SHORT PARTICULARS OF CASES
APPEALS

NOVEMBER SITTINGS

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TCL AIR CONDITIONER (ZHONGSHAN) CO LTD v THE JUDGES OF THE FEDERAL COURT OF AUSTRALIA & ANOR (S178/2012)

Date application referred to the Full Court: 21 August 2012

The Plaintiff ("TCL") is a company registered in the People's Republic of China. It manufactures air conditioners. In 2003 TCL entered into a distributorship agreement ("the agreement") with Castel Electronics Pty Ltd ("Castel"), a company registered in Australia. A dispute later arose between the parties when Castel alleged that TCL had breached the agreement. In July 2008 Castel commenced an arbitration, pursuant to clause 12(1) of the agreement. TCL opposed that claim and it also counter-claimed against Castel. After hearing both claims, an arbitral tribunal made two awards ("the Arbitral Awards"). On 23 December 2010 it awarded $2.8M to Castel and on 27 January 2011 it also awarded Castel costs of $732,500. Castel then commenced Federal Court proceedings to enforce the Arbitral Awards under the *International Arbitration Act* 1974 (Cth) ("IA Act").

In a judgment delivered on 23 January 2012 ("the interlocutory judgment"), Justice Murphy held that the Federal Court had the jurisdiction to determine Castel's application. This was pursuant to Articles 35 and 36 of the United Nations Commission on International Trade Law's *Model Law on International Commercial Arbitration* ("the Model Law") and s 16 of the IA Act, read with s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth) and s 54 of the *Federal Court of Australia Act* 1976 (Cth).

The case proceeded to final hearing (along with two proceedings commenced by TCL to set aside the Arbitral Awards). On 26 April 2012 Justice Murphy reserved his judgment, which remains reserved as at the time of writing.

On 4 July 2012 TCL filed an Application for an Order to Show Cause. It seeks orders restraining the First Defendant from enforcing the Arbitral Awards, and/or quashing Justice Murphy's interlocutory judgment. Also on that date, TCL filed a Notice of a Constitutional Matter under s 78B of the *Judiciary Act* 1903 (Cth). The Attorneys-General of the Commonwealth, New South Wales, Queensland, Victoria, Western Australia and South Australia have all informed the Court that they will be intervening in this matter.

On 21 August 2012 Justice Gummow referred this matter into the Full Court for final hearing.

The grounds said to justify the granting of relief include:

- The Federal Court's finding of jurisdiction should be quashed, and any further action by the First Defendant in respect of the enforcement of the Arbitral Awards should be restrained by a writ of prohibition, because Articles 35 and 36 of the Model Law, read with s 7 and Part III of the IA Act:

    a) purport to confer the judicial power of the Commonwealth on arbitral tribunals contrary to the requirements of Chapter III of the *Constitution*; and/or

    b) impermissibly interfere with the judicial power of the Commonwealth contrary to the requirements of Chapter III of the *Constitution*; and/or

    c) undermine the institutional integrity of Chapter III Courts, and are invalid.

X7 v AUSTRALIAN CRIME COMMISSION & ANOR (S100/2012)

Date case stated referred into the Full Court: 21 August 2012

The Australian Crime Commission ("ACC") is established under the *Australian Crime Commission Act* 2002 ("the Act"). Pursuant to section 46B(1) of that Act, the Chief Executive Officer ("CEO") of the ACC appointed specified examiners in relation to a special ACC investigation. By a summons issued on 22 November 2010, the Plaintiff was required to attend to give evidence before such an ACC examiner on 14 December 2010.

Following his arrest on 23 November 2010, the Plaintiff was charged by the Australian Federal Police with the following offences:

a) conspiracy to import a commercial quantity of a border controlled drug contrary to sections 11.5 and 307.1 of the Criminal Code;

b) conspiracy to traffic in a commercial quantity of a controlled drug contrary to sections 11.5 and 302.2 of the Criminal Code; and

c) conspiracy to deal with money being the proceeds of crime contrary to sections 11.5 and 400.3(1) of the Criminal Code.

