SHORT PARTICULARS OF CASES
APPEALS

APRIL 2018

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THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v THOMAS (B60/2017)
THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v MARTIN ANDREW PTY LTD (B61/2017)
THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v THOMAS NOMINEES PTY LTD (B62/2017)
THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v THOMAS (B63/2017)

Court appealed from: Full Court of the Federal Court of Australia [2017] FCAFC 57

Date of judgment: 12 April 2017

Special leave granted: 20 October 2017

Thomas Nominees Pty Ltd ("TNPL") was the trustee of a trust of which Mr Martin Thomas and the company Martin Andrew Pty Ltd ("MAPL") were beneficiaries. Mr Thomas and his mother were the directors and shareholders of TNPL, while Mr Thomas was the sole director and shareholder of MAPL.

In the income years ending 30 June 2006, 2007, 2008 and 2009, TNPL's income included franked dividends. In each of those years, TNPL made two resolutions that purported to apply the trust's net income in certain ways for the benefit of Mr Thomas and MAPL (collectively, "the Resolutions"). An assumption underlying the Resolutions was that the taxation benefits of franking credits could be treated as a category of income separately (severally and disproportionately) from dividend income in any manner TNPL might determine. Income tax returns lodged for the trust included franking credit sums ostensibly distributed (by the Resolutions) to Mr Thomas and to MAPL. For the 2008 income year, for example, most of the net income of $142,651 was distributed to MAPL and $50 was distributed to Mr Thomas, while franking credits were distributed in the amounts of $42,780 to MAPL and $1,030,839 to Mr Thomas.

Initial assessments for tax issued by the appellant ("the Commissioner") led to Mr Thomas receiving substantial refunds on account of offsets for franking credits. Later however the Commissioner commenced an audit, after doubting that the Resolutions had properly distributed all of the trust's net income to the beneficiaries (Mr Thomas and MAPL) with a corresponding proportionate allocation of franking credit benefits.

TNPL then commenced Supreme Court proceedings under s 96 of the *Trusts Act* 1973 (Qld) for declarations as to the proper interpretation (and, if necessary, rectification) of the Resolutions. (Both Mr Thomas and MAPL were inactive parties and the Commissioner declined to seek to be joined as a party to those proceedings.) On 11 November 2010 Justice Applegarth held that, in view of the trust deed and relevant taxation legislation, the Resolutions enabled TNPL to treat the franking credits as part of the trust's net income and to distribute them to the beneficiaries in the manner that it did. Declarations made by Justice Applegarth the next day included, at paragraph 1(b) ("the Declaration"), that the Resolutions were effective to allocate the franking credits and the benefits thereof to both Mr Thomas and MAPL and to confer on those

beneficiaries corresponding vested and indefeasible interests. The Declaration also stated that the Resolutions were effective in distributing all of the trust's distributable income.

The Commissioner later issued amended notices of assessment to the Taxpayers. After objections to those assessments were disallowed by the Commissioner, the Taxpayers appealed to the Federal Court. Justice Greenwood (in determining four appeals involving various issues) held that the amended assessments should stand. His Honour held that the allocation of franking credits (and the subsequent use of them for tax offsets) independently of the distribution of corresponding franked dividends was impermissible, as a nexus between such allocation and distribution was mandated by s 207-55 of the *Income Tax Assessment Act* 1997 (Cth) ("the Act"). This was after his Honour had held that the Declaration and underlying findings made by Justice Applegarth did not bind the Commissioner in relation to the operation of Commonwealth taxation law.

The Full Court of the Federal Court (Dowsett, Perram and Pagone JJ) unanimously allowed an appeal by Mr Thomas and an appeal by MAPL (the latter in relation to one income year) and dismissed two appeals by the Commissioner. The Full Court held that, although the Commissioner was not bound by Justice Applegarth's interpretation of Div 207 of the Act, the rights of the beneficiaries as against the Commissioner under Div 207 depended wholly upon the rights as between the trustee and the beneficiaries by whatever had been achieved by the Resolutions. Their Honours held that the Declaration had conclusively determined the latter rights and therefore also the former. The Full Court then set aside the Commissioner's decisions on Mr Thomas' and MAPL's objections and ordered the Commissioner to redetermine the trust's net income.

