SHORT PARTICULARS OF CASES
APPEALS

JANUARY/FEBRUARY 2007

****

ALBARRAN v MEMBERS OF THE COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY BOARD & ANOR (S356/2006)

GOULD v DONALD MAGAREY, DAVID OLIFANT AND PATRICK PONTING BEING THE MEMBERS CONSTITUTING THE COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY BOARD & ANOR (S361/2006)

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

Date of judgment: 19 May 2006

Date of grant of special leave: 29 September 2006

Mr Albarran commenced proceedings in the original jurisdiction of this Court, seeking an order for prohibition against the Companies Auditors and Liquidators Disciplinary Board ("the Board") from conducting certain proceedings. The Australian Securities and Investments Commission ("ASIC") had applied for orders that Mr Albarran's registration as a liquidator be cancelled due to his failure to adequately carry out his duties. Mr Gould also commenced proceedings in the original jurisdiction in this Court, seeking an order that both the Board and ASIC be prohibited from acting upon a decision of the Board dated 21 December 2004. On that date the Board found that Mr Gould had failed to adequately perform his duties as a liquidator. It then suspended his registration for three months.

Both matters raised the same issue, namely whether the exercise of certain powers by the Board under section 1292 of the *Corporations Act* 2001 (Cth) ("the Act") involved the exercise of the judicial power of the Commonwealth. Relevantly, section 1292 of the Act permits the Board to cancel or suspend the registration of company liquidators. On 15 August 2005 and 14 October 2005 respectively, Justice Heydon remitted both of these matters to the Federal Court.

On 19 May 2006 the Full Federal Court (Emmett, Allsop and Graham JJ) unanimously dismissed both applications. Their Honours found that the exercise of the power conferred by section 1292(2) of the Act to cancel or suspend a person's registration dealt with the continued existence of a statutory right. It was concerned with assessing whether someone should continue to occupy a statutory position in circumstances whereby they had failed to adequately perform their professional duties in the past. It was not the function of the Board to determine whether an offence had been committed, nor was it concerned with punishment. Those were the functions of a Court, exercising a judicial power, to decide.

The Full Federal Court also noted that the terms of section 1292 of the Act were akin to a licensing regime. Their Honours also observed that the power to terminate or suspend a statutory right was something that either a Court or an administrative tribunal might do. It was not a power that was inherently judicial. They further noted that the character of the Board, its composition and its functions generally were also not inherently judicial.

A notice of constitutional matter was filed in respect of each of these matters, the essence of which is that section 1292(2) of the Act unlawfully conferred the

judicial power of the Commonwealth upon the Board. On 7 November 2006 the Attorney-General of the Commonwealth advised the Court that he would be intervening in each matter.

In matter number S356/2006 (Albarran) the grounds of appeal are:

- The Full Court erred in concluding that section 1292 of the Act does not invest the Board with the judicial power of the Commonwealth.

- The Full Court erred in failing to conclude that section 1292 of the Act was beyond the legislative competence of the Parliament.

In matter number S361/2006 (Gould) the ground of appeal is:

- The Full Federal Court of Australia should have held that subsection 1292(2) of the Act seeks unlawfully to confer the judicial power of the Commonwealth upon the First Respondents.

VISNIC v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (S389/2006)

Court from which cause removed: Full Court of the Federal Court of Australia

Date of cause removed: 30 October 2006

At all material times, Mr Milan Visnic was a director of 13 wound-up corporations. A liquidator reported to the Australian Securities and Investments Commission ("ASIC") that the unsecured creditors of those corporations may not receive more than 50 cents in the dollar. The liquidator also advised ASIC that offences against Commonwealth legislation may have been committed.

On 4 November 2005 ASIC served Mr Visnic with a "Notice To Demonstrate Why A Disqualification Should Not Occur" pursuant to section 206F(1)(a)(i)(ii)(b)(i) of the *Corporations Act* 2001 (Cth) ("the Act"). That notice offered Mr Visnic an opportunity to be heard, either in person or in writing, to demonstrate why he should not be disqualified from managing a corporation. Mr Visnic responded by advising ASIC that he would be commencing a High Court challenge to the constitutional validity of section 206F of the Act. He further declined to attend any hearing arranged by ASIC.

On 24 January 2006 a delegate of ASIC served on Mr Visnic a "Notice of Disqualification from Managing Corporations" ("Disqualification Notice"), accompanied by a "Statement of Facts, Findings and Reasons for Decision". The Disqualification Notice disqualified Mr Visnic from managing a corporation for five years.

