SHORT PARTICULARS OF CASES
APPEALS

BRISBANE SITTINGS
COMMENCING MONDAY, 21 JUNE 2010

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PUBLIC TRUSTEE OF QUEENSLAND v. FORTRESS CREDIT CORPORATION (AUS) II PTY LTD & ORS (B9/2010)

Court appealed from: Court of Appeal, Supreme Court of Queensland [2009] QCA 282

Date of judgment: 18 September 2009

Date special leave granted: 12 March 2010

This case concerns the construction and application of sections 263 and 268 of the *Corporations Act* 2001 (Cth) ("Act") which require, respectively, notice of any charge created or varied to be lodged with the Australian Companies and Securities Commission. In this case, the parties executed a deed acknowledging that a guarantee provided in respect of a loan agreement, for which no security had been given, was a "transaction document" within the meaning of a separate loan facility which was secured by fixed and floating charge.

On 31 May 2007, the first respondent ("Fortress") entered into a loan agreement with Young Village Estates Pty Ltd ("YVE") as borrower, guaranteed by the second respondent ("Octaviar") ("the YVE guarantee"). No security was given for payment of that loan. On 1 June 2007 Octaviar and a related company guaranteed another loan arrangement ("Castle Facility Agreement") in which Fortress was lender and Octaviar Castle Pty Ltd ("Octavia Castle") was borrower. Octaviar provided security for the loan by way of a fixed and floating charge, and notice of the charge was lodged with ASIC in accordance with s 263 of the Act. Under clause 2.1 of the charge, Octaviar charged all its present and future property for payment of "secured money", defined in the charge as "all money, obligations and liabilities … owing or payable …under or in relation to a Transaction Document". The charge left any undefined terms (which included "transaction document") to have the meaning given them in the Castle Facility Agreement. On 22 January 2008 Fortress, Octaviar and Octavia Castle executed a deed ("the January 2008 agreement") acknowledging that the YVE guarantee was a "transaction document" for the purposes of the Castle Facility Agreement and thus within the terms of the charge. No notice of any charge created or varied was lodged with ASIC.

In late 2008, administrators were appointed to Octaviar and to the third respondent (Octaviar Administration Pty Ltd), and each company subsequently executed a deed of company arrangement. The appellant applied to set aside both deeds of company arrangement, and a preliminary question arose as to whether Fortress held a valid charge in respect of Octaviar, that is, whether the January 2008 agreement was a new charge, or a variation in the terms of a charge, requiring lodgement of notice with ASIC in accordance with s 263 or s 268 respectively of the Act. If so, and in the absence of such notice, a new charge would be void pursuant to s 266(1), and a varied charge void pursuant to s266(3), of the Act. McMurdo J at first instance held that the January 2008 agreement amounted to a variation of the charge, by bringing the YVE guarantee within its coverage, and was void for failure to lodge notice of that variation as required by s 288 of the Act.

The respondents' appeal to the Court of Appeal (Holmes and Muir JJA, White J) was unanimously allowed. Holmes JA, with whom White J agreed, held that s 268(2) was directed at variations in the terms of the charge, not at changes

imposed in accordance with those terms and the burden of liability under a charge. Her Honour observed that when notice of the original charge was lodged, the definition of "secured money" would alert any prospective investor or creditor to the need for further inquiry as to what might be comprised by those liabilities. The January 2008 agreement did not entail any change to what the parties were entitled or obliged to do under the charge, and there was no variation in its terms and no new charge. Muir JA observed that after execution of the January 2008 agreement, the deed of charge had not been modified or altered in its terms or its operation.

The grounds of appeal include:

- Did entry into the January 2008 agreement constitute a "variation in the terms of the charge having the effect of increasing the liabilities secured by the charge" within the meaning of s 268(2) of the *Corporations Act* and therefore require registration in order to avoid being void as a security pursuant to s 266(2), or

- Did the January 2008 agreement constitute a new charge within the meaning of s 263(1) of the Act and therefore require registration in order to avoid being void as a security pursuant to s 266(1)?

