SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 4 MARCH 2014

No. Name of Matter Page No

Tuesday, 4 March 2014

1. NSW Registrar of Births, Deaths and Marriages v. Norrie 1

Wednesday, 5 March 2014

2. Thiess v. Collector of Customs & Ors 2

Thursday, 6 March 2014

3. Stewart & Anor v. Atco Controls Pty Ltd (In Liquidation) 4

Friday, 7 March 2013

4. Plaintiff S297/2013 v. Minister for Immigration and Border Protection & Anor 6

5. Plaintiff M150 of 2013 by his Litigation Guardian Sister Brigid Marie Arthur v. Minister for Immigration and Border Protection & Anor 8

Tuesday, 11 March 2014

6. FTZK v. Minister for Immigration and Border Protection & Anor 10

Wednesday, 12 March 2014

7. Howard v. Commissioner of Taxation 12

Thursday, 13 March 2014

8. Gillard v. The Queen 14

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NSW REGISTRAR OF BIRTHS, DEATH AND MARRIAGES v NORRIE (S273/2013)

Court appealed from: New South Wales Court of Appeal [2013] NSWCA 145

Date of judgment: 31 May 2013

Special leave granted: 8 November 2013

Upon a review of a decision by the NSW Registrar of Births, Death and Marriages ("the Registrar") not to register Norrie's sex as "non-specific" under Pt 5A of the *Births, Deaths and Marriages Registration Act* 1995 (NSW) ("the Act"), the Administrative Decisions Tribunal ("the Tribunal") held that the Registrar's power under s 32DC of the Act was confined to the registration of a person's sex as either "male" or "female". The Appeal Panel of the Tribunal subsequently affirmed that decision. Upon a further appeal to the Court of Appeal, Norrie contended that the Appeal Panel had erred in its construction of s 32DC of the Act by holding that the Registrar could only register a change of a person's sex from "male to female", or from "female to male".

On 31 May 2013 the Court of Appeal (Beazley ACJ, Sackville AJA and Preston CJ of LEC) unanimously allowed Norrie's appeal. Their Honours held that the Appeal Panel had erred in construing that s 32DC(1) of the Act limited the Registrar's powers of registration of a person's sex to only "male" or "female". They also held that, as a matter of construction of s 32DC, the word "sex" does not bear the binary meaning of "male" or "female".

The Court of Appeal unanimously found that the Appeal Panel had therefore erred in law in concluding that it was not open to the Registrar to register Norrie's sex as "non-specific". Their Honours further held that it will be a matter for the Tribunal, upon remittal, to determine if it is satisfied that a person's sex may be registered as "non-specific". The Court of Appeal also found that the text and context of the word "sex" in the definition of "sex affirmation procedure" does not limit the sex affirmation procedure to only the "male" or "female" sexes.

A Gender Agenda Inc has applied for leave to appear as *amicus curiae* at the hearing of this appeal.

The grounds of appeal are:

- The Court of Appeal erred in concluding that s 32DC of the Act permits registration of a person's change of sex to a category other than "male" or "female".

- The Court of Appeal erred in holding that it was open to the Tribunal to consider whether to register a specification of sex of the kind sought by the Respondent, namely, "non-specific".

THIESS v. COLLECTOR OF CUSTOMS & ORS (B20/2013)

Court appealed from:	Supreme Court of Queensland, Court of Appeal [2013] QCA 54
Date of judgment:	22 March 2013
Date of grant of special leave:	11 October 2013

The appellant taxpayer imported a yacht in 2004 for "home consumption" within the meaning of the *Customs Act 1901* (Cth) ("the Act"). By reason of the Act import duty payable on goods for home consumption had to be paid at the time of the entry of the goods. Upon importation, his customs broker, the third respondent, mistakenly entered the "gross construction tons" of the yacht as 108 rather than 160. This meant the taxpayer was liable to pay a total amount of $543,918.91 (consisting of $494,471.74 of import duty and $49,447.17 of GST) instead of a nil amount.

