SHORT PARTICULARS OF CASES
APPEALS

DECEMBER 2015

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FISCHER & ORS v NEMESKE PTY LTD & ORS (S223/2015)

Court appealed from: Supreme Court of New South Wales, Court of Appeal [2015] NSWCA 6

Date of judgment: 11 February 2015

Special leave granted: 16 October 2015

Nemeske Pty Ltd ("Nemeske") is the trustee of the Nemes Family Trust ("the Trust"), a trust which was established by a deed of settlement ("the Trust Deed"). The Trust's beneficiaries included Mr Emery Nemes and his wife Mrs Madeleine Nemes ("the Nemes"), along with others including the Appellants. The Trust Deed also gave Mr Nemes a general power ("the General Power") to vary it, the Trust Deed, by means of an oral resolution.

In May 1994 Mr Nemes orally resolved ("the Nemes Resolution") to vary the Trust's terms, such that the vesting day became 24 June 1992 instead of a date decades later.

The Trust's only assets, which were originally valued at just $1,000, were ten shares in Aladdin Ltd. By July 1994 however those shares had been revalued at $3,904,300. In September 1994 Nemeske resolved ("the September Resolution") that $3,904,300 be distributed to the Nemes as joint tenants. Thereafter Nemeske's books showed a debt of $3,904,300 owed to the Nemes. In August 1995 Nemeske executed a deed of charge in which it covenanted to pay $3,904,300 to the Nemes on demand. A director's declaration made in May 2004 ("the Director's Declaration") also acknowledged Nemeske's debt.

Mrs Nemes died in 2010 and Mr Nemes died in 2011. In 2013 the Appellants commenced proceedings against the executors ("the Executors") of Mr Nemes' estate, seeking a declaration that Nemeske, as trustee, was not indebted to the estate. On 24 March 2014 Justice Stevenson dismissed that claim and ordered that Nemeske pay the Executors $3,904,300 plus interest.

On 11 February 2015 the Court of Appeal (Beazley P, Barrett & Ward JJA) unanimously dismissed the Appellants' subsequent appeal. Their Honours held that the Nemes Resolution was ineffective because it purported to vary the Trust in a way which was contrary to a limitation contained in the General Power. They held however that the September Resolution was valid and it effectively applied $3,904,300 of the Trust's income or capital for the Nemes' benefit. An action in debt then arose, an action which was also available to the estate. The Court of Appeal found that it was not statute-barred, as the relevant 12 year limitation period counted from May 2004 (being the date of the Director's Declaration).

The grounds of appeal include:

- The Court erred in finding that the September Resolution of Nemeske, as trustee of the Trust, to make a distribution from the Trust:

    a) effected a resettlement of some or all of the Trust property, or otherwise altered the obligation of the trustee with respect to such property, such that the trustee thereafter held some or all of the assets

of the Trust (or former assets of the Trust) upon trust to pay $3,904,300 to the Nemes; or

b) created an equitable obligation to pay the Nemes $3,904,300 as joint tenants, which obligation was to be satisfied by raising an amount from the assets of the Trust.

On 2 November 2015 a notice of contention was filed, the grounds of which include:

- In the events that occurred namely:

  a) The September Resolution to distribute the asset revaluation reserve;
  b) The crediting of the loan account of the Nemes in the books of Nemeske shortly thereafter in an amount the sum equal to the asset revaluation reserve;
  c) The execution of the Deed on 30 August 1995.

  Nemske thereby effected a distribution of $3,904,300 being a sum equal to the asset revaluation reserve to the Nemes and a simultaneous loan by them back to Nemeske of the amount of the distribution without it being a physical distribution in cash, and thereby became indebted to the Nemes.

STEWART & ORS v ACKLAND (C12/2015)

Court appealed from: Supreme Court of the Australian Capital Territory, Court of Appeal
[2015] ACTCA 1

Date of judgment: 12 February 2015

Special leave granted: 11 September 2015

On 10 October 2009 Mr Benjamin Ackland, then 21 years old, visited an amusement park with a group of fellow university students. There Mr Ackland used a jumping pillow. After obtaining advice from colleagues who were also using the device, Mr Ackland twice attempted to perform a backwards somersault. On the second attempt he landed awkwardly on his head, causing a broken neck and permanent quadriplegia.

