SHORT PARTICULARS OF CASES

FEBRUARY 2019

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CARTER HOLT HARVEY WOOD PRODUCTS AUSTRALIA PTY LTD v.
THE COMMONWEALTH OF AUSTRALIA & ORS
(M137/2018)

Court appealed from: Supreme Court of Victoria (Court of Appeal)
[2018] VSCA 41

Date of judgment: 28 February 2018

Special leave granted: 17 August 2018

Amerind Pty Ltd ("Amerind") carried on business solely as trustee of the Panel Veneer Processes Trading Trust, manufacturing and distributing decorative and architectural finishes. Amerind had a number of facilities and accounts with the Bendigo and Adelaide Bank Limited ('the Bank"), secured by a range of securities.

On 6 March 2014, the Bank sent a notice to Amerind demanding repayment of, and terminating, the existing facilities.

On 11 March 2014, the sole director of Amerind resolved to appoint three members of the firm of Rogers Reidy, including Brent Morgan as the joint and several administrators to Amerind, ("the administrators") pursuant to s 436A of the *Corporations Act 2001* (Cth) ("the Act"). On the same date the Bank appointed Matthew Byrnes and Andrew Hewitt as receivers and managers to Amerind ("the receivers"). On 13 August 2014 Amerind's creditors resolved that the company be wound up, and the administrators were appointed as liquidators.

The receivers traded on after their appointment and realised the assets Amerind held on trust. The Bank recovered the sum of approximately $20 million it was owed. After allowance for the receivers' likely remuneration, the net surplus from the receivers' realisation of Amerind's assets said to be available for distribution to creditors was $1,619,018 ("the surplus").

The receivers applied to the Supreme Court of Victoria for directions concerning the distribution of the receivership surplus and on central issues arising in the receivership. Pursuant to orders of Sifris J dated 24 December 2015 a number of entities were given leave to appear as interested parties having filed Appearances indicating their intention to be heard in the proceeding regarding a possible claim on the surplus.

These entities included: (a) the Commonwealth Department of Employment ("the Commonwealth") which had paid accrued wages and entitlements to the former employees of the business and now sought to recover those moneys from the surplus as a priority under ss 433 and 556 of the Act; (b) Carter Holt Harvey Wood Products Pty Ltd ("CHH") who claimed to be a secured creditor of Amerind behind the Bank, entitled to have priority to the surplus over the Commonwealth (whom it argued should only be able to claim on the moneys available to the unsecured creditors); and (c) the liquidator Brent Morgan (the other two liquidators having resigned) who also had an interest in the surplus.

The first issue before the trial judge was whether the receivers were justified in proceeding on the basis that the surplus was properly characterised as property

held on trust (he held that they were), and if they were, whether the priority regime in ss 433(3), 556 and 560 of the Act applied to the surplus. Those sections give priority, in a liquidation of a company, to the payment of certain employee entitlements from the property of the company. In particular, s 433 provides that a receiver appointed on behalf of a debenture holder that is secured by a 'circulating security interest" (previously known as a 'floating charge') must pay out of the property coming into his hands debts in accordance with the statutory priorities in s 556 of the Act.

The receivers and the Commonwealth argued that the priority regime should apply as the various assets constituting the surplus were, at the date of the receivers' appointment, circulating assets of the company. If the company had been conducting business in own right, the employees would have been priority creditors under ss 433(3) and 561 of the Act. The Commonwealth submitted that the result should not be different when the business in question was conducted by the company as a trustee, and the company had a right of indemnity out of the assets of the trust to pay the employees. The trial judge noted that there were conflicting authorities on the point and held that the better view was that the priority regime did not apply to trust property. As a consequence the Commonwealth did not have priority.

The Commonwealth sought leave to appeal from the trial judge's orders, contending that the surplus was not trust property and that it should be applied in accordance with the priority regime. CHH contended that the Commonwealth was not entitled to priority because s 433 did not apply. The Court of Appeal noted that the issue of how a corporate trustee's right of indemnity (out of the trust's assets for the liabilities it incurred as trustee) is to be dealt with upon a winding up, or where s 433 applies, is one of long-standing controversy. The five members of the Court of Appeal unanimously granted leave to appeal and allowed the appeal. The Court made declarations, inter alia, that the receivers were justified in proceeding on the basis that that the priority regime in ss 433(3), 556 and 561 of the Act applied to the surplus insofar as those assets were, at the date of the receivers' appointment, circulating assets of Amerind within the meaning of s 340 of the *Personal Property Securities Act 2009* (Cth) ("the PPSA").

