SHORT PARTICULARS OF CASES
APPEALS

FEBRUARY/MARCH 2006

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SMITS & ANOR v ROACH & ORS (S398/2005)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 15 July 2004

Date of grant of special leave to appeal: 5 August 2005

The appellants ("Smits Leslie") were at all material times partners of a firm of solicitors practising under the firm name "Smits Leslie".

From July 1995 Smits Leslie acted on behalf of the first, second and third respondents ("the Roach clients") to recover damages for the alleged negligence of Freehill Hollingdale & Page ("Freehills"). Freehills had acted for the Roach clients in the late 1980's and early 1990's concerning the potential exploitation of peat deposits in Victoria. Smits Leslie continued to act as solicitors for the Roach clients in this matter, until there was a breakdown in the relationship which resulted in the termination of their retainer on 7 April 1999.

The present proceedings were commenced by Smits Leslie on 12 July 1999. On 19 June 2002 McClellan J determined that all claims by Smits Leslie for remuneration for their work as solicitors for the Roach clients should be dismissed.

Following the delivery of the principal judgment on 17 June 2002 in draft form, his Honour disclosed to the parties that his brother, Mr Geoffrey McClellan, was a partner, and at that time Chairman, of Freehills. This disclosure led to the filing of a notice of motion by the appellants seeking that McClellan J disqualify himself from the proceedings, withdraw his reasons for judgment, make no final orders and make arrangements for another judge to hear the matter. His Honour dismissed that motion.

On appeal the appellants submitted that McClellan J had erred by failing to disqualify himself. The Court of Appeal per Sheller JA (Ipp and Bryson JJA agreeing) found that McClellan J should have disclosed to the parties that his brother was a partner or Chairman of Freehills. However the Court held that the right to object had been waived in the circumstances.

The respondent seeks to file a notice of contention out of time. The notice of contention asserts that the Court of Appeal erred in holding that the Trial Judge's family relationship with the Chairman of Freehill Hollingdale & Page gave rise to a reasonable apprehension of bias which required his Honour's disqualification from hearing the proceedings.

The grounds of appeal include:

- the Court of Appeal erred in holding that the appellants had waived their right to seek to have the trial Judge disqualify himself upon the ground of reasonable apprehension of bias in light of his family relationship with the Chairman of Freehill Hollingdale & Page Solicitors

THEOPHANOUS v COMMONWEALTH OF AUSTRALIA (M22/2005)

Date Case Stated: 12 September 2005

This case raises the issue of whether certain provisions of the *Crimes (Superannuation Benefits) Act* 1989 (Clth) (the Act) are invalid either as contrary to Chapter 3 of the Constitution or as an acquisition of property otherwise than on just terms.

The plaintiff served as a Member of the House of Representatives (Commonwealth Parliament) and became entitled in 2001 to a retirement allowance under the *Parliamentary Contributory Superannuation Act* 1948.

In 2002 he was convicted by the County Court of Victoria on four counts of breaching the *Crimes Act* 1914 (Clth) (one count of conspiracy to defraud the Commonwealth, one count of defrauding the Commonwealth, and two counts of breaching s 73 A (1) of the *Crimes Act* 1914, that is, accepting bribes as a Member of the Parliament of Australia) and sentenced to terms of imprisonment. In 2003 his conviction on the count of conspiring to defraud the Commonwealth was set aside and a retrial ordered. He was subsequently re sentenced to an effective term of three years imprisonment on the remaining convictions.

The defendant in 2004 authorised the Commonwealth Director of Public Prosecutions, pursuant to s 16 of the Act, to apply to the County Court of Victoria for a superannuation order to recover the plaintiff's employer funded superannuation entitlements.

The plaintiff issued a Writ of Summons in the High Court seeking a declaration that Part 2 of the Act is invalid in so far as it applies to the application in respect to the plaintiff dated 9 September 2004.

The following questions have been reserved for the consideration of the Court:

- Is Pt 2 of the *Crimes (Superannuation Benefits) Act* 1989 invalid in so far as it purports to authorise the making by the appropriate court of a superannuation order under s 19 of the Act on the ground that Pt 2 purports to confer federal jurisdiction on State and Territory Courts that is contrary to Chapter III of the Constitution?

