SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 1 MARCH 2011

No. Name of Matter Page No

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AUSTRALIAN CRIME COMMISSION v. STODDART & ANOR (B71/2010)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCFCA 89

Date of judgment: 15 July 2010

Date special leave granted: 12 November 2010

The second respondent ("the examiner") is an examiner of the Australian Crime Commission ("ACC"). The first respondent appeared before the examiner in answer to a summons issued under s 28 of the *Australian Crime Commission Act* 2002 (Cth) ("Act") in connection with a "special ACC investigation" as defined in s 4 of the Act. Counsel assisting the examiner asked the first respondent questions about alleged activities of her husband. Through her counsel, the first respondent purported to claim the privilege of spousal incrimination and declined to answer the questions. The examiner rejected the claim to spousal privilege, concluding that if spousal privilege exists, the Act abrogates it. The proceeding was adjourned to permit an application to the Federal Court for a declaration that "the common law privilege or immunity against spousal incrimination has not been abrogated by the [Act]".

Reeves J dismissed the application. His Honour concluded he was bound by the decision of a Full Court of the Federal Court in *S v. Boulton* (2006) 151 FCR 364 (per Black CJ and Jacobson and Greenwood JJ, allowing an appeal from Kiefel J at first instance) that spousal privilege exists at common law. However, Reeves J concluded that the privilege had been abrogated by s 30 of the Act.

The Full Court of the Federal Court by majority allowed the first respondent's appeal and made the declaration sought (Spender and Logan JJ; Greenwood J dissenting). Logan J wrote the principal judgment for the majority. The majority concluded that the Act did not abrogate the claimed spousal privilege. Spender J noted that the only question arising on the appeal was as to whether the Act abrogated the privilege, as there had been no cross appeal or notice of contention in respect of Reeves' J's finding that spousal privilege exists at common law. Greenwood J in dissent observed that only two matters of privilege or immunity have any operation upon the general obligation imposed by the Act to answer questions, those being limited use immunity for answers which might tend to self-incriminate and legal professional privilege, and having regard to the character and purpose of the Act, by necessary implication any spousal immunity at common law has been abrogated.

The grounds of appeal include:

- Whether the common law of Australia recognises a privilege against incriminating one's spouse; and

- Whether, if spousal privilege exists, the *Australian Crime Commission Act* 2002 (Cth) abrogates the privilege.

JEMENA ASSET MANAGEMENT (3) PTY LTD & ORS v COINVEST LIMITED (M127/2010)

Court appealed from: Full Court, Federal Court of Australia
[2009] FCAFC 176

Date of judgment: 18 December 2009

Date special leave granted: 3 September 2010

The appellants ('Jemena') are successors to part of the electricity distribution business formerly undertaken by the State Electricity Commission of Victoria and, at material times, employed persons in their business who were engaged in the construction industry. The respondent is the trustee of the Construction Industry Long Service Leave Fund ('the fund') established under the *Construction Industry Long Service Leave Act 1997* (Vic) ('the CILSL Act'), which creates a scheme requiring employers to contribute to the fund which is disbursed in a way which provides portable long service leave entitlements for workers in the construction industry. The appellants are said to be obliged to participate in the scheme but are also parties to federal industrial instruments which touch upon long service leave benefits for their employees. The issue in this appeal is whether there is an inconsistency (within the meaning of s 109 of the Commonwealth Constitution) between: (a) the federal industrial instruments binding the appellants (providing an entitlement to paid long service leave); and (b) the CILSL Act and the scheme created by it.

Marshall J, in the Federal Court, held that the CILSL Act and the scheme which it provided did not alter, impair or detract from the operation of the federal industrial instruments. The State law and the federal instruments co-existed in harmony such that each of them could be considered supplementary to or cumulative upon the other.

The appellants' appeal to the Full Federal Court (Moore, Middleton and Gordon JJ) was dismissed. The Court noted that the principles applicable to s 109 are relatively well settled: see *Telstra Corporations Ltd v Worthing* (1999) 197 CLR 61. A law of a State will be inconsistent with a law of the Commonwealth where (a) the State law would alter, impair or detract from the operation of a Commonwealth law or the exercise of a power under a Commonwealth law; or (b) the State law enters a field that the law of the Commonwealth was intended to cover exclusively or exhaustively In this case, there was an imposition of an additional duty on particular employers under the State Act, but no inconsistent duty or conflicting duty to that imposed by the federal scheme instruments. In no way did the CILSL Act or scheme deny or vary any right, power or privilege conferred by the federal scheme instruments.

