

SHORT PARTICULARS OF CASES
APPEALS

AUGUST 2022

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

Tuesday, 9 August 2022

| | | |
|----|---------------------------------------|---|
| 1. | BHP Group Limited v Impiombato & Anor | 1 |
|----|---------------------------------------|---|

Wednesday, 10 August 2022 and Thursday, 11 August 2022

| | | |
|----|---|---|
| 2. | Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788 | 2 |
|----|---|---|

Tuesday, 16 August 2022

| | | |
|----|---|---|
| 3. | Bosanac v Commissioner of Taxation & Anor | 4 |
|----|---|---|

Wednesday, 17 August 2022

| | | |
|----|----------------|---|
| 4. | TL v The Queen | 6 |
|----|----------------|---|

BHP GROUP LIMITED v IMPIOMBATO & ANOR (M12/2022)

Court appealed from: Full Court of the Federal Court of Australia
[2021] FCAFC 93

Date of judgment: 3 June 2021

Special leave granted: 18 February 2022

The appellant, BHP Group Limited (“BHP”), is a company registered in Australia and listed on the Australian Securities Exchange (“ASX”). At all material times, BHP shared a dual listed company structure with a separate company, then known as BHP Billiton Plc (“BHP Plc”), which was registered in the United Kingdom and listed on the London Stock Exchange (“LSE”), with a secondary listing on the Johannesburg Stock Exchange (“JSE”). Through a wholly-owned subsidiary, BHP held a 50% interest in a Brazilian company which owned and operated the Germano complex in Brazil. The complex included the Fundao Dam, which failed in November 2015.

The respondents are the representative applicants in a class action proceeding brought against BHP arising from the failure of the dam. They allege breaches by BHP of its continuous disclosure obligations, and misleading or deceptive conduct, in relation to information disclosed to the market regarding the Fundao Dam. The respondents allege that, following the dam failure, BHP’s share price declined significantly on the ASX, as did the price of BHP Plc shares on each of the LSE and the JSE. The group definition purports to include persons who, during a defined period preceding the dam failure, contracted to acquire fully paid-up ordinary shares in: (a) BHP on the ASX; (b) BHP Plc on the LSE; and/or (c) BHP Plc on the JSE, and are thereby alleged to have suffered loss. A substantial number of shareholders, and the vast majority of BHP Plc shareholders falling within the group member definition, are not resident in Australia.

This appeal raises the question of who may a representative applicant include as a ‘group member’ under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (“the Act”): anyone in the world, or only persons within the territory of Australia?

The grounds of appeal are:

- The Full Court erred in finding that Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the Act) applies to claims brought by the Respondents (being the Joint Applicants in the substantive proceedings) on behalf of shareholders of BHP Group Limited (BHP) and/or BHP Group Plc (BHP Plc) who are not resident in Australia.
- Specifically, the Full Court erred in finding that the presumption against extra-territorial operation of legislation does not apply to Part IVA of the Act and that, while silent on the subject, Part IVA operates extraterritorially in purporting to render judgments in proceedings under that Part binding on and enforceable against non-resident group members.

**ALLIANZ AUSTRALIA INSURANCE LIMITED v DELOR VUE
APARTMENTS CTS 39788 (S42/2022)**

Court appealed from: Full Court of the Federal Court of Australia
[2021] FCAFC 121

Date of judgment: 9 July 2021

Special leave granted: 17 March 2022

The respondent (“Delor Vue”), the body corporate of an apartment complex built in 2008-09, obtained an insurance policy for the complex covering public liability and property damage (“the Policy”) from the Appellant (“Allianz”), without disclosing roof defects of which Delor Vue had knowledge. In March 2017, five days after the commencement of the Policy, the complex’s roof was damaged by a cyclone and some apartments were rendered uninhabitable.

