SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 4 FEBRUARY 2014

****

ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY & ANOR v. EMMERSON & ANOR (D5/2013)

Court appealed from: Court of Appeal of the Northern Territory [2013] NTCA 04

Date of judgment: 28 March 2013

Date special leave granted: 11 October 2013

On 15 August 2011 Southwood J declared the first respondent ("Emmerson") to be a "drug trafficker" pursuant to s 36A(3) of the *Misuse of Drugs Act 1990* (NT) ("MDA") By virtue of that declaration the property of Emmerson, which had previously been made the subject of a restraining order, was forfeited to the Northern Territory pursuant to the provisions of the *Criminal Property Forfeiture Act 2002* (NT) ("CPF"). It was common ground that, apart from the $70,050 seized from Emmerson (which was crime-derived property), the balance of the property restrained was neither crime-derived nor crime-used property. Nor was it unexplained wealth. The property was valued in excess of $850,000 and had been acquired by Emmerson through legitimate means. It was acknowledged to have no connection with any criminal offences whatsoever. At the relevant time Emmerson was aged 55 years. He had for many years unlawfully used different drugs. He had been convicted of various drug-related offences in the Northern Territory and interstate.

Emmerson appealed against the decision on four grounds, two of which challenge the validity of the legislative scheme contained in the MDA and the CPF. The first of those grounds is that the forfeiture of property effected by the legislative scheme created by s 36A of the MDA and s 94(1) of the CPF is a law with respect to the acquisition of property otherwise than on just terms contrary to s 50(1) of the *Northern Territory (Self Government) Act 1978* (Cth). The second is that those provisions confer powers and functions on the Supreme Court of the Northern Territory which substantially impair and distort the institutional integrity of the Court and, further, are inconsistent with the defining characteristics of a court including the reality and appearance of independence and impartiality.

The Court of Appeal (Riley CJ, Kelly and Barr JJ) by majority, Riley CJ dissenting, held that s 36A of the MDA and s 94(1) of the CPF are invalid because they create a scheme which enlists the Supreme Court to give effect to executive decisions and/or legislative policy in a manner which undermines its institutional integrity in a degree incompatible with its role as a repository of federal jurisdiction.

The ground of appeal is:

- The Court of Appeal erred in holding that the statutory scheme comprised by the inter-operation of s 36A of the MDA and s 94 of the CPF is invalid because the scheme enlists the Supreme Court of the Northern Territory to give effect to executive decisions and/or legislative policy in a manner which undermines its institutional integrity in a degree incompatible with its role as a repository of federal jurisdiction.

The first respondent has filed a notice of contention contending that the decision of the Court of Appeal should be affirmed on the ground that the Court erroneously decided or failed to decide some matter of fact or law. The grounds include: "The

Court of Appeal erred in holding that s 94(1) of the CPF together with s 36A of the MDA are not invalid as a law with respect to an acquisition of property otherwise than on just terms within the meaning of s 50(1) of the *Northern Territory (Self Government) Act 19*78". The first respondent now seeks to rely on an amended notice of contention.

On 30 October 2013 a Notice of a Constitutional Matter was filed by the first appellant and on 26 November 2013 a Notice of a Constitutional Matter was filed by the first respondent. The Attorneys-General for the states of Western Australia, South Australia, New South Wales and the Attorney-General of the state Queensland have advised the Court that they will be intervening in this appeal. The Attorney-General for the Commonwealth of Australia is also intervening.

MILNE v THE QUEEN (S278/2013 & S279/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2012] NSWCCA 24

Date of judgment: 2 March 2012

Special leave granted: 8 November 2013

In November 2010 the Appellant was found guilty of one count of "money laundering" contrary to s 400.3(1) of the *Criminal Code Act* 1995 (Cth) ("the Code"). He was also found guilty of one count of doing an act with the intention of dishonestly obtaining a gain from the Commonwealth contrary to s 135.1(1) of the Code. Justice Johnson then sentenced him to 8½ years imprisonment, with a non-parole period of 4 years and 9 months.

The Crown alleged that the Appellant had acquired a significant parcel of shares (at a negligible cost) in Admerex Limited ("Admerex") through his own private company, Barat Advisory Pty Ltd ("Barat"). He then received tax advice and proceeded to establish certain tax-deferral arrangements involving numbers of overseas entities through which those shares were ultimately disposed. The short term feature of those arrangements was the necessity to pass both the legal and beneficial ownership of those shares to those overseas entities. A critical dealing in which was the "swap" of approximately 48 million Admerex shares for 1 million shares in Temenos Group AG.

