SHORT PARTICULARS OF CASES
APPEALS

APRIL 2015

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CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION v. BORAL RESOURCES (VIC) PTY LTD & ORS (M18/2015)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2014] VSCA 261

Date of judgment: 24 October 2014

Date special leave granted: 13 February 2015

On 5 April 2013 Hollingworth J, in the Supreme Court of Victoria made orders restraining the appellant ('the Union') from, inter alia, preventing, hindering or interfering with, or attempting to prevent, hinder or interfere with, the supply or possible supply of goods or services by the first respondent ('Boral') at any building or construction site in Victoria. On 22 August 2013, Boral filed a summons seeking that the Union be punished for contempt of court for allegedly establishing and maintaining, through the actions of its official Joseph Myles, a blockade of a construction site in Footscray on 16 May 2013, thereby preventing the supply of concrete to that site by Boral.

In order to succeed on the charges, Boral needed to establish either that the Union authorised Myles to engage in the alleged conduct, or that it failed to take appropriate steps to prevent it. Boral therefore sought discovery of documents that went to the issue of Myles' authority to act as he did on 16 May 2013. Daly AsJ dismissed Boral's application on the grounds that proceedings for punishment for contempt are criminal in nature and discovery is not available or appropriate in criminal proceedings. Boral successfully appealed and on 25 March 2014 Digby J ordered specific discovery as sought. His Honour held that although Daly AsJ was correct in characterising the proceeding as a 'criminal contempt', her Honour was not correct in her characterisation of it as a 'criminal proceeding', to which the rules of civil procedure did not apply.

In its appeal to the Court of Appeal (Ashley, Redlich & Weinberg JJA), the Union relied upon both *X7 v Australian Crime Commission* (2013) 248 CLR 92 and *Lee v The Queen* (2014) 308 ALR 252 as having established definitively what had always thought to be the law, namely that an alleged contemnor was not obliged to give discovery in proceedings brought against him or her. The Union further submitted that, although neither *X7* nor *Lee* involved any question of discovery, the broad-ranging statements of principle by this Court regarding the nature of the accusatorial system meant that this proceeding, which was undoubtedly criminal in nature, should not be conducted as though it were nothing more than an ordinary piece of civil litigation.

The Court of Appeal noted that the law regarding civil contempt is in an unsettled and uncertain state and that, although each side was able to call in aid a significant body of authority in support of its contention, none of those authorities was directly in point. The Court found that the problem with the Union's submissions was that a contempt proceeding cannot simply be characterised, for all purposes, as a criminal proceeding. A description of that kind may be apt for some purposes, but that is not inevitably the case. While it is clear contempt proceedings are brought within the civil jurisdiction of the Court, they have a certain chameleon-like quality, taking their character from the surrounding circumstances and the context within which the analysis proceeds. The Court saw no error in Digby J's conclusion that Daly AsJ was wrong to refuse specific discovery simply on the basis that this was a criminal proceeding and therefore

the Supreme Court Rules had no application. This matter should not have been so characterised: its actual status was more complex than that.

The grounds of appeal include:

- The Court of Appeal erred in deciding that discovery may be ordered under Order 29 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) in contempt proceedings (which are criminal in nature) brought against a corporation under Order 75 of those Rules.

AUSNET TRANSMISSION GROUP PTY LTD v COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA (M139/2014)

Court appealed from: Full Court, Federal Court of Australia
[2014] FCAFC 36

Date of judgment: 7 April 2014

Date special leave granted: 12 December 2014

In August 1993, the Victorian Government announced its intention to disaggregate the State owned electricity commission into three new operating businesses each of which would respectively undertake the generation, transmission and distribution of electricity. In October 1993, National Electricity, which was later known as PowerNet Victoria ('PNV'), was established as a State body, but in April 1997 the Government announced its intention to privatise the business of PNV. On 12 October 1997 an asset sale agreement was executed between PNV and the appellant ('Ausnet'). On 28 October 1997, the Governor in Council made an order under s 163AA of the *Electricity Industry Act* 1993 (Vic) ('EIA') declaring that the holder of the Transmission Licence would pay imposts to the Treasurer totalling $177,500,000 for the period to 31 December 2000. Ausnet paid the imposts and claimed them as deductions under s 8-1(1) of the *Income Tax Assessment Act* 1997 (Cth). The respondent disallowed the deductions.

