SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 26 NOVEMBER 2013

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THE SHIP GO STAR v DAEBO INTERNATIONAL SHIPPING CO LTD (P46/2013)

Court appealed from: Full Court of the Federal Court of Australia
[2012] FCAFC 156

Date of judgment: 7 November 2012

Date of grant of special leave: 11 September 2013

This appeal concerns the choice of law in tort. The general principle applicable to a tortious claim in determining the proper law to apply to the tort is *lex loci delicti*, the place that the tort was committed.

Go Star Maritime Co SA were the owners of the appellant, The Ship Go Star. In 2007, the owners entered into a time charterparty of the appellant with Breakbulk Marine Services Limited ("BMS"). This was the head charterparty. BMS then sub-chartered the ship to Bluefield Shipping Co Ltd ("Bluefield") and in July 2007 Bluefield entered into a further sub-charter of the appellant ship with the respondent ("Daebo"). Daebo then entered into a time sub-charterparty with Nanyuan Shipping Co Ltd ("Nanyuan"). This sub-charterparty provided that delivery of the ship was to occur in Chinese territorial waters at a port near Shanghai. On 3 January 2009, a certificate of delivery was executed, which recorded that delivery to Nanyuan had occurred that day. A day later, Daebo issued an invoice to Nanyuan for the first hire payment and the bunkers.

In the meanwhile, the head charterer, BMS, had fallen into arrears with the payment of hire under the head charterparty. Before Nanyuan had paid the respondent's invoice for the hire and bunkers, the owners' agent, Evaland Shipping Co SA ("Evaland"), advised Nanyuan that it intended to exercise its rights to withdraw the ship under the head charterparty.

After having received these and other communications from the owners' agent, Nanyuan did not pay the invoice furnished by the respondent, and arranged an alternative vessel for its cargo. On or around 15 January 2009, the owners withdrew The Ship Go Star under the head charterparty on the grounds of non-payment of hire. On or around 21 January 2009, the owners chartered the ship to another company, which directed that the ship sail to Albany in Western Australia.

Daebo claimed that the appellant had unlawfully interfered in its contractual relations with Nanyuan and claimed damages against the appellant on those grounds.

The trial judge (Siopis J) resolved the issues in favour of the owners and dismissed the respondent's application. His Honour held that the events alleged to constitute the tort of unlawful interference took place in China. This finding was made on the basis that one Ms Chen, the person in charge on behalf of Nanyuan, was located in China, and the email communications by a Mr Pantelias, acting on behalf of Evalend, were acted upon by Ms Chen in China in respect of a ship then located in Chinese territorial waters. The owners led unchallenged expert evidence that there was no such tort known to the law of China. Consequently Siopis J dismissed Daebo's claim.

On appeal the Full Court (Keane CJ, Rares and Besanko JJ) held that the owners had unlawfully interfered with the contractual obligations between Nanyuan and Daebo. Nanyuan's failure to pay its debts for the bunkers and hire was the breach of contract induced by the vessel owners. The Full Court determined the *lex loci delicti* for the tort of unlawfully interfering with contractual relations by reference to the place where the person, Captain Hu, who was induced to cause Nanyuan to breach the sub-charterparty, was located (namely Singapore).

The ground of appeal is:

- The Full Court erred in law by determining the *lex loci delicti* for the tort allegedly committed by the owners of the appellant vessel, of unlawfully interfering in the contractual relations contained in a sub-charterparty between the respondent and Nanyuan, by reference to the place where the person who was induced to cause Nanyuan to breach the sub-charterparty was located (namely Singapore). The Full Court ought to have determined the *lex loci delicti* for this tort by reference to the place where Nanyuan breached the sub-charterparty, namely in China.

ZIRILLI v THE QUEEN (M1/2013)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2012] VSCA 288
Date of judgment:	30 November 2012
Date special leave referred:	16 August 2013

