SHORT PARTICULARS OF CASES
APPEALS

AUGUST - SEPTEMBER 2007

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KOOMPAHTOO LOCAL ABORIGINAL LAND COUNCIL & ANOR v SANPINE PTY LTD & ANOR (S221/2007)

Court Appealed from: New South Wales Court of Appeal

Date of Judgment: 2 November 2006

Date of Grant of Special Leave: 24 April 2007

This appeal raises the following issue: whether the conduct of the innocent party is a relevant factor to be considered by a court in determining whether the requisite repudiatory intention exists.

The first appellant ("Koompahtoo") is a Local Aboriginal Land Council incorporated under the *Aboriginal Land Rights Act* 1983 (NSW) and at all material times owned a parcel of land near Morisset (Lot 556). Koompahtoo entered into a joint venture with the first respondent ("Sanpine") to develop some of Lot 556 on 14 July 1997. A supplemental agreement amending the joint venture was executed on 17 October 2000. Koompahtoo and Sanpine held a 50 per cent interest in the joint venture, Koompahtoo contributing its land and Sanpine as development manager contributing its services. On 25 February 2002 the second appellant was appointed the administrator of Koompahtoo under the *Aboriginal Land Rights Act*. On 12 December 2003 he asserted that Sanpine by its conduct had repudiated the joint venture agreement, such conduct being accepted by the second appellant as terminating the agreement. Sanpine sought declaratory relief in the Supreme Court of New South Wales to the effect that the joint venture agreement was valid and subsisting. Campbell J identified nine distinct breaches of the joint venture agreement as varied and rejected a case based on waiver or estoppel. His Honour found that the breaches amounted to repudiatory conduct entitling Koompahtoo to terminate the agreement.

Sanpine appealed. It did not attack the factual findings made by Campbell J, but rather focused its case on a claim that some breaches were excused by waiver or estoppel and that even if the breaches were made out, that Campbell J erred in holding that it had repudiated the agreement. Sanpine's appeal was allowed by the Court (Giles, Tobias and Bryson JJA). Giles JA gave the majority judgment. Bryson JA dissented.

Giles JA noted that the primary judge’s decision appeared to be based on the finding that Sanpine evinced an intention to carry out the contract as and when it suited it. His Honour further noted that when the party in breach has by its conduct shown the sort of intention enabling termination to occur, an evaluation of the conduct in all the circumstances was required. This included the conduct of the party not in breach and required consideration of the extent to which Koompahtoo had been complicit or acquiescent in the departures from the agreement and their continuance. Giles JA found that the breaches found

against Sanpine did not amount to a repudiation and did not in all the circumstances show an intention to carry out the agreement only in a manner substantially inconsistent with its obligations and not in any other way.
His Honour found that Sanpine was working to achieve the central objective of the joint venture and that whilst there was a failure to strictly comply with the agreement in some aspects, in the circumstances of constant communication and informal provision of information, lack of formal adherence to the agreement was not repudiatory. His Honour noted various instances of acquiescence by Koompahtoo in departures from the agreement.

In dissent, Bryson JA noted that the authorities on repudiation did "not speak with uniformity or precision" and that as with other legal standards, "repudiation calls for judicial decision on whether conduct has passed a boundary although the precise location of the boundary is not clear." His Honour held that the circumstances found by Campbell J were a "full and clear basis upon which the conclusion that there had been a repudiation was open."

The grounds of appeal include:

- The Court of Appeal erred by allowing its deliberations regarding repudiatory intent to be governed by extraneous matters concerning the first appellant's acts or omissions, in circumstances where the first appellant's conduct was not held to be sufficient to constitute a waiver of the first respondent's numerous breaches.

- In the absence of any findings that the first appellant waived (or was estopped from denying) the first respondent's multiple breaches of the Joint Venture Agreement, the Court of Appeal erred in considering and attributing any significance to the first appellant's conduct in determining the question of the first respondent's repudiatory intention.

BLUEBOTTLE UK LIMITED & ORS v DEPUTY COMMISSIONER OF TAXATION & ANOR (S302/2007)

Court Appealed from: New South Wales Court of Appeal

Date of Judgment: 14 December 2006

Date of Grant of Special Leave: 25 May 2007

This appeal raises issues of statutory construction and the potential scope of the powers of the Deputy Commissioner of Taxation ("the Commissioner") under s 255 of the *Income Tax Assessment Act* 1936 (Cth) ("ITAA").