The Crown alleged that prior to the swap, the Appellant both deliberately and significantly departed from the terms of his tax advice. It further alleged that he did so with the intention of avoiding Capital Gains Tax ("CGT"). In particular, the Crown alleged that Barat had retained the beneficial ownership of the shares. It also alleged that when the Appellant ultimately disposed of the Admerex shares, he did so with the intention of avoiding CGT. The relevant transactions forming the subject of the money laundering offence occurred in both Australia and overseas between January 2003 and September 2005, with the CGT liability arising in the 2005 financial year.

The circumstances relating to the second count concerned the Appellant's dealings with his accountants relating to the production of Barat's accounts and income tax returns. The Crown alleged that the Appellant intentionally omitted the true CGT position in his 2005 tax return, with the consequence of avoiding a liability of between $1.9 million and $2.4 million.

On 2 March 2012 the Court of Criminal Appeal (Whealey JA, Latham & Harrison JJ) unanimously refused the Appellant's appeal against both his conviction and his sentence. Their Honours rejected all of the Appellant's grounds of appeal, specifically finding that there was no failure on Justice Johnson's behalf to adequately direct the jury concerning either of the counts. They further noted that they themselves had no doubt as to the Appellant's guilt and that it was likewise open to the jury to be satisfied beyond reasonable doubt.

With respect to the sentence, the Court of Criminal Appeal found that there was no error in how Justice Johnson approached this task. In particular, their Honours noted the trial judge's careful consideration of the proper sentencing principles concerning the complex considerations of totality, overlapping criminality and the

need to avoid double punishment. They further noted that Justice Johnson had recognised that there was a clear overlap between the offences in this matter, but he had correctly concluded that count 1 involved significant additional criminality over count 2. They additionally found that the sentences imposed were not manifestly excessive.

The grounds of appeal in both matters are:

- The Court of Criminal Appeal erred in its interpretation of the definition "instrument of crime" in s 400.1 of the Code and as a result erred in finding that the property referred to in count 1 of the indictment was capable of falling within that definition in the circumstances alleged against the Appellant at trial.

TAYLOR v THE OWNERS – STRATA PLAN NO. 11564 & ORS (S179/2013)

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 55

Date of judgment: 18 March 2013

Special leave granted: 6 September 2013

On 7 December 2007 Mr Craig Taylor was killed when a shop awning collapsed on him. His widow (Mrs Susan Taylor) then brought a claim under the *Compensation to Relatives Act* 1897 (NSW) ("the Compensation Act"). That claim included an amount for lost expectation of financial support. Section 12(2) of the *Civil Liability Act* 2002 (NSW) ("the Liability Act") relevantly provides:

"In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award."

On 27 July 2012 Justice Garling determined the following separate question in the affirmative:

"Insofar as the plaintiffs claim damages pursuant to ss 3 and 4 of the Compensation Act, is any award of damages limited by the operation of s 12(2) of the Liability Act?"

In particular, his Honour construed the word "claimant" in s 12(2) as including a deceased person, the injury to whom gives rise to a claim under the Compensation Act.

Upon appeal to the Court of Appeal, the issues for determination were:

(i) whether Part 2 of the Liability Act applies to Compensation Act claims; and

(ii) if so, whether s 12(2) if the Liability Act limits damages payable under the Compensation Act.

On 18 March 2013 the Court of Appeal dismissed Mrs Taylor's appeal. In relation to (i), Justices McColl and Hoeben held that Part 2 applies "to and in respect of an award of [damages that relate to the death of or injury to a person]". Their Honours found that there was a sufficient connection between a Compensation Act claim and the "death of... a person" to satisfy the term "relate to". Justice Basten noted that Justice Garling had resolved (in the affirmative) the question of whether damages available under the Compensation Act were damages that "relate to" the death of the deceased. As that dispute had not been reopened on appeal, his Honour accepted that the relevant connection had been established.

In relation to (ii) Justices McColl and Hoeben held that the Court is required to prefer a construction of the Liability Act that promotes that Act's purpose. They noted that the purpose of s 12 was to limit the amount of damages that may be awarded in personal injury claims. Their Honours further found that the Court can depart from the literal interpretation of a legislative provision when such an interpretation does not conform to the legislative intent. They went on to hold that, properly construed, s 12(2) limited an award based on "the claimant's *or deceased*

person's gross weekly earnings". Justice Basten however held that it was unclear what answer Parliament would have given had it considered the operation of s 12 in relation to a claim under the Compensation Act. He further noted that the Court should be cautious in imputing a general legislative intention to override the ordinary meaning of a statutory text.

The grounds of appeal include:

- The Court of Appeal failed to have regard to Mrs Taylor's arguments made before it that the words of s 12(2) as legislated were capable of a construction which accorded with the apparent intention of the provision and which provided a reasonable result.

AUSTRALIAN FINANCIAL SERVICES AND LEASING PTY LIMITED v HILLS INDUSTRIES LIMITED & ANOR (S163/2013)

Court appealed from:	New South Wales Court of Appeal [2012] NSWCA 380
Date of judgment:	4 December 2012
Special leave granted:	16 August 2013

This appeal concerns the attempt by the Appellant ("AFSL") to recover funds it paid out on the basis of fraudulent documents provided by a third party, Mr Richard Skarzynski.