On 3 February 2006 Mr Visnic filed a writ and a statement of claim in this Court in which he challenged the constitutional validity of section 206F of the Act. That matter was however remitted to the Federal Court of Australia by Justice Kirby on 27 March 2006. On 11 October 2006 (and before the Full Federal Court could determine the matter pursuant to a direction made by Chief Justice Black), Mr Visnic sought the removal of this matter back into this Court. This was on the basis that special leave to appeal had recently been granted in the

matter of *Albarran v the Members of the Companies Auditors and Liquidators Disciplinary Board & Anor* and that there was a substantial overlap in the issues in both cases. On 30 October 2006 Justice Heydon removed into this Court the cause then pending in the Full Federal Court. His Honour also ordered that the removed matter be listed for hearing concurrently with the appeals in *Albarran* and also that of *Gould v Magarey & Ors.*

On 30 November 2006 a notice of constitutional matter was filed in respect this matter. On 13 December 2006 the Attorney-General of the Commonwealth advised the Court that he would be intervening.

The issues raised in the notice of constitutional matter are:

- Whether section 206 of the Act is ultra vires the legislative power of the Parliament of the Commonwealth to the extent that it invests the judicial power of the Commonwealth in an administrative body contrary to the separation of judicial, executive and legislative power entrenched in the Constitution.

- Whether section 206F of the Act is null and void and of no legal effect because it purports to invest the judicial power of the Commonwealth in an administrative body contrary to the separation of judicial, executive and legislative power entrenched in the Constitution.

- Whether section 206F of the Act is null and void and of no effect to the extent of conferral of power to disqualify based on the grounds and findings falling within sections 206C and/or 206E of the Act.

GENERAL MOTORS ACCEPTANCE CORPORATION AUSTRALIA & ANOR v SOUTHBANK TRADERS PTY LTD (M132/2006)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 5 May 2006

Date special leave granted: 29 September 2006

The respondent ("Southbank") was a motor vehicle wholesaler, the first appellant ("GMAC") was a financer and Auto Group ("Auto Group") a motor vehicle auctioneer. In 2002 Southbank sold 10 vehicles to Kingstrate, a motor vehicle retailer, and each contract contained a retention of title clause. Kingstrate took possession of the vehicles with the price unpaid and sold them to GMAC, who in turn bailed the vehicles to Kingstrate under a floor plan agreement enabling Kingstrate to display the vehicles in its yard. Upon learning that Kingstrate was insolvent, GMAC took possession of nine of the vehicles and registered a "security interest" pursuant to the *Chattel Securities Act* 1987 (Vic) ('the Act') in December 2002. In January 2003 GMAC sold the nine vehicles to the second appellant and in mid-January 2003, Southbank registered the security interest in the vehicles pursuant to the Act.

At trial in the County Court of Victoria, Southbank contended that GMAC converted the vehicles when it took possession of them, registered a security interest and then sold them to Auto Group. Auto Group was said to have converted the vehicles by purchasing them from GMAC and, in failing to deliver them up, had wrongfully detained them. GMAC contended that Southbank had an unregistered security interest which was, by virtue of s 7(1) of the Act, extinguished. Section 7(1) provided that:

> if a secured party has-
>
> (a) an unregistered security interest... ;
>
> in goods but is not in possession of the goods and a purchaser purchases ... an interest in the goods ... for value in good faith and without notice .. of the security interest from a supplier being- ...
>
> (c) the debtor (a term defined in s 3(1) as meaning relevantly the person who created the security interest) ...
>
> the security interest of the secured party is extinguished.

Judge Holt noted that the question to be decided was whether the retention of title clauses were "security interests" as defined in the Act. His Honour found that on a plain reading of the definition in s 3 of the Act, the clauses in question amounted to a security interest. He found that when Southbank sold the vehicles to Kingstrate, the agreement was that Kingstrate could onsell them before paying Southbank. Southbank inserted the retention of title clause to, in effect, secure payment of the debt.

On the question of whether the retention of title clauses were extinguished under s 7(1) by virtue of GMAC's acquisition of the vehicles, the trial judge found that the security interest had been extinguished on the basis that GMAC did not have actual or constructive notice of the security interest, that GMAC purchased the vehicles in good faith and without notice and as such, Southbank's interest did not have priority over GMAC.