The primary judge (Gordon J) rejected Ausnet's claim on the basis that the s 163AA imposts were not a cost of Ausnet deriving its income, but were payments out of Ausnet's profits after the calculation of Ausnet's taxable income. Her Honour also concluded that if it were necessary to decide, the payments were outgoings of capital, or of a capital nature.

The appellant's appeal to the Full Federal Court of Appeal (Edmonds and McKerracher JJ, Davies J dissenting) was unsuccessful. The majority of the Court held that the s 163AA imposts were outgoings of capital, or of a capital nature, because they were part of the cost (to Ausnet) of acquiring the assets of the business, specifically, the Transmission Licence, which was unarguably a capital asset. Critically, the transfer of the Transmission Licence to Ausnet carried with it the s 163AA liability of PNV; equally critically, the s 163AA impost was not made on Ausnet post the transfer of the Transmission Licence. It was assumed by Ausnet on the transfer of the Transmission Licence, not by Order under s 163AA, and as such, formed as much part of the cost of acquisition of the assets as the total purchase price. The majority disagreed with the primary judge regarding the application of the first limb of s 8-1, however. They found that the imposts were incurred by Ausnet in relation to carrying on its business for the purpose of gaining or producing assessable income. There was sufficient nexus between the expenditure and Ausnet's income producing operations and activities.

Davies J (dissenting) noted that the obligation to pay the imposts flowed as a necessary consequence of holding the licence, so that the thing that produced the assessable income was the thing that exposed Ausnet to the liability discharged by the expenditure. The imposts were therefore to be seen as an expense in the business operations of Ausnet and on revenue account rather than as a cost in securing the right to conduct the transmission business.

The grounds of appeal include:

- The majority of the Full Court erred:
  (a) in deciding that the impost formed part of the consideration for the acquisition by the appellant of the transmission assets of PowerNet Victoria under the asset sale agreement;
  (b) in deciding that the liability to pay it arose from the asset sale agreement;
  (c) in not, in any event, deciding in accordance with the reasoning of the majority of this Court in *Cliffs International Inc v Federal Commissioner of Taxation* (1979) 142 CLR 140, that when each impost was paid, it was no more than a business expense, regularly incurred, which secured no additional benefit or advantage to the appellant.

The respondent has filed a Notice of Contention on the ground that the Full Court erred in failing to find that the payments made to the State of Victoria in the 1999 to 2001 years of income under s 163AA(1) of the *Electricity Industry Act* 1993 (Vic) did not satisfy the requirements of s 8-1(1) of the *Income Tax Assessment Act* 1997 (Cth).

TOMLINSON v RAMSEY FOOD PROCESSING PTY LIMITED (S7/2015)

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 237

Date of judgment: 21 July 2014

Special leave granted: 12 December 2014

Mr Grant Tomlinson worked at an abattoir operated by the Respondent ("Ramsey"). Ramsey had initially employed Mr Tomlinson directly, before formally terminating his employment on 16 October 2006. On the following day however Mr Tomlinson entered the employ of Tempus Holdings Pty Ltd ("Tempus"), a recently registered labour hire company. He continued however to work at the abattoir, under the direction of Ramsey. His employment was finally terminated in November 2008 (along with that of other workers at the abattoir).

In June 2011 Mr Tomlinson sued Ramsey in negligence in the District Court, claiming damages for a workplace injury he had suffered in June 2008 ("the Injury Claim"). He alleged in those proceedings that at the time of his injury he had been employed by Tempus. Ramsey contended however that *it* was the true employer at that time. If it could establish that position, the Injury Claim would fail, by reason of Mr Tomlinson's non-compliance with various requirements imposed by the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) and the *Workers Compensation Act* 1987 (NSW).

