“Well hidden” equity - four equity eucalypts

This column is about lengthy first instance judgments, often involving many parties, which are predominantly directed to resolving issues of fact and applying well-settled rules and principles of law, but which may also contain useful analysis of equitable principle on unsettled or unfamiliar topics.

The distinctive flower buds collected from Bruny Island in Tasmania on Cook's third, fatal, voyage were named “eucalypt” in 1788,[1] from the Greek ευ (the adverb seen in euphoric or euphonious or eulogy) and the participle καλυπτος (which is cognate with calyx and incorporated in Calypso's name in the Odyssey). Some substantial first instance judgments resemble those “well hidden” flower buds. Many first instance judgments are necessarily lengthy, in order to address the evidence and resolve factual contests. Nonetheless, those judgments may also record and resolve legal arguments of broader interest, which can be hidden hundreds of paragraphs within the reasons of the trial judge. Such judgments are rarely reported, and although readily available online, their sheer length leads to the potentially important parts of the reasoning being easily overlooked. Such judgments may be useful if for no other reason than they restate and apply relatively unfamiliar principles. Occasionally, they may go further and decide an unresolved issue. Even though the judgment may be subject to appeal, they may be useful, including to practitioners from other jurisdictions.

Such well hidden passages are the subject of this note. The selection process was simple: I looked for large first instance judgments delivered in the last 6 weeks with catchwords suggestive that they might fall within the scope of this column. I stopped after finding four, owing to the limitations of this column. Doubtless there are other judgments which might have been chosen, a point to which I shall return. My purpose is neither to endorse nor to criticise, but merely to alert readers to the existence of these judgments.

Subrogation, laches and unclean hands

I start with three judgments of 425, 893 and 395 paragraphs delivered at the end of June and beginning of July 2021. Each deals with a relatively unfamiliar area of the law.

1 By the French botanist Charles Louis L'Héritier de Brutelle. Very fine images of the pages of his work *Sertum Anglicum seu Plantae Rariores* (Paris, 1788) showing his description, his attribution to William Anderson, the senior botanist on the voyage, and of the plant itself (studied by him at Kew) may easily be seen at the website of the Bibliotheque nationale de France https://gallica.bnf.fr/ark:/12148/bpt6k9818871b/f68.item and https://gallica.bnf.fr/ark:/12148/bpt6k9818871b/f69.item

First, there is no right of subrogation to a mortgage, generally speaking, until the whole of the mortgage debt is paid. But what is the position where some but not all of the liability has been paid? Although the right of subrogation to a creditor's securities is be nascent and cannot presently be exercised, is there presently an interest such as may be supported by a caveat? *Nguyen v Sage Consultant Group Pty Ltd; Dang v Nguyen*[2] considers that issue,[3] as well as the relationship between writs and caveats which prohibit the registration of a writ or the registration of dealings recording transactions made in execution of a writ.[4]

Second, laches is often pleaded as a defence to an equitable claim but seldom made out. The defence was made out in *Wright v David John Neale Lemon as executor of the estate of Michael John Maynard Wright [No 2]*, and paragraphs [844]-[860] address the governing principles, distinguishing between those cases which turn on waiver implied by conduct (which arise when the plaintiff has knowledge of the claim) and those which turn on delay coupled with detrimental reliance (which do not turn on the plaintiff's knowledge).[5]

[103] Third, in *Break Fast Investments Pty Ltd v Rigby Cooke Lawyers (a firm)*,[6] as well as an analysis of more familiar areas concerning breach of fiduciary duty and causation, there is an extensive consideration of the discretionary defence of unclean hands.[7] The decision also holds that contributory negligence is inapplicable to a claim for knowing receipt of trust property.[8]

Joint liability of second limb *Barnes v Addy* defendants and the release rule

Less commonly, a first instance judgment will determine an unsettled question of principle. Some questions tend only to arise in the type of large multipartite litigation that is associated with lengthy judgments, and once again may be well hidden in the hundreds of paragraphs dealing with evidence.

It is not uncommon for multiple defendants to be sued as knowing assistants to a breach of fiduciary duty. Is their liability to compensate the plaintiff joint, or several, or joint and several? That may

2 [2021] NSWSC 753 (Robb J).
3 *Nguyen* at [258]-[269].
4 *Nguyen* at [321]-[335].
5 [2021] WASC 159 (Le Miere J).
6 [2021] VSC 398 (Macaulay J).
7 *Break Fast* at [332]-[355].
8 *Break Fast* at [384]-[386].

matter if the plaintiff has given a release, as opposed to a promise not to sue, and it is said that the release operates to discharge the jointly liable defendant.[9] However, that traditional rule of the common law, linked with the notion that “where there was a joint tort there could be only one action and one judgment for the whole amount of damages to which the plaintiff was entitled”,[10] does not sit well with equitable liability of multiple defendants between whom contribution was available.

There are quite a few complexities in this area.

