SHORT PARTICULARS OF CASES

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ADCO CONSTRUCTIONS PTY LTD v GOUDAPPEL & ANOR (S201/2013)

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 94

Date of judgment: 29 April 2013

Special leave granted: 11 October 2013

This appeal concerns the operation of transitional provisions pertaining to amendments to New South Wales workers compensation legislation.

Mr Ronald Goudappel was injured while working as an employee of the Applicant. On 19 April 2010 he claimed (and was later paid) workers compensation for lost wages and medical expenses. Mr Goudappel's injury left him with a whole-person impairment that was assessed at 6%.

On 20 June 2012 Mr Goudappel also claimed lump sum compensation, pursuant to s 66 of the *Workers Compensation Act* 1987 (NSW) ("WCA"). On 27 June 2012 s 66 was amended such that lump sum compensation would be available only to persons impaired to a degree greater than 10%. That amendment was contained in Schedule 2 of the *Workers Compensation Legislation Amendment Act* 2012 (NSW) ("Amending Act"). Schedule 12 of the Amending Act added Part 19H to the saving and transitional provisions set out in Schedule 6 of the WCA. Clause 15 of Part 19H is as follows:

> **15 Lump Sum Compensation**
> An amendment made by Schedule 2 to the [Amending] Act extends to a claim for compensation made on or after 19 June 2012, but not to such a claim made before that date.

In Schedule 8 of the *Workers Compensation Regulation* 2010 (NSW) ("the Regulation") new provisions which commenced on 1 October 2012 include clause 11:

> **11 Lump Sum Compensation**
> (1) The amendments made by Schedule 2 to the [Amending] Act extend to a claim for compensation made before 19 June 2012, but not to a claim that specifically sought compensation under section 66 or 67 of the [WCA].
> (2) Clause 15 of Part 19H of Schedule 6 to the [WCA] is to be read subject to subclause (1).

On 22 October 2012 the President of the Workers Compensation Commission, Judge Keating, gave the following answer to a referred question of law:

> The amendments to Division 4 of Part 3 of the [WCA] introduced by Schedule 2 of the [Amending Act], apply to claims for compensation pursuant to s 66 made on and after 19 June 2012, where a worker has made a claim for compensation of any type in respect of the same injury before 19 June 2012.

This was after Judge Keating had held that the phrase "a claim for compensation" in clause 15 meant a claim specifically for lump sum compensation. Mr Goudappel

would therefore be unable to obtain such compensation, as his application for it had been made after 19 June 2012.

On 29 April 2013 the Court of Appeal (Bathurst CJ, Beazley P & Basten JA) unanimously allowed Mr Goudappel's appeal. Their Honours found that the relevant legislation merely provided for claims generally, without requiring a separate claim for lump sum payments. Mr Goudappel's claim under s 66 was therefore an extension of his original claim. The Court of Appeal held that Mr Goudappel's right to compensation pursuant to s 66 arose at the date of his injury (17 April 2010). Their Honours held invalid any transitional regulations which prejudicially affected a right that had accrued prior to their publication, as the power in Part 20 of Schedule 6 to the WCA did not authorise them. Clause 11 of Schedule 8 to the Regulation therefore could not operate to deprive Mr Goudappel of lump sum compensation. The Court of Appeal then substituted the following answer for that given by the Workers Compensation Commission:

> The amendments to Division 4 of Part 3 of the [WCA] introduced by Schedule 2 of the [Amending Act] do not apply to claims for compensation pursuant to s 66 which are made before 19 June 2012 in respect of an injury that results in permanent impairment, whether or not the claim specifically sought compensation under s 66 or s 67 of the [WCA].

The grounds of appeal are:

- The Court of Appeal erred in finding that clause 11 of Schedule 1 to the *Workers Compensation Amendment (Transitional) Regulation* 2012 (NSW) was invalid, and failing to find that it was validly made pursuant to clause 5(4) of Schedule 12 to the *Workers Compensation Legislation Amendment Act* 2012 (NSW), and/or failing to give effect to it.

- The Court of Appeal erred in not finding that the amendments to Division 4 of Part 3 of the *Workers Compensation Act* 1987 (NSW) introduced by Schedule 2 of the *Workers Compensation Legislation Amendment Act* 2012 (NSW) apply to claims for compensation pursuant to s 66 of the *Workers Compensation Act* 1987 (NSW) made on and after 19 June 2012, where the worker has not made a claim specifically seeking compensation under ss 66 or 67 before 19 June 2012 (including the first respondent's claim).

