SHORT PARTICULARS OF CASES
APPEALS

PERTH SITTINGS
18-21 OCTOBER 2010

****

TEC DESERT PTY LTD & ANOR v. COMMISSIONER OF STATE REVENUE (P26/2010)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2009] WASCA 128
Date of judgment:	23 July 2009
Date special leave granted:	28 May 2010

The appellants entered into a sale agreement with WMC Resources on 27 November 1998. The agreement was entered into to allow WMC, as vendor, to divest itself of the responsibility to generate power for its mining operations in favour of the appellants as purchasers. WMC had two power generation systems comprising power generation stations, generators and various electrical wires, plant and equipment connecting the power stations to operations, a smelter or a township. There was also certain other personal property associated with the systems forming part of them for the purposes of the sale agreement. The assets comprising the two systems were largely on land subject of various mining tenements. Under the agreement, the appellants acquired certain assets among those comprising the systems, and provision was made for them to acquire the right to use remaining assets in situ. Licences were granted for that purpose. The respondent assessed the sale agreement as being subject to stamp duty under ss 70 and 74 of the *Stamp Act* 1921 (WA) ('the Act') on the basis that it was an agreement for the sale of property consisting in whole or in part of land or an interest in land in Western Australia. The taxpayers objected and appealed to the Supreme Court, submitting that there was no relevant transfer of land or any interest in land or any fixture or fixtures from WMC to them. In the event that there had been a transfer of fixtures, the appellant submitted that such a fixture did not constitute an interest in land. The trial judge (Simmonds J) held that whereas the sale agreement required WMC to surrender its existing tenure in the form of existing mining tenures, it did not require WMC to assign that tenure to the taxpayers. Assets that were chattels, choses in action or other personal property were sold but assets that were fixtures were not to be sold under the agreement but were treated as improvements under the licence agreement, and accordingly the sale agreement was not chargeable to stamp duty as a conveyance of land or an estate or interest in land.

The Court of Appeal (Wheeler, McLure and Newnes JJA) allowed the respondent's appeal. Wheeler JA (with whom Newnes JA agreed) noted that the sale agreement was for the sale of those items which were classified between the parties as fixtures and dealt with pursuant to the licence agreements, because the effect of those agreements was to require the purchaser to acquire the fixtures by the date of termination of the licences. Her Honour noted that as a matter of principle an interest in a fixture held by a person other than the owner of the land was an interest in land, and WMC's interest in the fixtures, which had been annexed to its mineral leases, could be described as an equitable interest in land and capable of being sold to the appellant. McLure JA held that WMC's rights in relation to the fixtures constituted an equitable interest in land to be transferred to the appellants on grant of the permanent tenure and on expiry of the licence and accordingly the agreement to sell the fixtures was dutiable as an agreement for the sale of an interest in land.

The grounds of appeal include:

- Whether the Court of Appeal erred by construing the sale agreement as an agreement under s 74(1) of the *Stamp Act* 1921 (WA) for the sale of any estate or interest in land and as such dutiable as a conveyance on sale of the estate or interest agreed to be sold.

KUHL v. ZURICH FINANCIAL SERVICES AUSTRALIA LTD & ANOR
(P31/2010)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2010] WASCA 50
Date of judgment:	24 March 2010
Date special leave granted:	30 July 2010

The appellant, Geoffrey Kuhl, was injured in the course of his employment in November 1999. His arm was drawn into the suction inlet of a vacuum hose while extracting lines from a reactor at a BHP Billiton plant in Port Hedland. The vacuum unit and the truck on which it was mounted were owned by WOMA (Australia) Pty Ltd ("WOMA"), and controlled by Mr Kelleher, an employee of Hydrosweep Pty Ltd ("Hydrosweep"). The appellant was employed by Transfield Construction Pty Ltd ("Transfield"). Both WOMA and Hydrosweep were subsequently deregistered, but at the relevant time WOMA was insured by the first respondent ("Zurich") and Hydrosweep by the second respondent ("QBE"). The accident occurred while the appellant was attempting to clear a blockage in the vacuum hose and Mr Kelleher took over the task. Mr Kelleher indicated that the blockage had been cleared and passed the vacuum hose back to the appellant, whose arm was then drawn into the hose in a manner which the evidence did not make clear. The trial judge held that Hydrosweep merely provided the vacuum truck and operators to WOMA and that there was no duty on Hydrosweep to train or instruct the appellant in the manner in which he was to carry out work for his employer, Transfield. The appellant's action against Transfield was statute-barred. His Honour held that WOMA owed a duty to the appellant to provide a vacuum unit which was suitable for use by Transfield employees, but that WOMA was entitled to expect that Transfield would instruct its employees in its use. His Honour further held that the possibility of injury in the particular circumstances was not reasonably foreseeable, having found that the evidence was insufficient to determine how the appellant's arm had been drawn into the vacuum hose and therefore to identify the relevant, and causally related, breach. Finally, the trial judge concluded that modifications made to the vacuum unit by WOMA after the accident did not establish negligence.

