SHORT PARTICULARS OF CASES
APPEALS

COMMENCING 2 OCTOBER 2012

****

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA v THE CORPORATION OF THE CITY OF ADELAIDE & ORS (A16/2012)

Court appealed from: Full Court of the Supreme Court of South Australia [2011] SASCFC 84

Date of judgment: 10 August 2011

Special leave granted: 11 May 2012

The second and third respondents were prosecuted in the Magistrates Court of South Australia after they preached and canvassed in Rundle Mall in 2009 without permission, in breach of clauses 2.3 and 2.8 of a by-law made by the first respondent (Adelaide). Those clauses read as follows:

2. No person shall without permission on any road:-

2.3 preach, canvass, harangue, tout for business or conduct any survey or opinion poll provided that this restriction shall not apply to a designated area as resolved by the Council known as a "Speakers Corner" and any survey or opinion poll conducted by or with the authority of a candidate during the course of a Federal, State or Local Government Election or during the course and for the purpose of a Referendum; …

2.8 give out or distribute to any bystander or passer-by any handbill, book, notice, or other printed matter, provided that this restriction shall not apply to any handbill or leaflet given out or distributed by or with the authority of a candidate during the course of a Federal, State or Local Government Election or to a handbill or leaflet given out or distributed during the course and for the purpose of a Referendum.

The second and third respondents, who are members of a religious organisation called "Street Church", brought proceedings in the District Court seeking a declaration that the clauses were invalid. Judge Stretton declared the first three words of cl 2.3, "preach, canvass, harangue", and all of cl 2.8, to be beyond Adelaide's by-law making powers, but that the by law could be saved by severing them.

Adelaide's appeal to the Supreme Court (Doyle CJ, White and Kourakis JJ) was dismissed. The Full Court held that the by-law was made "for the convenience, comfort and safety" of the inhabitants of the City of Adelaide as authorised by s 667(1)9(XVI) of the *Local Government Act* 1934 (SA). The Court was not persuaded that the by-law, in its application to the regulated conduct, was such an unreasonable or disproportionate measure that it fell outside the legislative authority conferred by those words. It was not unreasonable to take the view that the regulated conduct, if left uncontrolled, would interfere with commercial activity and detract from the public's use of and enjoyment of Adelaide's streets.

However, the Court went on to find that the by-law was inconsistent with the implied constitutional freedom of political communication. It considered that an obligation to obtain permission to speak on political matters was incompatible with the system of democratic and responsible government established under the Constitution. Even though the by-law was reasonably appropriate and adapted to the convenience, comfort and safety of the inhabitants of Adelaide, it secured that objective in terms

which were calculated to restrict impermissibly public speech on political and governmental matters.

The appellant has served s78B Notices and the Attorneys-General of the Commonwealth, Western Australia, Victoria, New South Wales and Queensland are intervening in the appeal. The second and third respondents have filed Notices of Contention. The Human Rights Law Centre Limited has applied for leave to appear as amicus curiae.

The grounds of appeal include:

- The Full Court erred in holding that the words “preach”, “canvass” and “harangue” in clause 2.3 and the entirety of clause 2.8 of the Corporation of the City of Adelaide By-law No 4 – Roads are inconsistent with the implied constitutional freedom of political communication;

- The Full Court erred in taking into account the possibility that local council officers who administer the permit system may not have sufficient regard to the implied freedom in exercising their discretion about whether or not to grant a permit. It was erroneous for the Court to have regard to this and to assess the validity of the by law on the basis that it may be administered incorrectly.

MONIS v THE QUEEN & ANOR (S172/2012)
DROUDIS v THE QUEEN & ANOR (S179/2012)

Court appealed from: New South Wales Court of Criminal Appeal [2011] NSWCCA 231

Date of judgment: 6 December 2011

Special leave granted: 22 June 2012

Mr Man Haron Monis was charged with using a postal service in contravention of s 471.12 of the *Criminal Code* 1995 (Cth) ("the Code"). Ms Amirah Droudis was charged with aiding and abetting Mr Monis. Section 471.12 creates an offence (and prescribes a penalty of two years' imprisonment) for using a postal service in a way that reasonable persons would regard as being menacing, harassing or offensive. The charges relate to the sending of letters to the wives and relatives of Australian military personnel killed while serving in Afghanistan. The letters were critical of Australia's military involvement in Afghanistan. They also denigrated the deceased soldiers. Mr Monis and Ms Droudis each moved the District Court of New South Wales to quash the indictments against them. This was on the basis that s 471.12 of the Code was (at least partly) invalid because it infringed the implied constitutional freedom of political communication.

On 18 April 2011 Judge Tupman dismissed both motions. Her Honour found that s 471.12 did burden the freedom of communication about governmental or political matters. Judge Tupman held however that the section was reasonably appropriate and compatible with the system of government prescribed by the Constitution. It was therefore not invalid.