The second respondent, Virgin Blue, is an Australian based corporation. Its shareholders include the second appellant, Cricket S.A., and the third appellant, Virgin Holdings, both of which are non-resident corporations. On 11 November 2005 the board of Virgin Blue passed a resolution to pay a dividend. On 12 December 2005 the first respondent, the Commissioner, issued notices to Virgin Blue, purportedly pursuant to s 255 of the ITAA, stating that Virgin Blue was to retain a total of $93,357,900.51 to pay tax due and payable by Cricket S.A. and Virgin Holdings.

On 13 December 2005 each of Cricket S.A. and Virgin Holdings executed a deed of assignment - of its right, title and interests to receive the dividend - to the first appellant, Bluebottle. Also on 13 December 2005 Bluebottle executed in favour of Virgin Blue an irrevocable direction to pay dividends to the fourth respondent, Barfair.

On 14 December 2005 each of Cricket S.A. and Virgin Holdings gave notice to Virgin Blue of the assignments and of the irrevocable direction to pay. Later on the same day the Commissioner served notices on Virgin Blue, purportedly pursuant to s 255 of the ITAA, requiring that Virgin Blue pay to the Commissioner the amounts described in the 12 December 2005 notices.

On 15 December 2005 the appellants commenced proceedings in the Supreme Court seeking, inter alia, a declaration that the purported s 255 notices were of no force or effect, a declaration that the dividend was payable by Virgin Blue to Barfair and an order that Virgin Blue pay the dividend to Barfair forthwith.

On 14 July 2006 Gzell J made the declarations and orders sought by the appellants. The Commissioner appealed to the Court of Appeal (Mason P, Santow and Basten JJA). The Court allowed the appeal, holding, per Basten JA, that the dividend declared on 11 November 2005 created a debt on that date, or at the latest, on 16 November 2005, in favour of the non-resident shareholders (amongst others), pursuant to s 254V(2) of the *Corporations Act 2001* (Cth). From that date the company was liable to pay money to a non-resident and was therefore deemed to be a person having the control of money

belonging to the non-resident, pursuant to s 255(2). The notification received from the Commissioner on 12 December 2005, identifying each non-resident taxpayer and the amount of the tax liability, was sufficient to engage the obligation under s 255(1)(b) to retain so much of the dividend due to each non-resident as was sufficient to pay the tax.

The respondent has filed a notice of contention asserting that the decision of the Court below should be affirmed on grounds that the Court below did not decide. The notice of contention issue turns (inter alia) on the terms of the assignments and the nature of the property assigned.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in allowing the appeal from the decision of the Honourable Justice Gzell made on 14 July 2006.

- The Court erred in finding that the Second Respondent "declared" the Dividend (as defined in the Affidavit of Jeffrey Robert Flick sworn on 15 December 2005) rather than "determined" the Dividend.

- The Court erred in finding that the declaration (or determination) of the Dividend by the Second Respondent gave rise to a debt incurred by the Second Respondent on 11 November 2005, or 16 November 2005 at the latest pursuant to section 254V(2) of the *Corporations Act* 2001.

WALKER CORPORATION PTY LIMITED v SYDNEY HARBOUR FORESHORE AUTHORITY (S307/2007 & S308/2007)

Court appealed from: New South Wales Court of Appeal

Dates of judgment: 27 July 2005 & 21 December 2006

Date of grant of special leave: 25 May 2007

On 26 September 2002 the Sydney Harbour Foreshore Authority ("the Authority") compulsorily acquired land at Ballast Point ("the land") on Sydney Harbour from the Walker Corporation Pty Ltd ("Walker Corporation"). This was done for the purpose of creating a harbourside park. At the time of its acquisition, the land was zoned "Industrial" under the Leichhardt Local Environment Plan 2000 ("LEP"). Its value would have been higher however had it been zoned "Residential".

Proceedings for the assessment of compensation under the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) ("the Acquisition Act") were commenced by Walker Corporation in the Land and Environment Court ("LEC"). On 9 July 2004 Justice Talbot held that the land's market value was $60 million. This was on the basis that the Council would have rezoned the land as "Residential" if it was not otherwise going be used for "Open Space". On 27 July 2005 the Court of Appeal set aside the LEC's judgment and remitted the matter for redetermination according to law.