- Is Pt 2 of the *Crimes (Superannuation Benefits) Act* 1989 invalid in so far as it purports to authorise the making by the appropriate court of a superannuation order under s 19 of the Act on the ground that Pt 2 is a law with respect to the acquisition of property otherwise than on just terms?

- Who should pay the costs of the Stated Case and of the hearing of the Stated Case before the Full High Court?

ISLAND MARITIME LIMITED v FILIPOWSKI (S449/2005)
KULKARNI v FILIPOWSKI (S450/2005)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 21 December 2004

Date of grant of special leave: 2 September 2005

Following an alleged discharge of oil from the "Pacific Onyx" into Botany Bay on 14 November 1999, the Appellant in each appeal (as owner and master respectively of the vessel concerned) were prosecuted pursuant to section 27 of the *Marine Pollution Act 1987* ("the Act"). On 7 March 2003 Justice Talbot dismissed those proceedings, finding that there was no case to answer. His Honour held that the offence created by section 27 of the Act did not apply to a discharge of oil into State waters when Part 2 or 3 of the Act applied. As the prosecution had only established a breach of section 8 (in Part 2) of the Act, no breach of section 27 could be proven.

Fresh prosecutions were subsequently launched against both Appellants, alleging that they had breached section 8(1) of the Act. The Appellants then sought permanent stays on the grounds that those proceedings breached the rule of double jeopardy. They also alleged that they were an abuse of process. On 9 July 2004 Justice Bignold refused those applications.

On 21 December 2004 the Court of Criminal Appeal (Sully, Dunford & Hidden JJ) unanimously dismissed the Appellants' appeals. In doing so their Honours rejected the Appellants' pleas of *autrefois acquit*. The Court noted that the relevant test was that expressed in *Pearce v The Queen.* After comparing the offences created by sections 8 and 27 of the Act, the Court concluded that the elements of the two charges were not the same. As not all elements of the first set of charges were included in the second set of charges, a plea of *autrefois acquit* was therefore not available. Their Honours also rejected the Appellants' submission that the prosecutions should be permanently stayed as an abuse of process. They noted that the jurisdiction to grant a permanent stay is discretionary, but that Justice Bignold had not erred in the exercise of that discretion.

The grounds of appeal (in both matters) are:

- The Court of Criminal Appeal erred in its formulation of the test to be applied in determining whether the plea of autrefois acquit was available to the Appellant.

- The Court of Criminal Appeal erred in its interpretation of the decision of this Honourable Court in *Pearce v The Queen* (1998) 194 CLR 610 and its application to the facts of this case.

- The Court of Criminal Appeal erred in failing to order that, in the circumstances that existed, the prosecution of the Appellant for an offence under section 8 of the Act, following the Appellant's acquittal on a charge under section 27 of the Act, should be permanently stayed as an abuse of the Court's process.

SWEENEY v BOYLAN NOMINEES PTY LIMITED T/AS QUIRKS REFRIGERATION (S451/2005)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 18 February 2005

Date of grant of special leave: 2 September 2005

On 2 August 2000 Mrs Maria Sweeney was injured when a refrigerator door fell onto her at a BP service station in West Pymble. She was opening the door at the time, intending to remove a carton of milk. Boylan Nominees Pty Limited ("Boylan") was in the business of supplying and servicing refrigeration equipment. It owned the refrigerator in question, which it leased to the BP service station. On the day of the accident, and in response to a reported fault with the door, Boylan had arranged for the refrigerator to be serviced. That service was performed by Mr Nick Comninos, who partially dismantled the door before testing and reassembling it. Mr Comninos serviced the door at around 2.30pm, while Mrs Sweeney was injured around 4.00pm. Mrs Sweeney sued Boylan as being vicariously liable for the negligently performed work of its employee, Mr Comninos.

On 12 March 2004 Judge Robison found that Mr Comninos had performed the work negligently and that Boylan was vicariously liable for that negligence. He awarded Mrs Sweeney $43,932.00 in damages. Upon appeal, Boylan challenged the finding that it was vicariously liable for Mr Comninos. It also claimed that he was an independent contractor.

