

**SHORT PARTICULARS OF CASES**  
**APPEALS**

**MARCH 2024**

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**GODOLPHIN AUSTRALIA PTY LTD ACN 093921021 v  
CHIEF COMMISSIONER OF STATE REVENUE (S130/2023)**

Court appealed from: Court of Appeal of the Supreme Court of  
New South Wales  
[2023] NSWCA 44

Date of judgment: 20 March 2023

Special leave granted: 13 October 2023

The respondent (“the Commissioner”) assessed the appellant (“Godolphin”) for land tax for the 2014-2019 tax years on two rural properties that were used by Godolphin for the insemination, birth, weaning, breaking in and resting of thoroughbred racehorses. Some of the subject land was also used for growing lucerne and maintaining cattle.

Godolphin objected to the Commissioner’s assessments, and in subsequent Supreme Court proceedings it claimed to be entitled to the exemption from land tax provided by section 10AA(1) of the *Land Tax Management Act 1956* (NSW) (“the Act”) in respect of rural land used for primary production. This was on the basis that the land’s “dominant use” was for “the maintenance of animals ... for the purpose of selling them or their natural increase or bodily produce”, in accordance with s 10AA(3)(b) of the Act. The Commissioner’s position was that although the land was used for the maintenance of animals, the dominant use was for racing rather than breeding activities, such that the exemption did not apply.

The primary judge, Ward CJ in Eq, upheld Godolphin’s objection and revoked the Commissioner’s assessments. Her Honour found that the properties were part of an integrated operation, the dominant purpose of which was the maximisation of revenue from the sale of bodily produce and of progeny.

An appeal by the Commissioner was allowed by the Court of Appeal (Kirk JA and Simpson AJA; Griffiths AJA dissenting). The majority held that, although Godolphin used the land for the separate (although related) *purposes* of sales and racing, the sales purpose being the more profitable, the use of the land for activities in pursuit of the racing purpose was not subservient to its use for the sales purpose. Godolphin therefore had failed to establish the dominant *use* necessary for the success of its claimed exemption from land tax.

Griffiths AJA considered that the business operations were unusually symbiotic, and that the primary judge had correctly characterised Godolphin’s use of the land as an integrated operation in which the preparation of horses for racing was with the dominant purpose of maximising revenue from the sale of bodily produce and of progeny.

The grounds of appeal include:

- The Court of Appeal erred in concluding that the requirement of dominance in s 10AA(3)(b) of the Act applies to both use and purpose.

- The Court of Appeal should have concluded that where the dominant use of the land involves the same physical activity for two or more complementary or overlapping purposes, one of which satisfies s 10AA(3)(b) of the Act and does not prevail over the other purpose, it is unnecessary to demonstrate separately that the exempt purpose is the dominant purpose.

By notice of contention, the Chief Commissioner raises grounds including the following:

- A majority of the Court of Appeal erred in:
  - (a) finding that Godolphin was conducting an integrated operation on the land with dual purposes, and/or conducting the same or a single relevant physical activity on the land with dual purposes; and
  - (b) failing to find that Godolphin's activities on the land involved two or more separate uses of the land, such that it was necessary to determine the dominant use of each parcel of land.

**MALLONLAND PTY LTD ACN 051 136 291 & ANOR v  
ADVANTA SEEDS PTY LTD ACN 010 933 061 (B60/2023)**

Court appealed from: Supreme Court of Queensland Court of Appeal  
[2023] QCA 24

Date of judgment: 28 February 2023

Special leave granted: 13 October 2023

Between 2010 and 2014, commercial sorghum farmers purchased sorghum seed, manufactured by the respondent and known as MR43, from intermediate suppliers and distributors. The sorghum seed was packaged in bags labelled with the respondent's terms and conditions of sale, which included a disclaimer of liability. The sorghum seed was contaminated with a sorghum off-type known as shattercane. After planting, the shattercane corrupted the sorghum. The result was the intermingling of sorghum and weeds over several seasons. The only way to prevent disruption of the farmers' sorghum production was to stop growing sorghum and to remediate the fields.

The appellants commenced Supreme Court proceedings as representative parties under Part 13A of the *Civil Proceedings Act 2011* (Qld) on behalf of sorghum farmers impacted by the contaminated MR43 seed. The appellants alleged that the respondent had breached a duty of care by engaging in misleading or deceptive conduct in connection with the supply of the seed, and claimed that they (the appellants) had suffered loss or damage caused by the respondent's negligence. The appellants submitted that the respondent had failed to conduct a grow-out of the contaminated seed before supplying it to the public, had failed to undertake scientific testing, and had failed to warn the appellants of the need to remove the shattercane. The respondent denied the existence of a duty of care owed and argued that the damage alleged was pure economic loss that was not reasonably foreseeable, and that the label on the MR43 bags operated as a disclaimer of any assumption of responsibility.