In each appeal, the grounds of appeal include:

- The Full Court erred in finding that it was bound by the decision of this Court in *Executor Trustee And Agency Company of South Australia Limited v The Deputy Federal Commissioner of Taxes (South Australia)* (1939) 62 CLR 545 to conclude that paragraph 1(b)(iii) of declarations made by the Queensland Supreme Court in *Thomas Nominees Pty Ltd v Thomas* (2010) 80 ATR 828 determined conclusively as against the Commissioner the existence of the alleged rights referred to in the declarations.

In each appeal, the respondent has filed a notice of contention and in B60/2017 Mr Thomas has filed a notice of cross-appeal. In B60/2017 and B61/2017 the respondents (being Mr Thomas and MAPL respectively) have each filed a notice of a constitutional matter. The Attorneys-General of the Commonwealth and the State of Queensland are intervening in both B60/2017 and B61/2017.

ANCIENT ORDER OF FORESTERS IN VICTORIA FRIENDLY SOCIETY LIMITED v LIFEPLAN AUSTRALIA FRIENDLY SOCIETY LIMITED & ANOR (A37/2017)

Court appealed from: Full Court of the Federal Court of Australia [2017] FCAFC 74

Date of judgment: 12 May 2017

Date special leave granted: 20 October 2017

The appellant ('Foresters') and first respondent ('Lifeplan') were both friendly societies which provided investment products, including funeral bonds and pre-paid funeral plan contracts. In 2010 two senior employees of Lifeplan (Woff and Corby) left Lifeplan and became employees of Foresters. In proceedings brought in the Federal Court in 2012, Lifeplan sought an account of profits on the grounds that Woff and Corby were in breach of fiduciary duties, duties of confidence and contractual duties owed to it, and that Foresters knowingly assisted those breaches, and induced them to breach their contracts of employment.

The primary Judge (Besanko J) found a number of breaches of duty by Woff and Corby. His Honour found, inter alia, that while still employed by Lifeplan, Woff used confidential Lifeplan documents containing detailed business and financial intelligence of Lifeplan to prepare a "business concept plan" and a presentation which he and Corby made to the board of Foresters; whilst employees of Lifeplan, Woff and Corby actively solicited the business of other funeral directors on behalf of themselves and Foresters; that they took and utilised for their new business a database of hundreds of funeral directors' contact details maintained by Lifeplan; and that they copied Lifeplan's disclosure documents, contracts, marketing and administrative documents for their new business with Foresters.

Besanko J further found that Foresters knowingly assisted Woff and Corby to breach their fiduciary duties to Lifeplan. He concluded, however, that although Foresters was involved in the breaches by the two employees and based its decision to employ them to develop the particular segment of business upon confidential information provided to it in breach of fiduciary duty, there was no causal connection between those breaches of fiduciary duty and the profits of the segment of business that was developed by Woff and Corby for Foresters.

Lifeplan's appeal to the Full Court (Allsop CJ, Middleton & Davies JJ) was successful. The Court found that without the breaches of duty in which Foresters was knowingly involved, without Woff and Corby taking advantage of their positions and of the confidential information taken from their employer, Foresters would not have made the profits it did from the business written in the venture with Woff and Corby. Their Honours held that to conclude that such is a sufficient causal connection to found a liability to account for profits of the business would not be to extend the causal relationship beyond the expressions of profits actually made by reason of the breaches; rather, it would be to fashion the remedy in a way that, in terms of a causal attribution, would conform to and enforce, and not undermine the strictness of, the duty by fashioning the remedy to fit the nature of the case and the particular facts. Further, far from being an

attenuating consideration, the satisfaction of a but-for test could be seen as a strong foundation for any causal analysis.

The grounds of the appeal include:

- The Full Court erred in concluding that there was sufficient causal connection between the profits the subject of the account of profits ordered against Foresters and the conduct that constituted its knowing participation in equity in breaches of fiduciary duty and confidence of Messrs Woff and Corby, and being a person involved in the contravention of ss 181, 182 and 183 of the *Corporations Act* 2001 (Cth) by Woff pursuant to s 1317H, because the Full Court was satisfied that but for that unlawful conduct by Foresters the occasion for the making of the profit would not have arisen, notwithstanding that the conduct was not the real or effective cause of any profit derived by Foresters.

The respondent has filed a notice of cross–appeal, the grounds of which include:

- The Full Court erred in fact and in law in holding that it was inequitable or inappropriate to order the appellant to account for the entire capital value of the business it established.

