SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 4 NOVEMBER 2014

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COMMISSIONER OF TAXATION v MBI PROPERTIES PTY LTD (S90/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 112

Date of judgment: 18 October 2013

Special leave granted: 11 April 2014

In September 2006 South Steyne Hotel Pty Ltd ("South Steyne"), which owned strata-titled apartments comprising the guest rooms of a hotel, leased each of those apartments to Mirvac Management Pty Ltd ("Mirvac"). South Steyne then sold some of the apartments to investors. The Respondent ("MBI") purchased three of those apartments, which remained subject to the leases to Mirvac. MBI intended that those leases be continued. The Appellant ("the Commissioner") assessed MBI for tax in relation to its three apartments, making an adjustment under s 135-5 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act") for the supply of a going concern. Section 135-5(1) relevantly provides that there is an "increasing adjustment" for the recipient of a supply of a going concern who intends that at least some of the supplies to their enterprise will be neither taxable supplies nor GST-free supplies. After MBI's objection was disallowed by the Commissioner, MBI appealed to the Federal Court.

Previous Federal Court proceedings had determined that: (1) South Steyne's lease of the apartments to Mirvac was an input-taxed supply under s 40-35 of the GST Act; (2) South Steyne's sale of the apartments to MBI constituted the supply of a going concern (which was thus GST-free); and (3) the continuation of the leases to Mirvac did not constitute a further supply by MBI for GST purposes.

On 6 February 2013 Justice Griffiths dismissed MBI's application, finding MBI liable for an increasing adjustment of its tax liability under s 135-5 of the GST Act. His Honour held that, although the leases were a supply made initially by another entity (South Steyne), the continuation of those leases constituted a continuing supply made with intent "through the enterprise" conducted by MBI.

On 18 October 2013 the Full Court of the Federal Court (Edmonds, Farrell & Davies JJ) unanimously allowed MBI's appeal. Their Honours held that the only supply was the *grant* of the leases, which was completed upon their coming into existence. As MBI had not made that supply, it was not liable for an increasing adjustment under s 135-5.

The grounds of appeal include:

- The Full Court erred in finding that MBI did not have an "increasing adjustment" under s 135-5 of the GST Act in relation to the enterprise it acquired from South Steyne because MBI did not intend that any input-taxed supply of residential premises would be made by it through the enterprise.

On 28 April 2014 MBI filed a notice of contention, the ground of which is:

- If, contrary to the conclusion of the Full Federal Court in *South Steyne Hotel Pty Ltd v Commissioner of Taxation* (2009) 180 FCR 409, MBI intended to make a supply or supplies through the enterprise it acquired from South Steyne, there was no price for that supply or those supplies with the consequence that, applying s 135-5(2) of the GST Act, there was no increasing adjustment.

COMMISSIONER OF STATE REVENUE v LEND LEASE DEVELOPMENT PTY LTD (M74/2014) (M75/2014) (M76/2014) (M77/2014) (M78/2014) & (M79/2014)

COMMISSIONER OF STATE REVENUE v LEND LEASE REAL ESTATE INVESTMENTS LIMITED (M81/2014)

COMMISSIONER OF STATE REVENUE v LEND LEASE IMT 2 (HP) PTY LTD (M80/2014)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2013] VSCA 207

Date of judgment: 15 August 2013

Date special leave granted: 15 August 2014

These appeals arise from objections to assessments issued under the *Duties Act* 2000 (Vic) ('the Act') by the appellant ('the Commissioner'), in respect of duty charged on the transfer of seven parcels of land around Victoria Harbour in the Docklands area of Melbourne. The land was transferred to the respondents ('LLD'), by the Victorian Urban Development Authority ('VicUrban') in various stages, between October 2006 and June 2010. The transfer of land for each stage was effected by a separate land sale contract, reflecting the terms of a generic land sale contract annexed to a development agreement between VicUrban and LLD.

The development agreement obliged LLD to make various contribution payments in respect of development works in the Dockland area, including a contribution to infrastructure in the area that was external to the stages, the remediation of an old disused gasworks site that was largely outside the boundaries of the stages, and a contribution to public art that was integrated throughout the Docklands area and not installed on any of the land transferred. The assessments issued by the Commissioner were calculated on the basis that the consideration for the transfer of the land included LLD's obligation to make payments towards infrastructure and construction works pursuant to the development agreement, as well as the agreed purchase price for the land. As a result of the assessments, LLD paid an additional $2,460,182.70 in duty, penalty and interest in relation to the additional payments.

