SHORT PARTICULARS OF CASES
APPEALS

APRIL SITTINGS 2008

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COMMISSIONER OF TAXATION v RELIANCE CARPET CO PTY LIMITED (M163/2007)

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

Date of judgment: 5 July 2007

Date special leave granted: 14 December 2007

The appellant assessed the respondent as being liable to pay an amount of Goods and Services Tax in respect of a deposit that had been forfeited to it upon the rescission of a contract for the sale of property. The respondent sought review of the assessment arguing that, by rescinding the contract, it did not make a "supply" or, in the alternative, that the forfeiture of the deposit was a payment of liquidated damages for breach of contract. It argued that as the supply was made for consideration pursuant to s 9 - 5(a) of *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) (the GST Act), no tax was payable.

The AAT (Olney DP) affirmed the decision of the appellant. The Tribunal reasoned that upon execution of the contract the respondent, as vendor, made a supply in that, in terms of s 9 - 10(2)(g) of the GST Act, it "entered into an obligation" to perform the contract and payment of the deposit was consideration for a supply in that it was a "payment in connection with a supply" in terms of s 9 - 15(1)(a). However, by virtue of s 99 - 5(1), the deposit was not to be treated as consideration for a supply unless forfeited or applied as purchased money. Upon forfeiture, s 99 - 10(1) applied to attribute the GST liability to the tax period within which the deposit was forfeited. Finally, the Tribunal held that there was no basis for the proposition that the forfeiture of the deposit was in effect the payment of liquidated damages for breach of contract. The deposit was not calculated on the basis that it was a genuine pre-estimate of the damages likely to be suffered by the appellant in the event of the purchaser's breach, nor was it agreed to as such by the purchaser.

The Full Federal Court (Heerey, Stone and Edmonds JJ) unanimously allowed the respondent's appeal. The Full Court found that when the respondent entered into the contract of sale, the supply contemplated was a single supply of real property; nothing more and nothing less. Where the contract was rescinded prior to completion and the deposit thereby forfeited, the contemplated supply did not materialise. This had the result that there was no supply by the vendor for which the deposit paid by the purchaser would be consideration. There was no supply of interim obligations, either at the point of rescission or subsequently. By issuing the rescission notice the respondent did not surrender any rights or release the purchaser from any obligations. Section 99 - 5 did not operate to deem the existence of supply in respect of a forfeited deposit. That section depended on the prior identification of a supply for which the deposit could be treated as consideration.

The respondent will also be seeking to rely on a Notice of Contention.

The grounds of appeal are:

- the Court misconstrued s 9 - 10 of *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act") in holding that the deposit paid to the respondent on entering into the contract for the sale of land was not consideration for a supply where the contract was rescinded, the deposit forfeited to the respondent and the land not transferred to the purchaser

- In particular, the Court erred in holding that the only supply by the respondent under the contract for the sale of land was to be the transfer of real property and that:
  (i) both the entry into the contract and the taking of the deposit were "incidental or ancillary" to that intended supply; and
  (ii) the taking of the deposit and its later forfeiture upon rescission were to be disregarded for the purposes of the GST Act where that intended supply did not take place.
- Alternatively, the Court misconstrued s 9 - 10 of the GST Act in holding that the rescission of the contract for the sale of land was not a supply made by the respondent to the purchaser.

COLLINS v TABART (S638/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 4 April 2007

Date of grant of special leave: 6 December 2007

The appellant was seriously injured on 2 July 2002 whilst driving his truck north on the F3 Freeway. Approximately 3 km north of the Ourimbah roundabout he collided with the respondent's vehicle and then veered out of control. The principal issue at trial was whether the collision took place in the breakdown lane or whether the respondent's vehicle suddenly veered across the appellant's path. It was the respondent's case that he had stopped in the breakdown lane to make a mobile phone call. Records indicated that he was on the phone at the time of the collision.

Gibb DCJ found that, in light of the observations and measurements of police officers attending the scene of the accident, there could be no doubt that the respondent's vehicle was wholly in the breakdown lane when the accident occurred. Her Honour accepted expert evidence to the effect that the vehicle was wholly in the breakdown lane. She made a number of positive credibility findings with respect to the witnesses who gave evidence consistent with the respondent's account. She concluded that there was no breach of duty by the respondent causative of the accident.

The Court of Appeal (Mason P, Beazley & Tobias JJA) gave a unanimous decision dismissing the appeal. The Court indicated that no question of principle was raised. The Court further noted that the appellant gave inconsistent versions of how the accident happened and that none of his versions, when compared with the objective evidence, represented the likelihood of the accident happening as he said it did.

