SHORT PARTICULARS OF CASES
APPEALS

JULY-AUGUST 2009

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MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZIAI & ANOR (S37/2009)

Court appealed from: Federal Court of Australia [2008] FCA 1372

Date of judgment: 8 September 2008

Date of grant of special leave: 13 February 2009

The First Respondent is a Bangladeshi citizen who arrived in Australia on 27 May 2005. Shortly afterwards he applied for a Protection Visa on the basis of his (changed) religious beliefs. That application was refused by the Minister's delegate on 18 August 2005. Two hearings before the Refugee Review Tribunal ("RRT") followed, the decisions in each being set aside by the Federal Magistrates Court. The RRT's second decision (the subject of the current appeal) was dated 19 February 2008.

Before the Magistrate, the First Respondent submitted that the RRT had erred in failing to make further inquiries about his claims. This arose in the context of the RRT inquiring of the Ahmadiyya Muslim Association ("the Association") on whether the First Respondent was in fact an Ahmadi. The Association advised the RRT that it did not know of him and that, furthermore, certain documents he had provided were forgeries. The First Respondent was then invited to, and did comment upon, that information. Despite this, the RRT accepted the Association's evidence and went onto hold that the First Respondent was a liar. Magistrate Scarlett held that it was reasonable in the circumstances for the RRT to make no further inquiries concerning the evidentiary conflict.

On 8 September 2008 Justice Flick upheld the First Respondent's appeal. His Honour held that simply because the RRT had obtained supposedly "reliable" information did not necessarily absolve it from making further inquiries. He noted that the RRT had no hesitation in making an inquiry of the Association and also in suggesting that an adverse inference could be drawn against the First Respondent by not consenting to that course. His Honour further held that while there may be no general obligation to make inquiries to test the authenticity of documents, where an inquiry initiated by the RRT itself places the authenticity of documents in issue, further inquiries should be made to attempt to resolve that conflict.

The grounds of appeal include:

- The Federal Court erred:

  a) by finding that there was a duty upon the RRT to make further inquiries of Mr Nuruzzaman and/or Mr Hossain;

  b) by finding that the failure to make further inquiry of Mr Nuruzzaman and/or Mr Hossain rendered the RRT's decision so unreasonable that no reasonable person could have made it.

On 27 May 2009 Chief Justice French made orders, inter alia, permitting the First Respondent to file a Notice of Contention out of time. His Honour also permitted the First Respondent to file an amended Notice of Constitutional Matter. On 5 June 2009 the First Respondent filed an amended Notice of

Constitutional Matter and the Commonwealth Attorney-General subsequently advised the Court that he is intervening on behalf of the Commonwealth.

On 20 July 2009 the First Respondent filed a Notice of Contention, the grounds of which are:

- The Court below failed to find that the RRT fell into jurisdictional error by failing to:

  a) invite the First Respondent to a further hearing following receipt of an allegation that two documents provided by the First Respondent to the RRT were "fake and forged";

  b) further or alternatively, endeavour to contact or take evidence from the identified authors of those documents, or the Association,

  which amounted to a denial of procedural fairness, or a failure to conduct the review required by section 414 and Division 4 of Part 7 of the *Migration Act* 1958, or both.

INTEGRAL HOME LOANS PTY LIMITED & ANOR v INTERSTAR WHOLESALE FINANCE PTY LIMITED & ANOR (S109/2009)

Court appealed from: New South Wales Court of Appeal [2008] NSWCA 310

Date of judgment: 24 November 2008

Date of grant of special leave: 1 May 2009

Interstar Wholesale Finance Pty Limited and Interstar Non-Conforming Finance Pty Limited ("Interstar") are finance companies. Integral Home Loans Pty Limited and Integral Financial Pty Limited ("Integral") are so-called 'mortgage originators' who introduced applications by third parties for loans to Interstar. Integral also managed the ongoing servicing of such loans. The legal relationship between Interstar and Integral was governed by two substantially identical written agreements styled Loan Origination and Management Agreements ("LOMAs").

