SHORT PARTICULARS OF CASES
APPEALS

DECEMBER 2008

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TABCORP HOLDINGS LTD v BOWEN INVESTMENTS PTY LTD (M63/2008)

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

Date of judgment: 13 March 2008

Date special leave granted: 1 August 2008

The respondent built and owns a multi-storey office building in Melbourne and leased the entire building to the appellant for 10 years commencing on 1 February 1997. In that year, in breach of cl 2.13 of the lease (which required the respondent's written consent before substantial alterations/additions to the premises were made), the appellant demolished and replaced the foyer, marginally enlarging it and reducing the lettable area on the ground floor. The respondent commenced proceedings in the Federal Court in September 2005, claiming $1.38 million as the cost of reinstating the original foyer.

The trial judge (Tracey J) found that the appellant breached the lease, but that the renovations had not caused any significant loss of value to the building. The respondent only suffered a diminution in value due to the loss of net lettable area arising from the modification to the foyer. Damages were awarded in the sum of $33,820 (the cost of moving a wall), together with $1,000 as nominal damages for breach of the lease.

The respondent successfully appealed to the Full Court. The principal issue was whether damages should be awarded on the basis of the cost of reinstatement of the original foyer or on the basis of the diminution in value of the reversion. The Court (Finkelstein, Rares and Gordon JJ) unanimously found, applying the rule in *Joyner v Weeks* [1891] 2 QB 31, that if the lessor brings an action at or near the termination of the lease, the lessor is entitled to recover the cost of repair, i.e., the cost of reinstatement. Finkelstein and Gordon JJ further found that damages for breach of the covenant not to alter the demised premises without approval were to be assessed on the same basis as for breach of a covenant to keep and leave the premises in repair, i.e., the cost of reinstatement, or the diminution in value of the property due to the breach. An assessment of what was reasonable in a particular case was not to be measured in purely economic terms and personal preferences of a subjective nature were not irrelevant in choosing the appropriate measure of damage. Their Honours allowed the appeal and awarded damages in the sum of $1.38 million.

The grounds of appeal include:

- The Full Court erred in holding that damages should be assessed in accordance with the decision in *Joyner v Weeks* [1891] 2 QB 31

- The Full Court erred in finding that damages for breach of clause 2.13 of the lease should be measured by the cost of reinstating the respondent's original foyer, plus an assumed loss of rent while such reinstatement took place, when:

  a) the unauthorised alterations to the foyer did not cause any diminution in the value of the respondent's premises or its reversionary interest; and

  b) the appellant was entitled to possession of the premises until 2012 or (should it exercise an option) 2017, at which time the respondent would in any event need to extensively renovate whichever foyer was then in place.

STUART & ANOR v KIRKLAND-VEENSTRA & ANOR (M39/2008)

Court appealed from: Supreme Court of Victoria, Court of Appeal

Date of judgment below: 29 February 2008

Date special leave granted: 23 May 2008

The first respondent (the wife) brought proceedings against the appellants (the police officers) for damages in negligence, a claim under Part III of the *Wrongs Act* 1958 (Vic) and a claim for breach of statutory duty. The wife also claimed damages from the second respondent (Victoria) alleging that the State was vicariously liable for the conduct of the police officers. Each action arose from the suicide of Roland Veenstra (the husband) on 22 August 1999.

At about 5.40am on 22 August 1999, the husband's car was observed by the police officers on routine patrol duties on the Mornington peninsula. His was the only car in a public carpark. They noticed a hose from the rear to the left side of the vehicle; however the engine was not running and the driver's window was fully open. The police officers, who were in plain clothes in an unmarked car, approached the husband, who was sitting in the driver's seat, and identified themselves. There followed a conversation between them, during which the police officers asked questions and obtained information on how and why the husband came to be there. They radioed in and confirmed that personal and vehicle details matched. He had been there for about 2 hours before the police officers arrived. Of his own motion, the husband removed the hose from the exhaust and put it in the car. The police officers saw no sign of alcohol, drugs or medication. The husband said he had contemplated doing "something stupid" but he was going to go home and discuss things with his wife. He refused the appellants' offers to contact his family or his doctor. Under s10 of the *Mental Health Act* 1986 (Vic) (the Act), police have power to apprehend a person who appears to be mentally ill and has or is likely to attempt suicide, self-harm or harm to others. Both officers were of the same opinion: the husband showed no signs of mental illness; he was rational, co-operative and very responsible. After about 15 minutes, the husband left, as did the police.

The husband was next seen by his wife at about 9am at home when she got up. They spoke about their planned trip to a dog show that day. The husband chose not to go, but insisted the wife go as planned, which she did. The wife's father arrived at the house just before 2.30pm to discover the husband in his car with the engine running and a hose connected to the exhaust. He tried unsuccessfully to revive the husband. The wife returned just after 2.30pm by which time the emergency services had also arrived. The husband, aged 37, left a suicide note.

The trial judge dismissed the wife's claim on the ground that there was no duty of care owed by the police officers in the particular circumstances. A majority of the Court of Appeal (Warren CJ & Maxwell P, Chernov JA dissenting) allowed the wife's appeal. The wife's claim was acknowledged to be a novel one and the Court considered the governing principles to be derived from a number of authorities in determining whether a common law duty of care was owed by the police officers to particular members of the public, in this case the wife and the husband. The majority considered this case was more closely analogous to cases involving negligence by statutory authorities rather than cases involving negligence by police in carrying out their duties. They drew a distinction between the role of police in investigating and preventing crime and/or maintaining public order and the role of a police officer who is the repository of a statutory power to prevent a mentally ill person from committing suicide. The Court concluded that in the present

case the police officers were exercising a health and safety power and not a policing power. The majority held that a duty of care arose to exercise the power conferred by s10 of the Act when they realised that the husband had been, or was, contemplating suicide. Chernov JA took the view that the governing principles in determining whether there was a duty of care were informed by specific public policy considerations, as articulated in the "police cases". He concluded that the imposition of a duty of care would be incompatible with the framework of the Act which, under s10, created a discretionary power in the police to act. Chernov JA held that there was no duty of care.

The grounds of appeal include:

- The majority of the Court of Appeal erred in holding that each of the appellants owed a duty of care to the first respondent's husband by reference to the existence of the statutory powers contained in s10 of the *Mental Health Act* 1986 (Vic).

- The majority of the Court of appeal erred in holding that the appellants owed a duty of care:

    a) by applying the principles contained in the authorities in which consideration had been given to whether a statutory authority owed a duty of care;

    b) by rejecting as a "distraction" the authorities in which consideration had been given to whether police officers owed a duty of care to a member of the public; and

    c) by applying a criterion for the imposition of a duty formulated for statutory authorities in *Pyrenees Shire Council v Day* (1998) 192 CLR 330, namely that the appellant had "entered the field" by virtue of the provisions of the *Mental Health Act* 1986 (Vic).