The primary judge, Jackson J, dismissed the appellants' claim, holding that the salient features of vulnerability and coherence within the existing legal framework did not support the existence of a duty of care owed by the respondent to the appellants. His Honour further held that the terms and conditions attached to the packaging of MR43 seeds amounted to a disclaimer of an assumption of responsibility, and therefore negated the existence of any duty of care to prevent economic loss in the event of contamination.

The Court of Appeal (Morrison and Bond JJA and Williams J) unanimously dismissed an appeal by the appellants. Their Honours held that an assumption of responsibility could be negated by an express disclaimer. The Court of Appeal was satisfied that the terms and conditions on the packaging constituted a clear and prominent disclaimer of the respondent's liability. Their Honours held that the particular disclaimer was an essential characteristic of the product, affecting the end users' choice to purchase that product over another product.

The grounds of appeal are:

- The Court of Appeal erred in failing to find that the respondent manufacturer owed a duty of care to the appellant farmers as end users of its MR43 seed product, sold to them through distributors, to take reasonable care to avoid the risk that such end users who used the product as intended on their land for sorghum farming would sustain economic losses by reason of hidden defects in those goods.
- The Court of Appeal erred, when approaching the question of whether the respondent owed such a duty of care as manufacturer to the appellant farmers, in finding that the presence of a disclaimer of liability on the product packaging for the MR43 seed product negated any assumption of responsibility by the respondent so as to preclude the duty of care on the part of the manufacturer arising (thereby overwhelming consideration of all other salient features).

By notice of contention, the respondent seeks to raise grounds that include:

- The Court of Appeal should have found that the appellants' claims were statute barred pursuant to section 82(2) of the *Trade Practices Act 1974* (Cth), s 236(2) of the *Australian Consumer Law*, s 10(1) of the *Limitation of Actions Act 1974* (Qld) and s 14(1) of the *Limitation Act 1969* (NSW).

**GREYLAG GOOSE LEASING 1410 DESIGNATED ACTIVITY  
COMPANY & ANOR v P.T. GARUDA INDONESIA LTD  
(S135/2023)**

Court appealed from: Court of Appeal of the Supreme Court of  
New South Wales  
[2023] NSWCA 134

Date of judgment: 14 June 2023

Special leave granted: 19 October 2023

The appellants (together, “Greylag Goose”) lease aircraft to the respondent (“Garuda”), a company incorporated in Indonesia that operates that country’s national airline. Garuda is registered in Australia as a foreign company under Part 5B.2 of the *Corporations Act 2001* (Cth) (“the Corporations Act”).

In August 2022, Greylag Goose applied for an order that Garuda be wound up in insolvency under Pt 5.7 of the Corporations Act. In response, Garuda claimed immunity from the jurisdiction of Australian courts, under the *Foreign States Immunities Act 1985* (Cth) (“the FSIA”). That was pursuant to section 9 of the FSIA, which gives general immunity to “a foreign State”, and s 22, which provides that the immunity applies also to “a separate entity of a foreign State”. Garuda came within the definition, contained in s 3 of the FSIA, of such a separate entity. Greylag Goose then relied on s 14(3) of the FSIA, which provides as follows:

- (3) A foreign State is not immune in a proceeding in so far as the proceeding concerns:
  - (a) bankruptcy, insolvency or the winding up of a body corporate; or
  - (b) ...

The primary judge, Hammerschlag CJ in Eq, upheld Garuda’s claim of immunity and set aside the originating process filed by Greylag Goose. His Honour considered that the legislature would not have intended that s 14(3)(a) apply to a legal person (the State or its separate entity) the object of the immunity where that person was the subject of the proceeding. If otherwise, s 14(3)(a) referred to the same person in two different ways, and its application would have the undesirable consequence that the immunity would not apply to the head of a foreign State the subject of bankruptcy proceedings.

An appeal by Greylag Goose was unanimously dismissed by the Court of Appeal (Bell CJ, Meagher and Kirk JJA). The Court of Appeal held that the reference to a body corporate in s 14(3)(a) should be interpreted to mean a body corporate in and of the Commonwealth. This was after considering the historical context of s 14(3)(a) and of the FSIA more broadly. Their Honours held that s 14(3)(a) related only to a bankruptcy, insolvency or winding up in which a foreign State claimed an interest in property with which a proceeding was concerned. The provision did not render a foreign State or its separate entity susceptible to a winding up proceeding.

