SHORT PARTICULARS OF CASES
APPEALS

AUGUST-SEPTEMBER SITTINGS

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PLAINTIFF M61 OF 2010 v THE COMMONWEALTH OF AUSTRALIA & ORS (M61/2010)

Date application referred to Full Court: 20 July 2010

The plaintiff is a citizen of Sri Lanka of Tamil ethnicity who entered Australia, without a visa, at Christmas Island on 2 October 2009. He claimed refugee status on the basis that he faced persecution in Sri Lanka from the Sri Lankan army, other agencies of the Sri Lankan government and paramilitary groups because of his alleged support for the Liberation Tamil Tigers of Eelam (LTTE).

By entering Australia in that manner, the plaintiff became, pursuant to s 14(1) of the *Migration Act* 1958 (Cth)("the Act"), an unlawful non-citizen. He underwent a process of assessment ("the RSA process") to determine whether he was a person to whom Australia had protection obligations under the *Convention relating to the Status of Refugees* 1951. That process was conducted by the fourth defendant ("Lew"), who was an officer of the Department of Immigration and Citizenship. The plaintiff's claim was rejected, and he then applied for an independent merits review of the decision. This review was carried out by the third defendant ("Karas") who was an employee of Wizard People Pty Ltd ("Wizard"). Karas undertook the assessment in accordance with a contract between the Commonwealth and Wizard and by reference to a procedural manual developed by the Department. He also rejected the plaintiff's claim.

The Commonwealth contends that the development of the procedural manual and the execution and maintenance of the contract with Wizard was a non-statutory exercise of the executive power of the Commonwealth under s 61 of the Constitution, and the assessments conducted by Lew and Karas had and continue to have no statutory or other legal effect. The practical consequence of those assessments is that the Department has made no submission to the Minister as to whether or not he should consider exercising the power conferred on him by s 46A(2) of the Act; by operation of s 46A(1) of the Act the plaintiff is incapable of making a valid application for a visa; and by operation of s 198(2) of the Act, he must be removed from Australia as soon as possible.

On 29 April 2010 the plaintiff filed an application for an order to show cause seeking, inter alia, orders in the nature of certiorari to quash the decisions of Lew and Karas, and an order in the nature of mandamus compelling the Minister to personally consider the circumstances of the plaintiff pursuant to ss 46A(2) and 195A(2) of the Act. On 20 July 2010 Hayne J referred the application for consideration by a Full Court.

The grounds of the application include:

- The RSA process fails to comply with, and is inconsistent with, ss 46A(2) and (3) and ss 195A(2) and (5) because it does not enable the Minister to make, and the Minister did not in fact make in respect of the plaintiff, a personal decision whether it is in the public interest for the power in s 46A(2) or the power in s 195A(2) to be exercised;

- In making the review decision the third defendant was required to, but did not, afford procedural fairness to the plaintiff. The third defendant failed to disclose adverse information to the plaintiff and invite comment from the plaintiff on such information;

- In making the RSA decision the fourth defendant misconstrued and failed to apply the Refugee Convention as it is incorporated into Australian domestic law by the Migration Act and Migration Regulations and in particular s 36 of that Act.

The plaintiff and the defendants have filed Notice of a Constitutional Matter under s 78B of the *Judicary Act 1903* (Cth).

PLAINTIFF M69 OF 2010 v THE COMMONWEALTH OF AUSTRALIA & ORS (M69/2010)

Date application referred to Full Court: 20 July 2010

The plaintiff is a citizen of Sri Lanka of Tamil ethnicity who entered Australia, without a visa, at Christmas Island on 2 October 2009. He claimed refugee status on the basis that he faced persecution in Sri Lanka from the Sri Lankan army, other agencies of the Sri Lankan government and paramilitary groups because of his alleged support for the Liberation Tamil Tigers of Eelam (LTTE).

By entering Australia in that manner, the plaintiff became, pursuant to s 14(1) of the *Migration Act* 1958 (Cth) ("the Act"), an unlawful non-citizen. He underwent a process of assessment ("the RSA process") to determine whether he was a person to whom Australia had protection obligations under the *Convention Relating to the Status of Refugees* 1951. That process was conducted by an officer of the Department of Immigration and Citizenship. The plaintiff's claim was rejected, and he then applied for an independent merits review of the decision. This review was carried out by the third defendant ("Zelinka") who was an employee of Wizard People Pty Ltd ("Wizard"). Zelinka undertook the assessment in accordance with a contract between the Commonwealth and Wizard and by reference to a procedural manual developed by the Department. She also rejected the plaintiff's claim.

