
The Problem With the Dental Act — *Bennett v Dental Board of Queensland*

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This paper concerns the legal effect and correctness of the decision of the Court of Appeal in *Bennett v Dental Board of Queensland* (unreported, appeal no. 71 of 1994). This decision has been the subject of much debate within the dental profession in Queensland, both for and against. The facts briefly are these: Mr Bennett and another wished to practise dentistry under the name “Albert St. Dental Group”, and sought approval from the Dental Board (hereinafter “the Board”) as required by s 41(2A) *Dental Act 1971* (Qld):

From a list of names submitted in respect of a dental company or proposed dental company the Board may select one or more names acceptable to it as an approved name ...

The Board rejected this name (and others) on the basis that the geographic reference gave the applicant an unfair advantage in competition with other practices in the area. Mr Bennett sought review under the *Judicial Review Act 1991* (Qld), alleging that in following such a policy, the Board was taking into account an “illegitimate consideration”.¹ At first instance, Mr Bennett was successful before Moynihan J in the Supreme Court. The Board then brought an appeal to the Court of Appeal, which allowed the appeal, dismissing Mr Bennett’s application.

The leading judgment in the Court of Appeal was delivered by Pincus JA.² His Honour’s reasoning rested on interpretation of the relevant provisions of the *Dental Act 1971* (Qld) (hereinafter “the Act”). Section 30(4) of the Act provides:

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1 This is grounds for review under s 20(2)(c) *Judicial Review Act 1991* (Qld) (“JRA”) as an “asking the wrong question”-type jurisdictional error (*Anisminic Ltd v Foreign Compensation Commission* [1969] AC 374; *BHP Petroleum Pty Ltd v Balfour* (1987) 71 ALR 711), or as an irrelevant consideration under ss 20(2)(e) and 23(a) JRA.

2 Fitzgerald P and McPherson JA delivered separate but concurring judgments.

A dentist or a dental specialist shall not practise dentistry under a name other than his or her own name,

and was the focus of the judgment. The Act establishes the Board and includes the power to make by-laws to regulate advertising by the dental profession.³ Pursuant to this power, the *Dental By-laws 1988* were enacted. These provide *inter alia* that the by-laws alone shall govern the mode of the advertisement of the practice of dentistry,⁴ and that a dentist or dental specialist may advertise that he or she practises dentistry as a member of a partnership or association only if the Board has approved the proposed name of the partnership or association.⁵

Justice Pincus noted that the power of the Board to approve names of partnerships or associations was implicit in the by-laws.⁶ His Honour also found that to practise under such an approved name would necessarily contravene s 30(4) of the Act. Yet his Honour found no immediate problem with this, observing:

If one asks whether a grant of approval of a name of a partnership will necessarily lead to a breach of s 30(4) of the Act the answer must be in the negative. The grant of approval of the name does not create a positive obligation to use it and members of a partnership having an approved name could, as it appears to me, lawfully refrain from practising under that name and simply use their own names.

Yet the undesirable result of the legislation in this regard was also noted:

But as a practical matter the purpose of obtaining approval of a name will surely be to practise under that name ...

His Honour also found that s 38 of the Act implicitly permits the practice of dentistry in the name of a dental company, and stated:

It is odd that the Act permits this yet otherwise prohibits the practice of dentistry under a name other than the dentist's own ...

However, notwithstanding these observations, Pincus JA concluded:

It follows that if approval were granted and taken advantage of by practising under the approved name, whether or not the name of the individuals comprising the partnership or association so named are disclosed, there will be a breach of s 30(4) of the Act. In those circumstances the Board should refuse approval of the proposed name and in my respectful opinion the application for approval should not have been remitted to the Board.

3 Section 35(2) (f) *Dental Act 1971* (Qld).

4 By-law 16(1) (a).

5 By-law 16(2) (a) (i).

6 This is despite the fact that the Act itself authorises registration of dental companies only according to the words of s 38. Rationale for the implicit power can be found from the heading to the section "Formation of Dental Companies, *etc*" (emphasis added).

This decision is somewhat startling as it entails a number of conclusions. First, it substantially limits the Board's powers to make by-laws for the regulation of advertising in s 35(2) (f) and s 40 of the Act, with the result that by-law 16 is largely invalid. Second, it renders s 38 virtually ineffective. Third, the net effect of s 41 (regulation of company names) is no more than mere courtesy.⁷

With respect, Parliament could surely not have intended such a result,⁸ and there exists an interpretation of the Act which may give all of its provisions useful effect.