CHH has appealed to the High Court. The first respondent is the Commonwealth; the second respondents are Matthew Byrnes and Andrew Hewitt in their capacity as the receivers and managers of Amerind. The third respondent is Brent Morgan who, in his capacity as the liquidator of Amerind, has filed a Submitting Appearance.

The grounds of appeal include:

- That the Court of Appeal erred in holding that the funds held by the receivers of Amerind Pty Ltd (receivers and managers appointed) (in liquidation) in its capacity as trustee of the Panel Veneer Processes Trading Trust, are proceeds of the company's right of indemnity as trustee, and therefore available for distribution to the company's creditors pursuant to s 433 of the *Corporations Act 2001* (Cth).

- That the Court of Appeal erred in holding that the company's right of indemnity was "property comprised in or subject to a circulating security interest" within the meaning of s 433(2) of the Act.

FRUGTNIET v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (M136/2018)

Court appealed from: Full Court of the Federal Court of Australia
[2017] FCAFC 162

Date of judgment: 12 October 2017

Special leave granted: 17 August 2018

The Appellant was born in Sri Lanka and spent his early years in the United Kingdom. He migrated to Australia in 1990 and became an Australian citizen.

The Appellant graduated from Deakin University with a Bachelor of Laws (2001) and a Master of Laws (2003). He unsuccessfully applied for admission to practise as a barrister and solicitor to the Board of Examiners in Victoria in 2001 and again in 2004. He commenced working as a finance broker in 2004 via Unique Mortgage Services Pty Ltd ("UMS"), a company of which he was the sole director and shareholder. He also variously conducted work, via UMS, as a migration agent, as a tax agent and as a conveyancing agent.

In November 2010, the Appellant caused UMS to lodge an application for an Australian credit licence with the Respondent, the Australian Securities and Investment Commission ('ASIC'). The Appellant declared in the application form that all information was complete and accurate, including questions about his status as a fit and proper person. The licence was granted, effective from 24 December 2010.

The Appellant did not disclose in UMS' application that he had a conviction from 1978 for dishonesty offences in the United Kingdom for which he had served two years in prison. Nor did he disclose that he had been found guilty in 1997 of obtaining property by deception by the Broadmeadows Magistrates Court of Victoria although no conviction was recorded. He claimed that he did not make any false statements in the application, which did not expressly require him to disclose those matters.

From the mid 1990's the Appellant had also been involved in a number of investigations where questions had been raised about his conduct in providing information to various licensing and regulatory authorities. In 1999 he had failed to disclose pending charges against him for theft and attempted theft when he applied for registration as a migration agent (he was subsequently acquitted of those charges in March 2000). In 2004 he had conceded that he was unable to satisfy the Victorian Board of Examiners that he met the requirements for admission to legal practice and that he had failed to make full disclosure under State legislation.

In April 2011 the Victorian Civil and Administrative Tribunal (VCAT) granted an application by the Law Institute of Victoria to declare the Appellant to be, for three years, a disqualified person under the *Legal Profession Act 2004* (Vic). As a consequence his conveyancing licence in Victoria was cancelled by the Business Licensing Authority and his registration as a tax agent was terminated by the Tax Practitioners Board. Later, his registration as a migration agent was cancelled.

On 26 June 2014 a delegate of the Respondent, ASIC, made a permanent banning order against the Appellant on the basis that the Appellant was not a 'fit and proper person' to engage in credit activities pursuant to s 80(1)(f) of the *National Consumer Credit Protection Act 2009* (Cth) ("the NCCP Act").

In making this decision, the delegate was precluded from taking into account spent convictions as defined by s 85ZM(2) of the *Crimes Act 1914* (Cth) ('the Crimes Act').

It is common ground that the Appellant's UK and Broadmeadows convictions are spent convictions under s 85ZM(2) of the Crimes Act.

Division 3 of Part VIIC of the Crimes Act outlines the effect of the right of non-disclosure of spent convictions. Subject to the exclusions contained in Division 6, s 85ZW provides that a Commonwealth or State authority must not take into account a spent conviction when making a decision.

