SHORT PARTICULARS OF CASES
APPEALS

PERTH CIRCUIT - OCTOBER 2006

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BURGE & ORS v. SWARBRICK (P24/2006)

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

Date of judgment: 8 December 2005

Date of grant of special leave: 4 August 2006

The respondent, John Harley Swarbrick, is a naval architect and designs yachts. He designed a class of yacht, the first of which to be built was named the *Bateau Rouge*, and which consists of a fiberglass hull and deck, together with all the usual fittings for a yacht. The respondent claims ownership of the copyright in, *inter alia*, the hull and deck of the *Bateau Rouge* and that the fourth appellant (Boldgold Investments Pty Ltd), with the assistance or involvement of the other appellants, infringed his copyright in the hull moulding and threatened to infringe his copyright in the deck moulding of the *Bateau Rouge.*

The second and third appellants, Trevor Rogers and Benjamin Warren, were employed by Swarbrick Yachts International Pty Ltd, of which the respondent is a director and which is licensed to manufacture the *Bateau Rouge*. The hull and deck mouldings were provided to Mr Rogers for this purpose. The first appellant, Brent Burge, told the fifth appellant, Glen Bosman, of the manufacture of the *Bateau Rouge*, and Mr Bosman, together with the sixth appellant, Sergio Zaza, formed Boldgold for the purpose of acquiring the hull and deck mouldings in Mr Rogers' possession in order to manufacture the *Bateau Rouge*. Mr Rogers and Mr Warren subsequently left their employment with Swarbrick Yachts to work for Boldgold, and Mr Burge was engaged as operations manager of premises leased by Boldgold for the manufacture of the yacht.

The construction of the hull and deck mouldings was found by the primary judge (Carr J) to have involved a process involving craftsmanship and had the requisite aesthetic quality to be described properly as artistic. Carr J found, *inter alia*, that the hull and deck of the *Bateau Rouge* were works of artistic craftsmanship within the meaning of section 77(1)(a) of the *Copyright Act* 1968 (Cth) ("Act"). Carr J also found that the hull and deck were sculptures and therefore within the meaning of the definition of "artistic work" in section 10(1)(a) of the Act. Carr J concluded that copyright in the hull and deck subsisted in the respondent and had been infringed by the appellants.

Section 10(1) of the Act relevantly defines "artistic work", in which copyright subsists, as follows:

> "(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
>
> (b) a building or a model of a building, whether the building or model is of artistic quality or not; or
>
> (c) a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies …"

The Full Court of the Federal Court (Moore, North and Emmett JJ) dismissed the appellants' appeal, and rejected the appellants' submission that the hull and

deck mouldings came within the exception in section 77(1) of the Act, that copyright is not infringed when “a corresponding design” is applied industrially to “an artistic work (other than … a work of artistic craftsmanship)” and the articles so produced are sold or otherwise marketed. The Court rejected the interpretation of section 77(1)(a) urged by the appellants, that when read with section 10(1) of the Act, the exception in the bracketed words in section 77(1)(a) can only apply to a work of artistic craftsmanship which falls within section 10(1)(c) of the definition of “artistic work”, which could not apply to the hull and deck which the primary judge found were “sculptures”.

The grounds of appeal include:

- The meaning of “work of artistic craftsmanship” in, and the proper interpretation of, section 77(1) of the Copyright Act;

- The meaning of “artistic work” in section 10(1) of the Copyright Act.

KLEIN v. MINISTER FOR EDUCATION (P31/2006)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia

Date of judgment: 27 September 2005

Date of grant of special leave: 1 September 2006

The appellant, Alan David John Klein, was a security guard on mobile patrol employed by a security company. That company had contracted with the respondent to provide security services for the protection of premises and assets administered by the respondent. The appellant responded to a call that there were youths at a particular school and, when he arrived, he heard the sound of smashing glass and saw a youth in the act of smashing windows. The appellant chased and tackled the youth, in the course of which he fell to the ground and struck his knee on a lump of concrete which was partially obscured by long grass and difficult to see at night.

