SHORT PARTICULARS OF CASES
APPEALS

MAY 2019

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PALMER & ORS v AUSTRALIAN ELECTORAL COMMISSION & ORS (B19/2019)

Application for a constitutional or other writ filed: 2 April 2019

Date referred to the Full Court: 10 April 2019

The First Plaintiff is the registered officer of the United Australia Party ("UAP"), a registered political party under Pt XI of the *Commonwealth Electoral Act 1918* ("Electoral Act"). In the 2019 Federal Election, the UAP intends to nominate candidates in each Division of the House of Representatives. It also intends to nominate candidates in the Senate for each State and Territory, including Western Australia and Christmas Island. The Plaintiffs submit that the choices to be made by voters in Western Australia and Christmas Island may be affected by their perception of the electoral performance of the UAP candidates in the eastern states. To that effect, the First Plaintiff points to an error made by the First Defendant in the two-candidate preferred count at the 2013 Federal Election in the Division of Fairfax. While the First Plaintiff was ultimately elected as the member for Fairfax in 2013, it became clear during the count that night that the First Defendant's selection of the two candidates for the preferred count was incorrect.

The Plaintiffs therefore seek to prevent the First Defendant from publishing, or otherwise making known, the identity of the two candidates selected by the First Defendant for any Division for the indicative two-candidate preferred count under s 274(2A) of the Electoral Act, or the progressive results of any of those indicative counts, until after the close of polls in all Divisions throughout Australia, namely 9.00 pm AEST.

On 2 April 2019 a notice of constitutional matter was filed by the Plaintiffs. On 18 April 2019 the Attorney-General for the Commonwealth filed a notice of intervention in this matter.

Upon the filing of an agreed statement of facts, Justice Gordon referred this matter to the Full Court for its consideration on 10 April 2019.

The grounds of the application include:

- The exercise by the First Defendant of the power under section 7(3) of the Electoral Act, or otherwise, is constrained by a statutory limitation preventing the release by the First Defendant to a nationwide audience, at a time when the polls remain open in Western Australia or Christmas Island, of the identity of the two candidates selected by the First Defendant for each Division under s 274(2A) or of the results of those indicative counts. Such publication would or may have the practical effect of: (i) favouring major party candidates, over other candidates, in the electoral choices being made by voters in Western Australia and Christmas Island; (ii) creating an appearance that the First Defendant is giving its *imprimatur* to the two selected candidates; or (iii) constituting the dissemination by the First Defendant of misleading information, which may be material to voters, at a time when they are still voting.

- The exercise by the First Defendant of the power under s7(3) of the Electoral Act, or otherwise, is constrained by a constitutional limitation to similar effect. Publication by the First Defendant of the identified

information, at a time when the polls remain open in any part of the nation, has the practical effect of burdening the mandate for direct and popular choice contained in ss 7 and 24 of the Constitution. That burden is not justified by a substantial reason, and is not reasonably appropriate and adapted or proportionate to the achievement of a legitimate end, consistent with the maintenance of the constitutionally prescribed system of representative government.

LOVE v COMMONWEALTH OF AUSTRALIA (B43/2018)
THOMS v COMMONWEALTH OF AUSTRALIA (B64/2018)

Dates writs of summons filed: 10 September 2018
5 December 2018

Date special cases referred to Full Court: 5 March 2019

Each of the Plaintiffs, Mr Daniel Love and Mr Brendan Thoms, identifies as Aboriginal and is accepted by others (of their respective tribes) as an Aboriginal person. Both men were born overseas, however, and neither has Australian citizenship. Each held an Australian visa until it was cancelled in 2018.

Mr Love is a citizen of Papua New Guinea ("PNG"), where he was born in 1979. His mother was a citizen of PNG and his father is a citizen of Australia. Mr Love's father was born in the Territory of Papua (as a part of PNG then was), to a Papuan mother and an Aboriginal Australian father. From the age of five Mr Love held an Australian permanent residency visa and since the age of six he has resided continuously in Australia. In 2018 he was sentenced to imprisonment for 12 months for an offence of assault occasioning bodily harm, with court-ordered parole to commence on 10 August 2018. On 6 August 2018 a delegate of the Minister for Home Affairs cancelled Mr Love's visa under s 501(3A) of the *Migration Act 1958* (Cth) ("the Migration Act"), on the bases that: (1) Mr Love was serving a sentence of full-time imprisonment, and (2) Mr Love had been sentenced to a term of imprisonment for 12 months or more. On the day on which his parole commenced, Mr Love was released from prison into the custody of Border Force officers, who handcuffed him and took him directly to an immigration detention facility. This was done pursuant to s 189 of the Migration Act, on suspicion that Mr Love was an unlawful non-citizen. Mr Love was released from immigration detention on 27 September 2018, when a delegate of the Minister for Home Affairs revoked the cancellation of Mr Love's visa.

