

SHORT PARTICULARS OF CASES

MARCH 2021

No.	Name of Matter	Page No
-----	----------------	---------

Tuesday, 2 and Wednesday, 3 March

1.	LibertyWorks Ltd v Commonwealth of Australia	1
----	--	---

Thursday, 4 March

2.	Matthew Ward Price as Executor of the Estate of Alan Leslie Price (deceased) & Ors v Christine Claire Spoor as trustee & Ors	3
----	--	---

Friday, 5 March

3.	MZAPC v Minister for Immigration and Border Protection & Anor	5
----	---	---

Wednesday, 10 March

4.	Talacko v Talacko & Ors	7
----	-------------------------	---

Thursday, 11 March

5.	Namoia v The Queen	9
----	--------------------	---

LIBERTYWORKS INC v COMMONWEALTH OF AUSTRALIA (S10/2020)

Date writ of summons filed: 7 February 2020

Date special case referred to Full Court: 20 August 2020

On 10 December 2018, the *Foreign Influence Transparency Scheme Act 2018* (Cth) (“the Act”) came into force. Pursuant to s 3 of the Act, the object of the Act is to provide for a scheme for the registration of persons who undertake certain activities (including, pursuant to ss 10, 20 and 21 of the Act, political lobbying, political communication and politically related payments) on behalf of foreign governments and other foreign principals in order to improve the transparency of their activities on behalf of those foreign principals.

The Plaintiff is a private think tank incorporated in Queensland. It aims to move public policy in the direction of increased individual rights and freedoms (including the promotion of freedom of speech and political communication) and to advocate for drastic reductions in governmental control over all individuals’ personal and economic lives. The American Conservative Union (“ACU”) is an American corporation established for the promotion of political freedom and for the purpose of influencing politics and politicians in the United States of America (“USA”). Among other things, the ACU annually organises and hosts a multi-day political conference in the USA known as the Conservative Political Action Conference (“CPAC”).

In October 2018 an agreement was reached between the Plaintiff’s president and the executive director of the ACU concerning the holding of a CPAC event in Australia. From 9 to 11 August 2019 the CPAC event was held in Sydney (“the Conference”). The Conference was promoted throughout Australia and was attended by persons from several States as well as members of the ACU.

On 22 October 2019 an officer of the Commonwealth Attorney-General’s Department sent the Plaintiff a notice under s 45(2) of the Act requiring the Plaintiff to provide information and produce copies of documents in relation to the Conference and the ACU to satisfy the Attorney-General’s Department as to whether the Plaintiff was liable to register under the Act in relation to the ACU (“the Notice”). The Plaintiff did not comply with the Notice and has not since applied for registration under the Act.

The Plaintiff commenced proceedings in this Court, seeking declarations that the Act or relevant provisions of the Act are invalid and a permanent injunction restraining the Defendant from taking any step in relation to the Plaintiff’s alleged contravention of s 45 of the Act.

The parties filed a Special Case, the questions in which Justice Bell referred for consideration by Full Court. The Special Case states the following questions for the opinion of the Court:

- 1) Is the *Foreign Influence Transparency Scheme Act 2018* (Cth) invalid, either in whole or in part (and if in part, to what extent), on the ground that it infringes the implied freedom of political communication?

- 2) Is the *Foreign Influence Transparency Scheme Act 2018* (Cth) invalid, either in whole or in part (and if in part, to what extent), on the ground that it is contrary to the freedom of interstate intercourse referred to in s 92 of the Constitution?
- 3) In light of the answers to questions 1 to 2, what relief, if any, should issue?
- 4) Who should pay the costs of and incidental to this special case?

A Notice of a Constitutional Matter was filed by the Plaintiff. The Attorneys-General of South Australia and New South Wales have intervened in the proceeding.

MATTHEW WARD PRICE AND DANIEL JAMES PRICE AS EXECUTORS OF THE ESTATE OF ALAN LESLIE PRICE (DECEASED) & ORS v CHRISTINE CLAIRE SPOOR AS TRUSTEE & ORS (B55/2020)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2019] QCA 297

Date of judgment: 17 December 2019

Special leave granted: 11 September 2020

On 25 June 1998 Alan and Alanna Price, and James and Gladys Price (“the Prices”) each executed a mortgage in favour of Law Partners Mortgages (“LPM”) as security for a loan of \$320,000. The loan was not repaid by the repayment date and a new agreement was entered with an extended payment date of 2 July 2000. Certain repayments were made until 30 April 2001 after which no further repayments or acknowledgements were made.