Southbank's appeal to the Court of Appeal (Maxwell P, Eames and Ashley JJA) was successful. The Court found that Southbank's interest was not a security interest and therefore could not have been extinguished under s 7(1) of the Act. The Court found that the retention of title clause constituted a conditional sale so that property in the vehicles did not pass to Kingstrate but remained with Southbank. It noted that the definition in s 3(1) of a "security interest" did not capture a conditional sale. To satisfy the definition of a security interest, the relevant interest had to arise pursuant to an instrument or transaction and secure payment of a debt. On the facts, no interest arose pursuant to an instruction or transaction because Southbank remained owner so that no security interest was or could have been created by Kingstrate. The issue of whether GMAC purchased the vehicles "for value and in good faith without notice" did not strictly arise because of the conclusion on the first issue. However, the Court of Appeal observed that whilst the appellant succeeded at trial on this issue, the issues of notice and good faith were appropriate to have been remitted for retrial.

The grounds of appeal are:

- The Court of Appeal erred in holding that the respondent's interest in respect of motor vehicles pursuant to a retention of title clause in contracts of sale, between the respondent and Kingstrate Pty Ltd (t/a Dandenong Suzuki) ("Kingstrate"), was not a "security interest" as contemplated by *the Chattel Securities Act* (Vic) ("the Act").

- The Court of Appeal erred in not dealing with the ground in the appellants' Notice of Contention to the effect that each of the first appellant and the respondent held a security interest in respect of the vehicles and that by the operation of section 10 of the Act the first appellant's security interest took priority over that of the respondent.

- The Court of Appeal erred in not dealing with the ground in the appellant's Notice of Contention to the effect that in the event of a finding that the respondent had no security interest under the Act, the disposition by Kingstrate, as mercantile agent, to the first appellant was valid to transfer title in the vehicles to the first appellant pursuant to section 67 of the *Goods Act 1958* (Vic).

BLACK & ORS v GARNOCK & ORS (S401/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 1 June 2006

Date of grant of special leave: 10 November 2006

This application involves the interpretation of section 112(2) of the *Civil Procedure Act* 2005 (NSW) ("the Civil Procedure Act") and section 105 of the *Real Property Act* 1900 (NSW) ("the Property Act"). It also involves the nature of a purchaser of land's interest under a contract exchanged but not completed prior to the recording of a writ of execution pursuant to section 105 of the Property Act.

The Applicants are judgment creditors of the Sixth Respondent who is the registered proprietor of land at Bukalong, NSW. The Sixth Respondent sold the land to the First to Fourth Respondents ("the Purchasers"). A search of the register was completed on the morning of the settlement, but unbeknown to the Purchasers, the Applicants registered a writ for levy on the property several hours later (and prior to the completion of the sale). The Registrar declined to register the transfer and the Purchasers sought declarations that they were entitled to priority over the judgment creditors. They also sought an injunction restraining the execution of the writ against the property.

Justice Lloyd dismissed the Purchasers' application on the basis that the protection provided by section 112(2) of the Civil Procedure Act was restricted to title obtained upon registration. His Honour also held that section 105A(2) of the Property Act was unambiguous, which meant that the Purchasers' transfer could not be registered unless the writ was recorded as a prior encumbrance.

On 1 June 2006 the Court of Appeal (Beazley and Ipp JJA, Basten JA dissenting) allowed the Purchasers' appeal. The Court agreed that the definition of "title" in section 112(2) of the Civil Procedure Act included unregistered interests in land. The majority also found that the delivery of a writ of execution to the Sheriff did not give a judgment creditor priority over equitable interests. Furthermore, none of the provisions relied upon by the judgment creditors expressly or impliedly prevented the Purchasers from taking action to restrain any sale by the Sheriff.

Justice Basten however would have dismissed the Purchasers' appeal. His Honour held that the amendments to the Property Act precluded a purchaser from having their interests recorded unless they were lodged prior to the writ (or with the Sheriff's consent). The Purchasers' title therefore remained defeasible by the registration of another interest which obtained the protection of section 42(1) of the Property Act.

On 5 December 2006 the Purchasers filed a notice of contention, the grounds of which include:

- Sections 105 to 105D of the Property Act, on their true construction, do not deprive the Court of jurisdiction to determine questions of priority of competing rights affecting land.

- The primary judge erred in law in admitting into evidence the affidavit of Neville James Moses sworn 4 November 2005 and in concluding that the Respondents failed to undertake a search of the land that ought reasonably to have been carried out.

