SHORT PARTICULARS OF CASES

JUNE 2021

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PALMER v THE STATE OF WESTERN AUSTRALIA (B52/2020)
MINERALOGY PTY LTD & ANOR v STATE OF WESTERN AUSTRALIA (B54/2020)

Dates writs of summons filed: 14 September 2020
18 September 2020

Date special cases referred to Full Court: 8 April 2021

Mr Clive Palmer is the controller and majority beneficial owner of Mineralogy Pty Ltd ("Mineralogy") and its subsidiary International Minerals Pty Ltd ("IM"). In December 2001 Mineralogy, IM and other companies entered into a written agreement ("the Agreement") with the State of Western Australia ("the State") under which the State agreed to assist in the establishment of projects proposed by Mineralogy (by itself or in conjunction with one of more of the other companies) in relation to the mining, processing and transport of iron ore within and from the Pilbara region. The Agreement was ratified and implemented by the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ("the 2002 Act"), which provided that the Agreement took effect despite any other law.

The Agreement, which came to be varied in 2008, provided that any dispute or difference of view between the parties arising out of the Agreement be referred to and settled by arbitration under the *Commercial Arbitration Act 1985* (WA). Such a referral was made to settle the question of whether a submission of certain documents in 2012 by Mineralogy and IM to the relevant Minister of the State constituted the making of a valid proposal with which the Minister must deal in accordance with the Agreement. In May 2014 an arbitral award ("the First Award") was made by the Hon Michael McHugh AC QC ("the Arbitrator"), who declared that the submission in question was a proposal with which the Minister was required to deal under clause 7(1) of the Agreement. The Arbitrator also held that the Minister, by failing to give a decision on the proposal within two months of its submission, was in breach of the Agreement and was liable in damages for any resulting damage suffered by Mineralogy and IM.

In July 2014 the Minister purported to impose 46 "conditions precedent" to giving approval to the proposal, a step which Mineralogy and IM claimed was unreasonable and in breach of the Agreement.

In October 2019 the Arbitrator made another arbitral award ("the Second Award"), determining certain preliminary issues concerning whether Mineralogy and IM had a right to damages for the State's breach of the Agreement. The Arbitrator held that the two companies were not foreclosed from pursuing claims for damages for breach, as the First Award had not determined the companies' rights to recover such damages.

On 8 July 2020 Mineralogy and IM entered into an agreement with the State for the Arbitrator to arbitrate disputes as to the companies' claim for damages for the Minister's breach of the Agreement (as held in the First Award) and the companies' additional claim that the Minister's imposition of conditions precedent in July 2014 was unreasonable. The hearing of that arbitration was scheduled to commence on 30 November 2020.

Meanwhile, on 13 August 2020 royal assent was given to the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ("the 2020 Act"), the Bill for which had been introduced into the Legislative Assembly of Western Australia on 11 August 2020. The 2020 Act provides that the First Award and the Second Award have no effect, that the arbitration on foot is terminated, that relevant arbitration agreements are not valid, and that no documents submitted to the State prior to 13 August 2020 can constitute a valid proposal under the Agreement. The 2020 Act also provides that relevant proceedings cannot be maintained or commenced (whether in Western Australia or elsewhere), that the State can have no liability for any loss connected with its disputes with Mineralogy and IM in relation to the Agreement, and that Mineralogy, IM and Mr Palmer are to indemnify the State against any liability connected with their disputes and any reduction in funding which the State otherwise would have received from the Commonwealth.

By their proceedings in this Court, Mineralogy and IM, and separately Mr Palmer, challenge the validity of the 2020 Act. The bases of the plaintiffs' challenges include incompatibility with the institutional integrity of courts, detraction from the exercise of federal jurisdiction by courts, deficiency as to manner and form, impermissible delegation of legislative power, lack of full faith and credit given to laws of other States, and discrimination against Mr Palmer as a resident of Queensland.

On 6 April 2021 Justice Gageler granted the parties leave to state agreed questions of law in the form of a special case for the opinion of the Full Court. A special case then filed in each proceeding states the following questions:

1. Is the 2020 Act invalid or inoperative in its entirety?

2. If the answer to question 1 is "no", are any of [Part 3 or various sections and sub-sections thereof] of the 2020 Act invalid or inoperative, and if so, to what extent?

3. If the answer to question 2 is "yes", are any or all of the invalid provisions of the 2020 Act severable such that the 2020 Act is capable of operating to the extent of the remaining valid provisions?

4. By whom should the costs of this Special Case be paid?

The plaintiffs have filed notices of a constitutional matter in each proceeding. The Attorneys-General of the Commonwealth, New South Wales, Queensland, the Northern Territory and Victoria are intervening in both proceedings.

HAMILTON (A PSEUDONYM) v THE QUEEN (S24/2021)

Court appealed from: Court of Criminal Appeal of the Supreme Court of New South Wales
[2020] NSWCCA 80

Date of judgment: 27 April 2020

Special leave granted: 11 February 2021

The Appellant was tried before a jury on an indictment containing 10 counts of aggravated indecent assault contrary to s 61M(2) of the *Crimes Act 1900* (NSW). The offences were alleged to have been committed against three of his five children (the "First", "Third" and "Fifth" children). On 1 March 2019, the jury found the Appellant guilty on all counts.

