Case notes

WHEN IS A GARDEN EQUIPMENT SALESMAN A FARMER?; CAN A SOLICITOR ACT FOR TWO DIFFERENT DEFENDANTS AGAINST THE SAME PLAINTIFF?; AND MEDIATION MEDIA WATCH

COMMONWEALTH BANK OF AUSTRALIA V BIRD

In *Commonwealth Bank of Australia v Bird* [2011] NSWSC 586, the first defendant, Mr Bird, sought to defend an action for foreclosure by the plaintiff, the Commonwealth Bank of Australia, by relying on provisions of the *Farm Debt Mediation Act 1994* (NSW) (the Act). The issue before the court was whether the Act applied.

The defendant granted two mortgages in favour of the plaintiff for three sums totalling approximately $2 million, advanced to the defendant and his company Clevedon over a 10-month period. The loans fell into default and the plaintiff sought to recover its money under the mortgages. The defendant asserted that the plaintiff's efforts to enforce the mortgages were void as they had not complied with the Act.

Schmidt J noted that the property securing the mortgages was a house with sheds on 25 acres at North Richmond in north-western Sydney. The loan was initiated by a mobile lender employed by the plaintiff who gave evidence that the defendant had advised her that the loan was to purchase an established dwelling. The court rejected the defendant's evidence that he had advised the mobile lender that he wished to purchase cattle for breeding and sale. In fact the mobile lender gave evidence that she would have been unable to process the loan if it had been for the reasons asserted by the defendant because she was only authorised to deal with loans for owner occupied residential properties and investment properties. The mobile lender asserted that she would have had to refer the defendant to the business banking section if the defendant's assertions as to the nature of the loan were true.

The evidence was that the defendant referred to himself as a self-employed businessman importing and selling gardening tools and that he planned to use the property to live in and to store equipment used in his business which would save him large storage costs. Consistent with this, the loan application did not refer to the defendant being a farmer or requiring the loan to purchase farming equipment.

Further, evidence was tendered that Clevedon's receivers did not find the company had listed livestock or farming equipment as part of its assets portfolio; to the contrary, it referred to the conduct of the business of selling gardening equipment.

Schmidt J listed the relevant sections of the Act including the s 4 definitions which state:

> [15] *creditor* means a person to whom a farm debt is for the time being owed by a farmer.
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> *farm* means land on which a farmer engages in a farming operation.
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> *farmer* means a person (whether an individual person or a corporation) who is solely or principally engaged in a farming operation and includes a person who owns land cultivated under a share-farming agreement and the personal representatives of a deceased farmer
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> *farm debt* means a debt incurred by a farmer for the purposes of the conduct of a farming operation that is secured wholly or partly by a farm mortgage.
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> *farm mortgage* includes any interest in, or power over, any farm property securing obligations of the farmer whether as a debtor or guarantor, including any interest in, or power arising from, a hire purchase agreement relating to farm machinery, but does not include:
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> (a) any stock mortgage or any crop or wool lien, or
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> (b) the interest of the lessor of any farm machinery that is leased.
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> *farming operation* means:
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> (a) a farming (including dairy farming, poultry farming and bee farming), pastoral, horticultural or grazing operation, or

(b) any other operation prescribed by the regulations for the purposes of this definition.

Her Honour made it clear that the onus was on the defendant to prove that: (a) he was a farmer; (b) the mortgage was a farm debt mortgage securing a farm debt; and (c) the debt was incurred for the purpose of conducting a farming operation. Schmidt J stated:

