SHORT PARTICULARS OF CASES
APPEALS

DECEMBER 2007

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NORTHERN TERRITORY OF AUSTRALIA & ANOR v. ARNHEM LAND ABORIGINAL LAND TRUST & ORS (D7/2007)

Court appealed from: Court of Appeal, Supreme Court of the Northern Territory

Date of grant of special leave: 21 March 2007

Grants of estates in fee simple were made in 1980 under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act") over areas of Arnhem Land comprising the "Mainland" grant and the "Islands" grant. The grants extend seaward to the low water mark and to straight lines joining the seaward extremities of each of the opposite banks of each river, stream and estuary which intersects that area of coast, much of which is subject to tidal inflows and outflows ("the tidal areas"). The first respondent is an Aboriginal Land Trust established under the Land Rights Act to hold title to the Mainland and Island grants and exercise its powers as owner of that land for the benefit of the third respondents ("the traditional Aboriginal owners"). The second appellant ("the Director of Fisheries") administers the *Fisheries Act* 1988 (NT) ("the Fisheries Act") and, in the course of that administration, issued fishing licences which permit licence holders to fish and navigate in the tidal areas covered by the Mainland and Island grants. The respondents commenced proceedings in the Federal Court seeking declarations pursuant to section 39B of the *Judiciary Act* 1903 (Cth) to the effect that:

1. the rights of the traditional owners to enter and occupy the land and waters covered by the grants were exclusive of all others;

2. the Aboriginal Land Trust was entitled to prevent persons entering the land and waters covered by the grants to take fish or aquatic resources; and

3. the Fisheries Act did not affect their exclusive entitlements and could not authorise the Director of Fisheries to grant licences to enter and fish in the areas covered by the grants without the permission of the traditional Aboriginal owners.

These proceedings, together with related proceedings seeking a determination of native title (the latter not challenged in this Court) were heard together by Selway J, who refused to make the declarations sought and gave reasons for that decision. Before his Honour could make orders, he died and Mansfield J made final orders on 11 October 2005. The respondents appealed to the Full Court of the Federal Court.

On 2 March 2007 the Full Court (French, Finn and Sundberg JJ) in a joint judgment allowed the appeal and made declarations in the terms sought, including that the Fisheries Act is invalid insofar as it purports to operate with respect to the areas covered by the grants. The Court applied the decision of this Court in *Risk v Northern Territory* (2002) 210 CLR 392 that "land" in the Land Rights Act is land above the low water mark and that section 73(1)(d) assumes that the buffer zone of sea adjoining Aboriginal land is not itself Aboriginal land. The Court concluded that a grant of an estate in fee simple to the low water mark, under the Land Rights Act, confers a right to exclude from the inter-tidal zone those seeking to exercise a public right to fish or navigate.

The grounds of appeal include:

- Whether the provisions of the Fisheries Act apply in tidal areas within the boundaries of “aboriginal land” within the meaning of the Land Rights Act;

- Whether a grant in fee simple of land including tidal areas confers rights to exclude from the tidal waters which overlie such land all persons including persons exercising public rights to fish and navigate;

- Whether the Full Court erred in concluding that the Fisheries Act is not capable of operating concurrently with the Land Rights Act and must be read down in accordance with section 59 of the *Interpretation Act* (NT) such that the Fisheries Act does not confer a power on the Director of Fisheries to grant licences to authorise the licence holder to enter and take fish from the tidal areas covered by the Mainland and Island grants.

O'DONOGHUE v. IRELAND & ORS (P40/2007)
ZENTAI v. REPUBLIC OF HUNGARY & ORS (P41/2007)

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

Date of judgment: 16 April 2007

Date of grant of special leave: 3 September 2007

Vincent Thomas O'Donoghue's extradition is sought by Ireland in respect of charges of obtaining property by false pretences, fraudulent conversion in the alternative. Charles Zentai's extradition is sought by the Republic of Hungary in respect of alleged war crimes. Both appellants sought an order in the nature of prohibition to restrain the second respondent in each matter (the presiding magistrate) from conducting proceedings to determine whether each appellant is eligible for surrender to extradition pursuant to section 19 of the *Extradition Act* 1988 (Cth) ("the Act"), on the basis that it is unlawful for State judicial officers to carry out the functions prescribed by section 19 of the Act. Both appellants sought declarations that sections 19 and 46 of the Act are invalid as being beyond the legislative power of the Commonwealth. By virtue of section 46 of the Act and section 6 of the *Magistrates Court Act* 2004 (WA), State magistrates of the State are empowered to conduct extradition proceedings pursuant to section 19 of the Act.