The sole ground of appeal is:

- The Court of Appeal erred in construing s 14(3)(a) of the FSIA as not applying to proceedings in so far as they concern the winding up, including in insolvency, of a body corporate that is a separate entity of a foreign State.

**THE DIRECTOR OF PUBLIC PROSECUTIONS v  
BENJAMIN RODER (A PSEUDONYM) (M85/2023)**

Court appealed from: Supreme Court of Victoria Court of Appeal  
[2023] VSCA 262

Date of judgment: 31 October 2023

Date referred to Full Court: 7 December 2023

The Respondent is charged with 27 sexual offences against two brothers, MW and EW, alleged to have occurred between 1999 and 2011. MW and EW were the respondent's step-children during the relevant period. The Respondent is facing trial in the County Court of Victoria for the offences charged.

The Director of Public Prosecutions ("the DPP") gave notice under section 97(1)(a) of the *Evidence Act 2008* (Vic) that they seek to rely at trial on the Respondent's tendency to have an improper sexual interest in his step-children MW and EW, and a willingness to act on that sexual interest by engaging in sexual activity with them. The DPP also seeks to rely at trial on the Respondent's tendency to act in a particular way, including but not limited to, a tendency to use his position of trust, physical proximity to and relationship with his step-children to engage in sexual activity with each of them.

The DPP relies on every sexual act alleged in every charge on the indictment ("the charged acts") as tendency evidence, and six other pieces of sexual misconduct which are not the subject of a charge ("the uncharged acts"). At a pre-trial hearing counsel for the Respondent conceded that the charged acts and the uncharged acts were admissible as tendency evidence but submitted that the trial judge should direct the jury that, before using evidence of the charged acts as tendency evidence, they must be satisfied beyond reasonable doubt that those acts occurred. Counsel for the Respondent relied on *Dempsey (a pseudonym) v The Queen* [2019] VSCA 224 (Beach, Kaye, Ashley JJA) ("*Dempsey*") in support of this submission. The DPP submitted that such a direction was prohibited by s 61 of the *Jury Directions Act 2015* (Vic) ("the JDA"), and that *Dempsey* was not applicable.

The judge accepted the principal submissions of the Respondent's counsel and rejected those advanced by the prosecution, ruling that the jury should be directed that the charged acts must be proved beyond reasonable doubt before they could be used as tendency evidence.

The DPP sought leave to appeal the pre-trial ruling to the Supreme Court of Victoria Court of Appeal. The Court of Appeal refused leave to appeal on the basis that they considered the central pillar of the trial judge's ruling to be sound. Counsel for the DPP submitted to the Court of Appeal that the jury must not be directed that they must be satisfied beyond reasonable doubt when using the charged acts for tendency purposes. Apart from being prohibited by s 61 of the JDA, counsel for the DPP submitted that the proposed directions would impermissibly limit the evidence that the jury could take into account in considering whether the alleged tendencies have been established, to the uncharged acts and the charges that precede the charge then under consideration on the indictment. In making these submissions, counsel for the DPP placed substantial reliance on a

passage from the High Court's reasons in *R v Bauer* (2018) 266 CLR 56, 97-9 [86] ("*Bauer*").

The Court of Appeal determined that the observations in *Bauer* relied upon by the DPP, do not purport to extend to cases in which charged acts are relied upon as tendency evidence. Rather, the observations in *Bauer* are limited to the directions ordinarily to be given to a jury in a single complainant sexual offences case in which the prosecution is permitted to adduce evidence of uncharged acts as tendency evidence. The Court of Appeal determined the present case was indistinguishable in any relevant sense from *Dempsey* and accordingly, *Dempsey* should be followed. The Court of Appeal also confirmed that s 61 of the JDA requires a trial judge to direct the jury that the elements of the offence charged must be proved beyond reasonable doubt. In the present case, every sexual act alleged in every charge on the indictment is an element of that charge. A direction that any such element must be proved beyond reasonable doubt – no matter the use sought to be made of the evidence – would not offend s 61 of the JDA; rather it would plainly be in conformity with the section.

The Court of Appeal held that the trial judge was correct to hold that the jury should be directed that every charged act relied upon by the prosecution as tendency evidence must be proved beyond reasonable doubt before it can be so used. To direct otherwise would be to risk confusing, and unacceptably undermining, the criminal standard of proof.

