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NEW SOUTH WALES ABORIGINAL LAND COUNCIL v MINISTER ADMINISTERING THE CROWN LANDS ACT (S168/2016)

Court appealed from: New South Wales Court of Appeal
[2015] NSWCA 349

Date of judgment: 16 November 2015

Special leave granted: 17 June 2016

In February 2012 the New South Wales Aboriginal Land Council ("the Appellant") lodged a claim pursuant to s 36 of the Aboriginal Land Rights Act 1983 (NSW) ("the Act") in respect of two adjacent parcels of Crown land in Berrima. The land itself comprised the decommissioned Berrima jail, various outbuildings and their surrounds ("the land"). On 20 November 2012 the Respondent rejected the Appellant's claim on the basis that the land was lawfully used and occupied by Corrective Services NSW ("Corrective Services"). The Appellant then appealed that decision to the Land and Environment Court.

On 1 December 2014 Justice Pain rejected the Appellant's appeal, finding that the land was lawfully occupied by Corrective Services, as a manifestation of the Crown in NSW.

On 14 November 2015 the New South Wales Court of Appeal (Beazley P, Macfarlan & Leeming JJA) unanimously dismissed the Appellant's subsequent appeal. Their Honours rejected the Appellant's submission that Justice Pain had erred in finding that the land was occupied as at the date of the claim. Their Honours found that Justice Pain's analysis amounted to a qualitative evaluation of the acts, facts, matters and circumstances pertaining to the whole and each part of the claimed land. The presence of 24/7 security and regular visits by offenders serving Community Service Orders to perform work in the grounds, for instance, were sufficient to base a finding of occupation. It was not the case that the land had ceased to be used for the purposes of punishment of offenders, nor had the land been "mothballed" pending a decision as to its future use.

The New South Wales Court of Appeal also noted that Justice Pain's reasoning reflected the limited nature of the alternative submissions made at trial. Their Honours found that any failure by her Honour to address issues not raised at trial (such as the failure to consider buildings individually) did not therefore amount to an error of law. They further found that Section 2 of the *New South Wales Constitution Act* 1855 (Imp) did not produce the result that statutory authorisation was required in order for any occupation of Crown land to be lawful. In relation to the question of whether Corrective Services (which is not a legal person) could lawfully occupy the land, their Honours held that the land was lawfully occupied by the Crown in right of New South Wales, which includes the Government of New South Wales.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in deciding that the Executive could authorise the management or control of land dedicated for a public purpose without statutory authorisation.

- The New South Wales Court of Appeal erred in deciding that there was an implied statutory authority under the *Crown Lands Act* 1989 (NSW) ("the Crown Lands Act") to maintain and secure the land for the time reasonably needed to perform the obligations imposed by that Act exercisable by any persons other than the Minister Administering the Crown Lands Act.

On 28 June 2016 the Appellant filed a Notice of Constitutional Matter. The Attorneys-General for Victoria, Western Australia and Tasmania have filed Notices of Intervention.

COMMISSIONER OF STATE REVENUE v ACN 005 057 349 PTY LTD
(M88/2016 & M89/2016)

Court appealed from: Supreme Court of Victoria Court of Appeal
[2015] VSCA 332

Date of judgment: 8 December 2015

Date special leave granted: 17 June 2016

The respondent ('ACN') was from 1988–2007 the registered proprietor of two adjacent properties in Toorak. For each tax year from 1990 to 2002, and from 2003 to 2007, ACN paid amounts to the appellant (the Commissioner) in response to assessments of land tax with respect to the two properties that were described as 2 Ottawa Road, Toorak, and 65 Albany Road, Toorak. For the 2008–2011 tax years, Streetriver Pty Ltd ('Streetriver') (a related company to ACN), the then registered proprietor of the two properties, was assessed for land tax for them. On 23 March 2012, the Commissioner informed ACN, that in calculating the land tax liability for '2 Ottawa Road', an erroneous valuation had been applied, as the valuation for '2 Ottawa Road' had included both the landholding of '2 Ottawa Road' and the landholding of '65 Albany Road', in addition to the separate valuation for '65 Albany Road'. The Commissioner reimbursed Streetriver the amount of $300,238.75.