The appellants contended before the Federal Court (Siopis J) that the WA parliament had not passed legislation consenting to and authorising State magistrates to perform Commonwealth functions conferred by sections 19 and 46 of the Act, that the Commonwealth parliament was not competent, as a matter of legislative power, to confer executive functions regarding Australia's external affairs on State officers, and that sections 19 and 46 of the Act vested Commonwealth executive power on State officers incompatible with the continuing exercise by those officers of the judicial power of the Commonwealth under Chapter III of the Constitution. Siopis J dismissed the applications on the basis that the functions performed by magistrates under section 19 were performed as *persona designata* and that, even if the validity of section 19 and 46 of the Act was reliant upon the existence of State legislative authority, such authority is provided in section 6(3)(b) of the *Magistrates Court Act*.

The Full Court of the Federal Court (Moore, Tamberlin and Gylers JJ) dismissed the appellants' appeals. Tamberlin J wrote the judgment of the Court, with which Moore and Gyles JJ agreed. The Court held that it was not necessary to rule on two of the appellants' arguments, on the basis that sufficient approval by the State for the performance by persons holding office under the *Magistrates Court Act* of duties under section 19 of the Act was provided by section 6(3)(b) of the *Magistrates Court Act* and an arrangement entered into between the Governor-General and the State Governor. The Court concluded that it was not necessary to address the arguments put by the appellants in relation to *persona designata* and Chapter III of the Constitution.

The Attorney-General for the Commonwealth and the Attorneys-General of Western Australia, New South Wales, Victoria and South Australia have all indicated their intention to intervene in the both proceedings.

The grounds of appeal include:

- Whether section 6 of the *Magistrates Court Act* and the arrangement between the Governor-General and the State Governor together give sufficient legislative and executive approval to the conferral of functions under section 19 of the *Extradition Act* on a State magistrate;

- Whether sections 19 and 46 of the *Extradition Act* effects an unconstitutional vesting of Commonwealth power in State officials incompatible with the continuing exercise by those officers of the judicial power of the Commonwealth.

In the O'Donoghue appeal, the first respondent (Ireland) will seek leave by consent to file an amended notice of contention:

- That by s.6(3)(a) of the *Magistrates Court Act* 2004 (WA), the Parliament of Western Australia has authorised the second respondent (the magistrate) to undertake functions under s19 of the *Extradition Act* 1988 (Cth); and

- That by s.6(1) of the *Magistrates Court Act*, the Parliament of Western Australia has authorised the second respondent to undertake functions under s19 of the *Extradition Act*.

In the Zentai appeal, the first respondent (Republic of Hungary) and the fourth respondent (Commonwealth) will seek leave by consent to file a notice of contention in the same terms as the first contention set out above.

WILLIAMS v UNITED STATES OF AMERICA & ANOR (S410/2007)

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

Date of judgment: 3 August 2007

Mr Williams is a United States citizen who was arrested at Sydney Airport, at the request of the United States Government, shortly after his arrival on 20 May 2006. He was granted conditional bail on 23 May 2006. On 13 July 2006 the Australian Government received an extradition request from the United States concerning Mr Williams. The United States wishes to prosecute Mr Williams on an indictment alleging offences of wilful attempts to avoid federal income tax.

On 17 July 2006 the Minister for Justice and Customs ("the Minister") issued a Notice of Receipt of Extradition Request under section 16 of the *Extradition Act* 1988 (Cth) ("the Extradition Act"). Mr Williams however successfully sought the judicial review of that decision before the Full Federal Court. On 29 March 2007 the Minister issued a fresh Notice of Receipt of Extradition Request and as a consequence, proceedings under section 19 of the Extradition Act were commenced before a New South Wales Magistrate.

