

SHORT PARTICULARS OF CASES

OCTOBER 2021

No.	Name of Matter	Page No
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Tuesday, 5 and Wednesday, 6 October

1.	Bell v State of Tasmania	1
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Wednesday, 6 and Thursday, 7 October

2.	Walton & Anor v ACN 004 410 833 Limited (Formerly Arrium Limited) (In Liquidation) & Ors	2
----	--	----------

Friday, 8 October

3.	H. Lundbeck A/S & Anor v Sandoz Pty Ltd CNS Pharma Pty Ltd v Sandoz Pty Ltd	4
----	--	----------

Tuesday, 12 October

4.	Hobart International Airport Pty Ltd v Clarence City Council & Anor Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands Council & Anor	6
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Wednesday, 13 October

5.	Deputy Commissioner of Taxation v Huang	8
----	---	----------

Thursday, 14 October

6.	Stubbings v Jams 2 Pty Ltd & Ors	9
----	----------------------------------	----------

BELL v STATE OF TASMANIA (H2/2020)

Court appealed from: Supreme Court of Tasmania (Court of Criminal Appeal)
[2019] TASCCA 19

Date of judgment: 15 November 2019

Special leave granted: 5 June 2020

The Appellant was indicted and tried on charges that included a charge of supplying a controlled drug to a child, contrary to s 14 of the *Misuse of Drugs Act 2001* (Tas). It was not in dispute that the alleged victim, a 15 year old female, had attended the Appellant's premises and he had injected her with methylamphetamine. During his interview with the police, the Appellant had claimed that she told him, and he believed that, she was 20 years old. The trial judge directed the jury it made no difference if the Appellant held an honest and reasonable mistaken belief that the person was aged 18 years or over. The jury found the Appellant guilty of the offence.

At trial, both the Appellant and the State of Tasmania (the Prosecution) accepted that honest and reasonable mistaken belief was available as a potential defence.

On appeal against conviction to the Court of Criminal Appeal, the Appellant argued that the trial judge had erred by directing the jury that the defence was not available. However, the Respondent State of Tasmania submitted that the trial judge correctly stated and applied the law.

The Court dismissed the appeal. Brett J found that there were only two tests available for when the defence of honest and reasonable mistaken belief applied: 1) the belief would render the conduct innocent of the offence charged, or 2) the belief would render the conduct innocent of any criminal charge whatsoever. Brett J held that the second test applied.

Martin AJ also found that a similar test applied but for different reasons. His Honour held that the language of s 14 of the *Criminal Code 1924* (Tas) requires that the belief excused the act in the sense that it would not amount to a criminal offence. Pearce J agreed with the reasons of Martin AJ.

The Court therefore found that the trial judge's instruction to the jury was correct.

The ground of appeal is that:

- The Court of Criminal Appeal erred in law by upholding the learned trial judge's ruling that the defence of honest and reasonable mistake as to age was not available to the Appellant as a defence to the charge.

The application was listed for hearing in the High Court on 3 February 2021. After hearing from the parties, the Court adjourned the matter to enable the State and Territory Attorneys-General to be advised of the nature of the issues raised. Subsequently, the Attorneys-General for Tasmania, New South Wales and Queensland filed Notices of Intervention.

WALTON & ANOR v ACN 004 410 833 LIMITED (FORMERLY ARRIUM LIMITED) (IN LIQUIDATION) & ORS (S20/2021)

Court appealed from: Supreme Court of New South Wales (Court of Appeal)
[2020] NSWCA 157

Date of judgment: 30 July 2020

Special leave granted: 11 February 2021

The First Respondent (“Arrium”) was a significant producer of steel and iron ore previously listed on the Australian Stock Exchange. Its’ assets included the Southern Iron Mining operation. In August 2014 it published its results for the financial year ended 30 June 2014 and shortly after announced a fully underwritten \$754 million capital raising to pay down debt. The capital raising was completed in October 2014 and in January 2015 Arrium announced the suspension or closure of the Southern Iron Mining operation. In February 2015 it recognised a \$1.335 billion impairment in the value of its mining operation in its half yearly financial results. Arrium went into voluntary administration on 7 April 2016 and liquidation on 20 June 2019.

