Welcome

The CPD will commence at 4:30pm

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Making and Resisting Calls on Security under Construction Contracts

Fiona Cameron

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Overview

- Forms of security
- Common contractual provisions
- Key factors to keep in mind acting for principal and contractor
- Recent examples

Forms of security

- Bank guarantees:
  - ‘As good as cash’
  - On demand or unrestricted vs restricted
  - Typically held by principal on trust
- Retention funds:
  - Typically held back progressively from progress payments
  - May be held on trust (depends on contract terms)
- Other less common forms: surety bonds, parent company guarantees, letters of credit

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Contractual provisions

- AS 2124-1992:

5.5 Recourse to Retention Moneys and Conversion of Security

A party may have recourse to retention moneys and/or cash security and/or may convert into money security that does not consist of money where—

(a) the party has become entitled to exercise a right under the Contract in respect of the retention moneys and/or security; and

(b) the party has given the other party notice in writing for the period stated in the Annexure, or if no period is stated, five days of the party's intention to have recourse to the retention moneys and/or cash security and/or to convert the security; and

(c) the period stated in the Annexure or if no period is stated, five days has or have elapsed since the notice was given.

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Contractual provisions

- AS 4000-1997:

5.2 Recourse

Security shall be subject to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the other party of intention to have recourse.

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Contractual provisions

- Amended AS 4300-1995:

The Contractor acknowledges that:

(i) subject to Clauses 5.6(e) and (f), the Principal has a right to convert security which does not consist of money into money at any time; and

(j) the Contractor has no entitlement to obtain an injunction or otherwise restrain:

(i) the Principal from converting any security;

(ii) any issuer of any security provided under this Clause 5 from paying the Principal pursuant to that security; and

(iii) the Principal from taking any steps for the purposes of making a demand under any such security or receiving payment under any security; or

(iv) the Principal using the money received under any such security.

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What to look out for

- When acting for **principal**:
  - Negative covenants on right to make call?
  - Outstanding claim against contractor?
  - Value of claim vs value of security
  - Restrictions on face of bank guarantees
  - Notice requirements
  - Financier requirements

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What to look out for

- When acting for **contractor**:
  - Negative covenants on right to make call or bring injunction?
  - Claim excessive or not properly made
  - Restrictions on face of bank guarantees
  - Disentitling conduct by principal
  - Contractual right of return of security
  - Why damages not an adequate remedy

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Recent examples

- *Uber Builders and Developers Pty Ltd v MIFA Pty Ltd* [2020] VSC 596
- *Ozland Fashion Pty Ltd v Kingsmede Projects Pty Ltd* [2020] NSWSC 763
- *Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* [2021] FCAFC 33
- *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2019] WASC 177

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Statutory Schemes for Misleading or Deceptive and Unconscionable Conduct

Paul Morgan

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Overview

- Three different statutory schemes:
  - *Australian Consumer Law* (Schedule 2 to *Competition and Consumer Act 2010*) (***ACL***)
  - *Australian Securities and Investment Commission Act 2001 (**ASIC Act**)*
  - *Corporations Act 2001 (**Corporations Act**)*
- All three have provisions dealing with misleading and deceptive conduct, and unconscionable conduct.
- Which Act applies? And which provision(s) within the relevant Act(s)?

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Legislative Porridge

Wingecarribbee Shire Council v Lehman Brothers Australia Ltd [2012] FCA 1028 at [948]

At [948]: “Why does a court have to waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same…”

At page 6 (summary): “The Parliament should consider returning to a simple clear two line long universal norm of conduct, as was contained in s 52, if it considers that misleading and deceptive conduct in trade or commerce ought be prohibited.”

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General applicability of the *ACL* to Corporations – s 131 Competition and Consumer Act 2010

Competition and Consumer Act 2010

S 131 Application of the Australian Consumer Law in relation to corporations etc.

> Schedule 2 applies as the law of the Commonwealth to the conduct of corporations in relation to Contraventions of Chapter 2, 3 or 4 of Schedule 2.

