SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 31 MAY 2011

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MICHAEL WILSON & PARTNERS LIMITED v NICHOLLS & ORS (S67/2011)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 222

Date of judgment: 15 September 2010

Date of grant of special leave: 11 February 2011

The First and Second Respondents were employees of the Appellant, a law firm operating in Kazakhstan. On 9 October 2006 the Appellant commenced proceedings in the Supreme Court of New South Wales against the First and Second Respondents alleging breach of fiduciary duty. Shortly beforehand it also commenced arbitration proceedings in London relating to another partner of the law firm, Mr Emmott. Again the Appellant alleged breach of fiduciary duty. (Mr Emmott however was not named as a party in the New South Wales proceedings.) On 11 December 2009 Justice Einstein found in favour of the Appellant.

On 15 September 2010 the Court of Appeal (Basten & Young JJA, Lindgren AJA) allowed the Respondents' appeal. (Much of the Court of Appeal's decision however concerned choice of law issues which are no longer in dispute.) Justice Basten (with whom Justices Young and Lindgren broadly agreed) upheld the Respondents' complaint of apprehended bias on a number of bases including:

(a) the number of ex parte applications made to the primary judge in 2007;
(b) the unusual nature of those applications;
(c) the absence of an opportunity for the Respondents to challenge the orders made ex parte;
(d) the absence of consideration in the judgments of the existence of the power, and the appropriateness of its use, to make orders in aid of criminal complaints in foreign jurisdictions;
(e) the absence of consideration of the power of the Court, on an ex parte hearing, to vary orders made by consent, pursuant to an agreement between the parties, thus unilaterally and without hearing from the affected party varying the orders which resulted from the agreement;
(f) the circumstances in which, and the period over which, confidentiality was maintained in respect of the orders permitting use of the disclosure affidavits in support of the criminal complaints;
(g) the fact that the primary judge appeared to have formed at least a tentative view that the individual Respondents had conducted themselves in a manner giving rise to a reasonable suspicion that they were involved in criminal activities, without permitting them an opportunity to present material to the contrary;
(h) forming the view last referred to on the basis of evidence of Mr Wilson in circumstances where Mr Wilson's credit was likely to be a significant issue at the trial;
(i) the absence of persuasive reasons in the judgment on the recusal application, tending to remove the basis of the apprehension of bias, and
(j) the remarks at the hearing on 28 May 2008 in respect of secreting documents in chambers.

The Respondents further contended that the Appellant's proceedings should be dismissed as an abuse of process. (After judgment was given at first instance, the Arbitrators published an interim award on liability in which they dismissed most of the claims against Mr Emmott.) Justice Basten found that to the extent that the Appellant was unsuccessful in the arbitration, it should not be able to pursue claims against the Respondents based on Mr Emmott's liability. His Honour found that such a course would constitute a collateral challenge to the Arbitrators' findings and would be an abuse of process. Justice Lindgren agreed.

The grounds of appeal include:

- The Court of Appeal erred in holding that it was an abuse of process for the Appellant to maintain and seek to enforce part of judgments of the Supreme Court of New South Wales dated 6 October 2009 and 11 December 2009, and part of orders and declarations made by the Supreme Court of New South Wales on 11 December 2009, in the face of an arbitral award made by London arbitrators on 22 February 2010.

On 4 March 2011 the Respondents filed a notice of contention, the grounds of which include:

- Upon an assumption that (if the appeal is successful) the whole of proceedings will be remitted to the Court of Appeal for further consideration (in accordance with paragraph 5.1 of the notice of appeal filed in the High Court on 25 February 2011), and subject to any direction from the High Court to the contrary, the Respondents proceed on the basis that it is not necessary, or appropriate, for them to advance in the High Court any contention that the order made by the Court of Appeal on 15 September 2010 for a re-trial should be affirmed on a ground other than an apprehension of bias in the primary judge.

CUMERLONG HOLDINGS PTY LTD v DALCROSS PROPERTIES PTY LTD & ORS (S120/2011)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 214

Date of judgment: 2 September 2010

Date of grant of special leave: 11 March 2011

Cumerlong Holdings Pty Limited ("Cumerlong") is the registered proprietor of Lot 1 in DP302605, known as 9 Werona Avenue, Killara. Dalcross Properties Pty Ltd ("Dalcross Properties") was the former registered proprietor of Lots 102 and 103 in DP834629, known as 26 Stanhope Road, Killara. Dalcross Holdings Pty Ltd ("Dalcross Holdings") operates a private hospital on Lot 101 in DP834629 (which adjoins Lot 103). On 28 June 2010 Australasian Conference Association Limited acquired Lots 102 and 103.