The Court agreed that there could be no doubt that the respondent's vehicle was in the breakdown lane at the time of the collision. No error was demonstrated in her Honour's analysis of the evidence of each witness. Whilst there were aspects of her Honour's reasons that possibly raised appellable issues, her conclusion was correct. The appellant's case turned on whether he established that the respondent's vehicle moved unexpectedly in front of him. The evidence of gouge marks incontrovertibly established the contrary.

The grounds of appeal include:

- The Court of Appeal, having recognised that the judgment appealed from was credit-based, held that findings of the primary judge, crucial to the credit of the respondent, had been wrongly made but failed in their judgment to give effect to those findings of error.

- The Court of Appeal misstated the "real contest between the parties" and were influenced in their judgment by that error.

- The Court of Appeal found that the learned trial judge had analysed carefully the evidence of the witnesses in the case without reference to the many misstatements of that evidence in her Honour's judgment the subject of grounds of appeal by the applicant.

KURU v STATE OF NEW SOUTH WALES (S649/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 5 June 2007

Date of grant of special leave: 6 December 2007

This appeal concerns the police powers under statute and common law to enter premises.

The appellant commenced proceedings against the respondent seeking damages for trespass to property, to the person, false imprisonment and negligence. The proceedings arose out of an incident whereby several police officers responding to a call alerting them to a domestic incident between the appellant and his partner, entered the appellant's apartment. At the time of entry the appellant was in the shower and his partner had left the premises. When he discovered their presence, the appellant had initially agreed to the police looking around the apartment but later withdrew his permission and asked them to leave. When they refused to do so a physical altercation ensued resulting in the appellant's arrest and detention. The appellant suffered a number of injuries in the course of the arrest. Murray ADCJ upheld the appellant's claim for trespass to property, trespass to the person, false imprisonment and negligence. Damages of $418,265 were awarded.

The respondent's appeal to the Court of Appeal (Mason P, Santow and Ipp JJA) was allowed. The principal question on appeal was whether the police entry and their continued presence was permitted by s 357F of the *Crimes Act* 1900 (NSW) ("the Act") and, to the extent applicable, s 357H of the Act or common law so as to obviate any trespass to the person or property or false imprisonment.

Santow JA found that the police were entitled, both at common law and under s 357H of the Act, to enter the appellant's apartment and to remain, even after the invitation had been withdrawn, for the purposes of investigating the domestic violence complaint. Although there had been no express consent, the appellant had given implied consent to the police entry to inspect the property to see if there was an injured woman there. The existence of such implied consent overcame the appellant's reliance on a decision of this Court in *Plenty v Dillon* (1991) 171 CLR 635. His Honour also found that at common law the police were able, notwithstanding the withdrawal of the invitation when the process of investigation was not yet complete, to carry out their investigative purpose to completion. They were entitled to complete their task either by further inspection on the premises or by making contact with the appellant's partner outside the premises. His Honour did not consider that common law entitled the appellant to withdraw an invitation when the invitation was originally to do that which the police were still in the course of doing. The police had the requisite justification.

Ipp JA noted that it could not have been disputed that the police, when entering the apartment, believed on reasonable grounds that a domestic violence offence had recently been committed there. It followed that, by s 357F, if the police were invited by the appellant to enter the apartment for the purpose of investigating whether such an offence had been committed, they were lawfully entitled to do so. His Honour noted the lower court finding that there was no invitation to enter because at the time of entry the appellant was in the shower. Ipp JA rejected the contention that an invitation to enter premises could only be made when a police officer was outside the premises.

By agreeing when he first saw police that they could look around his apartment, the appellant invited them to enter and remain in the apartment within the meaning of the word “invited” in s 357F(2). His Honour also agreed that the police were entitled at common law to enter the apartment. His Honour noted authority to the effect that at common law any person was entitled to enter private premises to prevent a breach of the peace from occurring. *Plenty v Dillon* did not alter this. His Honour was satisfied that the police remained in the apartment for a period reasonably necessary to take the action of the kind they were required by s 357H(1)(a) to take and s 357H(1) authorised them to remain, notwithstanding the revocation of consent by the appellant. Further, at common law, even though the police were told to leave by the appellant, they were entitled to stay until they had taken reasonable steps to satisfy themselves that no offence had been committed. He was satisfied that the police remained there to ascertain whether or not a domestic violence offence had been committed.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in holding that the police were not trespassers on the appellant's premises.

- The New South Wales Court of Appeal erred in holding that the police were lawfully entitled by sections 357F and 357H of the Act (now repealed) to enter, and remain, on the appellant's premises.

- The New South Wales Court of Appeal erred in holding that the police were lawfully entitled at common law, to enter, and remain, on the appellant's premises.