On 5 April 2018 solicitors for the Appellants, who were shareholders of Arrium, wrote to the Australian Securities and Investments Commission (“ASIC”) seeking that the Appellants be given eligible applicant status within the meaning of s 597(5A)(b) of the *Corporations Act 2001* (Cth) (“the Act”) to participate in examinations under Pt 5.9 Div 1 of the Act. The letter identified the purpose of the examinations as “to investigate the potential for claims to be made on behalf of creditors or shareholders of Arrium” related to matters including the capital raising. On 24 April 2018, ASIC authorised the Appellants as eligible applicants.

On 6 May 2019 the Appellants commenced Supreme Court proceedings for orders under s 596A of the Act that an examination summons be issued to a former director of Arrium, Mr Colin Galbraith. Orders were also sought under s 597(9) of the Act and s 68 of the *Civil Procedure Act 2005* (NSW) that certain documents be produced by Mr Galbraith, Arrium, Arrium’s auditor, KPMG, and its advisors on the capital raising, UBS AG. On 15 May 2019, a Registrar made the orders sought.

On 11 June 2019 Arrium filed an interlocutory application to have the Registrar’s orders stayed or set aside. KPMG was granted leave to be heard as an interested party and Mr Galbraith was granted an extension of time in which to seek to discharge the examination summons. On 19 November 2019 Justice Black refused to set aside the examination summons and orders for production to KPMG. His Honour found that the Appellants’ predominant purpose in seeking the issue of the examination summons was to investigate, and pursue, a personal claim in their capacity as shareholders against directors of Arrium or its auditors and acknowledged that the Appellants had abandoned any claim as unsecured creditors of Arrium. However, his Honour was not satisfied that Arrium had discharged the onus of establishing that the examination would be an abuse of process. In arriving at that conclusion, his Honour considered that the information likely to be produced by the examination would likely advance the interests of Arrium and its creditors, in that it would either produce additional information supporting further causes of action by Arrium, or would not and therefore support the liquidators’ assessment that their insolvent trading claims are more likely to benefit Arrium and its creditors.

The Court of Appeal (Bathurst CJ, Bell P and Leeming JA) unanimously allowed an appeal by Arrium. The Court found that the examination was sought for the predominant purpose of investigating and pursuing a potential claim in their capacity as shareholders for the benefit of a limited group of persons who purchased shares in Arrium at a particular time, irrespective of whether they held shares at the time of the appointment of administrators, and would be of no commercial benefit to Arrium. That subjective purpose would be one foreign to the purpose for which the examination power is conferred and therefore an abuse of process.

The grounds of appeal are:

- The Court of Appeal erred in holding that the examination summons issued to a director of Arrium on behalf of the Appellants pursuant to s 596A of the Act was issued for a purpose foreign to the purposes for which those powers were conferred by reason that the result intended to be achieved by them would bring no “commercial” or “demonstrable” benefit to Arrium or its creditors.
- The Court of Appeal ought to have held that the Appellants’ purposes in conducting the examination were connected to the legitimate purpose of enabling evidence and information to be obtained to support the bringing of proceedings against examinable officers and other persons in connection with the examinable affairs of Arrium.
- The Court of Appeal ought to have held that the Appellants’ purpose did not involve an abuse of process.

KPMG has filed a Notice of Contention which raises the following ground:

- On the proper construction of s 596A of the Act, it is an abuse of process for an eligible applicant to conduct an examination for the predominant purpose of investigating a potential claim by that applicant against a third party, even if the success of that claim would benefit the company, its creditors or its contributories.

H. LUNDBECK A/S & ANOR v SANDOZ PTY LTD (S22/2021)
CNS PHARMA PTY LTD v SANDOZ PTY LTD (S23/2021)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 133

Date of judgment: 4 August 2020

Special leave granted: 11 February 2021

The Danish company H. Lundbeck A/S (“H Lundbeck”) is the patentee of Australian Patent No 623144 (“the Patent”), the subject of which is the anti-depressant drug escitalopram. On 12 June 2009, the day before the Patent’s expiry date, H. Lundbeck applied to the Commissioner of Patents (“the Commissioner”) for an extension of time in which to seek an extension of the term of the Patent. In June 2011 the Commissioner granted the extension of time sought and on 25 June 2014 the Commissioner extended the term of the Patent to 9 December 2012.