Following a request from the Plaintiff's then lawyer, the examination scheduled for 14 December 2010 was adjourned until 1 February 2011. Before that later examination could commence however, the Plaintiff (who was by that stage unrepresented) requested a further adjournment. In refusing that request, the Examiner reassured the Plaintiff that his rights during the examination would be protected and that no-one associated with his criminal prosecution would have access to the information that he (the Plaintiff) may disclose. The Plaintiff was also advised about the privilege against self-incrimination. The Examiner then advised the Plaintiff that he could not refuse to answer any questions or refuse to produce any documents. The Plaintiff then claimed the privilege against self-incrimination with respect to all of the answers given by him that day.

On 2 February 2011 the examination of the Plaintiff resumed. By this stage the Plaintiff was represented and he refused to answer any further questions concerning the subject matter of his charges. The Examiner then advised the Plaintiff that he would be further charged with failing to answer questions. The Examiner also made an oral direction pursuant to section 25A(9) of the Act concerning, inter alia, the limited use that could be made of the Plaintiff's evidence. It was also concerned with protecting his identity. That direction was subsequently varied by the CEO's delegate under section 25A(10) of the Act. Nothing in that varied direction however authorised the publication to any person connected with the Plaintiff's criminal prosecution of any evidence (or documents) given by him to the Examiner. It also did not permit any information to be disclosed that might enable the Plaintiff to be identified, or even the fact that he had given evidence at the examination.

On 20 April 2012 the Plaintiff filed a writ of summons in which he sought, inter alia, a declaration that the ACC examination was an impermissible interference with his constitutional right to a fair trial on the drugs charges. On 23 August 2012 Justice Gummow referred a case stated into the Full Court for its consideration.

On 23 August 2012 the Plaintiff filed a Notice of Constitutional matter. The Attorneys-General for NSW, Victoria, Queensland, Western Australia and South Australia have all advised the Court that they will be intervening in this matter.

The questions stated for the consideration of the Full Court are:

- Does Division 2 of Part II of the Act empower an examiner appointed under section 46B(1) of the Act to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence so charged?

- If the answer to the question above is “Yes”, is Division 2 of Part II of the Act invalid to that extent as contrary to Chapter III of the Constitution?

BAINI v THE QUEEN (M87/2012)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2011] VSCA 298
Date of judgment:	5 October 2011
Date special leave granted:	17 August 2012

In June 2010, after a trial in the County Court of Victoria, a jury found the appellant guilty of 36 counts of blackmail (and his co-accused guilty of 13 counts). There had been directed acquittals on some counts and on others there had been verdicts of not guilty.

The circumstances of the offending commenced in late 2003 when the victim ("Rifat") was subjected to threats and violence at the hands of a business competitor, one Hakim. A mutual friend of Rifat and the appellant suggested to Rifat that he could introduce him to someone who would protect him from Hakim. Rifat alleged that the appellant told him that Hakim had offered the appellant $1,000 a month to take Hakim's side in the dispute between Hakim and Rifat. The appellant told Rifat that, unless he met certain demands, he would join forces with Hakim. Rifat said that, thereafter, the appellant made regular threats to harm Rifat's family and/or business. As a consequence, Rifat sent money to the appellant on some 35 separate occasions between 4 April 2005 and 15 March 2007.

One count of the indictment ("count 50") related to a different victim ("Srour"). The Crown alleged that in May 2007 the appellant made an unwarranted demand with menaces upon Srour. Srour gave evidence that the appellant had claimed that Srour owed one Capozza $100,000, and that it was the appellant's debt now. The appellant had told Srour that he was coming to collect in a few days. Asked by Srour how he intended doing that, the appellant had replied 'you know how I do that'. Srour alleged that this made him fearful, because the appellant had previously told him that he assaulted people to get what he wanted. At trial it was disputed that the appellant had made any unwarranted demands with menaces on either Rifat or Srour.

