

LEGAL BITES - 15 APRIL 2007

1. LOFTHOUSE v BAXTER & ANOR

[2007] FMCA 435

TOPIC: *Bankrupt applied to Court to rule that Trustee's counsel could not appear for conflict of interest as she had earlier tried to retain him for herself.*

To understand whether or not there is indeed a conflict of a kind which might present a difficulty, it is also relevant to note the authority referred to by Counsel for Mr Gardiner of the decision of Hayne J in the *Farrow Mortgage Services Pty Ltd v Mendall Properties Pty Ltd and Others* (1995) 1 VR (Farrow) at page 6 where His Honour states:

"The plaintiff's submissions described the information that "must have been received" in the course of the retainer as being information about the accounting and financial arrangements of F.M.S. However, it is by no means clear what is encompassed by this description. In particular it is by no means clear to me what is the information that I am asked to conclude that the firm received in the course of its retainer that was confidential at the time that it was given to the firm and remains confidential. Both sides accepted it was necessary for the plaintiff to show that confidential information had been imparted which related to the matters the subject of the present action and accordingly the plaintiff's submissions focussed upon "accounting and financial information" that related to the defences of illegality and sham. Thus reference was made to the flow of funds between the building societies and F.M.S. and the borrower but, at least as I understood them, the plaintiff's submissions never articulated what information it was said that I should conclude had been conveyed to the firm by the plaintiff in the course of the earlier retainer and that was information relating to these matters which still remains confidential."

"It is clear in the decisions of Gillard J to which I have referred and Hayne J in *Farrow*, that an essential task for the Court to perform in considering an application of this kind is to seek to identify and establish that there was some confidential information provided relevant to the substantive application."

2. *Commonwealth Bank of Australia v Clune*, [2007] NSWSC 305; Assoc. Justice Harrison.



TOPIC: Motion by one defendant to set aside a default judgment; proposed defence under Contracts Review Act and the Uniform Consumer Credit Code – unjust contract made with lender; Plaintiff is seeking summary judgement against other defendant. Key principles reviewed.

SUMMARY JUDGMENT

In the well known passage in **General Steel Industries Inc v Commissioner for Railways (NSW)** (1964) [112 CLR 125](#), Barwick CJ at 129 stated:

"It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action - if that be the ground on which the Court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense.'"

SET ASIDE DEFAULT JUDGMENT

One of the considerations to be taken into account when determining whether default judgment should be set aside was expressed by Priestley JA in **Cohen v McWilliam** [\[1995\] 38 NSWLR 476](#) at 481 quoting from the Federal Court in **Davies v Pagett** (1986) [10 FCR 226](#):

"It is, however, another question whether concern about the extent of delays, either in a particular case or generally, should, in the absence of prejudice in the particular case, be taken into account in exercising a discretion to set aside a default judgment. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed. The temptation to impose a limitation through motives of professional discipline or general deterrence is readily understandable; but, in our opinion it is an erroneous exercise of the relevant discretion to yield to that temptation..."

13 For the defendant to succeed in his or her application to set aside default judgment, they must give an adequate explanation for the delay in filing their defence and show that they have a defence on its merits. A Court, when hearing such an application, must be mindful of its fundamental duty to do justice between the parties.

I am satisfied that the first defendant has provided a satisfactory explanation for delay and has demonstrated that she has an arguable defence. The prejudice does not outweigh the first defendant's right to have a trial on its merits. It is my view that the default judgment entered against Ms Clune on 11 August 2006 ought to be set aside. I make an order that the defendants have leave to file an amended defence and an amended cross claim within 14 days. The plaintiff's notice of motion of 12 October 2006 is dismissed.



3. Hart v Cashman, [2007] NSWSC 233

Supreme Court of New South Wales
21 March 2007
Hall J

TOPIC: Can a solicitor be found guilty of professional negligence if he followed and acted upon counsel's advice?

Issues in relation to counsels' advice

47 In the plaintiff's submissions, it was contended that the defendants cannot rely upon the advice provided by Mr. Bates of counsel to exonerate their conduct. It is noted at this stage that, Mr. Everingham gave evidence that senior counsel, Mr. Parker, QC., had also provided advice on the matter in conference. The advices of Mr. Bates and Mr. Parker will be discussed later in this judgment.

48 In the submissions for the plaintiff, a number of English authorities were cited, including those referred to in **White Industries (Qld) Pty. Limited v. Flower & Hart (A Firm)** (1998) 156 ALR 169. The proposition advanced in submissions was, in essence, that a solicitor must not blindly rely on counsel's advice but must exercise his or her own independent judgment. Reliance was also placed upon the decision of the Full Court of the Federal Court in **Wakim v. McNally** [2002] FCA FC 208.

49 It was contended for the plaintiff that the advice of Mr. Bates was wrong and, in particular, was deficient in a number of respects. No reference to authority had been made by Mr. Bates in support of his opinion. It was observed that Mr. Bates had apparently not been briefed with advice that had been provided by Mr. Greg James, QC. (as stated earlier, the evidence established he had not been provided with the advice) or the report of Dr. Phillips nor a copy of the decision of the Court of Appeal in **Baldwin v. Lisicic** (unreported 20 April 1993). In particular in this case, the defendants, it was observed, had acted on behalf of the appellant/applicant in Baldwin's case and, as well, were in possession of what was referred to as a "*contradictory advice from eminent Queen's Counsel*", a reference to Mr. James, QC.'s advice. The defendants, it was said, were bound to turn their own mind to the advice of Mr. Bates and to examine it so as to be sure that it was sound. This, according to the submission, they did not do. These matters will be examined later in this judgment.

In the circumstances of the case and for reasons earlier stated, I do not consider that the historical medical and other material supports the existence of the pattern of symptoms indicative of post traumatic stress disorder causally linked to the plaintiff's treatment at former Chelmsford Private Hospital. The evidence establishes on the probabilities that such symptoms had not in fact existed before 1992 and that such symptoms that the plaintiff did suffer were identified over many years before 1993 as associated with cerebral damage the subject of the judgment at trial.

(9) In the circumstance of the present case and for reasons analysed above, I do not consider that the plaintiff has established that the advice given by junior and/or senior counsel, to which I have earlier referred, or the advice provided by Mr. Everingham was incorrect advice.