LLD objected to the manner in which the Commissioner had calculated the 'dutiable value' of the land. When the Commissioner disallowed its objections, LLD issued proceedings in the Supreme Court of Victoria. Pagone J held that the Commissioner had properly assessed the dutiable value payable on the land for each stage as including the payments made in respect of infrastructure and construction works pursuant to the development agreement.

The Court of Appeal (Warren CJ, Tate JA, and Kyrou AJA) upheld LLD's appeal. The Court found that the primary judge shifted his focus from the nature of the dutiable property and in effect conflated the development of the precinct with the transfer of the land. He also erred by arriving at his conclusion that the contribution payments were part of the consideration for the transfer of the land on the basis that (1) various contribution payments were payable before the transfer of title; (2) the works were beneficial to the land or essential or necessary for the development of the land; (3) the obligations were integrated within a composite development and (4) all the amounts were 'all "for" the land in the form and state intended to be secured through development'.

The Court considered that Pagone J was wrong to conclude that each of the contribution payments was consideration for the transfer of the land. He should have held that the consideration for the transfer of the land was the stage land payment, being the price specified in the land sale contract. The Court considered that the judge was wrong in failing to recognise that the contribution payments were for matters that were separate and distinct from the transfer of the land. He ought to have held that each of the contribution payments was 'for' something other than the transfer of the land and that the consideration 'for' the dutiable transaction was solely that which moved the part of the composite whole comprising the transfer of the land.

The grounds of appeal include:

- The Court of Appeal erred in deciding that the consideration for the dutiable transaction, namely the transfer of the Dock 5 land, was confined to the amount stated as being the "Stage Land Payment" in the Land Sale Contract.

- The Court of Appeal misdirected itself:

  (a) by asking what was the "instrument" that effected the dutiable transaction; and

  (b) by then characterising the promises in the Development Agreement as being contained in the "wrong instrument", thereby excluding them from the consideration for the sale of the Dock 5 land.

KORDA & ORS v AUSTRALIAN EXECUTOR TRUSTEES (SA) LIMITED (M82/2014)

Court appealed from: Court of Appeal, Supreme Court of Victoria [2014] VSCA 65

Date of judgment: 10 April 2014

Date special leave granted: 15 August 2014

On 25 September 2012, the 1st and 2nd appellants were appointed as receivers and managers of the 5th appellant Gunns Limited ('Gunns') and its subsidiaries, including the 3rd and 4th appellants, SEAS Sapfor Forests Proprietary Limited ('the Forest Company') and SEAS Sapfor Harvesting Proprietary Limited ('the Milling Company')**.**

The Forest Company promoted timber plantation schemes to investors ('the covenantholders') under which the covenantholders purchased a covenant that gave them certain rights and interests. The Milling Company was engaged to provide felling and milling services and also to market and sell the timber derived from the plantations. Any proceeds received by the Milling Company from the sale of timber or sale of plantation lands (subject to deductions for the Milling Company's costs and expenses and its commission) was to be paid to the Forest Company. After making its own deductions for further costs and expenses, the Forest Company was required to pay the net proceeds to Australian Executor Trustees (SA) Ltd (the respondent) for the benefit of covenantholders.

The respondent is and has at all times been a trustee for the covenantholders under the terms of a trust deed entered into by it and the Forest Company on 6 March 1964. In about 2008, the Forest Company and the Milling Company were taken over by Gunns Limited. After the takeover, each company encumbered its assets, by way of a fixed and floating charge, to lenders to the Gunns Group.

There is no dispute that when the proceeds from the harvesting of the timber or the sale of plantation lands was handed to the respondent under the terms of the trust deed, those moneys were then held on trust for the covenantholders. The parties disagreed, however, as to whether or not the proceeds from the sale of timber that were in the hands of either the Milling Company or the Forest Company before they were handed to the respondent under the terms of the trust deed were also held on trust for the covenantholders. The receivers and managers contended that before the proceeds were passed over to the respondent the covenantholders had no proprietary interest in the proceeds of the sale of timber, which were subject to the fixed and floating charge.

The trial judge (Sifris J) found that the covenantholders did hold a beneficial interest in the balance of the proceeds from the harvest of the plantations and the sale of plantation land before the proceeds were handed to the respondent.