Contrary to a recommendation contained in the owners' manual for the jumping pillow ("the Manual"), the amusement park's owners had not placed a sign on or near the device prohibiting somersaults or inverted manoeuvres. The Manual had been received by the parks' owners under cover of a circular which requested the recipient to read the Manual carefully, especially the chapter on safety (which contained the signage recommendation). The owners also took no other measures to prohibit, or to warn users of the danger of, backwards somersaults. Mr Ackland then sued the owners of the park, the Appellants, in negligence.

On 21 February 2014 Burns J awarded Mr Ackland damages of more than $4.6 million, after finding that the Appellants had been negligent both by failing to warn of the risk of serious neck injury and by failing to prohibit backwards somersaults. His Honour found that Mr Ackland had engaged in a "dangerous recreational activity" as defined in s 5K of the *Civil Liability Act* 2002 (NSW) ("the Act"). Burns J also found however that the harm suffered by Mr Ackland had not resulted from the materialisation of an "obvious risk" within the meaning of s 5F of the Act, with the result that the defence raised by the Appellants under s 5L had not been made out.

The Court of Appeal (Penfold J, Walmsley and Robinson AJJ) unanimously dismissed an appeal by the Appellants. Walmsley and Robinson AJJ held that Burns J, by finding that there was an obvious risk of minor injury but not of serious injury, had not erred in respect of "obvious risk". This was partly because the relevant risk for the purpose of s 5L is one that has come home rather than one which has not. Walmsley and Robinson AJJ found that a reasonable person in the Appellants' position would have construed the safety recommendations contained in the Manual as a warning in the interests of customers' safety. Such a person would have warned users not to do somersaults and would have prohibited somersaults on the jumping pillow. Penfold J held that, for the purpose of s 5L of the Act, "obvious risk" did not arise for consideration. This was because Burns J, by failing to consider the risk of harm prospectively, had erred by finding that Mr Ackland had engaged in a "dangerous recreational activity" at all. Penfold J also held that Burns J had not erred in respect of the Appellants' negligent failure both to warn and to prohibit.

The grounds of appeal include:

- The Court of Appeal erred in failing to find that the injuries suffered by Mr Ackland were as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by Mr Ackland within the meaning of s 5L of the Act.

- The Court of Appeal erred in failing to find that there was an obvious risk, within the meaning of s 5F of the Act, of serious injury in performing a backwards somersault on a jumping pillow.

On 5 November 2015 Mr Ackland filed a summons in which he sought leave to rely on a proposed notice of contention filed out of time. The ground of that proposed notice of contention is:

- The ACT Court of Appeal erroneously found that the recreational activity engaged in by Mr Ackland was properly characterised as a “dangerous recreational activity”.

MORETON BAY REGIONAL COUNCIL v MEKPINE PTY LTD (B60/2015)

Court appealed from: Supreme Court of Queensland, Court of Appeal [2014] QCA 317

Date of judgment: 2 December 2014

Special leave granted: 16 October 2015

In March 1999 Mekpine Pty Ltd ("Mekpine") entered into a retail shop lease ("the lease") within the meaning of the *Retail Shop Leases Act* 1994 (Qld) ("the RSLA"). This was in respect of Lot 6 on RP 809722 ("Lot 6"). At that time, Lot 6 was the site of a retail shopping centre ("the Shopping Centre") within the meaning of the RSLA. Under the lease, Mekpine had the right to occupy and use part of a building constructed on Lot 6. The "common areas" of the lease were identified as being those parts of the building (or Lot 6) not leased by the lessor.

Around 2007 the Shopping Centre expanded to include a retail development on adjoining land identified as Lot 1 on RP 847798 ("Old Lot 1"). At that time, Lot 6 and Old Lot 1 were amalgamated by the registration of a plan of survey and existing interests under the *Land Title Act* 1994 (Qld). This created Lot 1 on SP 184746 ("New Amalgamated Lot 1").

In November 2008 the Moreton Bay Regional Council ("the Council") resumed part of the New Amalgamated Lot 1 ("the Resumed Land") under the provisions of the *Acquisition of Land Act* 1967 (Qld) ("ALA"). The land resumed had previously formed part of Old Lot 1 and had never been part of Lot 6. Mekpine then brought a claim for compensation under the ALA on the basis that, as at the date of resumption, it had an interest in the Resumed Land for the purposes of section 12(5) of the ALA.