Upon the registration of DP834629 in November 1993, a covenant was created pursuant to s 88B(3) of the *Conveyancing Act* 1919. That covenant benefited Cumerlong's land, as its terms provided that Lots 102 and 103 could not be used as a hospital.

Prior to 28 May 2004, Lot 103 was zoned 2(b) under the Ku-ring-gai Planning Scheme Ordinance ("KPSO"). Clause 68(2) of the KPSO suspended any restriction on the use of land in any zone (but it exempted land zoned 2(b)). On 28 May 2004 Ku-ring-gai Local Environment Plan No 194 ("LEP 194") was gazetted whereby large areas of land (including Lot 103) were rezoned to 2(d3). As Clause 68(2) of the KPSO did not exempt land zoned 2(d3) from its operation, the covenant's operation was suspended.

On 27 August 2008 Ku-ring-gai Municipal Council granted Dalcross Holdings a development consent to extend its hospital already on Lot 101, onto Lot 103. On 18 August 2008 Cumerlong filed a Supreme Court summons, seeking an order that both Dalcross Holdings and Dalcross Properties be restrained from using Lots 102 and 103 as a hospital. On 30 October 2009 that summons was dismissed.

On 2 September 2010 the New South Wales Court of Appeal (Tobias & McColl JJA, Handley AJA dissenting) dismissed Cumerlong's appeal. At issue upon appeal was whether the Governor's approval was required under s 28(3) of the *Environmental Planning and Assessment Act* 1979 ("EP&A Act") to those provisions of LEP 194 that changed the zoning of Lot 103. Justices Tobias & McColl held, that in the absence of a provision in LEP 194 that a specified regulatory instrument was not to apply to any development permissible under that LEP, s 28(3) of the EP&A Act was not engaged. The Governor's approval of the relevant zoning provisions of LEP 194 was therefore not required.

On 5 April 2011 the New South Wales Minister for Planning and Infrastructure filed a summons in this matter, seeking leave to appear as *amicus curiae.*

The grounds of appeal include:

- Their Honours in the majority erred in finding that for s 28(2) of the EP&A Act to be engaged, the relevant environmental planning instrument (LEP 194) had to contain an express provision which identified a regulatory instrument here (being a restrictive covenant) which itself was not to apply to identified development.

HIH CLAIMS SUPPORT LIMITED v INSURANCE AUSTRALIA LIMITED (M24/2011)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2010] VSCA 255
Date of judgment:	29 September 2010
Date special leave granted:	11 March 2011

In March 1998, a large video screen at the Australian Grand Prix collapsed because of inadequate structural support. The New South Wales Supreme Court found that the scaffolder ("Steele") was liable in the amount of $1,461,045. Steele held a general liability insurance policy with a company in the HIH group. HIH accepted the claim but collapsed before making any substantive payment. The Australian Grand Prix held an insurance policy with SGIC which also responded to the claim against Steele (SGIC was later replaced by the respondent). Following the collapse of HIH, the Commonwealth Government set up the HIH Claims Support Scheme, of which the applicant was trustee and administrator. Steele sought assistance from the scheme. The applicant paid the sum of $1,314,941 in part satisfaction of the judgment against Steele and then sought contribution, in the Supreme Court of Victoria, from the respondent on the basis that it had coordinate liability. Hollingworth J found, inter alia, that the applicant and respondent did not have equal and coordinate liability because the applicant had no obligation to Steele at the date of the insuring clause event as it was not in existence at the time. Further, the applicant's obligation to indemnify was primary in nature as it arose under a contract of indemnity, whereas the respondent's obligation to Steele under a contract of insurance was a secondary obligation. Accordingly, the applicant had no entitlement to contribution from the respondent.