The Court of Appeal (Maxwell P and Osborn JA, Robson AJA dissenting) dismissed the appeal of the receivers and managers. The majority considered it was a matter of commercial necessity that the investments made by covenantholders not be at risk by reason of extraneous activities of the operating companies. Had there been any suggestion that such a risk existed, prospective investors would have been much less likely to invest. The only risks to which the parties intended that the investors be exposed were risks intrinsic to the enterprise being funded by their

investment moneys, that is, the enterprise of acquiring, preparing and planting land, tending and maintaining the timber, and finally felling, milling and selling it. Investors knew that the investment returns would depend on the commercial success of the forestry operations. They also knew that, in the event of such commercial success, the benefits would be held for them on trust. No investor would have imagined, and the prospectus certainly did not suggest, that the investment returns could be put at risk by reason of any activity of the operating companies outside the scope of the timber production enterprise. The whole tenor of the documentation was to precisely the opposite effect.

Robson AJA (dissenting) noted the absence of any reference to the timber sale proceeds being held in trust before they were paid to the trustee, in circumstances where the parties expressly established a trust in the clearest terms once the timber sale proceeds were paid to the trustee. His Honour thought this was an extraordinary omission on the part of the lawyers who drew the detailed and lengthy scheme documents; if it was intended that the covenantholders were to be protected at all stages by the land, trees, harvested trees and proceeds being held on trust, it would have been so stated. The omission to do so was a strong indicator of the intended nature and structure of the scheme. His Honour concluded that the matters which suggested that the presumed intention of the parties was not to establish a trust outweighed those that suggested to the contrary.

The grounds of appeal include:

- The Court of Appeal erred in finding (by majority) that the timber sale proceeds and land sale proceeds were held by the Forest Company and/or Milling Company on trust for the relevant covenantholders.

- The Court of Appeal ought to have held that commercial necessity did not require that the covenantholders' interests be protected by a trust structure over the timber sale proceeds or land sale proceeds.

The respondent has filed a Notice of Contention on the following ground:

- The conduct and statement referred to in paragraphs 89 to 91 of *Australian Executor Trustees (SA) Ltd v Korda* [2013] VSC 7 and paragraphs 67 and 68 of *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65 – and particularly the references therein to past practice – ought to have been taken into account, as evidence of acts by the appellant companies subsequent to the creation of the trust which support the existence and scope of the trust as alleged by the respondent.

AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY v TODAY FM (SYDNEY) PTY LTD (S225/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2014] FCAFC 22

Date of judgment: 14 March 2014

Special leave granted: 15 August 2014

During a radio program on 4 December 2012 the Respondent broadcast a recording of a telephone call made by the program's presenters in Sydney to a hospital in London ("the Call"). During the Call, the presenters posed as Queen Elizabeth II and Prince Charles. One of the hospital staff, apparently believing that the presenters were indeed the Queen and Prince Charles, gave details on the condition of a patient at the hospital, the Duchess of Cambridge.

The Appellant investigated the broadcasting of the Call ("the Investigation"), taking into account submissions made to it by the Respondent. In a preliminary report on the Investigation ("the Preliminary Report"), the Appellant opined that in broadcasting the Call the Respondent had breached a particular condition of its radio broadcasting licence ("the Condition"). The Condition was contained in clause 8(1)(g) of Schedule 2 of the *Broadcasting Services Act* 1992 (Cth) ("BSA"), which provided that the holder of a commercial radio broadcasting licence "*will not use the broadcasting service or services in the commission of an offence against another Act or a law of a State or Territory"*. The Preliminary Report stated that the Appellant was of the view that the Respondent had, on the balance of probabilities, committed an offence by communicating to third persons a private conversation in breach of s 11(1) of the *Surveillance Devices Act* 2007 (NSW).

The Respondent applied to the Federal Court for orders restraining the Appellant from making any determination that an offence had been committed. On 7 November 2013 Justice Edmonds dismissed the Respondent's application. His Honour held that the Appellant, in making a determination as to whether the Condition had been breached, was entitled to express an opinion that an offence had been committed. Such an opinion did not amount to a determination of criminal guilt. Justice Edmonds held that the Appellant was entitled to rely on that opinion, rather than on a judicial determination of guilt, to impose regulatory sanctions under the BSA. The Respondent appealed.

The Appellant meanwhile issued its final report on the Investigation, in which it found that the Respondent had breached the Condition ("the Finding"). The Appellant also informed the Respondent that it would later consider remedial measures that it might take.

The Full Federal Court (Allsop CJ, Robertson & Griffiths JJ) unanimously allowed the Respondent's appeal and set aside the Finding. Their Honours held that the text of the Condition did not authorise the Appellant, as a body exercising executive power for the purpose of imposing sanctions under the BSA, to make a finding that an offence had been committed under another Act or law. The Full Federal Court found that the phrase "the commission of an offence" in the Condition required a determination of guilt by a court, which the Appellant could then take into account

when investigating whether the holder of a licence had used a broadcasting service in breach of the Condition.