> [16] In order to establish these matters, it is necessary to have regard both to the present and to the past. As Barrett J discussed in *Constantinidis v Equititrust Ltd* [2010] NSWSC 299 at [13]:
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> > [13] … In speaking of a debt "incurred … for the purposes of the conduct of a farming operation" and directing attention to the purposes for which the debt was incurred, the definition of "farm debt" necessarily pays attention to purposes existing at the past time when the debt was incurred. But that, it seems to me, is the only past aspect to which attention is directed. To the extent that the definition of "farm debt" refers to incurring by a "farmer" and security under a "farm mortgage", it directs attention to the present status of the person who incurred the debt in the past and the present status of the mortgage by which the debt is secured.
> >
> > [14] … Applying the approach I consider to be correct, a person who is today a farmer and whose farm property stands today as security for a debt will be protected if the purpose of the original incurring of the debt was a relevant farming purpose (and whether or not the person was then a farmer), but not if the original incurring was for some non-farming purpose; while, if the original incurring was for a relevant farming purpose but either the person by whom the debt is owed is not today a farmer or the security property is not today a farming property, the protection will not be attracted.

Her Honour found that the property securing the mortgages was capable of being used as a farm within the definition of the Act but that it was not used for that purpose at the time the debt was incurred or presently. Schmidt J refused to find that the purchase of up to 18 head of cattle to the value of approximately $9,000 constituted a farming operation within the definition of the Act. Her Honour opined:

> [21] The invoices which show that a small number of cattle were purchased by a company at which Mr Bird was a director and the photographs showing a number of cattle present on the property at some time, cannot establish that the property is, or ever was used as a "farm". That is, that it was being used by a "farmer" to conduct a "farming operation". Nor is there any evidence as to what use is presently being made of the property and by whom. That it was used for grazing, was certainly not established.

Further, Schmidt J stated:

> [23] The evidence is simply incapable of establishing that Mr Bird is either now, or in the past was ever a "farmer", namely that he was ever "solely or principally engaged in a farming operation". The word "principally" must be construed qualitatively, not quantitatively (see *Varga v Commonwealth Bank of Australia* [1996] NSWSC 86). The test there discussed by Young J was whether in all the circumstances farming is shown to be the person's principal activity. That was not shown here.

Her Honour accepted that the defendant's claim to be breeding and selling cattle would fall within para (a) of the definition of "farming operation"; however, the evidence showed that the defendant did not engage solely or principally in farming on the property or anywhere else. Schmidt J pronounced judgment by stating:

> [26] It follows that it must be concluded that Mr Bird has not established that the Act applies to these mortgages. Furthermore, as the plaintiff submitted, there is no suggestion that the Clevedon debt was ever farm related and even if this had been established, the Act applies to the enforcement of a farm mortgage, not the enforcement of the loan itself (see *Australian Cherry Exports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337 at 340). Given the conclusions I have reached, it is not necessary to consider the submissions developed about this issue any further.

Her Honour ordered payment of the sums of money due under the mortgages and costs on an indemnity basis. Bird's case is an important decision given it interprets the statutory definitions of what constitutes a farm, farming operations and farm debt. Further, it sounds a warning to those borrowing funds that a proper disclosure of land use is required in all circumstances.

IAN WEST INDOOR AND OUTDOOR SERVICES PTY LTD v AUSTRALIAN POSTERS PTY LTD

In *Ian West Indoor and Outdoor Services Pty Ltd v Australian Posters Pty Ltd* [2011] VSC 287, the plaintiff was an independent contractor who contracted with the defendant to install advertising posters while the defendant was a company that conducts outdoor advertising. In this matter, the plaintiff appealed a decision by the Victorian Civil and Administrative Tribunal (the Tribunal or VCAT) to restrain the plaintiff's solicitor from acting for the plaintiff in the proceedings.

The plaintiff's solicitor acted against the defendant for another contractor called Wham Outdoor Advertising (Wham) in a dispute that was ultimately settled following two compulsory conferences conducted by the Tribunal. In this case the judgment recounted the Tribunal's decision to prevent the solicitor from acting based on the following facts:

> [4] (a) Both Wham and the plaintiff entered into contracts with the defendant to install outdoor advertising posters;
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> (b) A number of paragraphs of the plaintiff's outline in the West proceeding were substantially similar to the points of claim in the Wham proceeding;
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> (c) Compulsory conferences at the Tribunal in the Wham proceeding were conducted on a confidential basis;
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> (d) There was confidential correspondence between the defendant's firm and Mr Griffiths' firm, leading to an "in principle" agreement to settle the Wham proceeding;
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> (e) Terms of settlement were executed in the Wham proceeding and were confidential to the parties to that proceeding;
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> (f) There were a number of common factual elements in the West proceeding and the Wham proceeding;
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> (g) Documents provided to the plaintiff in the Wham proceeding would also be relevant to the West proceeding; and
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> (h) Counsel instructed by Taylor Splatt and Partners appeared at two compulsory conferences in the Wham proceeding.