WORKCOVER QUEENSLAND v. AMACA PTY LTD & ANOR (B10/2010)

Court appealed from: Court of Appeal, Supreme Court of Queensland [2009] QCA 72

Date of judgment: 27 March 2009

Date special leave granted: 12 March 2010

The parties joined in stating of case to the Court of Appeal concerning the proper construction and application the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) and, particularly, s 66 of the *Succession Act* 1982 (Qld). Mr Thomson contracted mesothelioma as a result of exposure to asbestos in the course of his employment, and applied to WorkCover for payment of compensation in respect of that injury. Shortly after payment of that compensation Mr Thomson died, not having commenced proceedings in relation to any cause of action he may have had as a result of his injury. The asbestos to which Mr Thomson had been exposed had been manufactured by the respondents. WorkCover commenced proceedings against the respondents to recover the amount of compensation it had paid to Mr Thomson.

Four questions were stated for the Court of Appeal but only the fourth question is the subject of the appeal, which is: Is the quantum of the indemnity to which WorkCover is entitled pursuant to s 207B(7) (as it is now numbered) of the *Workers' Compensation and Rehabilitation Act* for compensation paid to Mr Thomson reduced by the operation of s 66 of the *Succession Act* if, as here, the worker dies after compensation is paid and before the trial of WorkCover's action to enforce the indemnity?

On that question, the Court of Appeal by majority (de Jersey CJ, McMurdo P and Muir JA; McMurdo P dissenting in part) answered "yes". McMurdo P dissented on this point, answering in the negative. The majority (in separate, concurring reasons) held that the legislation ensures the survival of the worker's cause of action, although after the death of the worker it is available to be pursued by a personal representative, and that the assessment of damages under that cause of action delineates the extent of the indemnity. Therefore, the majority concluded, the statutory limitations arising under s 66 of the *Succession Act* apply to the calculation of damages for the purposes of the indemnity under s 207B(7) of the *Workers' Compensation and Rehabilitation Act*. McMurdo P held that the damages to which a plaintiff insurer is entitled under s 207B(7) involve only a hypothetical assessment of the third party tortfeasor defendant's liability for damages, which means that the assessment is not dependent on the survival of a deceased worker's cause of action under s 66 of the *Succession Act*. McMurdo P also concluded that in any event, s 66 specifically relates to a cause of action which survives under that section for the benefit of the estate, and a plaintiff insurer's claim under s 207B(7) is not such a cause of action.

The grounds of appeal include:

- Is the quantum of the indemnity the appellant is entitled to recover pursuant to s 207B(7) (previously s 272(7)) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) reduced by the operation of s 66 of the *Succession Act* 1981 (Qld) if the worker dies after compensation is paid and before trial of the appellant's action to recover the indemnity?

POLLOCK v. THE QUEEN (B14/2010)

Court appealed from: Court of Appeal, Supreme Court of Queensland [2009] QCA 268

Date of judgment: 11 September 2009

Date special leave granted: 12 March 2010

On 5 December 2008 the appellant, Andrew Murray Pollock, was convicted of the murder of his father, Murray Pollock, in the early morning of 31 July 2004, and sentenced to the mandatory term of life imprisonment. This conviction followed a previous conviction having been quashed on appeal by the Court of Appeal and a re-trial ordered. At the re-trial, the appellant pleaded guilty to manslaughter but not guilty to murder, arguing a defence of provocation.

The Court of Appeal (Keane, Muir and Fraser JJ) unanimously dismissed the appeal. The appellant argued that in the first appeal, McMurdo P formulated a seven point test for a jury to consider when determining whether the prosecution had satisfied them beyond reasonable doubt that an accused was guilty of murder rather than manslaughter where there was a defence of provocation, and that one of those points misstated the relevant element of the provisions in s 304 of the *Criminal Code* 1899 (Qld) as to provocation. The fifth point in the test formulated by Mc Murdo P ([2008] QCA 205 at [7]) was that "the loss of self-control was not sudden (for example, the killing was premeditated)". The trial judge gave a direction which omitted the reference to premeditation, but included a dictionary definition of "sudden". The appellant argued that this direction, and the test formulated by McMurdo P, are more onerous than that of s 304 of the Code, which requires that the accused acted "before there is time for the person's passion to cool". Keane JA, with whom Muir and Fraser JJA agreed, rejected this argument, finding that the elements of provocation are interrelated and that the formulation by McMurdo P, rather than an attempt to restate or paraphrase the elements in s 304 of the Code, was concerned to relate the terms of s 304 to the onus of proof having regard to the evidence in the case.

The grounds of appeal include:

- Whether the Court of Appeal erred in holding that the direction by the trial judge to the jury did not mislead the jury as to their task in considering the defence of provocation.