SHORT PARTICULARS OF CASES

NOVEMBER 2019

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BHP BILLITON LIMITED (NOW NAMED BHP GROUP LIMITED) v COMMISSIONER OF TAXATION (B28/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 4

Date of judgment: 29 January 2019

Special leave granted: 15 May 2019

This appeal concerns the assessment of the Appellant, a company listed on the Australian Securities Exchange, for tax by the Respondent ("the Commissioner") for the income years ended 30 June 2006 to 30 June 2010. At all material times, the Appellant was in a dual listed company arrangement ("the DLC Arrangement") with BHP Billiton Plc ("Plc"), a company listed on the London Stock Exchange. Both companies had the same directors and senior managers, and the two operated as if they were a single economic entity. The Appellant and Plc indirectly owned, in the respective proportions 58% and 42%, the Swiss company BHP Billiton Marketing AG ("BMAG").

The Appellant and Plc had a special voting arrangement, whereby votes cast by the ordinary shareholders of the Appellant and, separately, of Plc on an identical resolution came to be counted mutually. This was effected in each case by a shareholding company which was obliged, in casting its votes, to mirror the voting pattern and numbers of the ordinary shareholders of the other company (i.e. of the Appellant or Plc). In that way, for example, a resolution that would otherwise pass in respect of the Appellant on the voting of its ordinary shareholders could be defeated as a result of contrary votes cast by the special voting shareholder company, such votes merely mirroring the voting pattern and numbers of Plc's ordinary shareholders on an identical resolution.

Under Part X of the *Income Tax Assessment Act 1936* (Cth) ("the Act"), BMAG was deemed a "controlled foreign company" whose income was subject to attribution as income of the Appellant's for Australian tax purposes. In the relevant income years, BMAG made profits on the sale of commodities it had purchased from Australian subsidiaries of the Appellant. The Appellant included 58% of such profits in its Australian taxable income as "tainted sales income" under Part X of the Act. In amended assessments for tax, the Commissioner additionally included in the Appellant's income, as tainted sales income, 58% of profits BMAG had made on the sale of commodities it had purchased from Australian subsidiaries of Plc ("the Plc Purchase Profits").

In attributing the Plc Purchase Profits to the Appellant as tainted sales income, the Commissioner characterised the relevant Australian subsidiaries of Plc as "associates" of BMAG within the meaning of s 318(2) of the Act. This was on the view that the Appellant was "sufficiently influenced" by Plc, or vice versa, or that BMAG was sufficiently influenced by both the Appellant and Plc. Section 318(6)(b) of the Act provides that a company is sufficiently influenced by an entity if the company or its directors might reasonably be expected to act in accordance with the directions, instructions or wishes of that entity.

An objection by the Appellant to the amended assessments was disallowed by the Commissioner, whereupon the Appellant sought a review by the Administrative Appeals Tribunal ("the Tribunal"). On 22 December 2017 the

Tribunal (Justice Logan, Deputy President) set aside the Commissioner's objection decision, after finding that BMAG was not accustomed to treating the wishes or directions of Plc or the Appellant, without more, as a sufficient reason to act. The Tribunal found that the board of BMAG followed the wishes or directions of Plc or the Appellant only if to do so was in BMAG's best interests. The Tribunal also found that neither company could dictate to the other in the event of a disagreement and that the DLC Arrangement did not abrogate the effective control of Plc and the Appellant by their respective shareholders and directors.

An appeal by the Commissioner was allowed by the Full Court of the Federal Court (Allsop CJ and Thawley J; Davies J dissenting). Allsop CJ and Thawley J held that the Appellant and Plc sufficiently influenced each other, on account of two factors: (1) the special voting arrangement, and (2) an obligation of the Appellant and Plc to pay matching dividends. Their Honours held that the Tribunal had erred by focusing on the powers of directors and on the lack of a relationship of control and subservience. The majority also held that BMAG was sufficiently influenced by the Appellant and Plc, its owners, since it was likely to follow the wishes or directions of its owners despite undertaking an assessment of its own best interests in deciding whether to do so.

Justice Davies however found that the special voting arrangement and the payment of matching dividends were merely incidents of the DLC Arrangement, in the making of which the Appellant and Plc had each pursued its own interests. To act in concert with a mutuality of interest was not to act in accordance with the direction, instruction or wishes of the other within the meaning of s 318(6)(b) of the Act. Her Honour also held that the Tribunal was correct to hold that BMAG was not sufficiently influenced by the Appellant and Plc, given that BMAG exercised independent judgment and acted in accordance with its own best interests.

