SHORT PARTICULARS OF CASES
APPEALS

JUNE 2006

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CANUTE v COMCARE (S154/2006)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 16 December 2005

Date of grant of special leave to appeal: 19 May 2006

This appeal raises a question of statutory construction. The appellant, who was a civilian employee of the Department of Defence, suffered a back injury on 7 September 1998. On 9 February 2000 he was awarded permanent impairment compensation under ss 24 and 27 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Act") for a 12% whole person impairment arising from physical restrictions of the spine and legs. In August 2001 he developed depression and made a claim for further psychiatric permanent impairment in July 2002. The respondent denied the claim for psychological impairment on the basis that any increase in the whole person impairment did not amount to 10% or more, said to be required by s 25(4) of the Act. The appellant sought review in the AAT.

The AAT found that the appellant suffered from an adjustment disorder arising out of the 1998 physical injury and that this disorder represented an increased impairment flowing from that injury of less than 10% over the impairment for which he had been compensated. The AAT refused his application, also applying s 25(4) of the Act.

The appellant appealed to the Federal Court. Hill J set aside the AAT's decision on the basis that it had erred in law in failing to consider whether the adjustment disorder, though flowing from the 1998 injury, represented a distinct compensable injury rather than a mere increase in the level of impairment caused by the initial injury.

Comcare appealed to the Full Federal Court. French and Stone JJ found that a proper application of the law by the AAT would have led to the result which it reached. The adjustment disorder fell within the definition of impairment even though it was also an injury. It was an impairment caused by the initial injury and therefore an increase in the impairment attributable to that injury. On a proper examination of the Act, the constraints imposed by s 25(4) applied to it. The AAT decision should not have been set aside.

Gyles J, dissenting, said that Hill J was correct in finding that the AAT erred in failing to look at the question of whether the psychological injury was a separate injury and then treatable separately.

The grounds of appeal are:

- The majority of the Full Court erred in construing the Act so as to permit the accepted mental "injury" suffered by the appellant consequential to his back injury to be categorised also as an "impairment" resulting from the back injury.

- The majority of the Full Court erred in construing the SRC Act so as to conclude that the permanent impairment resulting from the appellant's mental injury was properly regarded as an "increase in the degree of permanent impairment" resulting from the back injury which was caught by sub-section 25(4) of the Act and Table 14.1 of the **Guide to the Assessment of the Degree of Permanent Impairment**.

COMMISSIONER OF TAXATION v McNEIL (S56/2006)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 8 August 2005

Date of grant of special leave: 10 February 2006

At the start of 2001 Mrs McNeil held 5,450 shares in St George Bank Limited ("St George"). On 12 January 2001 St George announced a buy-back of about 5% of its then issued capital, with the buy-back price set at $16.50 per ordinary share. Shareholders who wanted to exercise or dispose of any of their "Sell Back Rights" were required to return a completed direction form to St George. Those who gave no such direction however were still going to benefit. This is because their "Sell Back Rights" were to be sold to a merchant bank and they were to receive the net proceeds calculated according to a set formula.

Mrs McNeil was one of those shareholders who failed to give St George such a direction. Nevertheless she still had 272 "Sell Back Rights" allocated to her in respect of her shareholding and she duly received $576.64.

In her 2000/01 tax return Mrs McNeil included $576.00 by way of receipts. This was comprised of $514.00 as ordinary income and $62.00 as a capital gain. (The capital gain represented the difference between the sell price received from the "Sell Back Rights" ($576.00) and their cost base calculated by reference to their market value ($514.00)). She was assessed by the Commissioner of Taxation ("the Commissioner") as having received ordinary income. Alternatively Mrs McNeil was assessed as having received a capital gain of $514.00

Mrs McNeil objected to that assessment, contending that the sum of $514.00 was not assessable as ordinary income under section 6-5 of the *Income Tax Assessment Act 1997 (Cth)* ("the ITAA 1997"), nor as a capital gain. The Commissioner disallowed her objection. His stated reasons were as follows:

'Mrs McNeil was granted 272 Sell Back Rights on 19 February 2001. The grant of the "Sell Back Rights" is assessable as ordinary income under section 6-5 of the ITAA 1997. The amount to be included in assessable income for each Right granted is its market value at the time of the grant. The market value of each Right is $1.89, and accordingly Mrs McNeil is assessable on an amount of $514.00.

