The Westpac letters case

Bruce Burke discusses the injunctions restraining publication of these letters and suggests the law governing the reporting of parliamentary proceedings needs clarification

The recent case involving attempts by Westpac Banking Corporation to restrain the publication of two letters received wide media coverage and raised many legal issues. Unfortunately, it did not solve many of the issues raised and some very interesting and important questions remain unanswered.

The case revolved around questions of confidential information and breach of copyright and the principal actions remain on foot at the time of writing although the injunctions have now been discharged by consent.

The letters which form the basis of the action by Westpac were two letters of advice from its solicitors, Allen Allen & Hemsley, relating to the activities of Westpac's wholly owned subsidiary, Partnership Pacific Limited's dealings with foreign exchange transactions.

A number of banks had experienced problems with foreign currency loans to borrowers due to the severe devaluation of the Australian dollar against some foreign currencies during the 1980s.

Westpac engaged Allens to do a thorough review of the position. This examination revealed a number of actual or potential problems, the disclosure of which was to become a matter of some embarrassment to Westpac.

The reports suggested that the borrowers, who had relied upon the skill and expertise of Partnership Pacific Limited to manage their foreign exchange exposures, had ended up millions of dollars worse off than they would have been had their exposures not been managed at all.

The reports also suggested that 'point-taking' may have occurred. This is a situation where a borrower is not given the best exchange rate available when transactions are made on their behalf.

The other significant matter which was referred to in the Westpac letters was 'deal-switching'. Where a bank has entered into a foreign currency transaction in its own right and that transaction has turned sour the bank may, without the knowledge of a customer, switch that sour transaction to a customer in place of the customer's transaction which may have been profitable. The report did not find conclusive evidence of deal-switching but suggested it had occurred on the available evidence - despite the fact that vital records had gone missing.

In addition there were suggestions in the reports that suspense accounts had been used to avoid Reserve Bank requirements.

In short, the reports painted a very frank picture of a merchant bank with serious problems where customers' interests and the bank's fiduciary duties had not necessarily been foremost in the minds of the bank officers.

The injunctions

It was to emerge some weeks after the initial injunctions that there had been attempts to blackmail Westpac with these letters by certain parties and this goes some way to explaining the acute sensitivity of Westpac to publication of portions of the letters.

On 29 and 30 January the *Sydney Morning Herald* and *The Age* ran articles which referred to the existence of these letters and disclosed some of the contents. Whether the matter would have ended there had legal action not ensued is a moot point but Westpac responded seeking immediate injunctions to restrain further publication. Mr Justice Young granted interim injunctions restraining further publication of the letters contents by the John Fairfax Group (*Sydney Morning Herald* and the *Financial Review*), David Syme (*The Melbourne Age*) and Ms Anne Lampe, the journalist who had written the original articles.

An attempt was made to set aside the injunction but this was continued by Mr Justice Powell and similar orders were made against the ABC and later the proprietor of the *Canberra Times*.

An appeal against this decision was made by the John Fairfax Group, David Syme and the ABC to the Court of Appeal. That court chose not to interfere at that time as the interim relief granted was discretionary, and there was no manifest error.

The issues

Westpac sought an injunction on the basis of its rights to keep confidential the alleged confidential information in the two letters and to protect its copyright in those letters. To support its claim it produced an assignment of the copyright in the two letters from Allen Allen & Hemsley to Westpac made prior to the commencement of the proceedings.

Each of the defendants asserted that due to prior publication the information was no longer confidential. It was also argued by some of the defendants that the 'iniquity' the letters referred to would provide a defence to any claim of confidentiality. There is some looseness in the iniquity defence which may be clarified in any subsequent hearing of these proceedings. The essence of the iniquity claimed was that the public interest in the exposure of the letters' contents outweighed the plaintiff's right to maintain the confidentiality of the letters in this case.

The strong view of Justice Powell was that, whatever the merits of any iniquity defence might be, this was a matter which could only be properly dealt with at the final hearing. If it were dealt with at an interlocutory stage and the injunctions were discharged then Westpac would be deprived of its ultimate remedy.

Political involvement

Up until this time the proceedings had provided interesting legal questions relating to confidentiality and the iniquity defence, etc. However, a whole new area opened up when attempts were made to table the two letters in various houses of parliament. Attempts to table the letters in the Federal Parliament were frustrated when the Speaker ruled that it would be inappropriate to table the documents because they were sub judice. The clamouring for exposure came not from Liberal or Labor members but from several independent and Democrat members of various Federal, State and Territory houses.

In the ACT House of Assembly a large amount of material was disclosed in a speech by Mr Moore, an independent member of that house. The documents were then read in full by Mr Ian Gilfillan, a Democrat member of the South Australian Upper House, and so became part of the Hansard record of South Australia. As a result there was front page coverage of the issue and the substance of the letters in most States, although coverage in New South Wales was restricted.

All of the defendants then re-applied to discharge the injunctions on two principal grounds:

- That the material was now so widely disseminated, as a result of these parliamentary disclosures, that there was no confidentiality left in the documents and that the continuation of the injunctions would be futile.
- That the Court should take into account the interests of the public in receiving reports of parliament.