ACN lodged Notices of Objection against the 1990–2005 land tax assessments, claiming that an excessive amount of land tax had been assessed and paid by reason of the duplication error. The Commissioner claimed that he did not have the discretion to accept the objection because it was out of time. ACN filed a writ in the Supreme Court of Victoria, seeking restitution at common law for the overpayments. It also filed an originating motion seeking an order for mandamus or other orders on judicial review directing the Commissioner to issue amended assessments for each of the 1990 to 2002 land tax years and to refund the overpaid land tax. Sloss J dismissed both proceedings.

ACN's appeal to the Court of Appeal (Hansen & Tate JJA, & Robson AJA) was upheld. The Court noted that the sole question for determination was whether the Commissioner was bound to exercise the discretion he had to amend the assessments and whether, if he had a duty to do so, ACN was entitled to mandamus to compel him to do so. The Court held that given the nature of the power under s 19 of the *Land Tax Act* 1958 (Vic), and the circumstances of the case, the power could be exercised lawfully only in one way, namely, to amend the assessments for the 1990–2002 land tax years and to give effect to those amendments by making a refund; the Commissioner was under a duty to so act. Their Honours noted that this Court in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 recognised that an assessment is susceptible to judicial review where there has been conscious maladministration. In the present case the Commissioner had refused to perform his duty without good reason or justification; in the circumstances of the case he had acted with conscious maladministration. ACN was therefore entitled to an order for mandamus compelling the Commissioner to perform his duty to exercise the power under s 19 to amend and to give effect to the amendments by making a refund.

The availability of the s 19 power to provide a remedy did not circumvent the objection and refund regimes because, by contrast to those regimes, the s 19 power was enlivened only when the Commissioner knew that an assessment was incomplete and inaccurate. The power conferred by s 19 functioned as a mechanism to ensure the integrity of the system of tax collection under the Act, namely, that the Commissioner collected the correct amount of tax. ACN could not with reasonable diligence have discovered its mistake before the Commissioner's express admission of the duplication error on 23 March 2012, so any relevant limitation period was thereby postponed.

The grounds of appeal include:

- The Court of Appeal erred in concluding that, under the provisions of the *Land Tax Act* 1958 (Vic), the issuing of the assessment did not create a statutory tax debt.

- The Court of Appeal erred in concluding that payments made by the taxpayer were made under a mistaken belief which was operative and enduring.

- The *Land Tax Act* contained provisions whereby taxpayers were able to object to assessments and seek refunds within periods of time stipulated and subject to certain other conditions. In holding that, independently of the statutory objection and refund regimes, there arose, either at general law or under s 19, a duty to refund payments made of amounts assessed, the Court of Appeal erred.

ELECNET (AUST) PTY LTD (AS TRUSTEE FOR THE ELECTRICAL INDUSTRY SEVERANCE SCHEME) v COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA (M104/2016)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 178

Date of judgment: 14 December 2015

Date special leave granted: 28 July 2016

In December 2012, the appellant ("Elecnet") requested a private ruling from the respondent ("the Commissioner"), asking him to confirm that the Electrical Industry Severance Scheme ("the EISS**"**) is a Unit Trust, for the purposes of Division 6C of the *Income Tax Assessment Act* 1936 (Cth) ("the ITAA").

Elecnet was the trustee of the EISS which was established in February 1988 "*in order to provide portability and security of termination and redundancy benefits to workers in the electrical contracting industry*". Employers within the relevant industry became members of EISS. The employer members were required to make weekly contributions to EISS in respect of their workers, pursuant to industrial agreements or awards. EISS credited these contributions to an account in the name of each of the relevant workers. When a worker's employment was terminated, EISS was generally required to make a severance or redundancy payment to the worker.