An appeal was later brought under section 57(1) of the *Land and Environment Court Act* 1979 (NSW) against the second LEC judgment delivered on 4 April 2006. On that date Justice Talbot attributed a 100% prospect of the land being rezoned "Residential" and thus confirmed his previous valuation. Upon appeal the critical question was whether his Honour was correct to assume that the land should be treated as zoned "Residential".

On 21 December 2006 the Court of Appeal (Handley, Beazley & Basten JJA) unanimously allowed the Authority's appeal. Their Honours held that s 56(1) of the Acquisition Act encapsulates the principle that the market value of land is the amount that a willing but not anxious buyer would pay to a willing but not anxious seller. In this case the critical characteristic was the land's zoning. This is because it imposed a legal constraint on its possible development and hence its market value. At issue therefore is whether that zoning was part of the "public purpose" for which the land was required. Their Honours held that any precondition for notionally setting aside the land's zoning had not been established. The Court below therefore erred in law in doing just that.

The Court of Appeal also held that the value of land may reflect potentialities which have not yet been realised. A proposal to carry out the "public purpose" for which the land is later acquired may be seen as preventing that realisation,

and hence diminishing its value. That decrease must therefore be disregarded. Their Honours found that Justice Talbot had erred in disregarding the Leichhardt Council's inaction in considering a draft LEP which would have led to the land's rezoning (to Residential). What his Honour should have done was to identify the diminution in its value caused by that inaction.

In matter number S307/2007 (relating to the Court of Appeal's judgment of 21 December 2006) the grounds of appeal include:

- The Court of Appeal took an unduly narrow view of the words "the proposal to carry out the public purpose for which the land was resumed" in section 56(1)(a) of the Acquisition Act.

- The Court of Appeal erred in holding that it was not possible, as a matter of law, to characterise the conduct of the Leichhardt Council as part of "the proposal to carry out the public purpose" for which the Appellant's land was acquired.

In matter number S308/2007 (relating to the Court of Appeal's judgment of 27 July 2005) the grounds of appeal include:

- The Court of Appeal erred in taking the view that it was "far from clear" that s 56(1)(a) operated so as to require that a failure to act be disregarded.

- The Court of Appeal erred in holding that relevant factual findings had not been made, or issues considered, by the LEC. Such a view was not consistent with the reasons of Talbot J, especially at paragraphs 110-114.

QUEENSLAND PREMIER MINES PTY LTD & ORS v FRENCH (M54/2007)

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

Date of judgment: 14 December 2006

Date special leave granted: 24 April 2007

The first appellant ("QPM") acquired land in Yeppoon, Queensland in 1989 with a view to developing it into a shopping centre. The purchase of the land was financed by borrowings by QPM and the second and third appellants ("the Beckinsales"). There were two loan agreements, the first for $410,000 and the second for $560,000. The loans were secured by two mortgages. Those mortgages and the loan agreements were assigned to the respondent ("French") in 1992, and he became registered as mortgagee. For some years the Beckinsales and French tried to sell the land, but they were unsuccessful. French ultimately accepted an offer to purchase the land by Mr Beckinsale on behalf of the fourth appellant (Marminta), in early 2000.

A dispute arose between Marminta and French as to whether an agreement for the assignment of the mortgages had been concluded. Marminta sought specific performance of the agreement to assign the mortgages in the Supreme Court. French contended that the loan agreements were unaffected by the transfer of the mortgages and he sought to recover amounts due under the loan agreements. Dodds-Streeton J found for Marminta, holding that by operation of s 62 of the *Land Title Act* 1994 (Qld) ("the Act") the registration of the mortgage transfers had the effect of vesting in it the rights of recovery under the loan agreements.

French's appeal to the Court of Appeal (Maxwell P, Callaway and Redlich JJA) was allowed. The principal issue on appeal was where a mortgage of Torrens land secures the repayment of advances made under a separate loan agreement, and the instrument of mortgage contains a covenant to pay the amounts due under the loan agreement, does the registration of the transfer of the mortgage vest in the transferee the right of recovery of the debt under the loan agreement. The resolution of the appeal turned on the construction of s 62 of the Act, which provides:

> (1) "On registration of an instrument of transfer for a lot or an interest in a lot, all the rights, powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee.
> (2) Without limiting subsection (1), the registered transferee of a registered mortgage is bound by and liable under the mortgage to the same extent as the original mortgagee.
> (3) …
> (4) In this section –

> rights, in relation to a mortgage or lease, includes the right to sue on the terms of the mortgage or lease and to recover a debt or enforce a liability under the mortgage or lease."