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The carve out from the *ACL* of financial products and services

Competition and Consumer Act 2010

S 131A Division does not apply to financial services

Despite section 131, this Division does not apply, other than in relation to the following provisions of Schedule 2 as they apply as a law of the Commonwealth to the supply, or possible, of services that are financial services or financial products:

Division 3A of Part 3-2;	[gift cards]
Division 3A of Part 4-2;	[gift cards]
Part 5-5.	[linked credit products]

Determining what are financial products and services

ACL, s 2:

financial product has the meaning given by sectio*n* 12BAA of the *Australian Securities and Investments Commission Act 2001.*

financial service has the meaning given by section 12BAB of the *Australian Securities and Investment Commission Act 2001*

Financial products and financial services: determining which provision(s) of *ASIC Act* and/or *Corporations Act* to use.

ASIC Act 2001

S 12DA Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

Corporations Act 2001

S 1041H Misleading or deceptive conduct (civil liability only)

(1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service , that is misleading or deceptive or is likely to mislead or deceive.

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The local council CDO cases - background

- *Wingecarribbee Shire Council v Lehman Brothers Australia Ltd* [2012] FCA 1028

- *Bathurst Regional Council v Local Government Financial Services Pty Ltd* (No 5) [2012] FCA 1200

  - Backdrop is the Global Financial Crisis – subprime mortgages
  - Class actions brought by local councils (purchasers) against sellers of collateralised debt obligations (CDOs), and other involved parties
  - The councils lost a large amount on the investments, even though they had AAA ratings.
  - The council's claims included statutory claims for misleading or deceptive conduct under s 12DA(1) and s 1041H.

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Section 1041E of the Corporations Act

***Corporations Act* 2001 SECT 1041E**
False or misleading statements

(1) A person must not (whether in this jurisdiction or elsewhere), make a statement or disseminate information, if:

(a) the statement or information is false in a material particular or is materially misleading; and

(b) the statement or information is likely:

(i) to induce persons in this jurisdiction to apply for financial products; or

(ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or

(iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and

(c) when the person makes the statement, or disseminates the information:

(i) the person does not care whether the statement or information is true or false; or

(ii) the person knows or ought reasonably to have known, that the statement information is false or material in a material respect or is materially misleading…

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Other considerations to bear in mind when deciding which provision to use

- Penal provisions versus civil liability only.
- Contributory negligence considerations.
- Difference in extra-territorial coverage between Corporations Act and ASIC Act.

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Unconscionable conduct

ASIC Act – s 12CB
Unconscionable conduct in connection with financial services:

(1) A **person** must not, in trade or commerce, in connection with:

(a) the supply or possible supply of financial services to a person; or

(b) the acquisition or possible acquisition of financial services from a person;

engage In conduct that is, in all the circumstances, unconscionable..(emphasis added).

Corporations Act – s 991A
Financial services licensee not to engage in unconscionable conduct

(1) A **financial services licensee** must not, in or in relation to the provision of a financial service, engage in conduct that is, in all the circumstances, unconscionable (emphasis added).

(2) If a person suffers loss or damage because a financial services licensee contravenes subsection (1), the person may recover the amount of the loss or damage by action against the licensee.

(3) An action under subsection (2) may be begun at any time within 6 years after the day on which the cause of action arose.

(4) This section does not affect any liability that a person has under any other law.

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The Insurance List in the Federal Court of Australia

Alistair Wyvill SC

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Insurance List

- https://www.fedcourt.gov.au/about/national-court-framework/insurance-list

The aim is to provide to the insurance commercial community: underwriters, reinsurers, brokers and insureds a list which caters for the prompt and efficient resolution of legal issues to enable the parties to otherwise resolve their disputes without the need for full-blown hearings where a crucial issue could be decided discretely and swiftly.

Insurance List

- *Oceanview Developments Pty Ltd trading as Darwin River Tavern & Darwin River Supermarket v Allianz Australia Insurance Ltd trading as Territory Insurance Office* [2020] FCA 852
- 29 September 2018 – fire
- 28 June 2019 – Application and Concise Statement filed
- 5 August 2019 – Order for trial of preliminary issues
- 25 October 2019 – Trial
- 19 June 2020 – Judgment
- 19 November 2020 - Mediation

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Questions

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