SHORT PARTICULARS OF CASES
APPEALS

JANUARY/FEBRUARY 2006

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COMMISSIONER OF TAXATION v CITYLINK MELBOURNE LIMITED (M49/2005)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 12 October 2004

Date special leave granted: 29 April 2005

The respondent (Citylink) was the project vehicle for the City Link Project, which involved the design and construction of a road link connecting three Melbourne freeways. In October 1995 Citylink, the State of Victoria and other parties executed a Concession Deed under which Victoria contributed the land for the project and passed legislation to enable Citylink to levy tolls. Clause 3.1 of the Concession Deed provided that during the concession period (1996 to 2034) Citylink would pay to Victoria an annual concession fee of $95.6 million. An additional concession fee was payable if toll revenues exceeded certain financial projections. Citylink claimed a deduction in each year of income for the concession fees. Clause 18.5 of the Master Security Deed provided that the obligation of Citylink to pay the concession fees "may...be satisfied" by it issuing State Concession Notes of the same face value. Citylink issued Concession Notes to Victoria for the concession fees payable in each year of income. Clause 1.9 of the Master Security Deed provided that for so long as any "Project Debt" remained owing, the concession fee was "owing" but "not due for payment" unless and until there was a sufficient operating surplus "to meet that payment in full". According to the financial model used in the agreements, redemption of the Concession Notes was expected to commence in November 2013 and the Project Debt expected to be repaid by 2023.

The appellant disallowed the deductions claimed by Citylink under the relevant provisions of the income tax legislation relating to general business or outgoings. S51(1) of the 1936 *Income Tax Assessment Act* 1936 (Cth) applied to the income years 1996 and 1997 while s8-1 of the *Income Tax Assessment Act* 1997 (Cth) applies to the 1998 income year. There are no relevant material differences between the two versions.

The trial judge (Merkel J) considered a number of issues including: whether the liability for the concession fee was incurred; whether the concession fee obligations were properly referable to the relevant income years: and whether the concession fees were losses or outgoings of capital, or capital in nature. Merkel J found that although the concession fees had been incurred by Citylink in the relevant years of income, they were in the nature of a share of profits or payment of a dividend by it to Victoria as a joint venturer in return for advantages enuring to capital that Victoria contributed to the City Link Project. Alternatively the concession fees were of a capital nature. Accordingly they were held not to be allowable deductions.

On appeal, the Full Court held that Citylink had incurred the concession fees in years of income and were referable to those years. But it held that Citylink and Victoria were not joint venturers and did not in any relevant legal sense share profits. The Full Court found that the concession fees were payable for the use and occupation of or the right to conduct the operation in periods commensurate with the obligation to make payment and that the fees were a

cost of conducting the business operations rather than a cost of acquiring a profit making enterprise. The Full Court allowed Citylink's appeal.

The grounds of appeal include:

- The Full Court erred in holding that the concession fees represented outgoings which had been incurred in the respective years of income.
- Alternatively, the Full Court should have held, in relation to each of the years of income, that if an outgoing was incurred in that year in respect of concession fees it was incurred only to the extent ascertained by apportioning the concession fee over the period from that year of income up to the date when the concession fee became payable or, alternatively, was expected to become payable.

- Further or alternatively, the Full Court should have held, in relation to each of the years of income, that if and to the extent that an outgoing was incurred in respect of concession fees in that year it was:
  (a) not properly referable to that year; or
  (b) alternatively, was referable to that year only to the extent that results from apportioning the concession fee from the date when it was incurred over the period up to the date when it became payable or, alternatively, was expected to become payable.

- Further or alternatively, having held that the relevant outgoings had been incurred, the Full Court erred in holding that the outgoings were on revenue account.

- The Full Court should have held that each of the concession fees was an outgoing of capital, or of a capital nature.