While the matter before the Magistrate remained pending, Mr Williams filed an application in the Federal Court challenging the validity of sections 19(1) and 46(1)(a) of the Extradition Act. That application was brought pursuant to section 39(1A) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). In it Mr Williams sought to restrain the Respondents from taking any further steps before the Magistrate to determine whether he is eligible for surrender to the United States. He also sought a declaration that sections 19(1) and 46(1)(a) of the Extradition Act did not authorise or permit the conduct of such proceedings. The Attorneys-General for both the Commonwealth and the State of New South Wales subsequently intervened.

On 3 August 2007 the Full Federal Court (Branson, Tamberlin & Allsop JJ) unanimously dismissed Mr Williams' application. Justice Tamberlin, with whom the other Justices broadly agreed, noted that section 46 of the Extradition Act continued the established Australian practice of extradition proceedings being carried out by State Magistrates. His Honour went onto find that, on a proper construction of the meaning and operation of section 23 of the *Local Courts Act* 1982 (NSW), the State of New South Wales gave statutory approval to its Magistrates to perform the duty required of them under section 19 of the Extradition Act. The application for special leave to appeal from that decision has been referred to the Full Court for hearing concurrently with O'Donoghue v Ireland & Anor and Zentai v Republic of Hungary & Ors.

On 22 October 2007 the Applicant filed a notice pursuant to section 78B of the Judiciary Act. The Attorneys-General for the Commonwealth, New South Wales, Western Australia and South Australia and Victoria have all indicated that they are intervening in this matter.

The questions of law said to justify the grant of special leave to appeal are:

- Is it an implication from the federal structure of the Constitution that the Commonwealth Parliament cannot impose an administrative duty on the holder of a State statutory office without State legislative approval?

- Is the administrative duty imposed by section 19 of the Extradition Act imposed on a Magistrate as the holder of a State statutory office?

- Is the imposition of that duty approved by any legislation of the Parliament of New South Wales?

GUMLAND PROPERTY HOLDINGS PTY LTD v. DUFFY BROS FRUIT MARKET (CAMPBELLTOWN) PTY LTD & ORS (S395/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 14 February 2007

Date of grant of special leave: 3 August 2007

This appeal concerns the construction of a Lease and subsequent Deed of Variation, and the question of whether a breach arose giving rise to a right to the lessor to terminate and seek damages for loss of bargain.

In 1993 the first respondent became lessee of a substantial area in the Marketfair Campbelltown Shopping Centre for a term of 15 years. In 1999 the Deed of Variation was executed and as a consequence part of the area was sub-let to Woolworths. In September 2001 Gumland became the lessor.

By this time trading at the Centre had deteriorated and Duffy Bros were seeking to negotiate an exit. The sub-lessee Woolworths declined to renew its lease, tried to negotiate directly with Gumland, and remained in occupation at a unilaterally reduced rental. Gumland demanded that Duffy Bros make up the shortfall, but Duffy Bros denied they were liable as a result of the Deed of Variation. Gumland purported to terminate Duffy Bros' lease and the latter claimed the lease was terminated by Gumland's conduct.

The trial judge (Macready AJ) held, inter alia, that Duffy Bros was obliged to pay for the shortfall in Woolworth's payments pursuant to the 1999 Deed and that failure to do so was a breach of a fundamental clause in the original lease which entitled Gumland to terminate and seek damages for loss of bargain.

The Court of Appeal (Giles, Santow and Tobias JJA) held that on a proper construction of the documents the failure to make up the shortfall was a breach of the 1999 Deed, but not of an essential covenant of the original lease and did not give rise to a right to terminate and seek damages for loss of bargain.

The respondents cross-appeal, subject to the grant of special leave, from the whole of the judgment of the Court of Appeal. In the event that the cross-appeal is unsuccessful they contend that the decision of the Court below should be affirmed but on the ground that the court below erroneously decided or failed to decide some matter of fact or law.

The grounds of appeal are:

- The judgment of the Court below is wrong because it found that a Lessee (the first respondent) who failed to pay agreed rent to the Lessor (the appellant) did not breach a term which the parties had agreed was essential so as to entitle the Lessor to terminate the Lease and recover loss of bargain damages and costs of reletting (which had been awarded by the trial judge in the amount of $1,743,282), notwithstanding that the Lease and a Deed varying the rent payable under the Lease both declared that time for payment of rent was essential.