Prior to trial, the Crown made an application for the admission of tendency evidence ("the Tendency Application"). Amongst other things, the Crown sought that the evidence of the Third and Fifth children be cross-admissible as tendency evidence for their own counts and for each other.

At trial, pre-recorded evidence of each of the First, Third and Fifth children was adduced. Prior to the close of the Crown case, the trial judge heard and determined the Tendency Application. As the evidence the subject of the Tendency Application had already been adduced, the outstanding issue was whether the Crown could deploy tendency reasoning. The trial judge, Judge Williams, found that the probative value of the admission of the evidence as tendency evidence would be outweighed by the danger of unfair prejudice to the Appellant and rejected the Tendency Application.

In summing up, the trial judge instructed the jury that they must give separate consideration to each of the counts on the indictment (a "separate evidence direction") and that the child allegedly assaulted was the only witness in relation to the events the subject of each count, with the result that for each count on the indictment the jury had to be satisfied that the complainant child was an honest and accurate witness in order to convict (a "*Murray* direction"). His Honour did not give an anti-tendency direction in relation to evidence of the acts charged in relation to the Third and Fifth children.

On appeal, the Appellant contended, amongst other things, that the trial miscarried as a result of the jury not being warned by the trial judge in summing up as to the unavailability of tendency reasoning ("Ground 1").

The Court of Criminal Appeal (Beech-Jones and Adamson JJ; Macfarlan JA dissenting) refused the Appellant leave to raise Ground 1. The majority found that in light of the separate evidence and *Murray* directions, the potential for the jury to have engaged in tendency reasoning was diminished. Therefore, their Honours considered that the Appellant had not established a miscarriage of justice.

Justice Macfarlan would have granted leave for the Appellant to raise Ground 1, allowed the appeal, quashed the Appellant's convictions and directed a retrial. His Honour considered that there was a significant risk that the jury may have engaged in impermissible tendency reasoning and that it was incumbent on the trial judge, in light of his Honour's ruling on the Tendency Application, to attempt to ameliorate

the potential prejudice to the Appellant by giving appropriate anti-tendency directions.

The sole ground of appeal is:

- The Court of Criminal Appeal erred in finding that a miscarriage of justice was not occasioned by the failure of the trial judge to direct the jury that they were prohibited from using the evidence led in support of each count on the indictment as tendency evidence in support of the other counts on the indictment.

RIDD v JAMES COOK UNIVERSITY (B12/2021)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 123
[2020] FCAFC 132

Date of judgment: 22 July 2020

Special leave granted: 11 February 2021

On 2 May 2018 James Cook University ("JCU") terminated the employment of Professor Peter Ridd after 27 years. The termination followed JCU issuing two censures, on 29 April 2016 ("the First Censure") and 21 November 2017 ("the Final Censure"), which related to findings that Professor Ridd had engaged in misconduct and serious misconduct under the JCU Enterprise Agreement 2013-2016 ("the EA") by breaching the JCU Code of Conduct ("the Code") and confidentiality directions. The impugned conduct included statements made by Professor Ridd in an email to a journalist in December 2015 and a Sky News interview in August 2017 suggesting that reports produced, and research undertaken by institutions associated with JCU, including the ARC Centre of Excellence in Coral Reef Studies and the Great Barrier Reef Marine Park Authority, were unreliable.

Professor Ridd commenced proceedings in the Federal Circuit Court alleging that JCU had contravened s 50 of the *Fair Work Act 2009* (Cth) ("the Act") by, amongst other things, making findings against him that he had breached the Code. Professor Ridd did not dispute that he had engaged in any of the impugned conduct, that the conduct breached the Code or that his conduct should not be characterised as misconduct or serious misconduct. Instead, Professor Ridd contended that in respect of each of the misconduct findings he was exercising his right to intellectual freedom afforded by clause 14 of the EA and JCU had therefore contravened the EA by disciplining him for such conduct.

On 16 April 2019 Judge Vasta found that all the findings of misconduct and serious misconduct and consequent actions of JCU, including issuing the First Censure, the Final Censure and terminating Professor Ridd's employment, were unlawful. His Honour found that on its proper construction clause 14 of the EA provided Professor Ridd with the right to express his professional opinions in whatever manner he chose, provided he did not contravene the sanctions contained in the clause itself not to harass, vilify, bully or intimidate, and was not subordinate to the obligations imposed by the Code.

The Full Court of the Federal Court of Australia (Griffiths and SC Derrington JJ; Rangiah J dissenting) allowed an appeal by JCU. The majority found that, on its proper construction, clause 14 must be exercised in accordance with the Code and therefore did not provide Professor Ridd with the untrammelled right to express his opinions as he chose, unconstrained by the Code's behavioural standards. Accordingly, their Honours held that JCU's conduct did not contravene s 50 of the Act.