BATISTATOS BY HIS TUTOR WILLIAM GEORGE ROSEBOTTOM v ROADS & TRAFFIC AUTHORITY OF NEW SOUTH WALES (S530/2005)
BATISTATOS BY HIS TUTOR WILLIAM GEORGE ROSEBOTTOM v NEWCASTLE CITY COUNCIL (S531/2005)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 12 May 2005

Date of grant of special leave to Appeal: 7 October 2005

The appellant, born in 1932, suffered catastrophically disabling injuries in a motor vehicle accident on 21 August 1965 in Stockton, New South Wales; he became quadriplegic. He had always suffered from severe intellectual disabilities and spent much of his childhood and early life in institutions and hospitals.

Proceedings were commenced in the Supreme Court by Statement of Claim filed on 21 December 1994, more than 29 years after the accident. There were great delays in preparation for trial, caused at least in large part by extensive attention to interlocutory applications and correspondence relating to particulars, availability of witnesses, documents, discovery and other requests for inspection of documents and information generally.

On 6 August 1996 Newcastle City Council ("NCC") filed a notice of motion seeking orders that the proceedings be dismissed or permanently stayed under Pt 13 r 5 of the *Supreme Court Rules* 1970 or alternatively be struck out under Pt 15 r 26. The Roads and Traffic Authority ("RTA") filed a similar notice of motion soon afterwards. On 9 June 2000 Master Harrison declined to dismiss the proceedings as her Honour was of the view that the appellant had an arguable case that s 580(6) of the *Local Government Act* 1919 did not apply. On appeal, Bergin J affirmed that decision, and dealt with several other interlocutory applications. The applications for summary disposal, stay or dismissal based on abuse of process were heard by Hoeben J on 25 August 2004 and were refused on 3 September 2004. His Honour's decision was that the respondents had failed to satisfy him that a fair trial was not possible in the circumstances of the case. Each respondent sought leave to appeal.

In earlier interlocutory proceedings, before Hoeben J and on appeal, it was accepted for the purposes of the applications that the appellant had a reasonably arguable case that he had always been a person under a disability for the purpose of the *Limitation Act* 1969 ("the Act") particularly subs 11(3), with the result, produced by s 52 of the Act, that the running of any limitation period fixed by the Act upon a cause of action which arose on 21 August 1965 was suspended.

The Court of Appeal, per Bryson JA, with whom Mason P and Giles JA agreed, found errors in the decision of Hoeben J and held that "it would manifestly be quite unjust to allow these proceedings to go to what would in form be a trial but in substance would be only a ceremonial enactment of an opportunity to establish whether or not the plaintiff has the rights he claims".

The grounds of appeal include (in each matter):

- This Court of Appeal's reasons disclose no grounds on which its appellate intervention was warranted.
- The Court of Appeal erred in law in and about:
  - Defining the extent of any evidentiary onus cast upon the Appellant in the application;
  - Holding that the Appellant was required to demonstrate anything other than that he had a claim which was honestly brought, in which he believed and which was not untenable.

In each appeal the appellant has filed a summons seeking to amend one of the grounds of appeal.

DALTON v NSW CRIME COMMISSION & ORS (S334/2005)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 15 December 2004

Date of grant of special leave: 16 June 2005

The Appellant was served in Victoria (where he lives) with a summons requiring him to attend and give evidence before the New South Wales Crime Commission ("the Commission"). Justice Greg James had previously made an order pursuant to section 76 of the *Service and Execution of Process Act* 1992 (Cth) ("the SEP Act") granting the Commission leave to serve that summons interstate. (Section 76 relates to subpoenas in aid of investigative tribunals.) The Appellant sought a declaration that both the summons and order of Justice James were invalid.

The Commission and the Attorneys-General for NSW and the Commonwealth relied on section 51(xxiv) of the Constitution as the constitutional underpinning of section 76 of the SEP Act. They submitted that a subpoena issued by a commission of inquiry into criminal conduct was a “criminal process” within the meaning of the placitum. The Appellant however argued that the summons was neither a civil or criminal "process" of the State and that placitum (xxiv) was limited to processes in aid of the enforcement of legal rights in the civil and criminal law.