GOVIER v THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (Q) (B51/2017)

Court appealed from: Queensland Court of Appeal
[2017] QCA 12

Date of judgment: 10 February 2017

Special leave granted: 15 September 2017

Ms Toni Govier was a disability care worker employed by the Respondent ("the Employer"). She was responsible (along with a colleague, MD) with the care of a disabled client, Tara. Ms Govier claimed that MD had physically attacked her, requiring hospitalisation, during a shift crossover at Tara's home on 3 December 2009.

Ms Govier sued the Employer for damages for psychological injuries, alleging that it had breached its duty of care to provide her with a safe system of work. This however was set against a background of bad blood between Ms Govier and MD. Ms Govier also claimed that the Employer had breached its duty of care in the manner in which it investigated the incident. That investigation took the form of the Employer sending her two letters ("the investigative letters").

The first of those letters was delivered to Ms Govier in hospital on the day of the incident. It requested her to attend an interview the following day to discuss the matter. Ms Govier, who was covered by a medical certificate, did not attend that interview. On Friday 18 December 2009 Ms Govier received a second letter. That letter shifted the blame for the incident to Ms Govier and it also made significant criticisms of her conduct.

On 18 March 2016 Judge Andrews held that it was not reasonably foreseeable that the contact between Ms Govier and MD on 3 December 2009 was likely to result in Ms Govier sustaining any recognised psychiatric illness. With respect to the sending of the investigative letters however, his Honour found that the timing, manner and content of those letters had caused Ms Govier a sense of betrayal and had foreseeably aggravated her psychiatric injury. Despite this, Judge Andrews still accepted the Employer's argument, based upon *State of New South Wales v Paige* (2002) 60 NSWLR 371 ("Paige") that that proposed extension of the duty of care (into the realm of investigations of workplace incidents) should not be recognised at law.

On 10 February 2017 the Court of Appeal (Fraser & Gotterson JJA; North J) dismissed Ms Govier's subsequent appeal. In doing so, their Honours unanimously endorsed Judge Andrews' finding that it was not reasonably foreseeable that the contact between Ms Govier and MD on 3 December 2009 was likely to result in Ms Govier sustaining any recognised psychiatric illness. Their Honours also endorsed Judge Andrews' conclusion (concerning the investigative letters) on whether a new category of duty of care should be recognised. They concluded that, simply because an injury suffered by an employee was a foreseeable consequence of a lack of reasonable care by an employer, does not of itself justify the creation of a new category of duty of care.

The ground of appeal is:

- The Court of Appeal erred in deciding, in conformity with the decision of the Court of Appeal of New South Wales in Paige that the Employer did not owe Ms Govier a duty of care not to send her the investigative letters.

LATZ v AMACA PTY LIMITED (A7/2018)
AMACA PTY LIMITED v LATZ (A8/2018)

Court appealed from: Full Court of the Supreme Court of South Australia [2017] SASCFC 145

Date of judgment: 30 October 2017

Date special leave granted: 16 February 2018

Mr Latz developed malignant mesothelioma in 2016 as a result of inhaling asbestos dust and fibre in 1976 when cutting and installing asbestos fencing manufactured by Amaca Pty Limited ("Amaca"). He sued Amaca in the District Court of South Australia for damages for negligence. The trial Judge (Judge Gilchrist) found that Amaca was negligent in failing to warn of the dangers of asbestos. He assessed damages at $1,062,000 which included $500,000 for future economic loss, for the loss of an employment-based superannuation pension and of the Centrelink age pension that would have been payable to Mr Latz were he not destined to die prematurely as a result of the mesothelioma. In calculating the present value of the future loss of the superannuation pension, the Judge made no deduction on account of the two thirds reversionary pension that would be payable to Mr Latz's de facto spouse after his death.

In its appeal to the Full Court of the Supreme Court (Blue & Hinton JJ, Stanley J dissenting) against the award of $500,000 for future economic loss, Amaca contended that loss of a pension was not a recoverable head of loss because it could not be brought within one of the types of loss identified by this Court in *CSR Ltd v Eddy* (2005) 226 CLR 1. Those types of loss are: non-pecuniary losses such as pain and suffering; loss of earning capacity both before the trial and after it; and actual financial loss, such as medical expenses. Amaca further contended, in the alternative, that the Judge should have made a deduction on account of the reversionary superannuation pension.