The Tribunal accepted evidence from the solicitor in question that:

> [5] (a) he was not present at the compulsory conferences, but briefed counsel for them;
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> (b) he had been in similar situations before, representing different parties against one respondent;
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> (c) he bases his advice to his clients on their claims, not someone else's;
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> (d) he was aware of the "Harman" rule that documents obtained in legal proceedings may not be used for other purposes; and
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> (e) there were issues in the West proceeding in addition to those which arose in the Wham proceeding. In the West proceeding, in addition to the allegations about the representations, there had been a three year contract, so that some issues would be different.

The judgment recounted that the Tribunal relied on Einstein J's decision in *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd* [2009] NSWSC 356 where the court restrained a solicitor from acting for a party on the basis that the solicitor acted for another party against the same defendant in earlier proceedings that were substantially similar in substance. In that case the court was moved by the threatened breach of duty of confidentiality regarding information disclosed during mediation.[1]

The Tribunal distinguished *Worth's* case from the case before it on the grounds that there was no mediation in the instant case. The court noted that:

> [8] … the Tribunal stated that a similar approach must apply to compulsory conferences at the Tribunal, because the parties ought to be able to reveal all relevant matters at mediation without an apprehension that disclosure might subsequently be used against them. Although the VCAT Act did not impose a duty

[1] The decision at first instance being upheld on appeal (*Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd* [2009] NSWCA 354).

> of confidentiality on parties at a compulsory conference, the requirement that a compulsory conference be held in private supported the view that information obtained from a compulsory conference ought not to be available to a party who was not at the compulsory conference. The privacy of compulsory conferences ensured that the parties could reveal relevant information without that information subsequently being used against them.

Emerton J commenced the operative part of her judgment by noting the plaintiff's three grounds of appeal:

> [9] (a) The Deputy President was in error in holding that the information possessed by Mr Griffiths [plaintiff's solicitor] about the defendant gained from another proceeding in which he had acted as a solicitor for another party suing the defendant, was confidential information;
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> (b) The Deputy President was in error in issuing a restraint on the basis only of a finding of possession of confidential information without any finding of risk of misuse of that information being made or open to be made;
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> (c) The Deputy President was in error in holding that the mere possession by Mr Griffiths of confidential information about the defendant (without any finding of risk of misuse of that information being made or being open to be made) was sufficient to disqualify him from acting as the plaintiff's solicitor in the proceeding before VCAT.

In relation to the first ground, her Honour noted the submission of counsel for the plaintiff that called into doubt the Tribunal's reliance on *Worth* on the basis that the Tribunal had applied *Worth* without identifying any actual or particular confidential information other than general knowledge obtained at the compulsory conferences and without considering the basis upon which confidentiality bound the solicitor. Further, the court accepted and affirmed counsel's authority of *Smith Kline and French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73, to establish the conditions for the grant of relief arising from equitable obligations of confidence.

> [11] Those conditions were described by Gummow J as follows:
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> (i) the plaintiff must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question, and must be able to show that; (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence, and (iv) there is actual or threatened misuse of that information, without the consent of the plaintiff.

Emerton J noted that in *Worth* while the solicitor was not contractually bound to the terms of the mediation agreement the grant of relief turned on the conditions set out in *Smith Kline*. The court's conclusion in *Worth* was:

> [16] that the solicitor knew that his client had promised the defendant that the solicitor would not use confidential information except in accordance with the mediation agreement, and he participated in the mediation with that knowledge. That clearly established that the confidential information acquired by the solicitor at the mediation itself was acquired by him in such circumstances as to import an obligation of confidence owed directly to the defendant not to disclose or use the information except in accordance with the mediation agreement.