In 2017 the Respondents (the successors in title to LPM) commenced proceedings in the Supreme Court of Queensland against the Prices, seeking over \$4 million said to be due under the mortgages and recovery of possession of the mortgaged land. In 2017 and 2018 respectively, Alan Price and James Price died. James Price’s interest in the mortgaged land passed to Gladys Price and the proceeding was discontinued as against him. The executors of Alan Price’s estate were substituted into the proceeding. The Appellants (the executors of Alan Price’s estate, Alanna and Gladys Price) contended that the Respondents’ claims were statute barred by ss 10, 13 and 26 of the *Limitation of Actions Act 1974* (Qld) (“the Act”) and the Respondents’ title under the mortgages had been extinguished by s 24(1) of the Act. The Respondents contended that the Applicants were precluded from pleading any defence under the Act by a covenant contained in clause 24 of the mortgages (“Clause 24”).

On 12 April 2019 Justice Dalton entered judgment for the Appellants. Her Honour rejected a submission for the Appellants that, for public policy reasons, it was not possible at law to contract out of the provisions of the Act. However, her Honour found that it was not possible to exclude the operation of s 24(1) of the Act by contract. Justice Dalton found that the relevant periods of limitation for recovery of possession of land had passed before the proceeding commenced and held that s 24(1) of the Act operated to extinguish the Respondents’ title to the mortgaged lands. On the question of construction of Clause 24, her Honour found that the clause, which did not directly reference the Act, was ambiguous. Her Honour construed Clause 24 against the Respondents and held that it did not operate to prevent the Appellants from raising defences based on ss 10(1)(a) and 26(1) of the Act to the claim for monies owing under the mortgage.

An appeal by the Respondents was allowed by the Court of Appeal (Gotterson JA, Sofronoff P and Morrison JA agreeing), which set aside the orders of Justice Dalton. Their Honours rejected the Appellants’ contention that an agreement to contract out of the Act made before a cause of action has arisen is void and unenforceable as a matter of public policy. On the question of construction, the Court of Appeal found that by the inclusion of the word “defeat”, Clause 24 applied to provisions of the Act by which the enforcement of a right, power or remedy of the mortgagee might be defended by the mortgagor. The Court held that ss 10(1)(a), 13 and 26(1) of the Act were such provisions and the

Appellants were therefore precluded by Clause 24 from pleading a limitations defence. Further, the Court of Appeal found that the operation of s 24(1) of the Act was predicated upon the limitation period within which a person may bring an action to recover land (prescribed by s 13) itself having expired. Having held that Clause 24 operated to exclude s 13 of the Act, the period of limitation prescribed by s 13 had never applied and therefore never expired. Accordingly, the Respondents' title to the mortgaged land was not extinguished.

The grounds of appeal include:

- The Court of Appeal erred in finding a promise or agreement to exclude the operation of the Act made prior to the date of any cause of action accruing, or at the formation of a loan contract was not void or unenforceable as a matter of public policy for being contrary to statute.
- The Court of Appeal erred in failing to find that if Clause 24 of the standard terms document of the mortgages had the effect contended for by the Respondents that it was void and unenforceable.

**MZAPC v MINISTER FOR IMMIGRATION AND BORDER PROTECTION
& ANOR (M77/2020)**

Court appealed from: Federal Court of Australia
[2019] FCA 2024

Date of judgment: 4 December 2019

Special leave granted: 14 August 2020

The Appellant is a citizen of India who arrived in Australia on a student visa in 2006. He applied for another student visa in 2007 which was refused on 18 April 2012. He was unsuccessful in applying for review of that decision.

In October 2013 the Appellant lodged an application for a Protection visa but it was invalid because he did not provide personal identifiers. In January 2014 he lodged a second Protection visa application. His Protection visa was refused on 2 June 2014. The Appellant applied to the Refugee Review Tribunal ('the Tribunal') for a review of the decision.

On 4 November 2014 the Tribunal affirmed the decision to refuse the Protection visa. The Appellant made an application for judicial review in the Federal Circuit Court. On 17 May 2016 the Federal Circuit Court dismissed the application. He appealed to the Federal Court.

The appeal was held in abeyance until the High Court decided a number of appeals, including *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3, which dealt with notifications given under s 438 of the *Migration Act 1958* (Cth).

On 25 January 2018 the First Respondent (the Minister) filed an affidavit disclosing the existence of a notification given under s 438 of the *Migration Act 1958* (Cth). The s 438 notification contained details of the Appellant's police record including driving related offences and, relevantly, a 'State false name' offence. The Appellant argued that that the Tribunal had made an adverse credibility finding, that the 'State false name' offence in the s 438 notification could have contributed to that finding and that the Tribunal provided no other reason why the Appellant was not credible. The Appellant argued the s 438 notification was material to the Tribunal's decision and he had not been accorded procedural fairness because the Tribunal had not disclosed it to him.