A "Section 78B notice" has been filed in this matter, with the Attorneys-General of the Commonwealth, Queensland, South Australia and Western Australia all giving notice to the Court that they intend to intervene in support of the Appellant.

Summonses for intervention have also been filed on behalf of Commercial Radio Australia Limited and Free TV Australia Limited.

The grounds of appeal include:

- The Full Federal Court, generally at [73]-[115], erred in construing cl 8(1)(g) of Sch 2 to the BSA, pursuant to which commercial radio broadcasting licensees "*will not use the broadcasting service or services in the commission of an offence*", as requiring that, for the purposes of enforcement action by the Appellant under s 141 or s 143 of the BSA:

  a) the only permissible method for the Appellant to make an administrative finding of the commission of an offence is the recording of a conviction by a criminal court (or a like outcome of the criminal process, being an admission of guilt or discharge after finding the offence proved);

  b) the Appellant is required to defer enforcement action until after (if at all) a criminal process has reached its relevant conclusion, and if there is such a criminal process, the Appellant is bound conclusively in its administrative findings by the outcome of such criminal process, whether it be guilt or acquittal, irrespective of the evidence and submissions that may incline the Appellant to a contrary view.

On 1 September 2014 a notice of contention was filed, the ground of which is:

- If, upon its proper construction, clause 8(1)(g) of Schedule 2 to the BSA authorises the Appellant to:

  a) find that the holder of a commercial radio broadcasting licence has breached the Condition; and

  b) take any action, pursuant to Part 10, Division 3 of the BSA, including for the purposes of enforcement action under ss 141 or 143,

  prior to a competent court adjudicating that the licencee has used the broadcasting service or services in the commission of an offence against another Act or a law of a State or Territory, to the extent that any provision of the BSA, construed within the statutory scheme, purports to authorise such conduct, it is invalid, because it is, to that extent, inconsistent with the separation of executive and judicial power mandated by Chs II and III of the Commonwealth Constitution.

GRANT SAMUEL CORPORATE FINANCE PTY LTD v FLETCHER & ORS (S228/2014)
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION & ANOR v FLETCHER & ORS (S229/2014)

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 31

Date of judgment: 28 February 2014

Special leave granted: 15 August 2014

In the liquidation of the companies Octaviar Ltd and Octaviar Administration Pty Ltd, any application under s 588FF(1) of the *Corporations Act* 2001 (Cth) ("the Act") in respect of voidable transactions was to be made before 4 June 2011. That time limit, of three years from the "relation-back day", was imposed by s 588FF(3)(a) of the Act. Section 588FF(3)(b) provided that an application in respect of voidable transactions could be made "*within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.*"

Upon an application by the liquidators ("the Extension Application"), on 30 May 2011 Justice Hammerschlag made an order ("the Extension Order") under s 588FF(3)(b) of the Act extending time for the making of any application under s 588FF(1) to 3 October 2011. That was done in the absence of the Applicants, who would each be affected by the order.

After circumstances then arose that would prevent them from applying under s 588FF(1) of the Act before 3 October 2011, the liquidators applied to further extend that deadline. They did so under r 36.16(2)(b) of the *Uniform Civil Procedure Rules* 2005 (NSW) ("UCPR"), which permitted the variation of an entered order that had been made in the absence of a party (or a sufficiently affected third party). On 19 September 2011 Justice Ward ordered that the Extension Order be varied by the insertion of "3 April 2012" in lieu of "3 October 2011" ("the Variation Order").

The Applicants each applied to have the Variation Order set aside, partly on the basis that it could not be validly made under UCPR r 36.16(2)(b) in the face of s 588FF(3) of the Act. On 8 February 2013 Justice Black dismissed the Applicants' applications, holding that the Variation Order had been validly made. His Honour found that when considering the time requirement of s 588FF(3)(b), the only relevant application was the Extension Application, which had been made within the three-year limit set by s 588FF(3)(a).

The Applicants then appealed (in two separate appeals).

On 28 February 2014 the Court of Appeal (Macfarlan & Gleeson JJA; Beazley P dissenting) dismissed both appeals. The majority held that the determination of an extension application under s 588FF(3)(b) was subject to revival through rules of court such as UCPR r 36.16(2)(b). Their Honours then held that the Variation Order was valid, as it stemmed from the Extension Application and therefore had been made "on an application" within the meaning of s 588FF(3)(b). The President however held that the liquidators' application under UCPR r 36.16(2)(b) was in effect a new application to extend time, as it required a decision based on facts that had

not been considered in the Extension Application. Her Honour therefore found the Variation Order invalid, as the application for it had been made outside the time limit imposed by s 588FF(3)(b) of the Act.

