HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S106/2023

BETWEEN:

HBSY PTY LTD ACN 151 894 049
Plaintiff

and

GEOFFREY LEWIS
First Defendant

THE FEDERAL COURT OF AUSTRALIA
AND THE JUDGES THEREOF
Second Defendants

PLAINTIFF'S REPLY

Part I: The plaintiff certifies that these submissions are in a form suitable for publication on the internet.

Part II: **Concise reply to the argument of the First Defendant**

1. The construction of clause 7(5) must start with its text. The text requires that, where a matter for determination on appeal is "*a matter arising under*" one of the scheduled Acts, the appeal is to be instituted in the Full Court. The draftsperson has used a form of words ("*matter arising under*") with a settled meaning at law.[1] No ambiguity arises on a literal construction.

2. The first defendant submits, however, that "*an appeal from a decision of a single Judge of the Supreme Court of a State or Territory*" in s 7(5) of the *Cross-Vesting Act* should be construed as though it contains an additional unwritten requirement: that the single Judge was exercising cross-vested jurisdiction.

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[1] Plaintiff's submissions in chief at [25] and [49].

3. The first defendant's construction of s 7(5) relies on context and purpose to the exclusion of the actual wording enacted by Parliament. It in uncontroversial that the text of the Act is to be construed having regard to its context and purpose,[2] and that the context and purpose include legislative history and extrinsic materials.[3] However, the first defendant treats the examination of extrinsic materials as an end in itself,[4] and advances a construction which is too much at variance with the language in fact used by the legislature.[5]

4. The Explanatory Memorandum explains that (a) provision is made in the *Cross-Vesting Act* to recognise the special role of the Federal Court in matters in which it had exclusive appellate jurisdiction;[6] and (b) more specifically, s 7 was designed so that appeals under the scheduled Acts will lie only to the Full Court because the Full Court had (we interpolate, mostly) exclusive jurisdiction under those Acts immediately prior to the enactment of the *Cross-Vesting Act*.[7] That is consistent with the plaintiff's construction of s 7(5). By contrast, there is nothing in the Explanatory Memorandum which supports the first defendant's submission that s 7 was intended to ensure that the appellate business of State and federal courts would remain entirely unchanged. To the extent the Explanatory Memorandum is ambiguous, it does not assist in statutory interpretation.[8]

5. The Second Reading Speech is to similar effect though it states that, by reason of s 7, certain appeals "*will remain within the exclusive appellate jurisdiction of the Full Federal Court.*"[9] That language is inconsistent with the actual text of s 7 to the extent it indicates a retention of the then current position. "*The words of a Minister must not be substituted for the text of the law*".[10] A clear and unambiguous ordinary meaning

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[2] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at [14] (Kiefel CJ, Nettle and Gordon JJ).
[3] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
[4] *Cf Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* at [39].
[5] *Cf Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9 at [38] (French CJ, Crennan and Bell JJ).
[6] Explanatory Memorandum, General Outline at [8].
[7] Explanatory Memorandum, Notes on Clauses, cl 7.
[8] *Taylor v Attorney-General for the Commonwealth* (2019) 268 CLR 224; [2019] HCA 30 at [148] (Edelman J).
[9] Hansard, House of Representatives, 22 October 1987, p.2555.
[10] *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ); applied in *Harrison v Melhem* (2008) 72 NSWLR 380; [2008] NSWCA 67 at [168]-[169] (Mason P).

cannot be precluded by an erroneous interpretation offered to Parliament.[11] The Second Reading Speech is imprecise on any view because State courts did have some appellate jurisdiction under the *Bankruptcy Act* prior to the *Cross-Vesting Act*. The Minister has used imprecise language to explain that the Act has preserved the special role of the Federal Court, as a court with exclusive appellate jurisdiction in some matters, by directing certain appeals to the Full Court.

6. The first defendant also relies on the Preamble,[12] which provides that the *Cross-Vesting Act* is intended to establish a system of cross-vesting "*without detracting from the existing jurisdiction of any court*". The Preamble, an objects clause stated at a high level of generality, is relevant to identifying the objects and purposes of s 7(5).[13] It is not to be treated as an "*exhaustive statement of the purposes of a single provision*".[14] In particular, s 7 is concerned with the destination of appeals, but the "*primary objective*" of the *Cross-Vesting Act* was to vest State courts with federal jurisdiction so that no action would fail for want of jurisdiction.[15]

7. There is a further problem with the first defendant's submission that an object of the Act was to ensure that there was no derogation from existing jurisdiction. Section 7 did not remove jurisdiction from State courts. The first defendant relies on *Eberstaller v Poulos*.[16] In *Eberstaller*, Leeming JA (Beazley P and Meagher JA agreeing) held that the preconditions of s 7(7) had not been made out and the appellant was obliged to institute the appeal in the Full Court.[17] In a subsequent judgment, Leeming JA explained that the effect of s 7(5) is not to deny jurisdiction, but rather to impose an obligation on State courts as to the way in which jurisdiction is to be exercised.[18]

8. The first defendant then addresses the pre-existing regime of federal jurisdiction prior to the enactment of the *Cross-Vesting Act*. He notes the Attorney-General's submission that s 7(5) expands, in a small way, the category of appeals required to be