Division 6 of Part VIIC contains S 85ZZH(c) which provides that 'Division 3 does not apply in relation to … a court or tribunal established under a Commonwealth law, a State law or a Territory law, for the purpose of making a decision, including a decision in relation to sentencing.'

Section 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ('the AAT Act') provides that the Administrative Appeals Tribunal ('the Tribunal') may 'exercise all of the powers and discretions conferred upon the original decision-maker.'

On 29 July 2014, the Appellant applied to the Tribunal for a review of the delegate's decision. On 6 March 2015, the AAT affirmed the delegate's decision to make a permanent banning order against the Appellant. In its reasons for decision, the AAT made reference to the spent convictions.

The Appellant's appeal to the Federal Court of Australia was dismissed. His subsequent appeal to the Full Court of the Federal Court of Australia was also dismissed. The Appellant appealed to the High Court of Australia. On 17 August 2018 he was granted special leave to appeal from that part of the judgment of the Full Court which relates to the spent convictions.

The Appellant argues that the Tribunal 'stands in the shoes' of the original decision- maker, and as the delegate was precluded from taking into account the spent convictions, the Tribunal was similarly precluded from doing so. The Appellant submits that not to adopt this approach would produce an anomalous result.

The Respondent argues that the reasoning of the Full Court is correct, and that s 43(1) of the AAT Act and s 85ZZH(c) of the Crimes Act can operate concurrently. The Respondent contends that although the function of the Tribunal is to 'stand in the shoes' of the original decision-maker, this does not mean that the decision-making power needs to be exercised in the same manner, meaning that the Tribunal is able to take into account information that was not before the original decision-maker.

The ground of appeal is:

- That the Full Court erred in … failing to find that the Administrative Appeals Tribunal erred in having regard to the Appellant's spent convictions within the meaning of Part VIIC of the *Crimes Act 1914* (Cth) when reviewing, under the *Administrative Appeals Act 1975* (Cth), a decision made by the Respondent under section 80 of the *National Consumer Credit Protection Act 2009* (Cth).

The Respondent filed a s 78B Notice of a constitutional matter asserting that this matter involves or may involve a matter arising under the Constitution or its interpretation. None of the Attorneys-General of the States and Territories has intervened in response to that Notice.

VICTORIAN BUILDING AUTHORITY v ANDRIOTIS (M134/2018)

Court appealed from: Full Court of the Federal Court of Australia
[2018] FCAFC 24

Date of judgment: 21 February 2018

Special leave granted: 17 August 2018

In March of 2015, the Respondent was granted an 'Endorsed Contract Licence–Waterproofing' by New South Wales Fair Trading. When he applied for mutual recognition of that Licence by the relevant authority in Victoria, his application was refused on the basis that he was not of good character.

There exists in Australia a scheme for mutual recognition of occupations across State and Territory borders. The legislative objective of recognising qualifications is to be found in the *Mutual Recognition Act 1992* (Cth) (the Recognition Act'). The Recognition Act was enacted pursuant to s 51 (xxxvii) of the Constitution, namely the power of the Commonwealth legislature "*to make laws for the peace, order and good government of the Commonwealth with respect to… matters referred to the Parliament of the Commonwealth by the …Parliaments of any state or States*", following an intergovernmental agreement of the Commonwealth, States and Territories.

The "principal purpose" of the Recognition Act is found in s 3, that being to promote "the goal of freedom of movement of goods and service providers in a national market in Australia."

Section 17 of the Recognition Act provides that:

> *The mutual recognition principle is that, subject to this Part, a person who is registered in the first State for an occupation is, by this Act, entitled after notifying the local registration authority of the second State for the equivalent occupation:*
> *a) To be registered in the second State for the equivalent occupation; and*
>
> *b) Pending such registration, to carry on the equivalent occupation in the second State.*

Section 20 of the Recognition Act provides that the mutual recognition principle is subject to the exception that it does not affect the operation of laws that regulate the manner of carrying on an occupation in the second State, so long as those laws:

> *a) Apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and*
>
> *b) Are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.*

On 3 June 2015, the Respondent applied to the (then) Building Practitioners Board ('the Board', being the predecessor to the Victorian Building Authority (the 'VBA')) for registration as a 'Domestic Builder Class W – Waterproofing.'

