

SHORT PARTICULARS OF CASES
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NOVEMBER 2024

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**LENLEASE CORPORATION LIMITED ACN 000 226 228 & ANOR
v DAVID WILLIAM PALLAS AND JULIE ANN PALLAS AS
TRUSTEES FOR THE PALLAS FAMILY SUPERANNUATION FUND
& ANOR (S108/2024)**

Court appealed from: Court of Appeal of the Supreme Court of
New South Wales
[2024] NSWCA 83

Date of judgment: 17 April 2024

Special leave granted: 8 August 2024

This matter is a shareholder class action proceeding which was removed into the Court of Appeal from the Equity Division of the Supreme Court of New South Wales, pursuant to an order made by Ball J on 13 September 2023 in accordance with rule 1.21(1)(a) of the *Uniform Civil Procedure Rules 2005* (NSW). In removing the cause, Ball J stated a separate question (at the request of both parties) for the Court of Appeal to determine, in the following terms:

*“Notwithstanding the decision in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199 [(“*Wigmans*”)] and having regard to the decision in *Parkin v Boral Ltd* (2022) 291 FCR 116 [(“*Parkin*”)], does the Supreme Court of NSW have power pursuant to sections 175(1), 175(5) and 176(1) of the *Civil Procedure Act 2005* (NSW) (“the CPA”) or otherwise to approve a notice to Group Members of the right to register to participate in any settlement of the proceedings or opt out of the proceedings for the purposes of CPA section 162 containing the following notation:*

Upon any settlement of this proceeding the parties, alternatively, the defendant, will seek an order, which, if made, has the effect of providing that any Group Member who by a registration date: (i) has not registered; or (ii) has not opted out in accordance with the orders made by the Court, will remain a Group Member for all purposes of this proceeding but shall not, without leave of the Court, be permitted to seek any benefit pursuant to any settlement (subject to Court approval) of this proceeding that occurs before final judgment.”

The appellants contended that the answer to the separate question should be “Yes”. The respondents did not take a different position to the appellants on the question of the power of the Supreme Court to make a notation of the kind formulated in the separate question. However, they expressly reserved their position on the question as to whether the Court should exercise its discretion to issue a notice of the kind contemplated in the separate question if there was power to do so. Whilst the non-opposition of the respondents on the question of power fell short of positive support for the arguments advanced by the appellants, the Court of Appeal considered it necessary and desirable to appoint a contradictor to ensure the Court had the benefit of full argument. The same contradictor who appeared in the Court of Appeal has been appointed as contradictor in the appeal before the High Court.

The appellants and respondents accepted that the decision in *Wigmans* would compel a negative answer to the separate question. However, subsequent to the decision in *Wigmans*, the Full Court of the Federal Court of Australia in *Parkin*

purported to distinguish *Haselhurst v Toyota Motor Corporation Australia Ltd (t/as Toyota Australia)* (2020) 101 NSWLR 980 and held that *Wigmans* was “plainly wrong” and should not be followed. The appellants submitted that *Wigmans* should be overruled and *Parkin* applied.

The Court of Appeal (Bell CJ, Gleeson, Leeming and Stern JJA agreeing, Ward P agreeing in the orders) answered the separate question in the negative. The Court of Appeal held that intermediate appellate courts should only depart from decisions of courts of co-ordinate jurisdiction, or their own previous decisions, if they determine that the impugned decision is “plainly wrong”, or, to use a different expression, where there are “compelling reasons” to depart from the impugned decision. Where there are “competing” decisions, neither of which can be said to be “plainly wrong”, and one of those decisions is of the Court considering the question, that Court should adhere to its previously expressed view. The Court concluded that *Wigmans* was not “plainly wrong” and that there were no compelling reasons why a recent, closely reasoned decision of the Court of Appeal should be departed from. The Court confirmed that s 175(5) of the CPA must be construed in the context of the CPA as a whole and that s 175(6) constrains s 175(5) in two respects. First, the notice must relate to an “event”, and that “event” is one that must have occurred prior to the giving of the notice. The Court held that the proposed notification was not of any event. It was of a present intention on the part of the appellants (and perhaps the representative respondents) to participate in settlement negotiations in a particular way.

