SHORT PARTICULARS OF CASES

APRIL 2019

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BRISBANE CITY COUNCIL v AMOS (B47/2018)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2018] QCA 11

Date of judgment: 20 February 2018

Special leave granted: 14 September 2018

By Supreme Court proceedings commenced in 2009, the Appellant ("the Council") claimed from Mr Edward Amos the payment of overdue rates levied on eight properties owned by Mr Amos. The claim came to be based on rates notices issued between 1999 and 2012. One of the defences raised by Mr Amos was that those parts of the Council's claim which relied on rates notices issued more than six years prior to the commencement of proceedings must fail, on account of the limitation period prescribed by s 10(1) of the *Limitation of Actions Act 1974* (Qld) ("the Limitation Act"). Section 10(1) relevantly provides:

> *(1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action arose:*
> *…*
>
> *(d) an action to recover a sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of a penalty or forfeiture.*

The Council contended that no part of its claim was barred by s 10(1), because the applicable time limit in the circumstances was that prescribed by s 26(1) of the Limitation Act: 12 years. This was in view of the Council having the benefit of a statutory charge on land for any overdue rates, pursuant to s 97(2) of the *City of Brisbane Act 2010* (Qld) ("the COB Act").

Section 26 of the Limitation Act relevantly provides as follows:

> *(1) An action shall not be brought to recover a principal sum of money secured by a mortgage or other charge on property whether real or personal nor to recover proceeds of the sale of land after the expiration of 12 years from the date on which the right to receive the money accrued.*
>
> *…*
>
> *(5) An action to recover arrears of interest payable in respect of a sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land or to recover damages in respect of such arrears shall not be brought after the expiration of 6 years from the date on which the interest became due.*

Bond J found in favour of the Council, on 20 June 2016 giving judgment against Mr Amos in the sum of $807,148.28 including interest. His Honour held that the terms of s 26(1) were specific and therefore governing, operating to the exclusion of s 10(1)(d). Bond J also held that the interest claimed by the Council was not subject to the temporal limitation prescribed by s 26(5). This was because s 64(1) of the *City of Brisbane (Finance, Plans and Reporting) Regulation 2010* (Qld) ("the Regulation") defined overdue rates to include interest thereon. Such interest therefore was a part of the principal sum secured by the charge created

by s 97(2) of the COB Act rather than a separate sum to which s 26(5) of the Limitation Act could apply.

An appeal by Mr Amos was allowed by the Court of Appeal (Fraser and Philippides JJA, Dalton J), which set aside the orders made by Bond J and directed the parties to provide substitute orders. (The latter have not been provided, however, pending the determination of the appeal to this Court.) Philippides JA and Dalton J held that the maxim of statutory interpretation applied by Bond J when considering s 10(1)(d) and s 26(1) of the Limitation Act ought not to have been applied. One of the provisions cannot be characterised as more specific than the other, since they do not deal with the same subject matter (even though an action may fall within both of them). Their Honours also held that the shorter limitation period must prevail, given that both provisions prohibit, rather than permit, the bringing of an action within a certain time. Mr Amos therefore had a good defence, under s 10(1)(d) of the Limitation Act, to the Council's claim insofar as it sought the recovery of sums which had accrued more than six years prior to the commencement of proceedings.

Fraser JA would have allowed the appeal only on the limited basis that the Council's claim for interest on Mr Amos' unpaid rates was subject to the six-year limitation period prescribed by s 26(5) of the Limitation Act. His Honour held that the operation of s 10(1)(d) was excluded by the more specific terms of s 26(1). Fraser JA held that although interest was brought within the charge created by s 97(2) of the COB Act (due to definitions in the COB Act rather than in the Regulation), it was not transformed into principal for the purpose of the limitation period prescribed by s 26(5) of the Limitation Act.

