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CASENOTE: Liberty Financial Pty Ltd v Jugovic [2021] FCA 607

Background

Mr Jugovic (also **'Employee'**) was employed by Liberty Financial Pty Ltd ('**Liberty**' or '**Employer**') a finance company, in a role as Team Leader – Treasury.

The Employee signed a contract to take up a position as Executive Director - Debt Capital Markets with ORDE, another finance company less established than Liberty. Liberty responded by suing each of the Employee, and ORDE, and its parent company Wingate. The relief sought claims on the basis of the tort of inducing breach of contract, for breaches of legislative obligations, for accessorial liability in encouraging the Employee to take up his position with ORDE.

Interim injunction
On 4 May and 24 May 2021, Liberty sought and obtained (and then extended) an interim injunction restraining the Employee from being engaged by ORDE.

Interlocutory injunction
The subsequent hearing concerned the further extension of Liberty's injunction. This injunction sought to prevent the Employee taking up employment with ORDE until either the hearing of the main causes of action, or until his restraint of 12 months elapses.

His Honour Justice Beach of the Federal Court heard the application. His Honour considered authority concerning the twin test to be applied, when considering a pre-trial injunction, and noted that tests were:

- whether there is a serious issue to be tried – that is, whether it is merely possible or strongly arguable that a contravention has occurred, or will occur in future; and
- where the balance of convenience lies, if the injunction were to be granted – including whether damages would (in the circumstances of the case) be an adequate remedy.

Liberty filed affidavit evidence, including from its founder, Mr Ma. It argued in favour of the continuing injunction that:

a) it operated in residential, commercial and self-managed superannuation fund (SMSF) finance markets;
b) obtains funds to lend to borrowers from investors; and
c) as a non-bank lender, it then lends via referrals from mortgage brokers.

Liberty's principal argument was that the 12 months' restraint was reasonable. This was so, as the Employee was a senior manager supervising executives, and had responsibility for funding relationships which are the basis for Liberty's obtaining funds to lend. The Employee had regular (including weekly and sometimes daily) contact with clients.

Liberty's fear was that if the basis of lending (or 'securitisation' as it was called) were known or otherwise available to ORDE, then there was a great risk that the information would provide a head start to new entrant ORDE, helping it to very quickly raise funding and establish its funding capability. By this means it could obtain funding, and harm Liberty's business.

His Honour found that there were three types of confidential information in issue: first, the identity clients (lending to Liberty); second, the particular terms on which funding is secured from clients and, third, client investment preferences and risk appetites.

In contrast to Liberty, ORDE argued that it is not established as a business; and it is likely to be 2-3 years before any ratings agency approves and recommends investment in its lending products. ORDE says that its employment of the Employee will not give ORDE any advantage or head start, because his involvement or knowledge cannot be used during that term. By the time 2-3 years expires, ORDE says any information which Mr Jugovic holds about Liberty's clients or processes will be years out of date and, accordingly, of no assistance to ORDE.

Beach J was not at all convinced about the defendants' assertions and found a strong *prima facie* case that the restraints in the Employee's employment agreement were enforceable.

His Honour concluded that the present decision on the application may practically amount to final relief, and that he evaluated the material more closely and to say more than is usual concerning the strength of Liberty's *prima facie* case.

Repudiation argument

On 27 May 2021, after the hearing, solicitors for all defendants sent a letter and affidavits in response to the plaintiff's affidavits. In that material was a new argument, to the effect that Liberty is required to pay accrued and unused leave entitlements, and had not done so.

Mr Jugovic accepted non-payment as bringing the employment agreement to an end and cited authority in the Victorian Court of Appeal, to similar effect.[1]

Justice Beach was dismissive of the attempt to add repudiation as an additional argument to the defendants' case. His Honour found the Employee's employment agreement (except the post-termination restraints) came to an end on 4 May 2021 after notice of resignation. The leave entitlements only accrued on that agreement terminating. His Honour made clear that the repudiation argument did not sway his view on the enforceability of the restraints.

Rationale of the decision

This decision is intriguing for two reasons: *first* the detailed financial arrangements which (on first glance) would appear to be quite distinct in their application from ORDE and Liberty. Beach J conducted a detailed examination of many aspects of the lending and borrowing process of each of the corporate entities, in order to reach his conclusion about the *prima facie case*.

The second is the repudiation argument, which failed in this instance but has been successful in other cases. Whilst the non-payment of statutory of contractual entitlements is no trifling matter, the reasoning behind any repudiation argument is paramount. For example, if Liberty had withheld bonus entitlements or attempted to evade contractual obligations[2] then the repudiation argument may have had additional force.

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11 June 2021

[1] Crowe Horwath (Aust) Pty Ltd v Loone [2017] VSCA 181. See also (at first instance) [2017] VSC 163.
[2] Which were the facts of Loone at first instance: see [2017] VSC 163 at [21]-[22] (per McDonald J).