- The Court below erred by failing to find that:

- The first respondent breached essential terms of the lease, entitling the appellant to terminate the lease;

- The appellant was entitled to recover loss of bargain damages and costs of reletting from the first respondent, by virtue inter alia of the provisions of section 117 of the *Conveyancing Act* 1919 (NSW) and/or sections 51 and 52 of the *Real Property Act* 1900 (NSW); and

- The appellant was entitled to recover loss of bargain damages and costs of reletting from the second and third respondents under the terms of the guarantees they had given.

BETFAIR PTY LIMITED & ANOR v. STATE OF WESTERN AUSTRALIA (C2/2007) (part heard)

Date of Referral of Special Case to Full Court: 21 February 2007

The first plaintiff ("Betfair") holds a gaming licence granted by the Tasmanian Gaming Commission pursuant to the *Gaming Control Act 1993* (Tas) ("the Tasmanian Act") which permits Betfair to operate a betting exchange by means of internet connection or telephone and to broker wagering by players registered with Betfair, one of whom is the second plaintiff, Matthew Edward Erceg, a resident of Western Australia. On 23 January 2007 certain sections of the *Betting and Racing Legislation Amendment Act 2006* (WA) ("the amending Act") came into operation, including (relevantly) inserting new sections 24(1aa), 27B(1) and 27D(1) in the *Betting Control Act 1954* (WA) ("the Betting Control Act"). These sections make it an offence to bet through a betting exchange or to establish or operate a betting exchange, wherever that betting exchange is located, or to publish or make available a WA race field (that is, the list of horses or greyhounds taking part in a race to be conducted in Western Australia), unless the bet is placed with, or the betting exchange operator is, Racing and Wagering Western Australia (RWWA) or a bookmaker or totalisator licensed under the Betting Control Act. The effect of these new sections is to prohibit Betfair from accepting bets from a person in Western Australia or publishing a WA race field, and to prohibit the second plaintiff from placing bets with Betfair.

By writ of summons filed 29 January 2007, the plaintiffs seek declarations that sections 24(1aa) and 27D(1) of the Betting Control Act (and the amending Act to the extent that it inserts those sections) are invalid as a restraint on inter-state trade, contrary to section 92 of the Constitution, and that section 27D(1) of the Betting Control Act does not, on its proper construction, prohibit Betfair from operating a betting exchange in according with the licence granted to it under the Tasmanian Act or, in the alternative, that section 27B(1) of the Betting Control Act (and the amending Act to the extent that it inserts that section) are invalid as contrary to sections 92 and 118 of the Constitution.

The questions stated for the opinion of the Full Court include:

- Is section 24(1aa) of the Betting Control Act invalid as contrary to section 92 of the Constitution either wholly or as it applies to the second plaintiff when making a bet through Betfair's betting exchange by telephone or internet from a place in Western Australia to Betfair's Tasmanian premises?

- Is section 27D(1) of the Betting Control Act invalid as contrary to section 92 of the Constitution either wholly or as it applies to Betfair publishing or making available a WA race field by telephone or internet communication between its Tasmanian premises and a place in another State, or for the purpose of taking bets through its betting exchange by telephone or internet between its Tasmanian premises and a place in another State?

- Is section 27D(1) of the Betting Control Act invalid or inoperative by reason of section 118 of the Constitution either wholly or to the extent that that section would apply to Betfair publishing or making available a WA race field in Tasmania, Western Australia or elsewhere?

The Attorney-General of the Commonwealth of Australia, and the Attorneys-General for the States of New South Wales, South Australia, Victoria, Queensland and Tasmania are intervening in this matter pursuant to s. 78A of the *Judiciary Act* 1903.

The hearing of this matter is continued from 7, 8 and 9 November 2007.

ROMAN v. NORTH SYDNEY COUNCIL (S403/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 27 February 2007

Date of grant of special leave: 3 August 2007

This appeal involves the interpretation of s.45 of the *Civil Liability Act* 2002 (NSW) and the question of whether the relevant authority had "actual knowledge" of the existence of a pothole and could be sued in negligence.

