SHORT PARTICULARS OF CASES
APPEALS

SEPTEMBER/OCTOBER 2006

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X & ORS v AUSTRALIAN PRUDENTIAL REGULATORY AUTHORITY & ANOR (S284/2006)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 22 March 2006

Date of grant of special leave: 4 August 2006

Both X (1st appellent) and Y (3rd appellant) are senior managers of Z (2nd appellant), a foreign general insurer within the meaning of section 3 of the *Insurance Act* 1973 (Cth) ("the Act"). Neither Appellant has ever worked for Z in Australia, nor are they Australian citizens. In 2002 both X and Y came to Australia and gave evidence before a Royal Commission into the collapse of P.

Relevantly, section 25A of the Act gives the Australian Prudential Regulation Authority ("APRA") the power to disqualify a person from acting as a senior manager or agent of a foreign general insurer. Section 24 of the Act then prevents a disqualified person from so acting.

On 18 February 2005 Mr Mark Godfrey (a senior manager of APRA and the 2nd respondent) sent both X and Y a Notice to Show Cause ("Notice"). Each Notice stated that neither Appellant was a fit or proper person and that each should be disqualified from holding a senior insurance role pursuant to section 25A of the Act. Each Notice also stated that that view was based on their involvment in, knowledge of, and responsibility for certain arrangements entered into between Z and a general insurer, P.

The Appellants commenced proceedings in the Federal Court seeking, inter alia, declarations that APRA lacked the power to disqualify them under section 25A of the Act. They also submitted that APRA's use of their evidence to the Royal Commission contravened sections 6DD or 6M of the *Royal Commissions Act* 1902 (Cth) ("the RC Act"). Relevantly, section 6M of the RC Act prohibits harm or punishment being inflicted on a person as a result of them having given evidence to a Royal Commission.

On 16 September 2005 Justice Lindgren held that APRA had the power to disqualify X and Y under section 25A of the Act. This is because they had a connection with the Australian general business of a foreign general insurer in the past and there was a risk they would do so in the fututre. There was also a possibility that they would be, or act as, someone referred to in section 24(1)(a)-(c) of the Act. His Honour further held that APRA's use of their evidence before the Royal Commission did not contravene sections 6DD or 6M of the RC Act. Justice Lindgren held that the prohibition in the RC Act related to the act of giving evidence on a particular matter. It did not relate to the underlying facts on which evidence was given.

On 22 March 2006 the Full Federal Court (Emmett, Allsop & Graham JJ) held that there was no jurisdictional limit to the power of section 25A of the Act. In relation to the Royal Commission point, their Honours came to a conclusion similar to Justice Lindgren.

The grounds of appeal are:

- The Full Court erred in construing section 6M(b) of the RC Act, as not having the effect of preventing the First and Second Respondents from relying upon evidence given by a person to a Royal Commission, in

exercising the power conferred by section 25A of the Act.

- The Full Court erred in finding that the Second Respondent's proposal to recommend to the appropriate delegate of the First Respondent that X and Y be disqualified pursuant to section 25A of the Act was not prevented by section 6M(b) of the RC Act.

THE QUEEN v HILLIER (C1/2006)

Court appealed from: Court of Appeal, Supreme Court of the Australian Capital Territory

Date of judgment: 15 December 2005

The respondent, Steven Wayne Hillier, was charged with the murder of his former de facto partner, Anna Louise Hardwick, to which he pleaded not guilty. On 26 November 2004, following a jury trial, he was found guilty and sentenced to 18 years' imprisonment with a non-parole period of 13 years. The respondent appealed to the Court of Appeal which, on 15 December 2005, by majority allowed his appeal and set aside his conviction and sentence. The Crown seeks leave to appeal from that decision, to set aside the orders of the Court of Appeal or in the alternative for an order that the respondent be re-tried.

