SHORT PARTICULARS OF CASES
APPEALS

HOBART CIRCUIT
MARCH 2016

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COVERDALE v WEST COAST COUNCIL (H10/2015)

Court appealed from: Full Court of the Supreme Court of Tasmania [2015] TASFC 1

Date of judgment: 17 February 2015

Date special leave granted: 11 September 2015

In April 2014, the respondent Council sought a declaration that, on a proper construction of the *Valuation of Land Act* 2001(Tas) ("the Valuation Act"), the *Local Government Act* 1993 (Tas) ("the LG Act") and/or the *Marine Farming Planning Act* 1995 (Tas) ("the Marine Act"), the Valuer-General of the State of Tasmania ("the appellant") was obliged to keep and maintain valuation rolls and to provide to the respondent, as the relevant rating authority, valuation lists which included particulars of the ownership and values of marine farm leases granted in respect of areas in Macquarie Harbour. The leases granted to the lessee a particular area which included all waters and the seabed in that area. Prior to 30 July 2013, the appellant had included the leases in the valuation lists which he prepared. The respondent sought a declaration which would result in the practice prior to 30 July 2013 being re-instated.

The respondent's application was dismissed by the trial judge (Blow CJ). In its appeal to the Full Court (Tennent and Estcourt JJ, Pearce J dissenting), the respondent contended that the areas covered by the marine farming leases amounted to "rateable land" for the purposes of the LG Act. The appellant contended that rates were payable only in respect of land, not water; that the areas in question were not "land" for the purpose of the relevant legislation; and that he was not obliged to value them for rating purposes.

The majority of the Court noted that s 87(1) of the LG Act provided that all land was rateable, subject to certain specified exceptions, none of which applied to the marine farm leases. Their Honours thought it was clear from the statutory provisions that the respondent was obliged by virtue of s 11(1) of the Valuation Act to value Crown lands that are "liable" to be rated in accordance with Pt 9 of the LG Act, and that the areas of the leases met that description. The definition of the word "land" in the *Crown Lands Act* 1976 (Tas) was an inclusive definition. A plain reading of that definition could not be other than a description of the seabed, and the waters above it, of Macquarie Harbour. This interpretation of the definition of "land" in the *Crown Lands Act* must lead to a conclusion that the seabed and the waters of Macquarie Harbour were Crown land. It therefore followed that they must be "Crown lands that are liable to be rated" because they were not exempt under s 87(1) of the LG Act.

Pearce J (dissenting) held that the answer to whether the subject of the marine leases was "land" was not to be determined by the interpretation provisions, as those provisions were concerned with interests in land. The answer was in the ordinary and ordinary legal meaning of the word, in the context in which it appeared in the Valuation Act and the LG Act. In ordinary usage the land was to be distinguished from the sea. There was nothing in the Valuation Act or in the LG Act which gave any reason to conclude that references to land in either Act included the sea or the seabed below the low water mark.

The respondent has filed a submitting appearance. However the Attorney-General for the State of Tasmania will appear as contradictor.

The grounds of appeal include:

- The Full Court erred in law by determining that Part 9, s87 of the *Local Government Act* 1993 (Tas) applied so as to render the seabed and waters of Macquarie Harbour "land" liable to be rated.

- The Full Court erred in law by construing the word "lands" in s11 of the *Valuation of Land Act* 2001 (Tas) and the word "land" in s87 of the *Local Government Act* 1993 (Tas) so as to include the seabed and waters above the seabed, when on the proper construction of those words, seabed and the waters above it are necessarily excluded.

BADENACH & ANOR v CALVERT (H12/2015)

Court appealed from: Full Court of the Supreme Court of Tasmania [2015] TASFC 8

Date of judgment: 24 July 2015

Date special leave granted: 26 October 2015

The first appellant is a legal practitioner who was, at all material times, a partner of Murdoch Clarke Solicitors, the second appellant. In March 2009, the first appellant prepared and executed a will for Jeffrey Doddridge ("the testator"). In the will the testator left his entire estate to the respondent, whom he treated as a son. In 1984 the testator and the respondent had purchased two properties as tenants in common in equal shares. The testator had resided on one of those properties until his death. The testator had a daughter, Ms Doddridge, who was not included in his will at the time of his death in September 2009. Following her parents' separation in 1973, Ms Doddridge had had no involvement with her father. After the testator's death, Ms Doddridge made an application ("the TFM claim") under the *Testator's Family Maintenance Act* 1912 (Tas) ("the TFM Act"). The result of her application was an order that $200,000 be paid to her from the estate.

The respondent commenced proceedings against the appellants in the Supreme Court of Tasmania, claiming that the appellants should have advised the testator of the possibility of a claim being made under the TFM Act. The respondent argued that the appellants were negligent in failing to advise the testator of the risk of his daughter making a TFM claim, and subsequently in failing to advise him of the options to ensure that the estate would not be affected by a TFM claim. This failure to provide advice breached duties of care owed by the appellants to the testator as their client, and to the respondent as the beneficiary of the will. The appellants argued that they did not have a duty to provide the testator with advice on evading or limiting the likelihood of a TFM claim.