The Court noted that there were two covenants to pay, one in the mortgage and the other in the loan agreement. Under s 62(4), rights vested in the transfer included the right to sue on the terms of the mortgage (the first limb) and the right to recover a debt or enforce a liability under the mortgage (the second limb). It was common ground that on registration of the mortgage transfer the right to sue on the mortgage covenant vested in Marminta. The critical question was whether the registration also had the effect of vesting in Marminta the right to sue on the agreement covenant. The Court found that the right to sue on the agreement covenant was a not a right "to recover a debt or enforce a liability under the mortgage." It was a right to recover a debt under the loan agreement. They were separate covenants conferring distinct contractual rights, albeit in respect of the same loan amounts. To construe the second limb in that way was to give the statutory words their ordinary and natural meaning. There could only be a right to recover a debt or enforce a liability under the mortgage if the mortgage was the source of the debt or liability as the case may be.

The grounds of appeal include:

- The Court of Appeal should have held that section 62 of the Land Titles Act 1994 (Qld) upon its proper construction provides that upon registration of a transfer of mortgage all of the mortgagee's rights to sue for and recover a debt secured under the mortgage vest in the transferee.

INTERNATIONAL AIR TRANSPORT ASSOCIATION v ANSETT AUSTRALIA HOLDINGS LIMITED & ORS (M51/2007 & M52/2007)

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

Date of judgment: 10 November 2006

Date special leave granted: 24 April 2007

The appellant established the IATA Clearing House with responsibility for the clearance of accounts between member international airline operators arising from transactions entered into by those airline operators under various agreements, including the Interline Passenger Agreement ('the Agreement'). The Agreement provided for payments to be subject to the Clearing House Regulations. The respondent was a member of the Clearing House.

On 12 September 2001 administrators were appointed to the respondent and a Deed of Company Arrangement was executed pursuant to Part 5.3A of the *Corporations Act* 2001 (Cth) ('the Act'). A question arose as to whether the appellant was a creditor of Ansett in respect of certain Clearing House payments. The appellant submitted that the terms of reg. 9(a) of the Clearing House Regulations had the effect that transactions between airline operators who were members of the Clearing House resulted in no sum becoming payable between members, but gave rise only to a contractual right on behalf of the carrying airline to include its charge as a credit in a monthly account to be supplied to the Clearing House. If one member airline went into liquidation, the property of that airline could not include any entitlement to receive payment from any other member, irrespective of whether clearance of the transaction had been effected prior to the date of liquidation. The respondent claimed that by virtue of the Deed of Company Arrangement, the Clearing House arrangement ceased to apply to the debits and credits between Ansett and the other airlines, which had not been cleared as at the date of Ansett's insolvency.

Mandie J found that reg. 9(a) of the Clearing House Regulations established that no debt or chose in action ever arose as between members of the Clearing House and that the only debts that arose were between each member and the appellant.

Regulation 9(a) provides:

> "With respect to transactions between members of the Clearing House which are subject to clearance through the Clearing House as provided in Regulations 10 and 11 and subject to the provisions of the Regulations regarding protested and disputed items, no liability for payment and no right of action to recover payment shall accrue between members of the Clearing House. In lieu thereof members shall have liabilities to the Clearing House for balances due by them resulting from a clearance or

> rights of action against the Clearing House for balances in their favour resulting from a clearance and collected by the Clearing House from debtor members in such clearance."

The appeal was allowed by the Court of Appeal (Nettle JA and Bongiorno AJA, Maxwell P dissenting). The majority of the Court found that when the meaning of the Agreement, including the Regulations, was determined objectively by construing each clause according to its natural and ordinary meaning in light of the contract as a whole, the relationship between issuing airline and carrying airline remained one of debt, and the debt so created remained in existence until cleared in accordance with the Clearing House Regulations or was otherwise satisfied. They noted that while reg. 9(a), when read on its own, could be read as implying the loss of the debt and its replacement with rights as against the Clearing House alone, this was not the case where the clause was read in conjunction with other clauses.