On 15 December 2004 the New South Wales Court of Appeal (Spigelman CJ & Wood CJ at CL, Mason P dissenting) held that section 51(xxiv) of the Constitution encompasses the compulsory attendance to give evidence in the course of a criminal investigation by a statutory authority. The majority held that the ordinary meaning of the words “criminal process” covers such situations. They further held that the placitum should be given a broad construction when it comes to the enforcement of the States' criminal laws.

President Mason however held that the word “process” in section 51(xxiv) is confined to proceedings which are directly connected with the determination of legal rights or the enforcement of law. Accordingly, his Honour held the Appellant was entitled to a declaration that the summons had not been validly served.

The Victorian and South Australian Governments have advised this Court that they will be intervening in this matter.

The grounds of appeal include:

- The Court below erred in holding that Part 4, Division 4, Subdivision A of the SEP Act was not unconstitutional and that those provisions fell within the grant of Commonwealth legislative power set forth in section 51 *placitum* (xxiv) of the Commonwealth Constitution.

- The Court below erred in holding that *placitum* (xxiv) should be interpreted as referring to civil and criminal process of the States rather than, as formally contended by the Appellant, to the civil and criminal process of the courts of the States.

- The Court below erred in failing to hold that the words in *placitum* (xxiv) "courts of the States" were words of limitation qualifying both the expression "judgments" and the expression "civil and criminal process".

FORGE & ORS v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ORS (C7/2005)

Date questions reserved for Full Court: 31 May 2005

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v FORGE & ORS (C12/2005)

Date cause removed: 31 May 2005

FORGE ORS v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ANOR (S301/2005)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales

Date of judgment: 7 December 2004

These matters raise issues as to the validity of appointments of judges as acting judges of the New South Wales Supreme Court, and the validity of transitional provisions relating to contravention of the *Corporations Law* and the *Corporations Act* 2001 (Cth).

The first plaintiff in the writ of summons proceedings (C7/2005), William Arthur Forge, was the sole director and secretary of the fifth plaintiff, Bisoya Pty Ltd ("Bisoya"), his private family company. The second and third plaintiffs, Jozsef Endresz and Dawn May Endresz, are husband and wife and the fourth plaintiff, Allan Paul Endresz, is their son. The fifth defendant in the cause removed proceedings (C12/2005), Kamanga Holdings Pty Ltd, is a family company of the Endreszes. The Endreszes were at various times directors of CTC Resources NL ("CTC"), and Mr Forge was managing director of CTC.

The parties identified above ("the plaintiffs" and "Kamanga") engaged in eight transactions in 1998 by which they disbursed over $3.5 million from CTC to Bisoya and Kamanga. Those transactions were said to be payment of management and consultancy fees, and of unsecured loans to Bisoya and Kamanga. In April 2001, the Australian Securities and Investments Commission (ASIC) brought proceedings alleging contraventions of the *Corporations Law*, that the transactions were uncommercial, not in the interests of CTC or its shareholders, and in breach of the related-party provisions of the *Corporations Law.* By the time the proceedings came on for hearing before Foster JA of the Supreme Court of New South Wales, the *Corporations Law* had been repealed and the *Corporations Act* 2001 (Cth) had come into force.

ASIC was successful at trial and Foster JA made declarations that the transactions contravened the relevant sections of the *Corporations Law*. His Honour ordered that the plaintiffs be disqualified from managing corporations for periods up to 16 years, and imposed pecuniary penalties. An appeal to the Court of Appeal of the Supreme Court of New South Wales was unsuccessful except as to penalty. This issue was remitted for hearing to the Equity Division of the Supreme Court and is now the subject of the cause removed.

On 31 May 2005, Gummow J made orders:

1. Pursuant to section 18 of the *Judiciary Act* 1903 (Cth) reserving certain questions to the Full Court for consideration (C7/2005); and

2. Pursuant to section 40 of the *Judiciary Act* 1903 (Cth) removing part of the cause pending in the Supreme Court Equity Division (C12/2005).