The Court of Appeal (Warren CJ, Mandie JA and Beach AJA) dismissed the applicant's appeal. The Court found that the liability of the applicant and respondent were different. The respondent's liability was to indemnify Steele in respect of his liability for the loss that occurred as a result of the screen being damaged. Whilst that was the same loss covered by the HIH policy, the liability the applicant created by the acceptance of the offer document was subject to a condition enabling the applicant to prove in the winding up of HIH. An underlying assumption of the doctrine of contribution was that the creditor had equal or substantially equal recourse to each party who was liable. That was not the situation in this case. If Steele had been paid under the respondent's policy, there would have been no occasion for him to have made a claim on the scheme and thus no contract would have come into existence between Steele and the applicant and the applicant would never have had any liability to Steele. So if, instead of the applicant paying Steele's claim, the respondent had done so, there would have been no entitlement in the respondent to claim contribution from the applicant. Finally, the Court noted that for liability to be coordinate, the liability had to be of the same nature and the same extent. There were no common interests, common burden or common risk in this case.

The grounds of appeal include:

- The Court of Appeal ought to have found that the indemnities and liabilities of [the appellant] and [the respondent] were equal and coordinate and ordered contribution.

MOMCILOVIC v THE QUEEN & ORS (M134/2010)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2010] VSCA 50
Date of judgment:	17 March 2010
Date special leave granted:	3 September 2010

After a trial in the County Court of Victoria, the appellant was convicted of one count of trafficking in methylamphetamine. She was sentenced to two years and three months' imprisonment. The drugs in question were found in the appellant's apartment. Under s 5 of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ('the DPCS Act'), the appellant was deemed to be in possession of the drugs unless she 'satisfie[d] the court to the contrary'. Her partner (Markovski) owned another apartment in the same building but mostly lived with the appellant in her apartment. In evidence given at the appellant's trial, Markovski admitted that he was involved in drug trafficking and said that the drugs were in his possession for that purpose. He denied, as did the appellant in her own evidence, that she had any knowledge of the drugs or the trafficking operation.

The appellant appealed to the Court of Appeal (Maxwell P, Ashley and Neave JJA). She submitted that on ordinary principles of construction, s 5 should be construed as imposing only an evidentiary, rather than a legal, burden on the accused. The Court rejected that argument, finding that the question of construction was straightforward: the phrase '*unless the person satisfies the Court to the contrary*' conveyed unambiguously the legislative intention that the accused should carry the legal burden of establishing, to the Court's satisfaction, that he/she was not in possession of the relevant substance.

The appellant further argued that s 32(1) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic), which provides: '*So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights*', required that s 5 be interpreted as placing only an evidentiary burden on the accused. The Court held s 32(1) does not create a 'special' rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question. Accordingly, when it is contended that a statutory provision infringes a Charter right, the Court held that the correct methodology is as follows:

> Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act* 1984 (Vic).
>
> Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.
>
> Step 3: If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified.

The Court found that, on any view of s 32(1) of the Charter, it was not possible to interpret s 5 of the DPCS Act, consistently with its purpose, otherwise than as it had been traditionally interpreted – that is, as imposing a reverse legal onus of proof. The appeal was rejected.

This appeal came on for hearing before the Court for 3 days in February 2011. At that hearing the Attorneys-General of the Commonwealth, Western Australia, New South Wales, South Australia and the Australian Capital Territory appeared and intervened. The Human Rights Law Resource Centre was given leave to appear as amicus curiae. The second respondent was given leave to file a Notice of Contention.

Following the hearing the parties and intervener filed further written submissions in response to a number of questions raised by the Court. The matter has now been re-listed for further argument.

The grounds of appeal include:

- (a) In interpreting s 5 of the DPCS Act as casting on an accused a legal - as opposed to only an evidential burden - of disproof of possession of drugs; (b) in concluding that it was not possible, within the meaning of s 32(1) of the Charter to interpret s 5 of the DPCS Act as casting on an accused only an evidentiary - as opposed to a legal - burden of disproof of possession of drugs in circumstances where the Court also concluded (correctly) that, insofar as s 5 of the DPCS Act placed a legal burden of disproof on an accused, it was not compatible with the right to the presumption of innocence in s 25(1) of the Charter and did not, within the meaning of s 7(2) of the Charter, place a reasonable limit on that right.

