SHORT PARTICULARS OF CASES
APPEALS

JANUARY / FEBRUARY 2008

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RAFTLAND PTY LTD AS TRUSTEE OF THE RAFTLAND TRUST v. COMMISSIONER OF TAXATION (B11/2007)

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

Date of grant of leave: 21 June 2007

This matter concerns the application of section 100A of the *Income Tax Assessment Act* 1936 (Cth) ("the Act") to a particular series of transactions designed to minimise the appellant's tax liability. In 1995, the appellant company was acquired by interests owned by Brian, Martin and Stephen Heran and the Raftland Trust was settled, and another trust not previously associated with the Heran brothers' interests, E & M Unit Trust, was nominated as a "tertiary beneficiary" of the Raftland Trust. Several companies controlled by the Heran brothers were projected to make substantial profits, and Brian Heran had instructed his solicitor to "acquire" a trust which had tax losses from previous years and might be utilised so as to absorb the projected profits. E & M Unit Trust had accumulated tax losses of approximately $4 million, and a "price" of $250,000 for its acquisition was paid. The respondent assessed the tax liability for the appellant for the relevant tax years (1995, 1996 and 1997) on the basis that the Raftland Trust profits were taxable in Raftland's hands. The appellant lodged objections to those assessments, unsuccessfully, and appealed those objection decisions unsuccessfully to the Federal Court, which found (Kiefel J) that the transactions involving the E & M Unit Trust were a sham. Her Honour held that the E & M Unit Trust was not presently entitled to the income of the Raftland Trust (although the Heran brothers were), that the Heran brothers' entitlement arose out of a reimbursement agreement and that in the circumstances section 100A of the Act applied such that the appellant was correctly assessed under section 99A of the Act.

The Full Court of the Federal Court (Dowsett, Conti and Edmonds JJ) dismissed the appellant's appeal. Edmonds J wrote the leading judgment. His Honour found that the question was not whether the transactions were a sham, but whether the appellant had established that the tax assessed was excessive. His Honour concluded that the transactions were genuine, that the E & M Unit Trust had a present entitlement to the income of the Raftland Trust as beneficiary of that trust and that entitlement arose out of a reimbursement agreement. However, his Honour also held, applying subsection 100A (3A) of the Act, that there was on the facts no income of the interposed trust (that is, the E & M Trust) for distribution because of the general rule in *Upton v Browne* (1884) 26 Ch D 588, that, absent a contrary intention in the trust instrument, losses must be made up out of income of subsequent years and not out of capital. Accordingly, section100A(3A) denied the application of section 100A(1) in relation to that reimbursement agreement and therefore the E & M Trust was deemed not presently entitled to the income of the Raftland Trust. Accordingly, his Honour held that the assessment made was not established by the appellant to have been excessive. Except for a small adjustment made in respect of one of the relevant years (a conclusion not challenged in this appeal), his Honour did not disturb the orders of Kiefel J, including orders as to penalties assessed on the basis that the taxpayer had been "reckless" in the preparation of its return, but gave no reasoning for not disturbing the latter order, a conclusion which the appellant challenges in this appeal.

The grounds of appeal include:

- The proper interpretation and application of section 100A of the Act;
- Whether the rule in *Upton v Browne* should be overruled or not followed in the circumstances of these transactions and on a proper interpretation of the trust instrument;
- Whether the Full Court of the Federal Court erred by applying an incorrect test of “recklessness” in section 22H of the Act.

ROADS AND TRAFFIC AUTHORITY v ROYAL & ANOR (S517/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 4 April 2007

Date of grant of special leave: 5 October 2007

On 12 March 2001 Mr George Smurthwaite was seriously injured in a car crash at Herons Creek, New South Wales. At the time he was driving his car in an easterly direction across the intersection of the Pacific Highway and Bago/Boyds Roads ("the intersection"), with Boyds Road being a continuation of Bago Road. Mr Royal was driving in a northerly direction on the Pacific Highway. Both men were familiar with the road.

Immediately before the accident, Mr Smurthwaite had stopped at the stop sign at the intersection. It was possible however that he failed to see the traffic travelling north along the Pacific Highway due to a dip in the road just south of that intersection. Mr Royal was travelling at 105 kph when he collided with the side of Mr Smurthwaite's vehicle, towards the rear door. Relevantly, the Roads and Traffic Authority ("RTA") designed and constructed the intersection. It also had the care, control and management of the roads in question.