The grounds of appeal include:

- The Full Court erred in concluding that, despite holding that the words invoke a causal test, a person or entity acts "in accordance with" the directions, instructions or wishes of another entity for the purposes of s 318(6)(b) of the Act if the person or entity merely acts "in harmonious correspondence, agreement or conformity with" those directions, instructions or wishes.

- The Full Court should have found that, in order to act "in accordance with" the directions, instructions or wishes of another entity for the purposes of s 318(6)(b), a person or entity must treat that other entity's directions, instructions or wishes as themselves being a sufficient reason to act.

COMMISSIONER OF STATE REVENUE v ROJODA PTY LTD (P26/2019)

Court appealed from: Court of Appeal, Supreme Court of Western Australia [2018] WASCA 224

Date of judgment: 21 December 2018

Special leave granted: 17 May 2019

In March 1972 a partnership commenced between Anthony and Maria and their three children, Rosana, John and David ('the SIC Partnership'). Anthony and Maria entered into another partnership with effect from July 1986 ('the AMS Partnership'). The business of both partnerships included property ownership and investment. Anthony died on 12 February 2011. Under his will, the balance of his estate was to be divided equally between three testamentary trusts in favour of each child. In September 2011, Maria became the registered proprietor of the SIC Partnership Properties and the AMS Partnership Properties as surviving joint tenant of those properties. In May 2011 and March 2012 respectively each Partnership was dissolved in accordance with the Partnership Deeds. The value of the cash or other current assets of both Partnerships exceeded their liabilities.

John (who was married and had four children) died intestate on 7 August 2012. The former partners of each Partnership, or the legal representatives of their estates, executed two deeds on 1 December 2013 ('the 2013 Deeds') which relevantly provided: (a) the legal personal representatives of the estates of Anthony and John "hereby transmit" that estate's beneficial share of the Partnership properties to the beneficiaries of the estate; (b) Maria, as trustee of the Partnership properties, declared that she "confirmed" that she held the legal title for the benefit of the surviving partners according to their previous Partnership proportion and for each of the beneficiaries who had received a "transmission" of property; and (c) after the transmissions and confirmations described above, Maria "resigned" as the trustee of the former Partnership properties and Rojoda Pty Ltd (Rojoda) was appointed as replacement trustee. On 13 March 2015, title to the Partnership properties was transferred to Rojoda.

The Commissioner imposed duty on each of the 2013 Deeds pursuant to s 11(1)(c) of the *Duties Act 2008* (WA) which provides that a dutiable transaction includes a "declaration of trust over dutiable property". The Commissioner contended that, before the 2013 Deeds were executed, the Partnership properties were not held by Maria upon a bare trust for the former partners or the beneficiaries of their estates, and that after the 2013 Deeds were executed they were held by Maria (and then Rojoda) upon a bare trust. Consequently, the legal effect of clause 3 of each of the 2013 Deeds was to declare a new trust.

Rojoda objected to the assessment of duty. It contended that the 2013 Deeds merely acknowledged or recorded an existing obligation of Maria that had arisen under the general law and did not declare any new trusts. The Commissioner allowed the objection in part. Rojoda applied to the State Administrative Tribunal (SAT) to review the Commissioner's decision. The SAT dismissed the application and affirmed the Commissioner's decision to only partially allow Rojoda's objection. Rojoda's appeal to the Court of Appeal (Buss P, Murphy and Beach JJA) was successful.

The Court described the central issue of the case as follows: Is there a hard and fast rule that until the debts and other liabilities of a partnership are paid or discharged, or until the partners agree otherwise, the interest of each partner in each item of partnership property remains of a non-specific and fluctuating character? Or does equity take the more flexible view that if, and when, the surplus of partnership assets after payment of debts and discharge of other liabilities has been *sufficiently* ascertained and provided for out of particular assets, each partner will have a specific and fixed interest in the other assets comprising the surplus.

