SHORT PARTICULARS OF CASES
APPEALS

MAY SITTINGS 2010

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FORBES v. THE QUEEN (C10/2009)

Court appealed from: Court of Appeal, Supreme Court of the Australian Capital Territory [2009] ACTCA 10

Date of judgment: 19 June 2009

Date application referred: 12 March 2010

On 30 April 2007 the applicant, Benjamin James Forbes, was convicted after a trial by jury on one count of sexual intercourse without consent. The complainant was unable to identify her attacker. DNA taken from the complainant's clothing and a semen stain on her clothing was characterised by expert witnesses at the trial as providing "extremely strong" evidence that the applicant was the source of that DNA, the likelihood ratio for "extremely strong" being greater than 1 million. The applicant denied the offence and adduced exculpatory evidence including an alibi supplied by his wife.

On appeal, the applicant argued that because conclusions from DNA evidence can only ever be expressed in terms of likelihood, where there is no other incriminating evidence then an accused must be acquitted. The Court of Appeal (Higgins CJ and Besanko and Penfold JJ) rejected this argument. The Court held that there was no rule or principle that evidence of likelihood ratio produced by statistical calculations is inadmissible, and commented that such evidence may be highly probative. The Court concluded that it was open to the jury on the remaining evidence to find the applicant guilty of the offence.

At the hearing on 12 March 2010, the Court (French CJ and Crennan J) ordered that the application be referred for argument as if on appeal.

The questions of law said to justify a grant of special leave to appeal include:

- Whether the verdict was unjust or unsafe because DNA evidence standing alone was not capable of proving the applicant's guilt beyond reasonable doubt;

- Whether the verdict was unjust or unsafe having regard to the exculpatory evidence when the only evidence identifying the applicant was DNA evidence.

KOSTAS & ANOR v HIA INSURANCE SERVICES PTY LIMITED T/AS HOME OWNERS WARRANTY & ANOR (S273/2009)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 292

Date of judgment: 16 September 2009

Date of grant of special leave: 12 March 2010

On 5 August 1999 the Kostas parties engaged Sydney Construction Co Pty Ltd to undertake substantial renovations to their home. By June 2000 disputes had arisen in relation to various matters and the Kostas parties sought to terminate the contract. Shortly thereafter they made a claim on the First Respondent ("HIA") as the insurer responsible for their builder's work. Following refusal of that claim, the Kostas parties commenced proceedings against HIA and the builder in the Consumer, Trader and Tenancy Tribunal ("the Tribunal").

The proceedings against the builder were discontinued, but they were continued against HIA. This was on the issue of whether there had been a lawful termination of the contract. The Tribunal held that the Kostas parties had repudiated the contract with the builder. The Kostas parties then commenced proceedings in the Supreme Court pursuant to section 67 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) ("the Act"), while also invoking the judicial review jurisdiction of the Court under section 69 of the *Supreme Court Act 1970* (NSW). Justice Rothman set aside the decision of the Tribunal while also making certain declarations that the termination of the contract by the Kostas parties had been "lawful and effective". He then remitted the matter to the Tribunal for the hearing and determination of any remaining issues. HIA duly appealed.

The appeal focused on the proper characterisation of section 67 of the Act, in particular, whether a decision “with respect to a matter of law” included a decision with respect to a question of mixed fact and law, whether an appellate court, having established an error of law, is entitled to determine any other question of fact or law or mixed fact and law in order to make appropriate orders disposing of an appeal under section 67 and, whether, in the instant case, the primary Judge identified decisions made by the Tribunal with respect to matters of law.

The Court (Spigelman CJ, Allsop P & Basten JA) allowed HIA's appeal. Their Honours held that the language of the statute indicated that the right of appeal was not intended to be restricted to final orders disposing of proceedings before the Tribunal. They also held that the words "with respect to" were to be construed as limiting the scope of a statutory appeal under section 67 of the Act so as to exclude a decision with respect to a matter of fact. When a decision incorporated a mixture of fact and law, it was therefore necessary to separately identify a legal aspect of that decision in order to bring an appeal.

