Giles JA, who gave the leading judgment ((2002) 46 ACSR 504), said (at [774]) that the appeals had in substance failed.

Then, on 6 November 2002 Mr Adler was served with informations and summonses alleging the commission of various offences under the *Corporations Act*. He was committed for trial on five separate charges.

Counsel for Mr Adler conceded that neither the declarations nor the compensation order made in the civil proceedings were penal in nature (albeit the compensation order and the disqualification order were said to be "severely detrimental" to Mr Adler and these orders were said to be "part of the overall circumstances"), but relied upon the fact that the pecuniary penalty order made against him was penal. That being so, and the conduct alleged against Mr Adler in the criminal proceedings being the same as part of the conduct the subject of the civil proceedings, he submitted that the criminal proceedings should be stayed as an abuse of process because of Mr Adler's exposure to double jeopardy.

James J rejected that submission, having found that, because of their different elements, the criminal offences were different in important respects from the causes of action in the civil proceedings and also that the civil causes of action and the criminal offences had different purposes. He said, in this last respect (at [113]), that the purpose of the civil causes of action had been that of enforcing the obligations of a director or an officer of the company or a person in a position to become involved in a contravention by a company by a civil penalty provision and to provide remedies for wrongs done against the company or its shareholders, whereas that of the criminal charges was the protection of the integrity of the market in shares in a company and to punish wrongs done to potential purchasers of shares in the company. He concluded (at [114]) that, because of the important differences between the elements of the civil causes of action and the criminal charges and because of the different purposes served by each, the criminal proceedings did not constitute an abuse.

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EXTENDING THE PERSONAL LIABILITY OF DIRECTORS OF CORPORATE TRUSTEES

In *Hanel v O'Neill* [2003] SASC 409 the South Australian Full Court considered the personal liability of directors of corporate trustees for undischarged liabilities incurred by the corporation when acting, or purporting to act, as trustee. By a 2:1 majority, it preferred the view that directors are personally liable if the trust assets are not sufficient to fully indemnify the corporation against its liability.

The foundation for the director's liability is s 197 of the *Corporations Act 2001* (Cth). Section 197(1) provides (emphasis added):

> (1) A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability if the corporation:
>
> (a) has not, and cannot, discharge the liability or that part of it; and
>
> (b) is not entitled to be fully indemnified against the liability out of trust assets.
>
> *This is so even if the trust does not have enough assets to indemnify the trustee*. The person is liable both individually and jointly with the corporation and anyone else who is liable under this subsection.

The issue turns upon the construction of s 197(1)(b) and the italicised sentence.

On the narrow view, the existence of a right to indemnity, without more, prevents s 197(1)(b) being fulfilled and directors being held liable. On this view, it does not matter that the trust assets are of insufficient value to satisfy the right of indemnity.

On the wider view, there would only be an entitlement to indemnity if the trustee had both the right to indemnity *and* there were sufficient assets to satisfy that right.

The majority preferred the wider view.

That conclusion departs from the position under the predecessor to s 197. The former s 233(2) said that a trustee shall not, merely because the trust assets are insufficient to indemnify the trustee in

respect of the liability concerned, be taken not to be entitled to be fully indemnified out of the assets of the trust in respect of a liability. The closest s 197 comes to including such a provision is the sentence italicised above, the meaning of which is obscure.

One member of the majority, Gray J, said that re-enactment, without a provision directly comparable to s 233(2), suggested intended change.

The other member of the majority, Mullighan J, said that the question of entitlement to indemnity was not merely a matter of law to be determined from the trust deed but a matter of mixed law and fact; there could be no entitlement to be indemnified if there were no assets comprising the trust fund.

Debelle J dissented, saying that a change in statutory wording did not require a conclusion that Parliament intended to alter the law; s 197(1)(b) depended upon an entitlement to indemnity, not upon whether the indemnity is in fact provided.

These views are obiter. However, given the widespread use of trading trusts, the issue is likely to attract further judicial attention.

Andrew Lyons

GARCIA v NAB: WHO IS WITHIN ITS SCOPE AND WHAT MUST THEY BE TOLD?

Two recent decisions of intermediate appellate courts support widening those entitled to relief under the equitable principles discussed by the High Court in *Garcia v NAB* (1998) 194 CLR 395 beyond sureties married to, or in marriage-like relationships with, the debtor. One of those decisions also supports the view that the steps taken by many lenders to ensure that intending sureties are independently advised are insufficient to protect them against relief under *Garcia* or *CBA v Amadio* (1983) 151 CLR 447.

The joint judgment in *Garcia* says (at 409) that it is unconscionable for a lender to enforce a guarantee if:

(a) in fact the surety did not understand the purport and effect of the transaction;

(b) the transaction was voluntary (in the sense that the surety obtained no gain from the contract the performance of which was guaranteed);

(c) the lender is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and yet

(d) the lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her.

Subparagraph (c) mentions only wives. Elsewhere the joint judgment left open the extension of these principles to "long term and publicly declared relationships short of marriage between members of the same or opposite sex".

Both decisions consider sureties who are not in such a relationship with the debtor.

In *Kranz v NAB* [2003] VSCA 92, the borrowings were arranged by the surety's brother-in-law who was also his accountant and business adviser. Charles JA, with whom Winneke P and Eames JA agreed, wrote that the *Garcia* principles were not confined to intimate relationships but applied where a surety established "that the bank was aware of a relationship that put the bank on inquiry, such as that of husband and wife or solicitor and client, or that there was a relationship of trust and confidence between the debtor and the third party".

This wider view opened the door for the surety to satisfy the *Garcia* criteria but he nevertheless failed because the bank did not know, nor should it have assumed, that there was a relationship of trust and confidence between the surety and his brother-in-law.

The court refused to adopt the even wider position in *Royal Bank of Scotland v Etridge [No 2]* [2002] 2 AC 773 that for all non-commercial relationships of which the creditor is aware, the creditor is put on inquiry when a volunteer offers to stand surety for another. It refused because the joint judgment in *Garcia* declined to follow Lord Browne-Wilkinson's approach in *Barclays Bank v*

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