On 10 September 2012 the Land Court of Queensland determined a preliminary point as to whether, as at the date of resumption, Mekpine had an interest in the Resumed Land for the purposes of section 12(5) of the ALA. That decision involved a determination of the following questions:

a) Whether the amalgamation of Lot 6 with Old Lot 1 varied the lease to extend an interest over all of New Amalgamated Lot 1, including parts of New Amalgamated Lot 1 beyond the land that was previously within Lot 6; and
b) Whether the provisions of the RSLA varied the lease, or otherwise operated, to include an interest in parts of the New Amalgamated Lot 1 identified by the RSLA as "common areas" for the Shopping Centre.

The Land Court answered the first question in the negative, but the second in the affirmative, finding that Mekpine had a relevant interest in the Resumed Land. The Council then appealed to the Land Appeal Court of Queensland, which answered both questions in the negative. Mekpine then appealed to the Queensland Court of Appeal.

On 2 December 2014 the Queensland Court of Appeal (McMurdo P and Morrison JA; Holmes JA dissenting) allowed Mekpine's appeal. The majority found that the registration of the plan of survey to create New Amalgamated Lot 1 and/or the

registration of existing interests in Lot 6 on the title of the New Amalgamated Lot 1 varied the lease to include all of New Amalgamated Lot 1. They further found that the provisions of the RSLA operated to vary the lease to include areas defined by the RSLA as “common areas”, or otherwise create an interest in the “common areas” as defined by the RSLA.

Holmes JA however found that neither the amalgamation nor the provisions of the RSLA created any interest in land, within the meaning of section 12(5) of the ALA, beyond the existing interests in land within the former boundaries of Lot 6.

The grounds of appeal include:

- The Court of Appeal erred in determining that Mekpine had an interest in land resumed by the Council on 14 November 2008, being part of Lot 1 on SP 184746, for the purposes of section 12(5) of the ALA, in that the Court of Appeal wrongly found that registration of a plan of survey to create a new lot by the amalgamation of two existing lots and/or the registration of existing interests in the two existing lots on the title of the new amalgamated lot varied Mekpine’s lease over just one of the existing allotments to include a leasehold interest over all of the new amalgamated lot.

CGU INSURANCE LIMITED v BLAKELEY & ORS (M221/2015)

Court appealed from: Supreme Court of Victoria, Court of Appeal
[2015] VSCA 153

Date of judgment: 19 June 2015

Special leave granted: 11 September 2015

Akron Roads Pty Ltd (the second respondent) ('Akron') and its liquidators (the first respondents) brought proceedings in the Supreme Court of Victoria alleging that the directors of Akron breached s 588G(2) of the *Corporations Act* 2001(Cth) by failing to prevent it from incurring debts when it was insolvent. The relevant directors are Trevor Crewe (the third respondent) and Crewe Sharp Pty Ltd (in liquidation) (the sixth respondent) ('Crewe Sharp'). On 4 December 2013, Crewe Sharp made a claim for indemnity with respect to the proceeding under a professional indemnity policy of insurance that it had with CGU Insurance Limited ('CGU'). As Mr Crewe was a director of Crewe Sharp, he was also an insured under the policy. On 6 March 2014, CGU denied the claim on the basis that the policy did not provide cover in respect of the proceeding. Neither Crewe Sharp nor Mr Crewe indicated any intention to challenge CGU's denial of liability. The first and second respondents, however, sought an order pursuant to r 9.06(b) of the *Supreme Court (General Civil Procedure) Rules* 2005 ('the Rules') that CGU be joined as a defendant in the proceeding. They also sought leave to file and serve amended points of claim in which they sought a declaration that CGU was liable to indemnify Mr Crewe and Crewe Sharp under the policy in respect of any judgment obtained by the first and second respondents against them.

On 13 February 2015, Judd J granted the application and made orders joining CGU as the fifth defendant in the proceeding. CGU sought leave of the Court of Appeal to appeal on the grounds that the judge had erred in law in joining it as a defendant to the proceeding because courts have no jurisdiction at the suit of a stranger to grant declaratory relief as to the meaning and effect of a private contract between parties who will not pursue any claim relating to rights or duties under that contract.