In dissent, Maxwell P found that the contractual relationship between the carrier and the issuer in respect of the relevant charge was not a relationship of debt, nor was there between them any chose in action generating liability for, or entitling recovery of, any amount. Having construed the Regulations, it was clear that their main object and intent was to establish a system of clearance which had at its foundation the sui generis scheme of rights and obligations, defined by reg. 9(a). The manifest commercial purpose was intended to confer commercial advantages and the Court had to seek to give effect to the contract as intended.

The grounds of appeal include:

- the majority of the Court of Appeal erred in concluding that, by reason of the Interline Agreements and the regulations of the appellant's Clearing House, the relationship between members of the Clearing House in connection with claims that are the subject of clearance is that of debtor and creditor, and that the relationship of debtor and creditor inures until the debt is cleared in accordance with the Clearing House procedures or otherwise settled.

BLESSINGTON v THE QUEEN (S218/2007)
ELLIOTT v THE QUEEN (S215/2007)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 22 September 2006

Date of grant of special leave: 24 April 2007

In 1990 Mr Bronson Blessington and Mr Matthew Elliott ("the Appellants") were convicted of the brutal murder of Ms Janine Balding. Justice Newman sentenced both Appellants to life imprisonment and he also recommended that they never be released ("the Recommendation"). At the time it was made however the Recommendation had no legal effect. In 1992 the Court of Criminal Appeal (Gleeson CJ, Hope AJA & Lee AJ) unanimously dismissed the Appellants' appeals against the severity of their life sentences ("the First Appeal").

Successive legislative changes in 1997, 2001 and 2005 ("the legislative changes") gave legal effect to the Recommendation. Whereas once it was possible that the Appellants may eventually be released, the legislative changes altered that completely. As a consequence, the Appellants now claimed that the Recommendation had become a "sentence" within the meaning of the *Criminal Appeal Act* 1912 ("the Act"). They therefore sought leave to appeal out of time. Each Appellant also asked the Court of Criminal Appeal to quash the Recommendation or alternately, to quash their life sentences and impose determinate sentences.

The Appellants further challenged the constitutional validity of Schedule 1 to the *Crimes (Sentencing Procedure) Act* 1999 that would have given effect to the Recommendation even if it were quashed. The provisions were said to be incompatible with Chapter III of the Commonwealth Constitution.

On 22 September 2006 the Court of Criminal Appeal (Spigelman CJ & Howie J, Kirby J dissenting) refused the Appellants both leave to appeal out of time and leave to re-open the First Appeal. The majority held that the legislative changes were a constitutionally valid exercise of legislative power. They also held that the Court should not frustrate the intention of Parliament. The majority further found that legislative changes often impinge on existing sentences, but this does not necessarily mean that procedural fairness has been denied. Even if that had occurred, it was committed by the Parliament and not the Court. Consequently there had been no miscarriage of justice.

Justice Kirby however held that the Appellants had had no opportunity to address the appropriateness or otherwise of the Recommendation. There had therefore arguably been a miscarriage of justice and leave to appeal should be granted. By virtue of their youth at the time of Ms Balding's murder, the Appellants' crimes could also not be considered in the worst category of offences. Accordingly, their life sentences were manifestly excessive. His

Honour would have allowed the Appellants' appeals and quashed their life sentences. He would have resentenced them to 28 years imprisonment with a non-parole period of 21 years.

On 19 July 2007 the Respondent (in each matter) filed a summons seeking leave to file a notice of contention out of time, the grounds of which include:

- The majority in the Court below failed to find that there was no basis, when all relevant factors were taken into account, on which the appeal to the Court of Criminal Appeal, determined in 1992, might be re-opened.

In both matters, notices pursuant to section 78B of the *Judiciary Act* 1903 have been filed. The Attorney-General of the Commonwealth and the Attorney-General of New South Wales have advised the Court that they will be intervening in each case.

In both matters the grounds of appeal are:

- The majority of the Court (Spigelman CJ and Howie J, Kirby J dissenting), having found jurisdiction to re-open the 1992 appeal against sentence, erred in declining to exercise that jurisdiction. In particular, the majority erred in having regard to an attitude evinced by the enactment of subsequent legislation enacted by Parliament notwithstanding the absence of any legislative restriction or proscription in that legislation.

- The Court erred in holding that, although the "non-release recommendation" made by the sentencing judge would have been an order if the *Sentencing Legislation Further Amendment Act* 1997 had been in force at the time it was made, it was not an "order of the court of trial" for the purposes of the Act.