SHORT PARTICULARS OF CASES

APPEALS
TO BE HEARD IN ADELAIDE

NOVEMBER 2008

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K-GENERATION PTY LTD & ANOR v LIQUOR LICENSING COURT & ANOR (A12/2008)

Court appealed from: Full Court, Supreme Court of South Australia

Date of judgment: 30 August 2007

Date special leave granted: 23 May 2008

This appeal raises the issue of the validity of s28A of the *Liquor Licensing Act* 1997 (SA) ("the Act"), which authorises the Commissioner of Police to place criminal intelligence before the Liquor and Gambling Commissioner ("the Liquor Commissioner") and the Liquor Licensing Court of South Australia and have it acted on without it being disclosed to the other parties to the proceedings.

In October 2005, the first appellant ("K-Generation") applied to the Liquor Commissioner for an entertainment venue liquor licence, pursuant to the Act. The second appellant is the sole director of K-Generation. The Commissioner of Police provided criminal intelligence to the Liquor Commissioner. The criminal intelligence was not provided to the appellants. When its application was refused, K-Generation applied to the first respondent ("the Licensing Court") for a review of the decision. The Licensing Court affirmed the decision.

The appellants applied to the Full Supreme Court for judicial review of the decision. They contended that they had been denied procedural fairness at the hearings before the Liquor Commissioner and the Licensing Court, by virtue of the application of s 28A of the Act. They also argued that s28A required a State court to act in a manner which was antithetical to the judicial process and thus incompatible with the institutional integrity of the State courts required by Chapter III of the *Australian Constitution*.

A majority of the Full Court (Duggan and Vanstone JJ) upheld the validity of s28A. They noted that although the criminal intelligence could not be tested or addressed by the other party, it was within the power of the licensing authority to determine its weight, and to have regard to the fact that it may be unreliable or hearsay. In those respects the authority acted in an independent manner. The section did not, therefore, impose on the Licensing Court a procedure which was constitutionally incompatible with its status as a court that is a potential repository of Federal jurisdiction. Gray J (dissenting) found that s28A was constitutionally invalid because it involved the judiciary in the process of denying natural justice.

The ground of appeal is:

- The Full Court erred in law in finding that s28A of the Act is valid insofar as it requires the Liquor Licensing Court to hear and determine a review pursuant to s23 of the Act without disclosing to the applicant information classified as "criminal intelligence", relied on by the Liquor Licensing Commissioner in refusing an application for a licence.

The appellants have given notice that the matter involves a Constitutional issue, that is, the provisions of s28A of the Act are invalid as they impermissibly interfere with the exercise by the first respondent of the judicial power of the Commonwealth. The Attorneys-General of the Commonwealth, Victoria, Western Australia, Queensland and New South Wales have given notice of their intention to intervene.

R & R FAZZOLARI PTY LIMITED v PARRAMATTA CITY COUNCIL (S384/2008)
MAC'S PTY LIMITED v PARRAMATTA CITY COUNCIL & ANOR (S385/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 11 June 2008

Date of grant of special leave: 26 August 2008

After an initial preparation by the Government Architect and a public examination, a Master Plan ("the Master Plan") was adopted by the Parramatta City Council ("the Council") with effect from 1 June 2003. That plan related to land bounded by Smith, Darcy, Church and Macquarie Streets in Parramatta ("the Civic Place").

The purpose of the Master Plan was to provide a development framework for the Civic Place. The Appellants (in both matters) own land within the area to which the Master Plan relates. Mac's Pty Limited ("Mac's") owns approximately 260 square meters and R & R Fazzolari Pty Limited ("Fazzolari") owns approximately 640 square meters.

On 9 June 2005 the Council commenced a tender process for the implementation of the Master Plan. Ultimately no tenders were accepted, although the Council did negotiate with one of the tenderers, Grocon Pty Limited ("Grocon"). On 29 June 2006 the Council resolved to enter into a Development Agreement with Grocon to implement the Grocon proposal. It also amended the Master Plan to match the Grocon proposal. Under the Grocon proposal, Mac's land was ear-marked as part of a 31 story residential building. Fazzolari's land however was to be used as part of a 40 story commercial building.

As neither the Council nor Grocon owned the land in question, the Council commenced a process to acquire it compulsorily. On 15 December 2006 the relevant Minister gave approval pursuant to sub clause 187(2) of the *Local Government Act* 1993 (NSW) ("the LGA") for the Council to give each of Mac's and Fazzolari a Proposed Acquisition Notice ("PAN") under the *Land Aquisition (Just Terms Compensation) Act* 1991 (NSW). On 1 June 2007 the Council issued each of Mac's and Fazzolari a PAN in accordance with section 11 of that Act.

The Development Agreement between the Council and Grocon contained conditions precedent, including the compulsory acquisition by the Council of Mac's and Fazzolari's land. Upon the satisfaction of those conditions precedent, Mac's and Fazzolari's land was to be transferred to Grocon by a declaration of trust. As the Grocon proposal was progressively completed pursuant to the Development Agreement, legal title would also be transferred to Grocon or its nominee. Neither Mac's nor Fazzolari (as owners) gave their approval for the purposes of section 188(1) of the LGA. The Council for its part owns both Darcy and Church Streets and is compulsorily acquiring those streets to comply with the Development Agreement.