All Justices also held that an appellate court was not entitled to exercise a jurisdiction which, in permitting a reconsideration of factual issues, travels beyond the specific matter which was the subject of an appeal, namely the decision with respect to a matter of law.

The grounds of appeal include:

The Court of Appeal erred:

- In finding that "a question with respect to a matter of law" in section 67 of the Act is limited to a question of law *stricto sensu*; and
- In failing to find that "a question with respect to a matter of law" in section 67 of the Act may include a question of mixed law and fact.

CGU INSURANCE LIMITED v ONE.TEL LIMITED & ORS (S78/2010)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 282

Date of judgment: 2 October 2009

Date of grant of special leave: 12 March 2010

The appellant ("CGU") issued a directors' and officers' liability policy to indemnify the third respondent ("Greaves") in his capacity as a director of the first respondent ("One.Tel"). In 2001 ASIC commenced proceedings against Greaves in the Supreme Court of New South Wales. On 6 September 2004 the Supreme Court of New South Wales made orders in those proceedings, including orders that Greaves pay compensation to One.Tel in the sum of $20 million and that he pay ASIC $350,000. On or about 30 November 2004 the second respondent ("the Trustee") and Greaves executed a deed of arrangement ("the Deed") pursuant to Part X of the *Bankruptcy Act 1966* (Cth) ("the Act") under which Greaves assigned his rights under the policy to the Trustee. By a notice dated 16 October 2006, the Trustee gave notice to CGU of the assignment to him of Greaves' rights under the policy. Pursuant to section 235(d) of the Act, the Deed terminated on 30 November 2007. CGU refused to indemnify Greaves in relation to the orders made in the ASIC proceedings.

The Trustee issued proceedings in the Supreme Court of New South Wales to enforce Greaves' rights under the policy. McDougall J held that the Trustee did not have the power to maintain the proceedings because the Deed had terminated.

One.Tel appealed to the Court of Appeal (Hodgson & Campbell JJA, Sackville AJA). It had an interest in pursuing the appeal because the Deed provided that the Trustee was to apply amounts received by him under the policy in payment, inter alia, of any liability of Greaves to One.Tel.

The Court of Appeal noted that the primary judge appeared to have considered that the only available sources of power that enabled the Trustee to maintain the proceedings against CGU were section 219 of the Act and clause 4 of the Deed. In his Honour's view, termination of the Deed terminated the Trustee's powers under section 219 and clause 4. The Court of Appeal noted that the Trustee did not, however, rely either on section 219 or clause 4 to support his case against CGU. The proceedings were brought in the Trustee's own name, relying on his legal title to the chose in action constituted by the rights under the policy. The Court found that the assignment of the rights under the policy was effective at law, once the notice of assignment was given to CGU on 16 October 2006, which was before the Deed terminated on 30 November 2007. Legal title to the chose in action carried with it the right to sue CGU in the Trustee's own name. Therefore the Trustee, in pursuing the claim against CGU after the Deed had terminated, had no need to rely on any continuing powers conferred by the Deed. The appeal was upheld.

The grounds of appeal include:

- The Court of Appeal erred in law, in respect of Part X of the Deed under the Act that had terminated on 30 November 2007 pursuant to clause 17(c) and section 235(d), by holding that the former Trustee, David Patrick Watson, was entitled to continue to act as a trustee and/or assignee, in pursuing proceedings to recover alleged property in the nature of a chose in action assigned under clause 2 of the said Deed "to be dealt with by the Trustee in accordance with this Deed".