In this Court, the appellants contend that the order foreshadowed by the notice would be within the power of the Supreme Court to make, and that providing warning of the parties’ intention to seek that order is consistent with the procedural fairness objectives underpinning the notice provisions. The appellants further contend that where an intermediate appellate court is determining a question on which there is conflicting intermediate appellate court authority, at the least where that court is interpreting uniform legislation or the common law, the most pressing imperative should be arriving at the correct legal conclusion. The “plainly wrong” test should not apply.

The sole ground of appeal is:

- The Court of Appeal erred in holding that the Supreme Court of New South Wales does not have power in a representative proceeding to approve a notice to group members containing a notation to the effect that, upon any settlement, the parties or defendant will seek an order that group members neither registering nor opting out shall not be permitted without leave to seek any benefit pursuant to any settlement.

STUART & ORS v STATE OF SOUTH AUSTRALIA & ORS **(A1/2024)**

Court appealed from: Full Court of the Federal Court of Australia
[2023] FCAFC 131

Date of judgment: 14 August 2023

Special leave granted: 8 February 2024

This appeal concerns the proper construction and application of section 223(1)(b) of the *Native Title Act 1993* (Cth) (“the NT Act”), and the legal principles underpinning the “connection inquiry” in determining native title rights and interests.

Section 223(1) of the NT Act, relevantly, provides that:

- (1) *The expression “native title” or “native title rights and interests” means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or water, where:*
 - (a) *the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*
 - (b) *the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*
 - (c) *the rights and interests are recognised by the common law of Australia.*

Before this Court is the appeal of three overlapping applications pursuant to s 61 of the NT Act, for the determination of native title relating to an area of about 150km² in the vicinity of the town of Oodnadatta in South Australia, including the stock reserve known as Oodnadatta Common, close to the Northern Territory border. The Appellants are collectively known as the Arabana parties. The First Respondent is the State of South Australia, the Second to Fifth Respondents comprise the Walka Wani parties, and the remaining respondents are corporations and an individual who have filed submitting appearances.

In 2013, the Arabana parties filed an application seeking determination of native title over two separate areas, of which one has had the determination of native title by consent (“the Consent Determination”). The remaining area requires determination and concerns Oodnadatta (“the Arabana Claim”).

The Walka Wani parties separately filed two applications – the first application in 2013 sought the determination of native title in respect of only part of the area claimed by the Arabana parties, and the second application in 2018 sought a determination of native title over the remaining portion of the area claimed by the Arabana parties (“the Walka Wani Claims”). In combination, the areas which are the subject of the Walka Wani Claims overlap the area of the Arabana Claim (“the Overlap Area”). The land surrounding the Overlap Area is largely already the subject of native land determinations.

The primary judge (White J) made orders pursuant to s 67 of the NT Act providing for the Arabana Claim and the two Walka Wani Claims to be heard and determined in the same proceeding. In December 2021, White J dismissed the Arabana Claim and concluded that the Arabana parties did not, by their traditional laws and customs, have a connection with the Overlap Area, and held that the Arabana parties did not presently possess native title rights and interests in the Overlap Area. The primary judge subsequently made a determination of native title in favour of the Walka Wani parties (“the Determination”). The Arabana parties appealed to the Full Court of the Federal Court of Australia from the orders dismissing the Arabana Claim; and the Determination (“the Arabana Appeal”). The State of South Australia appealed only from the Determination (“the State Appeal”) and did not seek to disturb the order dismissing the Arabana Claim, and actively opposed the Arabana Appeal. A common trend to the submissions was that the primary judge erred in applying the principles that arise out of s 223(1)(b) regarding “connection” with the Overlap Area. The Walka Wani parties defended both appeals.

The Full Court of the Federal Court of Australia (Rangiah, Charlesworth and O’Byrne JJ) unanimously upheld the State Appeal. The Full Court by majority (O’Byrne J dissenting) dismissed the appeal of the rejection of the Arabana Claim and unanimously upheld the appeal in respect of the Walka Wani Claims, ordering that the Walka Wani Claims be dismissed. The ultimate effect of the Full Court’s decision is that the State Appeal succeeded in full, the Arabana Appeal succeeded only in part, and the Determination was set aside. The Arabana parties appeal to this Court from the Full Court decision. The Walka Wani parties have not sought to appeal to this Court. What remains for this Court to determine is the construction, interpretation, and application of s 223(1) concerning the connection that Aboriginal people have with their land and country.