Prior to arraignment, the appellant's counsel had, unsuccessfully, applied for severance of count 50. In his appeal to the Court of Appeal (Warren CJ, Nettle and Ashley JJA), the appellant argued, inter alia, that the trial judge had erred by failing to sever count 50 from the presentment. He submitted that the prior personal and business relationships between the parties were not a sufficient nexus to justify joinder. The Court held that the trial judge's refusal to sever count 50 did not cause any substantial miscarriage of justice to the appellant in respect of the Rifat counts. However, the refusal to sever count 50 did bring about a substantial miscarriage of justice with respect to the appellant's conviction on that count: the consequence of the ruling was that a great deal of evidence which had no possible relevance to the appellant's trial on that count, but which was highly prejudicial, went into evidence. The Court therefore allowed the appeal on that ground and directed a retrial on count 50. The appeal against conviction was otherwise dismissed.

In this Court, the appellant contends that the Court below, having found that there was a substantial miscarriage of justice as a result of the trial judge failing to sever count 50, ought to have ordered a retrial on all counts and not just count 50. The appellant contends that the Court below misinterpreted and misapplied the statutory

test now required by s276 of the *Criminal Procedure Act* 2009 (Vic), which replaced s568(1) of the *Crimes Act* 1958 (Vic), in relation to criminal appeals.

The grounds of appeal are:

- The Court below, having determined that the trial judge had erred in his ruling regarding the non-severance of count 50 and that a retrial should be ordered on that count, erred by failing to order a retrial on the "Rifat counts" and in particular erred by:

  (a) finding that the trial judge "…could fairly conclude, in a practical sense, that the non-severance of count 50, albeit involving a second complainant, was very unlikely to make any difference to the outcome on the Rifat counts so long as he gave a separate consideration direction."
  (b) determining that the guilty verdicts on the "Rifat counts" could be "saved" by recourse to the proviso.

- The Court of Appeal erred in deciding that there was a substantial miscarriage of justice by adopting the approach dictated in *Weiss v The Queen* [2005] HCA 81 (2005) 224 CLR 300 and thereby erred in failing to properly apply section 276 of the *Criminal Procedure Act* 2009 (Vic).

COMMISSIONER OF TAXATION v CONSOLIDATED MEDIA HOLDINGS LTD (S228/2012)

Court appealed from: Full Court of the Federal Court of Australia [2012] FCAFC 36

Date of judgment: 20 March 2012

Special leave granted: 17 August 2012

Consolidated Media Holdings Ltd ("CMH") held all of the issued shares ("the shares") of Crown Melbourne Ltd ("Crown"). On 28 June 2002 Crown and CMH agreed to a buy-back of many (approximately 29%) of those shares at a price of $1 billion. On that date, Crown recorded a $1 billion credit entry in its Inter-company Receivables Account ("ICR A/c"). It also created a Share Buy-Back Reserve Account ("SBBR A/c"), in which it made a debit entry of $1 billion. On 25 July 2002 Crown recorded a $1 billion debit in its ICR A/c and a corresponding credit in its Inter-company Loan (Payable) Account, with effect from 30 June 2002. On 6 August 2002 CMH transferred the relevant shares to Crown (which then cancelled them), in return for the assignment to CMH of a $1 billion debt owed to Crown (by a third company). No entry was made in the Shareholders Equity Account ("SE A/c"), in which Crown generally kept share capital.

The Commissioner of Taxation ("the Commissioner") assessed the income of CMH to include a large capital gain arising from the buy-back. CMH objected to that assessment. CMH claimed that pursuant to s 159GZZZP of the *Income Tax Assessment Act* 1936 (Cth) ("the Act") the $1 billion was deemed a dividend, which attracted a full rebate under s 46 of the Act. The Commissioner disallowed CMH's objection. CMH then appealed to the Federal Court.

