SHORT PARTICULARS OF CASES
APPEALS

JULY - AUGUST 2007

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WESTFIELD MANAGEMENT LIMITED v PERPETUAL TRUSTEE COMPANY LIMITED (S210/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 1 December 2006

Date of grant of special leave: 24 April 2007

On 26 April 1988 the then owner of the Glasshouse Shopping Mall ("the Glasshouse") in Pitt Street, Sydney registered an easement over that property in favour of the then owner of the adjacent Skygarden Shopping Mall ("Skygarden"). Both the Glasshouse and Skygarden have since changed ownership, with the former now being owned by the Perpetual Trustee Company Limited ("Perpetual") while the latter is owned by Westfield Management Limited ("Westfield").

Westfield subsequently acquired two other properties known as the Imperial Arcade and Centrepoint. The Imperial Arcade is adjacent to Skygarden, while Centrepoint is adjacent to the Imperial Arcade. All four properties face the Pitt Street Mall. Westfield successfully sought a declaration in the Supreme Court that persons and vehicles authorised by Skygarden may use its easement over the Glasshouse to access both the Imperial Arcade and Centrepoint.

The main issues upon appeal included the proper construction of the easement and the admissibility of certain evidence to aid its construction.

On 1 December 2006 the Court of Appeal (Beazley, Hodgson & Tobias JJA) unanimously allowed Perpetual's appeal. Their Honours held that they would not construe an easement to allow a contrary use to that which was originally intended. They found however that an investigation of what was initially intended was not a separate exercise from the construction of the grant. Any investigation of the original intentions could not therefore go beyond the appropriate method for construing the grant.

For an easement to bind the servient tenement, the Court of Appeal found that its authorised use must be of benefit to the dominant tenement. Regard may also be had to the surrounding circumstances, including the physical circumstances of both tenements at the time of the grant. It could also include evidence of communications between the parties prior to the grant. It could not however include evidence going to the subjective ideas and purposes of the grantor. Their Honours found that the initial grant of an easement may still permit a use for new or additional purposes. They further found that there is no universal rule that an easement granted for the enjoyment of one piece of land cannot be used for the purpose of traversing that land to another. In the present case however, the Court of Appeal held that the owner of Skygarden could not authorise persons to use the easement over the Glasshouse for the purpose of traversing Skygarden in order to access the Imperial Arcade and Centrepoint.

The grounds of appeal include:

- The Court of Appeal erred in holding that an easement permitting the registered proprietor of the dominant tenement to access the dominant

tenement in order to travel on to some more remote property does not, by itself, accommodate and serve the dominant tenement.

- The Court of Appeal erred, in its construction of an easement, in holding that a grant "for all purposes" is to be confined by the rule that an easement must accommodate and serve the dominant tenement so as to preclude access over the servient tenement to the dominant tenement and to an adjacent property.

- The Court of Appeal erred, in its construction of an easement and its regard to surrounding circumstances, by refusing to separately address and have regard to the commercial purpose and object of the grant.

PERPETUAL TRUSTEE COMPANY LIMITED v WESTFIELD MANAGEMENT LIMITED & ANOR (S166/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 8 September 2006

Date referred into the Full Court: 21 June 2007

On 24 February 1986 a development consent was granted in relation to the Glasshouse Shopping Mall site ("the Glasshouse") in Sydney. That consent, as later amended, contained Condition 56. Condition 56 effectively provided that a right-of-way applicable to the basement service parking levels of the Glasshouse in favour of the adjoining Skygarden Shopping Mall ("Skygarden") be extended to the neighbouring Imperial Arcade and the Centrepoint Shopping Mall ("Centrepoint"). The Perpetual Trustee Company Ltd ("Perpetual") is the current owner of the Glasshouse, while Westfield Management Limited ("Westfield") is the current owner of the other three sites. All four sites front the Pitt Street Mall.

Westfield unsuccessfully sought a declaration in the Supreme Court that Perpetual had failed to comply with Condition 56. Perpetual however successfully sought a declaration that Condition 56 was both invalid and severable.

Westfield submitted that the following issues were relevant to its appeal:

(1) whether Condition 56 was void for uncertainty;
(2) whether Condition 56 was void for unreasonableness;
(3) if yes to either of the above, whether Condition 56 was severable.

