SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 4 SEPTEMBER 2012

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STANFORD v STANFORD (P23/2012)

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

Date of judgment: 21 October 2011 and 19 January 2012

Date of grant of special leave: 22 June 2012

This appeal raises a question as to whether the Family Court erred in holding that it had power under s 79 of the *Family Law Act* 1975 (Cth) ("the Act") to order the provision of a substantial capital sum by a husband to his late wife's estate in circumstances where the parties remained married at the time of the wife's death and where, there was no dispute or controversy between the parties relating to property and the wife during her lifetime personally made no claim for property settlement or evinced any intention to make a claim.

The parties in this matter were married in 1971. It was a second marriage for them both. In October 2011 the wife was 89 years old and the husband was 87. On 30 December 2008 the wife suffered a stroke and was admitted to a care facility. On 17 August 2009 she filed an application for property settlement. She sought an equal division of property. The application was brought on her behalf by her case guardian. The husband sought orders that the wife's application be dismissed. The thrust of the wife's case was that a payment of a sum of money was sought on her behalf to provide for her financially in the future. The husband's case was that the wife's needs were adequately met and to the extent that they were not he would maintain her.

The Magistrate made orders that the husband pay to the wife the sum of $612,931 within 60 days and that upon payment the wife's interest in the former matrimonial home vest with the husband, as well as all personal property, bank accounts and household contents in the possession or name of the husband and that the husband's interest in the personal property and bank accounts in the possession or name of the wife be deemed the wife's absolutely.

The husband appealed. The appeal was heard by the Full Court of the Family Court on 13 April 2011. On 14 September 2011 the wife died. On 21 October 2011 the Full Court allowed the appeal and set aside the Magistrate's orders. The Court held that the Magistrate had erred in determining that the wife needed a sum of money to provide for her future financially or that the level of her care would improve by the making of an order for property settlement.

Following the wife's death both parties submitted that the Full Court should re-exercise the discretion. The Court delivered its decision on 19 January 2012 and ordered that the husband, by his case guardian, pay to the personal representatives of the wife the sum of $612,931 upon the death of the husband or at such earlier time as may be determined by the case guardian.

The appellant seeks leave to rely on an amended notice of appeal, the grounds of which include:

- The Full Court erred in holding that [it] had power under s 79 of the Act to order that the appellant pay a substantial capital sum to his late wife's estate in circumstances where:

    - Until the death of the wife the marital relationship was still subsisting and it was a happy and loving relationship; and,
    - The wife's daughter as her case guardian initiated and prosecuted a claim on behalf of the wife.

The appellant has filed a notice of a constitutional matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth). The Attorney-General of the Commonwealth of Australia, the Attorney-General for New South Wales and the Attorney-General for Western Australia are intervening in this appeal.

THE PUBLIC SERVICE ASSOCIATION & PROFESSIONAL OFFICERS' ASSOCIATION AMALGAMATED OF NSW v DIRECTOR OF PUBLIC EMPLOYMENT & ORS (S127/2012)

Court appealed from: Industrial Court of New South Wales
[2011] NSWIRComm 143

Date of judgment: 31 October 2011

Special leave granted: 11 May 2012

On 7 March 2011 the Public Service Association and Professional Officers' Association Amalgamated of NSW ("the PSA") applied to the Industrial Relations Commission of New South Wales ("the Commission") for new awards that would increase the salaries of certain NSW public sector employees. A hearing of the application was scheduled to commence on 1 August 2011.

On 17 June 2011 the *Industrial Relations Act* 1996 (NSW) ("the Act") was amended by the insertion of both a new section, s 146C, and a new sub-section, s 105(2). Both amendments were effected by the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* 2011 (NSW) ("the Amendment Act"). Section 146C requires the Commission to give effect to certain policies when it makes (or varies) an award or order about the employment conditions of public sector employees. Such policies are those which the NSW government declares (by regulation) to apply to a matter before the Commission. Section 105(2) stipulates that a contract is not unfair (under Part 9 of the Act) merely because a provision in it gives effect to a policy declared under s 146C of the Act.