With respect to part (b) of the test, the Court found that the proper characterisation of the field or subject matter of the federal scheme instruments was that they related to the industrial relationship between employee and particular employer, and the obligations and liabilities created through and by that relationship. The field did not extend to the complete subject matter of rights and liabilities of the employees and employers sourced otherwise than through that relationship. The field of the State Act and State Scheme was the provision of a portable scheme for the benefit of workers to access a fund set up by and under the State Act. That field did not intrude into the field of the industrial relationship between employer and employee in a way that the federal scheme instruments expressly or impliedly excluded.

The appellants have filed a Notice of a Constitutional Matter. The Commonwealth Attorney-General is intervening in the appeal.

The grounds of appeal include:

- The Full Court erred in holding that there was not an inconsistency within the meaning of:
  (a) s 170LZ(1) of the *Workplace Relations Act* 1996 (Cth) as it stood prior to 27 March 2006;
  (b) s 17(1) of the *Workplace Relations Act* 1996 (Cth) as it stood on or after 27 March 2006; or
  (c) s 109 of the Commonwealth Constitution;
  between the *Construction Industry Long Service Act* 1997 (Vic) (and the instruments referred to therein being the trust deed as defined therein and the Rules of the Construction Industry Long Service Leave Fund) and the AGL Electricity and Agility (Victoria) Certified Agreement 2004; the Agility Certified Agreement (Victoria) 2002; and/or the AGL Electricity Certified Agreement 1999.

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS v PONIATOWSKA (A20/2010)

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

Date of judgment: 2 August 2010

Date of referral to Full Court: 12 November 2010

The respondent pleaded guilty to 17 counts of obtaining a financial advantage from the Commonwealth knowing she had no entitlement to it, contrary to s 135.2 of *Criminal Code* 1995 (Cth) (the Code). The respondent had received fortnightly Single Parenting Payments intermittently since 1995. As that benefit is means tested, a recipient is required to advise Centrelink of any change in circumstances including financial circumstances. Between February 2005 and February 2006 the respondent was employed and was paid commission. Between August 2005 and May 2007 the respondent received 17 payments of commission totalling over $71,000. She did not notify Centrelink of receipt of any of that income. Accordingly during that period the respondent continued to receive benefits to which she was not entitled, or only partly entitled.

Convictions were recorded on each count in the Magistrates Court and the respondent was sentenced to one penalty of imprisonment for 21 months. She was unsuccessful in her appeal to a single judge of the Supreme Court against her sentence. She then appealed to the Full Court against not only sentence, but also her convictions. It was submitted for the respondent that the complaint was defective because it alleged conduct which did not amount to an offence. She argued that s 135.2 of the Code does not create an offence which can be committed by omission so that she could not be convicted under that section for omitting to advise the relevant department of changes in her financial circumstances. The Full Court, by majority (Doyle CJ & Duggan J, Sulan J dissenting) upheld her appeal. The Court concluded, relying on the common law, that the determination of whether omitting to perform an act was a physical element of the offence in question depended on there being a legal duty imposed, by Commonwealth statute, in the offender to perform the act omitted. The Court held that in the present case the offence could not be committed by omission and that she could not in law have been convicted of the offences. Sulan J applied Chapter 2 of the Code to the offence provisions and concluded that s 135.2 provides that an omission can constitute a physical element of the offence. He held that the Court was not required to look at the existence of a duty of disclosure either in statute or at common law, in addition to what is provided in s 135.2 to determine that issue.

At the hearing of the special leave application on 12 November 2010 the Court (French CJ & Gummow J) ordered that the application be referred for argument as if on appeal.

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

- Whether omitting to perform an act a physical element of the offence contrary to s 135.2 of the *Criminal Code* 1995 (Cth); and

- Whether the determination of that issue is dependent on the existence of a legal duty or obligation imposed by the offence provision or other Commonwealth statute to perform the act in question.

WHITE v. DIRECTOR OF PUBLIC PROSECUTIONS FOR WESTERN AUSTRALIA (P17/2010)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2010] WASCA 47

Date of judgment: 12 March 2010

Date special leave granted: 21October 2010

This matter concerns an application by the respondent for a crime-used property substitution declaration pursuant to s 22(1) of the *Criminal Property Confiscation Act* 2000 (WA) ("the Act"), that certain property owned by the appellant was available for confiscation in the place of "crime-used property". Section 22 provides that the Court must declare property owned by the respondent to the application under the Act to be available for confiscation instead of crime-used property if crime-used property was not available for confiscation, and it is more likely than not that the respondent (to the s 22 application) made criminal use of the crime-used property. The police had obtained a freezing order in relation property owned by the appellant which included some $135,000 in a bank account. The respondent's application under the Act sought confiscation of those monies.