The appellant brought an action for damages against the respondent, pleading a cause of action pursuant to, *inter alia*, the *Occupiers' Liability Act* 1985 (WA) and occupiers' liability at common law. The respondent relied on section 175 of the then *Workers' Compensation and Rehabilitation Act* 1981 (WA) ("the Act"), that the respondent was a "deemed employer" of the appellant, and the appellant was therefore required to bring his action under that Act. The result of the argument of the respondent would have been that the appellant was, by the Act, barred from recovery of damages under the *Occupiers' Liability Act* or by occupiers' liability at common law, and could not recover compensation under the Act for failure to comply with its procedural requirements.

The appellant was successful at first instance. The trial judge (Nisbet DCJ) found that the respondent was a statutory authority within the meaning of section 6 of the Act, which provides:

> The exercise and performance of the powers and duties of a … statutory authority shall, for the purposes of this Act, be treated as the trade or business of such … authority.

However, the trial judge also held that the provision of security services was not "work [which is] directly a part or process in the trade or business" of the respondent, as required by section 175 of the Act. His Honour held that the Act did not disentitle the appellant to recovery under common law or the *Occupiers' Liability Act*.

The Court of Appeal (Steytler P, Wheeler and Pullin JJA) allowed the respondent's appeal. It held that the trial judge erred in his application of section 6 of the Act to the circumstances of the case. The Court of Appeal held that section 6 directs attention to the powers vested in the statutory authority, not to the characterisation of the core business in which the statutory authority is engaged.

The grounds of appeal include:

- The proper construction of section 6 of the Act.

LEACH v. THE QUEEN (D10/2006)

Court appealed from: Court of Criminal Appeal of the Supreme Court of the Northern Territory

Date of judgment: 22 December 2005

Date of grant of special leave: 1 September 2006

On 16 May 1984 the appellant, Martin Leach, was found guilty after a trial of two acts of murder and one of rape. The crimes were particularly brutal. The appellant raped and murdered an 18-year-old woman and murdered her 15-year-old female friend in a recreation area in 1983. The appellant forced the two victims at knifepoint to a secluded area where he cut their clothes from them and used the clothes to bind and gag them. He first stabbed the older victim, leaving the knife in her, and raped her, the stabbing and rape occurring in front of the bound and gagged younger victim. He then murdered the younger victim with a single stab wound, then stabbed the older victim a second time, whose death, according to the pathologist, would have taken five to 10 minutes. The appellant was sentenced to life imprisonment on each count of murder and on the count of rape. At the time of sentencing, the court was not empowered to fix a non-parole period for life sentences. The only possibility of release was executive clemency.

On 11 February 2004 the *Sentencing (Crime of Murder) and Parole Reform Act* 2004 (NT) ("the Act") commenced operation. The Act provided that the Director of Public Prosecutions could, and in this case did, apply to the Supreme Court pursuant to section 19 of the Act for an order to refuse to fix a non-parole period. Pursuant to section 18 of the Act, without such an order a prisoner serving two life sentences for murder is taken to have a non-parole period of 25 years. The Act applies only to life sentences for murder, it has no operation in relation to the appellant's life sentence for rape. The application by the DPP was successful and the appellant appealed to the Court of Criminal Appeal.

The Act provides, in section 19(5):

> The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

As the Court of Criminal Appeal noted, even if the sentencing judge is satisfied that section 19(5) is met, the judge retains a discretion to fix a non-parole period, either greater or less than 25 years, and this discretion is exercised upon consideration of the usual sentencing principles. But the Court noted that this residual discretion is necessarily limited, given that the sentencing judge would already have determined that the community interest "can only be met" by a sentence of life imprisonment without parole.

The Court of Criminal Appeal (Mildren and Riley JJ; Southwood J in dissent) dismissed the appellant's appeal. All three judges agreed that the standard of proof of beyond reasonable doubt does not apply to the determination contemplated by section 19(5) of the Act, which involves a matter of judgment

to the level of satisfaction and is not a finding of fact. Mildren and Riley JJ also held that the sentencing judge from whose decision the appeal was brought (Martin (BR) CJ) correctly addressed himself to the usual sentencing principles after having determined that section 19(5) was engaged. Southwood J would have allowed the appeal on this ground.

The grounds of appeal include:

- Whether the Court erred in not finding that the sentencing judge had failed to give effect to ordinary sentencing considerations when applying section 19(5) of the Act;

- Whether the Court erred in concluding that a sentencing judge, when imposing a sentence of life imprisonment without possibility of parole, is not required to be satisfied beyond reasonable doubt that the offender's culpability was so extreme as to require such a sentence.