SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 30 AUGUST 2011

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SPORTSBET PTY LTD v STATE OF NEW SOUTH WALES & ORS (S118/2011)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCAFC 132

Date of judgment: 17 November 2010

Date of grant of special leave: 11 March 2011

Sportsbet Pty Limited ("Sportsbet") is a Northern Territory-based bookmaker which operates via the internet and telephone. It takes bets on the outcome of horse and harness races in New South Wales. Racing New South Wales and Harness Racing New South Wales (collectively known as the "NSW Racing Authorities") are the regulators of such races in New South Wales.

In 2006 amendments were made to the *Racing Administration Act* 1998 (NSW) ("the RA Act") and the *Racing Administration Regulation* 2005 ("the Regulations"). Those amendments established a scheme ("the Scheme") whereby the NSW Racing Authorities were authorised to grant approvals to wagering operators to use "race field information". (This included the names of the entrants in horse and harness races in New South Wales.) Without such approval, operators were prohibited from using race field information in their wagering operations.

The NSW Racing Authorities were also authorised to impose a fee as a condition of the grant of the necessary approval. They then imposed a fee of 1.5% of the total of all bets placed with any wagering operator on New South Wales horse and harness races. That fee was payable regardless of the domicile of the operator. Sportsbet paid it under protest.

Sportsbet commenced proceedings, challenging the validity of the Scheme. It submitted that that fee placed a burden on interstate trade from which almost all New South Wales based wagering operators were effectively exempted. Sportsbet claimed that that fee was protectionist and was therefore incompatible with section 49 of the *Northern Territory (Self Government) Act* 1978 (Cth) ("the NT Act"). That section follows the provisions of section 92 of the Constitution by providing that "trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

The primary judge, Justice Perram, found that Sportsbet's submission was well-founded. His Honour held that the fee was an unlawful protectionist burden which discriminated against Northern Territory based operators. Justice Perram also found that Sportsbet was entitled to a refund of the money it had paid under protest.

Upon appeal, the NSW Racing Authorities submitted that Justice Perram had erred in making findings as to the existence of "agreements, arrangements or understandings" upon which his conclusion of invalidity depended. Sportsbet however argued that his Honour's decision could be maintained on the basis of the Scheme's fundamentally protectionist nature. Sportsbet also filed its own appeal, seeking declarations that sections 33 and 33A of the RA Act and Part III of the Regulations were invalid. It also sought leave to appeal from an interlocutory decision of Justice Perram whereby his Honour refused to vary the orders in his primary judgment or to permit Sportsbet to amend its pleadings.

On 17 November 2010 the Full Federal Court (Keane CJ, Lander and Buchanan JJ) allowed the NSW Racing Authorities' appeal and set aside the judgment below. Their Honours also dismissed Sportbet's appeal and notice of motion.

The grounds of appeal include:

- The Full Court erred by failing to hold that the legal and practical effect of sections 33 and 33A of the RA Act and Part III of the Regulations (the impugned provisions) was to impose a discriminatory burden of a protectionist kind on Sportsbet and other interstate wagering operators by prohibiting Sportsbet from using an essential element of its interstate trade and commerce, namely NSW race field information, and making that prohibition subject to an unfettered discretion that was vested in the relevant racing control body.

On 7 April 2011 the NSW Racing Authorities filed a summons, seeking leave to file a notice of contention out of time. The grounds in that proposed notice include:

- To the extent that the arrangements relied on by the Appellant consisted of, or were consequential upon, contractual arrangements involving private parties, they were outside the purview of section 49 of the NT Act.

On 19 April 2011 a notice pursuant to section 78B of the *Judiciary Act* 1903 (Cth) was filed in this matter. The Attorneys-General for Victoria, Queensland and Western Australia have advised the Court they will be intervening, while TAB Limited and Tabcorp Holdings Limited have filed a summons seeking leave to intervene.

BETFAIR PTY LIMITED v RACING NEW SOUTH WALES & ORS (S116/2011)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCAFC 133

Date of judgment: 17 November 2010

Date of grant of special leave: 11 March 2011

This matter concerns section 92 of the Constitution which provides that "trade, commerce, and intercourse among the States...shall be absolutely free".

Betfair Pty Limited ("Betfair") is a betting exchange based in Hobart. It provides wagering services to punters in New South Wales and elsewhere. It is common ground that Betfair is engaged in interstate trade. Racing New South Wales and Harness Racing New South Wales (collectively known as the "NSW Racing Authorities") are the regulators of horse and harness racing in New South Wales. TAB Limited ("TAB") is the largest wagering operator in New South Wales.