The Court considered that the authorities supported the latter view. The Court concluded that, in this case, immediately before the 2013 Deeds were executed, each partner (or their legal representative) had specific and fixed beneficial or equitable interests in the Partnership Properties, reflecting their respective proportionate share of partnership property. The partners' rights in relation to the Partnership Properties were enforceable against Maria as the registered proprietor of the Partnership properties. She held those properties on trust for the Partnerships, to enable the sale of the Partnership Properties and the distribution of proceeds to the partners or their representatives in accordance with their respective proportionate share. Against this background, cl 3 of each of the 2013 Deeds, on its proper construction, merely acknowledged or recorded an existing obligation of Maria that had arisen under the general law. Clause 3 did not create new trusts in relation to the Partnership Properties.

The grounds of the appeal include:

- The Court of Appeal ought to have held that:

    (i) After dissolution of a partnership, but prior to the completion of its winding up, each former partner or their legal representatives only has a non-specific fluctuating interest in all the partnership assets until completion of the winding up; and

    (ii) Clause 3 of the SIC Partnership Deed and clause 3 of the AMS Partnership Deed each constituted declarations of trust for the purposes of s 11(1)(c) of the *Duties Act 2008* (WA), as these Deeds were each executed prior to the completion of the winding up of the partnerships to which they related.

Rojoda seeks leave to rely on a notice of contention.

SMETHURST & ANOR v COMMISSIONER OF POLICE & ANOR (S196/2019)

Date application for a constitutional or other writ filed: 26 June 2019

Date special case referred to Full Court: 6 September 2019

The First Plaintiff, Ms Annika Smethurst, is a journalist employed by the Second Plaintiff, Nationwide News Pty Ltd ("Nationwide"). On 29 April 2018 Nationwide published certain articles authored by Ms Smethurst ("the Articles") online and in The Sunday Telegraph newspaper. The Articles alleged that the Department of Home Affairs and the Department of Defence were secretly discussing a proposal to expand the powers of the Australian Signals Directorate ("ASD") such that it could covertly access data located in Australia. Two of the Articles included an image of part of a document which had been created by the ASD. The part of the document shown in the image bore markings indicating that it, and another document attached to it, were classified as "secret" and "top secret" respectively.

The Secretary of Defence referred the publication of the Articles to the Australian Federal Police ("AFP"), which commenced an investigation in response. In furtherance of that investigation, on 31 May 2019 the AFP succeeded in having two documents issued by a magistrate under the *Crimes Act 1914* (Cth) ("the Crimes Act"). The first was a search warrant ("the First Warrant") issued under s 3E of the Crimes Act. The second was an order, under s 3LA of the Crimes Act, requiring Ms Smethurst to assist the AFP to access and copy data on computers or data storage devices held at her home ("the s 3LA Order"). On 3 June 2019 another search warrant ("the Second Warrant"), the terms of which were almost identical to those of the First Warrant, was issued. Each warrant described the offence to which it related as follows:

> "On the 29 April 2018, Annika Smethurst and the Sunday Telegraph communicated a document or article to a person, that was not in the interest of the Commonwealth, and permitted that person to have access to the document, contrary to s 79(3) of the *Crimes Act 1914*, Official Secrets."

Both the First Warrant and the Second Warrant authorised AFP officers to enter and search Ms Smethurst's home and to access and copy data held on computer or storage devices found there.

On 4 June 2019 officers of the AFP executed the Second Warrant and searched Ms Smethurst's home. After requiring Ms Smethurst to provide her passcode to access her mobile telephone, an officer copied documents from the mobile telephone on to a USB device belonging to the AFP.

In their proceedings in this Court, the Plaintiffs seek relief which includes the quashing of both the Second Warrant and the s 3LA Order. The Plaintiffs also seek that the material seized by the AFP be delivered up or be destroyed and that none of it be provided to prosecuting authorities.

The Plaintiffs and the First Defendant filed a Special Case, the questions in which Justice Bell referred for consideration by the Full Court. (The Second Defendant, the magistrate who issued the search warrants and the s 3LA Order, has filed a submitting appearance.) The Special Case states the following questions for the opinion of the Court:

(1) Is the Second Warrant invalid on the ground that:
   (a) it misstates the substance of s 79(3) of the Crimes Act, as it stood on 29 April 2018?
   (b) it does not state the offence to which it relates with sufficient precision?
   (c) s 79(3) of the Crimes Act, as it stood on 29 April 2018, was invalid on the ground that it infringed the implied freedom of political communication?

