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# Building and Construction update

A discussion of some recent decisions affecting the law around misleading and deceptive conduct, liquidated and nominal damages and limitation periods

## Misleading and deceptive conduct

Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd [2020] NSWCA 223

1. Supreme Court primary judge held:
    a. causation not established
    b. matter of conjecture that the structural defects causally contributed to Bankwest enforcing its rights to the security
2. Not in dispute that:
    a. Australian Consulting Engineers engaged in misleading and deceptive conduct in providing the certificate; and
    b. the building would not have been constructed in accordance with the design but for the certificate

## Arguments of Mistrina in Court of Appeal

1. Incorrect application of Henville v Walker
   a. Mistrina only required to establish that the certificate "materially contributed to the loss"
2. Once the Primary Judge concluded that the certificate was at least one of the decisive considerations, there was no need to embark on the enquiry as to causation
3. Because the misleading and deceptive conduct need only have materially contributed to the loss, it would be rare that damages would be reduced.
4. Proper inference supported by evidence was that a reason for Bankwest's action was the defective slab and delay in completion

## Arguments of Mistrina in Court of Appeal

1. Evidence supports the position that but for the structural defects, works would have completed in September 2010 or earlier, and the evidence did not support the position that Bankwest would have exercised its step-in rights then (loan repayment due August 2010)
2. Primary Judge erred in holding that Mistrina's case was based on conjecture
3. If foreseeability is in issue, it was foreseeable even in a general way that Mistrina would suffer damage

## Arguments of ACG in Court of Appeal

1. No evidence on the basis on the decisions made by Bankwest
2. Primary Judge correctly identified the principle in *Henville* but didn't need to apply it because the appellants failed as a question of fact to prove that the misleading and deceptive conduct was a cause of Bankwest exercising its step-in rights
3. Cannot be the case that Mistrina need only prove some factual connection between the misleading and deceptive conduct in order to recover any and all loss suffered
4. Must be established on the balance of probabilities that Bankwest would have allowed Mistrina to complete and realise the development beyond August 2010.

# Decision

1. Primary Judge had the correct legal principle that it was sufficient for Mistrina to establish that the conduct complained of played a “material part” in Bankwest’s decision to step-in for it to have established causation
2. Primary Judge erred in not finding that the structural design defect issue was a material cause of Bankwest taking over the development
3. Court of Appeal considered that there was an overwhelming inference that the cessation of the building works due to the structural defect was a material cause of Bankwest’s decision to step-in and it was not mere conjecture
4. Did not decide on whether questions of remoteness are relevant to the *Trade Practices Act 1974*

# Decision

1. Considered that the loss suffered was foreseeable even in a general way
2. In relation to the discount for loss of opportunity – exhibits characteristic of a discretionary judgment and the Court would be reluctant to intervene unless the exercise of discretion miscarried

## Lessons

1. Engineers (and third parties) can be liable for misleading and deceptive conduct in relation to loss suffered by a developer, notwithstanding that their agreement is with the builder
2. Direct evidence need not be required to hold a third party liable where inferences can be drawn
3. Loss can be “generally foreseeable”
4. Still no decision as to whether the foreseeability test is relevant to the issue of damages pursuant to the TPA / ACL

# Misleading and deceptive conduct

*Owners SP – 87265 v Saaib; Owners – SP 87625 v Alexandrova* [2021] NSWSC 150

1. Case against Saaib in relation to defective works
    a. Ultimately found that he did not do the work and was not a party to the Contract
2. Case against Alexandrova for misleading and deceptive conduct in causing the insurer to issue a home warranty insurance policy (allegation of fraud)
3. Owners suffered loss in the inability to recover under the insurance policy or from Mr Saaib for breach of statutory warranties
4. The position was caused in part on the insurer's reliance on the home warranty insurance application
5. Link in a chain of causation that had a requisite degree of proximity to the loss suffered

# Price v Spoor [2021] HCA 20; (2021) 95 ALJR 607

Kiefel CJ, Gageler, Gordon, Edelman, Steward JJ

23 June 2021

## Simple facts

The Queensland Limitation Act prescribed the time within which actions for the recovery of monies secured by a mortgage over land shall be brought.

## Simple facts

Section 13

An action shall not be brought by a person to recover land after the expiration of 12 years from the date on which the right of action accrued …

## Simple facts

Section 24:

"… where the period of limitation prescribed by this Act within which a person may bring an action to recover land … has expired, the title of that person to the land shall be extinguished."

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Price v Spoor [2021] HCA 20

## Clause 24 mortgage agreement:

"… the provisions of all statutes [by which] the powers rights and remedies of the Mortgagee … may be … defeated or extinguished shall not apply hereto and are expressly excluded insofar as this can lawfully be done."

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## Price v Spoor [2021] HCA 20

Unpaid lenders sought to exercise their rights to sell the land to recover the unpaid monies

Borrowers allege action time barred / rights extinguished under the Limitation Act.

## Lenders rely on covenant - argue Limitation Act excluded

Clause 24 covenant:

> "… the provisions of all statutes [by which] the powers rights and remedies of the Mortgagee … may be … defeated or extinguished shall not apply hereto and are expressly excluded insofar as this can lawfully be done."

