SHORT PARTICULARS OF CASES

NOVEMBER 2020

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PALMER & ANOR v THE STATE OF WESTERN AUSTRALIA & ANOR
(B26/2020)

Date writ of summons filed: 25 May 2020

Date special case referred to Full Court: 4 September 2020

On 15 March 2020, in the face of the COVID-19 pandemic, a state of emergency was declared in Western Australia under s 56 of the *Emergency Management Act 2005* (WA) ("the Act"). On 5 April 2020 the *Quarantine (Closing the Border) Directions* (WA) ("the Directions") were issued by the Second Defendant, Police Commissioner Christopher Dawson, in his role as State Emergency Coordinator. The Directions were expressed as being given pursuant to powers under ss 61, 67, 70 and 72A the Act. The Directions (which have frequently been amended) prohibit any person who is not an "exempt traveller" from entering Western Australia.

The First Plaintiff, Mr Clive Palmer, is a resident of Queensland who wishes to resume frequent travel to Western Australia for business, social, charitable and political purposes. Mr Palmer is the chairman and managing director of the Second Plaintiff, Mineralogy Pty Ltd, which has lucrative interests in iron ore projects in Western Australia. Senior staff and advisers of Mineralogy Pty Ltd are accustomed to travelling between Brisbane and Perth, where the company maintains office premises and holds important documents.

On 25 May 2020, following an unsuccessful application by Mr Palmer to obtain "exempt traveller" status, the Plaintiffs commenced proceedings in this Court, seeking declarations that the Directions and/or relevant provisions of the Act were invalid. (The Plaintiffs' claim was subsequently amended such that declarations of invalidity were sought in respect of the Act and/or the Directions wholly or in part.) This was on the bases that the Directions and/or the statutory provisions infringed s 92 of the *Constitution* by impermissibly burdening the freedom of intercourse and/or the freedom of trade and commerce among the States.

On 16 June 2020 Chief Justice Kiefel remitted a part of the matter to the Federal Court for hearing and determination. The remitted part was a claim by the Defendants that the community isolation measures contained in the Directions were effective and reasonably necessary. Following the delivery of judgment on 25 August 2020 by Justice Rangiah of the Federal Court (*Palmer v State of Western Australia (No 4)* [2020] FCA 1221), the matter resumed in this Court.

The parties agreed upon a special case, which Chief Justice Kiefel referred for consideration by the Full Court. The questions stated in the special case are:

- Are the *Quarantine (Closing the Border) Directions* (WA) and/or the authorising *Emergency Management Act 2005* (WA) invalid (in whole or in part, and if in part, to what extent) because they impermissibly infringe s 92 of the *Constitution*?

- Who should pay the costs of the special case?

A Notice of a Constitutional Matter was filed by the Plaintiffs. The Attorneys - General of Victoria, Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory are intervening in the proceeding. (The Attorney-General of the Commonwealth intervened for a time before withdrawing.)

GERNER & ANOR v. THE STATE OF VICTORIA (M104/2020)

Date writ of summons filed: 12 October 2020

Date demurrer referred to Full Court: 20 October 2020

On 16 March 2020, in the face of the COVID-19 pandemic, a state of emergency was declared in Victoria under s 198(1) of the *Public Health and Wellbeing Act 2008* (Vic) ("the Act"). Acting under s 198(7)(c) of the Act, the Minister for Health extended the state of emergency declaration on multiple occasions to operate between April and November 2020. Under section 200 of the Act, various Directions were issued to restrict the movement of Victorian residents (both at home and at work) and to designate restricted areas. Collectively, these Directions are colloquially known as the 'lockdown laws'.

The first plaintiff is a resident of, and conducts a business in, a restricted area. As a result of the lockdown laws: the first plaintiff is prohibited from moving freely within Victoria; residents are prohibited from moving to the first plaintiff's business to purchase its goods and services; and employees of the business are prohibited from moving to and working on the premises of the business. As a result, the business has been and continues to suffer detriment in that it cannot earn income from its usual conduct.

The first plaintiff claims that the lockdown laws are constitutionally invalid because:

- their terms, operation or effect, impose an effective burden on the implied Freedom of Movement;
- they have no legitimate purpose that is compatible with the constitutionally prescribed system of federation, or with the system of representative and responsible government;
- they are not reasonably appropriate or adapted to serve any legitimate purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of federation or the system of representative and responsible government.

On 20 October 2020 Justice Keane referred the demurrer for consideration by the Full Court. The plaintiffs claim:

- A declaration that s 200(1)(b) and (d) of the Act are invalid by reason of an implied freedom of movement in the Constitution.

- Alternatively, a declaration that the lockdown laws made under s 200 of the Act are invalid by reason of an implied freedom of movement in the Constitution.

- Costs.

A Notice of a Constitutional Matter was filed by the Plaintiffs. The Attorneys - General of Western Australia, Queensland, South Australia, Tasmania and the Northern Territory are intervening in the proceeding.

WIGMANS v AMP LIMITED & ORS (S67/2020)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales
[2019] NSWCA 243

Date of judgment: 8 October 2019

Special leave granted: 17 April 2020

In May 2018 a representative proceeding under Part 10 of the *Civil Procedure Act 2005* (NSW) ("the CPA") was commenced against AMP Limited by Ms Marion Wigmans ("the Wigmans proceeding"), in relation to losses incurred by shareholders as a result of alleged misconduct by AMP. The proceeding is of a type known as an open class action, with persons rendered group members of the action by virtue of their having invested in AMP within a certain period.