The Commissioner ruled that the EISS was not a public trading trust for the purposes of Division 6C of the ITAA because any beneficial interests of the workers were not unitised, that is, they were not discrete parcels of rights over the income or capital of the Fund. Elecnet filed an objection to the private ruling. That objection was disallowed in full. Elecnet appealed to the Federal Court.

The primary judge (Davies J) allowed the appeal on two grounds. First, her Honour concluded that the concept of a unit trust is that of a trust in which the beneficial interest in property or income of the trust is widely held, whether or not the interest is described as a "unit", and whether or not the trust is described as a "unit trust". In reaching this conclusion, the primary judge relied on the inclusive definition of "unit" in s 102M of the ITAA. Secondly, her Honour concluded that under the EISS Deed each worker had a discrete proprietary interest in the contributions paid in respect of that worker into the trust fund and standing to their worker's account, even though the worker did not have a present right to any immediate payment. This was sufficient to give rise to a beneficial interest in the property of the trust estate within the meaning of "unit" in s 102M.

The Commissioner appealed to Full Court (Jessup, Pagone & Edelman JJ). The Full Court held that it was neither necessary nor appropriate to attempt a conclusive definition of a "unit trust" for the purposes of Division 6C. It was sufficient to say that whether a trust was a "unit trust" within the undefined meaning of that term in Division 6C required the text of that Division (including its definitions) to be construed in light of a functional and descriptive understanding of the nature of a unit trust.

With respect to the EISS, the Court found there were three factors which, in combination, had the effect that, whatever interest a worker might have in the property of the trust, the trust did not fit the functional description of a "unit trust". First, any contingent entitlement that a worker might have to a payment upon a severance event was subject to cl 8.1, which provided that cl 8 only applied to a worker who was an Active Worker. An "Active Worker" was defined as having "*the meaning determined by the Trustee for the purposes of this Deed*". Clause 17 provided that subject to express contrary provision, "*every discretion vested in the Trustee shall be absolute and uncontrolled ..... and every power vested in it shall be exercisable in its absolute discretion*". Thus Elecnet, as Trustee, had the power to determine a criterion which would entitle a Worker to a contingent distribution.

Secondly, the Trustee had a discretion to vary the amount standing to the credit of a worker's account. Clause 7.1(e) gave the Trustee power to debit "*such other amount(s) (if any) which the Trustee determines is appropriate or equitable to debit to the worker's account of the worker*". Thirdly, cl 8.3 broadly provided for the amount of a severance payment to be made. The amount was calculated as either (i) an amount "*up to and including* the amount standing to the credit of the relevant worker's account", or (ii) an amount "*up to and including* the prescribed amount" plus an amount "*up to and including* the balance of the relevant worker's account".

The Court considered that these three discretions, when considered together, had the effect that any interest that a worker has under the EISS Deed was not capable of being described functionally as a unitised interest under a unit trust. The terms of the EISS Deed therefore departed so far from the functional concept of a unit trust, as reflected in the context and background to Division 6C, that the trust cannot be described as a "unit trust" within Division 6C.

The grounds of appeal include:

- The Full Court erred in adopting as the criterion of liability to tax under Division 6C a "functional and descriptive notion of a unit trust" and should have construed the *Income Tax Assessment Acts* 1936 and 1997 (Cth) as ascribing to the term "unit trust" a single, identifiable meaning.

- Full Court erred in reasoning that the interests of beneficiaries in a unit trust must be "unitised" and should have held that a trust estate under the terms of which the interests of beneficiaries are fixed by reference to identified or indentifiable criteria and may be measured in numerical or proportionate terms is a "unit trust" for the purposes of Division 6C.

The Commissioner has filed a Notice of Contention that contends the Full Court ought to have held, contrary to the finding of the primary judge, that the terms of the EISS did not confer on the workers "*a beneficial interest, however described, in any of the income or property of the trust estate*" within the meaning of the definition of "unit" in s 102M of the ITAA.