A few days before the death of the deceased, the Family Court had made final orders awarding custody of the two children of the relationship to the deceased. There was evidence of considerable animosity by the respondent towards the deceased. The deceased was discovered by her parents, lying on the floor of her bedroom. There was no sign of forced entry to the house. A post-mortem determined that the deceased had died from neck compression, and not from the effects of a small fire in the bedroom, which appeared to have been deliberately lit to conceal the cause of death. DNA material was found on the lapel of the deceased's pyjamas, purchased some time after her separation from the respondent, which could have been that of the respondent, who had been alone on the night the deceased was murdered. The respondent denied any involvement in the death of the deceased.

In the Court of Appeal, the respondent, although represented by counsel, sought and obtained leave to address the Court, and also handed up a substantial volume of written material, much of which had not been tendered during the trial. By majority (Higgins CJ and Crispin J, Spender J dissenting), the Court of Appeal upheld the appeal and set aside the conviction on the ground that the verdict of the jury was unreasonable. The majority held that a number of factual issues, which had not been advanced during the trial or appeal and several of which were only advanced in the material handed up by the respondent himself during his submissions to the Court of Appeal, led to a "substantial possibility" that a person other than the respondent was responsible for the death of the deceased. Spender J, in dissent, held that the hypothesis of the majority was "utterly speculative" and that the factual issues on which it was based did not reflect the evidence which was before the jury.

On 4 August 2006 at the hearing of the application for special leave to appeal, Chief Justice Gleeson and Justice Callinan referred the matter for argument before a Full Court as if it were an appeal.

The questions of law said to justify a grant of special leave to appeal include:

- Whether the majority of the Court of Appeal erred in substituting its views of the evidence for the verdict of the jury, and in taking account of evidence not tendered at the trial;

- Whether the majority of the Court of Appeal erred in concluding that it was impossible to conclude that it was open to the jury to find that the guilt of the respondent had been proven beyond reasonable doubt;

- Whether the majority of the Court of Appeal erred in setting aside the respondent's conviction rather than ordering a re-trial.

SZBEL v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR (S274/2006)

Court appealed from: Federal Court of Australia

Date of judgment: 9 February 2006

Date of grant of special leave: 4 August 2006

This matter concerns an Iranian seaman who applied for a protection visa shortly after "jumping ship" in Port Kembla on 7 April 2001. The Appellant relied upon his reasons for jumping ship, rather than his purported conversion to Christianity, to base his claim for refugee status. He claimed that his interest in Christianity had become known to his work mates, including the Captain. He said that the Captain had threatened to turn him over to the authorities upon their return to Iran. The implication being that he would then be interrogated and dealt with severely for committing apostasy.

In 29 May 2001 the Minister's delegate rejected his application, as did the Refugee Review Tribunal ("RRT") on 27 June 2003. The RRT found that the Appellant's claims lacked credibility. It was also not satisfied that his Australian baptism and his involvement in Christian activities since his arrival here were genuine. In reaching that conclusion, the RRT had country information before it that suggested that Iranian converts to Christianity would be executed for apostasy. It also knew that Iranian merchant seamen with an adverse profile were likely to be imprisoned by their Captains if they were considered to be a security threat. This had not happened to the Appellant.

In February 2005 Federal Magistrate Raphael dismissed the Appellant's application for judicial review, while Justice Graham dismissed his appeal in February 2006. His Honour held that it was open to the RRT to find that the Appellant's freedom of movement (while on board in Port Kembla) was inconsistent with him holding a well-founded fear of persecution for reasons of his religion. It was also open to the RRT to reject the Appellant's claim of being motivated to jump ship because of his involvement in Christianity. His Honour further rejected the Appellant's submission that he was denied natural justice. While Justice Graham acknowledged that the RRT was obliged to afford the Appellant natural justice, it was not obliged to expose its provisional views to comment before making the decision in question.