The primary judge answered "Yes" to all three questions.

On 8 September 2006 the Court of Appeal (Hodgson, Tobias and Basten JJA) unanimously allowed Westfield's appeal. Their Honours held that:

1) The primary judge had erred in holding that Condition 56 was void for uncertainty. They found that it should be construed in light of the objective circumstances, including the Council policy of keeping traffic in the Pitt Street Mall to a minimum. Condition 56 therefore obliged Perpetual, without consideration, to take such action as required to extend the easement if and when there is appropriate co-operation from the owners of Skygarden, the Imperial Arcade and Centrepoint. The Court of Appeal further held that the approach taken in *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* could be applied to determine the terms of the extended easement.

2) Condition 56 was not unreasonable in the *Wednesbury* sense and that the primary judge was wrong to hold that it was. This was having regard to the transferable floor space made available to the then owner of Glasshouse in exchange for the imposition of Condition 56. Furthermore, the additional legal burden was not shown to have had a disproportionate effect on the Glasshouse site's value.

3) In light of the above, the question of severance did not arise.

On 24 April 2007 special leave to appeal was granted by Chief Justice Gleeson and Justice Heydon in a related matter, *Westfield Management Limited v Perpetual Trustee Company Limited* ("the Westfield appeal"). That appeal is set down for hearing before the Full Court in Canberra on 31 July 2007. On 21 June 2007 Justices Gummow, Kirby and Heydon referred this matter into the Full Court to be heard at the same time as the Westfield appeal.

The questions of law said to justify a grant of special leave to appeal include:

- In construing a condition of a development consent is it correct to adopt the principles of construction in relation to contracts reflected in the decisions of this Court in *Mehan v Jones* and *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd.*

EVANS v THE QUEEN (S219/2007)

Court Appealed from: New South Wales Court of Criminal Appeal

Date of Judgment: 7 September 2006

Date of Grant of Special Leave: 24 April 2007

This appeal raises a number of issues about the conduct of a trial involving admissibility of evidence, the circumstances in which "demonstration evidence" should be permitted, whether the trial Judge was obliged to or had given adequate reasons for rulings and whether the Court of Criminal Appeal correctly applied the proviso where a misdirection had been made on alibi evidence.

The appellant was convicted on charges of armed robbery and assault arising out of a robbery at Strathfield Municipal Chambers in February 2002. The offender was wearing overalls and a balaclava and spoke during the robberies. The balaclava was left behind and subsequently found to contain DNA which matched the appellant. A subsequent search of the appellant's home located similar overalls and balaclavas.

During the trial before Backhouse ADCJ, the balaclava and overalls seized at the home were shown to various witnesses after they had been asked to describe their recollections. Subsequently, over objection the appellant was asked to put on the balaclava, the overalls, sunglasses similar to those described as being worn and, at a later time to repeat the words "give me the serious cash" in the presence of the jury. The appellant gave evidence and denied that he was the robber.

The Court of Criminal Appeal (James, Hidden and Hoeben JJ) dismissed the appeal holding that sufficient relevance had been established to justify showing the items of clothing to witnesses and that the "demonstration of the clothing and words required of the appellant, with the exception of the sunglasses, were not subject to the requirements of section 53 of the *Evidence Act* 1995 (NSW) nor unfairly prejudicial to the appellant. The Court further held that the summing up as a whole contained adequate cautions on evidence of resemblance and did not require the specific directions for identification evidence, and that insofar as the trial judge failed to give written reasons where she had undertaken to do so, comments made during submissions were sufficient. Insofar as errors had been made in respect of the sunglasses and the ruling that there was not power to extend time for alibi evidence it was an appropriate case to apply the proviso.

The grounds of appeal include:

- The Court of Criminal Appeal should have held that the trial miscarried as a result of the admission of evidence of eyewitnesses concerning items of clothing that had been randomly seized from the applicant's home twenty two months after the offence.

- The Court of Criminal Appeal should have held that:

- Section 53 *Evidence Act 1995* (NSW) applies to "in court" demonstrations; and/or
- The prosecutor should not have been permitted to require the applicant to put on a balaclava and overalls, walk up and down in front of the jury and say words which were attributed to the robber by one eyewitness.

- The Court of Criminal Appeal should have held that there was a miscarriage of justice occasioned by failure to direct the jury on the dangers of the procedure outlined above.