Mr Thoms is a citizen of New Zealand who was born in that country in 1988 to an Aboriginal Australian mother and a New Zealand father. He has resided in Australia since 1994. In 2018 Mr Thoms was sentenced to imprisonment for 18 months, for a crime of assault occasioning bodily harm. On 27 September 2018 the Minister for Home Affairs cancelled Mr Thoms's visa under s 501(3A) of the Migration Act (on the same bases on which Mr Love's visa was cancelled). The next day, Mr Thoms commenced court-ordered parole. Like Mr Love, however, Mr Thoms was immediately handcuffed and placed in immigration detention by Border Force officers.

Each of the Plaintiffs seeks the payment of damages for false imprisonment, on the basis that his being held in immigration detention was (and is) unlawful. Mr Thoms also seeks to be released from immigration detention. The Plaintiffs argue that s 189 of the Migration Act cannot apply to them, since they have a special connection to Australia such that neither of them is an "alien" within the meaning of s 51(xix) of the *Constitution* ("the aliens power"). Each contends that he has a continuing right to remain in Australia regardless of whether he has Australian citizenship or a current visa.

In each proceeding the parties filed a Special Case, which Justice Edelman referred for consideration by the Full Court. Each Special Case raises the following two questions:

1. Is the Plaintiff an "alien" within the meaning of s 51(xix) of the *Constitution*?

2. Who should pay the costs of this Special Case?

The Plaintiffs jointly submit that their Aboriginality (by descent, self-identification and community acceptance), bolstered by their longstanding residence in Australia and their owing no allegiance to a foreign power (on account of their having emigrated from PNG and New Zealand as children), takes them beyond the reach of the aliens power.

The Defendant submits that any person who does not have the status of a citizen of Australia under the *Australian Citizenship Act 2007* (Cth) is necessarily an alien. The Defendant further submits that Mr Love and Mr Thoms owe allegiance to PNG and New Zealand respectively simply on account of their respective citizenship of those countries.

Each of the Plaintiffs has filed a Notice of a Constitutional Matter. At the time of writing, no Attorney-General had given notice to the Court of an intention to intervene in either proceeding.

BELL LAWYERS PTY LTD v PENTELOW & ANOR (S352/2018)

Court appealed from: Supreme Court of New South Wales, Court of Appeal [2018] NSWCA 150

Date of judgment: 13 July 2018

Special leave granted: 14 December 2018

In July 2010 Ms Janet Pentelow, a barrister, sued Bell Lawyers Pty Ltd ("Bell Lawyers") in the Local Court for unpaid fees for work she had performed for a client of that firm. After being unsuccessful in the Local Court proceedings, Ms Pentelow succeeded on appeal to the Supreme Court. The Supreme Court made an order for costs in Ms Pentelow's favour, for the proceedings in both courts.

In the Local Court proceedings Ms Pentelow had been represented by a solicitor and in the Supreme Court proceedings she had been represented by solicitors and senior counsel. In both proceedings she had also undertaken legal work herself. Based on the costs order made by the Supreme Court, Ms Pentelow sent a bill to Bell Lawyers claiming the payment of her legal costs of both proceedings. The bill included amounts for the legal work which Ms Pentelow had carried out herself (which amounted to approximately $45,000 of a total bill of approximately $144,000). Bell Lawyers had the bill assessed by a costs assessor, who disallowed all of the costs claimed by Ms Pentelow for the work which she had undertaken personally. This was on two bases: (1) Ms Pentelow had not been self-represented; and (2) the exception to the rule that a self-represented party is not entitled to his or her costs of pursuing legal proceedings personally, known as "the *Chorley* exception" (which applies to solicitors), did not apply to barristers. Upon a review of the costs assessment, a Review Panel determined that the *Chorley* exception indeed did not apply to barristers in New South Wales and that it had been open to the costs assessor to conclude that Ms Pentelow had not been self-represented in the Local Court and Supreme Court proceedings.

An appeal by Ms Pentelow to the District Court was dismissed on 25 August 2016 by Judge Gibson, who essentially held that the Review Panel had not erred.

Ms Pentelow then applied to the Court of Appeal for judicial review of Judge Gibson's decision. The Court of Appeal allowed Ms Pentelow's application in part (Beazley ACJ and Macfarlan JA; Meagher JA dissenting) and remitted the matter to the District Court (for remittal by that court to the Review Panel and for potential further remittal by the Review Panel to a costs assessor).

The majority of the Court of Appeal approached the matter as an application of the *Chorley* exception to Ms Pentelow's circumstances, namely, a barrister who was represented but who undertook some of the legal work herself. The rationale of the *Chorley* exception was based on the ability to quantify the type of legal work generally undertaken by solicitors. The majority found that barristers now also undertook such legal work and their fees were subject to the process of costs assessment. The majority held that the *Chorley* exception ought to apply to barristers in Ms Pentelow's circumstances.

