IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D5 of 2015

BETWEEN:

ALCAN GOVE PTY LTD
(ACN 000 453 663)
Appellant

and

ZORKO ZABIC
Respondent

APPELLANT'S REPLY

1. These submissions are in two parts – Alcan's submissions in reply on the appeal proper; and Alcan's response to Mr Zabic's submissions on the Notice of Contention.

A. REPLY TO THE APPEAL SUBMISSIONS

2. At the heart of his submissions Mr Zabic says something which suggests that he now accepts that he had no cause of action at the relevant time. His submission is as follows {RS para [37]}:

> *It is not contended that Mr Zabic could have enforced his right of action prior to 1 January 1987. He had no proof or means of proof at that time that his lungs contained the seed of a fatal disease. His case is that by that time he had a cause of action in negligence in the event that mesothelioma or another debilitating asbestos-related disease developed.*

3. It seems that Mr Zabic is no longer contending that he had a conventional cause of action in 1987 – his cause of action was in respect of a *risk* that he might develop *something*. It is no longer a claim for mesothelioma – although it could be mesothelioma or it could be "*another debilitating asbestos-related disease*". The common law has not hereto recognized a cause of action based upon a mere *risk* that an injury would be suffered: see, for example, *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526-7.

4. Apart from that general submission, there are a few specific matters which require correction.

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5. In a couple of places {RS paras [2], [30]} it is suggested that the proposition for which Alcan contends is inconsistent with amendments made in 2007 to the *Limitation Act*. Those amendments made special allowances for "*dust disease*" cases. The submission appears to be that unless Mr Zabic's argument is correct those amendments were unnecessary. The short answer is that those amendments apply generally to all those dust disease cases not involving an employee suing an employer. They have plenty of work to do.

6. Mr Zabic makes several points about *Orica v CGU* but, with respect, has failed to take into account the particular issue with which the judges in the NSW Court of Appeal were dealing at different points of time. As pointed out in Alcan's principal submission, in *Orica v CGU* the judges were dealing with a number of different issues. Alcan has specifically tried to identify and isolate those parts of the judgments which deal with common law liability. Mr Zabic's approach does not, and tends to create confusion:

   (a) When Mr Zabic makes his submissions on the way in which *Orica v CGU* dealt with the concept of "*injury*" {RS para [39]} it needs to be understood that the NSW Court of Appeal was there dealing with the meaning of "*injury*" for the purposes of determining liability for workers' compensation, not common law liability – hence the references to cases like *Favelle Mort v Murray*;

   (b) The submission Mr Zabic makes on the way in which subsequent judgments have interpreted *Orica v CGU* {RS paras [70]-[74]} is not on point either: those later judgments (none of which, incidentally, undermines the authority of *Orica v CGU* on the relevant issue) were dealing with the issue of which workers' compensation policy responded to a particular claim.

B. RESPONSE TO THE NOTICE OF CONTENTION

7. The argument on the notice of contention is left undeveloped. The whole of the submission is contained in a footnote. There is no identification of the "*property*" which was acquired; there is no discussion as to the fact or the timing of any "*acquisition*"; and there is no discussion at all of the crucial "*just terms*" issue. This, apart from anything else, is quite unfair to Alcan – Alcan will have to guess the argument which is to be put against it. Despite that, given Mr Zabic's circumstances,

Alcan has decided not to oppose a grant of leave to allow him to argue the point. Alcan will now address what it believes might be the argument.

8. The first thing to note is that Mr Zabic's point is not, as he claims, a "*constitutional*" question, or a matter which arises under s51(xxxi) of the Constitution. The true point is whether, in the circumstances, the combination of s52 and s189 of the *Return to Work Act* is incompatible with s50 of the *Northern Territory (Self-Government) Act 1978* – which provides as follows:

> ***Acquisition of property to be on just terms***
>
> *(1) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.*
>
> *(2) Subject to section 70, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms.*[1]

9. For the purpose of what Alcan understands might be the argument, Alcan makes these concessions:

   (a) Alcan concedes that s50 of the *Self-Government Act* operates in precisely the same manner as the constitutional guarantee of just terms under s51(xxxi) of the Constitution; and

   (b) Alcan concedes that the extinguishment of a *vested* cause of action for personal injury damages can, in some circumstances, constitute the *acquisition* of *property* for the purposes of s50 of the *Self-Government Act*.

Alcan's submissions

10. There are four reasons why Mr Zabic's arguments must fail, and why the protection promised by s50 of the *Self-Government Act* does not apply to this case.