The Attorney-General of the Commonwealth has intervened under s 84A (1) of the NT Act. The Attorney-General does not make any submissions as to any factual matters arising in the appeal and as such does not support any particular party, although his submissions on the legal significance of prior consent determinations relevant to Ground 2 of the grounds of appeal are consistent with the positions of the State of South Australia and the Walka Wani parties.

The grounds of appeal are:

- The majority erred by failing to find that the learned trial judge had failed correctly to construe and apply the definition of “native title” in s 223(1) of the NT Act when dismissing the Arabana’s native title determination application.
- The court erred by treating all aspects of the determination in *Dodd v State of South Australia* [2012] FCA 519 as being geographically specific. In particular, it failed to find that the determination in that matter that the Arabana people continued to acknowledge and observe the traditional laws and customs of the Arabana people at sovereignty was a determination as to the present claim group that should have been applied in the context of this small adjoining claim area.

**BOGAN & ANOR v THE ESTATE OF PETER JOHN SMEDLEY
(DECEASED) & ORS (M21/2024)**

Cause removed from: Supreme Court of Victoria Court of Appeal

Date cause removed: 7 March 2024

The applicants commenced representative proceedings in the Supreme Court of Victoria in August 2020, alleging amongst other things, misleading or deceptive conduct by the respondents, contrary to the *Corporations Act 2001* (Cth) (“the Corporations Act”). The group or class comprises people who acquired an interest in Arrium Ltd through shares between August 2014 and April 2016. The first to fourth respondents (“the director respondents”) were directors of Arrium Ltd during the relevant period and the fifth respondent (“KPMG”) had been retained by Arrium Ltd during the relevant period as its auditor.

As of 1 July 2020, the *Supreme Court Act 1986* (Vic) (“the Supreme Court Act”) was amended to introduce the concept of a ‘group costs order’ (“GCO”), which applies in group proceedings and allows the Court to order that the legal costs payable to a law practice in a group proceeding may be calculated as a percentage of the amount of any award or settlement recovered (also referred to as contingency fees). Such fees are otherwise prohibited throughout Australia. Justice John Dixon in the Supreme Court of Victoria made a GCO, setting the legal costs payable to the solicitors for the applicants at 40 per cent of the amount of any award or settlement recovered. There is no appeal possible from that GCO. The respondents applied by summons to have the group proceeding transferred to the Supreme Court of New South Wales, pursuant to an express statutory power in the Corporations Act on the ground that the Supreme Court of New South Wales is the more appropriate forum. Questions arose as to whether, in determining the transfer application, the fact that a GCO had been made is relevant to the exercise of the transfer power and, if the proceeding were transferred, whether the GCO would apply in New South Wales thereafter. New South Wales prohibits lawyers charging contingency fees and makes no exception for group proceedings, so had the group proceeding been brought in New South Wales there would have been no power to make a GCO.

Justice Nichols of the Supreme Court of Victoria reserved three questions for the consideration of the Court of Appeal (which are set out below as the questions reserved in this Court). The Court of Appeal found that because a GCO had been made, the litigation funder involved would probably not continue to fund the proceeding without the GCO; and because the GCO could not “travel” to New South Wales, the GCO in effect tied the proceeding to Victoria and no transfer should be ordered. The Court indicated they would answer the questions as follows:

1. Yes;
2. (a) No;
2. (b) Does not arise; and
3. No.

The Court did not make orders reflecting their reasons. Had any orders been made embodying those answers, they may not have been appealable by virtue of section 1337R(a) of the Corporations Act. Upon the application of KPMG, the proceedings have been removed into the High Court.

KPMG challenges the correctness of each of the Court of Appeal's conclusions. KPMG submits that having removed the proceedings, the High Court may do whatever is necessary for the complete adjudication of the cause, including giving answers to the reserved questions which are different to those given by the Court of Appeal. The director respondents generally support KPMG, including that the questions reserved are to be reconsidered *de novo*. The applicants however submit that this Court should not depart from the reasons of the Court of Appeal unless it finds error.

The applicants have filed a notice of a constitutional matter and the Attorney-General of the Commonwealth has intervened, generally in support of the respondents. The Attorney-General of the Commonwealth has also filed an additional notice of a constitutional matter.