The grounds of appeal are:

- The majority (Philippides JA and Dalton J) erred in holding that:
  (a) the proceeding by the Council for rates and charges levied pursuant to the *City of Brisbane Act 2010* (Qld) ("the COB Act") falls within the description of actions found both at ss 10(1)(d) and 26(1) of the *Limitation of Actions Act 1974* (Qld) ("the Limitation Act"), which provide respectively for limitation periods of 6 and 12 years, and that the inconsistency between these provisions was to be resolved by applying the shorter limitation period in s 10(1)(d), whereas, on a proper characterisation of the Council's claim, there is no conflict and the Council's claim is or includes an action to recover a principal sum of money secured by charge and therefore s 26(1) of the Limitation Act applies without regard to s 10(1)(d);
  (b) any conflict between ss 10(1)(d) and 26(1) of the Limitation Act was to be resolved by a detailed consideration of the historical context of the Limitation Act and other related statutes, and case authority of those other statutes and texts, whereas the task of statutory construction must begin with a consideration of the statutory text and so must the task end (*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]).

LIEN-YANG v CHIN-FU LEE & ORS (B61/2018)
CHAO-LING HSU v RACQ INSURANCE LIMITED (B62/2018)
CHIN-FU LEE v RACQ INSURANCE LIMITED (B63/2018)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2018] QCA 104

Date of judgment: 1 June 2018

Special leave granted: 16 November 2018

On 25 September 2013 Lien-Yang Lee ("Lien-Yang") sustained severe spinal injuries in a car accident on North Stradbroke Island. He has been left with a partial tetraplegia from which he will not recover. He was 17 years old at the time of the accident. Lien-Yang claimed damages for his injuries, alleging that they were caused by the negligence of his father, Chin-Fu Lee as the driver of the car in which he was travelling, a Toyota Tarago. His mother, Chao-Ling Hsu, was the owner of that vehicle. The case was defended by the compulsory third party insurer, RACQ Insurance Limited ("RACQ").

The parties agreed on the quantification of Lien-Yang's damages. They also agreed that the accident, which involved a head on collision between the Toyota and another vehicle, was caused solely by the negligence of the driver of the Toyota. The only issue at the trial was whether it was Lien-Yang's father who had been driving the Toyota, or instead, as RACQ contended, it had been Lien-Yang himself.

The trial judge, Justice Boddice, found that it was Lien-Yang who had been driving the Toyota and consequently his claim was dismissed. Upon appeal to the Queensland Court of Appeal, the ultimate question was whether that finding was correct. Before Justice Boddice, RACQ had counter-claimed against Lien-Yang and each of his parents, for payment of monies which RACQ had paid in response to notices of claim lodged by them after the collision. RACQ said that it had been induced to pay those monies by deceitful representations by Lien-Yang and his parents that the driver had been the father. Justice Boddice upheld that counter-claim. He then ordered Lien-Yang and his parents to pay $439,840.96, and then he also ordered Lien-Yang's parents to pay a further sum of $234,428.41. Those orders were also appealed. The outcome of those appeals again turned upon the question of whether Lien-Yang was the driver.

On 1 June 2018 the Queensland Court of Appeal (Fraser, Philippides and McMurdo JJA) dismissed Lien-Yang's and his parents' appeals. In a case that their Honours found to be finely balanced, they found that Justice Boddice had not misused his advantage in both hearing and seeing the evidence as it was given. Their Honours found that the DNA evidence, which linked Lien-Yang's DNA to the driver's side airbag, was persuasive evidence that he was the driver. They found that such evidence outweighed alternative theories, such as that proposed by Dr Grigg, a mechanical engineer with extensive experience in the investigation of motor vehicle accidents. In Dr Grigg's opinion, Lien-Yang's facial injuries were inconsistent with those that could be expected if he was the driver. Alternatively Dr Grigg said Lien-Yang's father's injuries were very similar to those to be expected if he was the driver.

The Court of Appeal held that Justice Boddice's decision was neither "glaringly improbable" nor "contrary to compelling inferences". Their Honours held that Lien-Yang's sometimes powerful submissions had failed to demonstrate that the decision of the trial judge was wrong. The appeals were therefore dismissed.

In each matter the grounds of appeal are:

- The Court of Appeal failed to give adequate reasons for its judgment by failing to address the evidence of Dr Grigg regarding the function of seatbelt pre-tensioners and the speed of inflation and deflation of the airbag and the contended inferences which arose from it.

- The Court of Appeal erred in failing to conclude that the trial judge had misused his advantage as the trial judge and that the finding that Lien-Yang was the driver of the vehicle was contrary to compelling inferences from uncontroverted evidence.

