

**FRUGTNIET v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
(M136/2018)**

Court appealed from: Full Court of the Federal Court of Australia
[2017] FCAFC 162

Date of judgment: 12 October 2017

Special leave granted: 17 August 2018

The Appellant was born in Sri Lanka and spent his early years in the United Kingdom. He migrated to Australia in 1990 and became an Australian citizen.

The Appellant graduated from Deakin University with a Bachelor of Laws (2001) and a Master of Laws (2003). He unsuccessfully applied for admission to practise as a barrister and solicitor to the Board of Examiners in Victoria in 2001 and again in 2004. He commenced working as a finance broker in 2004 via Unique Mortgage Services Pty Ltd (“UMS”), a company of which he was the sole director and shareholder. He also variously conducted work, via UMS, as a migration agent, as a tax agent and as a conveyancing agent.

In November 2010, the Appellant caused UMS to lodge an application for an Australian credit licence with the Respondent, the Australian Securities and Investment Commission (‘ASIC’). The Appellant declared in the application form that all information was complete and accurate, including questions about his status as a fit and proper person. The licence was granted, effective from 24 December 2010.

The Appellant did not disclose in UMS’ application that he had a conviction from 1978 for dishonesty offences in the United Kingdom for which he had served two years in prison. Nor did he disclose that he had been found guilty in 1997 of obtaining property by deception by the Broadmeadows Magistrates Court of Victoria although no conviction was recorded. He claimed that he did not make any false statements in the application, which did not expressly require him to disclose those matters.

From the mid 1990’s the Appellant had also been involved in a number of investigations where questions had been raised about his conduct in providing information to various licensing and regulatory authorities. In 1999 he had failed to disclose pending charges against him for theft and attempted theft when he applied for registration as a migration agent (he was subsequently acquitted of those charges in March 2000). In 2004 he had conceded that he was unable to satisfy the Victorian Board of Examiners that he met the requirements for admission to legal practice and that he had failed to make full disclosure under State legislation.

In April 2011 the Victorian Civil and Administrative Tribunal (VCAT) granted an application by the Law Institute of Victoria to declare the Appellant to be, for three

years, a disqualified person under the *Legal Profession Act 2004* (Vic). As a consequence his conveyancing licence in Victoria was cancelled by the Business Licensing Authority and his registration as a tax agent was terminated by the Tax Practitioners Board. Later, his registration as a migration agent was cancelled.

On 26 June 2014 a delegate of the Respondent, ASIC, made a permanent banning order against the Appellant on the basis that the Appellant was not a 'fit and proper person' to engage in credit activities pursuant to s 80(1)(f) of the *National Consumer Credit Protection Act 2009* (Cth) ("the NCCP Act").

In making this decision, the delegate was precluded from taking into account spent convictions as defined by s 85ZM(2) of the *Crimes Act 1914* (Cth) ('the Crimes Act').

It is common ground that the Appellant's UK and Broadmeadows convictions are spent convictions under s 85ZM(2) of the Crimes Act.

Division 3 of Part VIIC of the Crimes Act outlines the effect of the right of non-disclosure of spent convictions. Subject to the exclusions contained in Division 6, s 85ZW provides that a Commonwealth or State authority must not take into account a spent conviction when making a decision.

Division 6 of Part VIIC contains S 85ZZH(c) which provides that 'Division 3 does not apply in relation to ... a court or tribunal established under a Commonwealth law, a State law or a Territory law, for the purpose of making a decision, including a decision in relation to sentencing.'

Section 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ('the AAT Act') provides that the Administrative Appeals Tribunal ('the Tribunal') may 'exercise all of the powers and discretions conferred upon the original decision-maker.'

On 29 July 2014, the Appellant applied to the Tribunal for a review of the delegate's decision. On 6 March 2015, the AAT affirmed the delegate's decision to make a permanent banning order against the Appellant. In its reasons for decision, the AAT made reference to the spent convictions.

The Appellant's appeal to the Federal Court of Australia was dismissed. His subsequent appeal to the Full Court of the Federal Court of Australia was also dismissed. The Appellant appealed to the High Court of Australia. On 17 August 2018 he was granted special leave to appeal from that part of the judgment of the Full Court which relates to the spent convictions.

The Appellant argues that the Tribunal 'stands in the shoes' of the original decision-maker, and as the delegate was precluded from taking into account the spent convictions, the Tribunal was similarly precluded from doing so. The Appellant submits that not to adopt this approach would produce an anomalous result.

The Respondent argues that the reasoning of the Full Court is correct, and that s 43(1) of the AAT Act and s 85ZZH(c) of the Crimes Act can operate concurrently. The Respondent contends that although the function of the Tribunal is to 'stand in the shoes' of the original decision-maker, this does not mean that the decision-making power needs to be exercised in the same manner, meaning that the Tribunal is able to take into account information that was not before the original decision-maker.

The ground of appeal is:

1. That the Full Court erred in ... failing to find that the Administrative Appeals Tribunal erred in having regard to the Appellant's spent convictions within the meaning of Part VIIC of the *Crimes Act 1914* (Cth) when reviewing, under the *Administrative Appeals Act 1975* (Cth), a decision made by the Respondent under section 80 of the *National Consumer Credit Protection Act 2009* (Cth).

The Respondent filed a s 78B Notice of a constitutional matter asserting that this matter involves or may involve a matter arising under the Constitution or its interpretation. None of the Attorneys-General of the States and Territories has intervened in response to that Notice.