On 6 December 2011 the Court of Criminal Appeal (Bathurst CJ, Allsop P & McClellan CJ at CL) unanimously dismissed the Appellants' appeals. Their Honours found that the restriction imposed by s 471.12 of the Code does potentially fetter political communications by post. They held however that the section's validity must be assessed in light of the robust nature of political communication in Australia, and of Parliament's desire to protect people from the misuse of postal services. The Court of Criminal Appeal found it legitimate for Parliament to enact s 471.12 of the Code to prohibit communications which reasonable persons would find offensive.

"Section 78B" notices have been filed in each matter by both of the Appellants and both of the First Respondents. The Attorneys-General for the Commonwealth, Victoria, Queensland, Western Australia and South Australia have all advised the Court that they will be intervening in these matters.

In matter number S172/2012 (Monis), the grounds of appeal include:

- The Court of Criminal Appeal erred in holding that s 471.12 of the Code did not infringe the implied freedom of political communication.

In matter number S179/2012 (Droudis), the grounds of appeal include:

- The Court of Criminal Appeal erred in concluding that for the use of a postal service to be offensive within the meaning of section 471.12 of the Code, it is necessary that the use be calculated or likely to arouse

significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all the circumstances, as opposed to only hurting or wounding the feelings of the recipient.

In both matters the First Respondent filed a notice of contention in identical terms, the ground of which is:

- The Court of Criminal Appeal erred in holding that s 471.12 of the Code effectively burdened the freedom of communication about government or political matters.

In matter number S179/2012 (Droudis) the Second Respondent also filed a notice of contention identical to that of the First Respondent.

MILLS v COMMISSIONER OF TAXATION (S225/2012)

Court appealed from: Full Court of the Federal Court of Australia
[2011] FCAFC 158

Date of judgment: 8 December 2011

Special leave granted: 17 August 2012

Mr Andrew Mills ("the Taxpayer") held certain securities ("the Securities") that had been issued by the Commonwealth Bank of Australia ("the Bank"). The Securities comprised an unsecured subordinated note issued through the Bank's New Zealand branch and a non-redeemable preference share which could not be traded separately. The Bank paid fully franked dividends on all of its shares, and it proposed to make a franked distribution on the Securities. Such a distribution would normally enable the Taxpayer to claim a corresponding tax offset (by the use of imputation credits) under s 207-20 of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act"). The Commissioner of Taxation ("the Commissioner") however determined, under s 177EA(5)(b) of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"), that the Taxpayer could obtain no imputation benefit. This was on the basis that the arrangement was a scheme entered into for a purpose (other than an incidental purpose) of enabling the Taxpayer to obtain an imputation benefit, as described in s 177EA(3)(e) of the 1936 Act ("the relevant purpose"). Mr Mills objected to the Commissioner's decision. On 12 January 2010 the Commissioner disallowed that objection. Mr Mills then appealed to the Federal Court.

On 11 March 2011 Justice Emmett dismissed Mr Mills' appeal. His Honour held that, of the factors set out in s 177EA(17) of the 1936 Act, more of them pointed towards the relevant purpose than away from it. Justice Emmett found that factors in the Commissioner's favour included the Bank's obligation to compensate the Taxpayer for any unavailability of imputation credits and the payments' similarity to interest. They also included the sourcing of distribution payments from income (of the Bank's New Zealand branch) which bore no Australian tax.

On 8 December 2011 the Full Court of the Federal Court (Dowsett & Jessup JJ; Edmonds J dissenting) dismissed Mr Mills' appeal. The majority held that the central elements of the scheme indicated that the Bank did have the relevant purpose. Their Honours found as decisive the facts that amounts for distribution were calculated by reference to the level of imputation benefits, and that the Bank was to deliver (or to compensate for any lack of) imputation benefits. Justice Edmonds however found that the circumstances weighed in favour of the Bank. His Honour found that the Bank was required to fully frank its distributions on the Securities because it did so for all dividends that it paid. Justice Edmonds further found that the provision of imputation benefits was no more than an incidental purpose of the distributions to be paid on the Securities.

The grounds of appeal include:

- The Full Court erred in holding that the Bank entered into or carried out a scheme for the Securities for a purpose, not being an incidental purpose, of enabling the relevant taxpayer to obtain an imputation benefit within the meaning of s 177EA(3)(e) of the 1936 Act.

On 23 August 2012 the Respondent filed a notice of contention, the ground of which is:

- The Full Court below should have found that the following provisions of the 1936 Act also supported the conclusion that the Bank entered into or carried out the scheme for a purpose (not being an incidental purpose) of enabling the Appellant to obtain an imputation benefit within the meaning of s 177EA(3)(e) of the 1936 Act: s 177EA(17)(ga) and (h); s 177D(b)(vi).

COMMISSIONER OF POLICE v EATON & ANOR (S230/2012)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 30

Date of judgment: 6 March 2012

Special leave granted: 17 August 2012

Mr David Eaton was a probationary police officer for two years until he was dismissed in July 2009. A delegate of the Commissioner of Police ("the Commissioner") dismissed Mr Eaton pursuant to s 80(3) of the *Police Act* 1990 (NSW) ("the Police Act"). Section 80(3) provides that the Commissioner may dismiss a probationary officer at any time and without giving any reason. Mr Eaton then commenced proceedings in the Industrial Relations Commission of New South Wales ("the IRC"), claiming that his dismissal had been harsh, unreasonable or unjust under s 84(1) of the *Industrial Relations Act* 1996 (NSW) ("the IR Act"). The relevant part of the IR Act, Part 6 of Chapter 2 ("Ch 2 Pt 6"), expressly applies to members of the NSW Police Force. In the Police Act, s 218(1) provides that the IR Act is not affected by anything in the Police Act.

