SHORT PARTICULARS OF CASES
APPEALS

JULY-AUGUST SITTINGS 2008

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BHP BILLITON IRON ORE PTY LTD v NATIONAL COMPETITION COUNCIL & ANOR (M17/2008)

BHP BILLITON IRON ORE PTY LTD & ANOR v NATIONAL COMPETITION COUNCIL & ANOR (P6/2008)

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

Date of judgment: 5 October 2007

Date special leave granted: 7 March 2008

The appellants (BHPBIO) conduct mining operations in the Pilbara region in WA with mines in four mining areas: Newman, Yandi, Area C and Goldsworthy. BHPBIO operates two heavy haulage single track rail lines between the Pilbara and Port Hedland: the Mt Newman line and the Goldsworthy line.

The second respondent in each appeal (Fortescue) proposed to carry on the business of mining, refining and sale of iron ore in the Pilbara and wished to access the service provided by part of both the Mt Newman line and the Goldsworthy line. In June 2004 Fortescue made an application to the first respondent (the NCC) seeking access to the BHPBIO rail link, as well as to the associated infrastructure, pursuant to s44F(1) of the *Trade Practices Act* 1974 (Cth) "(the Act)". Fortescue sought a recommendation from the NCC that the service provided by the relevant parts of the Mt Newman and Goldsworthy rail lines be declared a "service" under Part IIIA of the Act. The NCC decided that the access application should be dealt with as two separate applications: one for the Mt Newman service and one for the Goldsworthy service. The NCC concluded that the relevant part of the Mt Newman line was a service to which Part IIIA of the Act applied. However the NCC considered that the "production process" exception in s44B of the Act applied to the relevant part of the Goldsworthy line and consequently it was not a service to which Part IIIA applied. BHPBIO applied to the Federal Court in Victoria in respect of the decision on the Mt Newman line and Fortescue applied to the Federal Court in Western Australia in respect of the decision on the Goldsworthy line.

BHPBIO argued that it manages its mine, rail and port operations as an integrated system and all of its activities constitute a single production process of which the rail link is a part. Consequently the use of the rail link involves "use of a production process" and is not a "service" within the meaning of s44B of the Act. The respondents each put similar arguments submitting that BHPBIO did not have one single production process in the Pilbara but rather several production processes and that the rail link was not a part of any production process but simply a method of moving iron ore from the place of one production process to another.

Middleton J held that both the Mt Newman and Goldsworthy rail lines were not the use of a production process because each service did not itself create, or make a product, or transform one thing into another, and therefore that each of them was a service within the meaning of s44B of the Act.

The Full Court (Sundberg & Greenwood JJ, Finkelstein dissenting) dismissed BHPBIO's appeals. The majority concluded that each of the Mt Newman and Goldsworthy rail service was the use of part of a production process and not the whole of a production process: for that reason each was a service within the meaning of s 44B.

Rio Tinto Limited has sought leave to intervene to make written and oral submissions in support of the appeals.

The grounds of the appeals are:

- the majority of the Full Court erred in concluding that use of each of the Mt Newman (in M17/08) and Goldsworthy (in P6/08) rail facility is a "service" within the definition contained in s44B of the *Trade Practices Act* 1974 (Cth).

- the majority of the Full Court erred in concluding that use of each of the Mt Newman (in M17/08) and Goldsworthy (in P6/08) rail facility is not the use of a production process within the meaning of the definition of "service" contained in s44B of the Act.

- the majority of the Full Court erred in concluding that the phrase "use of a production process" contained in sub-paragraph(f) of the definition of "service" in s44B of the Act does not include the use of part of the production process.

GEDEON v COMMISSIONER OF THE NEW SOUTH WALES CRIME COMMISSION & ORS (S536/2007)

DOWE v THE COMMISSIONER OF THE NEW SOUTH WALES CRIME COMMISSION & ANOR (S544/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 19 October 2007

Date referred to Full Bench: 18 April 2008

These applications concern the construction of the *Law Enforcement (Controlled Operations) Act* 1997 (NSW) ("the Act") and the question of whether the operational authorities issued pursuant to section 7(1)(b) of that Act were valid.

The applicants face prosecution for an offence under section 25(2) of the *Drug Misuse and Trafficking Act* 1985 for knowingly taking part in the supply of a commercial quantity of a prohibited drug, namely cocaine. The drugs were sold to the applicants by an informer who was participating in a series of "controlled operations" authorised by the first respondent pursuant to section 7(1)(b) of the Act.

