SHORT PARTICULARS OF CASES
APPEALS

SEPTEMBER 2014

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WELLINGTON CAPITAL LTD v AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION & ANOR (S275/2013)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 52

Date of judgment: 28 May 2013

Special leave granted: 8 November 2013

Wellington Capital Ltd ("Wellington") is the Responsible Entity of a managed investment scheme, the Premium Income Fund ("the Fund"). Such schemes are subject to the requirements of Chapter 5C of the *Corporations Act* 2001 (Cth) ("the Act"). The Fund is also governed by its own constitution ("the constitution"). Clause 13.1 of the constitution relevantly provides that the Responsible Entity has all powers legally possible for a corporation as if it were the absolute owner of the Fund's property and acting in its personal capacity. Clause 13.2.5 of the constitution relevantly provides that the Responsible Entity has power to dispose of or otherwise deal with the Fund's property as if it were the absolute and beneficial owner. Section 601FC(2) of the Act however provides that a responsible entity holds scheme property on trust for scheme members. The Fund's members are its unit holders.

In September 2012 Wellington sold 41% of the Fund's assets, receiving as payment all of the issued shares in Asset Resolution Ltd ("ARL"). Wellington then transferred those shares to the Fund's unit holders (without their consent) in proportion to their respective unit holdings ("the Transfer"). The First Respondent ("ASIC") applied to the Federal Court for declarations that the Transfer had contravened both the constitution and the Act.

On 17 October 2012 Justice Jagot dismissed ASIC's application. Her Honour found that clauses 13.1 and 13.2.5 of the constitution conferred power on Wellington to carry out the Transfer. Justice Jagot held that clause 13.1 picked up the power in s 124(1)(d) of the Act to "distribute any of the company's property among the members, in kind or otherwise". Her Honour found that because the unit holders were bound by the constitution, they could be taken to have agreed to become members of ARL for the purposes of s 231 of the Act.

On 28 May 2013 the Full Court of the Federal Court (Jacobson, Gordon & Robertson JJ) unanimously allowed ASIC's appeal. Their Honours held that the constitution must be viewed through the prism of trust law, as Wellington held the Fund's property on trust pursuant to s 601FC(2) of the Act. The Full Court found that "members" in s 124(1)(d) of the Act meant only members of a company, not members of a managed investment scheme. Their Honours held that clause 13.2.5 of the constitution addressed Wellington's power (as trustee) to deal with commercial parties in respect of the Fund's property. It did not override the Act. The Full Court then declared that Wellington, by making the Transfer, had operated the Fund in contravention of both the Act and the constitution, thereby contravening s 601FB(1) of the Act.

On 29 January 2014 the Appellant filed a summons, seeking leave to rely upon an amended notice of appeal. The grounds of that amended notice of appeal include:

- The Full Court erred in holding that clauses 13.1 and 13.2.5 of the Constitution of the Fund did not authorise the Appellant to make an in specie distribution of the shares in ARL to the unit holders of the Fund.

- The Full Court erred in failing to hold that the unit holders of the Fund to whom the ARL shares were distributed became members of ARL at that time having prospectively assented to becoming members, for the purposes of s 231(b) of the Act, by acquiring units in the Fund.

RHIANNON GRAY BY HER TUTOR KATHLEEN ANNE GRAY v RICHARDS (S111/2014)

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 402

Date of judgment: 2 December 2013

Special leave granted: 16 May 2014

Ms Gray was severely injured in a car accident in 2003. As a result she requires constant care. Through her mother as tutor, Ms Gray brought proceedings against Mr Cory Richards, claiming that his negligence caused her injuries. Justice McCallum agreed and awarded Ms Gray damages of $10 million. Her Honour also awarded Ms Gray a separate amount for the costs of administering the main part of the judgment. This matter concerns that separate amount awarded.