- One is that a plaintiff may have to elect between requiring the fiduciary and/or the third party to restore an asset, or to compensate the plaintiff, or to account for profits.
- A second is that the third party may be regarded as the “alter ego” of the fiduciary (for example, where a director diverts a corporate opportunity into a company owned and controlled by the director);[11] there is a strong argument in such cases for the liability of the fiduciary and the fiduciary's alter ego to be joint and several.
- A third is that the law recognises a difference between a third party who is merely knowingly involved in a dishonest breach of fiduciary duty, and a third party who procures a breach of fiduciary duty.[12] The latter is in substance treated as a primary wrongdoer, who is more likely to be jointly liable.
- A fourth is that liability for knowing assistance has a different doctrinal foundations in Australia and in the United Kingdom. In Australia, it turns upon a requisite level of involvement in and knowledge of a fiduciary's breach which amounts to a “dishonest and fraudulent design”. In the United Kingdom, the breach by the fiduciary need not be dishonest, but the involvement of the third party must be.[13]
- A fifth may be, in an appropriate case, the application of proportionate liability legislation.[14]

The joint judgment in *Michael Wilson & Partners Ltd v Nicholls* stated that “relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum”.[15] That is because the liability is imposed directly upon a person who knowingly assists in a [104] breach of fiduciary duty, independently of the claim (if any) that is made against

9 As as explained in *Lavin v Toppi* (2015) 254 CLR 459; [2015] HCA 4.
10 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 581.
11 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 at [243].
12 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; [2014] NSWCA 266 at [76]-[78].
13 See L Tucker et al, *Lewin on Trusts* (20th ed 2020, Sweet & Maxwell), Vol 2, p 821.
14 See A Gurr, “Accessory Liability and Contribution, Release and Apportionment” (2010) 34 *Melbourne University Law Review* 481 at 511-518.
15 (2011) 244 CLR 427; [2011] HCA 48 at [106] (Gummow ACJ, Hayne, Crennan and Bell JJ).

the fiduciary. As the joint judgment explained:[16]

> "the claimant may seek compensation from the defaulting fiduciary (who made no profit from the default) and an account of profits from the knowing assistant (who profited from his or her own misconduct). And if an account of profits were to be sought against both the defaulting fiduciary and a knowing assistant, the two accounts would very likely differ."

It is plain that liability to account for profits will at least generally be several, but what of compensation for loss? These issues were debated in very substantial proceedings in the Equity Division of the Supreme Court of New South Wales in *In the matters of Earth Civil Australia Pty Ltd, RCG CBD Pty Ltd, Bluemine Pty Ltd, Diamondwish Pty Ltd and Rackforce Pty Ltd (all in liq)*.[17] The judgment occupies 2784 paragraphs.[18] Seemingly, only in the second last week of a 7 week hearing, after one of the defendants had retained new senior counsel, an application was made to amend the defence to rely upon releases which had been given by the plaintiffs in related proceedings. That led to a "cascade of similar applications" by other defendants who had also been sued for knowing involvement in a breach of fiduciary duty and leave was granted.[19]

The reasons contain a valuable collection and analysis of much recent Australian and United Kingdom authority, including academic literature.[20] Her Honour's conclusion at [2445] was that "the implication arising from *Michael Wilson v Nicholls* is that the liability of a fiduciary and accessory to pay equitable compensation is several only", save in cases falling within the "alter ego" and "acting in concert" exceptions. Her Honour's further conclusions were even if the liability were joint and several, that s 95 of the *Civil Procedure Act 2005* (NSW) abrogated the rule (even in the cases of persons who were acting in concert or were alter egos),[21] and still further that "even if s 95 does not impliedly abrogate the release rule, courts of equity should not follow the release rule, which is derived generally from the unitary cause of action against joint debtors and tortfeasors".[22]

More eucalypts in the future?

Judging by how readily the decisions mentioned above were located, it seems likely that there are others which contain well hidden analyses of equitable principle which are less well known than

16 *Michael Wilson* at [106].

17 [2021] NSWSC 966 (Ward CJ in Eq).

18 A better gauge of its length, because many of the individual paragraphs are far from short, is that it is more than 310,000 words, which is to say, more than half the length of *War and Peace.*

19 *Re Earth Civil* at [551]-[565].

20 To which may be added references to J Dietrich and P Ridge, *Accessories in Private Law* (Cambridge University Press, 2015) pp 299-303 and P Davies, *Accessory Liability* (Hart Publishing, 2015), pp 271-272 (the latter addresses the United Kingdom position).

21 *Re Earth Civil* at [2471].

22 *Re Earth Civil* at [2472]-[2485].

they ought to be. Such judgment pose challenges for traditional law reporting, notwithstanding examples such as *Burger King Corporation v Hungry Jacks Pty Ltd* (which reports just under 100 paragraphs of a 763 paragraph judgment, omitting [48]-[140] and [188]-[761]).[23] Readers are invited to supply references to judgments which contain passages of analysis of equitable principle which would be of utility to the profession, which might be summarised in a future column. There is no harm in cultivating a stand of eucalypts.

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23 (2001) 69 NSWLR 558.