On 28 June 2007, 4.4 tonnes of ecstasy tablets, containing more than 1.4 tonnes of pure MDMA, were imported into Melbourne, concealed in a shipment of tinned tomatoes. The wholesale price of the shipment was estimated to be approximately $122 million. The applicant (together with others, including the applicant in matter M3/2013, *Barbaro v The Queen*) was involved in the conspiracy to import the tablets, his role being to transport them 'with a view towards sale by another, with ultimately a view to distribution'. The applicant (Zirilli) pleaded guilty to one count of conspiracy to traffic in a commercial quantity of MDMA, one count of trafficking in a commercial quantity of MDMA, and one count of aiding and abetting an attempt to possess a commercial quantity of cocaine. In agreeing to plead guilty, Zirilli (and Barbaro) had each entered into an agreement with the Crown that the prosecution would make a particular submission to the court on the sentencing range. However, the sentencing judge made it clear at the outset and during the course of the hearing that she did not want to receive submissions as to range from anyone. Had the Crown been allowed to do so, the prosecutor would have submitted, in Zirilli's case, a sentencing range of 21 to 25 years' imprisonment with a non-parole period of 16 to 19 years. Zirilli was sentenced to 26 years imprisonment, with a non-parole period of 18 years.

In his appeal to the Court of Appeal (Maxwell P, Harper JA, and T Forrest AJA) Zirilli contended that the sentencing judge's refusal to entertain a submission from the Crown on sentencing range constituted a breach of natural justice or a failure to take into account a relevant consideration. The Court found that the sentencing judge (King J) committed no error of law. The function of a Crown submission on range was to assist the sentencing judge. No authority suggested that a judge who declined such assistance should nevertheless be compelled to receive it, still less that the decision whether or not to entertain such a submission rested on considerations of procedural fairness. The Court considered that no sentencing judge is under an obligation to receive assistance on range if that is not desired.

In this matter (and in *Barbaro*), the Director of Public Prosecutions for Victoria has filed a summons seeking leave to intervene or leave to appear as *amicus curiae*.

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

- Does a submission as to sentencing range – in the form of a submission that sets out the numerical parameters beyond which a sentence would be in error – amount to a submission of law?
- Does a judge's refusal to hear from a prosecutor a submission as to range amount to (i) a breach of procedural fairness and/or (ii) a failure on the judge's part to hear and consider a relevant consideration?
- Are the answers to those questions affected by the fact that the putting of such a range by the Crown was part of a plea agreement with the applicant?

BARBARO v THE QUEEN (M3/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2012] VSCA 288

Date of judgment: 30 November 2012

Date special leave referred: 16 August 2013

On 28 June 2007, 4.4 tonnes of ecstasy tablets, containing more than 1.4 tonnes of pure MDMA, were imported into Melbourne, concealed in a shipment of tinned tomatoes. The wholesale price of the shipment was estimated to be approximately $122 million. The applicant (together with others, including the applicant in matter M1/2013, *Zirilli v The Queen*) was involved in the conspiracy to import the tablets, his role being to possess, transport, store, prepare and distribute the drugs. The sentencing judge (King J) accepted the Crown submission that the applicant (Barbaro) was 'at the apex of the criminal group'. He pleaded guilty to one count of conspiracy to traffic in a commercial quantity of MDMA, one count of trafficking in a commercial quantity of MDMA, and one count of attempting to possess a commercial quantity of cocaine. He also admitted to three further offences, and asked that they be taken into account. In agreeing to plead guilty, Barbaro (and Zirilli) had each entered into an agreement with the Crown that the prosecution would make a particular submission to the court on the sentencing range. However, the sentencing judge made it clear at the outset and during the course of the hearing that she did not want to receive submissions as to range from anyone. Had the Crown been allowed to do so, the prosecutor would have submitted, in Barbaro's case, a sentencing range of 32 to 37 years, with a non-parole period of 24 to 28 years. The applicant was sentenced to life imprisonment, with a non-parole period of 30 years.

In his appeal to the Court of Appeal (Maxwell P, Harper JA, and T Forrest AJA) Barbaro contended that the sentencing judge's refusal to entertain a submission from the Crown on sentencing range constituted a breach of natural justice or a failure to take into account a relevant consideration. The Court found that the sentencing judge (King J) committed no error of law. The function of a Crown submission on range was to assist the sentencing judge. No authority suggested that a judge who declined such assistance should nevertheless be compelled to receive it, still less that the decision whether or not to entertain such a submission rested on considerations of procedural fairness. The Court considered that no sentencing judge is under an obligation to receive assistance on range if they do not wish to do so.

In this matter (and in *Zirilli*), the Director of Public Prosecutions for Victoria has filed a summons seeking leave to intervene or leave to appear as *amicus curiae*.

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

- Does a judge's refusal to hear a prosecution submission as to sentencing range amount to a breach of procedural fairness or a failure on the judge's part to hear and consider 'a relevant consideration'?