Court of Appeal (Martin CJ, and Newnes JA; Wheeler JA in dissent) dismissed the appellant's appeal. The principal judgment was delivered by Newnes JA, with whom Martin CJ agreed, and his Honour found no fault with the reasoning of the trial judge. Wheeler JA agreed with the majority in relation to the appeal by Hydrosweep but would have allowed the appeal by WOMA. Her Honour found that the risk of injury occurring when the hose was passed while still in operation was reasonably foreseeable, the hose being heavy, awkward, too noisy to permit verbal directions, and with very powerful suction. Her Honour concluded that a "break box" on the hose, to stop suction, was a course of action which was neither difficult nor expensive and that a hose reasonably fit for the intended purpose would have included such a break box.

The grounds of appeal include:

- Whether the majority of the Court of Appeal erred in concluding that WOMA owed no duty of care to the appellant in the circumstances;

- Whether the Court of Appeal erred in its application of the decision in *Nelson v. John Lysaght (Australia) Ltd* (1975) 132 CLR 201 and ought to have concluded that modifications to the hose system after the accident were capable of supporting a finding of negligence;

- Whether the Court of Appeal erred in concluding that WOMA did not breach the duty of care it owed to the appellant in the circumstances.

Zurich has filed a notice of contention that the decision of the Court of Appeal should be affirmed on the following additional grounds:

- Given the findings of the trial judge, affirmed by the Court of Appeal, that Transfield and not WOMA was responsible for the work of extracting fines from the reactor, the Court of Appeal should also have found that the requirement to supply safe plant and equipment was the sole responsibility of Transfield; and

- The changes to the vacuum undertaken at the direction of BHP after the accident, including the provision of a break box manufactured by Transfield's employees, were more consistent with Transfield's duty to provide a safe system of work, and BHP's duty to define and co-ordinate the respective roles of its subcontractors, than with the existence of, or any breach of a relevant duty of care by, WOMA.

BRAYSICH v. THE QUEEN (P32/2010)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2009] WASCA 178
Date of judgment:	16 October 2009
Date special leave granted:	30 July 2010

The appellant, Jeffrey Joseph Braysich, was convicted after trial by jury in the District Court of Western Australia on 25 counts of creating a false or misleading appearance of active trading on the Australian Stock Exchange contrary to ss 998(1) and 1311(1) of the *Corporations Act* 2001 (Cth) ("the Act"). He was sentenced to 12 months' imprisonment, fully suspended, and fined $25,000. His co-accused, Dean Scook, was convicted on 158 similar counts. The counts against both concerned trading on the ASX in fully paid ordinary shares in Intrepid Mining Corporation NL. The offences were committed between 2 and 27 February 1998. The prosecution alleged that the appellant, while a broker at Paul Morgan Securities, caused the sale of shares in Intrepid on account of Walthamstow Pty Ltd (as vendor) to Challiston Pty Ltd (a company associated with Scook), that Scook then embarked on a process of acquiring a substantial shareholding in Intrepid following an announcement to the ASX to the effect that Intrepid had entered into a letter of intent with Cobra Resources for a takeover, including a placement of 7 million fully paid Intrepid shares at 50 cents which would come onto the market on 27 February 1998. During the relevant period the appellant completed "sell order notes" on instructions from a Mr Masel (associated with Walthamstow) or Scook for the sale of Intrepid shares by Walthamstow to Challiston, and "buy order notes" for the purchase of such shares by Challiston. Instructions for the purchase of Intrepid shares on the Walthamstow account required approval by Masel and sales on that account required authorisation by Masel or Scook. Under the terms of a several loan facilities, Walthamstow provided bridging loans to Challiston to pay Paul Morgan for Intrepid shares bought on its account when due, and Walthamstow required Scook/Challiston to immediately give Paul Morgan a "sell order" for the Intrepid shares. The prosecution alleged that the appellant was aware of the funding arrangement between Scook and Walthamstow and relied on evidence of contact by the appellant with Masel. The prosecution case was that the Intrepid shares sold on the Walthamstow account were at all times beneficially owned by Challiston and were only held by Walthamstow as security for the loans made to Challiston. The prosecution relied on s 998(5) of the Act which deems a transaction which does not involve a change in beneficial ownership to have created a false or misleading appearance of active trading. Section 998(6) of the Act would have provided a defence if the appellant could prove that the purpose or purposes for which he engaged in the conduct was not or did not include the purpose of creating a false or misleading appearance of active trading, but the trial judge ruled, and directed the jury, that the defence was not available because the appellant had denied in his evidence knowing that the transactions did not involve any change in beneficial ownership and because the appellant had not expressly stated that his purpose in causing the sell or buy orders to be made was not to create a false or misleading appearance.

