SHORT PARTICULARS OF CASES
APPEALS

FEBRUARY 2010

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WALLABY GRIP LIMITED v QBE INSURANCE (AUSTRALIA) LIMITED & ANOR (S281/2009)

STEWART v QBE INSURANCE (AUSTRALIA) LIMITED & ANOR (S284/2009)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 66

Date of judgment: 3 April 2009

Date of grant of special leave: 2 October 2009

Mr Angus Stewart died from mesothelioma in October 2007. Before his death, he had commenced proceedings against QBE Insurance (Australia) Limited ("QBE") and Wallaby Grip Limited ("Wallaby Grip") in the Dust Diseases Tribunal. Proceedings against QBE were brought on the basis that it was the workers' compensation insurer of Pilkington Bros (Australia) Limited ("Pilkington"), with whom Mr Stewart was employed in the 1960's. He claimed that he was negligently exposed to asbestos dust and fibre during his employment with Pilkington. Wallaby Grip was the supplier of that asbestos.

Following Mr Stewart's death, the proceedings were continued by his widow (and legal personal representative) Mrs Irene Stewart. On 18 March 2008 Justice Kearns gave judgment in favour of Mrs Stewart (and against QBE and Wallaby Grip) for $356,510.00.

Upon appeal QBE challenged:

a) the finding that Pilkington was negligent;
b) the finding that QBE was liable for more than $40,000 (the then minimum limit of an employer's indemnity policy under the (NSW) *Workers Compensation Act*) ("the insurance issue").

On 3 April 2009 the Court of Appeal (Ipp JA, Gyles AJA and Brereton J) dismissed the appeal on liability. In relation to the insurance issue, Justices Ipp and Gyles agreed that the trial judge had erred in holding that the onus was on QBE to prove that the cover was limited. Justice Brereton found that the trial judge was correct in concluding that QBE's liability under the policy was unlimited.

The grounds of appeal in both matters are identical and they include:

- The New South Wales Court of Appeal erred in law in holding (by majority) that the issue of a monetary limitation on [a] policy of workers compensation insurance for which QBE was responsible ("the Policy") was an issue concerning proof of an essential term of the Policy rather than an issue concerning the proof of the existence of a limitation of liability under the Policy.

- The New South Wales Court of Appeal erred in law in holding (by majority) that Mrs Stewart bore the onus of proving that the Policy was unlimited in amount.

EUROPEAN BANK LIMITED v EVANS (S272/2009)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 67

Date of judgment: 2 April 2009

Date of grant of special leave: 2 October 2009

Mr Evans gave an undertaking as to damages, pending an application for special leave to appeal to this Court. That undertaking was part of arrangements that were ancillary to orders that led to the European Bank Limited ("the European Bank"), a Vanuatu-based corporation, being owed a substantial sum of money for about 10 months. Pursuant to an order of 18 May 2004 ("the Order") that money was held by the Prothonotary and deposited with an Australian bank in a US dollar account. It earned interest accordingly.

The European Bank claimed that, had it held the money, it would have invested it more advantageously than the Prothonotary. (It said that it would have done so by transferring it into euros.) The European Bank then claimed the difference between the amount that it was ultimately paid by the Court and the amount that would have held had it invested the sum itself. On 27 September 2008 Justice Gzell accepted that argument and ordered Mr Evans to pay the difference amounting to US$803,077.71.

Upon appeal, the principal issue was whether Justice Gzell erred in holding that the damages claimed by the European Bank were the natural consequence of the Order.

On 2 April 2009 the Court of Appeal (Basten, Campbell & Gyles JJA) unanimously allowed Mr Evans' appeal. Their Honours held that the European Bank was entitled to just compensation for any loss it suffered due to being owed money for the period in question. All members of the Court however held that Mr Evans should not be liable for the European Bank's inability to obtain speculative profits. Justices Campbell and Gyles also noted that there was nothing to suggest that the European Bank had not obtained a commercial rate of interest on the Prothonotary's deposit.

The grounds of appeal include:

- The Court of Appeal erred in holding that the compensation which, at first instance, Mr Evans was ordered to pay pursuant to his undertaking as to damages given on 18 May 2004, was not a natural consequence of the making of the interlocutory order in respect of which the undertaking was given.