On 30 June 2010 IRC Commissioner Bishop upheld Mr Eaton's claim and ordered his reinstatement as a probationary constable.

On 5 May 2011 the Full Bench of the IRC (Walton VP, Marks & Kavanagh JJ) ("the Full Bench") upheld the Commissioner's appeal. The Full Bench found that Ch 2 Pt 6 of the IR Act was incongruous with the Commissioner's absolute power to dismiss under s 80(3) of the Police Act. The Full Bench held that s 80(3) impliedly repealed Ch 2 Pt 6. The IRC therefore lacked jurisdiction to deal with Mr Eaton's claim. Mr Eaton then applied to the Court of Appeal for a review of the Full Bench's decision.

On 6 March 2012 the Court of Appeal (Bathurst CJ, Handley & Tobias AJJA) unanimously upheld Mr Eaton's application and quashed the Full Bench's decision. Their Honours held that Ch 2 Pt 6 of the IR Act and s 80(3) of the Police Act could be read harmoniously. The Court of Appeal found that Parliament had given attention to the relationship between the Police Act and the IR Act (and its predecessor) on multiple occasions and it had not then excluded probationary constables from the unfair dismissal regime. Their Honours then remitted the Commissioner's appeal to the Full Bench, which dismissed the Commissioner's appeal on 24 March 2012.

The grounds of appeal include:

- The Court of Appeal erred in finding that the IRC had jurisdiction to hear and determine Mr Eaton's unfair dismissal claim brought pursuant to Part 6 of Chapter 2 of the IR Act on the basis that, on its proper construction, s 80(3) of the Police Act did not preclude such a claim being made.

MONTEVENTO HOLDINGS PTY LTD AND ANOR v. SCAFFIDI AND ANOR (P22/2012)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2011] WASCA 146
Date of judgment:	7 July 2011
Special leave granted:	22 June 2012

This matter involves a long-running dispute between certain members of the Scaffidi family over the control of the Scaffidi Family Trust. On different sides of the dispute are two brothers - the second appellant (Eugenio Scaffidi) and the first respondent (Giuseppe Scaffidi). The first appellant (Montevento Holdings Pty Ltd) was incorporated by Eugenio Scaffidi, who is the sole director and shareholder of that company.

In April 2010, the first respondent commenced proceedings seeking a declaration that the appointment of the first appellant was invalid because it breached cl 11.03 of the trust deed which provided that if any individual appointor was a beneficiary that individual would not be eligible to be appointed as a trustee. He sought orders removing the first appellant as trustee. EM Heenan J dismissed the application, finding that the first appellant had been validly appointed; the deed of settlement drew a clear distinction between individuals and corporations.

An appeal to the Court of Appeal was allowed by majority (Buss JA dissented). Murphy JA and Hall J noted that cl 11.03 served three purposes: to ensure that the trustee was seen as wholly separate from the position of an appointor/beneficiary; to maintain an even-handedness in the treatment of beneficiaries; and, to provide for express observance of the salutary rule that an appointor should generally not appoint himself or herself as a trustee. Clause 11.03 had to be read in the context of cl 11.01, which provided that a trustee may be a corporation; the former was designed to operate in circumstances where the trustee was envisaged, by the settlor, to be either an actual person or a corporate entity. The language of cl 11.03 was wide enough to preclude an appointment where an individual who was an appointor and beneficiary appoints as trustee a corporate entity he controlled and of which he was the directing mind and will (by virtue of his position as its sole shareholder and sole director) with the effect that the individual would exclusively exercise the powers and rights exercisable by the office of trustee. Montevento Holdings Pty Ltd was not an eligible appointee on the proper construction of the trust deed.

Buss JA found that there was a consistent pattern in cl 11 and the trust deed as a whole in relation to the use of the “individual”. It was used solely and exclusively to denote a natural person. Clause 11.03, according to its ordinary and natural meaning, confined the prohibition to the appointment of a trustee who was an individual/natural person.

Murphy JA and Hall J ordered that a “proper person” be appointed as trustee under s 77(1) of the *Trustees Act* 1962 (WA), subject to confirmation by the Court.

The grounds of appeal include:

- The Court below erred in holding that Heenan J had erred when he dismissed the First Respondent's application for a declaration that the appointment of the First Appellant as trustee by the Second Appellant was invalid.

- The Court below erred in law in holding that the Scaffidi Family Trust Deed (Trust Deed) prohibited the Second Appellant as both appointor and beneficiary of the Scaffidi Family Trust (Trust) from appointing the First Appellant being a corporate entity controlled by the Second Appellant, as Trustee of the Trust when on the proper construction of the Trust Deed there was no prohibition on the appointment of a company controlled by the Second Appellant as Trustee where the Second Appellant was both appointor and beneficiary of the Trust.