed.

The respondents to the High Court appeal contended that s 12(2) of the Civil Liability Act should be given a *purposive interpretation* and as such, words should be added to the section to ensure that the legislative purpose was upheld.

The primary judge in the Supreme Court took the view that the legislative purpose of s 12(2) was to 'limit claims for tortiously caused damage, and to restrict financial loss claims for high-earning individuals'.

As such, the phrase in s 12(2) – 'the claimant's gross weekly earnings' means 'the gross weekly earnings on which *the claimant relies*'.

The majority of the High Court did not support this approach and took the view that the word 'claimant' should be given its ordinary meaning, that is, a person who makes or is entitled to make a claim.

In the majority's view a purposive construction of the word 'claimant' may allow the reading of a provision as if it contained additional words or omitted certain words with the effect of expanding its operation. However, the High Court concluded that any modified meaning must be entirely consistent with the language actually used by the legislature. If a purposive construction is given that departs too far from the statutory text it could violate the separation of powers in the Australian Constitution (citing *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389). The minority High Court judges (Gageler and Keane JJ) agreed with the conclusion reached by Justice Garling at first instance and by the majority in the Court of Appeal, although noted that their reasoning differed slightly from that of the majority in the Court of Appeal in that their Honours considered that the construction adopted by the majority in the Court of Appeal was 'very strained'.

In their view, damages recoverable under the Compensation to Relatives Act are plainly 'personal injury damages' in respect of which Part 2 of the Civil Liability Act applies and the damages that Mrs Taylor was seeking should be limited to three times the average weekly earnings. Their preferred construction of s 12(2) was to construe the reference in s 12(2) to 'the claimant's gross weekly earnings' as a reference to the gross weekly earnings *on which the claimant relies* in the claim for damages that is the subject of an award of damages, rather than the gross weekly earnings of the person who happens to be the claimant.

Conclusion

The High Court has clarified that s 12(2) of the Civil Liability Act does not limit a claimant's entitlement to damages under the Compensation to Relatives Act.

The High Court also clarified that while a purposive approach to statutory interpretation is permissible the proposed modified meaning of the statute must be consistent with the actual language used by the legislature.

'I love you … I want you to have a home here with me': Proving reliance in proprietary estoppel

Rachel Mansted reports on *Sidhu v Van Dyke* [2014] HCA 19 (Court of Appeal *Van Dyke v Sidhu* (2013) 301 ALR 769; Supreme Court *Van Dyke v Sidhu* [2012] NSWSC 118).

A scenario which would not have been out of place on the Jerry Springer Show provided rich material for the High Court in a recent judgment on proprietary estoppel.

Ms Van Dyke lived with her son and husband in Oaks Cottage, on part of a large rural property, Burra Station. Mr Sidhu and his wife lived in the main house on the property, and owned Burra Station as joint tenants. Mr Sidhu's wife and Ms Van Dyke's husband were brother and sister. When Ms Van Dkye commenced an intimate relationship with Mr Sidhu, her husband soon left the property and after separation, a divorce was finalised. Ms Van Dyke and Mr Sidhu continued their relationship between 1997 and 2006. During this time, Mr Sidhu's wife remained on the property, and Ms Van Dyke continued to live in Oaks Cottage with her son. Mr Sidhu, on several occasions throughout the relevant period, made clear statements (some in writing) to Ms Van Dyke to the effect that he wished her to have Oaks Cottage. He even promised to rebuild the cottage and gift it to her, after the cottage accidentally burned down in early 2006. In mid-2006, the relationship between Mr Sidhu and Ms Van Dyke came to an end.

During the time she lived in Oaks Cottage, considering that it would one day be transferred to her, Ms Van Dyke did not seek full time employment, and carried out significant repair and maintenance work on the cottage and other parts of the rural property for no remuneration. She did not seek a property settlement in the divorce from her husband, on the strength of Mr Sidhu's assurance that she did not need a settlement, because Oaks Cottage was now hers.

All five members of the High Court decided that Ms Van Dyke was entitled to equitable compensation for Mr Sidhu's failure to transfer title to the Oaks Cottage. The two issues in the case were whether Ms Van Dyke had sufficiently proved the element of detrimental reliance required to make out an estoppel; and if so, what was the appropriate basis for equitable compensation in circumstances where the property was not Mr Sidhu's to give.