- The Court of Appeal erred in holding that compensation pursuant to the undertaking ought be limited to interest in respect of loss of the use of the money the subject of the interlocutory order when Mr Evans knew that the European Bank, as a bank dealing in foreign currencies as a normal feature of its business, would utilise it to earn income by making profit from currency differentials.

HOGAN v AUSTRALIAN CRIME COMMISSION & ORS (S289/2009)

Court appealed from: Full Court of the Federal Court of Australia [2009] FCAFC 71

Date of judgment: 19 June 2009

Date of grant of special leave: 2 October 2009

This matter concerns the operation and scope of confidentiality orders made under s 50 of the *Federal Court of Australia Act* 1976 ("the Act"). Relevantly, s 50 provides that the Court may make such orders forbidding or restricting the publication of particular evidence as appears necessary to prevent prejudice to the administration of justice.

The Australian Crime Commission ("the Commission") is conducting a special investigation pursuant to s 7C of the *Australian Crime Commission Act 2002* ("the Commission Act"). On 30 September 2005 it issued a notice ("the Notice") pursuant to s 29 of the Commission Act to the Appellant's accountants ("the Accountants"), requiring them to produce documents relating to a number of individuals and entities, including the Appellant. The Notice also contained a notation prohibiting the Accountants from disclosing its existence to the Appellant. That notation was subsequently varied to allow such a disclosure. The Appellant then commenced proceedings against the Commission in which he sought both injunctive and other relief.

Broadly speaking, there were four phases of the proceedings. In the first phase the Appellant established that a number of documents seized by the Commission were prima facie privileged. At the conclusion of this initial phase, the primary judge ruled that the regime of s 50 orders should remain in place until the resolution of the Commission's special investigation. This was in order to preserve the secrecy and integrity of the investigation.

The second phase of the proceedings was devoted to the Commission's contention that the documents were not privileged. It claimed they had been produced in furtherance of a crime or a fraud and that they were subject to the exception to privilege articulated in *Cox v Railton*. The Commission asserted that it had no documents or evidence which adversely affected the inferences which it sought to draw in its *Cox v Railton* case. The Appellant then successfully applied for further and better discovery. At the hearing of this application the Commission indicated that it no longer supported the regime of s 50 orders.

The third phase of the proceedings involved the question of whether the s 50 orders should be vacated. It culminated in Justice Emmett's judgment that all s 50 orders should be vacated. This was the judgment that was appealed to the Full Federal Court.

The fourth phase concerned the substantive relief claimed by the Appellant.

On 19 June 2009 the Full Federal Court (Moore and Jessup JJ, Gilmour J dissenting) dismissed the Appellant's appeal. Justice Gilmour however held that Justice Emmett had erred in failing to conclude that an order under s 50 was necessary in order to prevent prejudice to the administration of justice.

On 24 June 2009 Justice Moore ordered, inter alia, that order 1 made by Justice Emmett on 29 August 2008, insofar as it vacated Order 4 of his (Justice Emmett's) own orders of 1 August 2008, be stayed until further order of this Court.

The grounds of appeal include:

- The Court should have held that, in the events which had happened, it was necessary, in order to prevent prejudice to the administration of justice, for the Court to continue the existing order under s 50 of the Act prohibiting publication of the subject documents.

- The Court erred in failing to hold that the subject documents were inherently confidential such that there is a public interest in preserving the confidentiality of the documents to be weighed against the principle of open justice in determining whether the power to make an order under s 50 is enlivened.