The applicants also seek to contend that the decision of the Court below should be affirmed on the basis of the additional grounds identified in their document.

The questions reserved are:

1. In exercising the discretion to transfer proceedings to another court under s 1337H(2) of the Corporations Act, is the fact that the Supreme Court of Victoria has made a GCO under s 33ZDA of the Supreme Court Act relevant?
2. If the proceedings are transferred to the Supreme Court of New South Wales:
 - (a) will the GCO made by the Supreme Court of Victoria on 3 May 2022 remain in force and be capable of being enforced by the Supreme Court of New South Wales, subject to any order of that Court; and
 - (b) if the GCO will remain in force, does the Supreme Court of New South Wales have power to vary or revoke the GCO?
3. Should this proceeding (S ECI 2020 03281) be transferred to the Supreme Court of New South Wales pursuant to s 1337H of the Corporations Act?

**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
& ORS v MZAPC (P21/2024)**

Court appealed from: Full Court of the Federal Court of Australia
[2024] FCAFC 34

Date of judgment: 18 March 2024

Special leave granted: 9 May 2024

The respondent entered Australia in 2006 on a student visa which expired in March 2008. Before that expiry date, the respondent unsuccessfully applied for a Skilled Migration visa. He later applied for a protection visa, which was refused. His appeal to the High Court in respect of that refusal was dismissed in May 2021. Since his first visa refusal the respondent had held a bridging visa. That visa was cancelled in November 2015 following his conviction for drug-related charges. The respondent unsuccessfully sought review of the decision to cancel his visa in the Administrative Appeals Tribunal. His application to the Federal Circuit and Family Court of Australia was discontinued. He has exhausted all rights of review and appeal in relation to his immigration status and has no extant visa application. He has been in immigration detention since 2016, following his release from prison.

In August 2023, the respondent filed an originating application in the Federal Court of Australia. The asserted ground of review was that the second and third appellants had exceeded the executive power of the Commonwealth, in making a number of decisions in purported compliance with ministerial guidelines, in respect of requests the respondent made for the Minister to consider exercising powers under sections 195A and 417 of the *Migration Act 1958* (Cth) (“the Act”), and also under ss 48B and 351 of the Act, to grant him a visa. The respondent also applied for an interlocutory injunction on the basis that he was liable to be removed from Australia at any time after 6 July 2023. The primary judge found that there was a serious question to be tried in the substantive application and granted the interlocutory injunction.

The appellants sought leave to appeal in the Full Court of the Federal Court. It was not disputed that in the circumstances there was a duty imposed by s 198(6) of the Act to remove the respondent from Australia as soon as reasonably practicable. The injunction granted by the primary judge restrained the performance of that duty. The appellants submitted that the Court had no power to prevent the performance of the duty under s 198(6) in circumstances where the duty to remove was not being challenged by the respondent in his substantive application. A majority of the Full Court (Colvin & Jackson JJ; SC Derrington J dissenting) granted leave to appeal, but dismissed the appeal on the basis that the Court has the power to grant interlocutory relief to preserve the subject matter in dispute and to enable it to perform its function as a court.

The respondent filed a notice of a constitutional matter and a notice of contention. The Attorney-General of the Commonwealth has intervened in the proceeding in support of the appellants.

This appeal was listed for hearing before the High Court sitting in Adelaide on 13 August 2024. The High Court adjourned the hearing to allow the respondent to file an amended notice of contention and for the parties to file additional submissions to address the issue of statutory construction and the content of

“reasonable practicability” concerning the grant of the interlocutory injunction and the power to remove from Australia in the context of the duty imposed under s 198(6) of the Act.

The sole ground of appeal is:

- The Full Court of the Federal Court of Australia erred in concluding that the primary judge had power to grant an interlocutory injunction restraining the respondent’s removal from Australia.