The taxpayer paid the amount and only became aware of the overpayment of duty in 2006 after the statutory timeframe for refunds had expired. He then sought an "act of grace" refund of the customs duty and GST. No refund was made and the appellant commenced proceedings in the Trial Division of the Supreme Court of Queensland. The proceedings were referred to the Court of Appeal.

The Court of Appeal (de Jersey CJ, Fraser and Muir JJA) held that the appellant's claim for recovery of customs duty was barred by s 167(4) of the Act. The Court also held that the appellant was not entitled to a refund or credit of the GST amount because he had not notified the Commissioner of Taxation within four years after the importation of the yacht that he believed he was entitled to a refund (s 36 of the *Taxation Administration Act 1953* (Cth)).

The grounds of appeal include:

- The Court of Appeal erred in holding, as a matter of law, that the Appellant's claim for recovery of customs duty was barred by section 167(4) of the Act where (on the undisputed facts):
  - The payment was made under mistake;
  - The Appellant was under no lawful obligation to make the payment;
  - The payment was not made pursuant to any demand by the First Respondent or the Second Respondent;
  - The Appellant accordingly had no occasion to make the payment under protest.

The first and second respondents seek an extension of time to file a notice of contention. This notice contends that the decision of the Court of Appeal should be affirmed on the ground that the Court erroneously decided or failed to decide some matter of fact or law. The grounds include: "To the extent not otherwise encompassed in the reasons of the Court below section 163 of the Act and regulations 126 to 128A of the *Customs Regulations* 1926 (Cth):

- Excludes any common law rights of action to recover an amount mistakenly paid as customs duty; and
- Replaces those rights with an entitlement to a refund in specified circumstances.

STEWART & ANOR v ATCO CONTROLS PTY LTD (IN LIQUIDATION) (M141/2013)

Court appealed from: Court of Appeal, Supreme Court of Victoria [2013] VSCA 132

Date of judgment: 25 June 2013

Date special leave granted: 8 November 2013

In January 2002, the respondent ('Atco') appointed receivers to the second appellant ('Newtronics') after Newtronics lost a Federal Court case brought against it by Seeley International Pty Ltd ('Seeley'). Newtronics was a wholly owned subsidiary of Atco. On 26 February 2002, on application by Seeley, Newtronics was wound up and the first appellant ('Stewart') was appointed liquidator. Seeley is the major unsecured creditor of Newtronics. In addition, Newtronics owed money to Atco which was secured by a registered mortgage debenture. Immediately after the Federal Court judgment, Atco had made formal demand of Newtronics for payment of the money secured by the charge.

In April 2006, Newtronics commenced proceedings against Atco, claiming that letters of support provided by Atco gave rise to a contractual obligation on Atco's part to provide ongoing financial support to Newtronics and not to call upon its secured debt. Those proceedings were stayed when Atco went into voluntary administration and later liquidation. In December 2006, Newtronics was granted leave to proceed and to join Atco's receivers to the litigation. The proceedings against Atco and its receivers were funded by Seeley under an agreement to indemnify the liquidator, inter alia, for his costs and expenses in pursuing the proceeding. While its claim against Atco ultimately failed, Newtronics settled with the receivers on terms that required that they pay the settlement sum to Newtronics. Without informing Atco, the liquidator paid the settlement sum to Seeley, pursuant to the indemnity agreement.

Atco commenced an appeal, in the Supreme Court of Victoria, pursuant to s 1321 of the *Corporations Act* 2001(Cth) against Stewart's decision to pay Seeley the settlement sum, claiming that the settlement should have been paid to it under its registered charge. The proceeding was initially heard before Efthim AsJ who ordered that Stewart pay the settlement sum to Atco. An appeal was heard *de novo* by Davies J, who found in favour of Stewart on the basis that the right of indemnity by way of an equitable lien over the settlement sum arose because the costs and expenses were necessarily incurred by the liquidator in the Newtronics action in the course of the discharge of his duties as liquidator to collect in and realise the assets of the company.