MUSLIMIN v. THE QUEEN (D9/2009)

Court appealed from: Court of Appeal, Supreme Court of the Northern Territory [2009] NTCCA 3

Date of judgment: 29 April 2009

Date of grant of special leave: 2 October 2009

On 14 October 2008 the appellant was convicted by a jury of a charge pursuant to s.101 of the *Fisheries Management Act* 1991 (Cth) ("the Act"), that he had in his possession a foreign boat equipped with nets, traps or other equipment for fishing for sedentary organisms in the waters above the Australian continental shelf not within the Australian Fishing Zone ("AFZ"). Section 101 of the Act renders it a strict liability offence to be in possession or charge of a foreign vessel in the AFZ which is equipped with fishing equipment. Section 12(2) of the Act extends provisions in the Act relating to fishing in the AFZ "to the extent that it is capable of doing so" to fishing for sedentary organisms in or on any part of the Australian continental shelf not within the AFZ. The appellant was the master and in charge of the Indonesian flagged vessel *Segara 07* which, on 23 April 2008, crossed the seabed boundary between Australia and Indonesia and entered waters above the Australian continental shelf, which waters are also within the Indonesian Exclusive Economic Zone ("EEZ"). Shortly thereafter it was detected by *HMAS Broome*, crew from which boarded the *Sagara 07* and found equipment which was capable of being used for the fishing of a class of sedentary organisms called beche-de-mer, also known as trepang. No trepang was found on board, and in an interview with officers of the Australian Fisheries Management Authority the appellant claimed to have been looking for a sister vessel from which he had been separated and that he was not intending to fish for trepang in the area in which he was apprehended.

Prior to trial, a preliminary hearing was conducted to deal with a submission by the appellant that on a true construction of s 12 and s 101 of the Act, the indictment did not disclose an offence. The appellant argued that it would be contrary to international law for Australia to attempt to regulate the activity of possessing, in the Indonesian EEZ, equipment capable of fishing for sedentary species without any consideration of the intention of the possessor of such equipment to use it for harvesting sedentary species contrary to Australian law. The appellant argued that ss 12 and 101 of the Act should be construed narrowly so as to be consistent with Australia's limited sovereignty in that area and so as not to breach international law obligations or interfere unjustifiably with freedom of the high seas and the right of innocent passage. Riley J concluded that the Commonwealth of Australia has sovereignty over the continental shelf and that the Act, including s 101 as extended by s 12, gives effect to that sovereignty and is therefore not inconsistent with international law. Following a trial by jury, the appellant was convicted and fined $1,500.

The Court of Appeal by majority (Martin (BR) CJ and Mildren J; Angel J in dissent) dismissed the appellant's appeal. Mildren J wrote the principal judgment with which Martin (BR) CJ agreed. His Honour observed that the expression, in s 12 of the Act extending the operation of s 101 into the parts of the Indonesian EEZ which overlay the Australian continental shelf, of "capable" referred to practical capability and did not mean within the parameters of established rules of international law as urged by the appellant. In the particular factual situation,

where the appellant's vessel was equipped for fishing sedentary organisms and was found in the waters of the Australian continental shelf, s 101 was "capable" of extending to that situation. Angel J would have allowed the appeal, concluding that there was no real or sufficient nexus between the activities of the appellant (that is, being equipped with fishing equipment capable of, but not solely limited to, harvesting sedentary organisms and navigating an Indonesian vessel in the Indonesian EEZ) and fishing in or on the Australian continental shelf. His Honour held that "capable" includes the capacity of Australian law to apply under and consistent with international law.

The grounds of appeal include:

- The majority of the Court of Appeal erred in concluding that s 101 of the *Fisheries Management Act* 1991 (Cth) ("the FMA") was a provision "in relation to fishing" within the meaning of, and hence was extended by, s 12(2) of the FMA to the waters above the Australian continental shelf outside the Australian Fishing Zone.

- The majority of the Court of Appeal erred in failing to conclude that:

    - "capable" in s 12(2) of the FMA refers, amongst other matters, to Australia's capacity under the United Nations Convention on the Law of the Sea ("UNCLOS") to legislate in relation to the waters above the Australian continental shelf outside the Australian Fishing Zone; and

    - given the limits on Australia's capacity under UNCLOS to legislate in relation to the waters above the Australian continental shelf outside the Australian Fishing Zone, s 101 is not "capable" of extending to the waters above the Australian continental shelf outside the Australian Fishing Zone.