SIDHU v VAN DYKE (S312/2013)

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 198

Date of judgment: 1 July 2013

Special leave granted: 13 December 2013

Mr Prithvi Sidhu and his wife, Mrs Lajla Sidhu, lived in the main homestead of a property ("the Homestead Block") which they owned as joint tenants. The Homestead Block was part of a larger property known as Burra Station. From 1996 Ms Lauren Van Dyke and her husband (Mrs Sidhu's brother) lived in a house on the Homestead Block known as Oaks Cottage, which they rented from Mr and Mrs Sidhu. In 1997 Mr Sidhu and Ms Van Dyke commenced a romantic and sexual relationship. In January 1998, Mr Sidhu told Ms Van Dyke that he would arrange for title in the Oaks Cottage to be transferred to her after a planned subdivision of Burra Station had been carried out.

Ms Van Dyke then separated from her husband (after he had learnt of her affair with Mr Sidhu) and in 1999 they divorced. Ms Van Dyke did not however seek a property settlement with her former husband. Mr Sidhu had previously said to her, "*Lauren, you have the Oaks, you do not need a settlement from him.*"

Ms Van Dyke (and her young son) continued to live in Oaks Cottage, for which she paid below-market rent. She also assisted in the running of Burra Station in various ways. During 2004 and 2005 Mr Sidhu repeatedly promised to transfer to Ms Van Dyke both Oaks Cottage and a surrounding area of 7.3 hectares ("the land"). A subdivision of the Homestead Block was conditionally approved by the local council in 2005. In February 2006 however a fire destroyed Oaks Cottage, for which Mr and Mrs Sidhu received an insurance payment of $175,000. Ms Van Dyke then moved into a relocatable cottage, before leaving Burra Station in July 2006 after her relationship with Mr Sidhu had broken down. At around that time, Mr Sidhu told Ms Van Dyke that he would not transfer the land to her as promised. Mrs Sidhu (whom Mr Sidhu had asserted would give her necessary consent as joint tenant) also indicated that such a transfer would not take place.

Ms Van Dyke commenced proceedings against Mr Sidhu for the transfer to her of the land (or either a charge over it or the declaration of a constructive trust), plus compensation for the value of Oaks Cottage. Alternatively she sought compensation for the detriment she had suffered in reliance on his promise to transfer the land to her. That detriment was said to comprise the non-payment of wages for the work she had performed for Burra Station and other opportunities she had forgone. Those opportunities were a potential payment resulting from a property settlement with her ex-husband, and payment for full-time work from 1998 to 2006 and/or the acquisition of other land.

On 23 February 2012 Justice Ward dismissed Ms Van Dyke's claim. Her Honour found that Ms Van Dyke had relied upon Mr Sidhu's promise insofar as she did not seek a property settlement with her former husband. Justice Ward held that Ms Van Dyke's claim must fail however because Mr Sidhu's promise involved conditions beyond his control (the subdivision of land and Mrs Sidhu's consent), such that it was not objectively reasonable for Ms Van Dyke to have relied on that promise. Her

Honour also found that Mr Sidhu's departure from his promise was not unconscionable in the circumstances.

On 1 July 2013 the Court of Appeal (Basten & Barrett JJA, Tobias AJA) unanimously allowed Ms Van Dyke's appeal. Their Honours found that Ms Van Dyke's reliance on Mr Sidhu's promise was objectively reasonable, as there was no evidence to suggest that the subdivision might not take place or that Mrs Sidhu might not consent to the transfer. The Court of Appeal held that Ms Van Dyke ought to have had the benefit of a presumption of reliance, as it could be inferred that Mr Sidhu's promise was at least part of the reason for her continuing to live and work on Burra Station instead of seeking out alternatives. The onus of proof then shifted to Mr Sidhu, whose case could not rebut the presumption. Their Honours found that Ms Van Dyke's reliance had been to her detriment, in terms of the opportunities she had forgone. The Court of Appeal also found that in the circumstances it was unconscionable for Mr Sidhu to depart from his promise. Their Honours then ordered that Mr Sidhu pay Ms Van Dyke compensation, in an amount to be determined by the Supreme Court of New South Wales.