**CZA19 v COMMONWEALTH OF AUSTRALIA & ANOR (M66/2024);
DBD24 v MINISTER FOR IMMIGRATION AND MULTICULTURAL
AFFAIRS & ANOR (P34/2024)**

Court from which cause removed (CZA19): Federal Court of Australia

Date cause removed (CZA19): 31 July 2024

Date writ of summons filed (DBD24): 22 October 2024

Date special case referred to Full Court (DBD24): 5 November 2024

CZA19 is a citizen of Poland, where he was born in 1970. Upon his arrival in Australia on a tourist visa in 2009, he was arrested and charged with a drug import/export offence. In 2011, after being issued with a criminal justice stay visa, he was convicted of the charged offence and was sentenced to imprisonment for 10 years and 8 months, with a non-parole period of 6 years and 8 months. Upon his release from prison on parole in 2018 (after a period of escape and a further sentence for that offence), CZA19 was placed in immigration detention.

In January 2019, CZA19 applied for a protection visa. After that application was refused by a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs (“the Minister”), subsequent merits review, judicial review and appellate proceedings gave rise to a determination by the Administrative Appeals Tribunal (“the AAT”) in CZA19’s favour in November 2022. The AAT remitted CZA19’s protection visa application for reconsideration, finding that CZA19 met the complementary protection criterion, section 36(2)(aa) of the *Migration Act 1958* (Cth) (“the Act”), because if he were removed to Poland he might be imprisoned and suffer cruel and degrading treatment. The Minister’s department then obtained information about CZA19’s criminal history in Australia and in other countries, and obtained responses from CZA19. On 13 May 2024, a delegate of the Minister refused CZA19’s protection visa application, finding CZA19 to be a danger to the Australian community; therefore, he did not satisfy the criterion in s 36(1C) of the Act, and under s 36(2C) he was taken not to satisfy s 36(2)(aa). On the same day, CZA19 was released from immigration detention and he was issued with a bridging visa (with conditions of a curfew and wearing a monitoring device) pending his removal from Australia.

Prior to his release from detention, CZA19 had commenced Federal Court proceedings in which he challenged the lawfulness of his detention and sought a writ of habeas corpus for his release. Following his release, CZA19 amended his claim to include damages for unlawful detention.

DBD24 is a citizen of Vietnam, where he was born in 1997. After arriving in Australia by boat in April 2013, DBD24 was placed in immigration detention. After being released into community detention, in October 2013 he absconded and thereafter remained in Australia without ever holding a visa. In June 2021, he was convicted of drug offences and was sentenced to 3 years’ imprisonment, the sentence to be suspended after 2 years.

In January 2022, an application made by DBD24 for a protection visa was refused by a delegate of the Minister for Home Affairs. DBD24 was placed in immigration detention upon the conclusion of his imprisonment, in June 2023. Meanwhile, DBD24 had sought review of the decision to refuse his application for

a protection visa, and in December 2023 the AAT found in his favour and remitted the matter for reconsideration. The AAT found that DBD24 satisfied the s 36(2)(aa) complementary protection criterion, since if he were removed to Vietnam there was a real risk he would be sentenced to death on account of his having been an operative in a drug dealing enterprise.

On 25 May 2024, DBD24 commenced Federal Court proceedings, seeking a writ of mandamus requiring the Minister to grant or refuse DBD24's protection visa application forthwith, and a writ of habeas corpus for his release from detention.

On 2 July 2024, Mortimer CJ ordered that a Full Court hear a separate question in advance of other issues in each proceeding. The separate questions were whether CZA19's detention from 10 November 2022 to 13 May 2024 was unlawful, and whether DBD24 was entitled to a writ of habeas corpus.

Upon applications filed by the Attorney-General of the Commonwealth, Chief Justice Gageler ordered the removal into the High Court, under s 40(1) of the *Judiciary Act 1903* (Cth), of the separate question in each proceeding.

On 1 October 2024, DBD24 was given a resolution of status visa and was released from immigration detention. On 22 October 2024, he commenced proceedings in this Court, claiming damages for unlawful detention, and on 29 October 2024, Chief Justice Gageler granted him leave to discontinue the removed cause. A special case filed by the parties states the following question of law, which Chief Justice Gageler referred for consideration by the Full Court:

- In their purported application to DBD24 in the period between 18 December 2023 and 1 October 2024 (or part thereof), were ss 189(1) and 196(1) of the Migration Act invalid on the ground that, following the direction made by the AAT on 18 December 2023, there was no real prospect of his removal becoming practicable in the reasonably foreseeable future?