The applicants commenced proceedings in the Supreme Court, challenging the validity of the authorities issued pursuant to section 7(1)(b). This was on the basis that the failure to obtain a certificate under the parallel *Crimes Act* 1914 (Cth) ("the Crimes Act") meant that the activities of the controlled operation remained unlawful. It was further submitted that, since it was obvious the drugs were to be onsold and consumed, the certificates were granted in contravention of the prohibition of conduct likely to seriously endanger health or safety.

The primary judge, Justice Hall, held that the Act was not inconsistent with the Commonwealth legislation. His Honour also held that a controlled operation might constitute a "reasonable excuse" under the *Customs Act* 1901 (Cth) for an otherwise unlawful activity. He further found that while the precondition in section 7(1)(b) relating to health and safety was emphatic, it was not a jurisdictional fact which must exist at the time the operation was authorised.

On 19 October 2007 the Court of Appeal (Spigelman CJ & Handley AJA, Basten JA dissenting) agreed that the precondition in section 7(1)(b) was not a jurisdictional fact. The majority further held that no *Wednesbury*-style unreasonableness arose insofar as the section was not concerned with consequences subject to the authorised conduct. Justice Basten however would have allowed the appeal, holding that the controlled conduct would remain unlawful under Commonwealth law unless there was an equivalent certificate under section 15M of the Crimes Act. In addition, the danger to health and safety was obvious and the operational authorities were invalid as having been issued in breach of section 7(1)(b).

In matter number S536/2007 (Gedeon) the questions of law said to justify the grant of special leave to appeal are:

- Whether a “controlled activity” for the purposes of the Act is confined to conduct which would otherwise be unlawful but which section 16 of the Act renders lawful, or alternatively whether it extends to conduct which continues to be unlawful by reason of a law of the Commonwealth?

- Whether the prohibition in section 7(1)(b) of the Act against controlled operations involving “conduct that is likely to seriously endanger the health or safety of …any other person” turns upon the state of mind of the agency’s chief executive officer, even though it, unlike the prohibitions in section 6(3) and section 7(3) is not expressed to depend upon his or her being satisfied of the fact?

- Whether the words “any other person” in the same prohibition are confined to persons physically and temporally proximate with the conduct authorised, or extend to harm to other persons which is the forseen and expected consequence of the conduct?

In matter number S544/2007 (Dowes) the question of law said to justify the grant of special leave to appeal is:

- The Act permits various state law enforcement agencies to authorise "controlled operations" involving what otherwise would be breaches of the state criminal law. Section 7(1)(b) of the Act prohibits the authorisation of a controlled operation involving "conduct that is likely to seriously endanger the health or safety of that or any other participant or any other person". Is the prohobition embodied in section 7(1)(b) limited to the health and safety of persons proximate to the operation upon whom the authorised conduct directly impinges, so as to ignore "subsequent consequences" of the controlled operation, or does it extend to harm which is the forseen and expected consequence of proposed conduct?

AGRICULTURAL & RURAL FINANCE PTY LIMITED v GARDINER & ANOR (S180/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 6 September 2007

Date of grant of special leave: 5 May 2008

In 1997 Oceania Agriculture Ltd (“Oceania”) filed a prospectus with the Australian Securities Commission concerning a project known as the “Port Macquarie Tea Tree Plantation”. That project was promoted by Gerard Cassegrain & Co Pty Ltd, of which Oceania was a wholly owned subsidiary. The land however was owned by Endwise Holdings Pty Ltd ("Endwise"), while the plantations were managed by Oceania. An independent trustee was also appointed to protect the rights and interests of the investors. That trustee was the Australian Rural Group Ltd.

The investment scheme involved a financing arrangement whereby Agricultural and Rural Finance Pty Ltd (“A&R Finance”) provided the finance. Most investors also entered into an indemnity agreement under which Oceania agreed to indemnify their obligations of repayment under the loan contracts in particular circumstances. The project deed provided that termination could occur if the office of trustee became vacant and a new trustee was not appointed within 60 days. Between 1997 and 2002 the price of tea tree oil collapsed, leading to the appointment of an administrator to the trustee on 27 September 2002. The trustee then retired on 5 November 2002. Pursuant to clause 46.4 of the project deed, the project was terminated on 4 January 2003.

Following the project's termination, A&R Finance commenced proceedings against all of the borrowers seeking payment of loan monies which it claimed were repayable upon the cessation of the scheme. As the borrowers' representative, Mr Gardiner argued that the indemnity agreement was effective and enforceable, thereby releasing them from any obligation to repay amounts under the loan agreements. He also filed a cross-claim, asserting breaches of the *Trade Practices Act*, *The Corporations Law* and the *Australian Securities and Investments Commission Act*. Young CJ in Eq. gave judgment in favour of A&R Finance and dismissed the cross-claim by Mr Gardiner.