Section 170 of the *Building Act 1993* (Vic) ("the Building Act") provides that:

1) *The Building Practitioners Board must register an applicant in each category or class applied for if it is satisfied that the applicant –*

   a) *has complied with section 169; and*

   b) *either –*

      i) *holds an appropriate prescribed qualification; or*

      ii) *holds a qualification that the Board considers is, either alone or together with any other further certificate, authority, experience or examination equivalent to a prescribed qualification; and*

   c) *is of good character; and*

   d) *has complied with any other condition prescribed for registration in that category or class*

2) *The Building Practitioners Board may refuse to register an applicant if the requirements of subsection (1) are not met.*

On 30 November 2015, the Board informed the Respondent that the Application for registration had been refused under s 170(2) on the ground that he was not of good character, pursuant to s 170(1)(c) of the Building Act.

The Respondent appealed to the Administrative Appeals Tribunal ('the Tribunal'), who affirmed the decision not to grant the Respondent registration on the basis that he was not of good character. The Tribunal relied on the fact that the Respondent had made a number of false statements during the course of the hearing as well as his lack of 'respect for the law or for technical and professional codes,' as the bases for this finding. The Tribunal held that it was open to make this finding, as the qualification of good character under s 170(1)(c) was a law that regulated the 'manner of carrying on an occupation' and as such was an exemption from the entitlement to mandatory mutual recognition under s 17(1) of the Recognition Act.

The Respondent then 'appealed' to the Federal Court of Australia. (The applicant invoked the original jurisdiction of the Federal Court under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) and the Chief Justice of the Federal Court directed it be heard by the Full Court of that court as there were a number of other applications pending in the Federal Court awaiting its outcome. Thereafter the application was treated in effect as an 'appeal' to the Full Court).

The Full Court, constituted by Flick, Bromberg and Rangiah JJ allowed the appeal, finding that the Tribunal erred in concluding that it was entitled to apply the good character qualifications required by s 170(1)(c) of the Building Act and made orders remitting the case to the Tribunal for determination in accordance with the law.

The VBA appealed to the High Court. The Appellant argues that whilst the Commonwealth's Recognition Act provides for registration in a State of persons registered for an occupation in another State, it contains no good character requirement, but leaves room for the operation of some State laws. The Victorian

Building Act required an applicant to satisfy the registration authority, amongst other things, that he or she was "of good character". The Respondent contends that on their proper construction there is no inconsistency between s 17(2) of the Recognition Act and s 170(1)(c) of the Building Act. This is because the latter is a law based on the possession of some qualification relating to the applicant's fitness to carry on the occupation. Accordingly, it can have no operation in relation to interstate applications for registration via the Recognition Act, although it continues to operate in relation to local applicants for registration under the Building Act itself. It follows that an interstate applicant for registration under the Victorian Act via the Recognition Act must establish different matters from a local applicant; the two statutes are different but parallel paths to the same destination.

The grounds of appeal are:

- That the Full Court erred in holding that s 20(2) of the *Mutual Recognition Act 1992* (Cth) did not permit a local registration authority to refuse to register the Respondent, a person registered as a waterproofing technician in New South Wales, for an equivalent occupation under the *Building Act 1993* (Vic) in circumstances where the authority found the Respondent not to be of good character.

- That the Full Court erred in holding that:

    a. The exception to the mutual recognition principle in s 17(2) of the *Mutual Recognition Act 1992* (Cth) does not qualify the 'entitlement' to be registered under s 20(1);

    b. The 'good character' requirement in s 170(1)(c) of the *Building Act 1933* (Vic) is not a law regulating the 'manner' of carrying out the occupation of building practitioner within the meaning of s 17(2); and

    c. The 'good character' requirement is a law based on 'the attainment or possession of some qualification or experience relating to fitness to carry on the occupation' within the meaning of s 17(2)(b).

The Appellant has filed a Notice of a constitutional matter. None of the Attorneys-General has intervened in response to that Notice.

PLAINTIFF M47/2018 v MINISTER FOR HOME AFFAIRS & ANOR (M47/2018)

Date Special Case referred to the Full Court: 21 November 2018

The Plaintiff has been restrained in immigration detention by the Commonwealth in Australia for almost nine years. He seeks release from that detention. He contends that he is stateless. The Defendants are not satisfied as to the Plaintiff's identity and do not accept that he is stateless. It is common ground that there is currently no country willing to accept him as a national or as a person with a right of entry.