On 7 December 2023, Gordon J referred the DPP's application for special leave to appeal to the Full Court of the High Court of Australia for argument as if on appeal. The sole ground of appeal is:

- The Court of Appeal of the Supreme Court of Victoria erred in upholding the interlocutory decision of the Country Court of Victoria on the basis that:
  - (a) where a charged act is relied upon by the prosecution as evidence to prove a tendency, the jury should be directed that the charged act must be proved beyond reasonable doubt before it can be so used; and
  - (b) such a direction is not prohibited by s 61 of the *Jury Directions Act 2015* (Vic).

## **BIRD v DP (A PSEUDONYM) (M82/2023)**

Court appealed from: Supreme Court of Victoria Court of Appeal  
[2023] VSCA 66

Date of judgment: 3 April 2023

Special leave granted: 20 October 2023

In 2020, the respondent (“DP”) commenced a proceeding in the Supreme Court in which he claimed damages for psychological injuries which he alleged he sustained as a result of assaults committed by a Catholic priest, Father Bryan Coffey (“Coffey”), at the home of his parents in Port Fairy in 1971. At the time of the alleged assaults Coffey was the assistant parish priest and taught at the local Catholic primary school which DP commenced attending in 1971. DP instituted the proceeding against the Diocese of Ballarat (“the Diocese”) through the current Bishop, Paul Bird, who was the nominated defendant for the purpose of the proceeding pursuant to section 7 of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*. DP’s claim was made on two bases: first, that the Diocese was vicariously liable for the assaults committed by Coffey; and secondly, that the Diocese was directly liable in negligence as a result of the failure by the then Bishop of the Diocese to exercise reasonable care in his authority, supervision and control of the conduct of Coffey.

The trial judge concluded that, on balance, Coffey had committed the assaults which DP had alleged. His Honour held that, notwithstanding the unlawful nature of Coffey’s acts, the Diocese was vicariously liable for those assaults. However, the trial judge found that DP had not established that the Diocese was directly liable to him in negligence. The judge assessed DP’s total damages at \$230,000.

The appellant sought leave to appeal to the Court of Appeal. It was common ground before the Court of Appeal that, at the relevant time, Coffey was neither an employee of the Diocese, nor was he an independent contractor engaged by it. The two issues before that Court were: a) whether the particular relationship between Coffey and the Diocese was one to which the principles of vicarious liability may, in an appropriate case, apply; and b) if so, whether the criminal assaults committed by Coffey against DP were sufficiently related to that relationship so as to give rise to a liability of the Diocese in respect of them.

The Court of Appeal (Beach, Niall & Kaye JJA) observed that the relationship between a diocese and a priest or assistant priest is, necessarily, *sui generis* and that the relationship is founded in the context of the hierarchical system of a Diocese of the Roman Catholic Church. The Court identified that the question for determination was whether, applying the relevant principles, the evidence revealed that the content of the relationship between the Diocese and Coffey, as an assistant priest within the Diocese, was such as would, in an appropriate case, attract the principle of vicarious liability by the Diocese for a wrongful act by Coffey in the performance of his work. The Court held that the trial judge was correct in concluding that the relationship between the Diocese and Coffey could render the Diocese vicariously liable. The Court further held that the trial judge was justified in concluding that the position of power and intimacy invested in Coffey as an assistant parish priest, provided him with not only the opportunity to sexually abuse DP, but also the occasion for the commission of those wrongful acts.

The grounds of appeal are:

- Where:
  - (a) there was an express finding that the tortfeasor was not in an employment relationship with the appellant {J, [211]; CA, [44]}; and
  - (b) there was no finding that the tortious conduct occurred as part of any agency relationship between the tortfeasor and the appellant,

the Court of Appeal erred in holding that the appellant could be vicariously liable for that tortfeasor's wrong {cf. CA, [130]}.
- Assuming, contrary to Ground (1), that the relationship between the appellant and the tortfeasor gave rise to a relationship of vicarious liability, the Court of Appeal erred in concluding, based on the general and non-specific evidence accepted by the Court, that the conduct of the tortfeasor was conduct for which the appellant ought be liable as having provided both the opportunity and the occasion for its occurrence {CA, [148]}.

