

Supreme Court  
New South Wales

---

Case Name: Gooley v NSW Rural Assistance Authority

Medium Neutral Citation: [2018] NSWSC 593

Hearing Date(s): 30 April 2018

Decision Date: 4 May 2018

Jurisdiction: Equity - Commercial List

Before: Stevenson J

Decision: Rule pursuant to s 192A of the Evidence Act 1995 (NSW) that the report of Darel Hughes is not admissible

Catchwords: EVIDENCE – opinion evidence – exceptions – expert opinion – advance rulings – whether expert opinion admissible – whether parts of lay evidence admissible

PRACTICE AND PROCEDURE – pleadings – whether case propounded in affidavits beyond pleadings – whether pleadings embarrassing

Legislation Cited: Australian Securities and Investments Commission Act 2001 (Cth)  
Corporations Act 2001 (Cth)  
Evidence Act 1995 (NSW)  
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited: ASIC v Rich [2005] NSWSC 149  
Bone v Wallalong Investments [2012] NSWSC 137  
Chaina v Presbyterian Church (NSW) Property Trust (No 6) [2012] NSWSC 1476  
Kennedy v Cordia (Services) LLP [2016] UKSC 6  
Lambert Leasing Inc v QBE Insurance Australia Ltd [2012] NSWSC 953  
NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000; Arnold v Minister Administering Water Management Act 2000 (No 4)

[2012] NSWLEC 120  
Sellars v Adelaide Petroleum NL; Poseidon Ltd v  
Adelaide Petroleum NL (1994) 179 CLR 332; [1994]  
HCA 4  
Smith v Australian Executor Trustees Ltd; Creighton v  
Australian Executor Trustees Ltd [2017] NSWSC 1406

Category: Procedural and other rulings

Parties: Paul Gooley (First Plaintiff/Respondent)  
Susan Gooley (Second Plaintiff/Respondent)  
NSW Rural Assistance Authority (First Defendant)  
Commonwealth Bank of Australia (Second  
Defendant/Applicant)

Representation: Counsel:  
P E King (Plaintiffs/Respondents)  
T D Castle with A Kaufmann (Second  
Defendant/Applicant)

Solicitors:  
McKell's Solicitors (Plaintiffs/Respondents)  
Dentons (Second Defendant/Applicant)

File Number(s): SC 2016/279614

## **JUDGMENT**

- 1 In October 2007 Bank of Western Australia Ltd (“BankWest”) lent Mr Paul and Mrs Susan Gooley \$1.35 million secured over farming properties owned by Mr and Mrs Gooley in the Casino area. The properties are known as “Clovass” and “Dyraaba” (also known as “Dobbies Bight”).
- 2 Commonwealth Bank of Australia (“the Bank”), as the successor in title to BankWest, seeks to recover the amount that is said to be due under that advance (some \$1.9 million as at September 2016) and possession of the properties.
- 3 Mr and Mrs Gooley claim that BankWest agreed, and represented that the relevant loan facility had a term of 15 years, but called the loan up after only 5 years. They claim to have suffered damage as a result.

4 In the Second Cross-Claim, Mr and Mrs Gooley repeat the pleadings contained in their Defence to the Bank's First Cross-Claim. For convenience I will refer simply to Mr and Mrs Gooley's "Cross-Claim".

5 In their Cross-Claim, Mr and Mrs Gooley characterise that damage as follows (at par 51):

"As a result of the breach or breaches of contract by [BankWest] [Mr and Mrs Gooley] were left without banking support and unable to refinance and were forced to substantially wind down Gooley Farms as a going concern, and suffered significant loss and damage.

Particulars

Particulars exceed 3 folios and have been provided to [BankWest] in August 2016".

6 The "Gooley Farms" are Clovass and Dyraaba. The particulars referred to comprise a number of spreadsheets headed "Cumulative Economic Losses from Reduced Economic Activity" from January 2013 to June 2016 in respect of the properties Clovass and Dyraaba. The total loss alleged in that document is some \$2.68 million. A later document, this time expressed to deal with the period July 2012 to June 2017, alleges a loss in the order of \$3.5 million.