AUSTRALIAN FINANCE DIRECT LIMITED v DIRECTOR OF CONSUMER AFFAIRS VICTORIA (M53/2007)

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

Date of judgment: 20 November 2006

The respondent brought proceedings in the Victorian Civil and Administrative Tribunal against the appellant ("AFD") for contraventions of the Consumer Credit (Victoria) Code ('the Code'). AFD lent money to people to enable them to pay the fees to attend investment education seminars and courses conducted by National Investment Institute Pty Ltd ('NII') and a related company ("Capital"). When the NII/Capital customer signed the seminar enrolment form, he or she would also sign loan documentation which NII/Capital would forward to AFD. If the loan proceeded to settlement, AFD endorsed the loan contract as accepted and the loan monies would then be advanced directly to NII or Capital. The credit contract between AFD and the borrower stated that the amount of the loan was to be the full amount of the seminar fee charged by NII/Capital to the borrower together with an establishment fee charged by AFD. The credit contract identified the supplier as NII/Capital and it disclosed, in the section "amount payable to supplier" an amount equivalent to the whole of the seminar fee. An accounting document between AFD and NII/Capital showed the amount of the loan, an amount described as "holdback", and a net payment, consisting of the amount of the loan minus the "holdback".

The issues before the Tribunal and on appeal concerned the effect of the holdback on the obligations of AFD to disclose certain prescribed matters to borrowers under the Code. The respondent alleged AFD breached s 15(B) of the Code, which requires the contract document to show, inter alia, the amount of credit, the persons, bodies or agents, including the credit provider to whom it is to be paid, and the amounts payable to each of them. The Tribunal found that AFD breached s 15(B) of the Code because the credit contract incorrectly stated the amount of credit and the people to whom the money was paid.

On appeal to the Supreme Court (Kaye J), AFD submitted that the whole of the amount of credit specified in the credit agreement between the lender and the borrower was paid by AFD to NII/Capital, and was offset against a debt owing by NII/Capital to AFD for the holdback applicable to that amount of credit. Kaye J found that the evidence did not establish an agreement between AFD and NII/Capital whereby the holdbacks constituted a debt owed or to be owing by NII/Capital to AFD. In the alternative, AFD contended s 15(B) did not require that the contract document set out the terms of the separate agreement and was only concerned with accurately recording the terms of the agreement between the lender and borrower. That submission was rejected. Kaye J found that this would be contrary to s 15(B)(a)(ii), which relevantly provided that the contract document must contain in respect of the amount of credit which is to be provided "the persons, bodies or agents including the credit provider to whom it is to be paid and the amounts payable to each of them."

AFD's appeal to the Court of Appeal (Ashley and Neave JJA, Maxwell P dissenting) was dismissed. The majority found that the Tribunal did not err in finding that there was no legally enforceable agreement between NII/Capital and AFD for payment of holdbacks. Even if the facts were decided differently, AFD was required by s 15(B)(a)(ii) to specify an amount retained by it out of the

credit amount pursuant to the agreement with the NII/Capital. AFD breached s 15(B)(a)(ii) by failing to disclose that it retained the holdback. This was consistent with the language of that provision, its legislative context and its legislative history.

Maxwell P took the view that the holdback was equivalent to a payment to AFD at the direction of NII/Capital. He concluded that s 15(B) required disclosure only of amounts paid under the agreement between the credit provider and borrower, and it was irrelevant whether or not there was a contractual agreement between AFD and NII/Capital in relation to the holdback, as long as the funds were retained by or paid to AFD outside the terms of the credit contract.

The grounds of appeal are:

- the Court of Appeal ought to have held that the holdbacks arranged between the appellant and the service providers were not:
  (i) part of "the amount of credit to be provided";
  (ii) "to be paid" to the appellant; or
  (iii) "amounts payable" to the appellant
  for the purposes of section 15(B) of the Consumer Credit Code;

- the Court of Appeal erred in law in holding that s 15(B) of the Code required that the appellant's credit contracts contain a statement of the amount of the holdbacks and that they were payable to the appellant;

- the Court of Appeal erred in law in concluding that the payment by the appellant to the service provider of a net remittance did not effect payment of the amount that was, under the credit contract, to be paid to the service provider.