Upon appeal the issues for determination included:

(i) whether the amount awarded for fund management expenses should include an amount for the management of the fund management itself (fund management on fund management);

(ii) whether the amount awarded for fund management expenses should include an amount for fund management on fund income;

(iii) whether, when calculating the amount awarded for fund management expenses, certain components should be deducted from the body of the verdict.

On 2 December 2013 the Court of Appeal (Bathurst CJ, Beazley P, McColl, Basten & Meagher JJA) allowed the appeal in part. Their Honours found, inter alia, that it was inappropriate to extend the principle by which fund management expenses are awarded to a plaintiff (who is incapable of managing his or her award of damages by reason of their injuries) to also cover fees for managing that fund. They additionally found that the claim for fund management on fund income should not be allowed, as likely being contrary to s 127 of the *Motor Accidents Compensation Act* 1999 (NSW).

The Court of Appeal further found that it was inappropriate to make any deduction from the fund for the purpose of calculating fund management expenses. This was because there was no reason to suggest that the whole of the fund would not initially be available for investment, and further, that the timing of any relevant payments was speculative.

The ground of appeal is:

- The New South Wales Court of Appeal erred in holding that it was inappropriate to award fund management fees on the head of damage identified as fund management, and fund management fees on fund income, which is inconsistent with the principle of *restiutio in intergrum.*

COMMISSIONER OF TAXATION v MBI PROPERTIES PTY LTD (S90/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 112

Date of judgment: 18 October 2013

Special leave granted: 11 April 2014

In September 2006 South Steyne Hotel Pty Ltd ("South Steyne"), which owned strata-titled apartments comprising the guest rooms of a hotel, leased each of those apartments to Mirvac Management Pty Ltd ("Mirvac"). South Steyne then sold some of the apartments to investors. The Respondent ("MBI") purchased three of those apartments, which remained subject to the leases to Mirvac. MBI intended that those leases be continued.

The Appellant ("the Commissioner") assessed MBI for tax in relation to its three apartments, making an adjustment under s 135-5 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act") for the supply of a going concern. Section 135-5(1) relevantly provides that there is an "increasing adjustment" for the recipient of a supply of a going concern who intends that at least some of the supplies to their enterprise will be neither taxable supplies nor GST-free supplies. After MBI's objection was disallowed by the Commissioner, MBI appealed to the Federal Court.

Previous Federal Court proceedings had determined that: (1) South Steyne's lease of the apartments to Mirvac was an input-taxed supply under s 40-35 of the GST Act; (2) South Steyne's sale of the apartments to MBI constituted the supply of a going concern (which was thus GST-free); and (3) the continuation of the leases to Mirvac did not constitute a further supply by MBI for GST purposes.

On 6 February 2013 Justice Griffiths dismissed MBI's application, finding MBI liable for an increasing adjustment of its tax liability under s 135-5 of the GST Act. His Honour held that, although the leases were a supply made initially by another entity (South Steyne), the continuation of those leases constituted a continuing supply made with intent "through the enterprise" conducted by MBI.

On 18 October 2013 the Full Court of the Federal Court (Edmonds, Farrell & Davies JJ) unanimously allowed MBI's appeal. Their Honours held that the only supply was the *grant* of the leases, which was completed upon their coming into existence. As MBI had not made that supply, it was not liable for an increasing adjustment under s 135-5.

The grounds of appeal include:

- The Full Court erred in finding that MBI did not have an "increasing adjustment" under s 135-5 of the GST Act in relation to the enterprise it acquired from South Steyne because MBI did not intend that any input-taxed supply of residential premises would be made by it through the enterprise.

On 28 April 2014 MBI filed a notice of contention, the ground of which is:

- If, contrary to the conclusion of the Full Federal Court in *South Steyne Hotel Pty Ltd v Commissioner of Taxation* (2009) 180 FCR 409, MBI intended to make a supply or supplies through the enterprise it acquired from South Steyne, there was no price for that supply or those supplies with the consequence that, applying s 135-5(2) of the GST Act, there was no increasing adjustment.