Meanwhile, the Fair Work Ombudsman ("FWO") was pursuing separate proceedings in the Federal Court against Ramsey (and its manager, Mr Stuart Ramsey) under s 719 of the *Workplace Relations Act* 1996 (Cth) ("the WRA Claim"). Those proceedings, for the recovery of unpaid severance entitlements, were taken by the FWO on behalf of a group of former employees that included Mr Tomlinson. In a judgment delivered on 19 October 2011, Justice Buchanan found that Tempus had not been an employer in its own right. His Honour found that, from at least 17 October 2006, Mr Tomlinson's employer had been Ramsey ("the Finding").

In resisting the Injury Claim, Ramsey contended (in its filed defence) that the District Court was bound by the Finding ("the Estoppel Defence"). On 17 May 2013 Judge Mahony gave judgment in favour of Mr Tomlinson, awarding him damages of $155,069. This was after striking out the Estoppel Defence. His Honour held that the Finding could not be used by Ramsey to raise an issue estoppel. This was because the subject matter of the WRA Claim was different from that of the Injury Claim, and because there had been no privity of interest between the FWO and Mr Tomlinson, since the latter was unable to control the former's conduct of the WRA Claim.

The Court of Appeal (Meagher, Ward & Emmett JJA) unanimously allowed an appeal by Ramsey. Emmett JA, with whom Ward JA agreed, found that Judge Mahony had erred by considering that differences in cause of action and evidence, as between the WRA Claim and the Injury Claim, were material to the question of issue estoppel. The concept of employment that arose in the Injury Claim was no different from that in the WRA Claim, and the question of which company was Mr Tomlinson's employer at the relevant time had been conclusively determined by the Finding. Their Honours all found that, since the

WRA Claim was made by the FWO on behalf of Mr Tomlinson and for his benefit, the privity of interest required for an issue estoppel existed. The Court of Appeal therefore held that Ramsey should have been permitted to raise the Estoppel Defence, with the result that Mr Tomlinson could not succeed on the Injury Claim.

The ground of appeal is:

- The Court of Appeal of the Supreme Court of New South Wales erred in holding that the Appellant [is] issue estopped by the Federal Court decision in *Fair Work Ombudsman v Ramsey Food Processing Pty Limited* NSD 1005 of 2010.

The Respondent will be seeking leave to rely on a proposed notice of contention, the ground of which is:

- The Court of Appeal of the Supreme Court of New South Wales ought to have held that the evidence established that the Appellant was an employee of the Respondent in the course of his employment at the time of the said accident, as expressed by Emmett JA (at paragraph 99 of the judgment), with whom Ward JA agreed.

ISBESTER v KNOX CITY COUNCIL (M19/2015)

Court appealed from: Court of Appeal, Supreme Court of Victoria [2014] VSCA 214

Date of judgment: 10 September 2014

Date special leave granted: 13 February 2015

The appellant pleaded guilty to a charge, pursuant to s 29(4) of the *Domestic Animals Act* 1994 (Vic) ('the Act'), that her dog had bitten a person causing serious injury. Following her conviction, the respondent ('the Council') wrote to the appellant to inform her that it intended to consider whether to exercise a power under s 84P of the Act to have the dog destroyed, and invited her to attend a 'panel hearing'. The appellant attended the hearing and made submissions. After this process, the Council officer delegated to make a decision on behalf of the Council pursuant to s 84P determined that the dog should be destroyed and gave written reasons for that decision.

The appellant instituted proceedings in the Supreme Court of Victoria challenging the validity of the Council's determination. She submitted, inter alia, that the delegate's decision was affected by apprehended bias because one of the members of the panel, Kirsten Hughes, had been involved in the investigation of the matter and the formulation of the prosecution case, and was therefore neither impartial nor disinterested in the outcome of the hearing. Emerton J dismissed the proceeding.

The appellant's appeal to the Court of Appeal (Hansen, Osborn JJA and Garde AJA) was unsuccessful. The Court noted that it followed from the nature of the statutory scheme that: (a) the council's power to destroy the dog had already been determined at the time it considered whether it should, as a matter of discretion, be destroyed; (b) the Act expressly contemplated a hearing in the Magistrates' Court culminating in conviction as conditioning the establishment of that power but did not expressly contemplate a hearing as a precondition to the exercise of the relevant discretion; (c) there was nothing in the Act to suggest that the decision as to the exercise of the discretion was to be made other than administratively; (d) there was nothing in the Act to suggest that prior involvement with the history of the dog automatically disqualified members of the council or its officers from participating in the discretionary decision concerning the dog's destruction; and (e) the relevant discretion was reposed in a democratically elected local government body in unqualified terms.