Westpac, in opposing the applications claimed that the various articles and broadcasts by the defendants were in contempt of court and that a person in contempt should not be heard. Justice Powell did not base his decision on contempt but continued the injunctions indicating he was not aware of any authority binding upon him to permit reports of proceedings in 'foreign parliaments' and that the information was still confidential. He stated that there was still 'gold in them thar hills'.

Justice Powell also ordered that there be no disclosure in New South Wales of an annexure to an affidavit of Mr M J Martin of the ABC. The annexure was the proof copy of Hansard from South Australia which included Mr Gilfillan's reading of the two letters.

From this decision, the John Fairfax Group and David Syme launched a further appeal to the Court of Appeal.

Further developments

Meanwhile, there had been other developments. Westpac had sought orders against Mr McClennan, a former officer of Westpac and then an adviser to the Foreign Exchange Borrowers Association. This related to evidence to be given to a parliamentary inquiry into banking under the Federal Labor parliamentarian Steve Martin which was hearing evidence into the banking system. McClennan was to appear before this inquiry.

The Speaker of the Senate engaged Mr Garry Downes QC to appear to ensure that the interests of Parliament in its inquiry were preserved and that no fetter would be placed upon it. Westpac readily asserted that it made no claim to restrict Mr McClennan in presenting anything to the parliamentary inquiry and that the injunctions it sought were to be restricted to preventing disclosure of the information to any other party.

The *Tribune* newspaper then published the letters in full and Westpac sought injunctions and orders to deliver up all unsold copies. Current affairs programs beyond the ABC had started to examine the issues and Nine Network's *Business Sunday* program not only discussed the issues critically but exposed further damaging internal memos of the bank.

When Justice Powell had delivered his judgment refusing to set aside the injunctions he had been expressly asked by the ABC representative whether the intention of his judgment was to prevent the ABC from publishing a report of the South Australian Parliament on South Australian radio stations. Justice Powell indicated that he did intend that restriction. Similarly, *The Melbourne Age* which published predominantly in Victoria was unable to publish reports while the injunction remained in force as the injunctions operated against the publisher rather than simply within New South Wales. This placed all of the defendants at a disadvantage as against the rest of the Australian media as these other media organisations were not subject to the injunctions and could publish fair reports of parliament. Evidence was produced by the defendants that the speech of Mr Gilfillan in the South Australian Parliament had been widely reported throughout Australia although not in New South Wales.

Stuart Fowler

A further appeal

When the second appeal of John Fairfax Group and David Syme was heard before the Court of Appeal, senior counsel for Westpac acknowledged that he could not seek to continue a restriction placed upon a party broadcasting solely in South Australia so as to prevent it publishing a fair report of the proceedings of that State's parliament.

Section 12 of the South Australian *Wrongs Act* was raised. It provides a defence to any civil or criminal action arising from certain publications including an extract or abstract of parliamentary reports made in good faith and without malice. This section had not been raised in the argument before Justice Powell.

Similarly, section 3A of the Victorian *Wrongs Act* provides that reports of any Commonwealth or State parliament or Territory legislature are privileged unless malice is proved.

By contrast, the New South Wales safeguards for parliamentary reporting by the media are limited to section 24 of the *Defamation Act* which provides a defence to defamation proceedings only for fair reports of a wide range of proceedings of public concern including proceedings of any parliament or parliamentary committee of any country, State or province.

The interesting question which the Court of Appeal was asked to resolve was what parliamentary reports should a media publisher be entitled to publish. Senior counsel for Westpac indicated that his client could make no claim for a continuation of the injunction if the letters were tabled or read out in the Federal Parliament or the New South Wales Parliament, The issue appeared to be whether, in the absence of any authority which could be produced for the Court, the 'right' to report parliament within New South Wales was restricted to the reporting of the Federal and New South Wales parliaments or whether it should be extended to other Australian parliaments or to overseas parliaments and if so, where it should stop.

An unsatisfactory ending

The Court of Appeal showed considerable interest in the arguments put before it and there is no doubt that the judgment of the members of that court would have been important and interesting. However, the Chief Executive of Westpac appeared before the Parliamentary Banking Inquiry prior to the Court of Appeal handing down its determination. Mr Fowler of Westpac produced the relevant letters to the Parliamentary Inquiry and reluctantly acceded to those documents being tabled and forming part of the public record. Westpac then consented to the discharge of injunctions thereby removing a very interesting question from judicial consideration.

As the relative position of parliaments and courts became a very live issue in this case it may be that legislation will be contemplated to guarantee freedom to the media and individuals in general to discuss occurrences in parliaments of other states and territories. At present, there exists a first instance judgment to the effect that it is not possible to publish or discuss such matters as of right and that to do so may constitute contempt of court.

The effect of such court orders on media organisations not named in those orders is another area where judicial clarification would be welcomed. In the Westpac litigation there were some suggestions, based on English authority, that parties not subject to the injunction could be in contempt if, knowing of the injunction restraining others, they proceeded to publish.

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