In the instant case there was no mediation but instead two compulsory conferences neither of which were attended by the solicitor. Counsel for the plaintiff submitted:

> [19] Although a compulsory conference is to be conducted in private, s 85 provides only that evidence of anything said or done in the course of a compulsory conference is not admissible in any hearing before the Tribunal in the proceeding. This does not, in and of itself, impose an obligation of confidentiality upon the parties or the solicitors participating in a compulsory mediation.

Her Honour stated:

> [22] Moreover, although compulsory conferences at the Tribunal are to be held "in private" unless otherwise ordered, compulsory conferences form part of the general case management armoury available to the Tribunal and have a variety of functions that include identifying and clarifying the nature of the issues in dispute and the questions of fact and law to be decided by the Tribunal, and allowing directions to be given concerning the conduct of the proceeding. Promoting a settlement of the proceeding is only one of the functions of a compulsory conference. The VCAT Act does not provide

> that compulsory conferences are confidential but rather that anything said or done in the course of a compulsory conference is not admissible in the proceeding itself. I disagree with the Deputy President that the fact that the VCAT Act requires compulsory conferences to be held in private imports obligations of confidentiality.

Emerton J went on to find that the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act) provides limited statutory protection for confidential information divulged in compulsory conferences. However, the understanding of the parties to the conferences may give rise to an obligation of confidentiality. In this case the information conveyed to the solicitor from counsel who attended the conferences "was imparted in circumstances that imported an obligation of confidence" (at [27]). In this respect her Honour found that the parties were entitled to proceed with settlement negotiations on the basis that such communications would be confidential and in this respect the Tribunal had not erred in keeping those communications confidential. For this reason ground one of the appeal failed.

The second and third grounds of the appeal were based on the Tribunal's alleged error in finding that the solicitor could not expunge his knowledge of the defendant's negotiation in the *Wham* proceeding when it came to acting for the plaintiff in the instant case. The defendant submitted that the plaintiff's solicitor had documents in his possession that were provided by the defendant in *Wham*. Further, that it was clear from the documents filed in the instant case that common representations and factual information had been used from *Wham's* case. Finally, that information used in the compulsory conferences in *Wham's* case would be used by the plaintiff's solicitor in the instant case.

Emerton J recounted the evidence given by the plaintiff's solicitor:

> [41] When asked in cross-examination whether he could expunge from his mind his knowledge of the confidential dealings that he had with Wham, he said: "I'm only a human being. Of course I'm aware of what it is [the settlement sum], but it is not a factor. The factor is, what is the loss this client has settled [sic]? What is a reasonable figure on this."

Her Honour opined:

> [43] In my view, the Tribunal was required to more closely scrutinise the way in which it was said that the confidential information might be used to the benefit of the plaintiff and the disadvantage of the defendant. That might have caused the Tribunal to consider whether likely differences in the issues and evidence in the Wham proceeding would be such as to render knowledge of the history of negotiations in that proceeding of negligible use or relevance in the West proceeding. In the West proceeding, the issues have not yet crystallised because no defence has been filed.

Emerton J distinguished *Worth* from the instant case on the basis that in the former case the facts showed that there was a real possibility of the misuse of confidential information:

> [44] The plaintiff there engaged the solicitor to act for it because it knew the solicitor had been involved in a successful mediation with the defendant in an earlier case involving substantially similar issues.

Her Honour was of the view that in the instant case:

> [45] the plaintiff retained Mr Griffith as his solicitor before Wham and there could be no suggestion that he did so in order to take advantage of Mr Griffith's knowledge of the Wham proceeding.