On 6 September 2007 the Court of Appeal (Spigelman CJ, Basten JA & Handley AJA) allowed Mr Gardiner's appeal in part. It also dismissed A&R Finance's cross-appeal. All Justices found that the failure to replace the trustee was a relevant event for the purposes of clause 2(d) of the indemnity agreement. They also found that the failure to appoint a replacement trustee was an "event beyond the control" of investors such as Mr Gardiner. The indemnity agreement could therefore be relied upon to excuse his performance for the purposes of clause 31(a) of the licence and management agreement.

With respect to the punctuality of the loan payments, Chief Justice Spigelman and Justice Basten held that the first and second loan payments were punctual. All Justices held however that the third loan payment was punctual, but that the fourth was not.

The grounds of appeal include:

- The Court of Appeal erred in concluding that the words "punctual payment" in clauses 2(a) and 2(b) of the indemnity agreement extend to the situation where the lender has accepted the payment as punctual.

On 19 May 2008 Mr Gardiner filed an amended notice of contention, the grounds of which include:

- Upon its proper construction the expression "punctually paid" in clauses 2(a) and 2(b) of the indemnity agreement is satisfied where A&R Finance and/or Oceania accept monies paid as constituting punctual payment.

CAPITAL FINANCE AUSTRALIA LIMITED & ANOR v TOLCHER (AS LIQUIDATOR OF LLOYD SCOTT ENTERPRISES PTY LIMITED) (IN LIQUIDATION) & ANOR (S220/2008)

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

Date of judgment: 28 November 2007

Date of grant of special leave to appeal: 16 May 2008

This appeal concerns the voidable transaction provisions of Part 5.7B of the *Corporations Act* 2001 (Cth) ("the Act") and, in particular, whether:

(1) a Deed between Capital Finance Australia Pty Limited and Capital Corporate Finance Limited (together "the Capital Companies"), Lloyd Scott Enterprises Pty Limited ("LSE") and Lloyd John Scott executed on 12 January 2001 ("the Second Deed");
&
(2) steps consequent upon the making of the Second Deed including, in particular, certain payments made to Capital Finance between 14 February 2001 and 31 May 2001,

were properly characterised either as an uncommercial transaction within the meaning of s 588FB of the Act or as an unfair preference within the meaning of s 588FA of the Act or both.

LSE was placed into voluntary administration on 25 June 2001. Mr Tolcher, the first respondent, was appointed Liquidator of LSE on 24 July 2001. He applied to the Federal Court seeking payment of monies from the Capital Companies. The application was made pursuant to the voidable transaction provisions of Part 5.7B of the Act. The payments sought to be avoided were made between 14 February 2001 and 31 May 2001 and total $3,751,861.40.

The trial judge held that each payment was both an unfair preference and an uncommercial transaction and was therefore voidable under s 588FE of the Act. His Honour ordered Capital Finance to pay LSE the sum of $5,584,009.50.

The Capital Companies appealed. The Full Court (Heerey and Gordon JJ, Lindgren J dissenting) allowed the appeal in part. Gordon J (with whom Heerey J agreed) found that there was an uncommercial transaction within the meaning of s 588FB of the Act. Her Honour did not consider that there was an unfair preference.

The respondents have filed a notice of contention and also seek leave to file a notice of cross-appeal out of time.

The grounds of appeal include:

- The Full Court erred in failing to identify clearly and with precision any transaction of the second respondent (within the meaning of Part 5.7B of the Act) which was an uncommercial transaction within the meaning of Section 588FB(1) of the Act.

- The Full Court erred in holding that the receipt by the first appellant of the proceeds of sale of the appellants' equipment pursuant to contracts of sale between the appellants and National Australia Bank was, or was an element of, an uncommercial transaction or an insolvent transaction of the second respondent.

- In as much as the Full Court was required to consider whether a reasonable person in the second respondent's circumstances would not have entered into the transaction having regard to the matters referred to in Section 588FB(1), the Court erred in having regard to matters subsequent to or irrelevant to the second respondent's "entry into the transaction".