The Commonwealth contends that the development of the procedural manual and the execution and maintenance of the contract with Wizard was a non-statutory exercise of the executive power of the Commonwealth under s 61 of the Constitution, and the assessments conducted by the officer of the Department and Zelinka had and continue to have no statutory or other legal effect. The practical consequence of those assessments is that the Department has made no submission to the Minister as to whether or not he should consider exercising the power conferred on him by s 46A(2) of the Act; by operation of s 46A(1) of the Act the plaintiff is incapable of making a valid application for a visa; and by operation of s 198(2) of the Act, he must be removed from Australia as soon as possible.

On 24 May 2010 the plaintiff filed an application for an order to show cause seeking, inter alia, orders in the nature of certiorari to quash the decisions to reject the plaintiff's claim to refugee status, and a declaration that 46A of the Act is invalid. On 20 July 2010 Hayne J referred the application for consideration by a Full Court.

The grounds of the application include:

- Section 46A of the Act is not a 'law' within the meaning of s 51 or s 52 of the Constitution;

- Further or alternatively, s 46A purports to confer part of the judicial power of the Commonwealth on the Executive;

- In making the review decision the first defendant (by its officers) was obliged to, (a) determine the plaintiff's application according to law and (b) afford natural justice to the plaintiff. In breach of that obligation, the assessment of whether the plaintiff satisfies the definition in Art 1A(2) of the Refugees Convention was done on the basis that authorities of Chapter III courts on Art 1A(2), including authorities of this Court were, at best, no more than

useful policy guidelines;

- Section 46A(2) and (3) confers a personal discretion on the second defendant;

- By reason of the scheme implemented by the fourth defendant and officers within his Department, the second defendant has been prevented from considering whether to exercise his personal discretion in respect of the plaintiff.

The plaintiff has filed a Notice of a Constitutional Matter under s 78B of the *Judiciary Act 1903* (Cth).

PORT OF PORTLAND PTY LTD v STATE OF VICTORIA (M62/2010)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2009] VSCA 282
Date of judgment:	10 December 2009
Date special leave granted:	23 April 2010

By an agreement in writing dated 15 February 1996 ('the agreement') the Port of Portland Authority ("the Authority"), which administered the Port of Portland, agreed to sell to the appellant the assets and business of the Authority. The respondent was a party to the agreement and liable to carry out the Authority's obligations. Among the assets acquired by the appellant under the agreement were a number of parcels of land in and in the vicinity of the port, amounting to some 115 hectares. Clause11.4 of the agreement provided:

> (a) The State has agreed with the Purchaser that it will effect an amendment to statutes governing the assessment and imposition of land tax to ensure that the unimproved site value used as the basis for assessment of land tax liability for the Real Property excludes the value of buildings, breakwaters, berths, wharfs, aprons, canals or associated works relating to a port.
>
> (b) In the event that, ... the relevant statutory amendments do not become law and, as a result of that the Purchaser is assessed to land tax on the Real Property at a rate higher than would have been the case if the relevant statutory amendments were law, the State will refund or allow to the Purchaser the difference between the two amounts.

On 25 June 1996 the Royal Assent was given to *the State Taxation (Omnibus Amendment) Act* 1996 (Vic) (the Amendment Act). Section 27 of that Act was intended to carry out the respondent's obligations under cl 11.4 of the agreement, in that it contained amendments which were designed to ensure that port improvements were excluded in valuing land. The appellant was assessed for and paid land tax for the years from 1997 to 2001. In 2002 it instituted proceedings in the Supreme Court of Victoria, alleging that it had paid land tax which had been assessed on the basis of the site value which included the value of the port improvements and that this constituted a breach of the respondent's obligations under cl 11.4.

Mandie J held that the clause was unenforceable because the State cannot validly promise to release a person from taxes imposed by Parliament without Parliamentary approval and a promise by the State to return to the taxpayer tax duly payable and collected or an equivalent sum is equally unenforceable.