CZA19 and DBD24 (together, "the Applicants") have each filed a notice of a constitutional matter. No Attorney-General has intervened in the proceedings. LPSP, the lead applicant in a representative proceeding pending in the Federal Court, seeks leave to intervene or to be heard as *amicus curiae*.

The Applicants jointly submit that the holding of an alien in immigration detention pending the determination of the person's visa application is lawful only for a reasonable time in which such a determination should occur and where the result will be either the grant of a visa or, if the application is refused, the removal of the visa applicant from Australia. This is in view of an implied requirement of reasonable time on the duty to decide in s 65(1) of the Act, and detention under s 189(1) of the Act being required until a terminating event such as removal or a visa grant (s 196(1) of the Act). Although removal is required under s 198 where a visa is not granted, s 197C(3) provides that removal is not authorised where a protection finding has been made. Since a finding of complementary protection had been made in respect of each of the Applicants, and there was no evidence of an availability of removal to another country in the reasonably foreseeable future, it was inevitable that each of the Applicants would be released from detention and remain in Australia upon the determination of their visa application, even if that application came to be refused. Their detention therefore, they submit, was a form of punitive limbo not authorised under the Act and which also contravened the

constitutional limitation recognised by this Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (“*NZYQ*”).

The Respondents submit that detention for the purpose of investigation and determination of a visa application is reasonably necessary for a legitimate purpose and is non-punitive, and that the *NZYQ* limit does not apply in circumstances where, during the period of processing of a visa application, it becomes apparent that if the application is ultimately refused there would be no real prospect of removal becoming practicable in the reasonably foreseeable future.

THE KING v ZT (S38/2024)

Court appealed from: Court of Criminal Appeal of the Supreme Court of
New South Wales
[2023] NSWCCA 241

Date of judgment: 29 September 2023

Special leave granted: 7 March 2024

The respondent was found guilty of having been a party to the murder of William Chaplin on a rural property in New South Wales in 2010. The respondent was 16 years old at the time of the offence and living with a male and female couple who resided at the property.

The Crown's case against the respondent involved the doctrines of joint criminal enterprise or extended joint criminal enterprise, alleging an agreement between the respondent and the male resident to at the least assault the deceased.

The female resident had pleaded guilty to being an accessory after the fact by assisting to dispose of the body of the deceased. The respondent was not charged with that offence, although there was evidence from the female resident directly implicating him in doing so.

The Crown case against the respondent was circumstantial. As evidence of the respondent's involvement in the murder, the Crown relied upon various witness testimonies, forensic evidence and alleged admissions made by the respondent in intercepted telephone calls with family members and associates, and two police interviews. The respondent's admissions contained various inconsistencies and untruths. There is no dispute that the witness and forensic evidence would have been insufficient evidence to convict the respondent of the murder in the absence of his admissions in the telephone calls and police interviews.

The respondent was convicted of murder following a 13-day trial before a jury in the Supreme Court. The respondent sought leave to appeal on the sole ground that the verdict was unreasonable, or could not be supported, having regard to the evidence. The Court of Criminal Appeal upheld the appeal and entered a verdict of acquittal.

Justice Kirk (Sweeney J agreeing) held that the various admissions made by the respondent in the intercepted telephone calls and police interviews were unreliable and that it was not open to the jury to be satisfied beyond reasonable doubt that the respondent was guilty of the murder charge. Justice Fagan (dissenting) found that it was open to the jury to find that the respondent's admissions to his parents in intercepted telephone conversations and one of the police interviews established beyond reasonable doubt that he had participated in the murder pursuant to a joint criminal enterprise with the male resident.

The majority Justices did not listen to or watch the exhibits comprising the recordings of the telephone intercepts and police interviews. Justice Fagan listened to short passages of one police interview and the telephone intercepts played during that interview. The appellant contends that an independent assessment of the whole of the evidence could not be conducted by the Court of Criminal Appeal,

in the manner and to the extent necessary to apply the test articulated in *M v The Queen* (1994) 181 CLR 487, without reference to the recordings themselves.

The grounds of appeal are:

- The majority of the New South Wales Court of Criminal Appeal erred in concluding that the jury employed no relevant or significant advantage over the appellate court.
- The majority of the New South Wales Court of Criminal Appeal erred in its application of the test in *M v The Queen* (1994) 181 CLR 487.