Prior to those events, in 2007 H. Lundbeck and its Australian subsidiary and exclusive licensee Lundbeck Australia Pty Ltd (together, “Lundbeck”) entered into an agreement (“the Agreement”) with Sandoz Pty Ltd (“Sandoz”). Clause 3(1) of the Agreement provided, inter alia, that Lundbeck granted Sandoz an irrevocable licence to the Patent, effective from 31 May 2009 “if the Patent expires on 13 June 2009” or effective from 26 November 2012 “if the Patent expires on 9 December 2012”. At the time of the Agreement, 9 December 2012 marked the end of an extended term of the Patent given by the Commissioner in 2006 which was under challenge and which came to be held invalid by the Federal Court in 2008 (that extended term eventually being removed from the Register of Patents in 2010 following an unsuccessful appeal by Lundbeck and an unsuccessful application to this Court for special leave to appeal).

On 26 June 2014 Lundbeck commenced proceedings against Sandoz in relation to the latter’s selling of generic escitalopram products between 15 June 2009 and 9 December 2012, Lundbeck claiming that Sandoz had both infringed the Patent and engaged in misleading or deceptive conduct. CNS Pharma Pty Ltd (“CNS Pharma”), a subsidiary of Lundbeck Australia Pty Ltd, separately sued Sandoz for misleading or deceptive conduct. Justice Jagot found in favour of Lundbeck (on both aspects of its claim) and CNS Pharma, awarding the companies damages totalling more than \$17.5 million plus interest. Her Honour held that Sandoz held a licence pursuant to cl 3(1) the Agreement only for the fortnight ending 13 June 2009, as the Patent expired on that date (its term not having validly been extended at that time). This was after finding that it was apparent from cl 3(1) that the parties’ common intention was that Sandoz would have a licence for only two weeks prior to the expiry of the Patent.

Appeals by Sandoz were unanimously allowed by the Full Court of the Federal Court (Nicholas, Yates and Beach JJ). Their Honours held that, although when making the Agreement the parties apparently had assumed that the Patent’s expiry date would be known by May 2009, cl 3(1) conferred on Sandoz the right to enter the market of escitalopram products without concerning itself with the remote possibility that the Patent’s term might be extended after it had expired. The Full Court found that the objective intention of the parties was to specify only a start date of the licence and not an end date, and that the licence was not contingent on there being no extension of term after the Patent expired.

In each appeal the grounds of appeal include (in essence):

- The Full Court erred in holding that clause 3(1) of the Agreement granted Sandoz an irrevocable non-exclusive royalty free licence from 31 May 2009 of the Patent for the term of the Patent as extended from 13 June 2009 to 9 December 2012 and thereby constituted a complete answer to the Appellants' claims.
- The Full Court erred in holding that s 79 of the *Patents Act 1990* (Cth) did not entitle an exclusive licensee, such as Lundbeck Australia Pty Ltd, to commence a proceeding for infringement of the Patent in respect of conduct which occurred during its extended term.

Sandoz has filed notices of contention, raising the following grounds:

- The Full Court should have found, and should not have rejected the submission, that the surrounding circumstances of the Agreement were such that a reasonable commercial businessperson would have been aware that there was a risk that the parties would not know, before 13 June 2009, whether the term of the Patent would be extended.
- In circumstances where at the time of the sales of Sandoz' generic escitalopram products:
 - there was no patent in force;
 - any potential liability for patent infringement depended on Lundbeck obtaining an extension of time in which to apply for an extension of the term of the Patent, followed by an extension of the term of the Patent; and
 - there was a question as to whether Sandoz had a licence under clause 3(1) of the Agreement (which the Full Court determined in favour of Sandoz), the Full Court ought to have proceeded to hold that those sales did not involve any misleading or deceptive conduct.