NORTHERN TERRITORY OF AUSTRALIA v SANGARE (D11/2018)

Court appealed from: Court of Appeal, Supreme Court of the Northern Territory
[2018] NTCA 10

Date of judgment: 3 August 2018

Special leave granted: 5 December 2018

The issue in this Appeal is whether, and to what extent, an unsuccessful litigant's circumstances may inform the exercise of the Court's discretion not to award costs in favour of a successful litigant.

The Respondent sued the Appellant, the Northern Territory ('the Territory") for defamation seeking damages of $5 million. Given that the damages claimed exceeded the jurisdictional limit of the Local Court, the proceedings were heard in the Supreme Court of the Northern Territory. Grant CJ at first instance held that the Territory had successfully established defences giving it protection from liability under both section 27 of the *Defamation Act 2006* (NT) and the defence of qualified privilege at general law. Consequently on 6 February 2018 Grant CJ made orders that the Respondent's action be dismissed and the parties have liberty to apply with respect to costs. Before there was any application as to costs the Respondent appealed to the Court of Appeal. The question of costs was left pending determination of the appeal.

On 3 August 2018 the Court of Appeal unanimously upheld the judgment at first instance and dismissed the appeal. The Territory made application for its costs on the basis that the Territory had been wholly successful in both the trial and the appeal and that the appeal was without merit and doomed to fail. The Respondent opposed any order for costs, arguing that he was unemployed and the judgment against him prevented him from getting "any decent job".

The Court of Appeal noted the purpose of an award of costs is not to punish the unsuccessful party but to compensate the successful party and that "[c]ustomarily, in circumstances such as this the Court will make an order for costs on the basis that costs should follow the event. However, the legislative intention is plainly to confer on courts and judges an unfettered discretion as to costs…". The Court of Appeal declined to make an order for costs of either the trial or the appeal on the basis that the Territory was "most unlikely to be compensated even if an award of costs were made in its favour. In the circumstances, it seems to us that the Court should not make a futile order or orders as to costs."

The Respondent unsuccessfully sought special leave to appeal from the Court of Appeal's judgment dismissing his appeal to the High Court. The Territory's application for special leave to appeal on the question of costs was granted.
The Territory submits that the error of reasoning of the Court of Appeal is that it considered the Respondent's (asserted but not proven) financial position to be not only relevant to, but determinative of, the question of costs.

The Respondent has entered a submitting appearance in the appeal.

Justice Gageler made orders on 21 December 2018 appointing Miles Crawley SC and a junior counsel as amicus curiae in the appeal. The amicus curiae argues that although impecuniosity is not, of itself, a reason to deprive a successful party of their costs it can be, in combination with other factors, a reason to depart from the general rule that costs follow the event.

The ground of appeal is:

- The Court of Appeal erred in refusing to award the Appellant (the Northern Territory) of and incidental to the proceedings in the Court of Appeal and the proceedings below because the Respondent was unlikely to be able to pay any costs awarded against him.

MASSON v PARSONS & ORS (S6/2019)

Court appealed from: Full Court of the Family Court of Australia
[2018] FamCAFC 115

Date of judgment: 28 June 2018

Special leave granted: 19 December 2018

The Respondent mothers were married in New Zealand in 2015. The First Respondent is both the biological and birth mother of two girls, B and C, now aged around 11 and 10. B and C were conceived by artificial insemination. Both girls live with the Respondent mothers, but they have also spent regular time with the Appellant whom they call "Daddy". The Appellant is also B's biological father and is registered on her birth certificate as such. The identity of C's biological father is unknown, but s 60H of the *Family Law Act 1975* (Cth) ("the Federal Act") deems the Second Respondent to be her other "parent". She is shown as such on C's birth certificate.

The Respondent mothers wanted to relocate to New Zealand (with the girls), but that move was opposed by the Appellant. On 3 October 2017Justice Cleary restrained the Respondent mothers from moving overseas. In doing so her Honour applied s 60H(1)(a) of the Federal Act, holding that the Respondent mothers were *not* in a de facto relationship at the time of the artificial conception of B. This had the consequence that the Appellant, not the Second Respondent, was deemed to be her legal parent.