On 17 March 2006 Interstar terminated both LOMAs with the consequence that Integral ceased to be entitled to certain income under them. Integral then asserted that clause 20.3(c) in the LOMAs, which provided for the cessation of the payments, was a penalty.

On 3 July 2007 Justice Brereton held that the provisions in the LOMAs were void as a penalty and that Integral continued to be entitled to the commissions in question.

On 24 November 2008 the Court of Appeal (Allsop P, Giles & Ipp JJA) unanimously held that clause 20.3(c) was not a penalty but was part of the circumscription or definition of the entitlement. Their Honours held that it was not a forfeiture of accrued property for the collateral purpose of encouraging compliance with the contract. The Court found that the relevant fees were not fully earned as Integral's right to receive them was dependent upon it fulfilling its contractual responsibilities. The determination of the contract ended that entitlement in the way provided for in clauses 20.3(b) and (c). There was therefore no relevant forfeiture of fully earned property to engage the law of penalties, assuming that forfeiture of rights (as opposed to payment of money) could engage that law. There was also no relevant breach of contract which was necessary to engage the law of penalties.

The grounds of appeal include:

- The Court below erred in holding that Brereton J erred when his Honour held that clause 20.3(c) of each contract was void as a penalty.

- The Court below erred in holding that Brereton J erred when his Honour held that the appellants had rights to trailer commissions that were earned under the contracts, and that those rights were thus accrued rights that were not conditional upon the contracts remaining on foot and those accrued rights were divested or forfeited by the termination.

- The Court below erred in holding that it was not open to Brereton J to hold that the law of penalties is not limited in its application to circumstances where a contract is terminated for breach, but that the law of penalties can also apply when a contract is terminated pursuant to a right to do so upon occurrence of an event of default which the non-terminating party had, in substance, an obligation to avoid.

BRUTON HOLDINGS PTY LTD (IN LIQUIDATION) v COMMISSIONER OF TAXATION & ORS (S158/2009)

Court appealed from: Full Court of the Federal Court of Australia [2008] FCAFC 184

Date of judgment: 1 December 2008

Date of grant of special leave: 19 June 2009

The Appellant was the corporate trustee of a charitable trust established to provide scholarships. Under the terms of the trust deed, the office of trustee was immediately terminated if the corporate trustee entered into administration, receivership or liquidation. In 2007 the Appellant was placed into liquidation. On 26 March 2007 the Commissioner issued a notice of assessment to the trustee for approximately $7.7 million for the 2003/04 financial year. It also lodged a formal proof of debt for that amount. As it transpires, the Appellant had failed to apply for an endorsement as an income tax exempt charity, but did so (seeking retrospective endorsement) after having become aware of that requirement in 2004. The Respondent refused that application and the Appellant commenced proceedings challenging that refusal. It also retained a firm of solicitors (the Second Respondents) to act on its behalf in relation to that refusal. The Appellant paid the Second Respondent a retainer of approximately $447,000 for the costs of those proceedings.

On 9 May 2007 the Commissioner issued notices to the Second Respondent ("the section 260-5 notices") requiring it to pay $450,000. These notices were made pursuant to section 260-5 of Schedule 1 to the *Taxation Administration Act* 1953 ("the Tax Act"). The Appellant then sought declarations that the section 260-5 notices were void, arguing that section 500(1) of the *Corporations Act* 2001 (Cth) ("the Corporations Act") invalidated them. This is because that section provides that any attachment, sequestration, distress or execution put in force against the property of the company after the passing of the resolution for voluntary winding-up was void. The Appellant submitted that the section 260-5 notices were a form of attachment.

Justice Allsop held that the section 260-5 notices were void. His Honour found that notices under section 260-5 were attachments for the purposes of the Corporations Act.

On 1 December 2008 the Full Federal Court (Ryan, Mansfield and Dowsett JJ) unanimously allowed the Commissioner's appeal. Their Honours found that the process described by section 260-5 was not an attachment for the purposes of section 500(1) of the Corporations Act. They also found that there was no inconsistency between the operation of section 260-5 and the system of priorities prescribed by the relevant provisions of the Corporations Act. The Full Court held that the relevant question was whether a section 260-5 notice (given after the commencement of an entity's winding-up) affected the operation of section 501. As that question was not argued before them, their Honours refrained from expressing a concluded view. Ultimately however they found that the Appellant had not demonstrated any justification for restraining the Commissioner from acting upon the section 260-5 notices.