- Does a judge's refusal to hear a prosecution submission as to sentencing range – in circumstances where the making of the submission formed part of an agreement between the Crown and the offender that predicated the offender's plea of guilty - amount to a breach of procedural fairness or a failure on the judge's part to hear and consider 'a relevant consideration'?

COMMONWEALTH MINISTER FOR JUSTICE v ADAMAS & ANOR (P50/2013)

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

Date of judgment: 15 February 2013

Date of grant of special leave: 12 September 2013

This appeal concerns the extradition of the first respondent, who is an Australian citizen, to the Republic of Indonesia. On 17 December 2010, the appellant ("Minister") approved the first respondent's extradition to Indonesia under s 22(2) of the *Extradition Act* 1988 (Cth) ("the Act") in relation to his earlier *in absentia* conviction in Indonesia for the offence of corruption.

The first respondent filed an application for judicial review of the Minister's determination on 20 December 2010. On 15 March 2012 Gilmour J quashed the Minister's decision as well as the surrender warrant issued under s 23 of the Act finding the decision took into account irrelevant matters and failed to take into account relevant matters concerning the standard to be applied when considering whether the extradition of the first respondent would be unjust, oppressive or incompatible with humanitarian considerations having regard to the *in absentia* nature of the conviction, and was unreasonable in any event having regard to the *in absentia* nature of the conviction.

The Full Court (Lander, McKerracher and Barker JJ) dismissed the Minister's appeal. The Court was unanimous in its decision that the primary judge had erred in finding that the Minister's decision under s 22 of the Act was unreasonable in the *Wednesbury* sense. The Court was divided on the question whether the Minister had taken into account irrelevant matters or failed to take into account relevant matters in determining whether the extradition of the first respondent would be "unjust, oppressive or incompatible with humanitarian considerations" pursuant to Article 9(2)(b) of the Extradition Treaty between Australia and the Republic of Indonesia.

The grounds of appeal include:

- The majority of the Full Court erred in holding that the appellant committed a jurisdictional error by failing to take into account a relevant consideration or taking into account an irrelevant consideration in determining, under s 22(3)(e) of the Act that the first respondent is to be surrendered to the Republic of Indonesia in relation to the extradition offence.

The first respondent has filed a notice of contention contending that the decision of the Full Court should be affirmed on the ground that the Court erroneously decided or failed to decide some matter of fact or law. The grounds include: "That the Court erred in law in failing to hold that the decision of the appellant, either that in the circumstances of the first respondent's case he was satisfied extradition would not be "unjust, oppressive or incompatible with humanitarian considerations" or that he was satisfied that the surrender of the first respondent should nevertheless not be refused, was unreasonable.

SMITH v THE STATE OF WESTERN AUSTRALIA (P51/2013)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2013] WASCA 7

Date of judgment: 17 January 2013

Date of grant of special leave: 12 September 2013

Following the appellant's conviction on two counts of indecent dealing with a girl under the age of 13 years, a note addressed to the trial judge was found in the jury room. The note was in the following terms: "I have been physically coerced by a fellow juror to change my plea to be aligned with the majority vote. This has made my ability to perform my duty as a juror on this panel." The identity of the juror was not apparent from the note. The trial judge expressed the view that as the verdicts had been entered there was nothing he could do as a result of the discovery of the note.

The appellant appealed against his conviction. The only ground of appeal was: "The trial of the appellant miscarried as a result of at least one juror being coerced, by another juror or jurors, into joining in the guilty verdicts."

On appeal, the appellant advanced three propositions. First, it was submitted that the note, on its face, provided sufficient evidence of an irregularity in the conduct of the jury as to give rise to a miscarriage of justice, in the sense of *R v K* (2003) 59 NSWLR 431. Second, in the alternative, it was submitted that if the note is construed as falling within the ambit of the exclusionary rule, there is an exception to that rule where the interests of justice require evidence which would otherwise fall within the scope of the rule to be admitted. Third, it was submitted that if the second proposition is accepted, directions should be made for the conduct of inquiries with respect to the course of the jury's deliberations.

The Court of Appeal (Martin CJ, McLure P, Mazza J) refused to set aside the conviction. The Court, per Martin CJ, relied on the exclusionary rule. This is a common law rule which prevents evidence being given of jury deliberations (as opposed to prejudicial events extrinsic to the process of deliberation). His Honour noted that the rule was so well established that any significant modification of the rule was not a matter for an intermediate court.