LEHMAN BROTHERS ASIA HOLDINGS LIMITED (IN LIQUIDATION) v CITY OF SWAN & ORS (S362/2009)

LEHMAN BROTHERS HOLDINGS INC v CITY OF SWAN & ORS (S1/2010)

Court appealed from: Full Court of the Federal Court of Australia [2009] FCAFC 130

Date of judgment: 25 September 2009

Date of grant of special leave: 11 December 2009

On 26 September 2008 administrators were appointed to Lehman Brothers Australia Limited ("Lehman Australia"). Following the recommendation of the administrators, a majority of creditors (in both number and value) passed a resolution on 28 May 2009 that Lehman Australia execute a deed of company arrangement ("DOCA"). On 12 June 2009 such a deed was executed by Lehman Australia, the administrators and Lehman Brothers Asia Holdings Limited ("Lehman Asia").

The plaintiffs to the Federal Court of Australia action ("the Councils") are all creditors of Lehman Australia. They submitted that the DOCA purported to extinguish their rights to sue other members of the Lehman Group and that it was therefore invalid.

On 28 July 2009 Justice Rares reserved 8 questions for consideration by the Full Court. On 25 September 2009 the Full Federal Court (Stone, Rares & Perram JJ) answered those questions, including finding that the DOCA was void and of no effect. Their Honours found that its terms were outside the scope of Part 5.3A of the *Corporations Act 2001* (Cth) ("the Act"). They further held that Part 5.3A of the Act did not support the inclusion of a clause effecting third party releases. The Full Federal Court further held that the subject matter, scope and purpose of Part 5.3A limited s 444D of the Act to a construction referring only to claims that creditors have against the company in administration.

Subsequent to the Full Federal Court's decision, Justice Rares made consequential orders. On 2 October 2009 his Honour formally held that the DOCA was void. He also made orders for the winding-up of Lehman Australia. On 21 October 2009 Justice Rares made further orders concerning costs.

The Australian Securities and Investments Commission has given notice that it intends to intervene in both matters.

In matter number S362/2009 the grounds of appeal include:

- The Full Court erred in finding that provisions in a DOCA in the nature of third party or related entity releases were outside the objects and purposes of Part 5.3A of the Act.

In matter number S1/2010 the grounds of appeal include:

- The Full Court erred in concluding that s 447A of the Act did not permit the Court to amend a DOCA so as to empower the administrators to execute on behalf of certain creditors releases of the claims against non-parties to the DOCA, as such releases are within the scope of Part 5.3A of the Act.

JOHN ALEXANDER'S CLUBS PTY LIMITED & ANOR v WHITE CITY TENNIS CLUB LIMITED (S309/2009)

WALKER CORPORATION PTY LIMITED v WHITE CITY TENNIS CLUB LIMITED & ORS (S308/2009)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 114
New South Wales Court of Appeal
[2009] NSWCA 194

Dates of judgment: 3 June 2009 & 23 July 2009

Date of grant of special leave: 3 November 2009

Since 1948 the White City Tennis Club ("the Club") has operated out of the White City site in Paddington ("White City") pursuant to various licences granted by the site's owner, the NSW Lawn Tennis Association ("the LTA"). In April 2004 John Alexander's Clubs ("JACS") submitted a proposal to operate a facility out of the Club. On 26 August 2004 Tennis NSW (the LTA's successor) announced that some of White City would be offered for sale.

On 28 February 2005 the Club and JACS signed a memorandum of understanding ("MOU"). It recited that JACS had been negotiating with Tennis NSW to purchase (or for an option to purchase) the land by White City Holdings ("WCH"). It also stated that JACS was negotiating with a third party, the Trustees of the Sydney Grammar School ("SGS"), whereby JACS and SGS would tender for the purchase of the land by SGS. SGS would then grant JACS (on behalf of WCH) an option to purchase part of that land.

Of importance to the current proceedings was clause 3.7 of the MOU. It provided that JACS agreed that it would seek to obtain an option to purchase the land from Tennis NSW (or the third party) and that if it did so:

1. in the event that JACS exercised the option, that it would exercise the option on behalf of WCH upon which WCH would simultaneously grant JACS a 99 year lease;

2. JACS would seek to procure a further option to purchase for the Club if JACS did not exercise the option from Tennis NSW or the third party; or

3. in the event that the Club was not able to procure the further option and if JACS did not exercise the option, then upon the Club giving notice that it required JACS to exercise the option on its behalf, JACS would proceed to exercise the option.