7 Mr and Mrs Gooley have served two affidavits sworn by Mr Gooley on 13 February 2018, and a further affidavit sworn by Mr Gooley on 28 March 2018. They have also served what purport to be expert reports by Mr James Wade dated 29 March 2018 and by Mr Darel Hughes dated 9 April 2018.

8 By Notice of Motion filed on 20 April 2018, the Bank seeks advance rulings under s 192A of the *Evidence Act 1995* (NSW) concerning the admissibility of:

- (a) a number of paragraphs in Mr Gooley's affidavit; and
- (b) the reports of Mr Wade and Mr Hughes.

9 The Bank also seeks an order pursuant to r 14.28 of the Uniform Civil Procedure Rules 2005 (NSW) striking out identified paragraphs of Mr and Mrs Gooley's Cross-Claim.

10 In the course of argument Mr King, who appears for Mr and Mrs Gooley, accepted that it would be necessary for Mr and Mrs Gooley to amend their Cross-Claim in at least one respect and that it would also be necessary to "supplement" the reports of Mr Wade and Mr Hughes.

- 11 Mr King sought some time to take those steps.
- 12 Mr Castle, who appeared with Mr Kaufmann for the Bank did not, in terms, object to Mr King having an opportunity to cause those steps to be taken but urged me, nonetheless, to rule on the matters agitated in the Bank's Notice of Motion.
- 13 I shall do so, although as Mr King has foreshadowed responding to the Bank's application as I have stated, I shall do so a little more briefly than would otherwise be the case.
- 14 I shall deal first with the form of Mr and Mrs Gooley's Cross-Claim.

### **The Cross-Claim**

- 15 At the heart of Mr and Mrs Gooley's claim is an allegation that it was an express term of their arrangement with BankWest "that the term of the principal loan of \$1,200,000 remained unchanged for a term of 15 years, with principal repayable after 5 years by monthly instalments" and that an officer of BankWest, Mr Mitchell, represented "that the principal loan was for 15 years, an interest only term of 5 years and a 10 year term of principal and interest repayments".
- 16 Mr and Mrs Gooley claim that, contrary to that term and representation, BankWest demanded repayment of the loan after 5 years.
- 17 The first point to be made about the pleading is that it makes no reference to any claim made by Mr and Mrs Gooley for the loss of opportunity to relocate their farming activities from the Casino area to what Mr Gooley describes in his affidavits as "the Tablelands"; by which he means "areas located in the Armidale, Guyra, Glenn Innes and Inverell districts".
- 18 Mr Gooley's affidavit is, however, replete with references to such a relocation which Mr King, in his submissions, described as the "Gooley's lost ...opportunity of moving to the Tablelands completely by reason of the lure of a 15 year loan".
- 19 Evidently Mr and Mrs Gooley seek to make a claim of the kind discussed by the High Court in *Sellars v Adelaide Petroleum NL*; *Poseidon Ltd v Adelaide Petrol NL* (1994) 179 CLR 332; [1994] HCA 4.

- 20 To make out such a claim Mr and Mrs Gooley would have to show that conduct of BankWest caused them to lose an opportunity to relocate to the Tablelands. They would have to show, amongst other things, a causal relationship between the loss of that opportunity and BankWest's conduct and that there was a "substantial, and not merely speculative" prospect of obtaining the benefit of the opportunity said to have been lost (per Brennan J in *Sellars* at 364).
- 21 At present, the Cross-Claim contains no allegations at all about this alleged opportunity.
- 22 That is a matter Mr King said he would cause to be cured by an amendment to the Cross-Claim. That indication was given only in the course of argument before me and despite the fact that the Bank had made clear during a directions hearing before Hammerschlag J on 13 April 2018 and in its written submissions on the motion before me that it contended that the loss of opportunity case was not pleaded.
- 23 There are, however, other difficulties with the Cross-Claim as presently formulated.
- 24 To take par 51 as an example, the pleading does not articulate how the conduct complained of (calling up the loan after 5 years) left Mr and Mrs Gooley "unable to refinance" and being "forced to substantially wind down Gooley Farms as a going concern".
- 25 The pleading does not articulate any causal link between the breaches and the loss alleged (cf *Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd* [2017] NSWSC 1406 at [133] and [139] (Ward CJ in Eq)).
- 26 The Cross-Claim contains further allegations at par 52 that in 2011 the Bank "provided a further loan product" to Mr and Mrs Gooley to assist them with the purchase of Dobbies Bight (which I understand to be the same property as Dyraaba), that the Bank failed to exercise an alleged duty of care of skill and instead engaged in "a form of asset lending" (at par 53) and that this caused the same loss as is alleged at par 51.