On 18 February 2005 the Court of Appeal (Giles & Ipp JJA, Brownie AJA) unanimously upheld Boylan's appeal. Their Honours rejected the proposition that a principal might be vicariously liable for a person who is neither an independent contractor nor an agent, but who simply is a representative of that principal. They found that Mr Comninos was an independent contractor and that Boylan was not vicariously liable for his conduct. In reaching that conclusion the Court of Appeal noted that Mr Comninos drove his own van which displayed his own business name. He also provided his own equipment, public liability insurance and superannuation. Furthermore, Mr Comninos did not wear a Boylan uniform.

The grounds of appeal are:

- The Court of Appeal erred in finding that Mr Comninos was not an employee of the Respondent and that the Respondent was not vicariously liable for his conduct.

- The Court of Appeal erred in not finding that even if Mr Comninos was not an employee, the Respondent was liable for his negligence as its agent.

- The Court erred in finding that the Respondent, as a principal, is not vicariously liable in negligence for a person who is its "representative".

SST CONSULTING SERVICES PTY LIMITED v RIESON & ANOR (S452/2005)

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

Date of Judgment: 15 February 2005

Date of grant of special leave: 2 September 2005

The appellant, SST Consulting Services Pty Ltd ("SST"), sued the respondents, Stephen Charles Rieson and Scott Murray Bell, to enforce a guarantee dated 23 December 1999 ("the Guarantee") in respect of a loan made by SST to a company AFS Freight and Management (USA) Inc, of which the respondents were directors.

Emmett J found that the loan obligation was valid and enforceable notwithstanding that the agreement contained a provision contravening s 47(1) of the *Trade Practices Act* ("the Act"). (SST conceded that there was a contravention of s 47(1)). His Honour held that provision to be severable, hence the respondents were liable on the Guarantee.

The respondents appealed, challenging the correctness of Emmett J's conclusion that a provision of a loan agreement which contravened s 47(1) of the Act could, in the circumstances, be severed at common law from the agreement, leaving the loan obligation to be enforced according to its terms.

Section 47(1) of the Act prohibits a corporation in trade or commerce from engaging in the practice of "exclusive dealing" which itself is defined in succeeding subsections by reference to particularised practices. Section 47(6) provides (inter alia):

> *"A corporation also engages in the practice of exclusive dealing if the corporation:*
>
> > *(a) supplies, or offers to supply ... services;...*
> >
> > *on the condition that the person to whom the corporation supplies or offers or proposes to supply the ... services or, if that person is a body corporate, a body corporate related to that body corporate will acquire ... services of a particular kind or description directly or indirectly from another person."*

The word "condition" is defined for the purposes of s 47 in subsection (13) in the following terms:

> *"(a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances."*

Section 4L of the Act provides:

> *"If the making of a contract after the commencement of this section contravenes this Act by reason of the inclusion of a particular provision in the contract, then, subject to any order made under section 87 or 87A, nothing in this Act affects the validity or enforceability of the contract*

otherwise than in relation to that provision in so far as that provision is severable."

Section 87 of the Act provides that, where the Court finds that a person who is a party to a proceeding instituted (as here) under Part VI of the Act has suffered or is likely to suffer loss or damage by conduct of another which was engaged in contravention of a provision of Part IV (which includes s 47), the Court may make such orders as it thinks appropriate against that other if the Court considers that the order will prevent or reduce the loss or damage.

The Full Federal Court (Wilcox, Finn and Sackville JJ) held that the SST contract was illegal. It was prohibited by statute. Neither the contract nor the Guarantee given by the respondents was enforceable because, in order to prove its rights in either case, SST would have to rely upon the illegal contract.

The respondent seeks leave to file a notice of contention out of time. The notice contends that the decision of the Full Court of the Federal Court ought to be affirmed on grounds additional to those relied on by the Full Court.