The Plaintiff (then about 20 years of age) arrived in Australia by aeroplane from Belgium in January 2010, travelling on a Norwegian passport in the name of "MB", date of birth 11 October 1990. Shortly after arriving at Melbourne Airport, the Plaintiff destroyed the passport and presented himself to immigration officers as "Ye-Y", a "citizen" of West Sahara. He was detained under s 14 of the *Migration Act 1958* (Cth) ("the Act") as an 'unlawful non-citizen.' At all relevant times since then, he has been detained by officers of the Commonwealth in reliance on ss 189 and 196 of the Act. Section 189(1) provides an officer "must" detain a person where the "officer knows or reasonably suspects that [the] person [is] in the migration zone… [and] is an unlawful non-citizen". Section 196 establishes the duration of the required detention. It provides, in effect, that detention "must continue until removal, deportation, or the grant of a visa".

Before his arrival in Australia in 2010, the Plaintiff lived as an undocumented immigrant in various places in North Africa and Europe and (from about 2004) in Norway pursuant to a temporary residence permit. At the time of his arrival in Australia, the Plaintiff still held that permit. On 23 February 2010, the Plaintiff lodged a protection visa application in the name of "Ya-Y" (as opposed to "Ye-Y"), born on 11 October 1992. In March 2010, the Plaintiff made a written request that he be removed from Australia to Norway, and shortly thereafter withdrew his protection visa application. The Defendants unsuccessfully liaised with the Norwegian authorities to facilitate return of the Plaintiff to Norway. In the event, the Plaintiff was not removed to Norway, his permit having expired on 24 September 2010, and his request to renew the permit having been unsuccessful.
The Plaintiff has lodged two more protection visa applications and a Safe Haven Enterprise ("SHE") application since June 2010. In those and in the course of investigations as to his identity over the last nine years the Plaintiff has made several different and inconsistent claims about his identity, date and place of birth and relatives' whereabouts as well as admissions about multiple occasions on which he travelled on false passports.

The Plaintiff commenced proceedings in the High Court in April 2018 seeking declarations that his continued detention was unlawful and that he was not liable to detention under ss 189 and 196 of the Act and writs of mandamus and habeas corpus compelling the defendants to release him.

The Plaintiff argues that there is no real possibility, prospect or likelihood that he will be removed from Australia during the course of his natural life as there is no country willing to accept him. It follows that, as there is no real possibility that he will be removed from Australia, the powers conferred by ss 189, 196 and 198 to authorise his detention have been spent. The Plaintiff has exhausted his appeal and review rights under Australian law with respect to his unsuccessful

applications for a protection visa and SHE visa. Further, he has not been the subject of any adverse security assessment by any Australian security agency. Nor has he, at any time since his arrival in Australia, been the subject of any criminal proceeding or been detained as a consequence of, or pursuant to, any Court order.

The Defendant has made numerous unsuccessful attempts to ascertain the Plaintiff's identity over the almost 9 years of the Plaintiff's detention. The Defendant has also made numerous enquiries of various countries to ascertain whether they might be prepared to accept the Plaintiff, notwithstanding that the Plaintiff has no country willing to accept him as a national or as a person with a right of entry. Thus far these attempts have also been unsuccessful. The Defendant however submits that investigations into the Plaintiff's identity are ongoing, as are attempts to negotiate his acceptance as either a Moroccan or Algerian citizen with the representatives of those countries and attempts to identify third countries that might accept him, whether or not he has any rights of entry into those countries.

The Defendant argues that the circumstances of this case do not support an inference that there is "no real possibility… that the Plaintiff will be removed from Australia during the course of his natural life" or even that he will not be removed in the "reasonably foreseeable future". Therefore ss 189 and 196 of the Act, properly construed, undoubtedly authorise the present detention of the Plaintiff and are not contrary to Chapter III of the Constitution.

The questions of law stated by the parties for the opinion of the High Court are as follows:

1. On their proper construction, do ss 189 and 196 of the *Migration Act 1958* (Cth) authorise the present detention of the Plaintiff?

2. If so, are those provisions beyond the legislative power of the Commonwealth insofar as they apply to the Plaintiff?

3. What relief, if any, should issue to the Plaintiff?

4. Who should pay the costs of and incidental to this Special Case?

The Plaintiff filed a Notice of a Constitutional Matter. None of the Attorneys-General has intervened in response to that Notice.

The Australian Human Rights Commission has filed submissions in support of its application for leave to appear as amicus. It addresses the first question and submits, in support of the Appellant, that the answer to that question should be "no".