On 15 April 2010 One.Tel filed a notice of contention, the ground of which is:

- One.Tel supports the reasoning of the Court below that both clauses 9 & 11 of the Deed survived its termination. By grounds 2 & 3 of its notice of appeal, CGU contends that whilst clause 11 of the Deed should survive termination of the Deed, that clause 9 should not. If, contrary to the primary position of One.Tel, the Court below erred in holding that clauses 9 & 11 both survived termination of the Deed, One.Tel contends that the decision of the Court below can be affirmed on the alternative basis that neither clause 9 nor clause 11 survived termination in preference to the construction advanced by the CGU that one of the clauses survived termination but the other did not.

TRAVELEX LTD v COMMISSIONER OF TAXATION (S79/2010)

Court appealed from: Full Court of the Federal Court of Australia [2009] FCAFC 133

Date of judgment: 29 September 2009

Date of grant of special leave: 12 March 2010

This matter raises a question of construction concerning the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act"). On 25 November 2007 Mr Urquhart, an employee of Travelex Ltd ("Travelex"), flew from Sydney to Fiji. After checking-in and clearing Customs, he went to the Travelex counter in the departure hall and purchased F$400 in cash ("the Fijian currency transaction").

Travelex sought a Federal Court declaration that it was exempt from paying GST on the sale of foreign currency to a passenger who had passed through Customs. On 19 December 2008 Justice Emmett rejected that claim.

Upon appeal to the Full Federal Court, the issue was whether the Fijian currency transaction was a supply made in relation to rights, and whether those rights were for use outside Australia. If so it was a GST-free supply by reason of section 38-190(1) of the GST Act. Travelex submitted that the supply of the Fijian currency was a supply "in relation to" the rights that are incidental to being the owner or holder of bank notes. The Commissioner of Taxation ("the Commissioner") however submitted that the phrase "a supply that is made in relation to rights" should be construed as meaning "a supply of rights". It contended that the dominant aspect of the supply in this case was the supply of the actual bank notes, not the rights that flowed from their acquisition.

On 29 September 2009 the Full Federal Court (Stone and Edmonds JJ, Mansfield J dissenting) dismissed Travelex's appeal. The majority agreed with Justice Emmett's conclusion that the relevant supply was the supply of the physical notes. This was despite the fact that those notes were money within the meaning of the GST Act, that they were legal tender in Fiji and that they otherwise carried the incidents as identified by Travelex.

Justice Mansfield however considered that the relationship between the rights to use the Fijian bank notes as legal tender in Fiji and their supply was sufficient to conclude that there was a supply of a thing (the bank notes) which was made in relation to rights which were for use outside Australia. Consequently it was a GST-free supply because it fell within item 4(a) of section 38-190(1).

The grounds of appeal include:

- The Court below erred in holding that the supply of foreign currency in the circumstances of this case was not a supply *"in relation to rights"* within the meaning of Item 4 of the table in section 38-190(1) of the GST Act. The Court should have held that the supply was a "supply in relation to rights" within the meaning of that provision and was therefore a supply of a thing for consumption outside Australia and so was GST-free, pursuant to section 38-190(1) of the GST Act.

HEPERU PTY LIMITED & ORS v PERPETUAL TRUSTEES AUSTRALIA LTD
(S105/2009 & S26/2010)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 84

Date of judgment: 23 April 2009

Date of referral/grant of special leave: 12 February 2010

Between August 2001 and November 2003 an agent ("Mr Cincotta") of the Applicants/Appellants ("the Heperu parties") defrauded them. This involved the drawing and purchasing of cheques by the Heperu parties, their delivery to Mr Cincotta for investment on the Heperu parties' behalf and their use by Mr Cincotta for his own benefit. Perpetual Trustees Australia Limited ("Perpetual") was the trustee company managing a common fund into which Mr Cincotta deposited the cheques. Perpetual however was entirely innocent of the fraud.

The primary judge found that title in the cheques did not pass to Perpetual and that Perpetual had converted the cheques. It was therefore liable in damages to the Heperu parties.

Upon appeal, the issues included:

i) whether Perpetual was liable for the conversion of the cheques;
ii) whether Perpetual was liable in restitution;
iii) whether Perpetual was liable in negligence;
iv) whether Perpetual engaged in misleading or deceptive conduct for which it was liable.