WYNTON STONE AUSTRALIA PTY LTD (in liquidation) v MWH AUSTRALIA PTY LTD (M158/2010 & M159/2010)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2010] VSCA 245

Date of referral to Full Court: 11 March 2010

In early 1997 the applicant ("WSA") was engaged by the respondent ("MWH") to perform structural design work in relation to two sewerage treatment plants. On 6 May 1997 WSA sold its business to Taylor Thompson Whitting Pty Ltd ("TTW") and MWH entered into a deed of novation by which TTW was substituted for WSA. Clause 2 of the deed provided; *"[MWH] releases and discharges WSA from all claims and demands whatsoever in respect of the contract and accepts the liability of TTW under the contract in lieu of the liability of WSA and agrees to be bound by the terms of the contract in every way as if TTW was named in the contract as a party thereto to [sic] place of WSA*". Clause 4 of the deed contained an acknowledgement by WSA that the services performed by WSA to that date had been performed in accordance with the original contract between WSA and MWH.

In late 1997 cracking started to appear in the aerator tanks at the sewerage plants. Proceedings were commenced in the Supreme Court of Victoria to determine responsibility for, and the financial consequences of, the failure of the tanks. Byrne J rejected MWH's claim against WSA for breach of contract and negligent preparation of the structural design. He found that clause 2 of the deed operated as a complete release from all claims in respect of the contract, including negligence claims. However, his Honour found that clause 4 operated as a contractual warranty in respect of the work completed under the contract. He ordered WSA to pay MWH $4,138,696 together with damages by way of interest of $2,946,601.08, for breach of warranty.

Both parties appealed to the Court of Appeal (Warren CJ, Buchanan and Nettle JJA). The issues in the appeals were: (i) whether clause 2 of the deed of novation released WSA from all liability for breach of the contract or only from liability for breach of contract occurring on or after commencement of the deed; (ii) whether clause 2 of the deed released WSA from liability in tort; and (iii) whether clause 4 of the deed amounted to a contractual warranty and, whether or not it did, was it misleading or deceptive within the meaning of s 52 of the *Trade Practices Act* 1974 (Cth) (the 'TPA').

Buchanan and Nettle JJA disagreed with the trial judge's finding on the first issue, because his construction of the deed overlooked or undervalued the operation of clause 3 of the deed, which stated: "*The effective date for the substitution of TTW for WSA and the acceptance of such substitution and transfer by the client is the date of this deed*". Their Honours considered the effect of clause 3 was that TTW took the contractual position of WSA only 'as and from' the date of the deed and, correspondingly, that WSA ceased to be responsible under the contract for any defective work undertaken only 'as and from' that date. With respect to the second issue, their Honours agreed with the trial judge's conclusion that, if clause 2 was effective to release the liability of WSA for defective design work undertaken prior to the effective date, there was no rational basis for limiting this to exclude liability for negligence. On the third issue they also agreed with Byrne J's finding that clause 4 amounted to a contractual warranty, but disagreed

with his conclusion that it was not misleading and deceptive within the meaning of s 52 of the TPA.

Warren CJ dissented on the third issue, for three reasons: first, she was not satisfied that the making of the warranty had a substantial enough causal connection to MWH's decision to execute the deed on the evidence before the Court; secondly, the failure of MWH to establish, in light of the Court's finding as to clause 2, that it suffered any loss by entering into the deed; and thirdly the procedural unfairness occasioned to WSA if MWH was allowed to raise such a claim before an appellate court in a fashion inconsistent with its conduct of its case before the trial judge.

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

- If a court tells parties at the start of a trial, without objection, that it will treat as abandoned any pleaded claim not pressed in final submissions, can the court decide the case against the defendant on an issue not mentioned in the plaintiff's final submissions?
- When may what a court says is the "more likely" meaning of a commercial contract from "a business common sense point of view" allow it to depart from the natural and unambiguous meaning of words used in a contract?

On 11 March 2011 Heydon and Crennan JJ ordered that the applications for special leave be referred to a Full Court for argument as on appeal.

MAHMUD v THE QUEEN (S137/2011)

Court appealed from:	New South Wales Court of Criminal Appeal [2010] NSWCCA 219
Date of judgment:	24 September 2010
Date referred to the Full Court:	18 April 2011

On 15 June 2009 Mr Mahmud was sentenced by Judge Graham to 7 years and 6 months imprisonment, with a non-parole period of 4 years and 6 months. This was in respect of charges of supplying a large commercial quantity of methylamphetamine and the possession of firearms. In sentencing Mr Mahmud, Judge Graham also took into account a number of other firearms offences (on a Form 1).

