# SHORT PARTICULARS OF CASES

## CANBERRA
## JULY 2016


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**THE MARITIME UNION OF AUSTRALIA & ANOR v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S136/2015)**

Date application for an order to show cause filed: 9 July 2015

Date special case referred to Full Court: 6 May 2016

The *Migration Act* 1958 (Cth) ("the Act") applies a certain visa regime to non-citizens who participate in or support "offshore resources activity" as defined in s 9A(5) of the Act. Such activity includes the storage of greenhouse gases in the Australian seabed and the exploration for, and recovery of, undersea petroleum and minerals.

Section 8 of the Act deems to be part of Australia any resources installation attached to the Australian seabed, while s 5 designates such an installation an "Australian resources installation". By s 9A(1) of the Act, any person who is in a relevant area to participate in or support an offshore resources activity is deemed to be in the "migration zone" of Australia. Any such person who is a non-citizen must hold one of certain types of visa in order to lawfully enter and remain in the migration zone.

On 2 December 2015 the Minister for Immigration and Citizenship ("the Minister") made Determination IMMI 15/140 ("the Determination") under s 9A(6) of the Act. Paragraph 2 of the Determination excludes from the definition of "offshore resources activity" any relevantly licensed activity to the extent that it uses a vessel or structure that is not an "Australian resources installation". The consequence is that non-citizens working on relevant vessels and floating structures are no longer subject to the visa regime, since they are not deemed to be in the migration zone.

The plaintiffs are both trade unions whose members include workers in offshore resources industries. By a further amended application for an order to show cause, they seek a declaration that paragraph 2 of the Determination is invalid. The plaintiffs contend that that provision is invalid on the basis that it is either repugnant to the Act (especially ss 9A and 41(2B)) or it negatives too substantial a part of a legislative scheme that regulates foreign labour in offshore resources industries. That legislative scheme includes the *Offshore Minerals Act* 1994 (Cth) and the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth).

The parties filed a special case, which Justice Bell referred for consideration by the Full Court. The special case states the following questions:

1. Is paragraph 2 of Determination IMMI15/140, entered on the Federal Register of Legislative Instruments on 3 December 2015, invalid?

2. If the answer to Question 1 is "Yes", what relief, if any, should be granted?

3. Who should pay the costs of the Special Case?

**SIMIC & ORS v NSW LAND AND HOUSING CORPORATION & ORS**
**(S136/2016)**

Court appealed from: New South Wales Court of Appeal
[2015] NSWCA 413

Date of judgment: 18 December 2015

Special leave granted: 5 May 2016

In March 2010 Nebax Constructions Australia Pty Ltd ("Nebax") entered into a contract with the first respondent ("the Corporation") for the construction of home units at Bomaderry ("the construction contract"). In relation to the construction contract, Nebax obtained financial facilities from the second respondent ("the ANZ Bank"). Under one of those facilities, the ANZ Bank issued two performance bonds ("the Undertakings"), each of which was headed "Bank Guarantee". Nebax in turn agreed to indemnify the ANZ Bank against any expenses it might incur, either in making the payments under the Undertakings or arising from any claim in relation to them. Nebax's obligations to the ANZ Bank were guaranteed by the appellants ("the Guarantors"), who are three individuals and two corporations.

In each of the Undertakings, the ANZ Bank undertook to pay "the Principal" up to $73,482.53 on demand. The Undertakings described the Principal as "*New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940*", which was not the correct name (or ABN) of the Corporation.

In October 2013 the Corporation sent a letter of demand to the ANZ Bank, requiring payment in accordance with the Undertakings. The ANZ Bank however refused to pay, due to the discrepancy between the description of the Principal in the Undertakings and the description of the Corporation in the letter of demand.

The Corporation then commenced Supreme Court proceedings against the ANZ Bank, which in turn cross-claimed against Nebax and the Guarantors. (Leave was granted to proceed against Nebax, which had gone into liquidation.) On 24 March 2015 Kunc J declared that the description of the Principal in the Undertakings meant the Corporation. This was after finding that a reasonable business person would have understood that the beneficiary of the Undertakings was the entity with which Nebax had made the construction contract, and that it would be absurd for the misdescription to cause the Undertakings to be ineffective. Kunc J then ordered the ANZ Bank to pay the Corporation $146,965.06 plus costs. His Honour also declared that the ANZ Bank was entitled to indemnity from Nebax and that the Guarantors were liable to the ANZ Bank under various surety and guarantee arrangements. Kunc J found it unnecessary to order that the Undertakings be rectified by correcting the description of the Corporation in each of them.

The Guarantors appealed, whereupon the Corporation and the ANZ Bank each cross-appealed. On 18 December 2015 the Court of Appeal (Bathurst CJ, Ward JA & Emmett AJA) unanimously dismissed the appeal and both cross-appeals. Their Honours held that Kunc J, in construing the Undertakings, had not erred by considering the construction contract insofar as identifying its parties. This was because the construction contract and its parties were referred to in the Undertakings, which were to be construed so as to give them the effect they were clearly intended to have. The Court of Appeal held that such an approach did not

violate either the principle of autonomy, which ought not be applied with unyielding exactitude, or the principle of strict compliance, which was a principle of performance rather than a principle of construing documents. Their Honours found it unnecessary to order rectification of the Undertakings because, properly construed, they were addressed to the Corporation.

The grounds of appeal include:

- The Court of Appeal erred in finding that the misdescription of the beneficiary in the two bank guarantees issued by the ANZ Bank, at the request of Nebax, did not entitle the issuing bank to refuse to payout on the bank guarantee to the Corporation whose name was similar to but materially different from the named beneficiary in the bank guarantee.