The grounds of appeal are:

- The Court of Appeal erred in holding that the trial judge should have applied a "presumption of reliance" in determining whether the respondent relied on the promises made by the appellant and in holding that the trial judge, applying that presumption, should have found that the respondent did rely on the appellant's promises to her detriment, sufficient to establish a proprietary estoppel.

- The Court of Appeal erred in granting relief which was not connected to or proportionate with the detriment the respondent suffered in relying on the appellant's promises, and which created an obligation of a relevantly different and more onerous character than the appellant's promises.

DO YOUNG (aka JASON) LEE v THE QUEEN (S313/2013)
SEONG WON LEE v THE QUEEN (S314/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCCA 68

Date of judgment: 3 April 2013

Special leave granted: 13 December 2013

In late November and early December 2009 Mr Jason Lee ("Jason") was compulsorily examined by the New South Wales Crime Commission ("the Crime Commission"). At that time, Jason already faced drug possession and money laundering charges (which remained outstanding at the time of writing).

On 7 December 2009 police searched the apartment in which Jason lived with his son, Mr Seong Won Lee ("Seong Won"). During that search the police discovered two firearms, quantities of white powder, more than $1.1 million cash and various documents in Jason's name. Both Jason and Seong Won were then charged with firearms offences. On 16 December 2009 Seong Won was also examined by the Crime Commission. In May 2010 both Jason and Seong Won were further charged with supplying pseudoephedrine, after testing had confirmed that the seized powder contained that prohibited drug.

In July 2010 the Director of Public Prosecutions ("DPP") obtained the transcripts of both Jason's and Seong Won's examination from the Crime Commission. Those transcripts were later included in the DPP's brief of evidence. That brief of evidence also included witness statements that had been obtained by the Crime Commission. Those witness statements referred both to answers given by Jason during his examination and to documents that had been compulsorily produced to the Crime Commission.

Following a joint trial, a jury found Jason and Seong Wong each guilty of several offences (and acquitted them of several others) in March 2011. Judge Solomon then sentenced both men to imprisonment, Jason for 13½ years with a non-parole period of 9½ years, Seong Won to 8½ years, with a non-parole period of 5½ years. Each man appealed against his conviction.

During the joint appeals, the DPP accepted that both Jason's and Seong Won's examination transcripts had been provided to it unlawfully. The DPP also accepted that contents of documents produced to the Crime Commission had been unlawfully provided to the DPP. On 3 April 2013 however the Court of Criminal Appeal (Basten JA, Hall & Beech-Jones JJ) unanimously dismissed both men's appeals, finding that no miscarriage of justice had occurred. In respect of Jason, their Honours found that nothing in the examination transcripts was relevant to the trial as it in fact ran. They further found that the use of information from documents produced to the Crime Commission had not deprived Jason's defence counsel of any available strategy, and that similar versions of those documents, differently sourced, were in any event available to be tendered. The Court of Criminal Appeal also found that the provision of the examination transcripts to the DPP had given rise to no unfairness in the conduct of the trial in respect of Seong Won.

In each appeal, the grounds of appeal are:

- The Court of Criminal appeal erred in its application of the "miscarriage of justice" limb of s 6(1) of the *Criminal Appeal Act* 1912 (NSW) by:

  a) imposing a requirement that as a matter of necessity "a causal connection" be established between an irregularity and the conviction at trial; and/or

  b) conflating the questions of miscarriage of justice and the application of the proviso, thereby casting the onus on the appellant in relation to both issues.

- The Court of Criminal failed to properly assess the illegality and/or the impropriety of the Crime Commission and the prosecuting authorities and to take this relevant consideration into account when determining whether there had been a miscarriage of justice in the sense of a failure of adversarial process.

MACARTHURCOOK FUND MANAGEMENT LIMITED & ANOR v TFML LIMITED (S39/2014)

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 291

Date of judgment: 3 September 2013

Special leave granted: 14 February 2014

The provisions of Part 5C.6 of the *Corporations Act* 2001 (Cth) ("the Act") regulate the rights of members of managed investment schemes to withdraw from a scheme. This matter is concerned with the application of those provisions to redemptions required by the terms on which units in a unit trust scheme were issued by Zhaofeng Funds Limited (then named RFML Limited) ("RFML") to MacarthurCook Fund Management Limited ("MacarthurCook"). Those terms were contained in facility agreements by which MacarthurCook underwrote a public offer of units in the scheme. The redemptions did not occur because of the increasing uncertainty in credit and real estate markets during 2008. MacarthurCook sued TFML Limited ("TFML"), as the new responsible entity of the scheme, and RFML, for damages for breach of those obligations. On 10 August 2012 Justice Hammerschlag held that MacarthurCook was entitled to damages from TFML.