Alternatively, the grant of the Rights is a CGT event H2, and a capital gain of $514.00 arises under subsection 104-155(3) of the ITAA 1997.

This decision is in accordance with Class Ruling CR 2001/75.'

On 14 April 2004 Justice Conti held that neither the entitlement to the "Sell Back Rights", nor the money paid to Mrs McNeil were income. His Honour further held that she had not made a capital gain. On 8 August 2005 the Full Federal Court (French & Dowsett JJ, Emmett J dissenting) dismissed the Commissioner's appeal. The majority, for separate reasons and in separate judgments, concluded that neither the "Sell Back Rights" nor the money paid to Mrs McNeil were income. They also found that she had not made a capital

gain. Justice Emmett however held that the sum of $576.64 paid to Mrs McNeil was income, but he agreed that she had not made a capital gain.

The grounds of appeal include:

- The Full Federal Court erred in deciding that:

  a) the value of the "Sell Back Rights", which were granted for the benefit of Mrs McNeil by St George on 19 February 2001, was not income according to ordinary concepts derived by her for the purposes of section 6-5 of the ITAA 1997 in the year of income ending 30 June 2001; alternatively

  b) that the amount of $576.64 received by Mrs McNeil on or about 2 April 2001 in connection with the share buy-back scheme established by St George was not income according to ordinary concepts derived by her pursuant to section 6-5 of the ITAA 1997.

CONCRETE PTY LIMITED v PARRAMATTA DESIGN & DEVELOPMENTS PTY LIMITED & ANOR (S54/2006)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 22 August 2005

Date of grant of special leave: 10 February 2006

These proceedings were commenced by Concrete Pty Limited ("Concrete") against Parramatta Design & Developments Pty Limited ("PDD") and Mr Ghassan Fares ("Mr Fares"). Mr Fares is a qualified architect and the sole director and shareholder of PDD. Concrete's application was bought pursuant to section 202 of the *Copyright Act* 1968 (Cth). That provision allows a person threatened with a copyright infringement action to move against the maker of that threat. It is a defence to such an action however if the allegedly offending acts would have constituted an infringement of copyright.

PDD conducted an architectural business. It also owned the copyright in architectural drawings ("the drawings") for a 14 unit development for a site in Nelson Bay. Concrete purchased that development site at auction but it did not purchase the drawings. It also did not obtain PDD's express permission to reproduce them. Nevertheless Concrete wished to construct the proposed development in accordance with those drawings. It further submitted that it could do so without infringing copyright. The issue therefore was whether PDD had conferred a licence upon Concrete to use its drawings.

The trial judge, Justice Conti, found that PDD had implicitly licensed Concrete to use its drawings. The Full Federal Court (Branson, Kiefel and Finkelstein JJ) however upheld PDD's and Mr Fares' appeal. Their Honours declined to imply a licence in favour of Concrete. This is because it had neither paid for the drawings, nor had it been induced into thinking that they were to be available for its use.

Their Honours also upheld PDD's and Mr Fares' submission that the trial had miscarried because of a reasonable apprehension of bias on Justice Conti's part. This allegedly arose from the cumulative impact of a number of his Honour's statements at trial and also in his reasons for judgment. The Full Court found that Justice Conti had "made statements open to be understood as suggesting that he considered that the claim made by [PDD] that Concrete did not have permission to use the drawings for the 14 unit development was legally and ethically unmeritorious".

The grounds of appeal are:

- The Full Court erred in holding that the Appellant did not have an implied licence to use, either directly or by implied assignment from the trustees of the subject land, the architectural plans that accompanied Development Application No.16-2000-103-1 for the purpose of undertaking development on the land at 5 Laman Street, Nelson Bay.

- The Full Court erred in holding that the trial before his Honour Justice Conti miscarried on the ground of apprehended bias.