The grounds of appeal include:-

- The Court erred in finding that, because the appellant and AFS Freight & Management (USA) Inc (the borrower) had engaged in conduct that constituted exclusive dealing within the definition of s 47(6) of the Act and hence had breached s 47(1) that the contract between the appellant and the borrower made in the course of such conduct was (subject to the effect of s 4L of the Act and the doctrine of severance) wholly unenforceable under the common law doctrine rendering contracts void and unenforceable for illegality.

BEROWRA HOLDINGS PTY LIMITED v GORDON (S473/2005)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 28 February 2005

Date of grant of special leave: 9 September 2005

On 2 October 2001 the Respondent was injured while working for the Appellant. Less than two months after giving notice of that injury, he commenced proceedings against his employer in the District Court. This was in contravention of section 151C(1) of the *Workers Compensation Act* 1987 ("the Act"). That section states that proceedings cannot be commenced until six months from the date of such notice have elapsed. The Appellant however failed to raise non-compliance with section 151C(1) of the Act in its defence.

On 6 May 2003 the Appellant made the Respondent an Offer of Compromise ("the Offer"). In accordance with the District Court Rules, that Offer was required to remain open for 28 days. On 20 May 2003 the Appellant purportedly withdrew its Offer and sought to rely upon section 151C(1) of the Act instead. On 21 May 2003 the Respondent notified the Appellant that its Offer had been accepted. On that date, the Appellant also sought leave to withdraw its Offer. It also sought an order that the proceedings be dismissed.

On 27 August 2003 Acting Chief Justice Woods held that section 151C(1) of the Act sets a procedural condition precedent which bars a claimant from bringing proceedings unless that condition precedent is satisfied. Proceedings commenced in breach of that section were therefore invalid, as were any consequential acts. The Appellant's Offer, being part of the invalid proceedings, was therefore incapable of being accepted.

Upon appeal, the Respondent challenged the finding that the entire proceedings were invalid. He also submitted that the Appellant had waived its right to raise section 151C(1) of the Act as a defence.

On 28 February 2005 the Court of Appeal (Mason P, Sheller & Beazley JJA) unanimously allowed the Respondent's appeal. Their Honours held that although section 151C(1) of the Act was a procedural condition precedent, proceedings commenced in contravention of that section were not a nullity. This is because that section did not reflect the requisite legislative intention that nullity be the consequence of non-compliance. In reaching this conclusion their Honours followed the principles in *Project Blue Sky Inc v Australian Broadcasting Authority.* They also held that a party may waive its right to invoke section 151C(1) of the Act, or otherwise be estopped from relying upon it.

This appeal is being heard at the same time as the appeal in *Brighton und Refern Plaster Pty Limited (under external administration and/or controller appointed) v Boardman S479/2005).*

The grounds of appeal include:

- The Court of Appeal should have held that section 151C(1) of the Act, by denying the entitlement of the Respondent to have commenced proceedings when he did, also denied any legal effect being given to the steps purportedly taken under the rules of the District Court of New South Wales applying in such proceedings, namely a restriction on the withdrawal of an offer of compromise and provision for entry of judgment upon acceptance of such an offer.

- The Court of Appeal erred by holding that section 151C(1) entitled the Respondent to enforce against the Appellant the provision of the rules of the District Court of New South Wales restricting the withdrawal of an offer of compromise and providing for entry of judgment upon acceptance of an offer of compromise, despite the Respondent not being entitled to commence the proceedings in which the Respondent invoked those rules.

BRIGHTON UND REFERN PLASTER PTY LIMITED UNDER EXTERNAL ADMINISTRATION AND/OR CONTROLLER APPOINTED v BOARDMAN (S479/2005)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 12 May 2005

Date of grant of special leave: 9 September 2005

The Respondent brought proceedings claiming damages for a workplace injury. Those proceedings were commenced within six months of written notification of that injury being given. This was contrary to section 151C(1) of the *Workers Compensation Act 1987* ("the Act") and a strike-out application was duly made. On 13 February 2004 Judge Bella held that non-compliance with that section was both capable of being waived and that it had been waived.

The Appellant applied for leave to appeal. This was on the grounds that non-compliance with section 151C(1) of the Act was both incapable of waiver and that it had not been waived. Following the filing of that application, the Court of Appeal held in *Gordon v Berowra Holdings Pty Limited* that non-compliance with section 151C(1) did not render proceedings a nullity. It further found that non-compliance with that section could also be waived.