PACIFIC NATIONAL (ACT) LIMITED v CHIEF COMMISSIONER OF STATE REVENUE (S211/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 16 November 2007

Date of grant of special leave: 16 May 2008

The Appellant runs freight trains on the New South Wales rail infrastructure owned by the Rail Infrastructure Corporation ("RIC"). Its right to do so is set out in an "Access Agreement" with the RIC. Under that agreement, the RIC granted the Appellant non-exclusive rights to use railway lines and associated facilities vested in the RIC. For its part, the RIC does not own any of the land upon which those facilities are located. That land is mostly owned by the State Rail Authority.

Between 1 July 2000 and 31 December 2003 the Appellant made payments in excess of $162 million to the RIC pursuant to the Access Agreement. On 3 September 2004 the Respondent issued the Appellant with an assessment of duties payable for $736,614.44. The issue in this matter is whether the Appellant was liable to pay those duties pursuant to the *Duties Act* 1997 (NSW) ("Duties Act").

Section 164(1) of the Duties Act levies duty on lease instruments. A lease is then defined as including a lease of land in New South Wales or an agreement (such as a licence) by which a right to use land in New South Wales is conferred. It also includes, with certain temporal limitations, a franchise arrangement in respect of an area located in New South Wales.

On 12 April 2007 Justice Gzell held that the vesting of rail infrastructure facilities in the RIC did not pass onto it any interest in land. No duty was therefore payable by the Appellant.

On 16 November 2007 the Court of Appeal (Hodgson, Ipp & Basten JJA) unanimously allowed the Respondent's appeal. All members of the Court held that the Access Agreement was one by which a right to use land was either conferred or acquired. Justice Hodgson (with whom Justice Ipp broadly agreed) held that the issue was not whether an interest in land was conferred on or acquired by the Access Agreement, but whether a right to use land was so conferred or acquired. His Honour went on to hold that the Access Agreement conferred on the Appellant the right to use the land within the meaning of section 164A(b) of the Duties Act.

Justice Basten held that the Access Agreement conferred on the Appellant a right to use the tracks which constitute part of the New South Wales rail network. It therefore had a right to use so much of the land as is constituted by the upper surface of the tracks (and the adjacent air space) as is reasonably necessary for the operation of rolling stock. That right constituted a right to use land for the purposes of section 164A(b) of the Duties Act. The duty levied by the Respondent was therefore lawful.

The grounds of appeal are:

- The Court below erred in holding that the Access Agreement was an agreement by which any right to use land was conferred on or acquired by the Appellant.
- The Court should have held that the Appellant's right to use land on which rail infrastructure facilities were situated was a statutory right contained in clause 5(1) of Schedule 6A of the *Transport Administration Act* 1988 (NSW).

MINISTER ADMINISTERING THE CROWN LANDS ACT v NSW ABORIGINAL LAND COUNCIL (S217/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 12 October 2007

Date of grant of special leave: 16 May 2008

In May 2005 the Respondent lodged a claim under the *Aboriginal Land Rights Act* 1983 (NSW) ("ALRA") relating to urban land ("the land") in Wagga Wagga. A long-vacant building, which once housed a motor registry, stood on that land.

The Respondent's claim was rejected as not having been made over “claimable Crown lands” within the meaning of section 36(1)(b) of the ALRA. This was because the land was being lawfully "used or occupied" by the Department of Lands which was preparing it for sale.

The Respondent appealed that decision. On 30 March 2007 Justice Biscoe dismissed that appeal. His Honour found that the decision to sell the land (and the steps taken in furtherance of that intention) amounted to a "use" of the land.

On 12 October 2007 the Court of Appeal (Mason P, Giles & Tobias & JJA) unanimously allowed the Respondent's appeal. President Mason and Justice Tobias held that for the purposes of section 36(1)(b) of the ALRA, "use" must be more than notional. It must be a present, as opposed to a contemplated or intended use. Their Honours therefore held that Justice Biscoe had erred in finding that the decision to sell the land (and the steps taken in furtherance of that intention) amounted to a "use" of the land.

Justice Giles held that the question was not whether the sale of the land was "use" for the purposes of section 36(1)(b) of the ALRA. The issue is whether the land was in fact being used at the relevant time. His Honour held that, depending on the circumstances, the process of selling the land may or may not be considered a "use". In this case however the land had been effectively unused for about five years. It was also recognised as surplus but it had not been promptly sold. The better conclusion therefore was the land was unused Crown land which was in the process of being sold. The act of selling the land was not therefore part of its "use".

The ground of appeal is:

- The Court of Appeal erred in finding that the activities undertaken by and on behalf of the Appellant in respect of Crown land prior to its intended sale immediately before the making of a claim did not constitute a lawful use of the land within the meaning of section 36(1)(b) of the ALRA.