The grounds of appeal are:

- The Court of Appeal erred in law when it refused to allow the appellant to adduce evidence of a note addressed to the trial Judge written by a juror stating that the juror's vote had been procured by the physical coercion of a fellow juror ("Juror's Note"), because the Court of Appeal should have found that either:
  - The Juror's Note fell outside the common law rule precluding the admission of evidence of a jury's deliberations, or
  - The Juror's Note fell within an exception to that rule.

- The Court of Appeal erred in law when it refused to order an inquiry (as soon as practicable) into the circumstances referred to in the Juror's Note because such an inquiry was necessary to determine whether juror misconduct tainted the verdicts such as to constitute a 'miscarriage of justice' within the meaning of section 30(3)(c) of the *Criminal Appeals Act* 2004 (WA).

THE COMMONWEALTH OF AUSTRALIA v THE AUSTRALIAN CAPITAL TERRITORY (C13/2013)

Date writ of summons filed: 23 October 2013

Date questions reserved for determination by the Full Court: 4 November 2013

The *Marriage Equality (Same Sex) Act* 2013 (ACT) ("the ACT Marriage Act") was passed by the ACT Legislative Assembly on 22 October 2013 and commenced operation on 7 November 2013. On 23 October 2013 the plaintiff issued a writ of summons seeking a declaration that the ACT Marriage Act is of no effect or, alternatively, void.

The plaintiff claims that the ACT Marriage Act is inconsistent with the *Marriage Act* 1961 (Cth) and/or the *Family Law Act* 1975 (Cth) within the meaning of s 28(1) of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) and therefore of no effect. Further, or alternatively, the plaintiff claims that the ACT Marriage Act is repugnant to the *Marriage Act* 1961 (Cth) and/or the *Family Law Act* 1975 (Cth) and for that reason void.

The plaintiff has filed a Notice of Constitutional Matter indicating that the proceeding may involve the interpretation of s 109 of the *Constitution* and a consideration of the breadth of the powers in ss 51(xxi) and 51 (xxii) of the *Constitution*.

On 4 November 2013 Chief Justice French reserved, pursuant to s18 of the *Judiciary Act* 1903 (Cth), the following questions for determination by the Full Court:

1. Is the *Marriage Equality (Same Sex) Act* 2013 (ACT), in part or in its entirety:

   (a) inconsistent with the *Marriage Act* 1961 *(Cth)* within the meaning of s 28(1) of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth); and/or

   (b) repugnant to the *Marriage Act* 1961 (Cth)?

2. If the answer to question 1(a) is 'yes', to what extent, if any, is the *Marriage Equality (Same Sex) Act* 2013 (ACT) of no effect?

3. If the answer to question 1(b) is 'yes', to what extent, if any, is the *Marriage Equality (Same Sex) Act* 2013 (ACT) void?

4. Is the *Marriage Equality (Same Sex)* Act 2013 (ACT), in part or in its entirety:

   (a) inconsistent with the *Family Law Act* 1975 (Cth) within the meaning of s 28(1) of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth); and/or

   (b) repugnant to the *Family Law Act* 1975 (Cth)?

5. If the answer to question 4(a) is 'yes', to what extent, if any, is the *Marriage Equality (Same Sex) Act* 2013 (ACT) of no effect?

6. If the answer to question 4(b) is 'yes', to what extent, if any, is the *Marriage Equality (Same Sex) Act* 2013 (ACT) void?

7. In light of the answers to the preceding questions what, if any, orders should be made for the final disposition of these proceedings?

8. What orders should be made in relation to costs of the questions reserved and of the proceedings generally?

ELECTRICITY GENERATION CORPORATION T/AS VERVE ENERGY v WOODSIDE ENERGY LTD & ORS (P47/2013);
WOODSIDE ENERGY LTD & ORS v ELECTRICITY GENERATION CORPORATION T/AS VERVE ENERGY (P48/2013)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2013] WASCA 36

Date of judgment: 20 February 2013

Date of grant of special leave: 12 September 2013

Woodside Energy Ltd ("Woodside") and Electricity Generation Corporation ("Verve") were parties to a long term gas supply agreement ("GSA"). Verve was the major generator and supplier of electricity to a large area in the south west of Western Australia. It purchased gas under the GSA for use in its electricity generation facilities.