On 23 April 2009 the Court of Appeal (Allsop P, Campbell JA & Handley AJA) unanimously held that Mr Cincotta had the apparent authority to deal with the cheques. Their Honours therefore found that title to the cheques had passed to Perpetual upon their taking of possession of them. They also held that there was no conversion of the cheques by Perpetual. The Court of Appeal further held that the Heperu parties could not succeed in restitution as there was no unjust enrichment by Perpetual.

The Court of Appeal also found that the claim based on negligence failed. This was because there was no duty of care owed by a trustee company managing a common fund to avoid economic loss to potential investors who suffered from their agent's dishonesty. The claim based on misleading and deceptive conduct also failed because there was no relevant misrepresentation and no relevant reliance.

On 20 May 2009 the Heperu parties filed a notice of motion in the Court of Appeal seeking, inter alia, to have the orders made on 23 April 2009 set aside. The Heperu parties claimed that those orders had been given, made, or entered irregularly within Pt 36.15(1) of the *Uniform Civil Procedure Rules* ("the Rules"). They further submitted that Perpetual's representations and procedural defaults prior to the trial were failures to comply with the requirements in section 56(3) of the *Civil Procedure Act* and with various provisions of the Rules so as to attract the Court's powers under section 63(3).

On 2 October 2009 Justices Gummow and Heydon stood this matter out of the special leave list in Sydney, with liberty to the parties to re-list after the conclusion of

the Court of Appeal's proceedings. On 30 November 2009 the Court of Appeal (Allsop P, Campbell JA & Handley AJA) dismissed the Heperu parties' notice of motion as incompetent.

On 21 December 2009 Justice Heydon made orders for the filing of additional documents in this matter. His Honour also ordered that the matter be re-listed for hearing in Sydney on 12 February 2010. On 12 February 2010 Justices Gummow and Heydon granted special leave in relation to certain grounds, referred other grounds into an enlarged bench and dismissed the remaining grounds.

With respect to the application for special leave to appeal (S105/2009), the questions of law said to justify the grant of special leave include:

- The Court of Appeal erred, having found that the there was no actual authority to deliver the cheques and such purported delivery was inconsistent with the rights of the owners, in finding that apparent authority was sufficient to found a delivery of the cheques in the absence of a finding that the relevant Applicant was estopped from denying actual authority to deliver the cheques (not all of which were negoatiable instruments) and, in any event, in the absence of sufficient material to found such an estoppel.

The Respondent has also filed a (proposed) notice of contention, the grounds of which include:

- Mr Cincotta had sufficient actual authority to deliver the cheques for the purposes of the *Cheques Act* ("the Act").

- Nothwithstanding the absence of express protection in the Act, the common law continues to afford protection from an action in conversion to an original payee who takes a cheque bona fide for value and without notice of any irregularity.

With respect to the appeal (S26/2010), the grounds include:

- The Court of Appeal erred in not properly following or applying, and departing from, its own previous decision in *State Bank of New South Wales v Swiss Bank Corporation* (1995) 39 NSWLR 350 without being asked or seeking to overturn that decision and in so doing, wrongly stated the test (departing from the test as expounded in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353) as being that payments are to be taken as on the faith of the receipts when they would not have been made unless the receipts had been recognised in the attendant circumstances as valid and justifying acting on the basis of the receipt, without the additional requirement that there be information from the payer (being the party with a prima facie right to recovery in money had and received) which, if true, would have entitled the payee to deal with the receipt as it did.

The Respondent has also filed a notice of contention, the grounds of which include:

- The Court below should have held that the Appellants' claim for money had and received failed because the Respondent was a mere conduit, trustee or intermediary that paid the relevant funds to its beneficiary and /or paid the money out in accordance with its legal and equitable obligations to do so under an investment contract for value and before notice of the vitiating factor.