SHORT PARTICULARS OF CASES
APPEALS

FEBRUARY SITTINGS 2009

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CAMPBELL & ANOR v BACKOFFICE INVESTMENTS PTY LTD & ANOR (S435/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 19 May 2008

Date of grant of special leave: 26 August 2008

These proceedings concern a dispute between the shareholders of Healthy Water (NSW) Pty Ltd (in provisional liquidation) ("the Company"). As at January 2005 Mr Campbell held the two issued shares in the Company and was also its sole director. On 24 January 2005 BackOffice Investments Pty Ltd ("BackOffice") (of which Mr Tim Weeks was its shareholder and director) entered into a written Share Sale Agreement with Mr Campbell. Pursuant to that agreement, BackOffice purchased one of the issued shares in the Company for $850,000. Mr Weeks then became a co-director and joint managing director with Mr Campbell.

A significant dispute between Mr Weeks and Mr Campbell followed, leading to Mr Weeks and BackOffice commencing proceedings against Mr Campbell, Sentinel Construction Managers Pty Ltd (a company controlled by Mr Campbell) and the Company. The relief claimed included:

(a) on the ground of conduct within section 232 of the *Corporations Act* 2001 ("the Act"), an order that the Company be wound up, or alternatively an order that Mr Campbell repurchase BackOffice's share at a value to be determined by the Court;

(b) on the ground of misleading or deceptive conduct inducing entry into the contracts, an order declaring the contracts void and for return of the $850,000, or alternatively damages; and

(c) as damages for breach of contract, damages for breaches of the share sale agreement and the shareholders agreement.

With the consent of the parties, a provisional liquidator was appointed to the Company on 7 April 2005.

The trial judge, Justice Bergin, held that there had been oppressive conduct within the meaning of section 232 of the Act. She then ordered Mr Campbell to re-purchase BackOffice's share for $853,000 ("the buy-out order"). That order later became an order that Mr Campbell pay $853,000 to BackOffice, without provision for the transfer of the share to him. Her Honour held that although certain breaches of warranty of the implied contractual obligation had been established, no damages should be assessed in light of the buy-out order.

On the question of misleading conduct, her Honour held that even if such representations had been made, BackOffice had not relied on them. Her Honour also held that damages should not be awarded for the breaches of the Share Sale Agreement because any damages in addition to the $853,000 already awarded would over-compensate BackOffice.

The appellants appealed against the order for payment of $853,000, while BackOffice and Mr Weeks cross-appealed. On 19 May 2008 the Court of Appeal (Giles and Basten JJA, Young CJ in Eq) allowed the appellants' appeal and the respondents' cross-appeal in part. For different reasons, each Justice considered that the order that Mr Campbell purchase BackOffice's share for $853,000 and the order that Mr Campbell pay BackOffice $853,000 should be set aside. Justices Giles and Basten considered that BackOffice should have judgment against Mr Campbell for $850,000 as damages for misleading or deceptive conduct instead.

The grounds of appeal include:

- The Court of Appeal erred in holding that the damages for misrepresentation extended to losses attributable to the cessation of the business of the Company the share in which was acquired by BackOffice when such losses were not related to the subject matter of the alleged misrepresentations.

On 17 October 2008 the Respondents filed a summons, seeking leave to file both a notice of cross-appeal and a notice of contention. The grounds of the proposed notice of cross-appeal include:

- Their Honours erred in failing to order that Campbell purchase BackOffice's share in the Company for the amount of $853,000, or in the alternative, at a value to be determined by the Court, pursuant to section 233(1)(d) of the Act.

The grounds of the proposed notice of contention include:

- Their Honours erred in failing to assess damages for the Schedule 3 representations in the amount of $850,000, or in the alternative, in an amount to be assessed by the Court.

LK v DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITY SERVICES (S524/2008)

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

Date of judgment: 24 June 2008

Date of grant of special leave: 14 November 2008

This matter concerns the interpretation of the concept of "habitual residence" as used in the *Family Law (Child Abduction Convention) Regulations* 1986 (Cth) and the *Hague Convention on Civil Aspects of International Child Abduction* 1980.

The Appellant mother's four children were born in Israel. By 2005 her marriage was under strain and in early 2006 both she and the children travelled to Australia with the father's consent. There was ambiguity about the future of the parents' relationship and the family had return tickets. By July 2006 the father had withdrawn his consent and he subsequently sought the return of the children.

On 29 August 2007 Justice Kay found that there was insufficient evidence to conclude that the parents had reached a mutual understanding that Israel was no longer to be the children's home.