(2) Is the s 3LA Order invalid on the ground that:
   (a) at the time it was made, the Second Warrant was not in force?
   (b) it was made in aid of a different warrant, namely the First Warrant?
   (c) it did not specify the information or assistance required to be provided by the First Plaintiff, with sufficient precision, or at all?
   (d) it did not specify the computer or data storage device to which it related, with sufficient precision, or at all?

(3) Was s 79(3) of the Crimes Act, as it stood on 29 April 2018, invalid on the ground that it infringed the implied freedom of political communication?

(4) If the answer to any or all of questions (1)–(3) is 'yes', what relief, if any, should issue?

(5) Who should pay the costs of and incidental to this Special Case?

Two separate Notices of a Constitutional Matter have been filed in this matter. The Attorney-General of the Commonwealth of Australia and the Attorney-General for the State of South Australia have intervened. The Australian Human Rights Commission however, has been granted leave to appear at the hearing as amicus curiae.

THE QUEEN v GUODE (M75/2019)

Court appealed from: Court of Appeal, Supreme Court Victoria
[2018] VSCA 205

Date of judgment: 16 August 2018

Date special leave granted: 17 May 2019

On 8 April 2015 the respondent deliberately drove her car, with her four youngest children inside it, into Lake Gladman, Wyndham Vale. The three youngest children, twins aged 4 years and a baby aged 17 months, drowned. Only the eldest child, aged five years, survived. On 16 January 2017, the respondent pleaded guilty in the Supreme Court of Victoria to infanticide (charge 1), two charges of murder (charges 2 and 3) and one charge of the attempted murder (charge 4). The sentencing judge (Lasry J) imposed a sentence, on the charge of infanticide, of 12 months' imprisonment (with an order for cumulation of 6 months), 22 years' imprisonment in relation to each charge of murder (with an order for cumulation of 3 years upon one charge) and 6 years' imprisonment in relation to the charge of attempted murder (with an order for cumulation of 1 year). This resulted in a total effective sentence of 26 years and 6 months imprisonment with a non-parole period of 20 years.

The respondent sought leave to appeal against sentence on the ground that the sentence was manifestly excessive. On 30 October 2017, Weinberg JA refused leave to appeal. The respondent renewed her application for leave to appeal. On 16 August 2018 the Court of Appeal (Ferguson CJ, Priest & Beach JJA), allowed the appeal.

The Court considered that the charges of murder and attempted murder had to be be viewed in light of the statutory definition of infanticide in s 6(1) of the *Crimes Act 1958* (Vic) and by the prosecution's acceptance of a plea to infanticide with respect to the baby, by which it acknowledged that all four offences were committed in circumstances arising from, or causally connected to, a clinically significant mood disorder consequent upon the respondent recently having given birth to the baby. They noted that the uncontradicted psychiatric opinion was that the respondent's capacity to appreciate the wrongfulness of her conduct at the time was impaired, and the intent of her behaviour was obscured.

The Court considered the respondent's moral culpability to be significantly reduced, rendering denunciation less important in the exercise of the sentencing discretion than would otherwise be the case, and affecting the punishment that might be considered just in all of the circumstances. Moreover, given the manner in which the respondent's condition diminished her capacity to exercise appropriate judgment and to think clearly and make calm and rational choices, and adversely affected her capacity to appreciate the wrongfulness of her conduct, both general deterrence and specific deterrence had to be significantly moderated as sentencing considerations.

The Court accepted the submissions of the respondent's counsel that sentences of 22 years' imprisonment on each of the two charges of murder were of the order of sentences generally reserved for cases unattended by the powerful mitigating features of this case. Had adequate weight been given to the respondent's mental condition and other factors in mitigation, the Court considered that significantly

more lenient sentences would have been imposed on each of those charges. The Court resentenced the respondent to 12 months' imprisonment on the charge of infanticide (with an order for cumulation of 6 months), 16 years' imprisonment on each charge of murder (with an order for cumulation of 12 months against one charge) and 4 years' imprisonment on the charge of attempted murder (with an order for cumulation of 6 months). This resulted in a total effective sentence of 18 years' imprisonment with a non-parole period of 14 years.

The ground of appeal in the Crown’s appeal from the judgment of the Court of Appeal is:

- The Court of Criminal Appeal erred in taking into account as a relevant consideration in making its determination as to manifest excess the fact that the prosecution had accepted a plea to infanticide in respect of Charge 1 on the indictment.