SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 4 OCTOBER 2011

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AMACA PTY LIMITED (UNDER NSW ADMINISTERED WINDING UP) v BOOTH & ANOR (S219/2011)

AMABA PTY LIMITED (UNDER NSW ADMINISTERED WINDING UP) v BOOTH & ANOR (S220/2011)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 344

Date of judgment: 10 December 2010

Date of grant of special leave: 10 June 2011

These matters concern the approach to be taken when determining the questions of duty of care and causation in asbestos cases.

Mr Booth worked as a brake mechanic between 1953 and 1983 and he subsequently developed mesothelioma. During his employment he worked with brake linings containing asbestos manufactured primarily by Amaca Pty Limited (under NSW Administered Winding Up) ("Amaca") and Amaba Pty Limited (under NSW Administered Winding Up) ("Amaba"). There were also several other short exposures to asbestos which were unrelated to his employment.

The trial judge found that a duty of care was established because, by 1953, it was reasonably foreseeable that a person in Mr Booth's position may contract an asbestos-related disease. His Honour also found that adequate warnings on the dangers of asbestos had not been given. He further found that virtually all exposure to asbestos plays a cumulative and a causal role, and that Mr Booth's exposure to Amaca's and Amaba's products was therefore a material cause of his cancer.

The Court of Appeal (Beazley, Giles and Basten JJA) dismissed both Amaca's and Amaba's appeals, holding that no error had been demonstrated in the approach taken by the trial judge.

In both matters, the grounds of appeal are:

- The Court of Appeal erred in holding that any act or omission on the part of the Appellant caused Mr Booth's injury:

  a) By declining to correct, or alternatively by approving, the primary Court's decision that causation could be established by reference to an increase in risk, even a small increase in risk;

  b) By declining to correct, or alternatively by approving, the primary Court's reliance upon insufficient expert opinion evidence in respect of causation.

WALLER v HARGRAVES SECURED INVESTMENTS LIMITED (S223/2011)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 300

Date of judgment: 11 November 2010

Date of grant of special leave: 10 June 2011

This matter involves the construction of sections 8 and 11 of the *Farm Debt Mediation Act* 1994 (NSW) ("the Act"). It also involves the issue of whether a series of three loan agreements (secured over the Appellant's farm) resulted in the certificate issued pursuant to section 11 of the Act being invalid and the subsequent claim for possession being void.

In 2003 the Appellant executed a mortgage in favour of the Respondent, securing all monies that she owed to the Respondent. After the Appellant defaulted on her interest payments, the Respondent gave notice under section 8 of the Act of its intention to take enforcement action.

A mediation held in 2005 led to both a settlement and further loan which paid out the first loan. In 2006 a third loan was entered into which also went into default. The Respondent then both sought and obtained a certificate under section 11 of the Act. It also commenced the present proceedings for possession and for judgment.

On 12 November 2009 Justice Harrison rejected the contention that there was no valid section 11 certificate referable to the debt upon which the Respondent relied. His Honour then granted possession and gave judgment for the amount claimed.

On 11 November 2010 the Court of Appeal (Tobias JA and Sackville AJA, Macfarlan JA dissenting) dismissed the Appellant's appeal. The majority held that sections 8 and 11 of the Act distinguished between 'farm mortgage' and 'farm debt' and that there was nothing in the definition of 'farm mortgage' which refers to any particular debt being secured. The certificate therefore complied with the Act. Justice Macfarlan however held that each separate debt was a separate mortgage and that there was no relevant section 11 certificate. His Honour also would have set aside the order for possession.

The grounds of appeal include:

- The Court of Appeal erred in failing to hold that the primary judge should have dismissed the proceeding by reason of the operation of section 6 of the Act.
- The Court of Appeal erred in failing to hold that there was no certificate in force in respect of the farm mortgage concerned within the meaning of section 8(3) of the Act.

On 17 August 2011 the Respondent filed a summons, seeking leave to file a notice of contention out of time. The grounds of that notice of contention include:

- The majority of the Court of Appeal erred in finding that the loan agreement entered into by the parties on 28 July 2005 effectively discharged the loan agreement entered into by the parties on 28 August 2003 ("First Loan Agreement") thereby extinguishing the 'farm debt' created by the First Loan Agreement.