On 12 May 2005 the Court of Appeal (Giles & McColl JJA) unanimously refused the Appellant leave to appeal. Their Honours noted that the decision in *Gordon v Berowra Holdings Pty Limited* was a recent, unanimous and considered decision of the Court of Appeal. They did not think that the Appellant had made a case to question it. Their Honours also agreed with Judge Bella that the Appellant had waived its right to raise non-compliance with section 151C(1) of the Act.

This appeal is being heard at the same time as the appeal in *Berowra Holdings Pty Limited v Gordon (S473/2005).*

The grounds of appeal are:

- The NSW Court of Appeal ought to have construed the words of prohibition in section 151C(1), namely that "a person to whom compensation is payable under this Act is not entitled to commence Court proceedings for damages" by "the language of the relevant provision and the scope of the object of the whole statute" in the application of *Project Blue Sky Inc v Australian Broadcasting Authority* 194 CLR 355 (at [93]), and found the proceedings commenced to be in breach of the clear expression of the prohibition and to be invalid.

- In relation to a legislative provision prohibiting the commencement of proceedings such as in section 151C(1) of the Act, the Court of Appeal ought to have found that the classification of the provision as directory or mandatory, or as a condition precedent of a procedural nature or a condition subsequent, deflects attention, in the application of *Project Blue Sky* (supra), from the real issue being whether and act done in breach of the legislative provision is invalid, and such classifications should be abandoned.

- The Court of Appeal erred in determining that the words of prohibition "is not entitled to commence Court proceedings" in section 151C(1) means is entitled to commence and maintain Court proceedings in contravention of the provision.

FORSYTH v DEPUTY COMMISSIONER OF TAXATION (S543/2005)

Court appealed from: New South Wales Court of Appeal

Date of Judgment: 20 December 2004

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

The appellant was the director of a company which failed to remit group tax deductions at various times over a two year period. The appellant became personally liable to pay a penalty equal to the unpaid amount of the company's liability under s 222AOC of the *Income Tax Assessment Act* 1936. The Commissioner issued three notices under s 222AOE of his intention to commence proceedings to enforce the penalty. Each notice was in respect of a discrete period. The appellant failed to comply with the notices and the Commissioner commenced recovery proceedings against the appellant in the District Court of New South Wales. Judgment was entered in favour of the respondent in the sum of $414,326.45.

The appellant appealed, claiming that the District Court had no jurisdiction to determine the proceedings or alternatively, that the notices were invalid. The appellant submitted that the District Court was deprived of jurisdiction by reason of an amendment made to the *Supreme Court Rules* on 30 June 2000, assigning to the Equity Division of the Court proceedings in relation to any provision in a Commonwealth Act by which a tax, fee, duty or other impost was levied, collected or administered by or on behalf of the Commonwealth.

The Court of Appeal dismissed the appeal, holding per Spigelman CJ (Giles JA and Gzell J agreeing) that the jurisdiction of the District Court under s 44(1)(a) of the *District Court Act* 1973 (NSW) was fixed at the date the *District Court Amendment Act* 1997 came into effect and accordingly the District Court had jurisdiction to entertain the proceedings. The Court commented "It is most unlikely that Parliament intended that the jurisdiction of the District Court was able to be modified by the Supreme Court Rule Committee."

The appellant has issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

The respondent has filed a notice of contention asserting that the decision of the Court below should be affirmed, but on the ground that the Court below erroneously decided or failed to decide some matter of fact or law.

The grounds of appeal include:

- The Court of Appeal erred in holding that the District Court of New South Wales had jurisdiction to hear and dispose of the actions raised in the Proceeding.
- The Court of Appeal should have held that:
  - s 44(1) of the *District Court Act* 1973 (NSW) conferred jurisdiction on the District Court of New South Wales to hear and dispose of any action of a kind which if brought in the Supreme Court of New South Wales, at the time the action was instituted, heard and disposed of by the District Court of New South Wales would be assigned to the Common Law Division of the Supreme Court of New South Wales.