SHORT PARTICULARS OF CASES
APPEALS

MARCH 2010

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COMMISSIONER OF TAXATION v BAMFORD & ORS (S310/2009)
BAMFORD & ANOR v COMMISSIONER OF TAXATION & ANOR (S311/2009)

Court appealed from: Full Court of the Federal Court of Australia [2009] FCAFC 66

Date of judgment: 3 June 2009

Date of grant of special leave: 3 November 2009

In the 2000 and 2002 tax years Mr Phillip Bamford and Mrs Davina Bamford were directors of P&D Bamford Enterprises Pty Ltd ("the Company"). During that time, the Company acted as trustee of the "Bamford Trust", a trust established pursuant to a deed of settlement dated 9 February 1995.

In the 2000 tax year, the net income of the Bamford Trust as recorded in its accounts was $187,528. By reason of the (now uncontested) disallowance of deductions claimed for interest and superannuation expenses, the net income of the Bamford Trust pursuant to s 95 of the *Income Tax Assessment Act* 1936 ("the ITA Act") was $379,231. The trustee then exercised its powers of appointment to appoint the first $1286 of that year's income to minor beneficiaries, the next $118,500 to the Church of Scientology ("the Church") and a related body, the following $68,000 to Mr Phillip and Mrs Davina Bamford equally and then any balance to the Church. The net income however was less than the total of the specific appointments and the appointment of $68,000 abated. Mr & Mrs Bamford then became entitled to $33,872 each. The Commissioner of Taxation ("the Commissioner"), purportedly relying on s 97 of the ITA Act, then assessed the Bamfords to 18.06% of the s 95 income.

In the 2002 tax year, the trustee determined that a capital gain realised on the sale of a property should be treated as income to which the beneficiaries could be entitled. After the carrying forward of prior year losses, the trustee determined that there was no s 95 net income. The Commissioner however disallowed certain claimed deductions, with the result that the net income of the Bamford Trust was $16,100. The Commissioner then determined that there was no income of the Bamford Trust to which any of the beneficiaries were presently entitled under s 97, partly because he took the view that capital profit was not income. Consequently the Commissioner, relying on s 99A, assessed the trustee to tax on the whole of the net income.

The Administrative Appeals Tribunal applied the decision of the Full Federal Court in *FCT v Totledge* and decided that the capital profit was not income of the trust estate for the purposes of s 97. As there was no other "income of the trust estate" to which Mr & Mrs Bamford or any of the other beneficiaries were entitled, no amount was included in the assessable income of the Bamfords by s 97. The whole of the net income of the Bamford Trust was therefore properly assessed to the trustee under s 99A(4).

On 3 June 2009 the Full Federal Court (Emmett, Stone & Perram JJ) held that income from the Bamford Trust included the capital profit, but for different reasons. Justice Emmett held that income of the trust estate relates to "distributable income", being "income ascertained by the trustee according to accounting principles, the trust instrument and in accordance with the ordinary

concept of income". He then reasoned that for the 2002 year, if the trustee pursuant to the trust deed treats a capital receipt as income for the purposes of fixing entitlements to beneficiaries, the capital receipt becomes part of "income of the trust estate" within s 97(1). Since the whole of the net income was properly assessed to Mr & Mrs Bamford under s 97, no part of it was assessable to the trustee under s 99(4).

Justices Stone and Perram also concluded that the whole of the net income of the Bamford Trust was assessable to Mr & Mrs Bamford under s 97 but for slightly different reasons. Their Honours held that the meaning of the word "income" was to be interpreted as income of the trust as understood in trust law. They further held that the terms of the trust may have the effect of altering the income of the trust for s 97 purposes.

In matter number S310/2009 the grounds of appeal include:

- The Full Court erred in holding that the "income of the trust estate" in s 97 of the ITA Act is not confined to income according to ordinary concepts.

In matter number S311/2009 the grounds of appeal include:

- The Full Court should have held that the expression "that share of the net income of the trust estate" in s 97(1) refers to the share of the "net income of the trust estate" to which the beneficiary would be presently entitled, under the terms of the trust instrument and any relevant appointment, if the distributable income of the trust estate and the net income of the trust estate were the same amount.