Upon appeal, the main issue concerned whether the Appellant was a "parent" of B within the meaning of the Federal Act. The Respondent mothers submitted that Justice Cleary erred in failing to recognise that s 79 of the *Judiciary Act 1903* (Cth) ("the Judiciary Act") required her Honour to apply the *Status of Children Act 1996* (NSW) ("the State Act"), the effect of which being that the Appellant was conclusively presumed *not* to be B's father. Section 14 of the State Act lays down a series of presumptions of parentage of children born as a result of an artificial conception procedure. Relevantly s 14(2) of that Act states:

If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.

Section 14(4) of the State Act then states that such a presumption is considered to be irrebuttable.

On 28 June 2018 the Full Court of the Family Court (Thackray, Murphy & Aldrige JJ) unanimously upheld the Respondent mothers' appeal. Their Honours held that ss 14(2) & 14(4) of the State Act applied, unless a Federal law otherwise provided. They further found that s 14 of the State Act, which determines whether a man can be regarded as the father of a child, must be applied where that question arises in a federal jurisdiction. As the presumption in s 14 is irrebuttable, and as the Appellant was neither married to, nor in a de-facto relationship with the First Respondent, he was therefore presumed *not* to be B's father. He consequently ought not to have been treated as being her parent for the purposes of the Federal Act. Their Honours also rejected the submission,

advanced by the Appellant, that a child is capable of having more than two parents.
On 8 January 2019 the Appellant filed a section 78B Notice in this matter. Both the Attorney-General of the Commonwealth and the Attorney-General of Victoria have filed a notice of intervention.

The grounds of appeal are:

- The Full Court erred in holding that the primary judge failed to apply the relevant law in determining whether the Appellant was a legal parent of the child, B, and in particular, erred in holding that section 14 of the State Act was binding on the primary judge by reason of section 79 of the Judiciary Act.

- The Full Court erred in holding that the primary judge failed to apply the relevant legal principles and/or the relevant legislative pathway in determining the Respondent mothers' application to relocate to New Zealand with both of the children and, in particular, erred in holding that the primary judge proceeded from the erroneous basis that the Appellant was the parent of the child, B.

GLENCORE INTERNATIONAL AG & ORS v COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA & ORS (S256/2018)

Date writ of summons filed: 27 September 2018

Date demurrer referred to Full Court: 5 November 2018

The Plaintiffs are four companies in the international "Glencore group" of entities. In October 2014 an Australian law practice instructed by the Plaintiffs engaged a law practice in Bermuda to provide legal advice on a corporate restructure of the Australian entities within the Glencore group that was known as "Project Everest". Consequently the Bermudan law practice held a number of documents in electronic form relating to Project Everest.

In November 2017, media reports indicated that journalists had come into the possession of copies of many documents that were held by the Bermudan law practice (which were described colloquially as "the Paradise Papers"). A statement published by the Australian Taxation Office ("the ATO") indicated the ATO's interest in such documents and that the ATO was seeking to identify possible Australian links, in aid of tackling tax avoidance. Officers of the ATO later acknowledged, in a meeting with the Plaintiffs, that they were in possession of documents relating to Project Everest.

In the proceedings in this Court, the Plaintiffs seek an order for the delivery up of those documents in the possession of the Defendants which were created for the sole or dominant purpose of the Bermudan law practice giving legal advice to the Plaintiffs ("the Glencore Documents"), on the basis that such documents are subject to legal professional privilege. The Plaintiffs also seek an injunction restraining the Defendants and any other officer of the ATO from making use of any of the Glencore Documents.

The Plaintiffs filed an amended statement of claim, to which the Defendants demur. On 5 November 2018 Justice Edelman referred the Defendants' demurrer for hearing by the Full Court. The grounds of the demurrer are that, even if the Glencore Documents are documents or evidence communications to which legal professional privilege attaches under the common law of Australia:

1) the amended statement of claim does not disclose a cause of action in respect of which the Plaintiffs are entitled to the relief sought; and

2) further or alternatively, the Defendants are entitled and obliged to retain and use those documents by reason of, and for the purposes of, s 166 of the *Income Tax Assessment Act 1936* (Cth).

The Plaintiffs have filed a notice of a constitutional matter. No Attorney-General has given notice of an intention to intervene in the matter.

The Association of Corporate Counsel and its Australian chapter, the Australian Corporate Lawyers Association, have applied for leave to make submissions as amicus curiae.