The courts below – a portable palm tree

Justice Ward at first instance held that reliance was not made out. Her Honour held that it was 'entirely possible that [Ms Van Dyke] would have remained living on the property, carrying out tasks on the property (even if not to the extent of the work she in fact carried out) and working part-time, whether or not the promises had been made.'[1] There was therefore no detriment, given Ms Van Dyke was likely to have done all these things regardless of the promises made by Mr Sidhu. Ward J quoted from an English decision where it was bluntly opined that, if the court had a jurisdiction to hold people to mere moral obligations, 'one might as well forget the law of contract and judge every civil dispute with a portable palm tree.'[2]

Ward J's decision was reversed by the Court of Appeal, on the basis that the promises alleged by Ms Van Dyke were of a nature to create a presumption of reliance, being 'commonsense and rebuttable presumption of fact that may arise from the natural tendency of a promise'.[3] Barrett JA (with whom Basten JA and Tobias AJA agreed) said that, 'Where inducement by the promise may be inferred from the claimant's conduct, as is the case here, the onus or burden of proof shifts to the defendant to establish that the claimant did not rely on the promise'.[4] Mr Sidhu could not show that Ms Van Dyke did not rely on his promises to her detriment.[5]

In relation to relief, the Court of Appeal declined to order Mr Sidhu to take all necessary steps to procure the actual transfer of the land. This would have involved both obtaining his wife's consent, given they were joint tenants; and council approval for the subdivision. Instead, equitable compensation was awarded, to be measured by a 'sum equal to the value [Ms Van Dyke] would now have had the promises been fulfilled.'[6]

Onus of proof in the High Court – no reversal for reliance

Mr Sidhu appealed to the High Court, submitting that the Court of Appeal had improperly reversed the onus of proof in relation to detrimental reliance. The High Court agreed, holding that the authorities relied on by the Court of Appeal as supporting a presumption of reliance did not do so, and that Ms Van Dyke had the burden of proof in all circumstances.[7]

Nevertheless, the appeal was disallowed, on the basis that Ms Van Dyke had (contrary to Ward J's findings) met the onus of proof for detrimental reliance. In so finding, the High Court reviewed 'the whole of the evidence' that was before the primary judge, to show that Ms Van Dyke had made out 'a compelling case of detrimental reliance'.[8]

The High Court pointed to four reasons why Ms Van Dyke's case on detrimental reliance was made out. First, it was likely 'as a matter of the probabilities of human behaviour' that Ms

Van Dyke's evidence – to the effect that she made certain decisions on the basis of the promises by Mr Sidhu – was true.[9] Second, Ward J's finding that Mr Sidhu's promises 'played a part' in Ms Van Dyke's willingness to spend time and effort on maintenance warranted the conclusion that she had discharged the onus, notwithstanding that the promises were not the sole inducement for this course of conduct.[10] Third, the fact that Ms Van Dyke had, from time to time, displayed a concern that Mr Sidhu honour his promises (it is assumed the court is here referring to the requests for Mr Sidhu to commit to the promises in writing), indicated that the promises were material to Ms Van Dyke's choices.[11] Finally, the court found the applicant's argument, that the promises were 'not a real inducement' to Ms Van Dyke's decision to conduct herself as she did, was simply 'not compelling', following a review of the key parts of her testimony under cross-examination.[12] The High Court recast the question about reliance, asking 'Whether the respondent would have committed to, and remained in, the relationship with the appellant, with all that that entailed in terms of the effect upon the material well-being of herself and her son, had she not been given the assurances made by the applicant.' The court found that it was likely Ms Van Dyke would have conducted herself differently had Mr Sidhu told her, when she elected to remain on the property after her divorce, that she would only remain on the property while it suited him and his wife.[13]

Promising the moon – the measure of relief

At the time of hearing, Mr Sidhu's wife would not consent to the transfer of their jointly held land, and the council had not yet approved the subdivision of the property. This formed part of Mr Sidhu's argument that his promises to Ms Van Dyke were conditional and could not form the basis for reliance. The High Court disagreed, holding that what he had represented to Ms Van Dyke was that he would procure the consent of his wife and the subdivision of the property. In circumstances where Mr Sidhu could not achieve these things, the High Court affirmed the decision of the Court of Appeal to order equitable compensation, rather than requiring Mr Sidhu to take active steps to ensure the transfer of property.[14]