Total Concept Projects (Australia) Pty Ltd and Total Concept Productions (Australia) Pty Ltd (together, "TCP") were companies controlled by Mr Skarzynski. Both of the Respondents, Hills Industries Ltd ("Hills") and Bosch Security Systems Pty Ltd ("Bosch") were creditors of TCP. Mr Skarzynski arranged with AFSL for it to purchase certain equipment from each of the Respondents and then lease that equipment to TCP. In doing so he fabricated certain documents. In August 2009 Mr Skarzynski informed the Respondents that TCP's debts to them would soon be paid with funds to be provided by a third party. AFSL then made payments directly to each of the Respondents, who received the monies in good faith and discharged TCP's debts owed to them. (AFSL also began to receive payments from TCP under the leases that had been entered into.) Bosch then consented to the setting aside of default judgments obtained against TCP for debts owed to it. Bosch also abandoned other proceedings that it had on foot.

After learning that Mr Skarzynski's companies were in serious financial difficulty, AFSL obtained a mortgage over his family's home in February 2010. Six months after its payments to the Respondents, AFSL also discovered Mr Skarzynski's fraud. It then commenced proceedings in restitution against the Respondents for the recovery of monies it had paid out.

On 5 April 2011 Justice Einstein ordered Hills to pay restitution to AFSL, but dismissed AFSL's claim as against Bosch. His Honour found that Hills had given no consideration for the monies it had received from AFSL. Nor had Hills suffered detriment arising out of a (speculative) change of its position after receiving those monies. Justice Einstein upheld Bosch's defence however of "change of position", as Bosch had incurred a detriment by extinguishing its legal claims against AFSL. AFSL then appealed against Bosch, while Hills appealed against AFSL.

On 4 December 2012 the Court of Appeal (Bathurst CJ, Allsop P & Meagher JA) unanimously dismissed AFSL's appeal and allowed that of Hills. Their Honours held that the "change of position" defence was made out by both Bosch and Hills. This was because, by discharging the debts owed to them by TCP, they had each given up an opportunity to enforce payment of those debts by TCP. The Court of Appeal found that in such circumstances it would be unjust for either Bosch or Hills to be required to pay restitution to AFSL.

The grounds of appeal include:

- The Court of Appeal erred by finding at [160] that it was not a requirement of the law in Australia of change of position as described by the High Court in *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353 to point to actual expenditure or financial commitment or loss by the Respondents in order to make out the defence of change of position in a claim for payment by mistake.

On 6 September 2013 Hills filed a notice of contention, the grounds of which include:

- To the extent it did not do so, the Court of Appeal ought to have concluded that restitution by Hills to AFSL should not be required because Hills' discharge of TCP's debt gave rise to a defence of bona fide discharge.

On 6 September 2013 Bosch also filed a notice of contention, the grounds of which include:

- The Court of Appeal failed to decide that AFSL is not entitled to restitution for unjust enrichment as Bosch's receipt and application of $177,689.06 of the $198,000.00 from AFSL was a bona fide discharge of the indebtedness of TCP to Bosch. (Bathurst CJ [2] and Meagher JA [200]).

STATE OF WESTERN AUSTRALIA v. BROWN AND ORS (P49/2013)

Court appealed from:	Full Court of the Federal Court of Australia [2012] FCAFC 154 & [2013] FCAFC 18
Date of judgment:	5 November 2012 & 22 February 2013
Date special leave granted:	12 September 2013

In 1960, a joint venture was established to develop the iron ore deposits at Mount Goldsworthy in the Pilbara region of Western Australia. In February 1962, the West Australian Government awarded the successful tender to the joint venturers. The State of Western Australia and the joint venturers executed an agreement, the operative form of which was given effect to by the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) ("the 1964 Act"). The current joint venturers are BHP Billiton Minerals Pty Ltd, Itochu Minerals & Energy of Australia Pty Ltd and Mitsui Iron Ore Corporation Pty Ltd (the second respondent).

In late May 2007, Bennett J made a consent determination under the *Native Title Act 1993* (Cth) as to the native title rights and interests of the Ngarla People in relation to land in the Pilbara region. Excised from the determination was an area of land which was subject to the Mount Goldsworthy mineral leases. The leases were granted pursuant to a joint venture agreement made in mid October 1964. They were approved and given effect to by s 4(1) of the 1964 Act. An order was made by Bennett J on 5 October 2007 to determine as a separate question whether the Mount Goldsworthy mineral leases were subject to the native title rights and interests of the Ngarla People or whether the rights granted to the joint venturers extinguished those native title rights and interests.