- 27 Again the pleading does not explain how the provision by the Bank of that “further loan product” and the alleged fact that it was “a form of asset lending” has led to the circumstance articulated at par 51, namely Mr and Mrs Gooley being unable to refinance and being forced to substantially wind down Gooley Farms.
- 28 At par 54 of the Cross-Claim Mr and Mrs Gooley allege that in April 2012 they asked the Bank “for a short term loan of \$200,000 to enable the business to continue” and that such loan be “repayable on the sale of some property”.
- 29 Mr and Mrs Gooley then allege at par 57 that, in some unarticulated way, the Bank “failed to help [Mr and Mrs Gooley] overcome their financial difficulties at that time” and “instead worked against [Mr and Mrs Gooley] or any repayment plan by not consulting with them”.
- 30 That conduct is alleged to have caused the loss alleged at par 51. Again, the pleading does not attempt to articulate a link between the complaint and the loss.
- 31 I see similar difficulties with the pleadings concerning conduct that is said to be misleading or deceptive, and allegedly in contravention of s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth).
- 32 The Cross-Claim contains allegations at par 58 that Mr Mitchell represented that the loan would be for 15 years. At par 62, it is alleged that had the Bank stated that it “sought to make changes to the Facility” (by, presumably, changing the loan term from 15 to 5 years) Mr and Mrs Gooley “would have sought redress” for alleged breaches by the Bank of the Code of Banking Practice (par 63) and “would have made application” to their former bankers (Australia and New Zealand Banking Group Ltd) to be “reinstated as ANZ customers in line with” an identified “ANZ Offer Letter” (par 63).
- 33 Mr and Mrs Gooley then allege at par 65 that “in the premises” and “by [the] conduct” of the Bank, Mr and Mrs Gooley suffered the loss or damage alleged at par 51. Again no attempt is made in the pleadings to establish any link between the two: for example, how Mr and Mrs Gooley have suffered that loss by reason of not being able to “seek redress” under the Code of Banking

Practice; or by not having been able to “make application” to be reinstated as a customer of the ANZ Bank. Is the latter allegation, for instance, that the ANZ Bank would have resumed its banker customer relationship with Mr and Mrs Gooley? With what result? How would that have avoided the loss complained of at par 51?

- 34 At pars 72, 73 and 75 Mr and Mrs Gooley allege that BankWest’s conduct was unconscionable. Again the pleading does not explain how the loss alleged at par 75 (which is said to be the same loss as alleged at par 51) follows from the allegation that Mr and Mrs Gooley would have “sought redress” under the Code of Banking Practice (see par 72) or sought to be reinstated as customers of the ANZ Bank (see par 73).
- 35 Finally, under the *Corporations Act 2001* (Cth) Mr and Mrs Gooley allege that the Bank failed to comply with a direction of the Financial Ombudsman Service (“FOS”) and failed to “cooperate in the FOS mediation process”. Mr and Mrs Gooley say that they suffered “further loss and damage” and should be granted an unspecified remedy under s 1325 of the *Corporations Act*.
- 36 The pleading gives no hint as to how it is alleged that the Bank’s alleged conduct in relation to the FOS could have caused Mr and Mrs Gooley loss or entitled them to a remedy under s 1325.
- 37 In these circumstances, the Bank seeks to have the paragraphs of the Cross-Claim to which I have referred struck out pursuant to UCPR r 14.28 on the ground that the pleading is embarrassing.
- 38 I propose to defer ruling on that claim until Mr and Mrs Gooley’s amended cross-claim is to hand.
- 39 Mr and Mrs Gooley’s pleading should make clear precisely how they allege that the asserted shortcomings in BankWest’s conduct has led to the loss complained of.
- 40 At present that loss is said to be that Mr and Mrs Gooley were unable to refinance and were “forced to substantially wind down Gooley Farms as a going concern”.