Side note – an unrepresented litigant wins the day

Ms Van Dyke's claim started inauspiciously. Unrepresented in the Supreme Court, her claim was struck out by Gzell J, on the basis that Mr Sidhu's wife was not a party, and the promise was only to be fulfilled when the land had been subdivided.[15] However, the Court of Appeal – Young JA (with whom Bathurst CJ and Hodgson JA agreed) – set aside the orders of Gzell J, on the grounds that the learned primary judge 'reacted too quickly' in striking out the claim. The Court of Appeal found that Gzell J should have considered the material more carefully and concluded that it was possible for Ms Van Dyke to succeed.[16]

Endnotes

1. *Van Dyke v Sidhu* [2012] NSWSC 118 at [204].
2. *Taylor v Dickens* [1998] 1 FLR (Eng) 806; in Van Dyke v Sidhu [2012] NSWSC 118 at [261].
3. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [79].
4. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [83].
5. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [103]
6. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [138], [140].
7. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [55], [61].
8. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [67].
9. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [69].
10. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [70]-[73].
11. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [74].
12. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [75].
13. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [76]-[77].
14. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [86].
15. *Van Dyke v Sidhu* [2011] NSWSC 167 at [38].
16. *Van Dyke v Sidhu* [2011] NSWCA 187 at [13]-[14], [19].

Legal professional privilege and national security

Stephen Tully reports on *Timor-Leste v Australia.*

International Court of Justice. Photo: the Peace Palace Library, International Court of Justice.

Can federal investigative agencies covertly acquire your legal advices and other communications sent to your client – which you assume to be protected from disclosure by privilege – without your knowledge or permission for national security reasons? Under Australian common law, yes. National security is capable of falling under the crime or fraud 'exception' so as to abrogate privilege. The same conclusion is likely under international law. This note explores recent proceedings where this issue was put by Australia to the International Court of Justice (ICJ or Court) in light of Australian common law and recent law reform developments.

The proceedings in Timor-Leste v Australia

The question whether legal professional privilege can be abrogated by national security under international law arose for consideration in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*. In late 2013 the Australian Security Intelligence Organisation (ASIO) executed search warrants on the Canberra premises of the legal adviser to the Democratic Republic of Timor-Leste (Timor-Leste). Timor-Leste sought provisional orders (that is, interim measures of protection) before the ICJ, the principal judicial organ of the United Nations (UN), claiming that the confidential documents and data seized by Australia related to its legal strategy in a pending Timor Sea Treaty Arbitration between the two states and its future maritime negotiations with Australia. The subject matter of that arbitration included allegations, reported in the Australian media, that Australia had committed espionage in relation to Timor-Leste's position during negotiations for a treaty concerning maritime rights in the Timor Sea. The allegations referred to a witness who was said to be a former Australian intelligence officer.

In its submissions, Australia expressed concern that an Australian intelligence officer may have committed an offence under Australian law by disclosing that Australia had allegedly conducted espionage against Timor-Leste during treaty negotiations. It contended that, even if there was an international legal principle akin to legal professional privilege, such a principle was inapplicable when the communication concerned the commission of a crime or fraud, threatened national security or the public interests of a state, or undermined the proper administration of justice. Australia's argument reflected the common law position.

Legal professional privilege under the common law

Legal professional (or client legal) privilege attaches to confidential communications between clients and lawyers made for the dominant purpose of giving and receiving legal advice, or for use in existing or anticipated litigation. The rationale for the privilege is furthering the administration of justice by fostering trust and candour in the lawyer-client relationship.[1] However, the protection afforded by the privilege only attaches to communications intended for a proper or lawful purpose.

Privilege cannot be claimed over communications that frustrate legal processes.[2] Nor can privilege be used to protect communications made to further deliberate abuses of statutory power.[3] These communications are not within the ordinary scope of professional employment.

Privilege does not attach to communications made to further the commission of an offence or fraud. For example, a search warrant executed in *Propend Finance* concerned privileged material concerning tax evasion.[4] The improper and dishonest purpose considered in *AWB Limited* was knowingly and deliberately inflating transportation prices to work a trickery on the UN contrary to international and Australian sanctions regimes.[5] In the latter case, Young J concluded that expression of the principle by reference to communications that facilitated a crime or fraud did not capture its full reach. The principle encompassed a wide species of fraud, criminal activity or actions taken for illegal or improper purposes. The scope of conduct included all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery, and sham contrivances.

The crime or fraud exception would include offences against national security. Given the broad scope of the exception, committing a national security offence would, by reason of that illegality or impropriety, be sufficient to displace the privilege under Australian common law.

Covert investigations and abrogating privilege

A further issue that confronted the ICJ and has already received attention from Australian law reform organisations and legal institutions is whether covert federal investigations for national security purposes can abrogate privilege.