First, there was no acquisition of "*property*"

11. This, in substance, is a repetition of our principal argument: if it is accepted that Mr Zabic did not have an accrued cause of action as at 1 January 1987, then he had

[1] Section 70 deals with the acquisition of land and is presently irrelevant

no property which could be acquired. In *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 a plurality comprising Mason CJ, Deane and Gaudron JJ (at 305) described precisely why, in that case, Mr Georgiadis was entitled to the benefit of the constitutional guarantee:

> *Accordingly, "acquisition" in s.51(xxxi) extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes liability being brought to an end without payment or other satisfaction) and the cause of action is one that arises under the general law.*

The other member of the majority, Brennan J, said (at 312) that the "*constitutional guarantee of just terms ... protects common law choses in action which are vested in an individual*" and later (at 312) "*provided the corresponding common law cause of action is vested, the person in whom it is vested is entitled to the protection of s51(xxxi)*".

12. The key word is "*vested*". According to *Georgiadis* the pre-requisite for the operation of s51(xxxi) is that the cause of action must have already *vested*. A cause of action is only vested if it is complete and enforceable. A cause of action has not vested if it is inchoate or contingent or unenforceable. No case has gone so far as to suggest that anything less than a *vested* cause of action is sufficient – subsequent authorities have made it plain that the cause of action must have been *vested* at the time of the acquisition: *The Commonwealth v Mewett* (1997) 191 CLR 471; *Smith v ANL Limited* (2001) 204 CLR 493.

13. This conclusion stands to reason in the context of the practical application of the "*just terms*" guarantee. Unless there was some basis to get a general sense of the value of the thing to be acquired, it would not be possible to comply with the just terms requirement. What value could be placed upon a contingent or inchoate cause of action for the purpose of calculating compensation? The kinds of rights which Mr Zabic claims that he had (see RS para [37] – which was extracted earlier in these submissions) are not "*rights*" or "*property*" to which a value can be attributed for this purpose.

Secondly, this is not a law "*with respect to the acquisition of property*"

14. The guarantee of just terms provided by s50 of the *Self-Government Act* is limited in a manner similar to the constitutional guarantee in s51(xxxi) – that is, the requirement to provide just terms only arises when the Parliament is making a law "*with respect to the acquisition of property*". That is not a proper characterisation of the *Return to Work Act*.

15. The "*law*" in this instance is the *Return to Work Act* read as a whole; s52 cannot be extracted and isolated from the rest of the Act.

16. A proper characterisation of the *Return to Work Act* can be gleaned from its preamble, its statement or objects, from the Second Reading Speech, or from the legislation itself – taken as a whole it is a scheme designed to provide for workplace safety, and the rehabilitation and compensation of persons injured in the workplace.

17. This kind of argument was foreseen, and the issue was specifically reserved, by Mason CJ, Deane and Gaudron JJ in *Georgiadis*. The context was the validity of s44 of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*, which took away a Commonwealth employee's right to commence an action for common law damages. The plurality said (at 308):

> *It may well be that, if s44 appeared in legislation establishing a compensation scheme applying to employers and employees generally (assuming power to enact a scheme of that kind), it would not fairly be characterized as a law for the acquisition of property for a purpose for which the Parliament has power to make laws.*

18. That reservation applies here: the *Return to Work Act* is legislation establishing a compensation scheme applying to employers and employees generally. And although the plurality only said that a different characterisation "*may well be*" arguable, it is submitted that a consideration of the history, purpose, and terms of the *Return to Work Act* show that clearly to be the case here. The *Return to Work Act* is a comprehensive scheme – a point elaborated upon in the next section of these submissions.

Thirdly, this was an "*adjustment of rights*"

19. This argument relates very closely to the previous argument (indeed, it might be just a different way of describing the previous argument), but it has received some separate attention in the leading cases.

20. The concept was described in *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 (at 161) in the following terms:

> *The cases also establish that a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s51 of the Constitution.*

21. The *Return to Work Act* is a law concerned with the adjustment of competing rights and claims etc in a specific area of activity – the workplace. It was reforming legislation. It repealed an outdated workers' compensation scheme and replaced it with a new scheme directed at safety and rehabilitation. The Second Reading Speech amply demonstrates that the intention was to provide for a comprehensive scheme making safety the first priority, then rehabilitation, and only after that it provides for compensation[2].