The appellant was injured in 2001 when she fell into a pothole in the roadway at McMahons Point. She sued North Sydney Council alleging that the pothole must have been known to Council as its employees regularly swept the street and were required to report such hazards to their supervisor. The Council called evidence from its supervisors and others responsible for repairs, none of whom knew about the pothole or how it had come to be subsequently repaired. No street sweepers were called.

The trial judge (Ainslie-Wallace DCJ) concluded that the street sweepers would have been aware of the pothole and, despite the absence of any record, so too was the Council. Damages of $475,485.00 were awarded.

The Court of Appeal, by majority (Bryson and Basten JJA, McColl JA dissenting) allowed the appeal, holding that "actual knowledge" must be found in the mind of an officer having authority to carry out the repair. The evidence showed that no officer at that level had actual knowledge and consequently neither did the Council. McColl JA would have dismissed the appeal, holding that the knowledge of persons who, acting within the scope of their duties learn of a risk and are required to report it, should be attributed to the Council.

The grounds of appeal include:

The New South Wales Court of Appeal was in error:

- In holding that Section 45 of the Civil Liability Act, New South Wales, protected the respondent unless it could be shown that an officer of the respondent having delegated or statutory authority to carry out necessary repairs to roads had actual knowledge of the risk.

- When it purported to apply principles of corporate criminal or quasi criminal responsibilities to acts done or not done by employees of the respondent within the scope of their employment for which the respondent should have been held civilly liable.

- When it overturned the trial judge's finding that the respondent had the relevant knowledge for the purposes of Section 45 of the Civil Liability Act, New South Wales, whilst apparently accepting her finding that employees of the respondent who were part of the respondent's road maintenance system had knowledge of the hazard.

GASSY v THE QUEEN (A2/2006)

Court appealed from: Court of Criminal Appeal, South Australia

Date of judgment: 22 December 2005

On 23 September 2004, after a trial by jury, the applicant was convicted of the murder of Dr Tobin, the Director of Mental Health for South Australia. The case against the applicant was circumstantial. The Crown alleged that the applicant travelled in a lift with Dr Tobin before shooting her four times as she left the lift. The Crown led evidence of the applicant's presence in South Australia at the relevant time, his ownership of pistols of the same brand and manufacture as the pistol used to shoot Dr Tobin, and his possession of ammunition of the same kind as that used. The prosecution also relied on evidence of motive in that Dr Tobin had played a role in the deregistration of the applicant as a psychiatrist in New South Wales, and various pieces of identification evidence.

The applicant gave evidence at trial, denied any involvement in the killing, denied being in Adelaide at the time of the offence, and relied on by way of an alibi telephone call made from his home in Sydney on the weekend of the shooting, which he claimed to only have been made by him as his parents were overseas at the time.

The applicant appealed to the Court of Criminal Appeal (Bleby, White and Debelle JJ) on multiple grounds. The appeal was dismissed by a majority of the Court, with Debelle J dissenting. The applicant filed an application for special leave to appeal, which was heard by the High Court on 9 August 2007. The Court dismissed nine grounds of appeal relied on by the applicant, but referred the remaining two grounds for consideration by a Full Court to be argued as on a full appeal.

The first ground of appeal to be considered by the Full Court is based on a ruling by the trial judge that the applicant could not be represented by counsel during pre-trial argument if counsel was not briefed to conduct the trial before the jury. On this basis, counsel did not appear on any pre-trial issue but was available to the applicant for advice for 11 days. On the 11th day counsel indicated that he had been retained to represent the applicant for the remainder of the proceedings, including the trial. The applicant was then represented by counsel for some of the pre-trial matters but terminated counsel's instructions before the trial commenced and acted in person thereafter. The Court of Criminal Appeal found there was no sound reason to deny the applicant his right to legal representation for the pre-trial argument and the trial judge had erred. The question was whether this error vitiated the trial. After reviewing the matters canvassed on the voir dire for the period of the non-representation, the majority of the Court noted that the opportunity was there, after counsel began representing the applicant, to have the matter reopened before the ruling was made if it was considered that he had suffered some disadvantage in arguing the matter himself. The majority concluded that in the circumstances, although he was wrongly denied representation when he wanted it, there was no miscarriage of justice. Debelle J found that the trial judge's error regarding representation during the voir dire hearing gave rise to a miscarriage of justice, particularly as the availability of counsel may have seen more of the identification evidence excluded. This in turn may have had a material effect upon the reasoning of the jury.