OKS v THE STATE OF WESTERN AUSTRALIA (P62/2018)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia
[2018] WASCA 48

Date of judgment: 11 April 2018

Special leave granted: 16 November 2018

This is an appeal on conviction, relating to an offence of indecently dealing with a child under the age of 13 years allegedly committed by the Appellant in March 1997.

The Appellant and the female complainant's mother commenced a relationship in early 1997 when the complainant was approximately 10 years old. The Appellant lived in the family home with the complainant's mother, grandmother and three siblings.

In 2016, some 20 years later, the Appellant was charged with three counts of indecently dealing with the complainant contrary to s 320(4) of the *Criminal Code Act Compilation Act 1913 (WA)* ('the Code') and one count of attempting to indecently deal with the complainant, contrary to s 320(4) of the Code. At the time of the alleged offending the complainant was approximately 10 or 11 years old and the Appellant was aged between 45 and 47 years. At the time of trial the Appellant was 65 years old and the complainant 29 years old.

The matter was heard before a Judge and jury in the District Court of Western Australia. The Appellant's case at trial was that he did not do any of the acts the subject of any of the counts on the indictment, and further that the complainant was an unreliable witness. The complainant admitted, or it was alleged at trial, that she had told lies.

In the summing up, Deputy Chief Judge Stevenson directed the jury "*not to follow a process of reasoning that just because [the complainant] is shown to have told a lie, or admitted she told a lie, that all of her evidence is in fact dishonest and cannot be relied upon*" ('the impugned direction').

Before the jury retired to consider its verdict, Stevenson DCJ discharged the jury from returning verdicts in relation to counts three and four, being one count of indecently dealing with the complainant and one count of attempting to indecently deal with the complainant. The Appellant was then found guilty of count one and acquitted of count two. He was sentenced to a term of imprisonment for two years and three months.

The Appellant subsequently appealed his conviction to the Court of Appeal of the Supreme Court of Western Australia, arguing that the trial judge made a wrong decision on a question of law by directing the jury as above.

S 30(3) of the *Criminal Appeals Act 2004* (WA) ('the Criminal Appeals Act') provides that:

(3) The Court of Appeal must allow the appeal if in its opinion:

(a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported; or
(b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or
(c) there was a miscarriage of justice.

Pursuant to s 30(4) of the Criminal Appeals Act even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred ('the proviso').

The Court of Appeal found that the trial Judge intruded impermissibly on the function of the jury by erroneously giving them a direction that prohibited them from engaging in a process of reasoning, favourable to the Appellant, in relation to fact-finding about the complainant's honesty and reliability. It held that although under s 30(3)(b) the impugned direction was erroneous in law, a misdirection and a departure from trial according to law, it did not occasion a substantial miscarriage of justice as the Appellant was not denied a chance of acquittal on count one that was fairly open to him. The Court of Appeal dismissed the appeal.

The Appellant appealed to the High Court. The Appellant argues that given the nature and effect of the impugned direction, it was not open for the Court of Appeal to conclude that the Appellant was proved beyond reasonable doubt to be guilty of count one. He contends that the Court of Appeal failed to undertake its own independent assessment of the evidence (or alternatively failed to give adequate reasons). The Appellant further argues that the impugned direction should not have enlivened the proviso in s 30(4) allowing the Court of Appeal to reach a conclusion that no substantial miscarriage of justice had occurred.

The Respondent argues that the Court of Appeal was correct in holding that it was open to it to conclude that the Appellant had been proved beyond a reasonable doubt guilty of count one. The Respondent refers to a number of Facebook messages, texts and recorded phone calls as the basis for this argument, as they demonstrated a lack of denial by the Appellant of any wrongdoing, as well as containing allusions to sexual contact between the Appellant and the complainant. (The defence case was that there was a denial that anything happened in the Facebook message and the complainant was then cross-examined to that effect.) The Respondent also argues that the context of the impugned direction needs be taken into account in determining whether the error of law found by the Court of Appeal constitutes a substantial miscarriage of justice for the purposes of application of the proviso - which the Respondent submits it does not.

The grounds of appeal include:

- The Court of Appeal of the Supreme Court of Western Australia erred in law in its application of the proviso under section 30(4) of the *Criminal Appeals Act 2004* (WA) in relation to an error made by the trial Judge at first instance, delivering an impugned direction that constituted a wrong decision on a question of law.