On 20 June 2011 the *Industrial Relations (Public Sector Conditions of Employment) Regulation* 2011 ("the Regulation") was made. It was declared to be a government policy for the purposes of s 146C of the Act. The Regulation capped public sector salary increases at 2.5% (unless offsetting cost savings were made). The PSA applied for a declaration that the Amendment Act, or alternatively the Regulation, was invalid. Certain types of matter, such as the PSA's application, are heard by judicial members of the Commission sitting as the Industrial Court of New South Wales ("the Industrial Court").

On 31 October 2011 the Full Bench of the Industrial Court (Walton, Kavanagh & Backman JJ) unanimously dismissed the PSA's application. Their Honours held that the Amendment Act was not invalid, as it did not operate upon the Industrial Court's exercising of judicial power. The Full Bench found that the terms of s 146C clearly restricted its operation to the Commission, especially since s 146C(5) states that the section does not apply to the Industrial Court. Their Honours held that s 105(2) merely confines the Industrial Court's pre-existing statutory jurisdiction with respect to unfair contract claims. They further held that nothing in the Amendment Act fetters the adjudicative process undertaken by the Industrial Court in proceedings for the enforcement of Commission determinations (even if s 146C had restricted the Commission when it made its determination). The Full Bench also found that the Regulation was not invalid, as it was authorised by the Act. This was because s 146C permits the making of such regulations, and the Regulation's purpose is in accordance with that section.

On 18 May 2012 the PSA filed a Notice of a Constitutional Matter under s 78B of the *Judiciary Act* 1903 (Cth). The Attorneys-General of Victoria, Queensland, South Australia and Western Australia have all intervened in this matter.

The grounds of appeal include:

- The Industrial Court erred in finding that the Amendment Act was not invalid by reason that it undermines the institutional integrity of the Commission when constituted as the Industrial Court.

- The Industrial Court erred in finding that s 146C(5) of the Act is a complete answer to the proposition that the Amendment Act undermines the institutional integrity of the Industrial Court.

WESTFIELD MANAGEMENT LTD v AMP CAPITAL PROPERTY NOMINEES LTD & ANOR (S181/2012)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 386

Date of judgment: 14 December 2011

Special leave granted: 22 June 2012

The KSC Trust ("the Trust") is a managed investment scheme registered under Part 5C.1 of the *Corporations Act* 2001 (Cth) ("the Act"). Its trustee is AMP Capital Investors Ltd ("AMPCI"). The Trust is solvent and its principal asset is the Karrinyup Regional Shopping Centre ("the shopping centre") in Perth. The unitholders of the Trust are Westfield Management Ltd as trustee for the Westart Trust ("Westfield") and AMP Capital Property Nominees Ltd ("AMPCN") as nominee of UniSuper Ltd as trustee for the UniSuper superannuation fund ("UniSuper"). Westfield holds one-third of the units and UniSuper holds two-thirds. AMPCI, AMPCN, UniSuper and Westfield are also parties to a joint venture agreement ("the Agreement"). Clause 10.1(a) of the Agreement provides that the shopping centre not be sold without the written consent of the unitholders. Clause 16.2 requires the unitholders to exercise their voting rights under the Trust Deed so as to most fully give effect to the Deed's provisions. In August 2011 AMPCI (at the request of AMPCN) scheduled a meeting under s 601NB of the Act for the unitholders to vote on an extraordinary resolution for the Trust to be wound up. Under the Act, such a resolution can be passed by the votes of holders of at least 50% of the units. Westfield commenced proceedings to restrain UniSuper and AMPCN from voting on the winding-up resolution (in contravention of the Agreement).

On 1 September 2011 Justice Ward granted an injunction, ordering UniSuper and AMPCN not to vote for the extraordinary resolution without Westfield's prior written consent. His Honour found that a winding up of the scheme would lead to the sale of the shopping centre, without the consent of all unitholders. Such a circumstance would breach clause 16.2 of the Agreement with respect to clause 10.1(a). Justice Ward held that the restrictions set out in the Agreement were not inconsistent with the policy underlying s 601NB of the Act. This was in light of AMPCN and UniSuper having other avenues by which to exit the scheme or to apply for its winding up without Westfield's consent.