On 15 April 2005 SGS successfully tendered for the purchase of the land on behalf of both itself and Sydney Maccabi Tennis Limited ("Maccabi"). Part of the land was immediately onsold to Maccabi. On 29 June 2005 SGS, Maccabi, JACS and the Club entered into an agreement ("the White City Agreement") which provided that SGS/Maccabi granted JACS an option to acquire some of the land. It further stated that if it did not do so, the Club would be granted that option. The White City Agreement also provided that JACS and the Club agreed that the

MOU continued and that each would continue to carry out its obligations. In the event of any inconsistency however, the White City Agreement would prevail.

On 12 April 2006 JACS served a notice of termination of the MOU on the Club, stating that the Club had evinced an intention not to be bound by it. The Club rejected this. On 27 June 2007 Poplar Holdings Pty Ltd ("Poplar"), as JACS' nominee, purchased the option and became the land's registered proprietor. Walker Corporation Pty Limited ("Walker") financed Poplar's purchase and an unregistered mortgage was granted in its favour. A charge was also granted to secure Poplar's borrowings.

The Club commenced proceedings against both JACS and Poplar. It alleged that the MOU gave rise to a fiduciary duty on JACS only to exercise the option on the Club's behalf. It further alleged that it was in breach of that duty and that the Club was deprived of its opportunity to exercise the option in default of JACS. The Club also contended that JACS held the option on a constructive trust and that it ought to be conveyed to the Club upon payment of the amount for the option land. It further alleged fraud, unconscionability and breach of the *Trade Practices Act* 1974 (Cth) ("the TPA").

On 21 November 2008 Chief Justice Young in Eq dismissed the Club's application, holding that there was no such fiduciary duty. His Honour also held that the MOU had been repudiated before 12 April 2006 and that Poplar was protected by the indefeasibility provisions of the *Real Property Act 1900* (NSW) ("the RPA"). His Honour further held that there was no unconscionability, nor was there a breach of the TPA.

On 3 June 2009 the Court of Appeal (Giles, Basten and Macfarlan JJA) allowed the Club's appeal. Their Honours found that it would be unconscionable for Poplar to deny the Club's interest in the option land and that Poplar held that land on a constructive trust for the Club. They further found that the constructive trust arose notwithstanding JACS's termination of the MOU. It was also not necessary to base the finding that a constructive trust existed upon a conclusion that there was a fiduciary relationship between the parties. The Court additionally held that Poplar was not entitled to rely upon the indefeasibility provisions of the RPA.

On 5 June 2009 the Club filed a notice of motion, seeking a variation of the orders made on 3 June 2009. On 11 June 2009 Walker sought an order that it be joined as a party, asserting that its interest in the land ranked over the Club's.

On 23 July 2009 the Court of Appeal (Giles, Basten and Macfarlan JJA) delivered judgment on both applications. Justice Macfarlan noted that Walker knew of the litigation at all relevant times and it was now too late for it to be joined as a party. He further found that Walker's claim of having an equitable interest ranking in priority over the Club's could be pursued in separate proceedings. Their Honours did however make certain variations to the earlier order and they also granted a stay.

In matter number S309/2009 the grounds of appeal include:

- The Court of Appeal erred in its conclusion that Poplar held its interest in the land in Folio Identifier 2/1114604 upon constructive trust for the Club.

In matter number S309/2009 a notice of contention has also been filed, the grounds of which include:

- The Court below erroneously failed to decide whether the MOU was terminated on 12 April 2006, or subsequently repudiated, or whether the MOU remained on foot at all relevant times.

In matter number S308/2009 the grounds of appeal include:

- The Court of Appeal erred in holding that Walker's joinder to the proceedings was not necessary to determine the disputes between the Club, Poplar and JACS.

In matter number S308/2009 a notice of contention has also been filed, the grounds of which include:

- In light of the orders made by the Court of Appeal, and the availability to Walker of equity proceedings to seek to protect its claimed interest, Walker was not prejudiced by the dismissing [of] its amended notice of motion.