Meagher JA however would have dismissed Ms Pentelow's application. His Honour held that the "costs" to be considered for partial indemnification by costs orders were those actually incurred and payable. That was due to the statutory

source of the power to award costs, which was s 98(1) of the *Civil Procedure Act 2005* (NSW), read with the definition of "costs" in s 3(1) of that Act. The fees claimed by Ms Pentelow were not the subject of accounts rendered to her solicitors. Meagher JA found that Ms Pentelow's position was similar to that of a lay litigant who sought to claim for the value of his or her time.

The grounds of appeal are:

- The Court of Appeal erred in finding that Ms Pentelow was entitled to recover costs of the time spent by her in the conduct of the Local Court and Supreme Court proceedings.

- The Court of Appeal erred in determining that the *Chorley* exception applied to Ms Pentelow in circumstances where she retained solicitors in the Local Court and Supreme Court and, in addition, counsel in the Supreme Court.

- The Court of Appeal erred in determining that s 98 of the *Civil Procedure Act 2005* (NSW) permitted the application of the *Chorley* exception to Ms Pentelow.

MANN & ANOR v PATERSON CONSTRUCTIONS PTY LTD (M197/2018)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2018] VSCA 231

Date of judgment: 12 September 2018

Special leave granted 14 December 2018

In March 2014, the appellants entered into a written domestic building contract with the respondent for the construction of two townhouses on a property in Blackburn. The works were not completed by the due date of 17 December 2014. Unit 1 was completed and handed over to the appellants on 19 March 2015. On 16 April 2015, before Unit 2 was completed, the appellants asserted that the respondent had repudiated the contract and purported to terminate the contract by accepting the alleged repudiation. On 28 April 2015, the respondent asserted that the appellants' conduct constituted a repudiation of the contract and purported to accept their repudiation.

The respondent made an application to the Victorian Civil and Administrative Tribunal ('VCAT') in which it sought relief on a quantum meruit basis or, in the alternative, sums allegedly due under the contract. Both forms of relief included amounts for variations to the works. VCAT found that the appellants had orally requested the variations claimed by the respondent, that they had repudiated the contract by their purported termination and that the respondent had determined the contract when it accepted that repudiation on 28 April 2015. The appellants were ordered to pay the respondent the quantum meruit sum of $660,526.41, being the value of the work performed by the respondent, less the sums already paid by the appellants and the cost of rectification of defects.

The appellants sought leave to appeal against the VCAT order to the Supreme Court of Victoria. Cavanough J granted leave to appeal but dismissed the appeal other than correcting a minor mathematical error in VCAT's order.

In their unsuccessful appeal to the Court of Appeal (Kyrou, McLeish and Hargrave JJA) the appellants contended that the Court should reconsider the correctness of the long-established principle that a builder who accepts an owner's repudiation and determines a building contract is entitled to sue the owner in quantum meruit; and that the trial judge erred in finding that s 38 of the *Domestic Building Contracts Act 1995* (Vic) ("the Act") did not prevent the respondent from recovering the value of the work covered by the variations on a quantum meruit basis.

The appellants submitted that the availability of quantum meruit in a case such as the present has been the subject of criticism and referred to the observations made by the Victorian Court of Appeal in *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510. The criticism rests on the following propositions:

1. When a contract is terminated at common law by the acceptance of a repudiation, both parties are discharged from the further performance of the contract, but rights which have already been unconditionally acquired are not divested or discharged unless the contract provides to the contrary.

2. If there is a valid and enforceable agreement governing the claimant's right to payment, there is 'neither occasion nor legal justification for the law to

superimpose or impute an obligation or promise to pay a reasonable remuneration'.

3. Accordingly, there is no room for a restitutionary remedy since the builder's claim to payment is governed by the contract under which the work was carried out up to the point of repudiation.

The Court in *Sopov* stated that unconstrained by authority, they might well have upheld the argument that the builder's only remedy was to sue on the contract. But they were heavily constrained by authority. They noted that the right of a builder to sue on a quantum meruit following a repudiation of the contract had been part of the common law of Australia for more than a century. It was supported by decisions of intermediate courts of appeal in three States. If that remedy was to be declared to be unavailable as a matter of law, that is a step which the High Court alone could take.

In the present case, the Court of Appeal endorsed the observations made by the Court in *Sopov*, finding that nothing has transpired in the nine years since those observations were made which lessened their force. In the absence of a submission by the applicants that *Sopov* and the other two decisions of intermediate courts of appeal were plainly wrong, however, no occasion arose for the Court to consider the correctness of those decisions.