AWB LIMITED v AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION & ANOR (M117/2009)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2009] VSCA 234

Date of judgment: 9 October 2009

Date special leave granted: 11 December 2009

In August 2007 the first respondent ("ASIC") commenced an investigation under s13(1) of the *Australian Securities & Investments Commission* Act 2001 (Cth) ("the ASIC Act") into suspected contraventions by the appellant ("AWB") of the *Corporations Act* 2001 (Cth), and the *Crimes Act* 1958 (Vic). In the course of the investigation ASIC examined numerous witnesses. In December 2007 it commenced a proceeding in the Supreme Court of Victoria seeking declaratory orders, pecuniary penalties and disqualification orders against the second respondent ("Lindberg"). In the course of that proceeding, ASIC was ordered to make discovery to Lindberg of all transcripts of examinations conducted under s19 of the ASIC Act and all other statements relating to any question raised by the pleadings ("the ASIC Documents"). By summons dated 31 July 2009, AWB sought an order that the ASIC Documents be provided to it before being provided to Lindberg, to enable it to assert and test any claim for legal professional privilege.

Robson J made orders requiring ASIC to provide AWB's lawyers with copies of the ASIC Documents. His Honour noted that the courts had recognised that legal professional privilege included not only the right to resist giving information or documents that may reveal privileged communications, but the right to be given a practical and realistic opportunity to assert the privilege in order to resist giving the information or documents. In this case, AWB had not had that opportunity. Accordingly, its common law rights may not be observed if the ASIC Documents were provided to Lindberg without AWB having an opportunity to assert and test its legal professional privilege claims.

The Court of Appeal (Warren CJ, Neave and Mandie JJA) allowed ASIC's appeal. The Court found that the legal position derived from the decision in *Calcraft v Guest* [1898] 1 QB 759 is that, even if witness statements and transcripts contain or refer to communications that were the subject of legal professional privilege, that privilege was lost once the statements or the evidence recorded in them and in the transcripts were supplied to ASIC.

Lindberg has filed a submitting appearance.

The grounds of appeal include:

- The Court of Appeal erred in:

    a) holding that, by reason of the rule in *Calcraft v Guest* [1898] 1 QB 759, the Appellant 'lost' any legal professional privilege in communications recorded in witness statements and transcripts of examinations (the ASIC Documents) held by the First Respondent if

and when the communications were disclosed to the First Respondent by a third party without the consent or authority of the Appellant.

b) erroneously applying the rule in *Calcraft v Guest* [1898] 1 QB 759, an evidentiary rule confined to the tender of documents in proceedings, to a situation where the First Respondent had not sought to tender, and said that it did not intend to tender the ASIC Documents.

- In holding that privilege had been 'lost' the Court erred in law in failing to consider adequately or at all, the primary issue that had been argued at first instance and in the appeal, namely, whether the orders made at first instance were an appropriate means to afford to the Appellant a practical and realistic opportunity to protect any legal professional privilege in the communications recorded in the ASIC Documents in accordance with *Commissioner of Taxation v Citibank Ltd* (1989) FCR 403.

BERENGUEL v MINISTER FOR IMMIGRATION AND CITIZENSHIP (M66/2009)

Date Special Case referred to Full Court: 9 October 2009

The plaintiff (Berenguel) is a citizen of Brazil. He came to Australia in November 2004 on a temporary Student Visa and commenced full time English language studies. He was granted further temporary student visas. In 2005 he enrolled in a commercial cooking course which he completed in December 2007. On 21 April 2008 he applied for a Class VB, subclass 885 Skilled - Independent (VB 885) visa. One of the mandatory requirements for this visa is that an applicant has competence in English; an applicant is required to demonstrate this by providing his IELTS (International English Language Testing System) test results. Berenguel had, on 26 February 2008, sought to be tested for his English language competence and the earliest date available for this assessment was on 10 May 2008. He was assessed on that date and received the test results some two weeks later, which showed he was assessed at competent English level. Berenguel provided his IELTS (International English Language Testing System) test results to the Department on 7 June 2008.