Justice Rangiah, however, would have allowed the appeal and remitted the matter to the Federal Circuit Court for a new hearing upon the same evidence. His Honour agreed with the majority that the primary judge erred in construing clause 14 of the EA. However, his Honour considered that clauses 13 and 14 of the EA provided that in the event of a conflict between a genuine exercise of intellectual freedom

and a requirement of the Code, the former would prevail to the extent of any inconsistency.

The grounds of appeal are:

- The Full Court erred in finding that on the proper construction of the EA, the exercise of the right to intellectual freedom conferred by clause 14 of the EA ("intellectual freedom right") is qualified by the obligations imposed by the Code.

- The Full Court erred in finding that JCU's disciplinary action against Professor Ridd was not contrary to the EA on the basis that:
    - none of his conduct was protected by the intellectual freedom right; and/or
    - he could be lawfully directed by JCU (i) as to the exercise of the intellectual freedom right; and/or (ii) not to criticise, and to keep confidential, the disciplinary action that it had taken against him.

ADDY v COMMISSIONER OF TAXATION (S25/2021)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 135

Date of judgment: 6 August 2020

Special leave granted: 11 February 2021

Ms Catherine Addy is a British citizen who arrived in Australia in August 2015 on a 12-month working holiday visa for persons aged between 18 and 31. In July 2016 she was granted a visa of the same kind. Between July 2016 and her return to the UK in May 2017, Ms Addy derived an income in Australia of less than $30,000 (from waitressing work at two hotels in Sydney).

Upon a tax return lodged by Ms Addy, the respondent ("the Commissioner") assessed Ms Addy for tax on her income for the year ended 30 June 2017. In doing so, the Commissioner accepted Ms Addy's indication that she was a non-resident of Australia for tax purposes and applied a flat rate of tax prescribed for working holiday makers ("the Backpacker Tax") in Pt III of Sch 7 to the *Income Tax Rates Act 1986* (Cth) ("the Rates Act"), which for the relevant year was 15% on incomes up to $37,000. An objection lodged by Ms Addy was only partially successful: the Commissioner accepted Ms Addy's revised position that she was a resident of Australia for tax purposes but nevertheless levied the Backpacker Tax instead of applying the tax-free threshold of $18,200, followed by a tax rate of 19% on the remainder of her taxable income, as was generally applicable to Australian residents under Pt I of Sch 7 to the Rates Act ("the Residents' Rates"). A fresh objection by Ms Addy was disallowed by the Commissioner, who maintained that Ms Addy, as the holder of a working holiday visa, had properly been taxed as a "working holiday maker" deriving "working holiday taxable income" (as those terms are defined in s 3A of the Rates Act) despite her also being a resident for tax purposes. (In accepting that Ms Addy was such a resident, the Commissioner did not consider whether Ms Addy's usual place of abode was outside Australia and whether she intended to take up residence in Australia, as provided, in proviso form, in (a)(ii) of the definition of "resident" in s 6(1) of the *Income Tax Assessment Act 1936* (Cth).)

Ms Addy appealed to the Federal Court, contending that she ought to be taxed at the Residents' Rates, in view of Art 25 of a "double tax agreement" between Australia and the UK, the *Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital* made at Canberra [2003] ATS 22 ("the Convention"), which has the force of law in Australia pursuant to s 5(1) of the *International Tax Agreements Act 1953* (Cth). Art 25(1) of the Convention provides as follows:

> *Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.*

Ms Addy's appeal was allowed on 30 October 2019 by Logan J, who ordered that the matter be remitted to the Commissioner to re-assess Ms Addy's liability for tax. His Honour found that Sch 7 to the Rates Act gave rise to discrimination between taxpayers resident in Australia based on their nationality, since only a foreign

national could be a "working holiday maker" whose Australian-derived income attracted the Backpacker Tax. Logan J held that Art 25 of the Convention applied such that Ms Addy's income should be taxed at the Residents' Rates and not be subject to the Backpacker Tax.

An appeal by the Commissioner was allowed by the Full Court of the Federal Court (Derrington and Steward JJ; Davies J dissenting). In separate reasons, the majority held that Logan J had erred by treating the holding of a working holiday visa as a proxy for foreign nationality in undertaking the comparison set out in Art 25 of the Convention. Their Honours found that Sch 7 of the Rates Act did not give rise to discrimination based on British nationality, as various types of visa other than a working holiday visa were available to British nationals, a holder of any such other type of visa being assessable for taxation under Pt I or Pt II (the latter applying to non-residents) of Sch 7 rather than under Pt III. The majority held that Ms Addy's income was subject to the Backpacker Tax because she derived it as the holder of a working holiday visa, not because she was a British national. A comparison for the purposes of Art 25 of the Convention therefore could not be made.

Davies J however would have dismissed the appeal, on the basis that Logan J was correct to hold that Art 25 of the Convention was applicable and that it was infringed in Ms Addy's case. Her Honour found that Ms Addy was a "working holiday maker" under the Rates Act on account of her visa status and her foreign nationality, the latter attribute being inextricably linked to the former.

The ground of appeal is:

- The majority of the Full Court of the Federal Court erred by holding Ms Addy should not obtain relief under Art 25 of the Convention. The conclusions of the primary judge and Davies J (in dissent) were correct. The majority should have held Ms Addy was entitled to the same tax treatment as an Australian national.