SOUTHERN HAN BREAKFAST POINT PTY LTD (IN LIQ) v LEWENCE CONSTRUCTION PTY LTD & ORS (S199/2016)

Court appealed from: New South Wales Court of Appeal
[2015] NSWCA 288

Date of judgment: 25 September 2015

Special leave granted: 28 July 2016

In January 2013 the appellant ("Southern Han") entered into a contract ("the Contract") with the first respondent ("Lewence") for the latter to construct a block of residential units for a price of $14.2 million excluding GST. The Contract provided that Lewence would claim payment from Southern Han monthly, by claiming on the eighth day of each month for work done up to the previous day. In October 2014, Lewence duly claimed a monthly payment on 8 October. In the ensuing days, however, Southern Han gave notice under the Contract that it was taking the construction work out of Lewence's hands. Lewence regarded this as a repudiation of the Contract and accepted that the Contract was terminated as of 28 October 2014.

On 4 December 2014 Lewence served Southern Han with a claim for $3.2 million including GST ("the Payment Claim"). The Payment Claim claimed sums for work done up to 27 October 2014 and for various costs allegedly incurred by Lewence. It also claimed a progress payment under the Contract of $1.2 million including GST, for work carried out to 7 October 2014. The Payment Claim stated that it was made under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Act").

Section 8(1) of the Act relevantly provides that a person who has undertaken to carry out construction work is entitled to a progress payment on and from each "reference date" under the applicable contract. 8 October 2014 was a "reference date" within the meaning of s 8(1). Section 13 of the Act contains the following subsections:

> *(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.*
>
> *(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.*

After Southern Han denied owing Lewence any amount (and contended that it had overpaid Lewence by $64,000), Lewence applied for an adjudication of the Payment Claim. Southern Han submitted that the adjudicator did not have jurisdiction because the Payment Claim was not a valid claim under the Act. The adjudicator rejected that submission and proceeded to determine Lewence's claim in the sum of $1.2 million including GST ("the Determination").

Southern Han challenged the validity of the Determination in the Supreme Court. On 15 May 2015 Justice Ball declared the Determination void. This was after holding that the existence or otherwise of a "reference date" within the meaning of s 8 of the Act was a matter going to the jurisdiction of the adjudicator. His Honour held that the adjudicator lacked jurisdiction, as there was no longer a reference date available to support the Payment Claim. This was on either of two

alternative bases. The first was that Southern Han's taking over the work and suspending payment under the Contract meant that there was no subsequent date on which a progress payment could be claimed. The second was that Lewence's termination of the Contract had brought the accrual of reference dates to an end.

The Court of Appeal (Ward & Emmett JJA, Sackville AJA) unanimously allowed an appeal by Lewence and set aside the declaration made by Justice Ball. Their Honours held that Justice Ball had erred by construing s 13(1) of the Act as requiring a claimant to be a person who had undertaken construction work under a contract *in respect of which a reference date had arisen*. All that was required for the service of a claim under the Act was a claimed entitlement to a progress payment. Only after service of a claim would the existence of a reference date become relevant, in the determination of whether the claimant was in fact entitled to a progress payment. The Court of Appeal therefore held that the Payment Claim was a valid claim under the Act, which came to be duly determined by the adjudicator. Their Honours also held that, on the case and the evidence presented (which did not include a copy of the claim made by Lewence on 8 October 2014), it was not open to them to determine that the Payment Claim was a second claim in respect of 8 October 2014 which thereby contravened s 13(5) of the Act.

The grounds of appeal are:

- The Court of Appeal erred in concluding that the existence of a reference date to support a payment claim under the Act is not a jurisdictional fact (and that hence it is for an adjudicator under the Act to determine).

- The Court of Appeal erred in holding that a reference date arose after the termination of the contract in circumstances where the contract did not provide for a date after termination on or from which a progress claim could be made.

- The Court of Appeal erred in concluding that Lewence did not contravene s 13(5) of the Act by serving two payment claims with respect to the same reference date.