On 14 April 2011 Justice Emmett dismissed CMH's appeal. His Honour found that the cancelled shares were part of Crown's share capital and that the SBBR A/c was (along with the SE A/c) part of CMH's "share capital account" as deemed under s 6D of the Act. Justice Emmett held that $1 billion had been debited against amounts standing to the credit of Crown's share capital account within the meaning of s 159GZZZP of the Act. Accordingly no dividend had been deemed and a capital gain had arisen.

On 20 March 2012 the Full Court of the Federal Court (Stone, Greenwood & Logan JJ) unanimously allowed CMH's appeal. Their Honours held that the deeming of a single "share capital account" under s 6D of the Act did not extend to deem a debit in one account (the SBBR A/c) to have occurred against an amount standing to the credit of another (the SE A/c) in which share capital was kept. Consequently no amount was to be subtracted from the purchase price in the calculation made under s 159GZZZP of the Act. The Full Court therefore found that $1 billion was deemed a dividend paid by Crown to CMH, entitling CMH to a rebate under s 46.

The grounds of appeal include:

- The Full Court erred in concluding that s159GZZZP deemed to be a dividend that part of the share buy-back purchase price of $1,000,000,000 which was a return of share capital, namely the whole of it [paragraph 42 of the Full Court's reasons].

- The Full Court erred in holding that the sum of $1,000,000,000 returned as excess share capital was not debited against amounts standing to the credit of the share capital account of Crown for the purposes of s 159GZZZP.

BECK v WEINSTOCK & ORS (S56/2012)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 228

Date of judgment: 17 August 2011

Special leave granted: 10 February 2012

LW Furniture Consolidated (Aust) Pty Ltd ("the company") was incorporated in 1971 under the *Companies Act* 1961 (NSW) ("the Act"). Its Articles of Association ("Articles") described four classes of preference shares, "A" to "D", and ten classes of ordinary shares. The only shares ever issued were of classes "A", "C" and "D", none of which had voting rights attached. Class "A" shares had priority over all others upon a winding up of the company. Shares of classes "C" and "D" were of an equal, lesser, rank and the company could redeem them upon the death of their holder(s). Class "A" shares were issued to Mr Leo Weinstock when the company was incorporated. Eight class "C" shares were later issued to Mr Weinstock's wife, Mrs Hedy Weinstock. On 6 July 2004 Mrs Weinstock died. The company's directors then resolved to redeem her shares for $1 each. If the shares were not redeemable, they would have been valued at millions of dollars upon a winding up of the company. Ms Tamar Beck, who was one of Mrs Weinstock's executors (and her daughter), claimed that the shares could not be redeemed because they were not "preference shares" within the meaning of the Act.

On 17 September 2010 Justice Hamilton held that the shares could not be redeemed by the company because they were not in fact preference shares. His Honour held that in order for them to be preference shares, other shares with inferior rights must exist. He held that it did not matter that the company's Articles provided for inferior shares. Such shares must be on issue and thus in existence.

On 17 August 2011 the Court of Appeal (Giles JA & Handley AJA, Young JA dissenting) upheld an appeal by the company and members of the Weinstock family. The majority held that the class "C" shares had been validly issued and that they carried the rights described in the Articles. This was because the company's Articles defined the types of shares and gave the directors power to issue them. Their Honours found that a court could not hold that the shares had been issued with rights different from those set out in the Articles. To do so would require an amendment to the Articles, which neither the directors nor a court had power to do. The majority held that the non-existence of ordinary shares merely prevented the *enjoyment* of the full rights of class "C" shares as preference shares. They found therefore that the company could redeem the shares that had been held by Mrs Weinstock. Justice Young however held that the company could not redeem the shares. His Honour found that those shares would have been preference shares only if other shares with inferior rights had existed at the time when the class "C" shares were issued.

The ground of appeal is:

- The Court below erred in holding that eight “C” class shares in the company were redeemable preference shares for the purposes of the *Corporations Act* 2001 (Cth) notwithstanding that there was never any other shares on issue in the company by reference to which the “C” class shares conferred a preference.