W.R CARPENTER HOLDINGS PTY LIMITED & ANOR v COMMISSIONER OF TAXATION (S652/2007 & S653/2007)

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

Date of judgment: 11 July 2007

Date of grant of special leave: 14 December 2007

The Appellants appealed against certain determinations ("the determinations") made by the Respondent under section 136AD of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"). Those determinations were made in relation to consideration for property sold by the Appellants under international agreements ("the agreements"). The Respondent determined that the agreements were not at arm's length and it made transfer pricing determinations accordingly. This was done pursuant to section 136AD(1) and subsection (4) of the Act. The First Appellant was assessed on $17.89 million for deemed or imputed interest, while the Second Appellant was assessed for almost $900,000 for imputed interest.

The Appellants sought particulars of all the matters the Respondent took into account when making the determinations. The Respondent countered that his reasoning process was not an issue, nor was it the subject of judicial review. In the alternative he submitted that the Appellants bore the onus of proving that the assessments were excessive. On 20 September 2006 Justice Lindgren agreed with the Respondent's submissions and dismissed the Appellants' motion.

On 11 July 2007 the Full Federal Court (Heerey, Stone & Edmonds JJ) unanimously dismissed the Appellants' appeal. Their Honours held that the Respondent's determinations could still be challenged, but just not on judicial review grounds. This could be done by challenging the existence of the preconditions necessary to empower the Respondent to make the determinations. That said, it was up to the Appellants to prove that the assessment was excessive by showing that the correct arm's length consideration was less than the deemed amount of the Respondent's determination. In such a case the Appellants would prove that the statutory preconditions for the Respondent's discretion did not in fact exist.

The Full Court also held that when Parliament intended the criteria for liability to include the Respondent's state of mind, opinion or judgment, section 177(1) allowed a taxpayer to examine this on judicial review grounds. Where Parliament however had exhaustively set out the criteria for liability by reference to objective matters, but had made the application of those criteria dependent upon a step being taken by the Commissioner, that step was procedural and was not part of the criteria for liability. The making of such a determination was not therefore subject to examination on judicial review grounds.

The grounds of appeal (in both matters) include:

- The Full Court (Heerey, Stone & Edmonds JJ) erred in holding that, in making a detemination under para (d) of sub-secs 136AD(1) or (2) for either sub-section to apply, the Commissioner was "not making any finding as to an element or criterion of tax liability" [Para 29, following from para 27] and that the Court should have held that the making of a determination under para (d) is one of four criteria for the exisitence of a tax liability.

On 7 January 2008 the Respondent (in both matters) filed a notice of contention, the ground of which is:

- The Respondent has not asserted, and does not propose to assert, a positive case as to his state of mind or reasoning processes, of which, in accordance with the general principles governing the supply of particulars, particularisation might be appropriate.

On 20 February 2008 the Appellants (in both matters) filed a notice of constitutional matter, the grounds of which include:

- The constitutional issue involved in these appeal proceedings is whether the view of sec 136AD, read with sub-secs 175 and 177 of the Act, acted on by the Full Court of the Federal Court of Australia in a decision delivered on 11 July 2007:

  i) would deprive the High Court of the juriisdiction conferred on it by sec 75(v) of the Constitution;

  ii) would confer judicial power on the Commissioner;

  iii) would impose an incontestable tax; or

  iv) would mean that sec 136AD is not a law within section 51 of the Constitution.

COPYRIGHT AGENCY LIMITED v STATE OF NEW SOUTH WALES (S595/2007)

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

Date of judgment: 5 June 2007

Date of grant of special leave: 16 November 2007

The Copyright Agency Limited ("CAL") has appealed against the judgment of the Full Federal Court whereby that Court answered questions referred to it by the Copyright Tribunal of Australia ("the Tribunal").

CAL has been declared under section 153F of the *Copyright Act* 1968 (Cth) ("the Act") to be a collecting society for each owner of copyright in works, other than a work included in a sound recording or a film.

CAL made an application to the Tribunal under section 153A, 153K 161, 183(5) and 183A of the Act. It requested the Tribunal:

a) to determine, in respect of copying that is within section 183 of the Act, the method for working out equitable remuneration for the making of digital copies of survey plans by the State after 18 December 1998, including the sampling system to be used for estimating the number of copies, in accordance with section 183A(3)(a) of the Act, and

b) to fix the terms for communications to the public, by the State of New South Wales ("the State") of survey plans within section 183 of the Act.

