IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

Nos M158 and M159 of 2010

WYNTON STONE AUSTRALIA PTY LTD (IN LIQUIDATION) (ACN 065 625 498) Applicant

and

MWH AUSTRALIA PTY LTD (FORMERLY MONTGOMERY WATSON AUSTRALIA PTY LTD) ACN 007 820 322) Respondent

APPLICANT'S SUBMISSIONS IN REPLY

Inferred reliance

1 Contrary to the suggestion in the submissions of the respondent (**MWH**),[1] the requirement of proving causation is a necessary part of any claim under either s 87 or s 82 of the *Trade Practices Act*.[2]

2 MWH has pursued a case of causation by reliance. In seeking to establish its proof of reliance, MWH is driven to what is, with respect, a simplistic proposition in [59], that the inference of reliance will arise where a representation of certain character is made. But that is argument by bootstraps, seeking to prove the causal nexus between conduct and result by reference only to the conduct and the result. The submission, among other things, does not take into account a large body of jurisprudence, which is examined in the submissions of the applicant (**WSA**).[3]

3 The effect of MWH's submission would be to ignore, in every case, a party's failure to adduce evidence of reliance. It is not a sufficient answer that the weight of such evidence

[1] MWH submissions, [6].
[2] The words "loss or damage by conduct" appear (or appeared) in both sections.
[3] WSA submissions, [22]–[28]. See also *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11, [101] (Heydon, Crennan and Bell JJ); *cf* [49]–[51] (French CJ and Gummow J), where an inference of causation of physical injury arose where there was evidence that the worker's arm was trapped in a part of the machine affected by the absent safety equipment. Here, there was not even evidence that a relevant decision-maker of MWH had read the second sentence of cl 4 of the deed.

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might be limited in the circumstances of a given case,[4] and it is not sufficient explanation that MWH's pleading in this case was equally limited.[5]

4 WSA does not contend (as MWH submits)[6] that the deed was executed in a vacuum, but MWH has not referred to evidence which provides a context capable of supporting the inference it seeks to make out. The cited references[7] are so general in their nature as to have no probative value on the question whether the second sentence of cl 4 operated on the mind of MWH. And they were not relied upon at trial, or by the majority in the Court of Appeal. MWH, for the first time, refers also to an "assurance" by WSA in a cover letter,[8] but it adds nothing to point to a different representation about which there is also no evidence of reliance and about which complaint has never been made.[9]

5 ***Constitutional issue:*** MWH contends that no appeal lies on the inferred reliance point.[10] However, the grounds of appeal are directed to the same order appealed against. That order is supported equally by the findings in contract and under the TPA made in paragraph [109] of the reasons of Buchanan and Nettle JJA. MWH obtained a judgment for damages for breach of contract and in negligence either because the release in clause 2 of the deed was narrow (contractual construction) or unenforceable (TPA finding). The Court of Appeal made findings on both grounds, enabling equally that order for damages. MWH also proposed the same order for both its claims in contract and under the TPA.[11] This Court has jurisdiction to set aside that order regardless whether ancillary orders under the TPA were in fact made.

6 In any event, the issues of reliance are raised in the proposed cross-appeal by MWH,[12] which would contend that the Court of Appeal "should have ordered pursuant to section 87".

Contractual construction

7 MWH does not adopt the Court of Appeal's elaborate 're-writing' of the contract (although it contends for the same result). The construction propounded by MWH rests

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[4] *cf* MWH submissions, [60].
[5] *cf* MWH submissions, [63].
[6] MWH submissions, [68].
[7] MWH submissions, [64]–[67].
[8] MWH submissions, [75].
[9] Further, the effect of the "assurance" is contentious. For example, it may be contended that a commitment by a "merged company" suggests that there is no original company of substance remaining, and therefore less likely to encourage reliance on the acknowledgment in cl 4.
[10] MWH submissions, [3], [50]–[52].
[11] Note by counsel for MWH dated 10 November 2009, "Relief sought by the Appellant".
[12] As to which, see para 19 below.

on three matters distilled at [28(g)-(i)], but none contends with the plain meaning of cl 2 of the deed, and none is persuasive, for the reasons submitted below.

8 The first matter, in [28(g)], asserts that a complete release is not consistent with the substitution and transfer to TTW operating from the "effective date" (by cl 3, being the date of the deed).[13] There is no inconsistency in terms or effect. In any event, the term "effective date" in cl 3 only stipulates the time for operation of the deed, rather than informing the content of cl 2. However, if cl 3 were read in the manner MWH contends, it gives the contrary indication, by specifying the time for two limbs of cl 2 (substitution and transfer), but leaving the first limb (the release) unconfined and free to operate in accordance with its plain terms.

9 The second matter, in [28(h)], contends that a complete release is not consistent with the acknowledgment in cl 4, which "contemplates" certain claims not being released. The contention cannot be put higher than "contemplation" because the terms of the acknowledgment are not themselves inconsistent with a complete release, and can operate independently (for example, as the trial judge found, as a warranty) without detracting from the comprehensive scope of the release of prior liability.