Section 147 of the Act provides:

> A person makes criminal use of property if the person … uses or intends to use the property in a way that brings the property within the definition of crime-used property.

Section 146(1) of the Act defines property as being crime-used if:

> (a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a confiscation offence, or in or in connection with facilitating the commission of a confiscation offence;
>
> …
>
> (c) any act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a confiscation offence.

In this case, the appellant was convicted of wilful murder, which took place on a property leased by the appellant. The property was enclosed by cyclone fencing with barbed wire atop it and gates, also topped with barbed wire, which were secured by padlocks. During a dispute about money, the appellant shot the deceased several times within the property then, the deceased having managed to climb over the gates, opened those gates and shot the deceased, killing him. The primary judge (Jenkins J) declined to make the declaration sought. Her Honour concluded that the property was crime-used as defined by s 146(1)(c) of the Act because although the fatal shot was fired outside the property, the earlier shots fired on the property had a clear nexus with the fatal shot. However, in relation to s 147 of the Act, her Honour held that whilst the appellant "used" the fence and gates to assist him to commit the murder, he did not use the property in a manner bringing it within that section.

The Court of Appeal allowed the respondent's appeal. McLure P gave the judgment of the Court, with which Owen and Buss JJA agreed. McLure P held that deliberate access over or presence on the land in order to commit a confiscation

offence was not of itself sufficient to bring the conduct within either subs 146(1) of the Act, there must be a link between the relevant use of the property and the commission of the offence and that relationship had to be more than tenuous or remote. However, her Honour held that there would be a sufficient relationship if the acts constituting the use of the property had the consequence or effect of facilitating the offence. In this case, it was the intentional locking of the gates, and the storage of the deceased's body on the land.

The grounds of appeal include:

- Whether the Court of Appeal erred in finding that the property concerned was "crime-used" property within the meaning of s 146(1)(a) of the *Criminal Property Confiscation Act* 2000 (WA);

- Whether the Court of Appeal erred in finding that for a crime-used property substitution declaration it was not a requirement that the act or acts constituting the relevant use of the property be done with the intention or purpose or committing the specific offence of which the appellant was convicted;

- Whether the Court of Appeal erred in finding that the terms "uses" and "use" in s 147 of the Act encompass all activities that bring property within the definition of "crime-used" under s 146 of the Act.

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AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v. LANEPOINT ENTERPRISES PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (P27/2010)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCAFC 49

Date of judgment: 24 May 2010

Date special leave granted: 21 October 2010

The respondent ("Lanepoint") is a company within the Westpoint Group of companies and its property development activities were financed by loans secured by floating charges from Suncorp Metway Limited ("Suncorp") and from Westpoint Management Pty Ltd ("Westpoint Management"). Westpoint Management was a company within the Westpoint Group and made the loan to Lanepoint in its capacity as the responsible entity of the managed investment scheme which raised funds from the public to invest in Lanepoint's project to purchase and redevelop into residential strata units the Regency Motel site in Rivervale, Western Australia. Shortly before January 2006, Westpoint Group's accounts showed Lanepoint's debt to Westpoint Management as $6,607,978. In January 2006 two transactions were recorded in Lanepoint's books by Westpoint Group's financial controller which had the effect of reducing that debt to $2,266,557. Lanepoint defaulted on both the Suncorp and the Westpoint Management loans and in March 2006 both Suncorp and Westpoint Management appointed receivers and managers under their respective floating charges (Westpoint Management was by then in provisional liquidation).

On 2 June 2006 the appellant commenced an application for the winding up in insolvency of Lanepoint, pursuant to s 459P of the *Corporations Act* 2001 (Cth) ("Act"). Lanepoint contended that it was solvent and that the amount owed to Westpoint Management was only $2,266,557. It was agreed before Gilmour J that Lanepoint had assets of $5,729,837. Tax liabilities and other inter-group loans amounted to approximately $1.6 million, although Lanepoint contested these sums. The hearing was conducted over several days and Lanepoint called several witnesses including Westpoint Group's financial controller. Gilmour J ordered that Lanepoint be wound up, concluding that the two transactions were improper transactions designed to conceal the true position, that Lanepoint had failed to rebut the statutory presumption of insolvency arising under s 459C(2)(c) of the Act, and rejecting Lanepoint's argument that the winding up application should be dismissed or stayed on the basis that there was a substantial dispute as to the extent of indebtedness to Westpoint Management.