On 24 September 2009 the Court of Criminal Appeal (Giles JA, Hulme & Latham JJ) unanimously upheld the Crown's appeal on sentence. Their Honours however rejected the submission that Judge Graham had erred in characterising Mr Mahmud's involvement in the drug trade as being "below mid range". They also rejected the submission that his Honour had erred in similarly classifying the firearms offence.

The Court of Criminal Appeal nevertheless held that Judge Graham had erred in allowing Mr Mahmud an overly generous discount of 20% for his guilty pleas. Their Honours also found that the sentences imposed on both charges were manifestly inadequate. With respect to the drugs charge, they held that participants in the drugs trade should expect to receive heavy sentences. Their Honours also found that the firearms offence was still an objectively serious offence, notwithstanding the fact that it was below the mid-point of offending. This was especially so when Mr Mahmud's prior firearms offences were taken into account.

The Court of Appeal then re-sentenced Mr Mahmud. With respect to the firearms charge he was sentenced to five years imprisonment with a non-parole period of 3 years, 9 months. With respect to the drugs charge he was sentenced to nine years imprisonment, with a non-parole period of 6 years, 6 months. Mr Mahmud will become eligible for parole on 15 July 2015.

On 13 April 2011 a notice of constitutional matter was filed by the Applicant. The Attorneys-General of the Commonwealth, New South Wales, Western Australia and South Australia have intervened.

On 18 April 2011 Justice Hayne both expedited this matter and referred it into an enlarged bench to be fixed for hearing on the same day as *Muldrock v The Queen.*

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

- Whether the Court of Criminal Appeal erred in law by holding that the sentences were manifestly inadequate when there was no error of principle or special circumstance that supported an appeal under s 5D of the *Criminal Appeal Act 1912* by the Crown.

MULDROCK v THE QUEEN (S121/2011)

Court appealed from: New South Wales Court of Criminal Appeal [2010] NSWCCA 106

Date of judgment: 14 May 2010

Date of grant of special leave: 11 March 2011

The Appellant pleaded guilty to one count of sexual intercourse with a child under 10 years of age, contrary to section 66A of the *Crimes Act* 1900 (NSW). Another offence of aggravated indecent assault on the same victim was also taken into account upon sentencing. At the time of his offending, the Appellant was 30 years old. In 2000 he had also been sentenced to a 12 month intensive supervision order for a similar offence.

The evidence on sentence indicated that the Appellant had a permanent disability and that he had himself been sexually abused as a child. According to the Crown's witness (a clinical psychologist), it also showed that he suffered from "maladaptive sexual behaviour which seems to have manifested as a result of his own childhood sexual abuse and mental retardation." The Appellant's own expert witness stated that the Appellant may not have access to appropriate treatment programs in jail which might otherwise reduce his risk of re-offending. The Court was also advised that a position in a secure (community-based) facility which specialised in the treatment of intellectually disabled sexual offenders was available, if considered appropriate.

On 28 July 2009 Judge Black sentenced the Appellant to nine years imprisonment, with a backdated non-parole period of 96 days. That non-parole period was due to expire on the day he was sentenced. It was a condition of the Appellant's parole was that he was to be taken to that secure community-based facility.

On 14 May 2010 the Court of Criminal Appeal (McClellan CJ at CL, Howie and Harrison JJ) unanimously allowed the Crown's appeal against sentence. Their Honours held that Judge Black had erred in imposing the 96 day non parole period. They found that section 51 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Act") gave a Court power to impose parole conditions only in cases of imprisonment for three years or less. In all other cases it was a matter for the parole board. The sentencing process had therefore miscarried.

The Court of Criminal Appeal then re-sentenced the Appellant to nine years imprisonment, with a non-parole period of six years and eight months. In doing so, their Honours were constrained by Judge Blacks' head sentence (which was not challenged on appeal) and they did not vary the 25 per cent discount for the guilty plea. They were not however persuaded that a finding of special circumstances was appropriate. The Court of Appeal further found that treatment for the Appellant's condition was available within the prison system.

The grounds of appeal include:

- The Court erred in its consideration of the standard non-parole period. The Court erred by having regard to cases which were incomparable.

- The sentencing judge had found that the Appellant was "significantly intellectually disabled". The Court erred in deciding that the finding "was not justified by the contemporary evidence."