The ground of appeal is:

- Justice Graham erred in failing to hold that the Second Respondent denied the Appellant procedural fairness by reaching adverse conclusions that certain aspects of his claims were implausible, being conclusions that were not obviously open on the known material without giving the Appellant the opportunity to be heard in respect of those matters.

THE QUEEN v CORNWELL (S281/2006, S282/2006)
CORNWELL v THE QUEEN (S215/2006)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 11 April 2006

Date of grant of special leave: 4 August 2006 (S281 & S282/2006)

Date referred to Full Bench: 4 August 2006 (S215/2006)

Cornwell was charged, along with eight others of an offence of conspiring to import a commercial quantity of cocaine, an offence against s 233B(1)(k) of the *Customs Act* 1901 (Cth). The trial of this matter was first heard in the Supreme Court before Howie J and a jury commencing in February 2003 ("the first trial").

The Crown case against Cornwell to prove his involvement in the charged conspiracy consisted almost entirely of listening device recordings of Cornwell's conversations with the two alleged co-conspirators, John Lawrence and Juan Diez (both of whom were convicted in the first trial). Those conversations involved two inter-related topics: Cornwell's (and Diez and Lawrence) then current dealings in supplying cocaine and the imminent arrival of a large shipment of cocaine from abroad. The listening device evidence was admitted over objection. That evidence revealed, inter alia, that Cornwell was involved in large scale local cocaine distribution, which was not the subject of the indictment, but it was evidence that was admitted on the basis that it tended to prove the involvement of Cornwell in the alleged conspiracy.

Cornwell gave evidence in the first trial. An issue arose as to whether he was entitled to claim the privilege against self incrimination. Howie J upheld Cornwell's claim of privilege and granted a certificate pursuant to s 128 of the *Evidence Act* 1995. As it happened the certificate did not formally issue in the course of the trial. That fact was only discovered after the trial before Blackmore DCJ ("the second trial") had commenced and the question was raised as to the admissibility of the transcript of Cornwell's evidence at the first trial.

The jury in the first trial could not reach agreement. The second trial commenced. In the second trial, the Crown sought to tender (large parts of) the transcript of Cornwell's cross-examination in the first trial as constituting admissions against Cornwell. The subject of nearly all of this cross-examination was Cornwell's conversation with the two alleged co-conspirators. On behalf of Cornwell this evidence was objected to on the basis that Cornwell had a s 128 certificate which, it was claimed, applied to this evidence and that such evidence could not therefore be tendered in the second trial.

As Cornwell's legal advisors had failed to obtain the certificate which Howie J had said he would grant, application was then made, on behalf of Cornwell, to Howie J, for the issue of such certificate. The Crown contended that no certificate should issue given the delay in seeking it. Howie J issued the certificate. The Crown then lodged an appeal under s 5F of the *Criminal Appeal Act* 1912 against the granting of the certificate.

In relation to the tendering of Cornwell's evidence from the first trial in the second trial, Blackmore DCJ held that the evidence in question was evidence in respect of which Cornwell could never have claimed privilege in the first place

and that the certificate did not encompass such evidence. The evidence was admitted. Cornwell was convicted on 8 June 2004 of the offence of conspiring to import cocaine and was subsequently sentenced by Blackmore DCJ to imprisonment for 24 years with a non-parole period of 14 years and 6 months.

The Crown's appeal against the issue of the certificate was dismissed. Cornwell's appeal against his conviction was upheld and a new trial was ordered.

The Court of Criminal Appeal (McClellan CJ at CL with Hulme and Adams JJ agreeing) found that on its face the s 128 certificate encompassed the cross-examination evidence tendered by the Crown and Blackmore DCJ should have refused to admit the evidence. The Court agreed that the approach taken by Blackmore DCJ caused the trial to miscarry and that the evidence given by Cornwell at the first trial was given with the knowledge that the evidence would be protected by a certificate. In relation to the Crown's submission that the certificate be set aside the Court noted that Cornwell only gave evidence after Howie J had determined that a certificate would be granted and if the s 128 certificate were quashed "not only could the evidence be tendered at a retrial of the original trial but would also be available to the Crown to tender against [Cornwell] at a separate trial on the 'domestic charges'. This could result in significant injustice."