Some federal agencies, including ASIO, possess covert powers including the power to search and seize documents and things.[6] Their enabling legislation does not contemplate a national security exception for privileged material.[7] Because targets are unaware that information is being accessed, there is no opportunity to assert privilege at the time of access. Notifying targets may prejudice an investigation.

Concerns have been expressed in the United states that privilege is being eroded under the rubric of national security.[8] Following press reports of foreign government surveillance of American lawyers' confidential communications with overseas clients and the sharing of privileged information with the National Security Agency (NSA), the president of the American Bar Association (ABA) expressed his concerns to the NSA.[9] The NSA responded that it was firmly committed to the rule of law and the bedrock principle of attorney-client privilege.[10] It stated that it had and would continue to protect privileged communications in accordance with legislated privacy procedures.

In 2007 the Australian Law Reform Commission (ALRC) proposed that, in special circumstances, the Australian Parliament may legislate to abrogate client legal privilege in relation to federal investigations.[11] Abrogation could be justified on several grounds, including where the nature and gravity of the matter was one of major public importance such as national security. The ALRC concluded that abrogation was appropriate where there was a higher competing public interest.[12] Where exceptional circumstances existed, parliament could legislate to abrogate the privilege for a particular investigation undertaken by, or a particular power of, a federal body.

...states who are settling an international dispute by peaceful means could expect that the preparation and conduct of their case is conducted without interference.

It is difficult to contend that national security is not a significant public interest. However, the effects of encroaching upon legal professional privilege in service of national security are difficult to assess.[13] Unrestricted communication between a lawyer and client is necessary for the proper functioning of the legal system. If inroads can be made by invoking a higher public interest, in such a way as to exclude the opportunity to assess the competing interests, then application of the privilege becomes uncertain and the underlying policy is effectively undermined.[14] Such challenging questions were neatly sidestepped by the ICJ.

The ICJ's provisional measures order

The majority of the ICJ was satisfied at this stage of the proceedings that Timor-Leste's claimed rights were plausible.[15] The asserted inviolability of a state's right to confidentially correspond with its lawyers could be derived from the sovereign equality of states. states who are settling an international dispute by peaceful means could expect that the preparation and conduct of their case is conducted without interference.

Australia had also argued that there was no risk of irreparable prejudice to Timor-Leste's rights following several undertakings

provided by the attorney-general, the effect of which were to limit the use of the information to national security purposes and ring-fence the information from those involved in negotiations regarding resource exploitation, the ICJ proceedings or the Timor Sea Treaty Arbitration.

A majority of the court reasoned that the undertakings significantly contributed to mitigating the imminent risk of irreparable prejudice created by seizure of the material to Timor-Leste's rights, but did not eliminate this risk entirely. There remained a risk of disclosure because Australia envisaged the possibility of using this confidential and sensitive information in circumstances involving national security. Any breach of confidentiality might be incapable of remedy or reparation. Furthermore, the confidentiality of Timor-Leste's communications with its lawyers was left unaddressed.

Australia was ordered to keep the seized material under seal, ensure that it was not used to Timor-Leste's disadvantage and not to interfere in communications between Timor-Leste and its legal advisers. These orders are binding upon Australia.

Only Judge ad hoc Callinan explicitly considered Australia's submissions in relation to exceptions to the privilege, considering it unlikely that any state would treat national security as inferior, or subject to, legal professional privilege.[16] Judge ad hoc Callinan also considered the undertakings proffered by Australia to be sufficient for the circumstances of the case.[17]

Conclusions

The ICJ accepted, on a provisional basis, that a state has a right to conduct arbitration or negotiations without external interference, including the right of confidentiality when communicating with its lawyers. It is probable that, like the position under Australian common law, national security is a lawful reason for abrogating legal professional privilege under international law. However, as Judge ad hoc Callinan cautioned, the extent to which there is a settled principle of legal professional privilege under international law, and moreover immunity to any limitation in an international or national interest, requires further analysis. Assuming the ICJ will find it has jurisdiction, it is hoped clarification will occur at the merits phase of these proceedings.