Atco successfully appealed to the Court of Appeal (Warren CJ, Redlich JA & Cavanough AJA). The Court found that no equitable lien arose in favour of the liquidator over the settlement sum for a number of reasons. First, the litigation challenging the right of the secured creditor to enforce its charge and which led to the realisation of the settlement sum was pursued for the benefit of the unsecured creditor (Seeley), who was the fund provider, and it would not be unconscientious for the secured creditor (Atco) to obtain the sum free of the liquidator's litigation costs. Second, the realisation of the settlement sum bestowed no incontrovertible benefit on the secured creditor. Third, the liquidator had no existing indebtedness to which an equitable lien could or should attach. The litigation being for the benefit of the fund provider, equity will not provide the remedy of subrogation to enable the fund provider to recover his costs from the settlement sum in priority to

the secured creditor. Further, the fund provider's right of subrogation was expressly modified by the indemnity agreement, thus removing any obligation by the liquidator to account to him. The agreement between the fund provider and the liquidator set out the process by which it was intended that the fund provider, through the liquidator, could recover costs incurred under the indemnity agreement from the settlement sum. That process was approved by the Federal Court. The liquidator improperly bypassed the process set out under the indemnity agreement.

The grounds of appeal include:

- The Court below erred in holding that the liquidator of Newtronics was not entitled to an equitable lien for his reasonable fees, costs and expenses exclusively referrable to his realising for the benefit of the creditors of Newtronics a sum of $1.25 million claimed by Atco as secured creditor;
- The Court below erred in holding that the liquidator and indemnifying creditor had excluded or modified their rights, respectively, to have recourse to an equitable lien to recoup expenditure exclusively incurred in realising the sum and to be subrogated to the fruits of that lien.

Atco has filed a Notice of Contention on the grounds that:

- the Court of Appeal ought to have concluded that the lien did not arise because the costs and expenses claimed by Stewart did not relate exclusively to the realisation of the settlement sum, but included costs and expenses incurred in respect of Newtronics' claim against Atco.

PLAINTIFF S297/2013 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S297/2013)

Date writ of summons filed: 16 December 2013

Date demurrer referred to Full Court: 23 January 2014

The Plaintiff arrived in Australia without a visa in May 2012. He was immediately placed in immigration detention, where he has since remained. As an "offshore entry person" under the *Migration Act* 1958 (Cth) ("the Act") as it then stood, the Plaintiff was initially prevented by s 46A(1) of the Act from lodging a valid application for a protection visa. In September 2012 however he made such an application, after the First Defendant ("the Minister") had made a determination under s 46A(2) of the Act that he could do so.

In February 2013 a delegate of the Minister refused the Plaintiff's application for a protection visa. On 17 May 2013 however the Refugee Review Tribunal remitted the matter for reconsideration by the Minister, after finding that Australia owed the Plaintiff protection obligations under the Refugees Convention, in fulfilment of the visa criterion prescribed by s 36(2)(a) of the Act.

On 18 October 2013 a new subclass of protection visa, the Subclass 785 temporary protection visa ("TPV"), was introduced by the *Migration Amendment (Temporary Protection Visas) Regulation* 2013 (Cth) ("TPV Regulation"). Immediately prior to that date, the Subclass 866 permanent protection visa ("PPV") was the only type of protection visa available. By the insertion of clause 866.222 in Schedule 2 of the *Migration Regulations* 2004, the TPV Regulation imposed criteria having the effect that "unauthorised maritime arrivals" (of which the Plaintiff was one) could only obtain a TPV instead of a PPV. On 2 December 2013 however the Senate passed a resolution disallowing the TPV Regulation.

On 14 December 2013 the *Migration Amendment (Unauthorised Maritime Arrival) Regulation* 2013 (Cth) ("UMA Regulation") again inserted a clause 866.222 in Schedule 2 of the *Migration Regulations* 2004. That clause imposes criteria, which were also in the previous 866.222, that are to be satisfied for the Minister to decide upon an application for a PPV. It reads as follows:

> *The applicant:*
> *(a) held a visa that was in effect on the applicant's last entry into Australia; and*
> *(b) is not an unauthorised maritime arrival; and*
> *(c) was immigration cleared on the applicant's last entry into Australia.*

The Plaintiff does not satisfy any of those criteria. On 16 December 2013 he commenced proceedings in this Court, both challenging the validity of the UMA Regulation and seeking an order that the Minister determine forthwith his application for a protection visa.