**HOBART INTERNATIONAL AIRPORT PTY LTD v CLARENCE CITY COUNCIL
& ANOR (H2/2021)**
**AUSTRALIA PACIFIC AIRPORTS (LAUNCESTON) PTY LTD v NORTHERN
MIDLANDS COUNCIL & ANOR (H3/2021)**

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 134

Date of judgment: 6 August 2020

Special leave granted: 12 February 2021

The Second Respondent ('the Commonwealth') in each appeal owns properties in the municipal areas administered by of each of the First Respondents ('the Councils'). The Appellants each entered into long-term leases with the Commonwealth to operate the airports on each property, that is, Hobart Airport and Launceston Airport ('the Airport Sites').

Council rates and state land taxes are not payable on the Airport Sites. Clause 26.2(a) in each lease provides an amount equivalent to council rates to be paid by the Appellants to the Councils. The Appellants are obliged to use all reasonable endeavours to enter into an agreement with the respective Councils.

In the financial years 2014/15 to 2017/18, the Appellants made payments to the respective Councils in accordance with independent valuations by a firm specifically engaged by the Commonwealth to determine the amounts. The Appellants and the Commonwealth agree that these payments complied with cl 26.2(a).

In October 2018, the Councils sought declaratory relief with respect to the proper construction of cl 26.2(a) and the Appellants' liability to make payments for 2014/15 to 2017/18. They also sought consequential relief for the calculation of any shortfall in the payments.

The primary judge held that the Councils did not have standing to seek declaratory relief in respect of the proper construction of cl 26.2(a) because the parties to the leases had agreed that the Appellants had complied with their obligations. The only right or interest the Councils had was an asserted entitlement to a benefit under contracts to which they were not parties.

The Councils appealed to the Full Court of the Federal Court. The Full Court upheld the appeals. The Full Court held that the primary judge had erred in applying the 'doctrine of privity of contract'. It held that the subjects of the claims were the legally enforceable rights and liabilities of the contracting parties even though there was no dispute between or claim by those parties. The Full Court found that the Councils possessed a sufficient interest in the relief they sought as that relief was of real commercial and practical interest to them.

The grounds of appeal in each appeal are that:

- The Court erred in finding that standing of the Council to seek declaratory relief in respect of the interpretation or application of the lease between the Appellant and the Commonwealth was not to be determined by reference to, or constrained by, the doctrine of privity of contract.
- The Court erred in finding that Council has standing to seek declaratory relief in respect of the interpretation or application of the lease between the Appellant and the Commonwealth.
- The Court erred in finding that there is a “matter” in respect of which the Court has jurisdiction when the only rights, duties or liabilities to be established by the grant of a declaration are contractual rights, duties or liabilities of contracting parties *inter se* between whom there is no dispute as regards the meaning or effect of the contract.
- The Court erred in finding that the Council’s claim involves a justiciable controversy between the Council and the Respondents such as to constitute a “matter” in respect of which the Court has jurisdiction.

The Councils have each filed a notice of contention, the grounds of which are that:

- If the doctrine of privity of contract operates as argued by the Appellant, then ground 5 of the appeal to the Full Court contended that the primary judge erred in his conclusion that the case before him did not involve exceptional circumstances: *Meadows Indemnity Co Ltd v. The Insurance Corporation of Ireland PLC* [1989] 2 Lloyd’s Rep 298 at 309; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 33 at [95-96].
- The Full Court did not deal with this ground, reasoning, at [153] that ‘*nor, in our view, is it necessarily determinative to label the circumstances of the case as ‘exceptional’ to warrant a third party to a contract obtaining standing’* for the reason that it focused upon the quality of the interest of the councils to determine whether they were ‘*outsiders*’.
- The Full Court did not, however, expressly state that it was unnecessary to decide ground 5 or form a view on the merit of the arguments: [153].
- If the privity of contract doctrine operates as argued by the Appellant, then the Council contends:
 - that this case is one of exceptional circumstances and on that basis the Council has standing to seek declaratory relief as to the meaning and effect of clause 26.2 of the Lease; or
 - that this Court should confine the doctrine so that it does not operate to deny standing to a non-party applicant for declaratory relief as to the meaning of a contract where the applicant is a participant.