The interpretation of the Act presented by Pincus JA adopts the approach that the provisions after s 30(4), being inconsistent with the earlier provision, can be of no real effect. In general, an Act of Parliament is to be given effect according to its content. But this is not to restrict the interpretation solely on the face of the words or parts of the Act in isolation. The Act should be read as a whole:

... words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense ...⁹

The heading to Part 4 of the Act¹⁰ which contains s 30(4) is "MISCELLANEOUS". Although the language of s 30(4) is clear, it may be construed in a general sense, and therefore subject to the heading.¹¹ This provides a useful guide, particularly considering the Act's history of amendments, as to how s 30(4) is to be interpreted.

The long title of the Act is "An Act to consolidate and amend the law relating to dentists and to control the practice of dentistry in certain particulars". The long title forms an important part of the Act¹² and has a useful interpretative purpose:

It may be proper to look at the title for the purpose of determining the scope of an Act; it may be referred to, not to contradict any clear and unambiguous language, but if there is any uncertainty it may be referred to for the purpose of resolving the uncertainty.¹³

7 as approval by the Board would still not permit the practice of dentistry under such an "approved name".

8 Indeed, the second reading speech of the minister for health when the *Dental Act Amendment Act 1983* was enacted indicates that the introduction of Part 5 of the *Dental Act 1971* was intended to give the Board real power to regulate dental companies formed for the purpose of dental practice. Reference to this speech is permissible for the purposes of statutory interpretation — s 14B *Acts Interpretation Act 1954* (Qld).

9 *Attorney-General v Prince Earnest Augustus of Hanover* [1957] AC 436 per Viscount Simonds at 461.

10 The heading to the Part forms part of the Act — s 14(1) *Acts Interpretation Act 1954* (Qld).

11 *Toronto Corporation v Toronto Railway* [1907] AC 315 at 324; *Ragless v District Council of Prospect* [1922] SASR 299 at 311.

12 *Fielding v Morley Corporation* [1899] 1 Ch 1 at 4.

13 *Birch v Allen* (1942) 65 CLR 621 at 625.

Clearly in the present case there is uncertainty or at the very least ambiguity. The long title is of assistance in two respects. First, it states that the Act is to amend the law relating to dentists. Part 5 of the Act contains sections 38 and 40, and was added to the Act by amendment in 1984. Further, s 38 reads:

Nothing in this Act is to be construed as prohibiting the formation of a dental company and the practice of dentistry or any dental specialty in the name of a company.

Giving this section its ordinary meaning according to its words, it seems specifically directed at negating the potential effect of s 30(4) as held by Pincus JA.

There is also a presumption in statutory interpretation that later Acts or provisions impliedly amend or repeal earlier inconsistent Acts or provisions to the extent of inconsistency.¹⁴ It should be said, however, that before such an interpretation may be adopted, the two enactments should be so inconsistent or repugnant that they cannot stand together.¹⁵ If s 30(4) can be interpreted in a way that renders it harmonious with later provisions such as s 38, it should be so interpreted.¹⁶ With this in mind, the question is what interpretation could s 30(4) be given to produce the desired result? Before proceeding to this question, it should be noted that there is an exception to the above rule.

An exception to the above presumption exists in the so-called *generalialia specialibus non derogant* rule.¹⁷ This rule applies to prevent a later provision (or enactment) from amending an earlier provision where the earlier provision deals with the same or related subject matter in more specific terms. The rule does not, however, apply in this case as the subject matter is only dealt with in general terms. This is borne out in the specific wording of s 38 (and other provisions of Part 5), and the generality of the heading to Part 4 ("MISCELLANEOUS").

The specific wording in s 38 gives rise to a strong presumption of its having intended effect beyond that which it was given in this case. This is further evidenced by s 40 which amends the power of the Board to regulate advertising by dentists and dental specialists provided in s 35(f) so as to include dental companies and partnerships. Although no provision in Part 5 specifically states that s 30(4) is to be similarly amended, it is submitted that such an interpretation could be afforded to it in light of the other additions and amendments of Part 5. Accordingly, s 30(4) would read:

A dentist or dental specialist, dental partnership or dental company shall not practise dentistry under a name other than his, her or its own name.

14 This is the so-called *leges posteriores priores contrarius abrogant* rule; see MacAdam AI and Smith TM *Statutes* 3rd ed 1993 at 157 et seq.

15 *Goodwin v Phillips* (1908) 7 CLR 1 at 10.

16 *Ross v R* (1979) 141 CLR 432 at 440.

17 MacAdam & Smith *supra* n.14 at 162; *McLean v Kowald* [1974] SASR 384 at 387.

This interpretation retains the Board's capacity to regulate advertising for the purpose of practising dentistry, giving effect to the requirement of a dental company or partnership to submit a proposed name to the Board for approval. Equally, s 30(4) could be interpreted to read:

A dentist or dental specialist shall not practise dentistry under a name other than his or her own name or approved name.