On 7 February 2007 Judge Phelan held that Mr Royal was the primary cause of the accident, with Mr Smurthwaite's contributory negligence assessed at one-third. His Honour however found that there was no negligence on the RTA's part, despite the intersection being a known "black-spot". This was because the RTA had taken some steps to address the problem. Damages for Mr Smurthwaite were assessed at $871,019.60.

Upon appeal Mr Royal did not seek to challenge the finding of negligence against him. He did however seek to challenge the apportionment of liability. In relation to the appeal from the dismissal of his cross-claim against the RTA, Mr Royal also sought an order that the RTA contribute 80% of the amount he was ordered to pay Mr Smurthwaite, together with 80% of Mr Smurthwaite's legal costs. One of the main issues on appeal therefore was whether the RTA had been negligent in the design of the intersection.

On 4 April 2007 the Court of Appeal (Santow and Tobias JJA, Basten JA dissenting) allowed Mr Royal's appeal in part. Their Honours found that there was no basis for reapportioning liability as between Mr Royal and Mr Smurthwaite. With respect to the cross-appeal however, the majority held that the RTA had breached its duty of care in failing to remedy a known "black spot". They further found that that Mr Royal's supervening conduct did not break the chain of causation.

Justice Basten however concurred with Judge Phelan's conclusion that any inadequacies in the design of the intersection did not contribute to the accident in a causative sense.

The grounds of appeal are:

- Accepting that the RTA owed Mr Smurthwaite a duty of care and accepting further that RTA breached that duty of care, the harm suffered by Mr Smurthwaite was not caused by that breach.

- The Court of Appeal erred in finding that the damage suffered by Mr Smurthwaite was caused otherwise than by the acts and omissions of Mr Smurthwaite and Mr Royal.

- The Court of Appeal erred in finding that it was entitled to interfere with the findings of the trial judge on causation.

ADAMS v THE QUEEN (M121/2007)

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

Date of judgment: 2 April 2007

Date special leave granted: 5 October 2007

The appellant was found guilty after a trial of one count of possession of a prohibited import, namely 19.927 kilograms of a mixture containing 8.916 kilograms of ecstasy. That amount was substantially in excess of the commercial quantity of that drug.

The Crown case was that one Gojevski arrived in Melbourne from the USA and was closely connected with the importation of two temperature-controlled freight containers, in the floor of which was concealed a substantial quantity of ecstasy. Gojevski was involved in removing the ecstasy from the first container. The second container arrived in December 2003 and it was the Crown case that the appellant came to Melbourne from the USA as a replacement for Gojevski. He located and arranged delivery of the second container to a factory. He had in his possession specifications of the container, including a handwritten reference to a drill bit of a size that would be used to drill away the rivets in the floor of the container where the drugs were located.

In sentencing the appellant, Judge Duckett noted the seriousness of the offending and that the appellant's role in relation to the very large quantity of drugs was a significant one. His Honour noted the importance of deterrence as being the primary sentencing consideration and that imprisonment was likely to be served in Australia, which would impose additional hardship. The appellant was sentenced to 9 years imprisonment with a 7 year non-parole period. In the Court of Appeal one of the appellant's contentions was that the sentencing judge erred in equating the drug ecstasy with heroin for sentencing purposes. The Court (Buchanan, Vincent and Nettle JJA) rejected all of the appellant's grounds.

In this Court, the appellant submits that the Court of Appeal was in error in failing to find that the sentencing judge erred by equating the drug ecstasy with heroin; in particular, that the Court of Appeal erred by applying the reasoning found in *R v Pidoto and O'Dea* [2006] VSCA 185 to the *Customs Act* 1901 (Cth). The sentencing judge handed down the sentence before the judgment of the Court of Appeal in *R v Pidoto and O'Dea* [2006] VSCA 185. The Court of Appeal in *Pidoto* had held that as a matter of statutory construction the harmfulness of a drug was irrelevant to the exercise of the sentencing discretion when sentencing for offences of trafficking in drugs of dependence contrary to the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic). The appellant submits that *Pidoto* was wrongly decided and is inconsistent with a decision of this Court in *Ibbs v The Queen* (1987) 163 CLR 447, in particular that when an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case.

The ground of appeal is:

- The Court below erred in failing to find that the sentencing judge erred by equating the drug ecstasy with heroin, and, in particular, the Court below erred by applying the reasoning found in *R v Pidoto & O'Dea* (2006) 14 VR 249 to the *Customs Act* 1901 (Cth).