Endnotes

1. *Attorney-General for the Northern Territory v Maurice* [1986] HCA 80; (1986) 161 CLR 475, 487 (Mason and Brennan JJ).
2. *R v Bell; Ex parte Lees* [1980] HCA 26; (1980) 146 CLR 141.
3. *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500.
4. *Commissioner Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501.
5. *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234, (2006) 155 FCR 30 [210]-[212] & [229].
6. E.g., s 25, *Australian Security and Intelligence Organisation Act 1979* (Cth).
7. Legal professional privilege is not abrogated by statute without a clear indication that was intended: *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52.
8. E.g., Cohn M, 'The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001' (2003) 71(4) Fordham L Rev 3.
9. Letter from J Silkenat, President, American Bar Association (ABA) to General K Alexander, Director, and R De, General Counsel, National Security Agency (NSA), 20 February 2014.
10. Letter from General K Alexander, Director, NSA to J Silkenat, President, ABA, 10 March 2014.
11. Australian Law Reform Commission (ALRC), Discussion Paper 73: *Client Legal Privilege and Federal Investigatory Bodies*, 2007, Proposal 6.1 & [6.151].
12. ALRC, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* [2007] ALRC 107, [6.136], [6.142]-[6.143].
13. *Carter v The Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121, 157 (Toohey J).
14. *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500, 53 (Dawson J).
15. International Court of Justice, Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia), Order on Request for the Indication of Provisional Measures, 3 March 2014, [26] & [28].
16. Dissenting opinion of Judge ad hoc Callinan, [26].
17. Dissenting opinion of Judge ad hoc Callinan, [21], [31].

The change of position defence

Tom O'Brien reports on *Australian Financial Services Ltd v Hills Industries Ltd* [2014] HCA 14.

For most, the High Court's decision in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*[1] provides welcome clarification of the rationale, scope and application of the defence of change of position in restitution claims. For some unjust enrichment enthusiasts, particularly those across the globe, the decision may cause some consternation.

Facts

A fraudster procured payments by Australian Financial Services and Leasing Pty Ltd (AFSL) to two companies, Hills Industries Ltd (Hills) and Bosch Security Systems Pty Ltd (Bosch). AFSL were defrauded into believing they were purchasing equipment from Hills and Bosch. Hills and Bosch were defrauded into believing that AFSL's payments were being made to discharge the fraudster's outstanding debts.

After receipt of the money, both Hills and Bosch:

- treated the fraudster's debts as discharged;
- recommenced trading with the fraudster; and
- refrained from taking steps they otherwise would have taken to enforce the debts. In particular, Bosch consented to the setting aside of default judgments and discontinued proceedings in respect of the fraudster.

After six months, AFSL discovered the fraud and demanded repayment from Hills and Bosch on the basis that the payments had been made by mistake. The demand was rejected by Hills and Bosch, so AFSL instituted proceedings for recovery of the payments. By that time the fraudster was insolvent.

Issue

The issue before the High Court was whether ASFL's claim for recovery of the monies paid by mistake should be refused because Hills and Bosch had changed their position upon receipt of that money. AFSL submitted that any change of position must be valued, and that the defence should only operate to the extent of that value. For example, if $10 is mistakenly paid, and the recipient in reliance on that payment gives $2 to charity, the remaining $8 should still be recoverable, as opposed to the recipient's partial change of position acting as a complete bar to recovery.[2]

High Court decision

The High Court unanimously dismissed the appeal, holding that the defence of change of position provided a complete defence to AFSL's restitutionary claims. Three judgments were delivered: French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ; and Gageler J.

Three points of importance are highlighted for the purpose of this short note.

First, the High Court indicated that the ultimate question in determining whether the defence is available is whether recovery of the money would be inequitable[3] or unconscionable.[4] One circumstance in which recovery will be inequitable or unconscionable is where the recipient has changed their position by relying on the receipt of the money in good faith by taking certain actions or by omitting to act, such that they will suffer substantial detriment if they are required to return the money received. For this purpose, the plurality noted the relevance of the 'equitable doctrine concerning detriment' in connection with estoppel.[5] Gageler J almost[6] went a step further, to find that the defence of change of position was merely a particular application of the doctrine of estoppel. According to his Honour, this step would avoid uncertainty in defining the scope of the defence and difficulties reconciling it with estoppel.[7]

Second, for the purposes of the defence, detriment is not a narrow or technical concept,[8] so that it need not consist of expenditure of money or other quantifiable financial detriment.[9] Gageler J stated:[10]

> Material disadvantage must be substantial, but need not be quantifiable in the same way as an award of damage. Material disadvantage can lie in the loss of a legal remedy, or of a 'fair chance' of obtaining a commercial or other benefit which 'might have [been] obtained by ordinary diligence" (Footnotes removed).