The majority of the Court found that the trial Judge did not err in awarding damages for loss of the pensions. They noted the settled principle governing the assessment of compensatory damages: that the injured party should receive compensation in a sum which will put that party in the same position as he or she would have been in if the tort had not been committed. The majority did not accept that the reasons in *CSR Ltd v Eddy* modified that settled principle in any way, or that the three types of loss identified in that case were intended to be exhaustive.

Even if *CSR Ltd v Eddy* did constrain damages recoverable for personal injury to the three identified types, the majority held that the loss of pension entitlements was an actual loss and thus fell within the third category. By reason of Amaca's negligence, Mr Latz would be denied the pensions that he would otherwise receive for the remainder of his life. Subject to any statutory indication to the contrary, the denial of the pensions due to the negligence of Amaca amounted to an actual financial loss that sounded in damages.

The majority held, however, that the trial Judge erred in not deducting the net present value of the reversionary pension. They noted that the Judge relied on

the principle referred to by this Court in *Redding v Lee* (1983) 151 CLR 117 that damages awarded against a tortfeasor for causing disability to a plaintiff are not reduced by the proceeds of an insurance policy insuring the plaintiff against disability. The present case could be distinguished, however, because it was the loss of the very pension payable by the Fund to Mr Latz that was the subject of his claim for economic loss. It could not have been the intention that Mr Latz could vicariously enjoy the pension payable by the Fund at the same time and in the same amount as damages payable by Amaca by reason of his loss of that very pension.

Stanley J (dissenting) considered that the decision in *CSR v Eddy* was an authoritative and exhaustive statement of the heads of damages for personal injury in Australian law, and in the absence of High Court authority supporting the existence of a new head of damage, it was not open to the Full Court to uphold the Judge's award of $500,000. His Honour further held that the trial Judge did not err in not deducting the net present value of the reversionary pension. He noted that the pension was not payable to Mr Latz but to his partner. He found that the authorities relied on by Amaca were concerned with whether a statutory benefit received by a plaintiff should be deducted from the plaintiff's own claim for damages at common law, and it would be erroneous to take into account any benefit or loss to a third party, consequent upon Mr Latz's death, in assessing his own losses in an action by him brought and concluded in his lifetime.

The ground of the appeal in A7/2018 is:

- The Full Court erred in deducting from the appellant's damages for loss of superannuation payments, a benefit payable upon his death to his partner.

The grounds of the appeal in A8/2018 include:

- The Full Court erred in assessing damages for future economic loss during the "lost years".

UBS AG v SCOTT FRANCIS TYNE AS TRUSTEE OF THE ARGOT TRUST (B54/2017)

Court appealed from: Full Court of the Federal Court of Australia [2017] FCAFC 5

Date of judgment: 20 January 2017

Special leave granted: 15 September 2017

This dispute has been litigated (in broadly similar terms) before the Federal Court of Australia ("the Federal Court proceedings"), the High Court of Singapore ("the Singapore proceedings") and the New South Wales Supreme Court ("the NSW proceedings"). It concerns allegedly negligent advice given by UBS AG ("UBS") in 2007 and 2008 to Mr Scott Tyne, the sole trustee of the Argot Trust. That advice allegedly caused the Argot Trust losses, while Ms Clare Marks (Mr Tyne's wife) also claimed to have suffered losses as a guarantor.

Ms Marks was never a party to either the Singapore or the NSW proceedings, while the previous trustee of the Argot Trust, ACN 074 971 109, was a party to both the Singapore and NSW proceedings, but not the Federal Court proceedings. The Singapore litigation was ultimately decided against the Tyne interests, while the New South Wales litigation was permanently stayed and never decided on its merits.

On 8 January 2016 Justice Greenwood held that the Federal Court proceedings were to be permanently stayed as an abuse of process. On 20 January 2017 however, a majority of the Full Federal Court (Jagot & Farrell JJ; Dowsett J dissenting) allowed the Tyne interests' appeal. The majority held that an original plaintiff (or someone closely related, such as Ms Marks) *could* relitigate the same issues against the same parties, given the particular litigation history of this dispute. Furthermore, they could do so without causing either unfairness to those parties or by bringing the administration of justice into disrepute.

Justice Dowsett however found that the combined effect of delay, the increase in costs, vexation and the waste of public resources associated with the duplication of proceedings may be sufficient to give rise to manifest unfairness to UBS or to bring the administration of justice into disrepute. This was having regard to the public interest in the finality of litigation and the overarching purpose stated in section 37M of the *Federal Court of Australia Act* 1976 (Cth).