Under the GSA, Woodside had firm obligations to supply up to the maximum daily quantity of gas ("MDQ") nominated by Verve, within a specified tolerance. Verve was also entitled to nominate up to an additional quantity of gas per day in excess of MDQ, defined as SMDQ (supplemental maximum daily quantity).

Clause 3.3 of the GSA governed supply of SMDQ Gas. In essence, if Verve nominated to receive SMDQ Gas for a day, Woodside was obligated to use reasonable endeavours to make it available for delivery. In determining whether they were able to supply SMDQ on a day, Woodside could take into account all relevant commercial, economic and operational matters. Without limiting those matters, cl.3.3(b) specified instances where it was acknowledged by Verve that Woodside was not obliged to make SMDQ Gas available.

On 3 June 2008, a fire at a gas production facility owned by Apache (the other principal supplier of gas into the Western Australian market) shut down the supply of gas from that plant. This event reduced gas supply to the market by some 30%-35%. Demand for gas then exceeded supply and prices for short term supply increased considerably. These circumstances prevailed until late September 2008. Under cl.3.3, Woodside was obliged to use reasonable endeavours to make an additional amount of gas available, taking into account all relevant commercial, economic and operational matters. On 4 June 2008, Woodside informed Verve that they would not be able to supply additional gas but they could however supply the equivalent quantity of gas at a greater price than the prescribed price. Under protest, Verve entered into a series of short term agreements with Woodside for additional gas at this higher price.

Verve sued Woodside for damages for breach of cl.3.3. Verve contended that cl.3.3(a) required the applicants to use reasonable endeavours to supply nominated SMDQ Gas, that the content of this obligation was informed by cl.3.3(b) and that the overall effect of the whole provision was that if Woodside had the requisite volume of gas available (in a practical, operational sense) and none of the circumstances identified in sub-paragraphs (i) to (iii) of cl.3.3(b) applied, they were obliged to supply it. Verve did not contend that Woodside had acted unreasonably in the way in which they had taken into account commercial and economic matters in determining their capacity to supply SMDQ Gas.

The trial judge upheld the construction of cl.3.3 contended for by Woodside and dismissed Verve's claim for damages for breach of cl.3.3.

The Court of Appeal (McLure P, Newnes and Murphy JJA) found that Woodside was in breach of contract notwithstanding its commercial decision that they could not supply and also that Woodside had applied illegitimate pressure amounting to economic duress in causing Verve to enter into the short term contracts. Verve however did not ultimately succeed on this issue because the Court of Appeal also held that it was necessary for Verve to seek rescission of the short term agreements to obtain restitution of money paid under them.

The grounds of appeal are:

VERVE (P47/2013)

- The Court of Appeal having held that Woodside was required to sell certain volumes of gas to Verve by an existing contract but, by economic duress, caused Verve to enter into short term supply agreements to buy that same volume of gas at a much higher price and those contracts having been wholly performed, erred in:
  - Holding that Verve was required to rescind those short term contracts before it could obtain restitution of the additional moneys paid under those contracts; and
  - Dismissing Verve's claim for restitution of the additional payments made by Verve to Woodside pursuant to the short term contracts because Verve had not rescinded those contracts.

Woodside has filed a notice of contention in Verve's appeal contending that the decision of the Full Court should be affirmed on the ground that the Court erroneously decided or failed to decide some matter of fact or law. The grounds include: that the Court of Appeal should have held that Woodside was not required to make available for delivery SMDQ Gas because taking into account all relevant commercial, economic and operational matters, Woodside was not able and not obliged to supply SMDQ Gas.

WOODSIDE (P48/2013)

- The Court of Appeal erred in law in its construction of cl.3.3 of the GSA between Woodside and Verve in finding that the clause obliged Woodside by cl.3.3(a) of the GSA to use reasonable endeavours to make available for delivery of an additional 30 TJ/Day of gas (SMDQ) in excess of the MDQ without giving any meaning (or any adequate meaning) and effect to the express words of cl.3.3(b) of the GSA that permitted Woodside to take into account all relevant "commercial, economic and operational matters" in determining whether Woodside were able to supply SMDQ Gas.

- The Court of Appeal thereby erred in law in holding that the appellants were liable in damages for breaching cl.3.3 of the GSA.

- The Court of Appeal should have held that Woodside were not required to make available for delivery SMDQ Gas because, taking into account all relevant "commercial, economic and operational matters", Woodside was not able and not obliged to supply SMDQ Gas.