By way of background, the registered managed investment scheme was known as Reed Property Trust ("the RP Trust"). RFML was the trustee and responsible entity of the RP Trust. In 2006 the RP Trust was an unlisted unit trust investing primarily in property-based assets. In October 2006 and December 2007 RFML issued Product Disclosure Statements by which it sought to raise funds by an open-ended offer of ordinary units at $1 per unit. MacarthurCook agreed to underwrite the issue of units under that offer by subscribing for 10 million fully paid units at $1. Those units were to be subscribed for by 1 November 2006 and to be redeemed out of moneys raised in the public offer. If not redeemed by 31 October 2007, they were to be purchased by RFML. The underwriting was undertaken by two facility agreements dated 27 October 2006. Those agreements were Facility Agreement Tranche 1 ("FAT1") and Facility Agreement Tranche 2 ("FAT2"). The units issued were Founder Units which could be redeemed at $1 per unit. On 1 April 2007 RFML and MacarthurCook entered into Unit Conversion Agreement Tranche 1, by which the 5 million Founder Units issued to MacarthurCook under FAT1 were converted to ordinary units in the RP Trust.

In late 2007 MacarthurCook and RFML entered into three further facility agreements by which the former subscribed for a further 15 million Founder Units in the RP Trust. Each agreement was for 5 million units. These agreements were known as Facility Agreement Tranche 3 ("FAT3"), Facility Agreements Tranche 4 ("FAT4") and Tranche 5 ("FAT5"). The units, in the case of each agreement, were held by Sandhurst Trustees Ltd ("Sandhurst") as custodian and agent for MacarthurCook. These three facility agreements contained an almost identical provision for the redemption or purchase of the units. The relevant provision in FAT3, contained in cl 2.4, was:

"Subject to compliance with any requirements under the Corporations Act and the Constitution, during the Subscription Period, Subscription Units held by MacarthurCook must be redeemed by Reed RE for their Issue Price, using funds

received by the Trust as a result of accepted applications under the Offer Documents, such redemptions commencing 6 months from the Subscription Date."

On 29 September 2008 RFML gave notice that it had suspended all withdrawals from the RP Trust until further notice. RFML also did not pay MacarthurCook the conversion fee totalling $131,250 under the Unit Conversion Agreement Tranche 1.

On 3 September 2013 the Court of Appeal (McColl, Macfarlan & Meagher JJA) unanimously allowed TFML's appeal. Their Honours held that MacarthurCook failed in its claims to enforce RFML's liabilities against TFML as the new responsible entity. (These were the claims for breaches by RFML of cl 2.4 and cl 2.6 of the facility agreements and cl 2.4 of the Unit Conversion Agreement Tranche 1.) MacarthurCook also failed in its claim to damages against RFML for breach of cl 2.4 of the facility agreements. It succeeded however against RFML for breach of its obligations under cl 2.6 of the facility agreements and cl 2.4 of the Unit Conversion Agreement Tranche 1.

The Court of Appeal held that Part 5.6C (ss 601KA to 601KE) of the Act was a code governing all methods by which members of a managed investment scheme may exit that scheme. This had the result that that Part affected the obligations of RFML in cl 2.4 of each of FAT 3, FAT4 and FAT5.

The grounds of appeal include:

- The Court of Appeal erred in holding that Part 5C.6 of the Act was a code that governs all ways in which a member of a collective investment scheme may exit the scheme.

- The Court of Appeal erred in holding that Part 5C.6 of the Act applied to the obligation in cl 2.4 of each of the agreements to redeem MacarthurCook's Subscription Units.