- 41 The evidence adduced by Mr Gooley, and Mr King's submissions, indicate that Mr and Mrs Gooley wish to make out a further case; namely that but for the Bank's conduct, they would have sought to exploit an opportunity to relocate their enterprise to "the Tablelands".
- 42 The amended cross-claim should also make clear precisely how that case is put.

### **The reports of Mr Wade and Mr Hughes**

- 43 The Bank seeks an advance ruling, pursuant to s 192A of the *Evidence Act 1995* (NSW) as to the admissibility of these two reports.
- 44 Section 192A of the *Evidence Act* provides that a court can make a ruling in relation to the admissibility of evidence proposed to be adduced in advance of the hearing "if it considers it to be appropriate to do so".
- 45 I have earlier expressed agreement with the observations made by Biscoe J in *NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000*; *Arnold v Minister Administering Water Management Act 2000 (No 4)* [2012] NSWLEC 120 at [40] that:

"Whether the Court should make advance rulings under s 192A is a discretionary case management decision to be made in accordance with the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in dispute."

See for example *Lambert Leasing Inc v QBE Insurance Australia Ltd* [2012] NSWSC 953 at [12], and see also *Chaina v Presbyterian Church (NSW) Property Trust (No 6)* [2012] NSWSC 1476 at [8] (Davies J).

### *Report of Mr Wade*

- 46 Mr Wade is an agricultural consultant and animal nutritionist.
- 47 As best as I can understand his report, Mr Wade purports to "verify production assumptions and projections" made by Mr Gooley in relation to his farming enterprises and to "provide an opinion on the production strategies that would have been used" during the relevant years.
- 48 Mr Wade has a business relationship with Mr Gooley. Thus he is not truly independent of Mr Gooley.



- 49 In his report, Mr Wade says that in 2014 he assisted Mr Gooley “with a concept and feasibility report for investors for purchasing larger scale operations on the Northern Tablelands and North West Slopes of NSW” and established, with Mr Gooley, a consulting company called Australian Agricultural Developments and Management Pty Ltd.
- 50 Mr Wade says that during 2015 he and Mr Gooley “focused on production concepts and assessing feasibility of various projects” but that “in mid to late 2016 [he and Mr Gooley] elected to step back from the consultancy business until [Mr Gooley’s] banking matters were resolved”.
- 51 My attention has not been drawn to any Australian authority to the effect that a report prepared by an expert who is not independent of the litigants is, for that reason alone, not admissible.
- 52 In *ASIC v Rich* [2005] NSWSC 149, Austin J expressed the view that:
- “...although the expert need not be independent of the litigants, he or she must be in a position to exclude from consideration everything except the matters identified as the facts upon which his or her opinions are based.”
- 53 A stronger view has more recently been expressed by the United Kingdom Supreme Court in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6.
- 54 In that case, Lord Reed and Lord Hodge (with whom Baroness Hale of Richmond DPSC, Lord Wilson of Culworth and Lord Toulson agreed) express the view at [51] that:
- “...the requirement of independence and impartiality is in our view one of admissibility rather than merely the weight of the evidence.”
- 55 No Australian authority yet takes the matter this far.
- 56 In those circumstances I do not think it would be appropriate for me to make a ruling, under s 192A, in advance of the hearing that Mr Wade’s report is inadmissible solely on the basis of his business connection with Mr Gooley.
- 57 However, as emerged during debate, there are other difficulties with the form of Mr Wade’s report.
- 58 On a number of occasions Mr Wade expresses opinions based upon his statement of what Mr Gooley “would have done” and what Mr Gooley “has done”. On other occasions Mr Wade speaks of assumptions that he asserts

that Mr Gooley has made and to strategies adopted by “several of my clients” (see par 31, 42 and 49).

59 On other occasions Mr Wade expresses opinions without exposing the process of reasoning by which he arrives at those opinions.

60 For example, at par 33 Mr Wade expresses the opinion that values in a “Pasture Budget” apparently prepared by Mr Gooley “show a conservative estimate of the available dry matter...grown from establishing a pasture budget for the Gooley operation at the Clovass and Dyraaba properties”. Mr Wade does not explain the basis for that conclusion.

61 Mr Wade concludes his report by saying:

“[Mr Gooley] has had many years’ experience growing hay, and crops like corn and soyabeans so using his experience in contract hay and silage making and growing crops, he should have no problem in planting oats for grazing or hay and growing other crops suited to the Tablelands”.