The appellant's appeal to the Court of Appeal (Maxwell P & Buchanan JA, Nettle JA dissenting) was dismissed. The Court unanimously found that that the amendments which were made by s 27 of the Amendment Act failed to achieve the objective provided for in cl 11.4(a). The majority held that cl 11.4 did not constitute an effective dispensation from the land tax legislation and was invalid. This conclusion was based upon statements made by Rich J in *Magrath v The Commonwealth* (1944) 69 CLR 156, Dixon J in *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1, and Windeyer J in *Placer Development Ltd v The Commonwealth* (1969) 121 CLR 353.

Nettle J agreed with the majority that, upon its proper construction, cl 11.4(b) of the agreement was a covenant to reimburse tax and that, on the present state of the authorities, the better view was that such a covenant is void. He considered, however, that cl 11.4(b) could be severed from the agreement, leaving cl 11.4(a) to operate according to its terms: because severance would affect the extent but not the kind of obligations comprised in cl 11.4(a); and because the obligation to pay provided for in cl 11.4(b) was not an integral element of the obligation to procure legislative amendments provided for in cl 11.4(a).

The grounds of appeal include:

- The Court of Appeal erred in holding that cl 11.4(b) of the asset sale agreement dated 15 February 1996 between the appellant, the respondent and the Port of Portland Authority was unenforceable as a dispensation or exemption from land tax laws contrary to art 12 of the Bill of Rights 1688 (1 Wm & Mary ii c ii) (as applied in Victoria by s 8 of the *Imperial Acts Application Act 1980* (Vic));

- The Court of Appeal should have held that cl 11.4(b) of the Asset Sale Agreement did not confer a dispensation or exemption from land tax laws but provided for an adjustment to the price payable for assets under the Asset sale Agreement, calculated by reference to the appellant's liability to pay land tax on those assets if the Parliament failed to pass legislation reducing that liability.

DICKSON v THE QUEEN (M11/2009); (M102/2010)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2008] VSCA 271
Date of judgment:	8 December 2008
Date referred:	23 April 2010
Date special leave granted:	27 July 2010

The applicant was charged with conspiring with Holmes and Purdy to steal cigarettes. At the conclusion of Crown case at the first County Court trial in 2006, all three co-conspirators made submissions that there was no case to answer. The trial judge ruled that Holmes and Purdy had no case to answer and the jury had entered a directed verdict of acquittal. However the trial judge rejected the submission by the applicant. His Honour also rejected a submission by the applicant that there was then "no one" left with whom the applicant could conspire. The Crown subsequently filed over a further presentment alleging that the applicant had conspired with Holmes, Purdy, Wang and persons unknown to steal the cigarettes. After a second trial by jury in the County Court, the applicant was found guilty on 21 February 2008 of one count of conspiracy to steal and was sentenced to a term of imprisonment of five years and six months with a non-parole period of four years and six months.

The applicant was friends with one Farrell, an employee of the Australian Customs Service (Customs). Customs leased premises owned by a company known as Dominion Group (Dominion) which contained a large quantity of counterfeit cigarettes that had been seized in a Customs operation. The only means of accessing the storage area after hours was through Dominion staff. It was the Crown case that shortly before the theft of a number of pallets of cigarettes from the storage area, the applicant contacted Dominion employees posing as Farrell, creating the impression that a legitimate removal of the stock of cigarettes was being undertaken. Two men involved in the theft, Wang and Liang, gave evidence against the applicant. The Crown also relied on a significant amount of evidence about surveillance and telephone intercepts indicating that there were numerous calls made between the applicant and other alleged co-conspirators relating to the organisation of the theft and sale of the cigarettes. The defence case disputed that it was the applicant who had practised the deception and denied that there had been any conspiracy to steal the cigarettes.