As noted at the beginning of this paper, this decision has drawn much attention from dentists in Queensland. Dentists using a geographic reference in their practice name (or, as a result of this decision, any name other than their own name) have generally been dismayed and have called for a re-drafting of s 30(4). Those dentists who practise under their own name have in general applauded the result, and called for a retention of s 30(4) in its current form. As a disinterested party, I submit that following this decision s 30(4) should be redrafted in perhaps either of the above two forms. Alternatively, s 30(4) could be prefaced by the words "Subject to this Act", and interpreted as submitted above. This would give effect to the provisions in Part 5, vesting true regulation of dental practice names in the Dental Board as was seemingly intended by Parliament in amending the Act.¹⁸ If this occurs, the policy of the Board with respect to inclusion of geographic reference in dental practice companies or partnerships may properly be brought into question, as was intended by Mr Bennett's action.

References

1. MacAdam AI and Smith TM, *Statutes*, 3rd ed, Butterworths, Sydney 1993.
2. Gifford KH and DJ, *How to understand an Act of Parliament*, 6th ed, Law Book Co, Sydney 1987.
3. Miers DR and Page AC, *Legislation*, 2nd ed, Sweet and Maxwell, London 1990.

18 *Supra* n.8.

making and not just about profit-making. Disclosure as an exception to the conflicts and profits rule is discussed comprehensively and attention is drawn to the fact that these rules are excluded whenever the standards of conduct considered to be appropriate are satisfied.

The remedies available for breach of fiduciary duty are dealt with in great detail and the treatment of remedies is a useful addition to the literature on the topic. The earlier work on fiduciary obligations by PD Finn did not provide any extensive treatment of the remedies available for breach of fiduciary duty. In the course of analysing the available remedies there is a contemporary account of developments and a forward-looking approach to developments in this area. Hence in relation to the constructive trust there is a clear acknowledgment and acceptance of the constructive trust as a remedy, even where it is based on a pre-existent property interest. The author correctly observes that "Australian courts now take a policy-oriented approach to raising of interests to justify constructive trusts. Remedial and result-oriented considerations guide the inquiry. 'Property interest' simulacra of the express trust are no longer appropriate" (p.226). The remarks of Deane J in *Muschinski v. Dodds* as to when a constructive trust arises are referred to and dismissed with the following flourish: "Remarks like this may well be a straw in the wind. But, as legal doctrine had not so evolved at the date of writing this book, we will ignore these possibilities and assume that a constructive trust as a remedy for a breach of fiduciary duty is effective for all purposes as from when the breach occurred" (p.233). It is perhaps unfortunate that the author has dismissed this "straw in the wind" so quickly as there are important issues here which require further analysis in the context of the discretionary nature of equitable relief and the impact of such relief on third party rights. There are also issues which concern the status of unadjudicated claims, for example in the context of assets tests for determining pension rights. A more detailed consideration of the question of when the constructive trust arises would have enhanced the treatment of the constructive trust in this text. The necessity for rescission before the award of a constructive trust in some instances is discussed and the formalism of the need for rescission is questioned and rejected as inappropriate in comparison with developments in relation to the constructive trust in other contexts. These observations are to be welcomed and it is to be hoped that the matter may be reconsidered by the High Court in an appropriate case.

As the author points out in the Preface, much of the book "is taken up with discussing the shortcomings of personal remedies and examining the interaction of proprietary relief and insolvency: a level of analysis that equity illumines and restitution does not reach". In keeping with this statement there is a good analysis of proprietary claims in the context of insolvency and an acknowledgement that the courts have a discretion to award proprietary relief as well as acceptance of the fact that "It is not unsound now to recognise that a proprietary remedy may flow from a personal wrongdoing" (p.262). The good sense of these contemporary developments is accepted rather than attempting to maintain a rearguard action in

support of maintaining a rigid proprietary claims in disregard of the need for just outcomes.

The requirement of knowledge for accessories to be made liable for breach of duty is explored and the author points out that the High Court has not considered the question of knowledge required for accessories since *Consul*. There has been an extensive consideration of this issue in English and New Zealand cases and there is a need for the High Court to undertake a thorough reconsideration of this issue in the light of such developments. It is to be hoped that the High Court will soon be provided with an opportunity to undertake such a review.

There are some other aspects of this book which should be noted. It includes a chapter on confidential information and a chapter on undue influence. These chapters add little to the existing writings on these topics. Each chapter of the book is supported with extensive references to academic writings and decided cases including some material from the United States. However, the absence of any reference to and criticism of the reviewer's writings on the topic is a little surprising. This book is a welcome addition to the literature on fiduciary relationship and those parts of the book which focus on remedies for breach of fiduciary duty are particularly well done. It provides a useful and up-to-date account of the principles and remedies which are applicable to fiduciaries, while at the same time placing these principles and remedies within a theoretical framework which takes account of the legal reasoning processes involved in the application of the principles and remedies. It will help to ensure that the perspectives of equity are not lost through the reception of unjust enrichments and restitution ideas into Australian law.