EX PARTE CANDOUR, SOLICITORS' LIENS AND SET-OFF[*]

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[22] Five years ago, this column sought to collect the principles pertaining to the obligation of disclosure and the consequences of its breach in *ex parte* applications for injunctions.[1] The importance of the issue is obvious, and there is nothing to suggest there has been any reduction in urgent *ex parte* applications to courts. Recent decisions relating to the outer limits of that obligations, as well as a rare "Australian" *ex parte* injunction from the 18th century, may be of interest to readers.

An attempt to expand the obligation to contested applications

In *Young v Cooke* [2017] NSWCA 33 at [27], Gleeson JA, with whom Macfarlan JA agreed, restated the principles by reference to authority. A party making an application to the Court *ex parte* is bound by a duty of candour and "the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all material facts which that party would presumably have brought forward in his defence to that application." His Honour was critical of an attempt to expand the principle, so as to require disclosure in *contested* applications of material matters of which the opposing party's legal representative was unaware. It was not necessary to resolve that issue, because the non-disclosure was regarded in any event as not being material. However, Gleeson JA noted that Barrett J had earlier observed that "a party can be presumed – indeed expected – to put their best case forward", although continuing with following qualification: "That is not to say that a wilful misleading of the court will pass without remedy, but a mere failure to present a neutral case or to seek to remedy some deficiency in an opponent's evidence cannot lay the foundations for subsequent intervention."[2] That suggests there is a crisp distinction between *ex parte* applications and contested applications,

[*] This comment was published at (2018) 92 *Australian Law Journal* 22**.**

[1] "*Ex parte* applications for injunctions: then and now (2013) 87 *ALJ* 303.

[2] *J Aron Corporation v Newmont Yandal Operations Pty Ltd* (2004) 183 FLR 90; [2004] NSWSC 533 at [18].

in terms of the obligation of candour, notwithstanding that the latter may sometimes (for example, if the respondent is unrepresented, or poorly represented) be palpably one-sided.

Principle not confined to injunctions

In *Aristocrat Technologies Australia Pty Ltd v Allam* [2016] HCA 3 Gageler J emphasised that "full and fair disclosure must be made by any person who seeks an order from a court *ex parte*, with the result that failure to make such disclosure is ordinarily sufficient to warrant discharge of such order as might be made": at [15]. Gageler J noted that the principle was not confined to particular types of interlocutory orders, and was applicable in that case to the issuing of a writ of levy on property following the taxation of costs. The source of the obligation is best seen as "lying in the very nature of the adversarial system administered in Australian courts, coupled with the emphasis given to the desirability of finality in litigation."[3] That said, it will as ever be necessary to consider the particular statutory regime, which may modify the obligation. An example of legislation displacing the principle may be the provisions permitting garnishee orders.[4]

[23] ***Solicitors' "liens" over fruits of judgment***

The balance of the Aristocrat litigation was remitted to the Federal Court: *Aristocrat Technologies Australia Pty Ltd v Allam* [2017] FCA 812. This was the occasion for useful analysis by Perram J on two topics. The litigation had produced the result that one side had obtained favourable costs orders, in the amount of some $100,000, crystallised in a costs certificate from the High Court. The other side had costs orders in its favour worth around $700,000, but taxation was incomplete. The solicitors for the first side asserted a lien in respect of their clients' entitlement to the $100,000, while the other side said that it was entitled to set off the unliquidated amounts of costs orders in its favour against the liquidated amount in the costs certificate.

There can be confusion between a solicitor's lien at common law, to retain possession of a client's documents, until such time as the solicitor has been paid, and the equitable rights, often described as a "lien" over the "fruits of a judgment". The latter has nothing to do with possession. Perram J stated at [8] that:

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[3] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; [2009] HCA 49 at [133].

[4] See *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd* [2017] NSWCA 53 at [54]-[74] and [89]-[126].

> A solicitor's entitlement to be paid out of a judgment in favour of a client, although sometimes referred to as a lien, is in fact just a claim for equitable interference to ensure that the judgment is held as security for the debt owed by the client to the solicitor. The Court's order giving effect to the lien does not create a right but merely reflects a pre-existing equitable entitlement and, subject to the usual defences to and requirements of such equitable entitlements, such claims may be enforced by a direction to the judgment debtor to pay the solicitor together with an injunction to restrain the judgment debtor from paying the client. All of this was explained by Jordan CJ in *Ex parte Patience; Makinson v The Minister* (1940) 40 SR (NSW) 96 ...

It is not suggested there is any novelty in the foregoing. However, it may be worth reiterating; other decisions suggest that there can be confusion relating to nature of the solicitor's entitlement,[5] perhaps in part because of its misleading description as a lien.