Lewence has filed a notice of contention, the grounds in which include:

- If it be necessary, the Payment Claim was "support[ed]" by a reference date. Even if (as contended by Southern Han) "*the existence of a reference date to support a payment claim*" is a jurisdictional fact, the decision of the Court of Appeal should be affirmed on the ground that Southern Han failed to demonstrate the absence of that jurisdictional fact.

THE QUEEN v KILIC (M105/2016)

Court appealed from: Supreme Court of Victoria Court of Appeal [2015] VSCA 331

Date of judgment: 8 December 2015

Date special leave granted: 28 July 2016

On 30 March 2015 the respondent, then aged 22, pleaded guilty to intentionally causing serious injury. The charge arose out of an incident where he doused his then girlfriend in petrol, and set her on fire. The respondent also pleaded guilty to two summary charges of 'use of a prohibited weapon', and 'dealing with suspected proceeds of crime'. He was sentenced to 14 years imprisonment for the charge of intentionally causing serious injury and 12 months imprisonment on each of the two summary charges, making a total effective sentence of 15 years imprisonment. A non-parole period of 11 years was fixed.

The respondent appealed to the Court of Appeal (Redlich & Whelan JJA) on the ground that the individual sentences, orders for cumulation and non-parole period fixed were manifestly excessive as the sentencing judge (Judge Montgomery) gave too much weight to aggravating factors and too little weight to mitigating factors, current sentencing practices, the applicable maximum penalties, and the principle of totality. The respondent complained that the sentence imposed on him was the second largest sentence ever imposed on a charge of intentionally causing serious injury, including those sentences imposed following a not guilty plea. He submitted that the fact that lesser sentences had been imposed in offending where the victim had sustained permanent and significant brain damage, further supported his complaint of manifest excess.

The Court noted that sentencing judges are required by s 5(2)(b) of the *Sentencing Act* 1991 (Vic) to have regard to current sentencing practice. While sentences imposed in other cases were not precedents, nor should they be considered to restrict the sentencing judge's instinctive synthesis, they did play a role in informing the instinctive synthesis, particularly insofar as such an overview may provide a general guide to current sentencing practices. Current sentencing practice, including an examination of comparable cases, can provide a relevant 'yardstick' by which a sentencing court may ensure consistency in sentencing and in the application of the relevant legal principles.

The Court found that while it was important to recognise the limitations on the use that may be made of the worst category offending authorities relied upon by the appellant, and notwithstanding the latitude that must be extended to sentencing judges, there was such a disparity between the sentence imposed and current sentencing practice as illustrated by the authorities, that they were satisfied that there had been a breach of the underlying sentencing principle of equal justice. The sentence imposed was unjustifiably disparate from other sentences imposed for worst category offending by offenders in comparable circumstances.

Their Honours noted that subtle distinctions between serious injuries should be eschewed but without minimising the horrific injuries suffered by the victim, there was a clear distinction to be made here from those cases where the victims had sustained lifelong major physical or mental disabilities. When this consideration was combined with the lack of premeditation, the respondent's genuine remorse,

youth and lack of relevant prior offending, and prospects for rehabilitation, the conclusion was inescapable that the sentence imposed on the primary charge was well beyond a reasonable exercise of the sentencing discretion.

The appeal was allowed and the respondent was re-sentenced to a term of imprisonment of 10 years and 6 months on the charge of intentionally causing serious injury, 6 months imprisonment on the charge of use of prohibited weapon, and 3 months imprisonment on the charge of dealing with property suspected of being proceeds of crime. He was given a total effective sentence of 10 years and 10 months imprisonment with a non-parole period of 7 years 6 months.

The proposed grounds of appeal include:

- The Court of Appeal erred in holding that a sentence of 14 years imprisonment imposed on a charge of intentionally causing serious injury was manifestly excessive in circumstances where:

  (i) the maximum penalty prescribed for the offence was 20 years imprisonment; and

  (ii) the offence in question was properly categorised as falling within the "worst" category.