The Plaintiff claims that s 48 of the *Legislative Instruments Act* 2003 (Cth) operates to invalidate the UMA Regulation. This is on the basis that the UMA Regulation is substantially the same as the TPV Regulation (and was made within six months of the latter's disallowance by the Senate). The Plaintiff also claims invalidity on the basis that, because it deprives unauthorised maritime arrivals of eligibility for a protection visa, the UMA Regulation is inconsistent with s 36(2) of the Act. The Plaintiff further claims that the UMA Regulation is invalid for imposing criteria pertaining to a visa applicant's status as an unauthorised maritime arrival, where

ss 189, 196 and 198 of the Act had previously fixed the lawfulness of the person's detention by criteria determined at the start of that detention.

The Defendants demurred to the Plaintiff's amended statement of claim. On 23 January 2014 Justice Gageler referred the Defendants' demurrer for hearing before the Full Court.

The grounds of the Defendants' demurrer are:

1. the UMA Regulation is not the same in substance as the TPV Regulation and was therefore not made in contravention of s 48 of the *Legislative Instruments Act* 2003 (Cth) as alleged; and

2. the UMA Regulation is not *ultra vires* s 31(3) or s 504 of the Act or otherwise invalid as alleged.

PLAINTIFF M150/2013 BY HIS LITIGATION GUARDIAN SISTER BRIGID MARIE ARTHUR v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (M150/2013)

Date proceedings commenced: 19 December 2013

Date demurrer referred to Full Court: 23 January 2014

Plaintiff M150/2013 ("the Plaintiff") is a 15-year-old citizen of Ethiopia who entered Australia (as a stowaway aboard a cargo ship) without a visa. Upon his arrival on 29 March 2013, the Plaintiff was refused immigration clearance. He was also placed in detention, from which he was later transferred to community detention.

The Plaintiff lodged an application for a protection visa, which a delegate of the First Respondent ("the Minister") refused in July 2013. Upon a review however the Refugee Review Tribunal remitted the matter to the Minister on 3 October 2013, with a direction that the Plaintiff was owed protection obligations by Australia under the Refugees Convention such that the visa criterion prescribed by s 36(2)(a) of the *Migration Act* 1958 (Cth) ("the Act") was fulfilled.

On 18 October 2013 a new subclass of protection visa, the Subclass 785 temporary protection visa ("TPV"), was introduced by the *Migration Amendment (Temporary Protection Visas) Regulation* 2013 (Cth) ("TPV Regulation"). Immediately prior to that date, the Subclass 866 permanent protection visa ("PPV") was the only type of protection visa available. By the insertion of clause 866.222 in Schedule 2 of the *Migration Regulations* 2004, the TPV Regulation imposed criteria such that persons in certain circumstances (which included those of the Plaintiff) could only obtain a TPV instead of a PPV. On 2 December 2013 however the Senate passed a resolution disallowing the TPV Regulation.

On 14 December 2013 the *Migration Amendment (Unauthorised Maritime Arrival) Regulation* 2013 (Cth) ("UMA Regulation") again inserted a clause 866.222 in Schedule 2 of the *Migration Regulations* 2004. That clause imposes criteria, which were also in the previous 866.222, that are to be satisfied for the Minister to decide upon an application for a PPV. It reads as follows:

> *The applicant:*
> *(a) held a visa that was in effect on the applicant's last entry into Australia; and*
> *(b) is not an unauthorised maritime arrival; and*
> *(c) was immigration cleared on the applicant's last entry into Australia.*

The Plaintiff does not satisfy criteria (a) or (c). On 19 December 2013 his litigation guardian commenced proceedings in this Court, challenging the validity of the UMA Regulation and seeking an order prohibiting the Defendants from giving effect to it.

On 10 February 2014 a delegate of the Minister again refused the Applicant's application for a protection visa. That second refusal was based on the Applicant's failure to meet the criteria in clause 866.222. The Applicant was however granted a temporary humanitarian visa and was released from community detention.