The Court considered that the appellant had not demonstrated a real possibility of prejudgment in this case, for a number of reasons. First, it was significant that the prosecution culminated in the appellant's plea of guilty and it was upon this plea that the conviction founding the Council's jurisdiction under s 84P rested and not upon contested evidence. Secondly, the fact of participation in the prosecution by Ms Hughes did not of itself demonstrate a predisposition to a particular exercise of the discretion under s 84P. Thirdly, the fact Ms Hughes had obtained information from the Ministry of Housing as to the future possible accommodation of the dog prior to the panel hearing did not demonstrate relevant prejudgment. Fourthly, the fact that Ms Hughes undertook procedural tasks associated with the panel hearing could not be said to demonstrate any prejudgment of the merits. Fifthly, there was no evidence demonstrating that Ms Hughes had expressed any prior opinion or concluded judgment with respect to the real issues before the

panel. Sixthly, the legislative scheme did not require a panel hearing before persons who had had no involvement in the prosecution process which preceded it. Seventhly, prior to the panel hearing, the appellant and her solicitor were advised by letter that Ms Hughes would participate in the hearing. No objection was made to her participation. The obvious inference is that no apprehension of existing prejudgment was drawn by them at that time. Eighthly, the evidence as to the course of the panel hearing did not provide any basis for the conclusion Ms Hughes had prejudged the matter. The whole impression given by the evidence was that Ms Hughes participated actively in a hearing which examined the issues afresh. Lastly, the Court observed that Ms Hughes was not in fact the decision-maker. The reasonable observer would not regard any pre-existing views of Ms Hughes as demonstrating that the decision-maker was not 'open to persuasion' at the hearing.

The grounds of appeal include:

- Having accepted that the rules of procedural fairness applied to the panel hearing convened by the respondent to determine the fate of the dog "Izzy" the Court of Appeal:
  (i) erred in law holding that because the Magistrates' Court hearing in which the appellant pleaded guilty to a charge made under s 29(4) of the *Domestic Animals* Act 1994 (Vic) had concluded, Ms Hughes was not an accuser before the panel; and
  (ii) erred in holding that Ms Hughes' role as a decision maker on the panel did not constitute apprehended bias by way of a conflict of interest.

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v WZAPN & ANOR (M17/2015)

Court appealed from: Federal Court of Australia
[2014] FCA 947

Date of judgment: 3 September 2014

Date special leave granted: 13 February 2015

The first respondent (WZAPN) arrived in Australia on 21 July 2010. He is a stateless Faili Kurd who was born in Tehran. He claimed to fear persecution if he returned to Iran by reason of his Kurdish ethnicity and membership of a particular social group, namely, stateless persons, undocumented Faili Kurds living in Iran; stateless Faili Kurds; or undocumented refugees living in Iran. He claimed that he had been detained by the police and the Basiji (a religious/political group charged with the protection of Islamic values in Iran) from time to time, once for 48 hours but on other occasions for no more than twelve hours. He had never been physically assaulted, although he had suffered extreme verbal abuse.

WZAPN's application to the appellant (the Minister) to be granted refugee status was rejected on 27 September 2010. Although the Minister accepted there was a real chance that WZAPN would be questioned periodically and probably detained for short periods in the reasonably foreseeable future should he return to Iran, he did not accept that the frequency or length of detention, or the treatment WZAPN would receive whilst in detention would involve serious harm within the meaning of s 91R of the *Migration Act* 1958 (Cth).

WZAPN's application for judicial review was dismissed by the Federal Magistrates Court (Lucev FM), but his appeal to the Federal Court (North J) was successful. North J noted that s 91R(2)(a) defines 'serious harm' as including 'a threat to the person's life or liberty'. Section 91R2(a) does not stipulate any qualitative element of the harm, however, in contrast to the other paragraphs in s 91R(2). For example, in paragraphs (b), (c) and (d) physical harassment, physical ill-treatment and economic hardship each must be significant. His Honour concluded from the language and structure of s 91R(2) that serious harm in s 91R(1)(b) is constituted by a threat to life or liberty, without reference to the severity of the consequences to life or liberty.