DWYER v CALCO TIMBERS PTY LTD (M88/2007)

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

Date of judgment: 8 September 2006

Date special leave granted: 3 August 2007

On 27 March 2000 the appellant, employed as a driver and forklift operator for the respondent, was injured when his right arm was crushed by a crane. He underwent surgery and returned to work but was unable to drive either tray trucks or semi-trailers. He made an application pursuant to s 134AB(16)(b) of the *Accident Compensation Act* 1985 (Vic) ('the Act') for leave to bring proceedings for recovery of pain and suffering damages in respect of the injury suffered as a result of the accident, in the County Court of Victoria. In accordance with the definition contained in s 134AB(37) of the Act, he alleged that he suffered serious injury within paragraphs (a) and (b), namely permanent serious impairment or loss of function of the right upper limb and permanent serious disfigurement.

Judge Millane found that the appellant had suffered a permanent impairment of the right upper limb impacting on his life in the ways described by him, most of which were supported by medical evidence. However, when the consequences to the appellant of that impairment were compared with other cases in the range of possible impairments, her Honour was not satisfied that the impairment or loss of function could be described as at least very considerable, as required by the test established in *Humphries v Poljak* [1992] 2 VR 129. She made a similar finding on the issue of disfigurement.

The appellant appealed to the Court of Appeal (Maxwell P, Eames and Neave JJA). Section 134AD of the Act required the Court of Appeal to decide for itself whether the injury was a serious injury on the evidence. Eames JA (with whom Neave JA concurred) noted that the trial judge had advantages of substantial in-court demonstrations by the appellant of the extent of his disability and that appropriate weight had to be given to the advantages of the trial judge.
His Honour further found that application of the criteria did not depend on any legal principle but rather on the opinion of a judge familiar with a range of conditions within which the particular condition occurs. The Court had to be persuaded that the Judge was wrong in her decision. Essentially, the appellant's complaint was that her Honour failed to give sufficient weight to the facts as she found them to be, and had she given appropriate weight she would have come to a different conclusion. In reaching his conclusion that there was no error in her Honour's decision, Eames JA referred to the fact that the appellant had not received treatment for some four years and that his treating surgeon reported that the fracture had united and that whilst he had been left with some elbow stiffness, it was a remarkably good result overall.

In relation to the disfigurement issue, the appellant argued that the findings made by her Honour must have led to the conclusion that he had a serious disfigurement within the meaning of the Act. Again, Eames JA noted that the assessment of the severity of a disfigurement necessarily involved a judgment. He was not persuaded that her Honour was wrong to conclude that it did not pass the threshold to become a serious disfigurement within the terms of the Act.

The appellant also contended that Judge Millane's reasons for judgment were so inadequate as to fail to demonstrate the process of reasoning which led to her Honour's conclusion. Eames JA noted that there was no relevant factual dispute, nor was it a case where the Judge failed to set out her findings as to the consequences. His Honour noted that the assessment of whether an injury is serious was the daily task of County Court Judges and involved the making of a value judgment when one case is compared to the others in the Judge's experience. It was not a value judgment which needed to be attended by statements of principle, nor did it readily admit of explicit reasoning. In this case, having set out all of the facts on which the comparison with other cases and the assessment as to whether the injury was serious fell to be made, the value judgment could be stated simply and economically. Her Honour's reasons complied with s 134AE of the Act.

The grounds of appeal are:

- The Court of Appeal erred in its interpretation of s 134 AD of the *Accident Compensation Act* 1985 (Vic).

- The Court of Appeal erred in characterising the County Court as a "specialist tribunal".

AUSSIE VIC PLANT HIRE PTY LTD v ESANDA FINANCE CORPORATION LIMITED (M123/2007)

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

Date of judgment: 14 June 2007

Date special leave granted: 5 October 2007

On 3 April 2006 the appellant applied pursuant to s459G of the *Corporations Act* 2001 (Cth) to set aside a statutory demand dated 8 March 2006 by which the respondent sought recovery of some $400,000 under various finance contracts.

On 20 June 2006 Master Efthim dismissed the application and extended time for compliance with the statutory demand until 4 July. On 26 June the appellant appealed against the Master's decision within time and prior to the expiry of the 4 July date. The appeal was accompanied by an application for extension of time for compliance. An appeal from a decision of a Master is a hearing *de novo* of the application to the Master. On 28 July Whelan J dismissed the appeal as incompetent, without considering the merits, on the basis that the time for compliance with the statutory demand had expired and that he had no power to grant an extension of time for compliance after the expiry of the original extension granted by the Master. Whelan J considered that he was bound by the decision of the Court of Appeal in *Buckland Products Pty Ltd v Deputy Commissioner of Taxation* [2003] VSCA 85.

