SHORT PARTICULARS OF CASES
APPEALS

MARCH 2008

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CGU INSURANCE LIMITED v PORTHOUSE (S530/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 11 April 2007

Date of grant of special leave: 5 October 2007

Mr Porthouse is a barrister who acted on a claim for damages for personal injury by a person doing work pursuant to a Community Service Order. He did not however ascertain that amendments to the *Workers' Compensation Act* 1987 (NSW) ("the Act") had the potential of denying his client's claim if proceedings were not commenced within a certain time. Proceedings were commenced after this time, and although the trial judge found that this was not fatal, that decision was later overturned by the Court of Appeal.

The client sued Mr Porthouse and his instructing solicitors in negligence. Mr Porthouse cross-claimed against CGU Insurance Limited ("CGU") for indemnity under his professional insurance policy ("the Policy"). Although Mr Porthouse completed the Policy's proposal after he became aware of the potential effect of the amendments to the Act, he answered "No" to the question asking whether he was aware of any circumstances which could result in a claim being made against him.

The Policy excluded claims arising from "known circumstances". This was defined by Clause 11.12 as any fact or circumstance which the insured knew, or which "a reasonable person in the insured's professional position would have thought ..., might result in someone making an allegation" against him.

While the primary judge held that Mr Porthouse had been negligent, her Honour held that there was no circumstance which Mr Porthouse knew, or a reasonable person in his professional position would have thought might result, in someone making an allegation against him. She then ordered CGU to indemnify Mr Porthouse. CGU duly appealed.

On 11 April 2007 the Court of Appeal (Hodgson JA & Young CJ in Eq, Hunt AJA dissenting) dismissed CGU's appeal. The majority held that the second limb of the exclusion clause was ambiguous, that it was correctly construed and that an element of subjectivity was permissible. Justice Hunt however would have allowed the appeal. His Honour held that the applicable test was wholly objective and that a person in Mr Porthouse's position would have been aware of the consequences of his oversight.

On 22 January 2008 CGU filed a summons, seeking leave to rely upon an amended notice of appeal.

The grounds of appeal (in the amended notice of appeal) include:

- The majority erred in finding that a reasonable person in Mr Porthouse's professional position, having regard to the facts found or undisputed, would not have thought before the Policy began:

  a) that any fact, situation or circumstance known to him;
  b) might result in someone making an allegation against him;
  c) in respect of a liability that might be covered in the Policy.

- By reason of the finding described above, the majority erred:

  a) in concluding that CGU was liable to indemnify Mr Porthouse for the loss in question; and
  b) in failing to conclude that the loss for which Mr Porthouse sought indemnity was not covered by the Policy because of the operation of Clause 6.1(b) and (c) and Clause 11.12(b) of the Policy.

COMMISSIONER OF TAXATION v FUTURIS CORPORATION LIMITED (A47/2007)

Court appealed from: Full Federal Court

Date of judgment: 22 June 2007

Date special leave granted: 16 November 2007

This application arises from the assessment made by the appellant ("the Commissioner") of the respondent's tax liability for the year ended 30 June 1998. The respondent's tax return, lodged in December 1998, specified a taxable income of $86,088,045. In November 2002 the Commissioner served a notice of amended assessment which increased the taxable income of the respondent for that financial year by $19,950,088, making a total taxable income of $106,038,133. The increase was attributed to an increase in capital gains tax on the disposal by the respondent of shares in a subsidiary company. The respondent filed a notice of objection which was disallowed by the Commissioner on 22 May 2003. The respondent appealed to the Federal Court pursuant to Part IVC of the *Taxation Administration Act* 1953 (Cth). Those proceedings have not yet been heard.

On 9 November 2004, the Commissioner gave notice to the respondent of a determination that an amount of $82,950,000 (attributed to the tax benefit obtained by the respondent on the disposal of the shares) should be included in its assessable income for the year ended 30 June 1998. On 12 November 2004, the respondent was served with a second amended assessment which specified a taxable income of $188,988,223, calculated by adding the sum of $82,950,000 to the taxable income specified in the first amended assessment. This was done on the basis that if the respondent was successful in the Part IVC proceedings, a compensating adjustment could be made at a later stage.