10 The third matter, in [28(i)], contends that the words "liability of WS" in cl 2 should be read down to liability only to perform prospectively, because cl 1 imposes that obligation on TTW. However, TTW's obligation to perform the services does not inform the scope of liability assumed.

11 MWH also steps away from the Court of Appeal's reasoning by submitting that the *non sequitur* referred to in WSA's submissions at [44] was not required by the Court's decision. But the systematic overlay of words drawn from different parts of the deed was fundamental to the reasoning of the Court.

12 Further, MWH suggests that the lack of evidence informing contextual questions of business commonsense ought to have been remedied by WSA.[14] But WSA's criticism of the Court of Appeal's decision is directed to the absence of evidence informing the Court's postulations (including in the form of rhetorical questions) about matters external to the deed. If MWH relied on those matters, the onus to adduce relevant evidence fell on it.

[13] See also MWH submissions, [29(c)].
[14] MWH submissions, [29(e)], [30].

Abandoned breach of warranty claim

13 MWH seeks to draw a distinction between the formulations of the trial judge's admonition to determine only certain claims[15] – those which were "run" (as his Honour said at the commencement of trial) and those which were "pressed in final submissions" (as his Honour recorded in his reasons). That is, with respect, to rely on a distinction without a difference. The trial judge also clearly thought there was no difference.

14 Even if the claim for damages for breach of warranty was "live" several days before final submissions,[16] it was not "run" when MWH concluded its submissions without reference to the claim. In any event, however, MWH's citations of its own submissions in chief and reply[17] reveal distinct contentions made by reference to cl 4, but they are wholly disconnected from, and have nothing to do with, any claim for damages for breach of warranty. On the contrary, MWH's contentions were:

(a) that the 'undertaking' in cl 4 was a precondition for operation of the release;[18]

(b) that the release was given in exchange for the 'undertaking', supporting the argument that the release did not extend to negligence;[19] and

(c) that the 'warranty' was misleading or deceptive conduct enlivening relief under s 87 of the TPA so that the release is unenforceable.[20]

15 The trial judge's refusal to entertain the submission as to abandonment was addressed in the hearing before him (at the transcript cited in WSA's submissions).[21] His Honour did not find that MWH had in fact pursued its claim,[22] and he did not give written reasons. The written reasons to which MWH refers[23] to support the proposition that the trial judge rejected the abandonment submission in fact determined a different contention (that, if the damages claim were not abandoned, sufficient findings had not been made to make out the claim).

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[15] MWH submissions, [16].
[16] MWH submissions, [17]–[19], [35], [37].
[17] MWH submissions, [19]; see also [41].
[18] MWH submissions in VSCA: AB E19.
[19] MWH submissions in VSCA: AB E39.
[20] MWH submissions in VSCA: AB E41; MWH oral submissions in VSCA, T4204.
[21] WSA submissions, [17].
[22] Contrary to the suggestions in MWH's submissions, [38].
[23] Judgment No 6, [2007] VSC 127 (Byrne J), [8]–[11]: MWH submissions, [21] and [42].

16 The abandonment is not avoided or affected by pointing to the time taken for WSA to raise the abandonment. In any event, WSA did so at the first relevant opportunity, at the hearing for orders following delivery of reasons.[24]

17 Finally, this ground is not merely "a pure matter of practice and procedure in the Supreme Court of Victoria".[25] It is a matter which directly affects WSA's legal rights, and is significant in modern Australian case management of large and complex cases.

Procedural unfairness

18 The transcript references given by MWH[26] do not anywhere reveal even a hint of the Court of Appeal's elaborate construction of the deed and recourse to 'business common sense'. The passages relate only in general terms to construction of the deed, and several of them concern aspects which are not now in issue.

Proposed cross-appeal: discretionary relief under s 87

19 The claim by proposed cross-appeal for relief under s 87 should fail. MWH has not identified factors relevant to the crafting of any relief in relation to what is a tripartite deed. The trial judge and Warren CJ were both troubled by the absence of submissions by MWH as to the matters informing the exercise of discretion.[27] Even now, MWH only refers to a likelihood of suffering loss,[28] but that is only to restate the causation it must establish to enliven the discretion in the first place.

20 In any event, WSA submits that an order precluding it from enforcing the release in cl 2 would not be just where, among other things, MWH obtained judgment against TTW in respect of the same loss, and had a claim against WSA for breach of warranty which was abandoned.

Dated: 9 May 2011

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[24] WSA cannot be criticised because that hearing took place nearly 15 months after trial: *cf* MWH submissions, [37].
[25] MWH submissions, [77(b)].
[26] MWH submissions, footnotes 30 and 38.
[27] See transcript cited in WSA's submissions, footnote 121.
[28] MWH submissions, [80].