On 14 December 2011 the Court of Appeal (Giles, Campbell & Meagher JJA) unanimously allowed an appeal by UniSuper and AMPCN. Their Honours found that clause 10.1(a) of the Agreement should be construed to apply only during the life of the scheme. It does not apply to the termination of the Trust and the consequent sale of assets. The Court of Appeal therefore held that clause 16.2 did not prevent AMPCN and UniSuper from voting in favour of winding up the Trust without Westfield's consent.

The ground of appeal is:

- The Court of Appeal erred in holding that it would not be a breach of clause 16.2 of the Agreement for a unitholder to exercise its voting power to direct a winding-up of the Trust if that would inevitably lead to a sale of the shopping centre without the written consent of all of the unitholders.

On 12 July 2012 the Respondent filed a notice of contention, the grounds of which include:

- The Court of Appeal ought to have held that the rights given to members of a registered managed investment scheme pursuant to Part 5C.9 of the Act, particularly the right conferred by s 601NB to vote in favour of a winding-up of the scheme, were rights powers and remedies which, in terms of clause 18 of the Agreement, were rights, powers and remedies provided by law independently of the Agreement, and not excluded by it.

GOOGLE INC v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (S175/2012)

Court appealed from: Full Court of the Federal Court of Australia
[2012] FCFCA 49

Dates of judgments: 3 April 2012 & 4 May 2012

Special leave granted: 22 June 2012

Google Inc. ("Google") runs an internet search engine, a search of which produces both organic and sponsored links. Organic links are displayed free of charge, while sponsored links are highlighted paid advertisements. When a user enters a search term, Google returns a list of organic search results. These are matching web pages ranked in order of relevance determined by a complex algorithm developed by Google. The process of producing sponsored links however is determined through Google's AdWords program. When a user enters a search term, an internal "auction" is triggered that determines which sponsored links to show, in which order to show them and how much Google charges its advertisers. An AdWords customer may elect to trigger advertisements (or participate in an auction that will determine which advertising text will be displayed as a sponsored link) by choosing three different types of keywords. These are 'exact match', 'phrase match' or 'broad match'. Hence a search of a key word or phrase may trigger a number of similar, but commercially unrelated results.

At issue in this matter is whether Google has engaged in misleading and deceptive conduct contrary to section 52 of the *Trade Practices Act* 1975 (Cth) ("the Act"). It particularly concerns those sponsored links triggered by searches relating to: "Harvey World Travel", "Honda.com.au", "Alpha Dog Training" and "Just 4x4s Magazine". The Australian Competition and Consumer Commission ("ACCC") alleged that Google infringed section 52 by displaying an advertiser's web address in a sponsored link which also included the name of a competitor. This conduct is said to amount to a misrepresentation of the commercial relationship between the two. Google submitted that it was merely acting as the advertisers' conduit.

The primary judge held that each of the advertisers had engaged in misleading and deceptive conduct by falsely representing that there was a commercial association between themselves and another. His Honour however held that Google had neither endorsed nor adopted the advertisements in question.

On 3 April 2012 the Full Federal Court (Keane CJ, Jacobson & Lander JJ) unanimously upheld the ACCC's appeal, finding that the primary judge had erred in failing to conclude that Google had engaged in misleading and deceptive conduct. Their Honours held that what appears on Google's webpage is Google's response to the user's specific search inquiry. They further held that in the four relevant instances, through use of its proprietary algorithms, Google had actively created the message that it presented. It did not merely repeat or pass on the advertisers' statements.

The grounds of appeal include:

- The Full Court erred in finding that Google had made the representations contained in each of STA Travel's Harvey World Travel advertisement,

Carsales' Honda.com.au advertisement, Ausdog's Alpha Dog Training advertisement and Trading Post's Just 4x4s Magazine advertisement which were displayed on the results pages of Google's internet search engine, and that Google had thereby engaged in conduct that was misleading or deceptive or likely to mislead or deceive.

On 5 July 2012 the Respondent filed a notice of contention, the ground of which is:

- The Full Court erred in its finding at ([98]) that the role of creative maximisers and other Google personnel who advised and assisted customers in the selection of keywords as part of the Adwords programme was not relevant in determining whether Google made the representations.