- The Court of Appeal erred by finding that the "documentary discrepancy" present in the two subject bank guarantees did not affect the "principle of strict compliance" because that was a principle of performance only that applied only after the instruments were properly construed.

The Corporation has filed a notice of cross-appeal, the ground in which is:

- The Court of Appeal erred in not ordering rectification of the Undertakings.

The ANZ Bank has also filed a notice of cross-appeal, the grounds in which include:

- If the Court finds that the Court of Appeal erred as alleged in the notice of appeal filed on 19 May 2016 and does not find that the bank guarantees the subject of this appeal are ineffective to create an obligation on the part of the ANZ Bank, the Court of Appeal erred:

    a) in failing to give judgment for and make orders in favour of the ANZ Bank against the appellants on the ANZ Bank's cross-appeal pursuant to the admission of liability made by the appellants in the agreement between the ANZ Bank and the appellants reached during the hearing at first instance on 6 February 2015 ("the ANZ/Appellants' Agreement") and communicated to the Court at first instance on that date;

    b) in failing to give judgment for and make orders in favour of the ANZ Bank against the appellants on the ANZ Bank's cross-appeal to give effect to the ANZ/Appellants' Agreement under s 73 of the *Civil Procedure Act* 2005 (NSW);

    c) in failing to give judgment for and make orders in favour of the ANZ Bank against the appellants on the ANZ Bank's cross-appeal to give effect to the ANZ/Appellants' Agreement on the basis that it constituted accord and satisfaction.

**PRINCE ALFRED COLLEGE INCORPORATED v ADC (A20/2016)**

Court appealed from: Full Court of the Supreme Court of South Australia [2015] SASCFC 161

Date of judgment: 10 November 2015

Date special leave granted: 15 April 2016

The respondent was enrolled as a boarder in the boarding house of the appellant school in 1962, when aged 12 years. He was sexually assaulted on at least twenty occasions in 1962 by a boarding house master (Bain), who was later convicted for indecent assault in relation to his abuse of the respondent and other former boarders. Prior to being employed by the respondent, Bain had been convicted for gross indecency and he was suspected to have engaged in indecent behaviour towards students at another school that had employed him. There was little evidence as to what, if any, enquiries about Bain's suitability were undertaken by the appellant prior to employing him, or what could have been discovered had proper enquiries been undertaken.

Bain lived in the boarding house and the evidence established that he was the only housemaster regularly rostered to supervise the junior boarders during their bed time routine. He told stories to the juniors in their dormitory after "lights out", and did so while sitting on the respondent's bed. It was in this context that Bain began to sexually abuse the respondent.

Upon learning of the abuse, the appellant dismissed Bain, but did not at that time report the matter to police. The abuse caused the respondent to develop a post-traumatic stress disorder in the early 1980s, which in turn resulted in alcoholism, a breakdown in relationships, an inability to work and self-harming. The initial prognosis for the respondent was positive and he was expected to recover. In the 1990s the respondent received financial assistance from the appellant and reached a settlement with Bain. The appellant did not at that time undertake an investigation of what took place in the 1960s or preserve relevant records. A significant body of evidence has been lost since that time and some potential witnesses have died. In 2007, the respondent received medical advice that he would likely never recover from his post-traumatic stress disorder.

In 2008, the respondent commenced proceedings against the appellant in the Supreme Court of South Australia. The trial Judge (Vanstone J) found the appellant was neither vicariously liable for Bain's abuse of the respondent, nor directly negligent, and, in any event, her Honour would have declined to extend the time for the respondent to bring proceedings.

The respondent's appeal to the Full Court (Kourakis CJ, Gray and Peek JJ) was successful on the ground that the appellant was vicariously liable for Bain's abuse. The Court found that the trial Judge had erred in failing to find that Bain had at least ostensible authority to supervise and discipline the boarders and that this included supervision of showering and other preparations for bed and telling stories to the boarders to settle them into sleep. The power or authority which Bain used to accomplish his criminal purpose could be said to have been conferred by the enterprise of running a school and to be characteristic of that type of enterprise in the community. Accordingly, it could be seen that the

appellant's enterprise model of trust rather than supervision materially increased the risk of sexual assault and hence the harm that eventuated.

Bain's practice of inviting groups of boys to his room to watch television established that Bain, under cover of his (at least ostensible) authority, "groomed" the respondent in such a way as to make him vulnerable to sexual exploitation. This process took place within, and was made possible by, a disciplinary power structure that was an inseparable part of the functioning of the business of running the boarding school. Having regard to the cumulative effect of these matters, the Court considered that vicarious liability was established.

The Full Court also allowed the appeal against the trial Judge's exercise of discretion to refuse an extension of time within which to bring the proceedings. The Court considered that the trial Judge's erroneously narrow circumscription of the scope of Bain's duties affected the weight given to the prejudice suffered by the respondent and therefore vitiated the exercise of the Judge's discretion. The receipt of a medical report in 2007 which gave a bleak prognosis was a material fact ascertained by the respondent in the 12 months before bringing his claim. That enlivened a discretion to extend the time in which to bring the action pursuant to s 48 of the *Limitation of Actions Act* 1936 (SA).

The grounds of appeal are:

- The Full Court erred in finding that the school was vicariously liable for the unauthorised sexual molestation of the respondent by an assistant boarding housemaster during 1962;

- The Full Court erred in overturning the exercise of discretion by the Honourable Justice Vanstone who had refused to extend the time in which the respondent might commence proceedings against the school pursuant to s 48 of the *Limitation of Actions Act* (SA) 1936.

The respondent has filed a Notice of Contention which submits that the appellant should be liable on the basis that the sexual abuse by its employee breached its non-delegable duty of care to the respondent.