On 4 August 2006 the Full Court granted special leave to appeal in the Crown's two applications and stood over Cornwell's own application for special leave to appeal to an expanded Full Court.

The grounds of appeal include:

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- The Court of Criminal Appeal erred in failing to hold that s 128(8) of the *Evidence Act* does not confer on an accused giving evidence in a criminal trial privilege against self-incrimination when giving evidence about relevant facts even if that evidence tends to reveal that the accused is guilty of an offence other than that which (s)he stands charged.
- The Court of Criminal Appeal erred in failing to hold that section 128(7) of the *Evidence Act* has no application to retrials of a criminal offence.

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- The Court of Criminal Appeal erred in failing to hold that s 128(8) of the *Evidence Act* does not confer on an accused giving evidence in a criminal trial privilege against self-incrimination when giving evidence about relevant facts even if that evidence tends to reveal that the accused is guilty of an offence other than that which (s)he stands charged.
- The Court of Criminal Appeal erred in failing to quash the section 128 certificate.

HOUGHTON & ANOR v ARMS (M107/2006)

Court appealed from: Full Court, Federal Court of Australia

Date of judgment: 30 March 2006

Date special leave granted: 4 August 2006

This appeal concerns the liability of employees for misleading and deceptive conduct for actions taken within the scope of their actual authority.

In early 1999 the respondent (Arms) conceived the idea of providing an internet-based wine market service called "austcellardoor". He retained WSA Online Limited to design and construct the website. The appellants were employees of WSA. They recommended that the respondent use "ANZ e-Gate" to process electronic payments. They advised him that wineries could be added to the web-site and receive payment through ANZ e-Gate by simply filling in a form. This information was wrong: in fact, ANZ required each winery to become an accredited merchant and to provide acceptable profit and loss statements for the last two years and a business plan. At the time he discovered this, in June 2000, Arms had already signed up about 30 wineries and the web-site was to be launched within 5 days. It was impossible for him to require wineries to comply with the conditions imposed by ANZ, before the launch of the web-site. To preserve his credibility and goodwill in the industry, Arms changed the original concept of the business and operated it as a wine retailer, incurring losses of $58,331 in the first 12 months.

Arms sued WSA in the Federal Court for breach of contract and contraventions of the *Trade Practices Act* 1974 (Cth). He also sought to make the appellants personally liable on the basis of contraventions of ss 4 and 9 of the *Fair Trading Act* 1999 (Vic) ("the FTA"). Ryan J gave judgment against WSA in the sum of $58,331, but dismissed the claim against the appellants, because he did not consider it was open to him at law to find that an employee acting within the scope of his or her actual authority could also be liable under s 9 of the FTA.

Arms appealed to the Full Federal Court (Nicholson, Mansfield and Bennett JJ) against the dismissal of the claim against the appellants. The Court found that the primary judge had made an error of law, because there were at least two decisions at appellate level (*Arktos Pty Ltd v Idyllic Nominees Pty Ltd* (2004) ATPR 42-005 and *Wong v Citibank Ltd* [2004] NSWCA 396) in which the principle of the possibility of employee liability for acts in trade or commerce had been accepted. The appeal was therefore allowed.

The grounds of appeal include:

- The Full Court erred in construing s 9 of the *Fair Trading Act* 1999 (Vic) ("the FTA") to impose on the appellants liability in damages for misleading or deceptive conduct in "trade or commerce" when no conduct distinct from their corporate employer's conduct could be imputed to them and when neither of them could, in any sense, be said to have been engaged in trade or commerce of their own account.
- The Full Court ought to have found as a matter of statutory construction a company director, officer or employee, who makes misrepresentations as the company's alter ego is not liable "in trade or commerce" under s 9 of the FTA.