The grounds of appeal include:

- The Full Court erred in concluding, in paragraph 72 of the judgment, that a process prescribed by section 260-5 of Schedule 1 to the Tax Act is not an attachment for the purposes of section 500 of the Corporations Act.

- The Full Court erred in concluding, in paragraph 69 of the judgment, that the word "attachment" as used in section 569 of the Corporations Act refers to curial process, and the same meaning should be attributed to the word "attachment" in section 500 (and section 468) of the Corporations Act.

On 9 July 2009 the First Respondent filed a Notice of Contention, the grounds of which include:

- The operation of the notice given by the First Respondent to the Second Respondents under section 260-5 in the First Schedule to the Tax Act is not an "attachment....put in force" within the meaning of section 500 of the Corporations Act.

JEFFERY & KATAUSKAS PTY LIMITED v SST CONSULTING PTY LTD & ORS (S167/2009)

JEFFERY & KATAUSKAS PTY LIMITED v RICKARD CONSTRUCTIONS PTY LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT) & ORS (S168/2009)

Court appealed from: New South Wales Court of Appeal
[2008] NSWCA 283

Date of judgment: 19 December 2008

Date of grant of special leave: 19 June 2009

These proceedings arose out of the design, construction and failure of a pavement for a container terminal at Port Botany, a project for which the Appellant provided geotechnical services. The contract for that pavement's construction was between Rickard Constructions Pty Ltd ("Rickard") and Port Botany Container Park Pty Ltd ("Container Park"), now known as SST Consulting Pty Ltd ("SST"). Container Park later sold its business to Mayne Nickless Pty Ltd and MPG Logistics Pty Ltd (known collectively as "Mayne"), including its interest in its contract with Rickard.

Rickard agreed with Mayne to complete the necessary rectification works as a variation to the building contract. As consideration however it was to have Mayne's rights as against the Appellant assigned to it. Rickard then commenced proceedings against the Appellant, but it was unsuccessful before both the Supreme Court and the Court of Appeal. Those proceedings were funded by SST, which also provided security for costs at both first instance and upon appeal. Rickard is now in liquidation.

The Appellant applied to the trial judge pursuant to Rule 42.3(2)(c) of the *Uniform Civil Proceedure Rules* 2005 (NSW) ("UCPR") for payment by the Respondents of its costs. This was on the basis that their conduct was an abuse of the Court's process. It further claimed that its costs were occasioned by such an abuse.

On 14 August 2006 Justice McDougall held that the Court's power to make a non-party costs order was enlivened whenever the Court was satisfied that an abuse of process had occurred. This is regardless of the precise nature or classification of that abuse. He held however that no abuse of process had occurred here.

On 19 December 2008 the Court of Appeal (Giles & Tobias JJA, Gyles AJA) unanimously held that Justice McDougall was correct in holding that an actual abuse of process must have occurred for a third party costs order to be made. Their Honours also noted that the decision by this Court in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* ("Campbells Cash & Carry") made it extremely difficult to establish that litigation funding constituted an abuse of process.

In matter number S167/2009 the grounds of appeal include:

- The Court of Appeal erred in holding that the decision in *Campbells Cash & Carry* effectively precluded a finding that the funding agreement was an

abuse of process in circumstances where the funding agreement did not provide an indemnity to the Plaintiff against the Defendants' costs and/or assisted the prosecution by an insolvent plaintiff of ineffectively assigned bare causes of action in negligence and under section 82 of the *Trade Practices Act* 1974.

In matter number S168/2009 the grounds of appeal include:

- The Court of Appeal erred in holding that the decision in *Campbells Cash & Carry* effectively precluded a finding that the funding agreement was an abuse of process in circumstances where the funding agreement did not provide an indemnity to the Appellant against the Respondent's costs and/or assisted the prosecution by an insolvent appellant of ineffectively assigned bare causes of action.