The Full Family Court was invited to prefer the "broader factual enquiry" approach of the New Zealand Courts (*Punter v. Secretary for Justice* (2007) 2 NZLR 40) over the "settled purpose of the parents" test. On 24 June 2008 their Honours (Bryant CJ, Coleman and Thackray JJ) held that this was not part of the law in Australia. They found that "settled purpose" was not merely one factor to be considered, but that it was an integral part of the finding for habitual residence. The Court consequently declined to admit further evidence as to the adjustment of the children in Australia. This is because it related to events subsequent to the father's advice that his consent had been withdrawn. The appeal was then dismissed.

On 14 November 2008 this Court made orders effectively staying the orders of the Full Family Court up to and including the disposition of the appeal in this matter.

On 21 January 2009 the Appellant mother filed a summons, seeking leave to rely upon an amended notice of appeal. The grounds of which include:

- The Full Court erred in concluding that the children were habitually resident in Israel at the relevant time of their alleged wrongful retention and hence that the Convention and Regulations were applicable (at [64]).

On 19 December 2008 the Respondent filed a notice of contention, the ground of which is:

- If the Full Court of the Family Court of Australia should have addressed the difference in principle between the New Zealand law and the Australian law on "habitual residence", and, if, contrary to the Respondent's submissions, it should have held that the principles of New Zealand law should be the law in Australia, the appeal to the Full Court should nonetheless have been dismissed on the ground that the findings of fact at first instance justified that result.

HICKSON v GOODMAN FIELDER LIMITED (S470/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 24 April 2008

Date of grant of special leave: 30 September 2008

On 12 March 2003 the Appellant suffered significant injuries when the pushbike he was riding in Gardeners Road, Mascot was struck by a car travelling in the same direction. He later sued the driver of that car for damages ("the negligence proceedings"). For his part, the driver pleaded and particularised contributory negligence in his notice of grounds of defence. It was common ground that contributory negligence was a live issue in those proceedings.

The negligence proceedings were settled by the Appellant's acceptance of an offer of compromise. This was followed by a consent judgment being entered by Judge Charteris on 20 March 2006. In that judgment, no findings were made in respect of contributory negligence, the damages were not the subject of court approval and there was no evidence of any agreement as to any apportionment for contributory negligence.

As the accident occurred when the Appellant was travelling from his work, he was entitled to the benefit of the *Workers Compensation Act* 1987 ("WCA") in respect of his injuries. The Respondent duly paid him $607,315.43. On 7 June 2006 the Respondent commenced proceedings in the District Court seeking to recover the whole of that sum from the Appellant. This was pursuant to the provisions of section 151Z(1)(b) of the WCA. The Appellant however relied on section 10(2) of the *Law Reform (Miscellaneous Provisions) Act* 1965 ("LRA"). He submitted that the sum recoverable by the Respondent was that amount which was reduced on account of his contributory negligence.

Judge Kearns was then asked to determine the following three questions. Those questions, and his Honour's answers, were:

"Q1.a. Can section 10(2) of the LRA operate in reduction of the amount of workers compensation benefits repayable to the Plaintiff from damages recovered as a result of a settlement of the Defendant's action against a third party tortfeasor when no determination was made by a Court in the settled proceedings concerning contributory negligence and the quantum of damages?

A. Yes.

Q1.b. If the answer to Question (a) is in the affirmative, is evidence admissible in these proceedings to establish the extent to which the damages recovered by the Defendant as a result of the settlement of his action against the third party tortfeasor were in fact reduced on account of his contributory negligence?

A. Yes, subject to appropriate rules as to admissibility of evidence at trial;

Q.3. In the alternative to Question (b), if the answer to Question (a) is in the affirmative, is evidence admissible in these proceedings to establish the degree of the Defendant's contributory negligence and the quantum of the damages to which the Defendant would have been entitled without reduction for contributory negligence?

A. Yes."

Judge Kearns essentially held that section 10(2) of the LRA was available to the Appellant, subject to proof of contributory negligence and the fact of the damages recoverable by him having been reduced on account of it.

Upon appeal the principal issue was whether Judge Kearns had erred in his construction of Pt 3 of the LRA and therefore in his answers to the questions. The Respondent submitted that the first question should have been answered in the negative, with the result that the other two questions did not arise.

On 24 April 2009 the Court of Appeal (Giles JA & Hislop J, Hodgson JA dissenting) upheld the Respondent's appeal. The majority found that section 10(2) of the LRA was not available unless the damages recoverable by an injured worker were determined to have been reduced for contributory negligence by a court following a contested trial. Justice Hodgson however agreed with the answers to the questions given by Judge Kearns.