Section 186 of the LGA identifies the circumstances by which a Council may acquire land, including an interest in land (whether by agreement or by compulory acquisition) being, for the purpose of exercising any of its "functions". "Function" is then defined to include a "power, authority and duty". A restriction however is imposed upon the compulsory acquisition of land by section 188(1) of the LGA to the effect that it can not be acquired for the purpose of re-sale. This is unless the

land forms part of, adjoins, or is in the vicinity of other land acquired at the same time for a purpose other than the purpose of re-sale.

On 28 September 2007 Justice Biscoe held that the compulsory acquisition of Mac's and Fazzolari's land was unlawful. On 11 June 2008 however, the Court of Appeal (Hodgson & Tobias JJA, Palmer J) unanimously allowed the Council's appeals.

The common ground of appeal in both matters is:

- The New South Wales Court of Appeal erred by construing the expression "purpose of re-sale" in sub-section 188(1) of the LGA to require re-sale to be the dominant purpose when the Act as a whole means that re-sale could only ever be subservient to some other authorised purpose or statutory function proposed to be carried out by the Respondent.

On 9 September 2008 the Council filed notices of contention in both matters, the common ground of which is:

- That the Court below failed to decide that if the Appellants' land was to be acquired for the purpose of re-sale within the meaning of section 188(1), then the exception to section 188(1) contained in section 188(2)(a) would apply on the basis that the Appellants' land forms part of, or adjoins or lies in the vicitinity of, other land to be acquired at the same time under Part 1 of Chapter 8 of the LGA for a purpose other than the purpose of re-sale, such other land being the Darcy Street and Church Street road reserves or in the alternative each part of that land that is to be in Council ownership.

On 26 September 2008 the Appellants filed summonses in both matters, seeking leave to add an addtional ground of appeal. That proposed additional ground of appeal (which is common to both matters and is not opposed by the Council) is:

- The New South Wales Court of Appeal erred by not characterising the proposed eventual transfer to Grocon (Civic Place) Pty Ltd and Grocon Constructors Pty Ltd or their nominee or nominees, in return for money and money's worth, of land including the Appellants' land as, in the circumstances, a proposed "re-sale" within the meaning of subsection 188(1) of the LGA.

PNJ v THE QUEEN (A8/08)

Court appealed from: Court of Criminal Appeal,
Supreme Court of South Australia

Date of judgment: 18 April 2008

Date referred to Full Court: 8 August 2008

On 24 September 2002 the applicant (PNJ) stabbed the victim (H) in the left temple with a knife. PNJ was arrested on 26 September 2002 and charged with attempted murder, and in the alternative, wounding with intent to cause grievous bodily harm. In August 2003, a jury found PNJ not guilty of attempted murder but guilty of wounding with intent. He was sentenced to seven years' imprisonment with a non-parole period of four years. H died on 28 June 2004. In January 2006 PNJ was charged with the murder of H; the prosecution alleged that H died as a result of the injuries received from the stabbing incident. In September 2006 PNJ sought an order that he not be prosecuted for murder on the basis of pleas of *autrefois convict* and *autrefois acquit*. Alternatively PNJ sought an order that the proceedings be stayed as an abuse of process. This application was dismissed in October 2006 and in April 2007 that decision was upheld by the Court of Criminal Appeal (the CCA). That decision of the CCA was the subject of an unsuccessful application for special leave to appeal to the High Court (in A16/07).

In February 2008 PNJ applied for a permanent stay on the ground that as a result of the *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act* 2007 (SA) (the Amendment Act) he was exposed to being punished twice for the same conduct. The Amendment Act inserted a system of mandatory non-parole periods for serious crimes including, in the case of murder, a mandatory minimum non-parole period of 20 years. Layton J held that, in the event of a conviction for murder, double punishment could be avoided by directing that the head sentence and non-parole period be taken to have commenced on 26 September 2002, the date on which the sentence for wounding with intent was taken to have commenced. PNJ contended that the relevant provisions of the Amendment Act would not allow any backdating at all of any sentence for murder. Alternatively, he contended that if backdating was permissible it could not be backdated to a date before 28 June 2004, the date of H's death. Further, PNJ submitted that even if there could be backdating to 26 September 2002, it would still involve double punishment.

A majority of the CCA (Duggan & Gray JJ, White J dissenting) dismissed PNJ's appeal. All members of the Court were of the view that the trial judge would have the power to backdate a sentence for murder to the commencement date of the sentence for wounding with intent. The majority held that in the event of a conviction for murder, the backdating of the sentence would avoid any relevant unfairness to PNJ. However, White J found that any backdating of the sentence would not wholly avoid double punishment. This result would be oppressive and consequently he would have granted a permanent stay.

The applicant's special leave application was heard by this Court on 8 August 2008. It was referred to the Full Court to be argued as on an appeal.

The questions of law said to justify the grant of special leave include:

- Is it an abuse of process by reason of double punishment for the applicant who was convicted of wounding with intent to cause grievous bodily harm (and who has now served the majority of his head sentence) to be tried again for murder in respect of the same stabbing where, if convicted, a sentence will consist of (1) a second conviction; (2) a second head sentence - the usual mandatory sentence of life imprisonment; and (3) a second non-parole period - of a mandatory minimum 20 years.