The questions identified in the orders of Gummow J were:

1. The validity of the appointment under the *Supreme Court Act* 1970 (NSW) of Acting Justice Foster and the capacity of His Honour to act in the cause; and

2. The construction and validity of the transitional provisions of Chapter 10 of the *Corporations Act* (Cth).

On 17 June 2005, the plaintiffs and Bisoya also filed an application for leave to appeal the decision of the New South Wales Court of Appeal (S301/2005). Notice of a constitutional matter was filed in the cause removed proceedings and the Attorneys-General of the Commonwealth and the States and Territories have sought leave to intervene.

The questions of law said to justify a grant of special leave to appeal, and which are raised by the statement of claim and cause removed, include:

- Whether the appointment of Foster AJ as an acting judge of the Supreme Court of New South Wales was valid;

- Whether the appointment of acting judges to the Supreme Court is inconsistent with the Supreme Court being a repository of the judicial power of the Commonwealth under Chapter 3 of the Constitution, whether by reason of the temporal limitations of that appointment or, as in this case, by reason of the age of the acting judge exceeding 70 years;

- The validity of the transitional provisions of the *Corporations Act* (Cth), and in particular, whether the proceedings before Foster AJ and the Court of Appeal constitute “a matter” arising under a law made by the parliament within the meaning of section 76(ii) of the Constitution in a situation where the offences originally charged arose under a state enactment.

ADAMS v LAMBERT (C11/2005)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 9 December 2004

Date special leave granted: 17 June 2005

This appeal raises the issue of whether an error in, or an omission from, a bankruptcy notice could be said to relate to a matter that was an essential requirement of a bankruptcy notice such that the error or omission invalidates the notice. Another related matter which was also the subject of a grant of special leave to appeal and which raised the same issues has not been brought on appeal.
On 27 May 2004, the appellant, Colin Adams, presented a creditor's petition in bankruptcy against the respondent, Matthew Lambert, in relation to a judgment debt of $54,000. An interest calculation of $66.58 was attached to the bankruptcy notice for post-judgment interest. The source of this interest was said to be section 83A of the *District Court Act* 1973 (NSW). However, the actual source of post-judgment interest was under section 85 rather than section 83A, although the rate of interest applicable was identical.

Because of this deficiency, the bankruptcy notice was held to be invalid on the basis of the five-judge Full Federal Court decision in *Australian Steel Co (Operations) Pty Ltd v Lewis* (2000) 109 FCR 33. This case held, inter alia, that a bankruptcy notice is a nullity if it fails to meet a requirement made essential by the *Bankruptcy Act* 1966 (Cth) ("the Act"), or if it could reasonably mislead a debtor as to what is necessary to comply with the notice. Under the Act, a bankruptcy notice is required to set out the amount of any interest being claimed and the provision under which such interest is claimed. In *Australian Steel* the Court found that a bankruptcy notice which misdescribed the provision under which interest is sought was a nullity. Applying this decision, the judge at first instance found that the error in the bankruptcy notice did not involve a mere misdescription as the correct source of interest claimed was not stated.

On appeal to the Full Court of the Federal Court, the appellant contended that *Australian Steel* should be distinguished on the basis that the notice in that case failed to state the source of interest altogether, but that in the instant case, there was only an error as to the provision rather than the source. This argument was rejected, the Full Court considering itself bound by *Australian Steel*.

The grounds of appeal include:

- Whether the erroneous statement of the applicable statutory provision under which interest is claimed in a bankruptcy notice under the Act sufficient of itself to invalidate the bankruptcy notice;

- Whether the source of the debtor's obligation to pay interest specified in a bankruptcy notice a requirement made essential by the Act;

- Whether *Australian Steel Co (Operations) Pty Ltd v Lewis* (2000) 109 FCR 33 is correctly decided, or is it wrongly decided;

- Whether the decision in *Australian Steel* is inconsistent with the decision of this Court in *Kleinwort Benson Australia Ltd v Crowl* (1998) 165 CLR 71 and the authorities cited therein; and

- Are *Adams v Lambert* [2004] FCAFC 322 and *Marshall v GMAC* (2003) 127 FCR 453 correctly, or wrongly, decided.