The applicant appealed to the Court of Appeal (Vincent and Weinberg JJA and Robson AJA) against sentence and conviction. He submitted that the primary judge erred in ruling that the evidence relating to Holmes and Purdy was admissible in the trial of the applicant. Their Honours noted that this Court's decision in *R v Darby* (1982) 148 CLR 668 made it clear that it was open to convict one accused before the Court and acquit another who was jointly presented with him, even if they were the only two persons alleged to have participated. The fact that Holmes and Purdy had been acquitted did not of itself mean that no case could be presented against the applicant that he conspired with them. Evidence of Holmes and Purdy's acts and declarations could, subject to the principles set out by this Court in *Ahern v The Queen* (1988) 165 CLR 87, constitute part of the proof of guilt in the applicant's trial. The evidence relating to the activities of Holmes and Purdy was relevant to the issues of the existence of a conspiracy, its nature and

objectives and the applicant's participation and role in it. The admissibility of the evidence was not affected by their acquittal, nor did its reception involve any failure to give full recognition to those acquittals. The remaining grounds of appeal against conviction were also rejected.

On 23 April 2010 this Court, constituted by Gummow, Hayne & Crennan JJ, referred the application for special leave to an expanded bench to be argued as if on appeal.

At the hearing on 27 July 2010 ,the application for special leave was amended to include a further ground, namely "*That the Court of Appeal should have held that the cigarettes referred to in the presentment preferred against the applicant were Commonwealth property and that accordingly a) theft of the cigarettes was not an offence against the law of Victoria and b) the presentment should have been quashed as not disclosing an offence*." The Court granted special leave on that ground and adjourned the hearing of the special leave application to 31 August to be argued together with the appeal.

Notices of Constitutional Matter have been given to the Attorneys-General

The questions of law said to justify the grant of special leave in M11/2009) include:

- Whether it is an abuse of process for the Crown to file a presentment against an accused alleged that that accused conspired with persons who have already been acquitted of the same conspiracy in the same proceedings.

- Whether the Court of Appeal erred in determining that the evidence relating to the acquitted co-conspirators was admissible on the second trial?

- Whether the Court of Appeal incorrectly relied on the Ahern principle [paragraph 57, *Ahern v The Queen* (1998) 165 CLR 87)]

- Whether the Court of Appeal wrongly apply the rule in *Darby*'s case

The ground of appeal in M102/2010 is:

- That the Court of Appeal should have held that the cigarettes referred to in the presentment preferred against the applicant were Commonwealth property and that accordingly

- a) theft of the cigarettes was not an offence against the law of Victoria and

- b) the presentment should have been quashed as not disclosing an offence.

BRITISH AMERICAN TOBACCO AUSTRALIA SERVICES LIMITED v LAURIE & ORS (S138/2010)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 414

Date of judgment: 17 December 2009

Date of grant of special leave: 28 May 2010

Mrs Claudia Laurie is the widow and administratrix of the will of Mr Donald Laurie who died in 2006. In proceedings ("the Laurie proceedings") commenced in the Dust Diseases Tribunal ("the Tribunal"), she pleaded that British American Tobacco Australia Services Limited ("BATAS") had pursued a policy of intentionally destroying documents that tended to prove that its tobacco products could cause lung cancer. Those proceedings came on before Justice Curtis.

In unrelated proceedings between Brambles Australia Limited ("Brambles") and BATAS, *Re Mowbray; Brambles Australia Limited v British American Tobacco Australia Services Limited* [2006] NSWDDT 15 ("*Re Mowbray*"), Justice Curtis was required to determine whether Brambles could adduce privileged evidence to the effect that BATAS had dishonestly destroyed prejudicial documents for the purpose of suppressing evidence in anticipated litigation. On 30 May 2006 his Honour held that it could and admitted the evidence on the basis that the evidence constituted communications “in furtherance of the commission of a fraud” within the meaning of s 125(1)(a) of the *Evidence Act* 1995.

By notice of motion, BATAS then sought an order that Justice Curtis disqualify himself from hearing the Laurie proceedings. On 27 May 2009 his Honour declined to do so.

BATAS subsequently filed two summonses. The first sought leave to appeal from Justice Curtis' refusal to recuse himself pursuant to s 32(4) of the *Dust Diseases Tribunal Act* 1989. In the second, BATAS sought an order under s 69 of the *Supreme Court Act* 1970 prohibiting Justice Curtis from further hearing or determining the Laurie proceedings.

On 17 December 2009 the Court of Appeal (Tobias & Basten JJA, Allsop P dissenting) dismissed both summonses. As to whether Justice Curtis had erred in not disqualifying himself on the grounds of apprehended bias, Justices Tobias and Basten held that he had not. Their Honours found that a fair-minded lay observer would not reasonably apprehend that Justice Curtis might not bring an impartial and unprejudiced mind to the Laurie proceedings. President Allsop however disagreed, finding that Justice Curtis had created an apprehension of bias arising out of *Re Mowbray*.