62 Here, Mr Wade is, evidently, using some unstated knowledge he has of Mr Gooley’s farming experience and expressing, without any reasoning, the optimistic conclusion that Mr Gooley would have “no problem” growing crops in the Tablelands.

63 The passage is plainly inadmissible.

64 As Mr King has foreshadowed supplementing Mr Wade’s report, I shall make no further comments about it.

65 However, if Mr and Mrs Gooley propose to press reliance on it I will express more precise views as to the passages which are not admissible.

#### *Report of Mr Hughes*

66 Mr Hughes is a chartered accountant.

67 In his report, he expresses the inadmissible opinion that “the Bank interfered with the usual operations and caused damage to the Gooleys”. This hardly an opinion that he, as a chartered accountant, is qualified to express.

68 Mr Hughes then also considers two “scenarios” in relation to the (currently unpleaded) contention of Mr and Mrs Gooley that they have lost an opportunity to relocate all or part of their business enterprise to the Tablelands.

69 Mr Hughes says that he has been provided with “summaries of Economic Loss prepared by” Mr Gooley for each of the scenarios.

70 He then concludes, without reasoning or analysis, that:

“In my opinion the method employed in the calculation for [each] scenario is an appropriate method of calculation of loss”.

71 Although Mr Hughes states that he had been supplied with copies of the financial statements for Gooley Farms and the Gooley Family Trust for the years ending 30 June 2009 to 2017, and copies of the income tax returns for the same period, he does not say that he has, himself, conducted any analysis of those documents.

72 Mr Hughes has done no more than express the opinion that Mr Gooley adopts an “appropriate method” in preparing his own summary of the economic loss he has suffered.

73 Mr Hughes does not himself express any opinion as to what loss Mr and Mrs Gooley have suffered.

74 Mr Hughes has done no more than adopt Mr Gooley’s conclusions. His report is thus not admissible (for example see *ASIC v Rich* at [256(8)]).

75 Even if the report were admissible, I would have excluded it in the exercise of my discretion under s 135 of the *Evidence Act* upon the basis that it would be unfair to the Bank to expect it “to elucidate [Mr Hughes’] reasoning process in the course of cross-examination and then to challenge that process without the opportunity to reflect on it” (to adopt the words of McDougall J in *Bone v Wallalong Investments* [2012] NSWSC 137 at [37]).

76 No party should be expected to respond to an expert report in this form. There is thus utility in ruling on its admissibility at this stage under s 192A.

77 My ruling is that the report is inadmissible and should not be received in evidence.

### **Mr Gooley’s evidence**

78 Finally, the Bank seeks a ruling pursuant to s 192A that certain paragraphs in Mr Gooley’s affidavit are inadmissible.

- 79 Many of those paragraphs deal with Mr Gooley's contentions that he and Mrs Gooley have lost an opportunity to relocate their farming business to the Tablelands.
- 80 On the current state of the pleadings, those paragraphs are irrelevant as they address a case which has not been pleaded.
- 81 However, as Mr King has foreshadowed an amendment to the pleadings to deal with this matter, I will not deal further with it at the moment.
- 82 The Bank also sought to have other paragraphs ruled inadmissible on the basis that they are not relevant to the case as currently pleaded and also on the basis that they refer to a developing set of "scenarios" for which Mr Gooley contends he and Mrs Gooley have suffered loss.
- 83 I do not consider it appropriate to make advance rulings in relation to those paragraphs at this stage.
- 84 Further consideration of those paragraphs should be deferred until such time as it is known what, if any, expert evidence Mr and Mrs Gooley ultimately seek to adduce to make out their damages claim.

### **Conclusion**

- 85 In those circumstances the only order I propose to make is to rule pursuant to s 192A of the *Evidence Act* that the report of Mr Darel Hughes of 9 April 2018 is not admissible.
- 86 I will defer further consideration of the Bank's Notice of Motion of 20 April 2018 until such time as Mr and Mrs Gooley have circulated the amendments they propose to make to their Cross-Claim and any further or supplementary expert reports.
- 87 I will now hear submissions from counsel as to what should now be done in the proceedings.

\*\*\*\*\*