The grounds of appeal include:

- The majority erred in holding that section 10(2) of the LRA could not operate to reduce the amount of workers compensation benefits that were repayable to the employer from damages recovered as a result of a compromise of the worker's action against a third party tortfeasor.

RADIO 2UE SYDNEY PTY LTD v CHESTERTON (S474/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 17 April 2008

Date of grant of special leave: 30 September 2008

This matter concerns a radio broadcast on the *John Laws Morning Show* on 8 August 2005. Mr Chesterton, a journalist who writes for *The Daily Telegraph,* sued the Appellant for defamation. He alleged that the matter complained of conveyed, in its natural and ordinary meaning, the following imputations:

(a) That he is a creep in that he is an unpleasant and repellent person;
(b) He is a bombastic, beer-bellied buffoon;
(c) As a journalist he is not to be taken seriously;
(d) He was fired from Radio 2UE;
(e) He falsely accuses John Laws of being responsible for his dismissal from Radio 2UE; and
(f) He is an ungrateful person in that he accepted the hospitality of John Laws and then attacked him.

A trial took place before Justice Simpson and a jury of four. Counsel for Mr Chesterton made submissions to the jury and sought a direction from her Honour based upon the decision in *Gacic v John Fairfax Publications Pty Ltd* (2006) 66 NSWLR 675 ("Gacic"). Justice Simpson took the view that she was bound by the decision in Gacic and gave a direction on the issue of business defamation which was in accordance with that decision. On 18 July 2007 the jury held that the imputations were both conveyed and defamatory.

On 17 April 2008 the Appellant's appeal was dismissed by Chief Justice Spigelman and Justice Hodgson constituting the majority of the Court of Appeal. Justice McColl however would have allowed the appeal.

The grounds of appeal include:

- The Court of Appeal erred in holding that the Court of Appeal's judgment in Gacic had, in relevant respects, attracted support from the High Court on appeal when the relevant aspect of Gacic was not in issue in the High Court.

- The Court of Appeal erred in holding that Justice Simpson did not err in directing the jury that they were not required to assess whether the three "business reputation" imputations were defamatory in accordance with the standards of the general community.

JONES v. THE QUEEN (B40/2008)

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

Date of grant of special leave: 30 September 2008

The appellant, Christopher Clark Jones, and his co-accused, James Patrick Roughan, were each convicted on 4 April 2007 of the murder of Morgan Jay Shepherd, whose decapitated body was found in a shallow grave in bushland on 1 April 2005, his head located nearby. The appellant and Roughan were both sentenced to life imprisonment. The Crown case was that either or both had murdered the deceased, or that one of them had murdered the deceased and the other had aided the murderer in the attack on the deceased with the intent to cause him death or grievous bodily harm. Each of the accused blamed the other for the murder. The murder probably happened during the evening of 29 March 2005, which was the night that the appellant obtained treatment at a hospital emergency department for a stab wound to his hand. The appellant later claimed that the stab wound was inflicted by Roughan while Roughan was stabbing the deceased, whose body was found to have 133 stab wounds to various parts of the body in addition to axe wounds to the head and cutting wounds to the neck. Each of the accused on several occasions sought separate trials, on the basis that evidence admissible against one was inadmissible against the other, and each of those applications were refused by the trial judge (Atkinson J). Their appeals against conviction were heard together.

On appeal, the Court of Appeal agreed that evidence admitted by the trial judge from Jones that Roughan had been charged with the attempted murder, by stabbing, of a friend should not have been admitted as propensity evidence against Roughan and ordered a re-trial for Roughan. Keane JA held that this evidence was only admissible if it was similar fact evidence. McMurdo J, agreeing generally with Keane JA, held that its admissibility was not so dependent but held that the trial judge had not been asked to rule on its admissibility. Muir J, agreeing with Keane JA and McMurdo J, did not find it necessary to express a view. However, all three judges agreed that the trial judge had not erred in refusing to allow further cross-examination on the issue of the unrelated charge of attempted murder against Roughan, or in directing the jury that they could use evidence of the appellant's bad character to conclude that Roughan was less violent. The Court also concluded that her Honour had not erred in refusing to order separate trials.

The grounds of appeal include:

- Whether a miscarriage of justice occurred because:

(a) the trial judge erred in preventing the appellant's counsel from cross-examining the appellant's co-accused on the unrelated charge of attempted murder; or

(b) the trial judge misdirected the jury by instructing that they could use evidence of the appellant's bad character to reason that the co-accused was a less violent and less honest person than the appellant.