The other ground of appeal to be considered by the Full Court arises from a direction given by the trial judge, after the jury indicated it was having difficulty in reaching a verdict. The applicant complained that the direction was unbalanced as, for example, her Honour said nothing about the evidence of his alibi on the weekend of the killing. The majority noted that viewing the direction as a whole, it was not intended to be nor was it a review of the evidence on which either the prosecution or defence relied. They found that the direction was not unbalanced and was neutral. It was appropriate for the judge to make a suggestion as to how the jury might approach the evidence and identify any errors of disagreement or uncertainty before proceeding to take the next step. Debelle J found that the direction did not maintain an appropriate balance between the defence and prosecution cases. The trial judge did little more than recite the elements of the prosecution case and suggest a line of reasoning based on the prosecution case leading to a verdict of guilty.

The grounds of appeal include:

- The Court of Criminal Appeal erred in holding that while the trial judge erred in ruling that the applicant could not be represented by counsel for pre-trial argument unless the applicant was also represented by counsel at the trial before the jury, no miscarriage of justice ensued, despite the fact that the applicant was unrepresented for the first third of the pre-trial argument when he wished to be represented and had counsel retained and available to provide representation limited to pre-trial argument.

MW v DIRECTOR-GENERAL OF THE DEPARTMENT OF COMMUNITY SERVICES (S493/2007)

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

Date of judgment: 30 April 2007

Date of grant of special leave: 31 August 2007

The main issue in this case is whether the parents of a child born in New Zealand in 1996 were in a de facto relationship at the time of their son's birth.

On 15 September 2006 the Appellant ("the Mother") brought her son to Australia from New Zealand without the Father's knowledge or consent. On 11 October 2006 the Respondent filed an application seeking orders under the *Family Law (Child Abduction Convention) Regulations* for the return of the child. The Mother however submitted that the Father did not have "rights of custody" at the time their son came to Australia. She further submitted that the Father had acquiesced to their son's removal or, alternatively, that the Court should exercise its discretion against ordering his return.

Justice Steele noted that, pursuant to section 17 of the *Care of Children Act* 2004 (NZ) ("the Child Care Act"), both parents would be joint guardians if they were in a defacto relationship at the time of their son's birth. The evidence of the parties however conflicted on this point. His Honour preferred the evidence of the Father who stated that he lived with the Mother until their son was born. His Honour therefore found that both parents were joint guardians. Pursuant to the orders of the Family Court of New Zealand on 4 December 2006, the Father also had "rights of custody" and the Mother could not unilaterally change their son's country of habitual residence. His Honour also rejected the argument that the Father had acquiesced to his son's removal, or that the discretion should be exercised to prevent an order for his return. His Honour accepted that the Courts of New Zealand could determine the parenting issues after a full hearing of the facts. His Honour ordered that the child be returned to New Zealand.

On 30 April 2007 the Full Court of the Family Court (May & Thackray JJ, Finn J dissenting) dismissed the Mother's appeal. The majority held that the Mother's own evidence justified a finding that she and the Father were in a de facto relationship at the time of their son's birth. The majority also found that it was appropriate to set a "relatively low threshold" when determining whether the parents were in a de facto relationship at the time of their child's birth. They found that this approach ensured that a child had both natural parents as guardians.

Justice Finn however was not satisfied that there was sufficient evidence to enable Justice Steele to conclude that the parents had lived together in a de facto relationship. Her Honour found that the Respondent had not discharged the requisite onus of proof.

The grounds of appeal include:

- The Honourable Justices May and Thackray erred in finding the Mother's own evidence was sufficient to justify a finding that at the time of the child's birth, the Mother was living with the Father as a de facto partner.

- Section 29A of the *Interpretation Act 1999* (NZ) was inapplicable to the construction of the relevant provisions of the Child Care Act.

- The Honourable Justices May and Thackray erred in setting a "relatively low threshold" for determining whether the child's parents were living together in a de facto relationship upon regard to the purpose of the Child Care Act.