Delor Vue made a claim under the Policy, and disclosed the pre-existing roof defects during initial claim investigations. Strata Community Insurance (“SCI”), an underwriting agency owned and controlled by Allianz, informed Delor Vue in May 2017 that despite the non-disclosure, indemnity would be given “in line with all other relevant policy terms, conditions and conclusions”, save for costs associated with pre-existing defects (“the Initial Approval”). Additional defects then came to light during further investigations, and in March 2018 SCI proposed that the Policy be renewed at a higher premium and conditional upon the rectification of all roof defects. SCI subsequently informed Delor Vue that the work which it would indemnify under the Policy amounted to approximately \$919,000, while the cost of unindemnified work would amount to approximately \$3.6 million. Delor Vue then rejected an offer by SCI to give indemnity for the lesser amount only, whereupon SCI purportedly reduced its liability to nil.

In Federal Court proceedings commenced by Delor Vue, Chief Justice Allsop determined, as a preliminary issue, that Allianz (through SCI) could reduce its liability to nil under s 28(3) of the *Insurance Contracts Act 1984* (Cth) (“the Act”) on account of Delor Vue’s non-disclosure, in view of the position in which Allianz would have been if disclosure had occurred, which was that Allianz would not have entered into the Policy at all. Although the non-disclosure pertained only to the public liability component of the Policy (in particular, a risk of personal injury from falling soffits), at the time of considering a prospective combined policy an insurer could consider a disclosed risk in deciding upon the entire cover it may give (extending to any property cover).

His Honour proceeded to hold however that, given the Initial Approval, the doctrines of estoppel and waiver, and the duty of utmost good faith prescribed in s 13 of the Act, each applied so as to prevent Allianz from changing its position and relying on s 28(3) after it had obtained the advantage of reassessment following cooperative efforts made by Delor Vue, in the latter’s belief that it would be indemnified under the Policy. Allsop CJ held that Allianz was estopped from relying on s 28(3) of the Act, in view of Delor Vue’s cooperation in reliance on the Initial Approval, and on Allianz’s subsequent manner of proceeding on the claim for a period of more than 12 months. Similarly, Allianz must be viewed as having waived its entitlement to rely on s 28(3), as it had deliberately confirmed cover and then had proceeded as if non-disclosure had not occurred. The duty of utmost good faith also had been breached, as Allianz had unreasonably and unfairly made a “take it or leave it” offer,

without having sought to resolve its dispute with Delor Vue via a method of dispute resolution in accordance with standards of decent commercial behaviour.

The Full Court of the Federal Court (McKerracher and Colvin JJ; Derrington J dissenting) dismissed an appeal by Allianz. The majority upheld Allsop CJ's conclusions on the issues of estoppel, waiver and the duty of utmost good faith. Their Honours additionally held that the doctrine of election was a fourth basis on which Allianz ought not to be allowed to rely on s 28(3) of the Act, the insurer having elected to enter the property and adjust its loss under the Policy, rather than invoke at the outset its inconsistent entitlement to reduce its liability to nil.

Derrington J however would have allowed Allianz's appeal. His Honour found that Delor Vue had not established the detriment it would face if Allianz resiled from its promise in the Initial Approval, with the result that estoppel had not been made out. Allianz had not made an election between inconsistent *contractual* rights, and waiver did not occur merely due to the adoption of inconsistent positions in circumstances where the doctrine of election did not apply. Derrington J also found no breach of the duty of utmost good faith, as Allianz was unaware of the magnitude of the work required and it had partially honoured Delor Vue's claim.

The grounds of appeal include:

- The Full Court of the Federal Court erred by holding that Allianz had irrevocably elected not to raise a defence under s 28(3) of the Act in response to any claim by the respondent under the contract of insurance.
- The Full Court of the Federal Court erred by holding that if the doctrine of election did not apply, then Allianz waived its entitlement to raise a defence under s 28(3) of the Act to any claim by the respondent under the contract of insurance.
- In holding that Allianz was estopped from raising a defence under s 28(3) of the Act, the Full Court of the Federal Court erred by finding that Delor Vue had suffered detriment by refraining from (a) acting for itself in rectifying the insured property to the extent it was financially able to do so; and (b) suing Allianz.