At first instance, Blow CJ held that the appellants owed the testator a duty of care to ensure that his testamentary wishes be fulfilled. In the circumstances, this duty included making inquiries as to the existence of any family members who could make a claim under the TFM Act. However, his Honour considered that it could not be established that this inquiry would have prompted the testator to take steps to deplete his estate and frustrate a possible TFM claim by Ms Doddridge. On this basis, his Honour did not characterise the respondent's claim as a loss of opportunity, given that the existence of the opportunity was contingent on the hypothetical actions of the testator.

The Full Court (Tennent, Porter and Estcourt JJ) allowed the respondent's appeal, holding that the scope of the duty owed to the testator in contract and in tort by the appellants required that advice be given to properly ensure the fulfillment of the testator's testamentary wishes. Additionally, the appellants owed a non-contractual duty in tort to the respondent as a beneficiary of the will.

The Full Court found that the trial judge had erred by failing to characterise the respondent's claim as a loss of an opportunity. The Full Court found that the loss had occurred when the testator was not given the chance to consider the steps he would take should a TFM claim arise.

The grounds of appeal include:

- The Full Court erred in framing the duty of care owed by the appellants to the testator by conflating questions of duty and breach.

- The Full Court erred in concluding that no public policy reason militated against the duty of care it formulated as owed to the testator and to the respondent by holding that such duty did not give rise to conflicting duties and did not offend the principles of coherence in the law and conformity with the statutory purpose of the TFM legislation.

- The Full Court erred in determining a case governed by ss13 and 14 of the *Civil Liability Act* 2002 (Tas) that causation had been satisfied by reference to tests based upon a claim for loss of opportunity or loss of chance of a better outcome under the will.

MILITARY REHABILITATION AND COMPENSATION COMMISSION v MAY (S243/2015)

Court appealed from: Full Court of the Federal Court of Australia [2015] FCAFC 93

Date of judgment: 30 June 2015

Special leave granted: 13 November 2015

Mr Benjamin May enlisted in the Royal Australian Air Force ("the RAAF") in November 1998. At that time he was fit and healthy. Between November 1998 and March 2000 Mr May received various vaccinations in the course of his employment with the RAAF. After receiving each vaccination, Mr May experienced dizziness, nausea and diarrhoea. He was repeatedly diagnosed with viral or bacterial infections and on some occasions he required hospital treatment. A clear cause of Mr May's ailments however was never identified. In July 2004 Mr May was discharged from the RAAF, at the rank of Officer Cadet.

In November 2002 Mr May lodged a claim for rehabilitation and compensation, on the basis that the vaccinations he received in the course of his RAAF employment had caused him "low immunity, fatigue, illnesses, dizziness". In March 2003 the Applicant ("MRCC") rejected that claim, noting the lack of a medical diagnosis that could connect Mr May's symptoms with his RAAF service. In April 2010 that decision was affirmed upon a reconsideration of it by the MRCC.

Mr May then applied to the Administrative Appeals Tribunal ("the Tribunal") for review of the MRCC's reconsideration decision. On 14 December 2011 the Tribunal affirmed that decision, concluding that Mr May did not suffer a disease and he had not suffered an injury "amounting to a sudden or identifiable physiological change in the normal functioning of the body or its organs that can be attributed to the vaccinations he received while serving in the RAAF." This was after finding no objective evidence that connected Mr May's vaccinations with the ailments he suffered during his RAAF service. The Tribunal also found that Mr May had become incapacitated by a condition that could loosely be described as "vertigo" and that there was no objective evidence that he had suffered from that condition in the period following his vaccinations. Mr May was therefore not entitled to receive compensation under s 14 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Act").

An appeal to the Federal Court from the Tribunal's decision was dismissed by Justice Buchanan on 30 April 2014. His Honour held that the Tribunal had not mistakenly believed that a definitive diagnosis was required, nor had the Tribunal erred by finding that Mr May's ailments did not constitute an injury.

The Full Court of the Federal Court (Allsop CJ, Kenny, Besanko, Robertson & Mortimer JJ) unanimously allowed Mr May's appeal and remitted the matter to the Tribunal for it to re-determine. Their Honours held that the Tribunal had erred by confining the meaning of "injury" by reference to "a sudden or identifiable physiological change", whereas the meaning of the word "injury" as defined in s 4(1) of the Act was broader and derived partly from historical and legal context. A diagnosis of a recognised medical condition was unnecessary for the finding of an "injury" within the meaning of the Act. The Full Court held that once the Tribunal had found that Mr May suffered from vertigo it ought not have required

objective evidence in seeking a causal connection between Mr May's ailments and the vaccinations he had been given. Mr May had suffered an injury "in the course of" his employment with the RAAF, which is all that he needed to establish in order to receive compensation under the Act.

The grounds of appeal include:

- The Full Court erred in finding that the Tribunal erred in its construction of the term "injury (other than a disease)" as that term appeared in paragraph (b) of the definition of "injury" in s 4(1) of the Act (as in force at the time when the Respondent claimed to have sustained an "injury").

- The Full Court erred in finding that, on its proper construction, the term "injury (other than a disease)" did not require a sudden or identifiable physiological or pathological change.