The respondent issued proceedings in the Federal Court pursuant to s 39B of the *Judiciary Act* 1903 (Cth), claiming that the second amended assessment was invalid and should be quashed. The trial judge (Finn J) rejected the respondent's contention that the Commissioner had deliberately overstated the taxable income for the year ended 30 June 1998 by $19,950,088. His Honour held that s 177F(3) of the *Income Tax Assessment Ac*t 1936 (Cth) ("the Act") applied to permit the adjustment of the amount of $82,950,000. He held that the Commissioner was entitled to include that amount in the taxable income specified in the second amended assessment "in the knowledge that there was some likelihood of the need later to make a compensating adjustment" because the Part IVC proceedings had not been concluded; there was uncertainty about how the sum of $19,950,088 had been calculated; and there was a need to protect the revenue by making the second amended assessment in that way. His Honour also noted that because of the passage of time the Commissioner was unable to amend the assessment in the usual way.

The respondent's appeal to the Full Federal Court (Heerey, Stone & Edmonds JJ) was successful. The Court held that the second amended assessment was not a bona fide exercise of the Commissioner's power to assess because he knew that the taxable income could be no greater than $169 million (because the sum of $19,950,088 added to the respondent's taxable income in the first amended assessment was included in the sum of $82,950,000 added in the second

amended assessment, and thus had been double-counted) and yet he issued the assessment in respect of a taxable income of $188,988,223.

The grounds of appeal include:

- whether in proceedings other than those under Part IVC of the *Taxation Administration Act* 1953 (Cth), an assessment made under the *Income Tax Assessment Ac*t 1936 (Cth) ("the Act") that was subject to the protection of ss 175 and 177 of the Act was invalid in circumstances where the respondent had not made out the absence of an honest attempt by the Commissioner to exercise the power confided to him in making the assessment;
- whether an assessment which is made on the assumption that a reduction in the taxpayer's taxable income at a subsequent point might be required is for that reason invalid and liable to be quashed in proceedings other than those under Part IVC of the *Taxation Administration Act* 1953 (Cth).

SHI v MIGRATION AGENTS REGISTRATION AUTHORITY (S522/2007)

Court appealed from: Full Court of the Federal Court

Date of judgment: 27 April 2007

Date of grant of special leave: 5 October 2007

The issue in this case is whether section 43 of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("AAT Act") limits the Administrative Appeals Tribunal ("AAT") to the facts and circumstances as they exisited at the time of the decision under review.

On 14 July 2003 the Respondent cancelled the Appellant's registration as a migration agent pursuant to section 303(1) of the *Migration Act* 1958 (Cth) ("Migration Act"). It was satisfied that section 303(1)(h) of the Migration Act applied due to 96 breaches of the code of conduct prescribed in section 314 of that Act.

Upon review, the AAT substituted the decision to cancel the Appellant's migration agent's registration with a caution. In reaching this decision, the AAT took into account matters that had occurred after the Respondent's initial decision to cancel the Appellant's registration.

On 15 September 2005 Justice Edmonds allowed the Respondent's appeal. His Honour held, inter alia, that any subsequent material had to be relevant to the question of whether the initial decison (to cancel the Appellant's migration agent's registration) was correct as at the time it was initially made.

On 27 April 2007 the Full Federal Court (Nicholson & Tracey JJ, Downes J dissenting) dismissed the Appellant's further appeal. The majority held that the relevant time, when considering a decision to cancel a migration agent's registration, was the date on which the initial decision under review was made.

The grounds of appeal are:

- The majority of the Court erred in concluding that the AAT was bound to determine the Appellant's review of the Respondent's decision, made pursuant to section 303(1) of the Migration Act, to cancel the Appellant's registration as a migration agent as at the date of the Respondent's decision (14 July 2003), rather than as at the date of the decision of the AAT (2 September 2005) and that, as a result, the AAT could not have regard to evidence of events occurring after the date of the Respondent's decsion (14 July 2003).

- The majority of the Court erred in holding that section 303(A) of the Migration Act did not empower the AAT to impose a condition on the Appellant's registration as a migration agent that operated to limit his right to give immigration assisstance.