The grounds of appeal include:

- The Court of Appeal erred in holding that an unregistered equitable interest in Torrens tile land, of itself and without more, entitled the Purchasers to a final injunction restraining the exercise of a right arising from the recording of a writ under the Property Act.

- The Court of Appeal erred in construing the legislative scheme contained in sections 105-105D of the Property Act as conferring on the Purchasers a right to protect an unregistered interest in a manner which would give them a right to registration over a Sheriff's purchaser during the protected period (as defined in section 105A(9) of the Property Act.)

WHITE v DIRECTOR OF MILITARY PROSECUTIONS & ANOR (S312/2006)

Application for an order to show cause filed: 5 September 2006

Date referred to the Full Court: 11 October 2006

Ms Anne-Margaret White is a Chief Petty Officer with the Royal Australian Navy based at HMAS Manoora. On 30 June 2006 she was charged with six counts of indecency and one of assault under the *Defence Force Discipline Act 1982* ("the Defence Discipline Act"). The alleged offences occurred in Williamstown, Victoria on 3-4 June 2005 and the victims were also naval personnel. The alleged offences did not occur on Commonwealth property, none of those involved were on duty at the time and no-one was in uniform. Ms White denies the charges.

On 9 November 2006 Ms White filed an amended application for an order to show cause seeking an order of prohibition against the First Defendant and other declaratory relief. She submitted that section 103 of the Defence Discipline Act is invalid insofar as it permits the First Defendant to request that the Registrar of Military Justice refer the charges against her to a Defence Force Magistrate for trial (or to convene a Court Martial). Ms White also submitted that neither a Defence Force Magistrate nor a Judge Advocate under the Defence Discipline Act is appointed pursuant to section 72 of the Constitution. She further claimed, inter alia, that the power to hear and determine the charges under section 61 of the Defence Discipline Act is an exercise of judicial power.

On 11 October 2006 Chief Justice Gleeson made an order referring this matter to the Full Court for further hearing. On 20 November 2006 Ms White filed an amended notice of a constitutional matter, clarifying the constitutional issues to be determined.

The grounds in the amended application to show cause include:

- That section 103 of the Defence Discipline Act is invalid insofar as it permits the First Defendant to request the Registrar of Military Justice to refer the charges against Ms White to a Defence Force Magistrate for trial or to convene a General Court Martial or Restricted Court martial to try the charges.

- That neither a Defence Force Magistrate nor a Judge Advocate under the Defence Discipline Act are appointed pursuant to section 72 of the Constitution.

- That neither a Court Martial nor a Defence Force Magistrate is a Court within the meaning of section 71 of the Constitution.

CGU INSURANCE LIMITED v AMP FINANCIAL PLANNING PTY LTD (M127/2006)

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

Date of judgment: 2 September 2005

CGU INSURANCE LIMITED v AMP FINANCIAL PLANNING PTY LTD (M128/2006)

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

Date of judgment: 8 June 2006

Date special leave granted: 29 September 2006

The respondent ("AMP") retained the services of two financial advisers whose recommendations to investors led to large losses. On becoming aware of this, AMP notified its insurer ("CGU") and sought indemnity under the policy.

Discussions took place between them and AMP prepared a protocol for handling the claims which was agreed to in principle by CGU. It was envisaged that when a claim was received AMP would notify CGU, prepare a liability report setting out its views and recommendation, and CGU would make a decision within 14 days. Whilst CGU agreed in principle, it repeatedly stated to AMP that the question of indemnity "was reserved" and that AMP should act as a "prudent uninsured".

Forty seven claims were notified and over $3 million paid out by AMP, after repeated requests to CGU for determination were unsuccessful and under pressure from the Australian Securities and Investments Commission ("ASIC") to resolve the claims promptly. A subsequent claim for indemnification under the policy was refused and AMP commenced proceedings alleging that CGU was in breach of the policy.

The trial Judge (Heerey J) dismissed the application holding, inter alia,

- that AMP had to establish the occurrence of the insured event, not merely prove the settlements
- AMP had not demonstrated that the settlements were reasonable
- CGU was not liable for settlements made before any breach of the contract of insurance, and AMP could not avoid this result by claiming estoppel, unconscionable, misleading and deceptive conduct, or breach of the obligation to act in utmost good faith.