At first instance, Bennett J found that the Mount Goldsworthy mineral leases did not confer exclusive possession on the joint venturers so as to extinguish wholly the native title rights and interests of the Ngarla People, but found that the rights granted under those mineral leases and the underlying agreement were inconsistent with the native title rights and interests continuing to exist in the area where the mines, town sites and associated infrastructure were constructed, but not in the undeveloped areas. As a consequence of this inconsistency, her Honour held that the Ngarla People's native title rights and interests were wholly extinguished in the developed areas of the mineral leases.

Brown (on behalf of the Ngarla People), the first respondent, appealed. The appellant and the second respondent cross-appealed, arguing that the trial judge should have found that the Ngarla People's native title rights and interests were wholly extinguished across the whole of the area which was subject to the mineral leases.

The Full Court of the Federal Court of Australia, per Greenwood and Barker JJ, Mansfield J dissenting, allowed the appeal and dismissed the cross-appeal. Greenwood J found that the native title rights of the Ngarla people were not extinguished by the grant but the exercise of the granted rights by the mining companies would prevent the exercise of each of the native title rights (over the whole land) for so long as the mining companies carried on the activities contemplated by the agreement. His Honour concluded that the Ngarla people were prevented from exercising their native title rights over the whole land while the joint adventurers continued to hold their rights as granted.

The grounds of appeal include:

- The Full Court erred in law in finding that the determined native title rights continue to exist in the area of the Mt Goldsworthy Leases when the Full Court should have found that each determined native title right was extinguished in respect of the entirety of the lands the subject of the Mt Goldsworthy Leases by reason both:

  (a) that the grant of the Mt Goldsworthy Leases conferred on the Lessees a right of exclusive possession; and

  (b) that the rights granted to the Lessees pursuant to the Mt Goldsworthy Leases, the 1964 Act and the *Mining Act 1904* (WA) were exercisable on all parts of the leased land and were wholly inconsistent with each determined native title right.

The Attorney-General for the State of South Australia and the Australian Lawyers for Human Rights are seeking leave to intervene as amicus curiae.

ACHURCH v THE QUEEN (S276/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2011] NSWCCA 186 & [2013] NSWCCA 117

Dates of judgments: 16 August 2011 & 22 May 2013

Special leave granted: 8 November 2013

In 2008 Mr Brian Achurch was convicted of the following offences:

a) that on 7 March 2007 he supplied a prohibited drug (MDMA) (108.7 grams) contrary to section 25(1) of the *Drug Misuse and Trafficking Act* 1985 (NSW) ("the Drug Trafficking Act");

b) that on 7 March 2007 he supplied a commercial quantity of a prohibited drug (MDMA) (270 grams) contrary to section 25(2) of the *Drug Trafficking Act*;

c) on 30 May 2006 he supplied a large commercial quantity of a prohibited drug (methylamphetamine) (2.6 kg) contrary to section 25(2) of the *Drug Trafficking Act.*

On 26 May 2010 Judge Woods sentenced Mr Achurch to 14 years imprisonment with a non-parole period of 6 years. The Respondent then appealed against the manifest inadequacy of that sentence, arguing that Judge Woods had failed to sentence Mr Achurch in accordance with Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act"). This was because both offences b) and c) attracted standard non-parole periods of 10 and 15 years respectively.

On 16 August 2011 the original bench of the Court of Criminal Appeal (Macfarlan JA, Johnson & Garling JJ) upheld the Respondent's appeal and resentenced Mr Achurch to 18 years imprisonment, with a non-parole period of 13 years.

Following judgment of this Court in *Muldrock v The Queen* [2011] HCA 39, Mr Achurch applied to have his appeal re-opened in March 2012. He alleged that the original bench of the Court of Criminal Appeal had imposed a penalty contrary to law. Mr Achurch further submitted that the Crown appeal (and the subsequent resentencing) had proceeded upon an erroneous application of sentencing principles. He submitted that the appropriate course was to re-open the proceedings and consider whether, in light of *Muldrock,* the Respondent's appeal should have been allowed, and if so, whether some lesser sentence should have been imposed.

On 22 May 2013 an enlarged bench of the Court of Criminal Appeal (Bathurst CJ, McClellan CJ at CL, Johnson, Garling and Bellew JJ) dismissed Mr Achurch's application. After considering all of the facts of the case, their Honours held that it was not only correct that the Crown appeal be allowed, but they also held that no lesser sentence was warranted.

Concerning only the judgment dated 22 May 2013, the grounds of appeal are:

- Having found error in its earlier decision dated 16 August 2011, the Court of Criminal Appeal erred in:

  a) its interpretation and application of section 43 of the Sentencing Act;

  b) in rejecting the application to re-open the appeal proceedings on the basis that the sentence could, in accordance with correct principle, have been lawfully imposed by the Court.