Emerton J quoted the decision of the New Zealand Court of Appeal when it stated in *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343:

> [46] a party seeking the exclusion of the other side's legal adviser must first show that there is an appearance of risk, going beyond the remote or merely fanciful, of conscious or unconscious use or disclosure by the lawyer of something relevant to the current dispute of which the lawyer gained knowledge as a result of participation in an earlier mediation. But if that threshold is reached, it is then for the lawyer to demonstrate that in fact no such risk exists or that, if it does, no damage, other than de minimus, could possibly result from use or disclosure.

Her Honour found that the risk of a person breaching confidentiality in such circumstances goes beyond being "remote or merely fanciful" and must be a "real and sensible" possibility of misuse. Emerton J judged:

> [49] Accordingly, I have concluded that the Tribunal's finding that there was a real and sensible risk of misuse of the confidential information was not open simply upon the concession by Mr Griffiths that he

> could not expunge from his mind knowledge of the confidential negotiations in the Wham proceeding. The Tribunal did not properly turn its mind to whether there was a real and sensible risk of misuse by Mr Griffith of confidential information concerning the settlement amount, the steps by which settlement was reached and the movements in negotiations in the Wham proceeding. It did not consider how the information might be capable of being misused in the West proceeding, that is, applied for the benefit of the plaintiff to the disadvantage of the defendant.

On this basis her Honour found that grounds two and three of the appeal were made out and upheld the appeal allowing the plaintiff's solicitor to act in the matter presently before the Tribunal.

West's case is an important decision because it addresses the limited statutory protection of information disclosed and discussed at compulsory conferences pursuant to the VCAT Act. In this respect it affirms that the statutory protection only makes inadmissible in subsequent proceedings anything said or done in the course of a compulsory conference. It does not provide a veil of confidentiality over entire conference proceedings. Further, it establishes the primacy of a common law notion of a duty of confidentiality where parties enter settlement negotiations with the expectation that those negotiations are confidential in an absolute sense. This duty requires parties to keep matters confidential, meaning an obligation not to disclose or use information gleaned from a compulsory conference, as opposed to the common law doctrine of without prejudice that prevents the use of information derived from a settlement negotiation in subsequent proceedings.

MEDIATION MEDIA WATCH

The online news service AdelaideNow.com.au reported on 10 August 2011 that the Franchising Council of Australia (FCA) will lobby the South Australian State parliament in an effort to block new small business laws that will apply a new layer of regulation to what is already a highly regulated area.

In a piece entitled, *Franchisers Lobby SA Parliament*, reporter Russell Emmerson quoted FCA Executive Director Steve Wright who has expressed concern that the Bill before Parliament would add more costs to the franchising industry by introducing a franchising code without consultation.

Wright is quoted as saying, "Having read the Bill it is not what was put out for public consultation". he said. "We would support it if it was based on the Victorian model … but this creates a de facto franchising Code. The Code exists already. If you introduce another one, it implied it is stuffed, otherwise why would you need it?"

Emmerson reported that the Bill creates the role of Small Business Commissioner with a $1 million annual budget giving the Commissioner the power to mediate business disputes to cut court costs. He quotes South Australian Small Business Minister Tom Koutsantonis of raising the issue that the South Australian Bill is based on the Victorian model. However, Wright argued, "In Victoria, [mediation] is the key to the success of the Small Business Commissioner. He does that without interfering with any statute, it uses the Federal rules".

Koutsantonis is reported as stating that "the Bill aims to introduce the notion of bargaining in 'good faith' a term that he believes businesses should not be afraid of if they are doing no wrong but one that Mr Wright believes will create an additional regulatory burden for the country's franchising systems".

Emmerson reported that Wright believes that a Western Australian dispute between Yum Restaurants (the franchisor of KFC, Hungry Jacks and a number of other consumer brands) and WA franchisee Competitive Foods Australia was the trigger for the introduction of the "good faith" requirement. He reports that the dispute, where Yum decided not to renew a franchise agreement held by Competitive Foods after it expired, allegedly deprived Competitive Foods of the goodwill it had built in the business and a change in the law was needed to reflect that issue.

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