The Tribunal then made certain findings. CAL and the State subsequently and jointly requested the Tribunal, pursuant to section 161(1) of the Act, to refer for determination by the Federal Court of Australia certain questions of law. This was done by way of stating a case for the opinion of the Federal Court. On 5 June 2007 the Full Federal Court (Lindgren, Emmett & Finkelstein JJ) unanimously held:

a) that none of the relevant plans was made under the direction or control of the State in terms of section 176 of the Act;

b) that none of the relevant plans was first published by or under the direction or control of the State, in terms of section 177 of the Act;

c) that the State, other than by operation of section 183 of the Act, was entitled to a licence to reproduce and communicate to the public each of the relevant plans;

d) that the licence was for the State to do everything that, under the statutory and regulatory framework that governs registered plans, the State is obliged to do with, or in relation to, registered plans; and

e) that none of the relevant plans was reproduced within the meaning of the Act, by entering the Digital Cadastral Database in the manner set out in the Stated Case, of data sourced from the Plans.

The grounds of appeal are:

- The Full Federal Court erred in holding that question 5 should have been answered "Yes" and ought to have held that it be answered "No".

- The Full Federal Court erred in failing to hold that an implied licence did not exist on the facts of this case having regard to the existence of the statutory scheme of section 183 of the Act.

- The Full Federal Court erred in holding that question 6 should be answered as follows "the licence for the State to do everything that, under the statutory and regulatory framework that governs registered plans, the State is obliged to or authorised to do with or in relation to registered plans."

OSLAND v SECRETARY TO THE DEPARTMENT OF JUSTICE (M3/2008)

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

Date of judgment: 17 May 2007

Date special leave granted: 14 December 2007

The appellant was found guilty of murdering her husband, and after her appeal on conviction and sentence was finally refused by this Court on 10 December 1998 (see *Osland v The Queen* (1998) 197 CLR 316), the appellant submitted a petition for mercy to the Victorian Attorney-General, seeking a pardon from the Governor. On 6 September 2001 the Attorney-General announced that the Governor had refused the petition. In a press release the Attorney-General referred to legal advice received from three senior counsel recommending that the petition be denied. The appellant sought access to a number of advices provided to the Governor in connection with her petition, invoking the *Freedom of Information Act* 1982 (Vic) ('the Act'). The Department of Justice refused access to the documents, a decision later overturned by the Victorian Civil and Administrative Tribunal. Nine documents remained in dispute. The Tribunal found that the documents were exempt from production and that legal professional privilege had not been waived, but that public interest nevertheless required access to be granted under s 50(4) of the Act.

The respondent's appeal to the Court of Appeal (Maxwell P, Ashley JA and Bongiorno AJA) was successful. On the question of whether there had been an implied waiver of privilege, Maxwell P noted that the test was one of inconsistency between the conduct of the "client" and the maintenance of confidentiality. The Court did not accept the general proposition that disclosure of the conclusion of legal advice waived privilege over the entirety of the advice. The inconsistency test allowed for the privilege holder to disclose the content of legal advice to a third party for a particular purpose without being held to have waived privilege in that advice. In this case, the evident purpose of the Attorney-General's disclosure was to inform the public that the recommendation that the petition be denied was based on independent legal advice and was disclosure for the purpose of explaining or justifying his actions. There was no inconsistency between disclosing the fact of and conclusions of the independent advice for that purpose and wishing to maintain the confidentiality of the advice itself.

On the question of whether public interest warranted disclosure in accordance with s 50(4), the Court found that the Tribunal erred in treating the claim for exemption under s 30 as a secondary claim and that to do so failed to take into account public interest considerations underlying the exemption for internal working documents. Further, the Tribunal erred in approaching the matter on the basis that, when considering whether the public interest required disclosure of a privileged document, each document had to be considered individually. The public interest factors underpinning the privilege supported all privileged documents uniformly and did not depend on the particular content of a privileged document. Further, the Court found that the Tribunal fell into error in conflating "matters of public interest" with the phrase "in the public interest". The Tribunal took into account an irrelevant consideration, being the Tribunal's perception of the extent to which the public wished to know why the petition had been denied. The test of public interest in s 50(4) was a stringent test and the desirability of greater transparency in decision-making by the executive had no place in the s 50(4) analysis. The Court concluded that the test was not satisfied in this case.

The grounds of appeal are:

The Court erred in law in:

- finding that the Victorian Attorney-General did not waive and thereby lose legal professional privilege in respect of the joint memorandum of advice from three senior counsel by publishing a press release on 6 September 2001 that disclosed the substance and gist of the joint advice and the conclusion reached in it :
- in finding that the learned president of the Tribunal correctly concluded that the Attorney-General did not waive legal professional privilege in respect of the joint advice:
- in concluding, without considering the contents of Documents 1,3,4,5,6,7,8,9 & 11 (which were inspected by the Tribunal but not by the Court) that there could be no basis upon which, on the material before the Tribunal an opinion could be formed under s 50(4) of the Act that the public interest requires that access to the said documents be granted under the Act