## **OBIAN v THE KING (M77/2023)**

Court appealed from: Supreme Court of Victoria Court of Appeal  
[2023] VSCA 18

Date of judgment: 16 February 2023

Special leave granted: 13 October 2023

After a lengthy trial (and a number of earlier trials where the jury had been discharged without verdict), a County Court jury found the appellant (“Obian”) guilty of three charges of trafficking in a drug of dependence, 1,4-butanediol (“1,4-BD”), in not less than a commercial quantity contrary to section 71AA of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (“the DPCS Act”). 1,4-BD is a drug of dependence within the meaning of s 4 of the DPCS Act, except when possessed or used “for a lawful industrial purpose and not for human consumption”. The prosecution case at trial was that Obian imported and possessed 1,4-BD for the purposes of sale for human consumption. The defence case was that Obian imported and used 1,4-BD in the course of his cleaning business SAA Cleaning Services Pty Ltd (“SAA”), of which he was the sole director, secretary, and shareholder. SAA was registered as an importer of industrial chemicals with the Department of Health.

Each of the three charges arose out of an investigation (“Operation Merlin”) conducted by the Victoria Police Drug Taskforce, which culminated in the arrest of a number of people and the seizure of over 3,800 kilograms of 1,4-BD in June 2016. The prosecution case was that Obian imported 1,4-BD into Australia from China on two occasions in 2015 using SAA. Charges 1 and 2 related to the two shipments of 1,4-BD into Australia from China ordered by SAA: one on 13 July 2015 of 800 litres of 1,4-BD; and the other on 27 November 2015 of 16,000 litres of 1,4-BD. There was no dispute at trial as to the events the subject of charges 1 and 2; the dispute was confined to Obian’s intended use of the 1,4-BD. On charge 3, the prosecution case was that Obian participated with others in the transportation of 1,4-BD between various premises around Melbourne in the early hours of 14 June 2016. The movement of the drug that night was facilitated in part by the use of a white Toyota HiAce van (“the van”). The prosecution case relied on Obian’s alleged involvement in charge 3, amongst other things, to support the intent necessary for charges 1 and 2.

One aspect of the proof of his involvement was to establish that he had hired a HiAce van from Mini Koala Car Rental in Bell Street, Preston between midnight and 1:00 am on 14 June 2016. The van was used to move the boxes and barrels of 1,4-BD very soon afterwards. Obian gave evidence about the hire of the van and events occurring in the course of, and shortly after, that hire. Obian said that he was the person who rented the van from Mini Koala Car Rental. He said he hired it on behalf of one Allouche, because Allouche had called that night and asked him to do so. Obian said that he left the car hire premises to attend Allouche’s house and obtain money for the bond, before returning and renting the van. He then delivered the van to Allouche. Obian said that he had no further involvement with the van after delivering it to Allouche, and denied having agreed to move, or participated in moving, 1,4-BD from Moustafa’s (the co-accused’s) Braybrook storage facility that evening. He denied having seen Moustafa at all on 13 or 14 June 2016. Obian was not among the men apprehended on that morning,

although the prosecution case was that he was physically present during that process but managed to evade police.

Part way through the prosecution's cross-examination of Obian, the prosecution sought leave under s 233(2) of the *Criminal Procedure Act 2009 (Vic)* to reopen its case to call evidence from a police surveillance officer to rebut aspects of Obian's evidence regarding that night. This was said to be on the basis that it had been always disputed that Obian was the person who hired the van and that Obian had denied he was there at Mini Koala Car Rentals. The application was contested and there was extensive discussion about the application. The trial judge gave the prosecution leave to reopen its case, finding that the prosecution could not have reasonably foreseen Obian's evidence.

Obian sought leave to appeal and each of his proposed grounds in the Court of Appeal in one way or another took issue with the leave granted to the prosecution to reopen its case and the process of obtaining it. Obian contended that there was error because the trial judge had determined the s 233(2) application on the basis of incorrect propositions advanced by the prosecution (that Obian has consistently denied hiring the van), and wrongly found Obian's evidence relevant to that topic was not reasonably foreseeable. A majority in the Court of Appeal (Macaulay JA, Niall JA largely agreeing) accepted that the prosecutor's application was made on a false factual basis and that the trial judge had unwittingly been misled. The majority held that the outcome of the trial might have been different were it not for the trial judge's ruling. However, Macaulay JA determined that Obian's evidence about hiring the van on behalf of Allouche had not been reasonably foreseeable, and so if there was error or irregularity arising from the prosecutor's misrepresentations, that there had been no substantial miscarriage of justice as a result.

Priest JA held that the judge's discretion under s 233(2) miscarried because he exercised it on an objectively false factual basis.

The sole ground of appeal is:

- That the majority of the Court of Appeal erred in failing to find that the trial judge erred in permitting the prosecution to reopen the prosecution case under s 233(2) of the *Criminal Procedure Act 2009 (Vic)* and that a substantial miscarriage of justice occurred as a result.