WEINSTOCK & ANOR v BECK & ANOR (S266/2012)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 76

Date of judgment: 5 April 2012

Special leave granted: 7 September 2012

LW Furniture Consolidated (Aust) Pty Ltd ("the company") is a family company incorporated in 1971. The founding directors were Mr Leo Weinstock ("Leo") and his wife, Mrs Hedy Weinstock ("Hedy"). Leo was, in effect, the company's sole shareholder (as one share was also held in trust for him). Article 66 of the company's Articles of Association ("the Articles") provided that retiring directors act as directors throughout the meeting at which they retire, and that they be eligible for re-election. Article 67 provided that the company (at a meeting) could elect a person to fill the office of a retiring director and, in default, the retiring director be deemed re-elected. Article 69 provided for the appointment of additional directors, who were to hold office until the next annual general meeting ("AGM") but not be taken into account in determining the directors who were to retire by rotation at that meeting.

In 1972 shares in the company were issued to Hedy and to her and Leo's children, Mr Amiram Weinstock ("Amiram") and Ms Tamar Beck ("Tamar"). None of the shares on issue however had voting rights attached. In June 1973 Leo and Hedy resolved that both Amiram and Tamar be appointed directors of the company. The minutes of an AGM of the company held in December 1973 record a resolution that any director retiring in accordance with the provisions of the Articles be re-appointed. Similar resolutions were passed at subsequent AGMs and both Amiram and Tamar continued to act as directors each year. (Tamar however resigned in 1982.) In later years Hedy ceased to be a director due to loss of capacity (from Alzheimer's disease), while Leo died on 29 July 2003. The next day, Amiram appointed his wife, Mrs Helen Weinstock ("Helen"), as a second director of the company ("the Purported Appointment") to enable a quorum under the Articles. In 2010 Tamar commenced proceedings to wind up the company on the basis that it had no directors who had been validly appointed (and no members with voting rights to elect directors).

On 11 May 2011 Justice Barrett both validated the Purported Appointment and declined to wind up the company. His Honour found that Amiram and Tamar had been appointed (in June 1973) under Article 69 and that their appointments had then expired at the commencement of the AGM in December 1973. The resolution at that AGM to re-appoint them was ineffective, as Articles 66 and 67 were held to apply only to directors who retired during a meeting. Therefore Amiram and Tamar were *de facto* directors from that time. Justice Barrett validated the Purported Appointment (but not the earlier purported re-appointments of Amiram) pursuant to s 1322(4)(a) of the *Corporations Act* 2001 (Cth) ("the Act"). His Honour also held that Helen's directorship was continuing and that she could appoint another director, thereby restoring a functioning board of directors to the company (with the ability to issue shares that would carry voting rights).

On 5 April 2012 the Court of Appeal (Campbell & Young JJA, Sackville AJA) unanimously allowed Tamar's appeal and dismissed Amiram and Helen's cross-appeal. Their Honours held that Barrett J had correctly concluded that Amiram ceased to be a director in December 1973 and that the company could not

(without voting shares on issue) validly appoint him thereafter. Justices Young and Sackville held that s 1322(4)(a) of the Act could not support an order validating the Purported Appointment. That provision could only be used to rectify an appointment made under Article 69 by directors who had been, or could be, validly appointed. Amiram could never be validly appointed by the company (in its circumstances). Justice Campbell (dissenting on this issue) found that an order under s 1322(4)(a) could extend to multiple invalid steps regardless of whether those steps (such as the appointment of Amiram from December 1973) could be validated by the company. The Court of Appeal then remitted the matter for determination of whether the company should be wound up.

The ground of appeal is:

- The Court below erred in holding that the power under s 1322(4) of the Act was not exercisable in relation to the purported appointment of Helen as a director of the company on 30 July 2003 by Amiram (para [223] per Young JA, [239]-[240] per Sackville AJA).