In 2006 the New South Wales parliament passed legislation which allowed the NSW Racing Authorities to impose a race field fee ("the Fee") as a condition for the use of New South Wales race field information by wagering operators. Such information was vital for Betfair's business in respect of races held in New South Wales. The Fee was fixed at the rate of 1.5% of the "wagering turnover" of the wagering operator. It was imposed uniformly on all wagering operators, irrespective of their domicile.

Betfair brought proceedings against the NSW Racing Authorities alleging that the Fee was discriminatory. It also submitted that its practical effect was to protect New South Wales based wagering operators, particularly TAB, from interstate competition. Betfair argued that the Fee discriminated against it as a low-margin operator relative to a higher-margin operator such as TAB. It further submitted that the Fee contravened section 92 of the Constitution.

The primary judge, Justice Perram, agreed that the Fee discriminated against Betfair in that the impost was a greater percentage of its commission than that of TAB. His Honour however concluded that Betfair had not established that this differentiation was "protectionist discrimination" so as to engage the operation of section 92 of the Constitution. Accordingly, his Honour dismissed Betfair's claim. On appeal, Betfair argued that Justice Perram should have concluded that the Fee was of a protectionist character.

On 17 November 2010 the Full Federal Court (Keane CJ, Lander and Buchanan JJ) dismissed Betfair's appeal. Their Honours found that Justice Perram was correct to conclude that Betfair had failed to demonstrate a breach of section 92 of the Constitution. His Honour was also correct to conclude that Betfair had failed to establish that the Fee deprived it of a competitive trade advantage.

The grounds of appeal include:

- The Full Court erred in failing to find that for the purposes of section 92 of the Constitution, each of the impugned fee conditions imposed a

discriminatory burden of a protectionist kind on the interstate trade of Betfair.

On 24 March 2011 a notice pursuant to section 78B of the *Judiciary Act* 1903 (Cth) was filed in this matter. The Attorneys-General for the Commonwealth, Victoria, Queensland, South Australia & Western Australia have advised the Court they will be intervening.

On 7 April 2011 the NSW Racing Authorities filed a summons, seeking leave to file a notice of contention out of time. The grounds in that proposed notice include:

- The impugned fee was not proven to discriminate against Betfair or interstate trade.

- Betfair led no expert economic evidence, or other appropriate evidence, to seek to establish that gross revenue (as defined by Betfair) was the only criterion, or at least a better criterion than turnover, by which to set a fee for the use of a product which did not impede competition or burden interstate trade.

STOTEN v. THE QUEEN (B24/2011)
HARGRAVES v. THE QUEEN (B28/2011)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2010] QCA 328

Date of judgment: 23 November 2010

Date of grant of special leave: 13 May 2011

On 8 March 2010 after a trial by jury, each of the appellants were convicted of one count of conspiracy to dishonestly cause a loss to the Commonwealth, and were acquitted of one count of conspiracy to defraud the Commonwealth. They were each sentenced to six and a half years' imprisonment with a non-parole period of three years and nine months. The appellants, together with the brother of Mr Hargraves (acquitted on identical counts) were directors and shareholders of a company ("PDC") which produced local phone directories. PDC used a Chinese company, QH Data, to compile data for incorporation into PDC products. The Crown alleged that the appellants agreed to make false representations to the Commonwealth as to the allowable tax deductions of PDC. The agreement was implemented by a scheme which involved PDC entering into an agreement in 1999 devised by Strachans (a Swiss accounting firm) whereby instead of QH Data rendering its invoices to PDC it would render them to Amber Rock Pty Ltd (a company incorporated in the British Virgin islands). Amber Rock would inflate the amount of each invoice by an amount specified by one of the appellants and forward it to PDC. PDC would then pay the total invoiced amount to Amber Rock. Amber Rock would pay QH Data the amount invoiced by it and pay the balance into trusts from which distributions would be made into bank accounts held by the appellants. Those accounts would be accessed by the appellants through withdrawals from automatic teller machines in Australia. In its 2000 to 2004 tax returns, PDC claimed tax deductions for the inflated amounts. The scheme continued to operate until, in mid-2005 as part of Operation Wickenby, the appellants' offices and homes were raided by the Australian Crime Commission and the Australian Federal Police. The appellants' defence was that, based on professional advice they had received, they believed at all times that the scheme was a legitimate means of tax minimisation, and a critical basis for this belief was that they did not have control over the structure and, in particular, the disposition of the moneys paid to Amber Rock and the trusts.