The Minister accepted that that the failure to disclose the s 438 notification was a breach of procedural fairness but argued that the Appellant had failed to establish that it was material to the outcome of the Tribunal's review.

On 4 December 2019 Mortimer J dismissed the appeal. Noting the Minister's concession, Mortimer J found that the Tribunal's failure to disclose the s 438 notification constituted a denial of procedural fairness but found that, in order to establish jurisdictional error, the breach must be material to the decision. Mortimer J noted that she was bound to follow the High Court decision in *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 which held that in order to establish materiality, the Appellant must prove, first, that the s 438 information was in fact taken into account by the Tribunal, and second, that the outcome could have realistically been different if the Appellant had an opportunity to make submissions to the Tribunal about that information.

Mortimer J found that the Appellant had not proven that the s 438 information was taken into account or that, even if he had an opportunity to make submissions, there was a realistic possibility of a different outcome.

The grounds of appeal are:

- The Federal Court erred when considering the materiality of a denial of procedural fairness occasioned by the Appellant not being told a certificate had been issued under section 438 of the *Migration Act 1958* (Cth) in respect of his criminal record by requiring the Appellant to rebut a presumption and prove the criminal record had been considered.
- The Federal Court erred in finding that the denial of procedural fairness was not material by erroneously holding that only 'dishonesty offences' were capable of adversely impacting upon the credibility of the Appellant in the Tribunal proceedings.

TALACKO v TALACKO & ORS (M111/2020)

<u>Court appealed from:</u>	<u>Date of judgment:</u>	<u>Special leave granted:</u>
Supreme Court of Victoria (Court of Appeal) [2020] VSCA 99 [2017] VSCA 163	30 April 2020, 5 May 2020 27 June 2017	22 October 2020 16 October 2020
Supreme Court of Victoria [2018] VSC 807(and 751)	20 December 2018	16 October 2020

Before World War II, Anna and Alois Talacko owned several properties in the Czech Republic, Slovakia and Germany, which were expropriated by the communists. The couple came to Australia and lived here with their three children. In 1989 the collapse of communism opened the way to the restitution of the properties. Their parents having died, the three children discussed applying for their restitution and sharing them or the proceeds of them. One of the sons, Jan Talacko, managed to secure all the available properties in his own name, and denied his brother and sister any entitlement.

In 1998 the excluded children commenced proceedings in the Supreme Court of Victoria against him. The proceedings were settled by agreement that all parties were to share in the fruits of the restitution. When Jan Talacko failed to perform his part of the settlement, the respondents had the proceedings reinstated.

On 24 April 2008 the respondents in the reinstated Supreme Court case secured orders that Jan Talacko had breached the terms of the settlement and that he pay them equitable compensation. Kyrou J later assessed this compensation at approximately €10 million ('the Kyrou J judgment'). The respondents then commenced proceedings in the Czech Republic to enforce the judgment of the Supreme Court of Victoria. In order to facilitate these proceedings, the respondents applied to the Prothonotary of the Supreme Court for the issue of certificates under s 15 of the *Foreign Judgments Act 1991* (Cth). Those certificates were the subject of subsequent appeals which resulted in the High Court judgment in *Talacko v Bennett & Ors* [2017] HCA 15.

On 12 May 2009 Jan Talacko and his sons executed three donation agreements (the 'Donation Agreement') by which he transferred his interest in the properties to them by way of gift.

On 17 July 2009 the first to fifth respondents commenced a further proceeding in the Supreme Court of Victoria against Jan Talacko and his wife, the appellant. In this proceeding they argued that the Donation Agreement had resulted in them losing the chance to recover the money awarded in the Kyrou J judgment.

On 7 November 2011 the Federal Court of Australia declared Jan Talacko bankrupt. He died on 3 November 2014.

On 7 August 2015 McDonald J, the primary judge in the proceeding commenced in 2009, found that the purpose of the Donation Agreement was to deprive the first to fifth respondents of access to the Czech properties and was unlawful. However, he found that they had not proved that they suffered any monetary loss because there were still court proceedings in the Czech Republic.