The grounds of appeal include:

- The majority of the Full Court (Jagot & Farrell JJ) erred at [107]-[108] in failing to recognise, or to take account of, (i) the manifest unfairness to UBS and (ii) the effect of the proceedings in bringing the administration of justice into disrepute, which were constituted by those matters identified by Dowsett J at [23], [28] and [32], namely the significant delay in resolution of the dispute for a period of three or more years, the additional costs incurred or to be incurred by UBS, the vexation of UBS and the waste of public resources associated with the duplication of proceedings.

On 15 December 2017 Justice Bell made an order, by consent, removing Ms Marks (the then Second Respondent) as a party to this appeal

THE QUEEN v FALZON (M161/2017)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2017] VSCA 74

Date of judgment: 5 April 2017

Date special leave granted: 20 October 2017

On 17 December 2013, in the course of executing search warrants, police discovered cannabis plants growing at two properties in Mansfield Avenue, Sunshine North, and a property in Bryson Court, Sydenham. The two properties at Mansfield Avenue were owned by an associate of the respondent, and police surveillance from July 2013 disclosed the respondent's occasional attendance at the property. The Sydenham property had been purchased jointly by the respondent and a co-offender in early 2013.

Also on 17 December 2013, police executed a search warrant at the respondent's home in Kendall Street, Essendon. There were a number of items seized from the home, including $120,800 in cash. Over objection, the prosecution was permitted to lead evidence of the cash. The prosecutor relied on a line of cases that suggest that possession of cash may be probative of an allegation that possession of a drug is for the purposes of sale. The trial judge (Judge Smith) found the evidence was admissible in the same way as the finding of other indicia of trafficking is admissible because it was capable of having probative value when looked at alongside other evidence, including that of the organised and systematic cultivation of significant quantities of cannabis and the indicia of trafficking. His Honour did not consider that the probative value of such evidence was outweighed by the danger of unfair prejudice to the accused.

On 27 May 2016, a jury found the respondent guilty of cultivating a commercial quantity of cannabis at the Mansfield Avenue premises and trafficking cannabis at the Sydenham property, in a quantity less than a commercial quantity.

In his appeal to the Court of Appeal (Priest, Beach JJA, Whelan JA dissenting), the respondent submitted, inter alia, that a substantial miscarriage of justice occurred as a result of the admission of the evidence of the cash.

The majority of the Court noted that, ordinarily, it is the combination of the finding of a sum of cash in proximity to other incriminating articles which will go to support a guilty inference as to the origins of the cash or a person's reasons for its possession. In the present case, however, there was no attempt by the prosecution to show a relationship between the sum of cash found at the respondent's home and the trafficking at the Sunshine North or Sydenham premises. The finding of the cash was suspicious, but nothing more.

The majority considered that, insofar as the evidence of the possession of the cash was admitted on the basis that it was evidence of past trafficking, it was irrelevant and therefore inadmissible. The cultivation and trafficking of which the respondent was convicted related to Sunshine North and Sydenham respectively on one day. And with respect to the trafficking, the prosecution eschewed reliance on a *Giretti* charge, or on a case that involved an allegation of an ongoing drug trafficking business. Thus, as a matter of logic, it was impossible to

say that the evidence of cash at the respondent's home — from which it was not said that he conducted any ongoing illicit business — could have gone in proof of his having possession of cannabis for sale at Sunshine North or Sydenham on a single day in December 2013.

The majority concluded that if they were wrong in their primary conclusion, and the evidence might be seen to have some probative value, any such probative value was low, in circumstances where the risk of the misuse of the evidence was undoubtedly high. Thus, the probative value of the evidence was outweighed by the risk of unfair prejudice.

Whelan JA (dissenting) considered that the cash found at Kendall Street was one fact, properly to be considered by the jury together with the other evidence (the nature of the facilities, the quantities, the surveillance evidence, the other items found at Kendall Street, and what the respondent had said in his record of interview), in determining whether the respondent was, as at 17 December 2013, conducting a drug business. If they concluded he was, that rendered it more probable that his purpose in being in possession on 17 December was to sell, and it rebutted his assertion that his possession was for his own use.

The ground of appeal is:

- The Court of Appeal erred by concluding that a substantial miscarriage of justice occurred as a result of the learned trial judge having erred in admitting evidence at trial of $120,800.00 in cash that was found secreted at the respondent's home at Essendon.