The appellant appealed, foreshadowing a challenge to *Buckland.* A bench of five justices was convened to hear the appeal. On 14 June 2007, the Court of Appeal, by majority, dismissed the appeal. Maxwell P & Neave JA would have allowed the appeal; Chernov, Nettle & Ashley JJA delivered separate reasons for judgment for dismissing the appeal. Maxwell P & Neave JA held that, while there was a series of single judge decisions (commencing *Livestock Traders International P/L v BUI* (1996) 22 ASCR 51) that the power to extend and to further extend the period for compliance cannot be exercised after the time for compliance had expired, those decisions were wrong and ought not be followed. They were of the view that *Buckland* was distinguishable as it was concerned only with the interpretation of s459F (2)(a)(ii) of the *Corporations Act* 2001 (Cth), whereas in the present matter s459F (2)(a)(i) was engaged. Chernov JA also agreed that *Buckland* was distinguishable, but concluded that once the period specified has expired the Court does not have the power to extend it under s459F (2)(a)(i) or at all. Nettle JA considered that the preferable construction of s459F (2)(a)(i) was that an order extending time for compliance may be made after the time has expired, but he was not prepared to depart from previous single judge decisions of the Court in the interests of national uniformity. Ashley JA also considered that *Buckland* was distinguishable. Ashley JA agreed with the reasoning of Maxwell P & Neave JA, but he was of the view that the proper course was that proposed by Nettle JA in dismissing the appeal.

The grounds of appeal include:

- The Victorian Court of Appeal erred in its construction of s459F(2)(a)(i) of the *Corporations Act* 2001 (Cth) by holding that a judge had no power to grant an extension of time within which a company could comply with a statutory demand after the expiry of the original extension period.

ALINTA LGA LIMITED (FORMERLY THE AUSTRALIAN GAS LIGHT COMPANY) & ANOR v MINE SUBSIDENCE BOARD (S520/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 3 May 2007

Date of grant of special leave: 5 October 2007

This matter concerns the construction of sections 12 and 12A of the *Mine Subsidence Compensation Act* 1961 (NSW) ("the Act"). It also concerns the issue of whether decisions of the Mine Subsidence Board ("the Board") give rise to a right of appeal to the Land & Environment Court ("LEC").

The Appellant built and operates a natural gas pipeline in an area subsequently affected by mining subsidence. It undertook necessary preventative work and it then made a claim for compensation.

Section 15(5)(b) of the Act provides that where the Board did not grant approval to damaged improvements, no claim for compensation can be entertained unless a section 15B(3A) certificate is granted. The Board refused to grant that certificate and it also refused to entertain the compensation claim by reason of section 15(5)(b). It also expressed the view that sections 12 and 12A would only apply in respect of subsidence that had already taken place.

Section 12B of the Act provides for appeals to the LEC by persons claiming compensation under sections 12 or 12A:

"against the decision of the Board:

(a) as to whether damage has arisen from subsidence or could reasonably have been anticipated, or

(b) as to the amount of the payment from the fund"

Alinta asserted 3 appellable decisions. These were the refusal to issue the certificate, the refusal to entertain a compensation claim, and the view that section 12A did not apply to anticipated subsidence. At a preliminary hearing on jurisdiction, Biscoe J held that the 3rd matter came within section 12B(a).

The Court of Appeal (Hodgson & Tobias JJA, Handley AJA) unanimously held that the Board's view on anticipated subsidence was not an independent reason and was not relevantly a "decision" pursuant to section 12B. The majority (Hodgson JA dissenting) also held that the decision to refuse the section 15B(3A) certificate, and to refuse the compensation claim in its absence, did not engage any right of appeal under section 12B. Hodgson JA held that section 12B(a) should be given a wider interpretation because the alternative (relying on judicial review) was unsatisfactory.

The grounds of appeal include:

- The Court of Appeal erred in not considering the true legal effect of the decision of the Respondent in "not entertaining" the Appellant's claim for compensation.
- The Court of Appeal erred in not accepting that the reason offered by the Respondent for "not entertaining" the Appellant's claim, namely the non-issue

of a certificate under section 15B(3A), was not a valid one in the event, as the Appellants had pleaded in the LEC proceedings, that the pipeline had been approved, within the meaning of the Act, such that no section 15B(3A) certificate was required.