On 12 December 2008 a delegate of the defendant (the Minister) refused the visa on the grounds that Berenguel had not met the criteria for it as prescribed by clause 885.213 of Part 885 of Schedule 2 to the *Migration Regulations* 1994. The delegate stated that

> "*You provided evidence of an IELTS test booked for 10 May 2008 with your application. You have provided an IELTS test result on 07 June 2008.*
>
> *You have not provided an IELTS test result [for a] test conducted not more than 2 years before the day on which the application was lodged and therefore have not meet [sic] the regulatory requirement of having vocational English at the time of application".*

On 29 June 2009 Berenguel filed an application for an order to show cause in this Court. There was no dispute between the parties that the effect of s476 and 476A of the *Migration Act* 1958 (Cth) is that the High Court does not have the power to remit this matter to either the Federal Court of the Federal Magistrates Court. The critical legislative provisions are Regulations 1.15B and 1.15C of the *Migration Regulations* and Part 885 of Schedule 2 to those regulations. At issue is whether the reference to a test conducted *"not more than 2 years before"* the day on which the application was lodged ought to be read as *"no earlier than 2 years before"*. The defendant submits that the regulation requires that the test result must be provided at the time the application is made, so that, necessarily, the test must have been conducted prior to the application being made. Berenguel submits that so long as the test takes place no earlier than 2 years before the application is made, the applicant is able to establish that he had English competence at the time the application is made even, if the test results are provided subsequently.

On 9 October 2009 Crennan J referred the Special Case for consideration by the Full Court.

The questions in the Special Case include:

Q1. Did the delegate of the defendant misconstrue subregulation 1.15B(5) of the Regulations in finding that the plaintiff had *not provided an IELTS (International English Language Testing System) test result [for a] test conducted not more than 2 years before the day on which the application was lodged and therefore have not meet [sic] the regulatory requirement of having vocational English at time of application"*?

Q2. In the circumstances of the present case could the plaintiff satisfy the English language requirements of clause 885.213 in Schedule 2 to the Regulations by lodging and IELTS Test Report with the defendant's Department on a date after the date on which he lodged his visa application with the defendant's Department?

Cadia Holdings Pty Ltd & Anor v State of New South Wales & Anor
(S367/2009)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 174

Date of judgment: 1 July 2009

Date of grant of special leave: 11 December 2009

The First Appellant is the holder of mining leases granted under the *Mining Act* 1992 ("the Act") with respect to land owned by the Second Appellant at Cadia Hill ("the Cadia Hill mine"). The Cadia Hill mine extracts both gold and copper, but it is not possible to mine for one without the other.

The Cadia Hill mine comprises parcels of land granted by the Crown from 1852-1881, without any express reservation for copper. There is no dispute that the Crown owns the gold. It is also well established that the right of the Crown to gold does not have to be reserved in a grant. Gold is a "publicly owned mineral" for the purposes of the Act and the State is therefore entitled to retain all royalties paid in respect of it. The issue for determination in this case is the ownership of the copper. If the copper is a "privately owned mineral" for the purposes of the Act, the State must repay the owner seven-eighths of the royalties pursuant to s 284 of the Act. Royalties of about $8.7 million have already been paid in relation to the copper.

The submissions in the Court of Appeal proceeded by reference to the royal prerogative at common law and any relevant effects of the *Royal Mines Acts* 1688 (1 Wm & M. c.30) (UK) ("the 1688 Act") and 1693 (5 Wm & M c.6) (UK) ("the 1693 Act") upon that prerogative.

The majority in the Court of Appeal (Basten JA and Handley AJA) held that the copper in the specified land was a "publicly owned mineral" for the purposes of the Act. Chief Justice Spigelman however found the opposite.

The grounds of appeal are:

- The Court erred in finding that copper in the specified land was a publicly owned mineral for the purposes of the Act.

- The Court erred in failing to find that the royal prerogative with respect to copper in the specified land did not exist or had been abrogated as a result of the 1688 Act and/or the 1693 Act and/or the Act.