A notice of contention filed by Delor Vue raises the following ground:

- The Full Court's finding that an election was made is supported on the basis that the election in question was as between alternative and inconsistent sets of rights.

BOSANAC v COMMISSIONER OF TAXATION & ANOR (P9/2022)

Court appealed from: Full Court of the Federal Court of Australia
[2021] FCAFC 158 & [2022] FCAFC 5

Date of judgment: 31 August 2021 & 31 January 2022

Special leave granted: 12 April 2022

The appellant (Ms Bosanac) and the second respondent (Mr Bosanac) married on 3 October 1998. They separated in 2012 or 2013 but lived separately under one roof until about mid-2015. The case concerns the "Dalkeith Property", the former matrimonial home, which was purchased in 2006 for \$4.5 million in the name of Ms Bosanac only. The deposit of \$250,000 was paid with funds from a joint loan account. Mr and Ms Bosanac then jointly borrowed \$4.5 million from Westpac and this was used to pay the balance of the purchase price. The issue in this appeal is whether, contrary to the judgment of the primary judge, Mr Bosanac held an equitable interest in the Dalkeith Property. During the marriage, Mr and Ms Bosanac kept their substantial assets in separate names. They did not share all of the matrimonial assets jointly or pool their shareholdings. Mr Bosanac held a substantial share portfolio in his own name. At various times, Ms Bosanac owned other properties. At various times, Mr Bosanac also owned other properties. There was considerable evidence of separate ownership of property and the use of separately owned properties as security for joint loans. The only joint assets in evidence were joint bank accounts, consisting of a pre-existing joint loan account, a new joint loan account to fund the purchase of the Dalkeith Property, and a joint transaction account.

Mr Bosanac had substantial tax liabilities. The first respondent (the Commissioner) commenced enforcement proceedings and sought a declaration that half of the equity in the Dalkeith Property was owned beneficially by Mr Bosanac. The Commissioner claimed that the "presumption" of advancement no longer applied to matrimonial homes.

The primary Judge rejected the Commissioner's argument that the "presumption" of advancement only applied to particular species of property, being property acquired by one party for the use and enjoyment of the other party to the marriage. Instead, having considered the relevant authorities, his Honour concluded that the "presumption" of advancement for transactions concerning the matrimonial home was not qualified or abolished. As the "presumption" of advancement operated to preserve the legal status quo in favour of Ms Bosanac, in order to "rebut" the "presumption", the Commissioner was required to prove that Mr Bosanac held, at the time of purchase, an intention to retain a beneficial interest to the extent of his contribution to the purchase price. His Honour found that the fact that the Dalkeith property was the matrimonial home and that Mr Bosanac assumed a substantial liability by signing on to the loan documents did not ground such an inference.

The Commissioner appealed to the Full Court. The Full Court allowed the Commissioner's appeal and declared that Ms Bosanac held 50% of her interest in the Dalkeith property on trust for Mr Bosanac. The Full Court concluded that the "presumption" of advancement still applied to matrimonial homes. However, the Full Court relied on the use of borrowed funds to infer the contrary intention.

The grounds of appeal are:

- The Full Court found that the "presumption" of advancement applied to the Second Respondent's contribution towards the purchase of the home owned by the Appellant, but found it was rebutted by the inferred intention of the Second Respondent.
- The Full Court erred in finding, at paragraphs [15], [16] and [21], that the Second Respondent's use of borrowed funds to contribute to the purchase of the matrimonial home (and his liability to repay those borrowed funds) allowed for an inference to be drawn that rebutted the "presumption" of advancement. The Full Court ought to have found, as the primary judge did at paragraph [230] of his reasons, that there was no basis to infer that the Second Respondent held an intention to retain a beneficial interest in the property.

Mr Bosanac has filed a submitting appearance.