The Court of Appeal (Ashley, Beach and McLeish JJA) noted that Australian case law implicitly supports the proposition that in exceptional circumstances a court will permit a plaintiff who is not a party to a contract to seek a declaration as to rights existing under that contract. The authorities also show that if there is practical utility in resolving a matter in which the plaintiff has a real interest, this may suffice to justify making a declaration in respect of that matter. The Court found that the making of a declaration in the circumstances sought in this case would be of practical utility and would not constitute the giving of an advisory opinion, because its practical effect would be to resolve the issue as between insured and insurer. It would be an abuse of process to permit either to litigate the question in subsequent proceedings. While, as a general proposition it may be accepted that only contracting parties have an interest in the contract to which they are parties, once an insured becomes insolvent, leaving behind an unpaid claimant in respect of whose claim an insurance policy responds, the situation becomes different from that of an ordinary private contract. The Court accepted the submission of the first and second respondents that in those circumstances it is the claimant, and only the claimant, that has an interest in the insurance contract. The insured no longer has any practical commercial interest in the policy. That is the effect of s 562 of the *Corporations Act* 2001 (Cth) and s 117 of

the *Bankruptcy Act* 1966 (Cth), which provide for payment of the insurance proceeds 'to the third party'.

The Court considered, consistently with the way courts are expected to exercise their jurisdiction in a modern world, that the possibility of separate proceedings between the current parties and later proceedings between a relevant liquidator or trustee in bankruptcy and CGU could not be countenanced. For these reasons, the judge's analysis was correct and his orders should not be disturbed. Whether there were ultimately grounds for a declaration being made against CGU was a matter for trial. It was not a matter appropriate for final determination on a joinder application.

The grounds of appeal include:

- The Court erred in dismissing the appeal because the court does not have jurisdiction at the suit of the first and second respondents to grant declaratory relief as to the meaning and effect of a contract to which they are not parties and when the parties to the contract, being the appellant and the third and sixth respondents, are not themselves in dispute.

THE QUEEN v GW (C13/2015)

Court appealed from: Supreme Court of the Australian Capital Territory, Court of Appeal
[2015] ACTCA 15

Date of judgment: 24 April 2015

Special leave granted: 16 October 2015

"GW" is the father of "R" and "H", two young girls born to "M" during her marriage to GW. On 29 March 2012 a domestic incident gave rise to the police removing M from the family home. GW then obtained an interim domestic violence order against M, which prevented her from seeing their children during the ensuing days. At that time R was five years old and H was three years old. On 2 April 2012, R and H were removed from GW's care and placed in foster care, following a complaint made to authorities at the behest of M.

GW was later tried on charges of having committed acts of indecency on both R and H between 29 March 2012 and 2 April 2012. Evidence relied on by the prosecution included unsworn evidence given by R at a pre-trial hearing before Justice Burns on 6 August 2013. That evidence was given after Justice Burns had determined, under s 13 of the *Evidence Act* 2011 (ACT) ("the Evidence Act"), that R was not competent to give sworn evidence. This was upon his Honour stating that "*... because of the difficulty in truly gauging the level of her understanding ... I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence*" ("the Finding").

The jury found GW guilty of one of the six acts charged (count 3). On 14 July 2014 Justice Penfold sentenced GW to imprisonment for two years, the first three months to be served in periodic detention and the remainder suspended upon a good behaviour bond.

GW appealed against his conviction, on grounds which included that Justice Penfold should not have admitted the unsworn evidence of R and (alternatively) that her Honour had failed to properly direct the jury in relation to that evidence.

The Court of Appeal (Murrell CJ, Refshauge & Ross JJ) unanimously allowed the appeal and ordered a retrial of GW on count 3. Their Honours held that R's unsworn evidence should not have been admitted, due to Justice Burns having made a subtle but important error in making the Finding. The Court of Appeal held that, in applying s 13(3) of the Evidence Act, the correct question for Justice Burns to answer was whether R *lacked* the capacity to understand that in giving evidence she was under an obligation to give truthful evidence. Justice Burns however had mistakenly treated unsworn evidence, rather than sworn evidence, as the default position.

Their Honours also held that, if R's unsworn evidence had been admissible, Justice Penfold ought to have warned the jury that that evidence might be unreliable because it was unsworn evidence. This was in view of both the general primacy of sworn evidence and that in the trial of GW the most fundamental task for the jury was the assessment of the reliability of R's evidence.

The grounds of appeal include:

- The Court of Appeal erred in holding that where a witness has given unsworn evidence the jury should be directed as to the differences between sworn and unsworn evidence and that, in assessing the reliability of the witness' evidence, they should take into account that the witness was giving unsworn rather than sworn evidence.

On 3 November 2015 GW filed a notice of contention, the ground of which is:

- The Court of Appeal erred in its refusal to make an order under r 5531 of the *Court Procedures Rules* 2006 (ACT) permitting the following ground of appeal:

  "(g) the trial judge erred in failing to give any direction to the jury regarding the potential significance for other counts of a finding in respect of a count that a reasonable doubt existed as to the guilt of the accused".