This conclusion was confirmed by other considerations. In construing s 91R, His Honour noted that the construction which accords with Australia's obligations under the Refugees Convention should be favoured. Thus, a decision-maker faced with a claim based on persecution arising from a threat to a person's liberty should ask whether the deprivation was on grounds, and in accordance with procedures, established by law, whether the detention was arbitrary, and whether the appellant was treated with humanity and respect for the inherent dignity of the person. In taking this human rights approach, there is no place for a qualitative assessment of detention affecting the right to liberty for it to constitute an infringement of that right.

North J held that by making a qualitative assessment of the nature and degree of the harm experienced by WZAPN when asking whether the threat to his liberty was sufficiently significant, the Minister applied the wrong test in the application of s 91R(2)(a), and thereby fell into jurisdictional error.

The grounds of appeal include:

- The Federal Court erred in holding that ss 91R(1)(b) and 2(a) of the *Migration Act* 1958 (Cth) preclude a decision-maker from making a qualitative assessment of the nature and degree of the harm feared when determining whether a risk that a person will be detained if returned to his or her country of origin involves “serious harm” in the form of a “threat to liberty”.

The respondent has filed a Notice of Contention on the ground that the Federal Court erred in law by failing to hold that the second respondent (the independent merits reviewer) committed jurisdictional error by asking himself the wrong question, identifying the wrong issue and/or coming to an irrational conclusion in finding that the law or policy of general application which authorised the claimed questioning and detention was appropriate and adapted to achieving a legitimate object.

This appeal will be heard together with the appeal in *WZARV v. Minister for Immigration and Border Protection & Anor* (P10/2015).

WZARV v. MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (P10/2015)

Court appealed from: Federal Court of Australia [2014] FCA 894

Date of judgment: 22 August 2014

Date of grant of special leave: 24 February 2015

The appellant is a Sri Lankan citizen who left Sri Lanka lawfully in July 2010 using his own passport.

On 7 November 2010, he arrived on Christmas Island as an irregular maritime arrival. He claimed to fear harm in Sri Lanka based on his Tamil ethnicity, the fact that he had attended a one-day training program in his village conducted by the LTTE and the suspicions of the authorities that he was an LTTE supporter. He elaborated on the harm he claimed to have experienced in Sri Lanka during his interview with the Independent Merits Reviewer ("the IMR"). After this interview and by letter dated 22 May 2012, the IMR informed the appellant of various suggested inconsistencies in his account and extended an invitation to the appellant to comment on those inconsistencies.

In response, the appellant repeated his claims that the authorities were suspicious of him before he left Sri Lanka and his attempts to seek asylum would raise their suspicions. The appellant's migration agent submitted further country information and emphasised the risks of being a failed asylum seeker.

On 21 September 2012, the IMR recommended that the appellant did not meet either of the criteria for a Protection (Class XA) visa set out in s 36(2)(a) and s 36(2)(aa) of the Act and accordingly that he not be recognised as a person to whom Australia owes protection obligations.

The IMR accepted that the appellant was a Tamil from the Northern Province of Sri Lanka who had departed the country on a valid passport. She believed his claims that he was forced to undergo a day's training with the LTTE, was interned in a Sri Lankan Army camp in 2009 and had been employed by the UNHCR and the Swiss Foundation for Mine Action. She also accepted that it was likely that the appellant would be questioned by Sri Lankan authorities at the airport upon his return, but that country information indicated that such questioning would usually be completed in a matter of hours and that the appellant would not have a profile which indicated he would be suspected of being an LTTE supporter. It follows that she found that the brief detention the appellant was likely to experience whilst undergoing police checks at the airport did not amount to serious harm.

The ground of appeal is:

- His Honour erred in failing to find that the IMR has applied the wrong test pursuant to s 91R(2)(a) of the *Migration Act* 1958 (Cth).