As the enforcement opportunities forgone by Hills and Bosch were substantial, they were sufficient to ground the defence, despite not being easily quantifiable. [11] It was held that it was not appropriate for the court to attempt to quantify such detriment in the same way as an award of damages. Where such detriment could not be easily quantified, the change of position provided a complete answer to the restitutionary claim. [12] However, according to French CJ and Gageler J, where detriment could be easily quantified, the defence may operate pro tanto, so that a payer may recover the money paid, less the monetary detriment incurred by the recipient.[13]

Third, the High Court reaffirmed that in Australia, restitutionary claims and defences are rooted in equity, not unjust enrichment and the corresponding concept of 'disenrichment'. The plurality stated (at [78]):

> The principle of disenrichment, like that of unjust enrichment, is inconsistent with the law of restitution as it has developed in Australia.

...the High Court reaffirmed that in Australia, restitutionary claims and defences are rooted in equity, not unjust enrichment and the corresponding concept of 'disenrichment'.

This aspect of the decision was bemoaned by Professor Graham Virgo of Cambridge University, who queried the continuing significance of unjust enrichment in Australian law. In more strident terms, Professor Virgo questioned whether the equitable basis for restitution had any content, likening Australia's use of 'the old language of conscience' to: [14]

> nothing more than Hans Christian Andersen's Emperor, albeit one who thinks he is wearing old clothes, but is actually wearing nothing at all.

As to the continuing significance of unjust enrichment in Australia, in *Lampson (Australia) Pty Ltd v Fortescue Metals Group (No 3)* [2014] WASC 162, Edelman J considered the impact of the High Court's decision in Hills Industries. In a feat of judicial efficiency, no doubt taking advantage of the time difference between Canberra and Perth, Edelman J delivered that judgment on the same day that Hills Industries was handed down (7 May 2014). On the continuing role of unjust enrichment in Australia, his Honour explained that:

> [p]rovided that unjust enrichment is not applied as a direct source of liability, in Australia the taxonomic category of unjust enrichment has served a useful function and might continue to do so. Like the category of 'torts' the category of unjust enrichment assists in understanding even though it is not a direct source of liability. The category directs attention to a common legal foundation shared by a number of instances of liability formerly concealed within the forms of action or within bills in equity.

This is consistent with recent statements of the High Court on the role of unjust enrichment.[15] The role of unjust enrichment in Australia continues to be distinct from that in the United Kingdom. Hills Industries is merely confirmatory in that respect.

As to the content of the inquiry into whether retention of money will be inequitable or unconscionable, the plurality emphasised:[16]

> This is not to suggest that a subjective evaluation of the justice of the case is either necessary or appropriate. The issues of conscience which fall to be resolved assume a conscience 'properly formed and instructed'[17] by established equitable principles and doctrines.

To adopt and adapt Professor Virgo's analogy, Australia's law of restitution is wearing old clothing, which has been, and will continue to be, altered and patched 'on a case-by-case basis' so enabling it 'to meet changing circumstances and demands'.[18]

Endnotes

1. [2014] HCA 14; (2014) 307 ALR 513; 88 ALJR 552.
2. See the example given by French CJ at [28].
3. French CJ at [23].
4. Hayne, Crennan, Kiefel, Bell and Keane JJ at [69].
5. at [84].
6. His Honour found it unnecessary to finally decide the question: [156].
7. at [155].
8. [24] (French CJ); [88] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ)
9. [24] (French CJ); [88] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [150] (Gageler J).
10. at [150].
11. [30] (French CJ); [83] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [150] (Gageler J).
12. [31] (French CJ); [96] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [158] (Gageler J).
13. [17] and [28] (French CJ); [153] - [154] (Gageler J).
14. Graham Virgo, 'Conscience or Unjust Enrichment?: The Emperor's Old Clothes: *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*' on Opinions on High (19 May 2014) <http://blogs.unimelb.edu.au/opinionsonhigh/2014/05/virgo-hills-industries/>
15. For example: *Roxborough v Rothmans of Paul Mall Australia Ltd* (2001) 208 CLR 516 at [74] (Gummow J); *Bofinger v Kingsway Group* (2009) 239 CLR 269 at [88] – [89] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* (2012) (2012) 246 CLR 498 at [30] (French CJ, Crennan and Kiefel JJ).
16. [76] (French CJ, Crennan and Kiefel JJ).
17. *Citing ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [45].
18. *Commonwealth v Verwayen* (1990) 170 CLR 394 at 443 (Deane J), cited with approval by the plurality in Hills Industries at [98].