The Commissioner has filed a notice of contention, the grounds of which include:

- The Full Court of the Federal Court should have concluded, and this Court should now conclude, that where husband and wife purchase a matrimonial home, each contributing to the purchase price, and title is taken in the name of one of them only, it should be inferred in the absence of evidence to the contrary that it was intended that each of the spouses would have a half interest in the property regardless of the amounts contributed by them.

The Commissioner seeks to rely on an amended notice of contention which includes the following additional ground:

- The Full Court of the Federal Court should have concluded, and this Court should now conclude, that:
 - (a) the general law does not recognise a presumption of advancement in relation to a benefit provided by husband to a wife; and
 - (b) absent the operation of any presumption of advancement, there was no basis upon which the presumption of resulting trust was or could be refuted.

TL v THE QUEEN (S61/2022)

Court appealed from: Court of Criminal Appeal of the Supreme Court of New South Wales
[2020] NSWCCA 265

Date of judgment: 19 October 2020

Special leave granted: 13 April 2022

In 2017, TL stood trial on a charge of having murdered TM, his two-year-old stepdaughter, who died in hospital on 21 April 2014 as a result of blunt force trauma to her abdomen. TM's injury had occurred the previous evening at home, where TM lived with TL and his partner MW, TM's mother. A fourth person, DM (TL's 14-year-old nephew), was also present that evening.

MW had put her daughter to bed prior to going out with DM to buy takeaway dinner, the two being absent from the home for approximately 16 minutes. TL gave evidence that he had checked on TM twice and tended to her while MW and DM were out, as TM had cried and apparently was unwell. After finishing dinner with MW and DM, TL went to TM's bedroom for a third time and took her out to the bathroom, where MW saw that her daughter was floppy and insisted that she be taken to hospital.

The trial judge, Latham J, admitted four pieces of evidence that were led by the prosecution for the purpose of establishing that TL had a tendency to deliberately inflict physical harm on TM. The first was evidence of burns that TM had suffered while TL bathed her, burns which a forensic physician testified were likely caused by forced immersion in hot water ("the burns evidence"). The other three pieces of tendency evidence admitted were evidence of statements made by TM to relatives that TL had hurt her neck, that he had caused bruising of her arm, and that he had punched her in the face when she was naughty (together, "the hearsay evidence").

The jury found TL guilty of TM's murder, whereupon he was sentenced to imprisonment for 36 years with a non-parole period of 27 years.

On an appeal against his conviction, TL contended that the admission of the burns evidence and the hearsay evidence as tendency evidence had occasioned a substantial miscarriage of justice. TL's appeal was unanimously dismissed by the Court of Criminal Appeal ("CCA") (Hoeben CJ at CL, Adamson and Bellew JJ). Their Honours held that the conduct involved in the burns evidence need not have close similarity to that involved in the charged offence (which involved an intention to cause grievous bodily harm), in circumstances where TL was one of only three possible suspects. Evidence of a previous episode of abuse only 10 days before TM received her fatal injury, if accepted by the jury, had significant probative value in determining which of the three suspects had murdered TM. Their Honours noted that TL did not challenge the quite proper directions given by Latham J as to how the jury could use the tendency evidence, directions which would have ameliorated any prejudicial effect. The CCA similarly held that the hearsay evidence had significant probative value because it was capable of separating TL from MW and DM, and identifying TL as the perpetrator of the crime, on the basis of a tendency to deliberately inflict physical harm on TM.

TL's sole ground of appeal is:

- The Court of Criminal Appeal erred in:
 - (a) applying the principle articulated by the majority in *Hughes v The Queen* (2017) 263 CLR 388 at [39], that where tendency evidence is adduced to prove the identity of the offender for a known offence, the probative value of the tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence;
 - (b) holding (at [207]) that “the requirement for close similarity should only arise when the tendency evidence is the only or predominant evidence that goes to identity”, and that “a class of exceptions” exists where there is evidence that only limited persons had the opportunity to commit the offence; and
 - (c) finding, in those circumstances, that the tendency evidence had significant probative value as required by s 97 of the *Evidence Act 1995* (NSW), and that the trial judge did not err in admitting the tendency evidence.