AKTAS v WESTPAC BANKING CORPORATION LTD & ANOR (S3/2010)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 9

Date of judgment: 9 February 2009

Date of grant of special leave: 11 December 2009

Mr Aktas was the sole shareholder of Homewise Realty Pty Ltd ("Homewise Realty"). On 1 December 1997 Westpac Banking Corporation Limited ("Westpac") dishonoured 30 of Homewise Realty's cheques in error. Mr Aktas and Homewise Realty then brought proceedings against Westpac, including in defamation. A jury found that Westpac's endorsement “refer to drawer” on the cheques conveyed defamatory imputations. Justice Fullerton however found that the relevant publication was protected by qualified privilege. Her Honour noted that if those who made the communication had an interest in making it, and those who received that communication had a corresponding interest in receiving it, then qualified privilege would exist. This was notwithstanding the fact that the information conveyed (but not the existence of the relationship) was premised on a mistake.

On 9 February 2009 the Court of Appeal (Ipp & Basten JJA, McLellan CJ at CL) unanimously dismissed Mr Aktas’ appeal. Their Honours held that the matter which defamed Mr Aktas was sufficiently connected to the privileged occasion to attract the defence. They concluded that Westpac had a duty to communicate its decision to refuse payment of the cheques to the payees or their banks. The payees also had the necessary interest in receiving that communication. The Court of Appeal further noted that the endorsement “refer to drawer” was a common banking expression. Its use by Westpac was relevant to the privileged occasion and accordingly the defamatory imputations which the jury found to arise were themselves privileged.

The ground of appeal is:

- That the Court erred in holding that the publication by Westpac of the matter found to have conveyed defamatory imputations of and concerning Mr Aktas was published on an occasion of common law qualified privilege.

SAEED v MINISTER FOR IMMIGRATION & CITIZENSHIP (S305/2009)

Court appealed from: Full Court of the Federal Court of Australia [2009] FCAFC 41

Date of judgment: 1 April 2009

Date of grant of special leave: 18 November 2009

The Appellant is a Pakistani citizen who applied for a Skilled – Independent (Subclass 175) visa. This was an application for a type of visa for which the "procedural fairness" obligations otherwise imposed upon the Minister (and his delegates) by s 57 of the *Migration Act* 1958 ("the Act") did not apply. The critical issue in this case therefore is whether there was another basis on which to provide the Appellant with "procedural fairness".

On 16 July 2008 the Minister's delegate refused the Appellant's application. That decision was based upon adverse information, specific to the Appellant, obtained by Australian immigration officers in Pakistan. None of that information was drawn to the Appellant's attention prior to the decision being made, nor was she ever invited to comment upon it.

On 2 December 2008 Magistrate Emmett dismissed the Appellant's application for judicial review to the Federal Magistrates' Court. Her Honour held that she was bound by authority to conclude that the Appellant's application for judicial review could not succeed. Upon appeal to the Federal Court, the Appellant submitted that the relevant authorities should not be followed.

On 1 April 2009 the Full Federal Court (Spender, Buchanan and Logan JJ) unanimously dismissed the Appellant's appeal. Their Honours noted that in order for the Appellant to succeed, she needed to establish that the Full Federal Court's decision in *Minister for Immigration & Multicultural & Indigenous Affairs v Lat ("Lay Lat")* was plainly or clearly wrong. In *Lay Lat*, the Full Federal Court held that the legislative intent to exclude the relevant common law rules on natural justice could not have been made clearer. Their Honours in this case then went onto conclude that the decision in *Lay Lat* (and its adoption in *SZCIJ v Minister for Immigration & Multicultural Affairs*) was clearly correct. They further held that the construction adopted in *Lay Lat* not only accommodated the relevant statements of legislative intent (excluding natural justice), but it also allowed for the harmonious operation of the provisions in question.

The grounds of appeal include:

- The Court below erred in failing to determine that the Appellant had been denied procedural fairness by the Minister's delegate in making a decision to refuse to grant a Skilled – Independent (Subclass 175) visa.
- The Court below erred in adopting the construction of s 51A of the Act stated by the Court in *Lay Lat.*

On 29 January 2010 the Appellant filed a "Section 78B Notice" in this matter. The Attorney-General of the Commonwealth has intervened in the appeal.