# Price v Spoor [2021] HCA 20

Borrowers’ rejoinder: clause 24 unenforceable as contrary to public policy

Trial judge upheld borrower’s position – cannot contract out of Limitation Act

Price v Spoor [2021] HCA 20

Queensland Court of Appeal reverses trial judge

Rejects contention that an agreement to contract out of the Limitation Act before a cause of action arises is void and unenforceable as a matter of public policy

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## High Court dismisses borrowers’ appeal

HCA unanimously dismisses borrowers’ appeal

Clause 24 could be enforced by the lenders

Lenders able to enforce their security over the land as unpaid lenders.

## Price v Spoor [2021] HCA 20

*Westfield v AMP* (2012) 247 CLR 129 considered

It held that a person upon whom a statute confers a right may waive or renounce that right unless it would be contrary to the statute to do so

## Contracting out not contrary to the Act

HCA says of the Limitation Act:

- no express prohibition against contracting out of it
- merely gave defendants a right to plead extinguishment when a limitation period has expired
- did not effect an automatic extinguishment upon such expiry

***Commonwealth v Mewett*** (1997) 191 CLR 471

In a statute of limitations, a statutory bar does not go to the jurisdiction of the court to entertain the claim but rather to the remedy available

Unless a limitation defence is pleaded, the statutory bar does not arise for the consideration of the court.

Price v Spoor [2021] HCA 20

## Kiefel CJ and Edelman J

5 propositions:

1 An agreement not to rely upon a benefit given by the Limitation Act is enforceable

2 Limitation provisions of the kind in question are not dictated by public policy to the exclusion of individual rights

3 The benefit conferred by the Limitation Act is of a nature that can be given up

4 Section 24 operates by reference to a plea of the time-bar being made under s13 and being given effect. It does not operate automatically and independently of s13 at the expiry of the limitation period

5 By agreeing to the terms of cl 24, the borrowers effectively gave up the benefit provided by the Limitation Act

## Steward J

A party may agree to promise not to invoke limitation defences as part of a contractual bargain

## Steward J

An agreement to exclude a statutory limitation period may be enforceable

It was open to the parties to exercise their freedom of contract by the inclusion of cl 24

The common law does not recognise a public policy, independent of the Limitation Act, of finality in litigation.

## Wider implications?

Professional services contracts

Clauses limiting liability for contraventions of ACL / misleading or deceptive conduct

*Henjo* principle

Front end drafting?

# Agreement for LDs of $1 per day

*Cappello v Hammond & Simonds NSW Pty Ltd*
[2020] NSWSC 1021

Where the parties agree to an amount for liquidated damages, it may be taken that they have thereby excluded a right to general damages for delay and the failure to complete by the stipulated date.

Where a nominal amount is stated for LD's, rather than a genuine pre-estimate, can the parties have been taken to provide an exclusive remedy?

In this case No – per s.18G of the HB Act. However, it is also arguable as a matter of general principle where, as here, the "exclusive remedy" would be, in effect, no remedy at all.

## Methodology for Delay Analysis

*Built Qld Pty Ltd v Pro-Invest AHO (ST)*
[2021] QSC 224

Experts called for each party adopted differing methodologies – one a "prospective" analysis and the other a "retrospective" analysis.

The appropriate methodology is governed by the terms of the contract.

In this case, the contract permitted each methodology as the relevant terms, *inter alia*, referred to an EoT if the Contractor *"is or will be delayed"*, but also referred to the Contractor being *"actually delayed"*.

## Acceleration Claims

*V601 v Probuild* [2021] VSC 849

Probuild made EoT claims which it alleged were wrongly refused by the Superintendent. Probuild asserted that it then had to accelerate to address the delay events, and it was entitled to additional costs of doing so as:

- damages for breach;
- mitigation of loss caused by the breach;
- it had been effectively directed to accelerate by conduct.

The Court found that Probuild was entitled to the costs of acceleration as damages for breach, and as necessary and reasonable costs incurred in mitigation. It rejected the 3rd basis.

## Construction of an LDs clause

*Triple Point Technology v PTT Public Company*
[2021] UKSC 29

An LD's clause provided for a rate per day from the due date for delivery of work up to the date the work was accepted by the Principal. The work was never completed or accepted before termination of the contract.

The English Court of Appeal held that the LDs clause had no application beyond the precise event for which it expressly provided – i.e. the delayed acceptance of work.

The UK Supreme Court held that this narrow construction was inconsistent with commercial reality and established principles that LDs are an accrued right recoverable on termination.

# Penalty Clause still enforceable?

*Eco World v Dobler* [2021] EWHC 2207

A contract provided for LDs at £25,000 per week, up to an aggregate maximum of 7% of the contract sum.  It was asserted that the clause was a penalty (per *Cavendish Square*) and, although it was, the stated "cap" also applied to any general damages claim

Looking at charterparty cases, an unenforceable penalty clause is ignored where actual loss is claimed.  It is a "dead letter".  Such a clause has been described as "wholly unenforceable" (per *Cavendish Square*).

However, in this case, on the construction of the term, it was held that the "cap" might still operate, even though it was within a penalty clause, as an express limitation on liability.