On 3 March 2014 TFML filed a notice of contention, the ground of which is:

- If Part 5C.6 of the Act did not apply to the obligation in cl 2.4 of each of the agreements to redeem MacarthurCook's Subscription Units, RFML did not breach its obligations under cl 2.4 because:

    a) on its proper construction, clause 2.4 did not require RFML to redeem any of MacarthurCook's units before 29 September 2008; and
    b) in consequence of the suspension of all withdrawals on 29 September 2008, RFML was not in breach of clause 2.4 in failing to redeem any of MacarthurCook's units after 29 September 2008.

COMMONWEALTH BANK OF AUSTRALIA v BARKER (A1/2014)

Court appealed from: Full Court of the Federal Court of Australia [2013] FCAFC 83

Date of judgment: 6 August 2013

Date special leave granted: 13 December 2013

The respondent was employed by the appellant ('the bank') as an executive manager in its corporate banking section in Adelaide under a written contract of employment which permitted the bank to terminate the contract, without cause, by four weeks' written notice. On 2 March 2009 the respondent was handed a letter which informed him that his current position was to be made redundant but it was the bank's preference to redeploy him to a suitable position and it would consult him to explore appropriate options. He was required to clear out his desk, hand in his keys and mobile phone and not return to work. His email facilities and access to the bank's intranet were terminated immediately. However, the human resources section of the bank, which was responsible for managing the redeployment process, was unaware until 26 March 2009 that the respondent no longer had access to his business email or mobile phone. They made a number of unsuccessful attempts to contact him by those means to inform him of the position of "Executive Manager – Service Excellence" within the bank that would have been suitable to his skill set. On 9 April 2009 the respondent was advised in writing that his employment was terminated by reason of redundancy with effect from close of business that day.

In 2010 the respondent brought proceedings against the bank for breach of his contract of employment and for damages under s 82 of the *Trade Practices Act* 1974 (Cth). The claim was, in part, based upon an implied term of mutual trust and confidence in his contract of employment with the bank. The primary judge (Besanko J) found that the bank had been almost totally inactive in complying with its policies during the period after notifying the respondent of his redundancy, and that this was a serious breach of the implied term of mutual trust and confidence which sounded in damages. The respondent was awarded damages of $317,000 for loss of the opportunity to be redeployed to a suitable position within the bank.

In the bank's appeal to the Full Federal Court (Jacobson and Lander JJ, Jessup J dissenting) there were two main issues: first, whether the contract of employment contained the implied term; and second, whether, if it did, the bank's breach of its own policies constituted a serious breach of the relationship of trust and confidence upon which the term was founded.

A majority of the Court considered that, although no High Court authority had determined the question of whether the implied term forms part of employment contracts in Australia, it had obtained a sufficient degree of recognition, both in England and Australia, such that it ought to be accepted by an intermediate court of appeal as a term implied by law. The key issue in this case was not whether the term applies at the point of dismissal, but whether it operated at a point of time anterior to and independent of the termination of the respondent's employment. The majority noted that the boundary line, between acts which occurred prior to an employee's dismissal and the dismissal itself, may be difficult to draw. But where, as here, the bank's actions in failing to take steps to enable the respondent to obtain the possibility of redeployment were separate from and anterior to the

termination of his employment, the line should be drawn in favour of the application of the implied term.

The majority considered that the bank was required to take positive steps to consult with the respondent about alternative positions and to give him the opportunity to apply for them. Instead, it failed to make contact with him for a period which the primary judge found to be unreasonable. The bank was unable to do what was required of it because it withdrew the respondent's email and mobile phone facilities without telling the person charged with the responsibility of contacting him of those facts. That was sufficient to constitute a breach of the implied term.

Jessup J held that the implied term did not form part of the common law of Australia. His Honour also considered that, even if the implied term existed, the bank's failure to comply with its own policies did not amount to a breach.

The grounds of appeal include:

- The Federal Court erred in holding that the common law of Australia requires that the contract of employment between the appellant and the respondent contained an implied term that the appellant would not, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the appellant and the respondent.

- The Federal Court erred in finding that the implied term of mutual trust and confidence required the appellant, on the determination of the redundancy of the respondent's position, to take steps to consult with the respondent and inform him of redeployment options in circumstances where:

  a) it was an express term of the contract that the respondent's employment could be terminated either on four weeks' written notice or immediately with a payment of an amount equivalent to four weeks' pay in lieu of notice; and/or

  b) any such steps would have been necessarily and directly part of the process of determining whether or not to terminate the respondent's employment.