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[11] *Harrison v Melhem* at [152] (Mason P; Spigelman CJ, Beazley and Giles JJA agreeing).
[12] First defendant's submissions at [14].
[13] *Unions NSW v State of New South Wales* (2019) 264 CLR 595; [2019] HCA 1 at [172] (Edelman J).
[14] *Ibid.*
[15] Explanatory Memorandum, General Outline at [5].
[16] (2014) 87 NSWLR 394; [2014] NSWCA 211 (***Eberstaller***); First defendant's submissions at [23]-[24].
[17] *Eberstaller* at [28].
[18] *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No. 73943* (2014) 88 NSWLR 488; [2014] NSWCA 409 at [91].

instituted and determined in the Full Court,[19] and submits that s 7(5) should be construed "*as narrowly as possible*" to ensure that s 7(5) does not effect any derogation from the existing jurisdiction of State courts.[20] The proposition that the section should be construed "*as narrowly as possible*" is contrary to general rules of construction. In any event, the first defendant does not rely on a narrow construction. He relies on a construction which inserts words to defeat the literal meaning.

9. The first defendant's submissions at [19]-[21] do not acknowledge that the scheduled Acts conferred significant appellate, but not original, jurisdiction on the Federal Court prior to the *Cross-Vesting Act*,[21] with the consequence that the first defendant's construction effects a more extensive alteration to the pre-existing jurisdiction (or more accurately, business) of courts than does the plaintiff's literal construction. The first defendant's construction undermines the purpose which he says it is intended to achieve. The same applies if s 7 is seen as derogating from jurisdiction because of its effect on the allocation of appellate business.[22]

10. The first defendant submits, by reference to *Shergold v Tanner*,[23] that s 7(5) should not be construed as withdrawing or limiting a conferral of jurisdiction under s 39(2) of the *Judiciary Act* unless that appears clearly and unmistakably.[24] The submission in paragraph 8 is repeated, and (in any event) the language of s 7(5) is clear and unmistakable. A literal construction does not involve any repeal of s 39(2), which provision the draftsperson must be taken to have understood.

11. The issue raised at [35] of the first defendant's submissions does not advance matters. The same could be said where the court at first instance was exercising cross-vested jurisdiction, and the presumption has little or no work to do when one is construing a provision expressly concerned with the proper court to hear appeals.

12. The first defendant's submissions at [36]-[58] address arguments advanced by the Attorney-General. At [46]-[52], the first defendant offers an alternative construction of s 7(5) which focuses on the appellate jurisdiction to be exercised rather than the

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[19] First defendant's submissions at [19]-[20].
[20] First defendant's submissions at [22].
[21] Submissions of the Attorney-General for the Commonwealth at [35]-[39].
[22] First defendant's submissions at [25].
[23] (2002) 209 CLR 125; [2002] HCA 19.
[24] First defendant's submissions at [29]-[34]; see also *R v Ward* (1978) 140 CLR 584 at 589 (Gibbs ACJ, Stephen, Mason, Jacobs and Aickin JJ).

first instance jurisdiction that was exercised, and which abandons any consideration of cross-vested jurisdiction. It is entirely focused on the *Judiciary Act* even though s 7 is in the *Cross-Vesting Act*. This approach was not adopted in *Singh v Khan*[25] or by the Full Court. It does not overcome any of the problems identified *supra* or in the plaintiff's submissions in chief.

13. The first defendant's submissions at [59]-[64] address Court of Appeal authorities. The plaintiff relies on its submissions in chief.[26] The first defendant also refers to three further authorities. *Whitton v Watton*[27] was concerned with an application for leave to appeal against a costs order made consequent upon a disputed hearing to extend a caveat. The Court of Appeal held that this did not give rise to a matter "*arising under*" the *Bankruptcy Act*.[28] In both *Jakimowicz v Jacks*[29] and *Moss v Eaglestone*[30] the issue of jurisdiction was not raised.[31]

14. The first defendant advances submissions on the costs orders that should follow if he is unsuccessful in this proceeding.[32] Jurisdiction is to be determined at the outset, and if the plaintiff succeeds, it was correct that the Full Court had jurisdiction. Though the jurisdictional issue was determined within the context of an application for an extension of time, the same issue equally arose for determination on the appeal proper. The disentitling conduct complained of is unrelated to the conduct of the appeal and this proceeding, and is contested in the substantive appeal. Costs should follow the event.

Dated: 28 March 2024

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[25] (2021) 363 FLR 88; [2021] NSWCA 281.
[26] At [31]-[42].
[27] [2018] NSWCA 277.
[28] At [27].
[29] (2016) 306 FLR 51; [2016] VSCA 42.
[30] (2011) 83 NSWLR 476; [2011] NSWCA 404.
[31] See *Jakimowicz v Jacks* at [10] and the comments on that matter in *Morris Finance Ltd v Brown* (2016) 93 NSWLR 551; [2016] NSWCA 343 at [36], [38] and [40] (Payne JA). See *Moss v Eaglestone* at [2].
[32] First defendant's submissions at [65]-[68].