In appeal S228/2014, the grounds of appeal include:

- The Court of Appeal erred in finding that rule 36.16(2)(b) of the UCPR was "picked up" by s 79 of the *Judiciary Act* 1903 (Cth) to the extent that it permits the further extension of the three year period specified in s 588FF(3)(a) of the Act by an order varying an earlier valid extension in circumstances where the application for such variation is made on a date after the expiry of the original three year period, notwithstanding the terms of s 588FF(3)(b) of the Act and s 79 of the *Judiciary Act* 1903 (Cth).

In appeal S229/2014, the grounds of appeal include:

- The majority of the Court of Appeal erred in finding that the Variation Order:

  a) which was made pursuant to rule 36.16(2)(b) of the UCPR, after the end of the period specified in s 588FF(3)(a) of the Act, and

  b) which varied the time period that had previously been ordered on an application made under s 588FF(3)(b) of the Act,

  was an order which was made "on an application" under s 588FF(3)(b) within the meaning of that paragraph of the Act.

FELICITY CASSEGRAIN v GERARD CASSEGRAIN & CO PTY LTD (S141/2014)

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 453

Date of judgment: 18 December 2013

Special leave granted: 20 June 2014

A statutory derivative action was brought on behalf of Gerard Cassegrain & Co Pty Ltd ("GC & Co") against Mr Claude Cassegrain ("Claude") and his wife, Mrs Felicity Cassegrain ("Felicity"). GC & Co's claim related to $4.25 million that was credited to Claude's company loan account on 31 October 1993. That sum was purportedly owed to Claude as part of an overall settlement of proceedings with the Commonwealth Scientific and Industrial Research Organisation for $9.5 million. The payment of the $4.25 million was a condition precedent to a Deed of Settlement entered into on 27 September 1993.

GC & Co alleged that Claude (a director of GC & Co) fraudulently debited that amount to the loan account in breach of his fiduciary duty to the company. It further alleged that Claude then drew on that account for personal (and other) expenses. He also utilised its credit balance in purported satisfaction of the purchase price of a farming property ("the Dairy Farm"), a property that GC & Co transferred to both Claude and Felicity as joint tenants ("the first transfer") around 1997. On 24 March 2000 Claude executed a transfer of his interest in the Dairy Farm in favour of Felicity for the nominal consideration of $1 ("the second transfer").

Justice Barrett upheld GC & Co's claim against Claude, finding that he had dishonestly breached his fiduciary duty to GC & Co. His Honour however dismissed GC & Co's claim against Felicity, finding that her title was indefeasible. Both Claude and GC & Co subsequently appealed.

On 18 December 2013 the Court of Appeal (Beazley P, Basten & Macfarlan JJA) dismissed Claude's appeal with costs. Their Honours however allowed GC & Co's appeal.

The issues raised by GC & Co's appeal included:

(1) Whether Felicity's title was defeasible pursuant to the fraud exception in section 42 of the *Real Property Act* 1900 (NSW) ("the Property Act") because Claude was acting as her agent;

(2) Whether Felicity's title was defeasible pursuant to the fraud exception in the Property Act, because Claude and Felicity were joint tenants;

(3) Whether proceedings may be brought for the recovery of the Dairy Farm from Felicity pursuant to Section 118(1)(d) of the Property Act.

The majority found that GC & Co raised sufficient evidence from which an inference may be drawn that Claude was Felicity's agent for the first and second transfers of the Dairy Farm. Justice Basten however held that there was insufficient evidence to establish agency and the preferable inference was that Felicity acted on her own behalf.

Both President Beazley and Justice Macfarlan found that Felicity's title in the Dairy Farm was affected by Claude's fraud as both were registered as joint tenants. Justice Basten however held that Felicity's interest was indefeasible because it was unaffected by Claude's fraud.

President Beazley and Justice Macfarlan further held that, pursuant to s 118(1)(d) of the Property Act, GC & Co was entitled to bring proceedings for recovery of the Dairy Farm. Justice Basten however held that, pursuant to s 118(1)(d)(ii) of the Property Act, GC & Co was only entitled to obtain an order that Felicity transfer a half share in the Dairy Farm to GC & Co, being that share that she obtained from Claude in the second transfer.

The grounds of appeal include:

- The Court of Appeal erred in holding that Claude was Felicity's agent in relation to giving instructions for:

  a) the execution of Property Act transfer 2892535B on behalf of Felicity; and

  b) the lodgement for registration of transfer 289253B.