The Court of Appeal dismissed the appeals against convictions but allowed the appeals against sentence. Muir JA gave the principal judgment of the Court, with which Fraser JA and Atkinson J agreed. Muir JA rejected the appellants' argument that the trial judge misdirected the jury as to the belief about the legitimacy or unlawfulness of the scheme by leaving open to the jury the rejection of such a belief by reference to "another possibility" not raised by either the prosecution or the defence. Muir JA found error in the trial judge's direction to the jury that they may evaluate evidence on the basis of the interest of a witness in the outcome of the trial. However, her Honour concluded that the evidence adduced by the Crown was overwhelming and applied the proviso.

The grant of special leave to appeal was limited to a single ground of appeal. Notices pursuant to s 78B of the *Judiciary Act* 1903 (Cth) have been filed in each appeal.

The ground of appeal for which special leave was granted is:

- In applying the proviso, the Court of Appeal did not take into account:
    - whether the “interest” direction constituted a significant denial of procedural fairness as described in *Weiss*;
    - whether, given that these were offences under Commonwealth law, the provisions of s 80 of the *Constitution* are inconsistent with the application of the proviso.

HANDLEN v. THE QUEEN (B26/2011)
PADDISON v. THE QUEEN (B27/2011

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2010] QCA 371

Date of judgment: 23 December 2010

Date special leave granted: 13 May 2011

The appellants were, on 18 December 2008, found guilty of several drug offences: Dale Handlen of two counts of importing and one count of attempting to import a commercial quantity of border controlled drugs, and one count of possessing a commercial quantity of border controlled drugs; and Dennis Paddison of two counts of importing a commercial quantity of border controlled drugs and one count of attempting to possess a commercial quantity of border controlled drugs. They were tried with a third co-offender ("Kelsey Nerbas") who pleaded guilty during the trial, and a fourth co-offender ("Matthew Reed") had pleaded guilty prior to trial. The four offenders had been involved in two shipments in computer monitors from Canada of more than 135 kg of cocaine and over 121,000 of mixed ecstasy and methamphetamine tablets. The Crown case against the appellants was presented to the jury, and the jury was instructed by the trial judge, on the basis that the appellants, together with the two co-offenders, had all committed acts by which they together imported the drugs. At the time, the *Criminal Code* 1995 (Cth) ("the Code") did not contain s 11.2A (joint commission of offences), only s 11.2 (aid, abet, counsel or procure). The appellants appealed against their convictions, arguing that they had been convicted on the basis of a form of criminal liability not then known under the *Code* which at the time contemplated an offence of importation committed either as a principal or as an aider or abettor of a principal offender.

The Court of Appeal (Holmes, Fraser and White JJA) agreed but dismissed the appeal after applying the proviso. Holmes JA delivered the principal judgment of the Court. Her Honour held that the appellants could only be criminally responsible as aiders under s11.2 of the *Code*, which was not how the Crown case was put to the jury nor were the trial judge's directions to the jury consistent with that basis of criminal responsibility. However, her Honour concluded that the proviso should be applied, finding that the Crown case was extremely strong and that the guilt of the appellants was established beyond reasonable doubt. Her Honour did not regard the absence of reference to accessorial liability by the trial judge in his directions to the jury as deflecting the jury from "the true issue between the Crown and the appellants; that is, whether the latter did things to advance importation of drugs into Australia, with that intention". Her Honour rejected the appellants' argument that the errors at trial were so fundamental that the proviso could not operate, and the appellants' argument that the fundamentals of trial by jury under s 80 of the *Constitution* did not exist where the jury had not made a finding on the basis necessary to establish guilt (that is, as to aiding and abetting, rather than as to joint criminal enterprise).

The grant of special leave to appeal was limited to a single ground of appeal. Notices pursuant to s 78B of the *Judiciary Act* 1903 (Cth) have been filed in each appeal.

The ground of appeal for which special leave was granted is:

- The jury were not directed, in relation to counts 1 and 4 on the indictment, to return a verdict on the essential elements of accessorial criminal liability under s 11.2 of the Criminal Code (Cth) with the result that:

    - There was a substantial miscarriage of justice in the convictions on counts 1 and 4 and the proviso in s 668E(1A) of the Criminal Code 1899 (Qld) could not apply;

    - the application of the proviso to the convictions on counts 1 and 4 was excluded by s 80 of the *Constitution* as the trial lacked the essential elements of trial by jury;

    - there was a substantial miscarriage of justice in the convictions on counts 2 and 3 on the indictment.