The grounds of appeal include:

- The majority of the Court of Appeal erred in declining to make an order prohibiting the Fourth Respondent, his Honour Judge Curtis, from hearing proceedings 6057 of 2006 in the Tribunal between the Appellant (as defendant) and the First Respondent (as plaintiff) on the grounds of apprehended bias arising by reason of his Honour's judgment in *Re Mowbray*.

FINCH v TELSTRA SUPER PTY LTD (M5/2010)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2009] VSCA 318

Date of judgment: 23 December 2009

Date referred: 23 April 2010

In 1988, the applicant underwent gender reassignment surgery to become a woman. She was employed by Telstra from 1 October 1992 and became a member of the superannuation fund administered by the respondent. By 1996, the applicant realised that the gender reassignment was a mistake and resumed his male identity. This led to him suffering severe depression. He went on sick leave from 30 June 1996 to 24 March 1997. Following his return to work, he suffered further severe depression. He ultimately accepted an offer of redundancy with his employment formally ceasing on 23 January 1998. He began receiving a disability support pension in March 1998. He attempted to return to work twice. First, for a month in February to March 1999 with Foxtel and for a period of six months part-time work with Qantas ending in May 2000. He was not employed thereafter. The applicant applied for a total and permanent invalidity ("TPI") benefit under the trust deed but this was rejected twice by the respondent. He commenced proceedings in the Supreme Court of Victoria seeking declarations that the respondent's determinations were void and of no effect and that he was entitled to a TPI benefit. Byrne J found that the second determination was void because the respondent did not comply with its obligations of good faith and genuine consideration.

The respondent's appeal to the Court of Appeal (Buchanan and Redlich JJA and Hansen AJA) was successful. The Court's decision rested largely on the interpretation of clauses 2.1.2 and 2.3.3 of the trust deed. Clause 2.3.3 relevantly provided "[i]f a member ceases to be an employee . . . because of total impairment invalidity, there is payable to the member from the fund a lump sum benefit . . .". A TPI was defined in cl 2.1.2(a) as where "the member has been continuously absent from all active work for a period of at least six months . . ."

The Court found that the primary judge erred in concluding that the period of at least six months absence from "active work" referred to in cl 2.1.2(a) was not limited to work at Telstra. The applicant had not been continuously absent from active work at Telstra for a period of at least six months at the time he ceased to be an employee of Telstra. It followed the definition of "TPI" was not satisfied at the time the applicant ceased to be an employee of Telstra. He therefore did not cease to be an employee because of a TPI, as required by cl 2.3.3 and accordingly, he was not eligible for a TPI benefit.

Whilst strictly unnecessary to do so, the Court also considered the respondent's challenge to the finding that it had not complied with its obligations of good faith and genuine consideration in that it did not investigate the circumstances in which the applicant ceased employment at Telstra and did not inquire into the circumstances of his employment at Qantas. The Court noted, referring to the decision in *Karger v Paul* [1984] VR 161, that the mere fact that a trustee makes an error as to a fact or does not make all inquiries that may have been open was not sufficient reason for the Court to set aside a determination that was made in good faith, upon real and genuine consideration and for a proper purpose. However, if gaps and errors in the trustee's information and belief upon matters relevant to the

exercise of the discretion were sufficiently extensive, it could sustain an inference that the trustee had not been in a position to give a real and genuine consideration to the exercise of the discretion. After reviewing the evidence, the Court concluded that there was nothing that required the respondent to make the further investigations which the primary judge considered to be necessary.

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

- in construing the provisions of a superannuation fund trust deed in the context of a claim for disability, to what extent if any should the Court of Appeal have applied the doctrine of construction of contra proferentem and attempted to adopt a practical and purposive approach to the construction?

- to what extent (if any) should the criteria for seeking to disturb a decision of a trustee, as described in *Karger v Paul* [1984] VR 161, be applied in the context of a disability claim on a superannuation trust?

On 23 April 2010 Gummow and Crennan JJ ordered that this application be referred to a Full Court for argument as on an appeal.