DEPUTY COMMISSIONER OF TAXATION v HUANG (S26/2021)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 141

Date of judgment: 17 August 2020

Special leave granted: 11 February 2021

Mr and Mrs Huang lived (and were tax residents) in Australia for several years. In 2018, Mr Huang left Australia to reside in the People's Republic of China ('China'). Mrs Huang left Australia for China in 2019. At the time of Mr Huang's departure, an audit into his income tax affairs by the Australian Taxation Office was in progress. In September 2019 as a result of that audit, the Deputy Commissioner issued notices of amended assessment for the years ended 2013, 2014 and 2015, and a notice of assessment assessing Mr Huang as liable for a total amount of over \$140 million in tax penalties for those years. The Deputy Commissioner also filed an originating application in the Federal Court of Australia seeking judgment against Mr Huang in that amount as well as freezing orders pursuant to rule 7.35 of the Federal Court Rules 2011 against Mr Huang and his wife.

In September 2019 the Federal Court made those freezing orders which applied to assets held by Mr and Mrs Huang in Australia and outside Australia. The effect of the orders was to prevent them from disposing or otherwise dealing with those assets in order to avoid paying the penalty amount. Mr Huang filed a notice of appeal challenging the freezing orders made in relation to assets outside of Australia.

The Full Court of the Federal Court noted that the purpose of a freezing order as identified in rule 7.32 of the Federal Court Rules is the prevention of the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied. If assets are beyond the reach of the Court's enforcement process, a freezing order with respect to those assets will not be for the purpose of rule 7.32 because there is no longer a realistic possibility that the removal or disposition of the assets will frustrate or inhibit the Court's process such that a judgment will be wholly or partly unsatisfied.

The Full Court was of the view that there must be a realistic possibility that any judgment obtained by a plaintiff can be enforced against assets of a defendant in the place to which the proposed order relates. Noting that a realistic possibility of enforcement in a foreign State is necessary, and the fact that enforcement in China was almost certainly impossible in this case, the Full Court allowed the appeal.

The ground of appeal is that the Full Court of the Federal Court erred in imposing, as a jurisdictional precondition for the making of a worldwide freezing order, proof of a realistic possibility of enforcement of a judgment debt against assets of the respondent in each foreign jurisdiction to which the proposed order relates.

STUBBINGS v JAMS 2 PTY LTD & Ors (M13/2021)

Court appealed from: Supreme Court of Victoria (Court of Appeal)
[2020] VSCA 200

Date of judgment: 5 August 2020

Special leave granted: 12 February 2021

The respondents made an asset-based loan to a company owned and controlled by the appellant. An asset-based loan is a loan made on the basis of the security of a particular asset alone, without any consideration of the appellant's ability to repay the loan from his income or other assets. Whether or not the making of an asset-based loan constitutes unconscionable conduct depends on 'all the circumstances' of the case, not just the fact that it is an asset-based loan.

The loan of \$1,059,000 made by the respondents was to enable the appellant to purchase a property as a home. The security for the loan was a mortgage over the property as well as equity the appellant had in two other houses that he owned. At the time the appellant was unemployed and had no regular income. Interest under the loan was payable monthly in advance. The first and second interest payments were made but no further payments were made, and the respondents sought possession of the property. Possession was granted in a summary judgment.

The appellant appealed the summary judgment and alleged that the mortgage had been procured by unconscionable conduct. The trial judge accepted the unconscionable conduct defence and declared that the loan agreement was invalid, unenforceable and set aside.

The respondents sought leave to appeal to the Court of Appeal. Leave to appeal was granted by the Court of Appeal. The Court of Appeal allowed the appeal against the trial judge's unconscionability finding and ordered judgment for the respondents for possession.

The grounds of appeal are that:

- By evaluating the respondents' system of lending by reference to the short-hand label "asset-based lending", rather than the normative standard of conduct underlying s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth), the Court of Appeal erred in concluding that the respondents did not act unconscionably.
- By confining its consideration of the respondents' knowledge to constructive notice, and disregarding the respondents' knowledge of, or wilful blindness to, the appellant's personal and financial circumstances, the Court of Appeal erred in concluding that the respondents did not act unconscionably.
- The Court of Appeal erred in substituting its own inferences for those of the learned primary judge as to whether the respondents' agent, Mr Jeruzalski, knew of matters that made the loan transaction unconscionable in all the circumstances.