Set-off of untaxed costs

As for the set-off claimed by Aristocrat, despite the taxation of the costs orders in its favour being incomplete, it is now tolerably well established that equity allowed set-off involving unliquidated claims,[6] but in any event in the special case of costs, the considerable weight of authority supports the proposition that such set-off flows from the Court's inherent jurisdiction rather than its equitable jurisdiction.[7] The inherent jurisdiction does not turn on whether taxation or assessment has been completed, and extends to judgments in different courts.[8] Because the orders were from the same litigation, the appropriate exercise of discretion was to permit the set-off which would ultimately have the effect that the much larger debt from Aristocrat would exhaust the costs certificate. The fact that the set-off would eliminate the fund over which the solicitors would otherwise have a "lien" is not to the point.[9] The equitable rights of a solicitor in respect of the judgment debt cannot be greater than those of the client.

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[5] See for example *Edwards & Peters and Anor* [2012] FamCAFC 65.

[6] See *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10 at 20 and *Lahoud v Lahoud* [2012] NSWSC 284 at [88]; cf *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50 at 62.

[7] See *Team Dynamik Racing Pty Ltd v Longhurst Pty Ltd* [2008] QSC 36; *Sivritas v Sivritas* [2008] VSC 580; (2008) 23 VR 349; *Australian Beverage Distributors v Evans & Tate Premium Wines Pty Ltd* [2006] NSWSC 560; (2006) 230 ALR 184 at [68], cited with evident approval in *State of New South Wales v Hamod* [2011] NSWCA 376 at [36]-[37]; *In the matter of Fewin Pty Ltd* [2017] NSWSC 1093 at [8]-[9].

[8] See *Griffiths v Boral Resources (Qld) Pty Ltd (No 2)* [2006] FCAFC 196; (2006) 157 FCR 112 at [25]-[26] and *In the matter of Fewin Pty Ltd* [2017] NSWSC 1093 at [10]-[15].

[9] See *Cade Pty Ltd v Thomson Simmons (No 2)* [2000] SASC 369 at [16] (Doyle CJ).

Ex parte injunctions centuries ago

Complaints about *ex parte* injunctions are scarcely new. I am indebted to Professor Isabella Alexander for drawing to my attention what is, perhaps, the second earliest example of an "Australian" injunction.[10] [24] A note on page 3 of the very first publication, on 1 January 1785, of "The Universal Daily Register" (which a few years later became "The Times") records:

> Messrs Stockdale, Scathard, Whitaker and Fielding, Proprietors of the Octavo edition of COOK's VOYAGES, respectfully inform the Subscriber that a Mr George Nicoll, the agent seller of the Quarto Edition, did on the 14th inst [sic] obtain *ex parte* an injunction which arrests their sale till the merits of the case comes back before the Court of Chancery, on the 15th of January instant.
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> The circumstances attending the proceedings of Mr Nicoll to obtaining this injunction, being unprecedented, are worthy the attention of the public: No notice of this application was served upon the defendants, and the injunction, when obtained, was not delivered until it was too late for the defendants to put in their answer, which would have prevented its operation. The reason of this conduct is evidence: the agent knowing the weakness of his case, resorted to the mean subterfuge of trick. If his case be good, why did he not come forward, like a brother tradesman, and meet the defendants on the merits before the Chancellor, from whose candour and impartial justice he must have been certain of receiving redress, if he had suffered injury.

At least this was not so harsh as the practice of obtaining an injunction from the Court of Exchequer (before its equitable jurisdiction was removed in 1841) immediately before the court went on Circuit. One barrister gave evidence to a Select Committee reviewing the equitable jurisdiction of that court as follows:[11]

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[10] An earlier example occurred in 1773, coinciding with the original publication of the official account of Cook's first voyage. See M Leeming, "Hawkesworth's Voyages: The First 'Australian' Copyright Litigation (2005) 9 *Australian Journal of Legal History* 159, available at SSRN: https://ssrn.com/abstract=1028195.

[11] Minutes of Evidence before Select Committee on the Administration of Justice Bill, 22 June 1840, question 214, p 34 (printed in *House of Commons Papers*, Session 16 January – 11 August 1840, Vol 15).

> Is it consistent with your Experience that Parties who want an Injunction, or who want to obtain an unjust Advantage against a Defendant, will file a Bill just before the Circuit, trusting to the Difficulty of the Opponent to dissolve it?
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> It certainly is. Latterly I have not drawn many Bills of that Description, but during the first Ten Years of my Practice I certainly prepared many Bills that were filed in the Court of Exchequer with that view; a much larger Proportion than in the Court of Chancery.

Respondents can incur serious prejudice if orders are made *ex parte*, and the temptations for abuse are longstanding. Hence the need for, and the importance of, the obligations of candour.