22. This aspect of the *Return to Work Act* has been the subject of judicial consideration in the Northern Territory. In *Chaffey v Santos Ltd* [2006] NTSC 67 a question arose regarding a 2004 amendment to the *Return to Work Act* which retrospectively removed an entitlement to superannuation from the calculation of weekly benefits payable to an injured worker. The issue was whether the retrospective operation of the amendment involved a breach of the just terms provision in s50 of the *Self-Government Act*. In the course of considering that, each of the members of the NT Court of Appeal described the history of the legislation and the purpose of the new scheme: see Angel J at [12]-[14]; Mildren J at [36]-[48]; Southwood J at [70]-[76]. As those judgments demonstrate, the new scheme struck a balance between employers, those injured employees who could establish fault, those injured employees who were unable to establish fault, and the community generally. The judgments (and an examination of the legislation itself) shows that the new scheme incorporated an expansion of the worker's entitlements, including lump sum

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[2] *Hansard*, Legislative Assembly, 19 June 1986. A full copy of the Second Reading Speech will be supplied

compensation to for pain and suffering and for permanent impairments to the body and mind. The *Return to Work Act* was not a law directed at extinguishing common law rights; it is true that common law rights were extinguished, but only as an incidental part of a much larger package of reforms.

23. An appeal in those *Chaffey* proceedings subsequently went to the High Court: *Attorney-General for the Northern Territory v Chaffey* (2007) 231 CLR 651; where it was argued, *inter alia*, that the legislation removing the superannuation benefit was valid upon the grounds that the legislation was properly characterised as an adjustment of rights (see the report of the argument at pp 654-655). The majority of the High Court found that the legislation was valid without needing to address the adjustment of rights argument, but three judges did so, and each would have held that this was an independent basis for finding that the legislation was valid: see Kirby J at [38]-[40]; Callinan J at [50]; and Heydon J at [64]-[66].

Fourthly, "*just terms*" were provided

24. In any event, Alcan does *not* concede that even if there was an acquisition of property it was an acquisition upon other than just terms.

25. The *Return to Work Act* is a no-fault scheme. It provides for a wide range of potential benefits to *all* workers, not just those workers who could establish fault on the part of the employer. The benefits include substantial payments during incapacity (ss65, 65 and 66); an indemnity in respect of medical and related expenses (s73); lump sums payable upon death (s62) or in respect of the permanent impairment to the body or mind (s71); substantial payments available to spouses and dependents (s63). There are also provisions for rehabilitation (ss75 and 76); retraining (s61); and requiring employers to provide suitable employment to disabled workers (s61). Payments can be made for home modification (s78) and attendant care (s78).

26. These benefits are unlikely to have precisely the same dollar value as the damages payable at common law – in some cases the benefits might be worth more than the common law damages; in some cases they would be less. The picture is unclear as to

whether Mr Zabic is better or worse off[3]. But that does not matter because the cases on the meaning of "*just terms*" for the purposes of s51(xxxi) establish two things: the first is that whether or not the terms of compensation are just is to be tested by reference to fairness and justice generally, and *not* against an individual case; and the second is that "*terms*" can be "*just*" even though they are less than the market value.

27. In *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 Dixon J said (at 290) of "*just terms*":

> *Under that paragraph the validity of any general law cannot, I think, be tested by inquiring whether it will be certain to operate in every individual case to place the owner in a situation in which in all respects he will be as well off as if the acquisition had not taken place. The inquiry rather must be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country.*

28. And later (at 291):

> "*Nor does justice to the subject or to the State demand a disregard of the interests of the public or of the Commonwealth*".

29. In *Nelungaloo Pty Ltd v The Commonwealth* (1947) 75 CLR 495 Dixon J (at 599) reiterated this, suggesting the whole of the circumstances are to be taken into account:

> *It rests on the somewhat general and indefinite conception of just terms, which appears to refer to what is fair and just between the community and the owner of the thing taken.*

And later (at 599):

> *When the question is one of fairness in any community the standard must depend upon the life and experience of that community, rather than upon the changing fortunes of other countries and the exigencies which beset them. Unlike 'compensation', which connotes full money equivalence, 'just terms' are concerned with fairness.*

30. Even assuming that Mr Zabic had property which was acquired by the *Return to Work Act*, it is not conceded that this property was acquired on anything other than "*just terms*". Many injured workers in the Northern Territory – maybe most – would prefer a package of rights which includes substantial continuing financial benefits, coupled with rehabilitation and retraining. Also, it is much too simplistic to compare the benefits available under the Act with a common law remedy in a case (like

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[3] Because this point was not taken in either Court below, no attempt had been made to evaluate Mr Zabic's alternative statutory compensation rights

Mr Zabic's) where liability is clear: many workers would face a difficult choice where liability is less certain, or where contributory negligence might or would be a factor.

Dated: 23 July 2015

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