BBH v. THE QUEEN (B76/2010)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2007] QCA 348

Date of judgment: 19 October 2007

Date referred: 13 May 2011

This application for special leave to appeal was referred to an enlarged Full Court for hearing as on appeal.

After a trial by jury, the applicant was convicted of one count of maintaining an unlawful sexual relationship with a child under 16 years of age who was his daughter and under his care, four counts of indecent treatment of a child under 16 years of age who was his daughter and under his care, and four counts of sodomy of a child under 16 years of age who was his daughter and under his care. He was found not guilty on three counts of indecent treatment. He was sentenced to 10 years' imprisonment on each count, to be served concurrently. The trial judge admitted evidence from the complainant's brother ("W") who gave evidence that when he, the complainant and the applicant were on a camping holiday he returned to the campsite to find the complainant undressed from the waist down and bent over with the applicant's hand on her waist and his face close to her bottom. W agreed that the incident could have been consistent with the applicant examining the complainant for a bee sting or ant bite. The complainant gave no evidence about this incident.

The Court of Appeal dismissed the applicant's appeal against conviction. Keane JA (as his Honour then was) gave the judgment of the Court, with which Holmes JA and Lyons J agreed. The applicant contended that the evidence of W should not have been admitted because it was equivocal, and that the trial judge had not given an adequate warning as to the use that could be made of that evidence. Keane JA rejected this argument, finding that W's evidence was relevant to the issue of whether there was a sexual attraction on the part of the applicant toward the complainant and therefore to the relationship between the applicant and the complainant and to the context in which the particular charged offences occurred. His Honour also held that W's evidence tended to establish the maintaining offence, and that the trial judge's direction was sufficient to ensure that the jury understood that they could not act on W's evidence unless they were satisfied that the incident did occur and that it did not have an innocent explanation.

The grounds of appeal in the draft notice of appeal include:

- Whether the Court of Appeal erred when it held that evidence of an event, the source of which was a witness who proffered an innocent explanation for that event, could be used in proof of an unnatural relationship between the applicant and the complainant, who gave no evidence about any such event;

- In *HML v. The Queen* [2008], differing views were expressed about the effect of this Court's decision in *Pfennig v. The Queen*. Does the test for admissibility proposed in *Pfennig* apply to evidence of discreditable conduct? If so, is such a test necessary? Does it have any "real practical application"?

TASTY CHICKS PTY LIMITED & ORS v CHIEF COMMISSIONER OF STATE REVENUE (S218/2011)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 326

Date of judgment: 4 January 2011

Date of grant of special leave: 10 June 2011

The issue in this case is the proper characterisation of the Supreme Court's role in reviewing the decisions of the Chief Commissioner of State Revenue ("the Commissioner") concerning the de-grouping of companies for payroll tax purposes, pursuant to ss 97 and 101 of the *Taxation Administration Act* 1966 (NSW) ("the Administration Act"). Is it an appeal in "the right and proper sense", or is it a hearing de novo?

The Appellants run a diverse array of businesses which involve; chicken meat processing, administrative services, transportation and the leasing of premises. Between 2002 and 2007 the Commissioner issued a series of assessments that grouped them together under s 16C of the Administration Act. The Appellants subsequently challenged the decision not to de-group them for any of the assessment periods.

On 1 October 2009 the Appellants' review was allowed by Justice Gzell, who held that he was entitled to re-exercise the Commissioner's discretion concerning the de-grouping.

On 4 January 2010 the Court of Appeal (Giles, Macfarlan JJA and Handley AJA) allowed the Commissioner's appeal. Their Honours held that an appeal under s 97 of the Administration Act (in respect of a decision not to de-group) is an appeal in "the right and proper sense". Accordingly, the Court must not consider the matter by way of a hearing de novo.

The grounds of appeal include:

- The Court of Appeal erred when it overruled the decision of the primary judge in *Affinity Health Limited v Chief Commissioner of State Revenue (NSW)* (2005) NSWSC 663, insofar as that decision held that the Supreme Court had, first, the power to undertake a full review on the merits of all of the decisions of the Commissioner under s 97 of the Administration Act, and secondly, the power under s 101(1) of the Administration Act to re-exercise those statutory discretions of the Commissioner which depend on his state of mind.

- The Court of Appeal erred in failing to consider whether the principles enunciated in *House v The King* (1926) 55 CLR 499 at 504-505 apply in an appeal from proceedings under section 97 of the Administration Act involving the review by the Supreme Court of a discretionary determination by the Commissioner.