The Court of Appeal (Pullin, Buss and Miller JJA) unanimously dismissed the appeal, Buss JA delivering the principal judgment of the Court. His Honour held that there was no direct evidence of the appellant's subjective purpose or purposes in carrying out the transactions, that the evidence was at best circumstantial evidence from which an inference could have been drawn that he was acting in the ordinary course of his business as a stockbroker, but that direct evidence of subjective purpose was a critical omission and the trial judge was correct not to leave the defence to the jury.

The grounds of appeal include:

- Is it proper for a trial judge to direct a jury that a statutory defence is not available because the accused has not expressly raised the defence in his (relevantly) evidence, even though there was circumstantial evidence supporting the statutory defence but which the trial judge does not consider sufficient for the jury to conclude, on the balance of probabilities, that the defence has been made out?

STUBLEY v. THE STATE OF WESTERN AUSTRALIA (P29/2010)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2010] WASCA 36
Date of judgment:	3 March 2010
Date special leave granted:	30 July 2010

On 21 November 2008 after a trial by jury the appellant, Alan John Stubley, was convicted of seven counts of rape, one count of attempted rape and three counts of indecent assault, in respect of two complainants. He was sentenced to 10 years' imprisonment. He was acquitted of a further count of rape and two further counts of indecent assault. At the time of the offences, which were committed between 1975 and 1978, the appellant was practising as a psychiatrist and the complainants were his patients. During the trial, in a separate decision, the trial judge (Johnson J) ruled that certain evidence from three other women who were patients of the appellant was admissible as propensity evidence. That evidence concerned episodes of sexual activity in the appellant's consulting rooms between the appellant and the witnesses, none of which was the subject of charges. At trial, the appellant admitted to acts of touching and carnal knowledge and attempted carnal knowledge and accordingly the only issue at trial was consent.

The Court of Appeal allowed the appeal against sentence and reduced the sentence to six years' imprisonment but, by majority (Owen and Buss JJA; Pullin JA in dissent), dismissed the appeal against conviction. The majority (Buss JA delivering the principal judgment) held that the evidence of the three other women was "significantly probative" of a number of facts in issue at the appellant's trial and therefore satisfied s 31A(2)(a) of the *Evidence Act* 1906 (WA). The majority concluded that the evidence could rationally have affected the deliberations of the jury in the assessment of the probability that the sexual activity occurred in the manner and circumstances, including the dynamics of the relationships, described by the complainants, the probability of whether the complainants consented to the activity, the probability of whether the appellant had an honest and reasonable but mistaken belief that there was consent, and the significance, if any, of the facts that the complainants continued to consult the appellant and did not make contemporaneous complaints about his behaviour. The majority concluded that the trial judge correctly directed the jury as to the limited purposes for which they could use the evidence of the three other women if they accepted that evidence as truthful and reliable. Pullin JA held that all the evidence of the three other women could have shown was a propensity for the appellant to have sexual encounters with women patients in his consulting rooms in order to prove that the sexual encounters with the two complainants occurred but that, since this was not in issue at trial because of the admissions made by the appellant, the evidence of propensity was irrelevant to any live issue.

The grounds of appeal include:

- Whether the evidence of the three other women was properly admitted on the basis that it was "significantly probative" for the purposes of s 31A(2)(a) of the *Evidence Act* 1906 (WA);

- Whether the interests of the administration of justice in this particular case require consideration by the High Court of the judgment below.