Ms Wigmans faced competition however from four similar proceedings, each of which was commenced by a different lead plaintiff. The respective plaintiffs each applied for orders that the other four proceedings be stayed. One such plaintiff was Komlotex Pty Ltd, the Second Respondent to the appeal in this Court, which commenced its class action ("the Komlotex proceeding") one month after the commencement of the Wigmans proceeding.

On 23 May 2019 the primary judge, Ward CJ in Eq, ordered that three of the proceedings, including the Wigmans proceeding, be permanently stayed. Her Honour also ordered that the fifth proceeding, which had been commenced by Fernbrook (Aust) Investments Pty Ltd, be consolidated with the Komlotex proceeding, leaving the latter (in its consolidated form) as the only class action to progress. This was after finding that the modelling of costs and returns had indicated that, on most scenarios, the net return for group members of the Komlotex proceeding would likely be the highest or around the highest. The primary judge's orders were expressed as having been made pursuant to ss 67 and 183 of the CPA and the inherent power of the Supreme Court of New South Wales. (Ms Wigmans and the two lead plaintiffs of the other proceedings which were permanently stayed were all group members of the Komlotex proceeding.)

The Court of Appeal (Bell P, Macfarlan, Meagher, Payne and White JJA) granted Ms Wigmans leave to appeal, on one of three grounds put forward by her. Their Honours unanimously dismissed the resulting appeal, however, finding that the primary judge had taken into account relevant considerations and had not erred in exercising the judicial discretion vested by the CPA. The Court of Appeal unanimously refused Ms Wigmans leave to appeal on proposed grounds which targeted the primary judge's assessment of comparative hypothetical returns to group members of the competing proceedings, finding that those proposed grounds raised no issue of principle.

The Court of Appeal held that the Komlotex proceeding could not constitute an abuse of process based on it and the Wigmans proceeding having common parties, since group membership did not equate with party status. This was because group members were free to opt out, in which event they would not be bound by the outcome of the relevant proceeding (and they would each be free to institute a proceeding of their own against AMP). Their Honours also held that an open class action was not, on account of its having been filed first, in such a position that

competing plaintiffs needed to establish that the first-filed action was a "clearly inappropriate" vehicle in order for it to be stayed. Additionally, the sequence of initial filing of competing proceedings became a less relevant consideration where the proceedings were commenced within a short time of each other.

The grounds of appeal are:

- The Court of Appeal erred in failing to find that Part 10 of the CPA did not authorise the approach taken by the primary judge to the determination of the cross-stay applications between Ms Wigmans and Komlotex concerning multiple, duplicative open class actions.

- The Court of Appeal erred in refusing to grant leave to appeal in respect of whether the primary judge erred by acting upon the assumption that the proceedings by each of Ms Wigmans and Komlotex had an equal probability of achieving each possible settlement or judgment outcome within the range of possible outcomes, and should have found that in doing so the primary judge had erred.

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v MAKASA (S103/2020)

Court appealed from: Full Court of the Federal Court of Australia [2020] FCAFC 22

Date of judgment: 28 February 2020

Special leave granted: 12 June 2020

Mr Likumbu Makasa is a Zambian citizen who arrived in Australia in 2001, aged 18. In 2005 he was convicted of three counts of common assault and received concurrent good behaviour bonds for each offence. In 2007 he was convicted of a series of driving offences, including drink driving. In 2009 Mr Makasa was also found guilty of three counts of sexual intercourse, knowing that the Complainant was under 16. He was then sentenced to three concurrent terms of 2 years imprisonment, with a single 12 month non-parole period.

In 2011 the Minister's delegate cancelled Mr Makasa's visa under s 501(2) of the *Migration Act 1958* (Cth) ("Migration Act"), a decision that was later set aside by the Administrative Appeals Tribunal ("AAT") in 2013.

In 2017 Mr Makasa was convicted of a minor parole violation, while in a separate incident that year he was also convicted of a series of mid-level driving offences concerning alcohol. It was these two convictions that triggered a process of reconsideration of the cancellation of his visa. On 18 October 2017 the Minister then personally cancelled his visa under s 501(2) of the Migration Act. An unsuccessful application for judicial review then followed.

On 28 February 2020 the Full Federal Court (Allsop CJ, Kenny, Banks-Smith and Besanko JJ; Bromwich dissenting) upheld Mr Makasa's subsequent appeal. Allsop CJ, Kenny & Banks-Smith JJ held that the Minister had no power to re-exercise his discretion under s 501(2) of the Migration Act to cancel Mr Makasa's visa where the delegate had already exercised that power. This is in circumstances whereby the AAT had already set aside the delegate's cancellation and whereby the Minister was relying on the same facts as the AAT to enliven the discretion under s 501(2). Their Honours however held that the Minister, acting personally, could set aside the AAT's decision (and substitute his own decision under s 501A, providing that conditions enlivening the power in ss 501A(2) or (3) were met).

While also allowing Mr Makasa's appeal, Justice Besanko held that the Minister had failed to consider a relevant consideration, that being the earlier decision of the AAT not to cancel Mr Makasa's visa. Justice Bromwich however found that the Minister's conclusion that Mr Makasa represented a low, but continuing risk of sexual reoffending may have been pessimistic, but it was not legally unreasonable.
The grounds of appeal include:

- The Full Court erred by finding that the Minister did not, at the time of the decision under review, have power to exercise the discretion conferred by s 501(2) of the Migration Act to cancel Mr Makasa's visa.

- The Full Court erred by finding that the Minister was not able to rely upon the same offences to enliven the discretion in s 501(2) of the Migration Act as had been relied upon by a delegate and by the AAT in prior decision making as to whether the power to cancel Mr Makasa's visa should be exercised.