With respect to the effect of s 38 of the Act, the Court held that, in accordance with the principle of legality, s 38 should not be construed as abrogating the right of a builder to sue on a quantum meruit following acceptance of an owner's repudiation of a contract, or significantly narrowing the scope of that right by excluding work performed under a variation, except by clear words or necessary intendment. They found there was nothing in s 38 which stated that it extended to claims in quantum meruit or which necessarily required that it be construed in that manner.

The grounds of the appeal include:

- The Court of Appeal erred in holding that the respondent builder, having terminated a major domestic building contract upon the repudiation of the contract by the appellants, was entitled to sue on a quantum meruit basis for the works carried out by it.

CONNECTIVE SERVICES PTY LTD & ANOR v SLEA PTY LTD & ORS
(M203/2018)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2018] VSCA 180

Date of judgment: 27 July 2018

Special leave granted: 14 December 2018

The Appellants ("Connective") were registered in 2003. Each of their constitutions contain pre-emptive rights in respect of the transfer of shares, requiring a member who wishes to transfer shares of a particular class to first offer those shares to existing holders of that class. At all relevant times, the shareholders in Connective were the first respondent ("Slea") and the third respondent ("Millsave").

On or about 12 August 2010, Slea and the second respondent ("Minerva") entered into an agreement ("the accommodation agreement"). The existence of that agreement was not disclosed by Slea until 14 December 2011 when it revealed it in a defence it filed in a Supreme Court proceeding. Connective commenced proceedings against the respondents on 11 August 2016, alleging that the accommodation agreement triggered the pre-emptive rights provisions of the Connective constitutions and seeking orders compelling Slea to comply with its obligations under those provisions ("the pre-emptive rights proceeding").

On 4 October 2016, Slea and Minerva applied for orders staying or dismissing the pre-emptive rights proceeding. The application was brought on three grounds: (a) that by commencing the proceeding in reliance upon the accommodation agreement which had been obtained through discovery in other proceedings, Connective had breached an implied undertaking not to use that agreement for any purpose other than those proceedings; (b) that instituting the proceeding was in breach of s 260A of the *Corporations Act 2001* (Cth); and (c) that Connective did not have standing to enforce the pre-emptive rights or to seek the relief they claim in the proceeding.

On 12 May 2917, Almond J rejected the s 260A ground and the standing ground, but upheld the first ground and stayed the proceeding as an abuse of process. On 2 June 2017, Connective applied to lift the stay ordered by Almond J and for leave *nunc pro tunc* to use the accommodation agreement for the purpose of instituting the proceeding. On 22 November 2017, Judd J granted the leave sought; and lifted the stay ordered on 12 May 2017.

Slea and Minerva applied to the Court of Appeal for leave to appeal from that part of the decision of Almond J in which his Honour dismissed the ground based on s 260A of the *Corporations Act* 2001 (Cth). That section provides that a company may financially assist a person to acquire shares in the company only if giving the assistance does not materially prejudice the interests of the company or its shareholders or the company's liability to pay its creditors.

The Court of Appeal (Ferguson CJ, Whelan and McLeish JJA) held that the conduct of Connective in commencing and pursuing the pre-emptive rights proceeding, by reason that Connective was liable to pay for its own legal costs and potentially the legal costs of the respondents, was "financial assistance" within the meaning of s 260A(1).

The Court noted that the relief sought in the proceeding was an order compelling Slea to offer its shares to Millsave and a shareholder of Connective, Mark Haron. On the Connective companies' case, absent a court order Slea would not make the offer. The commercial consequence was that some action has to be taken to enforce the existing right. The purpose of the proceeding was to compel Slea to make the offer. If Slea were forced to do so, Millsave and Mr Haron would have the option of accepting the offer and, if they did accept, of acquiring the shares. The proceeding sought to procure that outcome. This 'assists' Millsave and Mr Haron to both obtain the offer (which is an 'option') and to acquire the shares (if they decide to do so). The 'assistance' is properly characterised as 'financial assistance' because the assistance given to Millsave and Mr Haron comes at a financial cost. The Connective companies have incurred, and will continue to incur, legal costs in instituting and pursuing the proceeding. They have also undertaken a potential cost liability. There is no evidence that Millsave and Mr Haron have incurred any costs or taken on any potential cost liability. There is, therefore, in the relevant sense a net transfer of value from the company, which is bearing the cost, to the shareholders other than Slea, who will receive the benefit.

The grounds of the appeal include:

In dealing with the question of relief against financial assistance under s 260A of the *Corporations Act 2001* (Cth) the Court of Appeal erred in holding that:

- Each appellant's institution of proceedings, incurring and continuing to incur the legal costs of such proceedings and exposure to the risk of an adverse costs order in such proceedings was capable of amounting to financially assisting a person to acquire shares in the appellants in terms of s 260A.