On 27 June 2017 the Court of Appeal allowed an appeal ('the 2017 Court of Appeal judgment'). The Court held that the first to fifth respondents had suffered a loss of a chance to recover the amount in the Kyrou J judgment and that the first to fifth respondents' expenses of proceedings in the Czech Republic also constituted monetary loss. It held there should be an assessment of damages representing the difference between the value of the first to fifth respondents' chance of recovering the judgment debt before and after entry into the Donation Agreement. The proceeding was remitted to McDonald J to determine the amount of damages.

On 15 December 2017 the High Court refused special leave to appeal from the 2017 Court of Appeal judgment on the basis that it was not, at that stage, a suitable vehicle for consideration of the issues. The High Court noted that there had been no assessment of damages.

On 7 December 2018 McDonald J delivered reasons assessing the amount of damages due to the loss or reduction of chance ('the 2018 Supreme Court damages judgment'). On 20 December 2018 McDonald J delivered reasons in relation to the costs of various related proceedings ('the 2018 Supreme Court costs judgment'). The total amount of both judgments was \$18,524,984.50. On that date his Honour pronounced orders in relation to both damages and costs.

On 30 April 2020 the Court of Appeal dismissed an appeal brought against the 2018 Supreme Court judgments ('the 2020 Court of Appeal judgment').

The appellant filed a number of applications for special leave in the High Court. Special leave has been granted in relation to the 2017 Court of Appeal judgments, the 2018 Supreme Court judgments, and the 2020 Court of Appeal judgment. In granting special leave this Court directed that all matters be consolidated into one appeal.

The appellant has filed a Notice of Appeal. The first respondent has filed a Notice of Cross-Appeal and a Notice of Contention. The second to fifth respondents have filed a Notice of Cross-Appeal and a Notice of Contention.

The grounds of appeal are:

- The Court of Appeal erred in holding or finding that an agreement to transfer properties had caused the loss of a chance to recover a judgment debt, in circumstances where the chance was only reduced and the judgment debt may yet be recovered.
- The Court of Appeal erred in holding or finding that a party was entitled to recover its expenses of foreign proceedings by way of damages, in circumstances where the foreign proceedings are ongoing and where the foreign court may order the expenses to be borne by that party.

NAMOA v THE QUEEN (S188/2020)

Court appealed from: Court of Criminal Appeal of the Supreme Court
of New South Wales
[2020] NSWCCA 62

Date of judgment: 6 April 2020

Special leave granted: 13 October 2020

The Appellant was tried before a jury on an indictment containing one count of conspiring with her co-accused, Mr Bayda, to do acts in preparation for a terrorist act or acts contrary to ss 11.5(1) and 101.6(1) of the Schedule to the *Criminal Code Act 1995* (Cth) (“the Criminal Code”). The charge alleged that the Appellant and Mr Bayda conspired with each other between about 8 December 2015 and about 25 January 2016, when they were both aged 18, to do acts in preparation for a terrorist act or acts involving the detonation of an improvised explosive device or devices and/or incendiary devices and/or the use of bladed weapons.

Prior to the trial, the Appellant unsuccessfully sought orders for a permanent stay on the basis that she and Mr Bayda had been married on 30 December 2015 and that a husband and wife could not be guilty of the crime of conspiracy under the Criminal Code. On 5 October 2018 the jury found the Appellant guilty and, on 31 January 2019, she was sentenced to a total term of imprisonment of three years and nine months. Mr Bayda was also found guilty and sentenced to a total term of imprisonment of four years.

On appeal against conviction the Appellant contended, amongst other things, that the trial judge erred in finding that the common law immunity of a husband and wife to a conspiracy charge had not formed part of the common law of Australia prior to the introduction of the Criminal Code and, even if it had, it was not incorporated in s 11.5 of the Criminal Code.

The appeal was dismissed by the Court of Criminal Appeal (Payne JA, Johnson and Davies JJ agreeing). The Court held that the language of s 11.5 of the Criminal Code, in particular the use of the words “with another person”, was sufficiently clear to demonstrate an intention by the Parliament that any immunity for conspiracy between a husband and wife was no longer to apply. The Court also considered that, if it were necessary to decide, the trial judge was correct to find that at the time immediately prior to the introduction of the Criminal Code the common law of Australia did not recognise such an immunity.

The grounds of appeal are:

- The Court of Criminal Appeal erred in holding that:
 - at the time immediately prior to the enactment of the Criminal Code, the common law rule that an agreement between two married persons could constitute a criminal conspiracy had been extinguished;
 - that common law rule should not now be maintained;
 - the Criminal Code does not incorporate the common law rule.

- The Court of Criminal Appeal erred in holding that the offence of conspiracy prescribed by s 11.5 of the Criminal Code can be committed by the entry into an agreement by two married persons.