The Full Court of the Federal Court of Australia by majority allowed Lanepoint's appeal (North and Siopis JJ; Buchanan J dissenting). In a joint judgment the majority held that in the light of the dispute about the Westpoint Management loan, the trial judge's discretion to stay or dismiss the winding up application miscarried. The majority held that in general a company should not be wound up on a disputed debt and that the trial judge had erred in proceeding to determine that disputed debt in winding up proceedings from which the putative creditor and other key parties and evidence were absent. Buchanan J would have dismissed the appeal, agreeing with the trial judge that the January 2006 transactions had concealed the true position about the debt. Buchanan J held that the trial judge was entitled to reject Lanepoint's case and having done so there was no barrier to

proceeding to act on the presumption that Lanepoint was insolvent and had not demonstrated the contrary.

The grounds of appeal include:

- Whether, and if so in what circumstances, the assertion by a company presumed to be insolvent under s 459C(2) of the *Corporations Act* (Cth) that it disputes a debt ought to result in the dismissal or stay of an application that the company be wound up in insolvency.

EQUUSCORP PTY LTD v HAXTON (M128/2010);
EQUUSCORP PTY LTD v BASSAT (M129/2010);
EQUUSCORP PTY LTD v CUNNINGHAM'S WAREHOUSE SALES PTY LTD
(M130/2010); (M131/2010); (M132/2010)

Court appealed from: Court of Appeal, Supreme Court of Victoria [2010] VSCA 001

Date of judgment: 29 January 2010

Date special leave granted: 3 September 2010

The respondents, through a series of schemes in the late 1980s, invested in a blueberry farm project at Corindi in New South Wales. The appellant ("Equuscorp") brought proceedings in the Supreme Court of Victoria, seeking to recover from the respondents as a debt, or alternatively in restitution, the outstanding principal and interest allegedly due under the loan agreements they had each entered with Rural Finance Pty Ltd ('Rural') in order to finance their participation in the schemes. In 1997, Equuscorp had acquired, for $500,000, Rural's rights to loans totalling approximately $50 million under numerous agreements with scheme investors.

The trial judge (Byrne J) held that the loan contracts were illegal and unenforceable against the investors, because they were not severable from scheme transactions which breached the prescribed interest provisions of the Companies Code due to the want of any or any proper prospectus. He nevertheless found that Equuscorp had a good claim in restitution against each of the respondents.

The Court of Appeal (Redlich and Dodds-Streeton JJA and Beach AJA) upheld the respondents' appeals. The Court found that Equuscorp did not establish that on the facts Rural (its assignor) had a prima facie entitlement to restitution by reason of total failure of consideration. If (contrary to that finding) the investors were prima facie obliged to restore the loan funds due to a total failure of consideration or otherwise, the obligation was displaced. The investors' retention of the loan funds was not unjust in circumstances where: the loans were, in substance, integral elements of investment schemes, in which an entity related to the lender offered interests to investors without any complying prospectus, in breach of the protective prescribed interest provisions of the Code; the loans funded the investors' acquisition of interests in the scheme; the loan agreements provided that following two initial payments of capital, the balance of the loans was to be paid with the guaranteed proceeds of the sale of blueberries over a five year term; it was neither pleaded nor established that the investors entered the schemes in order to obtain tax deductions; there was no evidence that any investor had obtained any benefit by way of a taxation benefit or advantage; and under the investment schemes, Rural's loans were secured by mortgages over the investors' scheme interests, typically licences or leases of the blueberry farm on which the blueberry crops (the proceeds of which were to be applied to the payment of their loans) were produced.

The grounds of appeal include:

- The Victorian Court of Appeal erred in finding that Rural Finance Pty Ltd did not have a prima facie entitlement to recover in restitution from the respondent the amounts advanced pursuant to the unenforceable loan agreement dated 31 May 1989.

- The Victorian Court of Appeal erred in finding that it was not unjust to allow the respondent to retain the balance of the amounts advanced by Rural Finance Pty Ltd pursuant to the unenforceable loan agreement dated 31 May 1989.