On appeal, the Full Court (Moore & Emmett JJ, Gyles J dissenting) upheld the appeal and ordered that the matter be remitted to Heerey J. The majority found that Heerey J had incorrectly approached the issues of estoppel and whether the delay in decisions by CGU on the recommendations demonstrated a lack of utmost good faith. They also held that the finding that the settlements were not reasonable due to the fact that AMP was under pressure from ASIC was not, of itself, sufficient and each settlement needed to be individually assessed. The majority also held that AMP's apparent failure to properly take into account the possible defence under Section 819(4) should not have been relied upon as a

further reason for concluding the settlements were unreasonable without first having assessed the material available to AMP and its advisers.

Gyles J held that the central issue was the applicability of S819. The trial judge's view was only tentative due to the incomplete evidence and uncertain operation of the section. In those circumstances AMP had not acted as a prudent uninsured as it should not have agreed to any settlements until this issue had been properly explored.

The grounds of appeal in matter M127/2006 are:

- In the context of a claim for damages by an insured against an insurer for breach of a professional indemnity insurance policy, the Full Court erred in holding that:
  - (a) the reasonableness of settlements entered into by the respondent ("AMPFP") with third party claimants could be assessed by reference to matters unrelated to the merits of those claims including circumstances personal to the insured such as adverse publicity that might arise in the absence of a settlement and pressure to settle from a government regulator, namely ASIC;
  - (b) the position of CGU in relation to its potential liability under the policy was irrelevant in determining the reasonableness of settlements entered into by AMPFP with third party claimants;
  - (c) the settlement of a claim by AMPFP could be found to be reasonable in the absence of any evidence that could satisfy a court that AMPFP could have been liable to the claimant in respect of such claim;
  - (d) the primary judge had erred in holding that the settlements were unreasonable because AMPFP failed to take into account the possible availability of a defence under section 819(4) of the *Corporations Law* to claims that might be brought against it by third party claimants.
  - (e) CGU could be in breach of the obligation of utmost good faith, implied in the policy by the provisions of section 13 of the *Insurance Contracts Act* 1984 (Cth) by failing to comply with a procedure imposed by AMPFP for settling claims which was extraneous to the insurer's contractual obligations with respect to indemnity under the policy;
  - (f) in the context of settlement of each of the claims made by the third party claimants, it was relevant to address the question whether the settlement was reasonable; and
  - (g) the primary judge had erred in failing to consider whether CGU was estopped from requiring AMPFP to establish by admissible evidence that it had a liability to each claimant with whom it settled when that case was neither pleaded nor conducted by AMPFP at the trial.

Following the judgment of the Full Court on 2 September 2005, CGU applied for leave to reopen the appeal. There were two bases for the application: (1) the Full Court failed to consider three issues which were argued before the trial judge; and (2) the majority of the Full Court misapprehended the basis on which certain material was tendered by AMP at the trial, and how it might be used on remitter.

The application was dismissed on 8 June 2006. The Full Court noted that CGU had not filed a notice of contention which raised the three issues, and they were not clearly and directly raised in argument by CGU in the appeal. While it was true that the issues were raised in a cross-appeal filed by CGU against the costs order made by the trial judge, that would not raise them in the appeal in the absence of a notice of contention.

As to the second basis of the application to re-open the appeal, the Full Court denied that it was under any misapprehension that the material was admitted on a limited basis, that is, not as proof of the truth of the underlying facts contained in the material, but as evidence of the circumstances in which AMP decided to settle various claims.

The grounds of appeal in matter M128/2006 are:

- The Full Court erred in:

  (a) dismissing the appellant's cross-appeal without addressing and determining the grounds of the cross-appeal;
  (b) holding that the appellant's cross-appeal was academic in light of the orders made in the respondent's appeal when a favourable determination of any one of the grounds of cross appeal would, despite the determination of the respondent's appeal, have entitled the appellant to judgment in the application and to a consequential award of costs;
  (c) refusing to re-open the appellant's cross appeal to address and determine the grounds of the cross appeal despite not having previously made or entered any orders in relation to the cross appeal;
  (d) refusing to re-open the respondent's appeal in order to address and determine, as alternative grounds upon which the order of the primary judge should be affirmed, the challenge made by the appellant to the determination by the primary judge of issues 7, 8 and 9 in the reasons for judgment of the primary judge;
  (e) holding that, in the absence of a notice of contention, the appellant had failed to present to the Full Court, as alternative grounds upon which the order of the primary judge should be affirmed, the challenge made by the appellant to the determination by the learned trail judge of issues 7, 8 and 9 in the reasons for judgment of the primary judge.