

SHORT PARTICULARS OF CASES
APPEALS

AUGUST 2015

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ALCAN GOVE PTY LTD v ZABIC (D5/2015)

Court appealed from: Northern Territory Court of Appeal
[2015] NTCA 2

Date of judgment: 27 March 2015

Special leave granted: 15 May 2015

The Respondent was employed by Alcan Gove Pty Ltd (“Alcan”) as a manual labourer at its alumina refinery from 1974-1977. He regularly carried out repairs and maintenance of the network of pipelines at the refinery, which were insulated with asbestos lagging. In November 2013 he began to experience chest pain and shortness of breath and in January 2014 he was diagnosed with malignant mesothelioma.

The Respondent commenced proceedings in the Supreme Court of the Northern Territory against Alcan in negligence. He submitted that Alcan was negligent in exposing him to asbestos dust and fibres when it knew of the relevant dangers and failed to take any precautions for his safety. He further submitted that the cause of action arose with the inhalation of the asbestos dust which caused changes to the mesothelial cells, as opposed to when the symptoms of mesothelioma developed. Alcan countered that the claim was statute-barred on the basis that the Respondent did not suffer compensable damage until the onset of the malignancy process, most likely in 2009. It further submitted that his claim was not preserved by s 189 of the *Workers Rehabilitation and Compensation Act* 1986 (NT) (“the Act”) as the damage arose after the date of the commencement of the Act on 1 January 1987.

Justice Barr found that Alcan was negligent and that its breach of duty of care had caused the Respondent’s malignant mesothelioma. His Honour however agreed that the claim was statute-barred pursuant to s 52 of the Act. This was on the basis that the cause of action arose after the relevant date, 1 January 1987, and was not otherwise preserved by s 189 of the Act.

On 25 March 2015 the Court of Appeal (Riley CJ, Southwood and Hiley JJ) upheld the Respondent’s appeal. Their Honours found that the medical evidence established that exposure to asbestos caused changes in the Respondent’s mesothelial cells well prior to 1987. The Court found that those changes were the start of a process that resulted in the Respondent suffering from malignant mesothelioma. Hence the cause of action and the compensable damage arose in 1974 and the claim was not statute-barred.

The ground of appeal is:

- The Court of Appeal erred in failing to find that the Respondent’s claim was barred by s 52 of the Act.

On 17 June 2015 the Respondent filed a summons, seeking leave to rely upon a Notice of Contention filed out of time. The ground of that Notice of Contention is:

- If the Appellant's contention that the Respondent's claim is barred by the operation of s 52 of the Act, then that section is invalid because it offends against the provisions of s 50(1) of the *Northern Territory (Self Government) Act 1978* (Cth).

On 18 June 2015 the Respondent filed a Notice of Constitutional matter. As at the time of writing no Attorney-General has advised the Court of their intention to intervene.

DUNCAN v INDEPENDENT COMMISSION AGAINST CORRUPTION **(S101/2015)**

Court from which cause removed: New South Wales Court of Appeal

Date cause removed: 25 May 2015

Mr Travers Duncan is a substantial shareholder in Cascade Coal Pty Ltd (“Cascade”), a company of which he was a director from February to July 2009. In June 2009, following expressions of interest to the New South Wales Department of Primary Industries, Cascade was selected to receive a coal exploration licence for an area known as Mount Penny.

In July 2013 the Independent Commission Against Corruption (“ICAC”) published a report entitled “*Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others*” after conducting a public inquiry. Findings made by ICAC in its report included that Mr Duncan and the other directors of Cascade had engaged in corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988 (NSW)* (“the Act”). That conduct was the taking of steps to deceive public authorities as to the involvement of the Obeid family in the creation of the Mount Penny tenement.

Mr Duncan commenced Supreme Court proceedings, seeking a declaration that the finding of corrupt conduct on his part was a nullity because, in making it, ICAC had exceeded its jurisdiction. On 29 July 2014 Justice McDougall dismissed Mr Duncan’s application.

Mr Duncan applied to the Court of Appeal for leave to appeal (“the leave proceedings”) from Justice McDougall’s decision. Following this Court’s judgment in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (“*Cunneen*”), Mr Duncan sought final orders in his favour in the leave proceedings. This was on the basis that *Cunneen* was fatal to ICAC’s position.

Meanwhile, on 6 May 2015, Schedule 4 to the Act was amended by the addition of Part 13. The provisions of Part 13 purport to validate ICAC’s actions done and findings made prior to the date of *Cunneen*, along with anything (including legal proceedings) done in reliance upon such actions and findings. In so providing, Part 13 extends the meaning of “corrupt conduct” in s 8(2) of the Act to include (contrary to *Cunneen*) conduct that could adversely affect the *efficacy* of the exercise of official functions by a public official.

In the leave proceedings, Mr Duncan amended his grounds of appeal and orders sought, adding a challenge to the validity of Part 13 of Schedule 4 to the Act. He then applied to this Court for it to remove that part of the leave proceedings from the Court of Appeal. On 25 May 2015 Justice Gageler granted the order sought.

A Notice of a Constitutional Matter was filed by Mr Duncan. The Attorneys-General of New South Wales, Victoria, Queensland, Western Australia and South Australia are intervening in the removed proceedings.

The grounds of appeal include:

- Part 13 of Schedule 4 to the Act is invalid on the basis that:
 - (i) on its proper construction, cl 35 of Schedule 4 to the Act does not alter the substantive law relating to:
 - (a) the powers or functions of ICAC; or
 - (b) the definition of “corrupt conduct” within the meaning of the Act,but instead merely deems certain action by ICAC to have been, and always to have been, valid if it would have been validly done, had corrupt conduct for the purposes of the Act included conduct that adversely affects, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions;
 - (ii) as a consequence, the principal, if not the sole, effect of cl 35 of Schedule 4 to the Act is to oust the power of the Supreme Court of New South Wales to grant relief for a specific genus of jurisdictional error by ICAC, which error is not, as a matter of law, cured by cl 35; or
 - (iii) in the alternative to (ii) above, it is beyond the legislative competence of the New South Wales Parliament to enact a law purporting to direct the Supreme Court of New South Wales (or the High Court of Australia) so as to preclude it from making orders or granting relief reflective of the legal reality appertaining to the rights, powers or duties of the parties before it, being, in this case, the unaltered circumstance that ICAC did not have power to make findings of corrupt conduct on the basis of an asserted adverse effect upon the efficacy, as distinct from the probity, of an exercise of official functions.