The Plaintiff claims that subclauses 866.222(a) and (c) are inconsistent with the s 36(2)(a) criterion for a protection visa, which is that the visa applicant is: "*a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the*

Refugees Protocol'. The Plaintiff also claims that clause 866.222 imposes exclusionary criteria other than those founded upon Articles 1, 32 or 33 of the Refugees Convention, in a manner inconsistent with the Act. Further or alternatively, the Plaintiff claims that s 48 of the *Legislative Instruments Act* 2003 (Cth) operates to invalidate the UMA Regulation. This is on the basis that the UMA Regulation is substantially the same as the TPV Regulation (and was made within six months of the latter's disallowance by the Senate).

The Defendants demurred to the Plaintiff's statement of claim. On 23 January 2014 Justice Gageler referred the Defendants' demurrer for hearing before the Full Court.

The grounds of the Defendants' demurrer are:

1. the UMA Regulation is not the same in substance as the TPV Regulation and was therefore not made in contravention of s 48 of the *Legislative Instruments Act* 2003 (Cth) as alleged; and

2. the UMA Regulation is not *ultra vires* s 31(3) or s 504 of the Act or otherwise invalid as alleged.

FTZK v MINISTER FOR IMMIGRATION AND BORDER CONTROL & ANOR (M143/2013)

Court appealed from: Full Federal Court of Australia [2013] FCAFC 44

Date of judgment: 6 May 2013

Date special leave granted: 8 November 2013

In December 1996 in the People's Republic of China (PRC) a 15 year old boy was kidnapped on his way to school. After an unsuccessful ransom attempt the boy was murdered by being tied up and thrown through a hole in the ice, where he drowned. His body was found the following day. In January 1997 the appellant (FTZK) successfully applied for a Class UC Temporary Business subclass 456 visa and arrived in Australia in February 1997. In May 1997 the appellant was implicated, by two co-accused in China, in the kidnapping and murder of the boy and a PRC warrant was issued for FTZK's arrest. In May 1998 the two co-accused were executed by the Chinese authorities.

In December 1998 FTZK lodged a protection visa application (and received a bridging visa while that application was considered). He stated he had been subjected to detention and torture in China as a practising Christian. The application was refused by a delegate of the first respondent (the Minister) in January 1999. Ultimately the Refugee Review Tribunal (the RRT) affirmed the delegate's decision and subsequently his bridging visa ceased. FTZK disappeared into the community and could not be located; consequently his immigration status became that of an "unlawful non-citizen". In February 2004 his whereabouts were discovered and he was taken into detention pending return to China. In June 2004 the appellant was advised of the PRC arrest warrant by an officer of the Minister.

FTZK filed an application in 2007 in the High Court seeking, inter alia, a review of the RRT decision that had rejected his claim for refugee status. Ultimately, after remitter to the Federal Court and a series of legal proceedings, in May 2011 a delegate of the Minister decided that it was not satisfied that FTZK was owed protection obligations under the *Migration Act* on the grounds that Article 1F(b) of the Refugees Convention had application. In May 2012 the second respondent (the AAT) affirmed the delegate's decision.

Article 1F of the Refugees Convention states:
The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that … he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

It was not in dispute in the AAT that the each crime alleged was a "serious non-political crime". The issue before the AAT was whether there were "serious reasons for considering" that FTZK had committed the crime or crimes alleged. FTZK denied any knowledge of, or involvement in, the kidnapping and murder of the boy, or the two co-accused. The AAT had before it a copy of the PRC warrant, a copy of the case summary report, including transcripts of interviews with the two co-accused, and the autopsy report from the Chinese authorities. The AAT stated that it took into account the allegations contained in the

documents from the Chinese authorities. It was satisfied that FTZK left China shortly after the crimes were committed and that he provided false information to the Australian authorities in order to obtain a business visa and again later when he applied for a protection visa. Further that he was evasive when giving evidence as to his religious affiliations in Australia and China. It also took into account that he attempted to escape from detention in 2004 and that he intended to again live unlawfully in the Australian community. FTZK advanced what were said to be innocent explanations for his conduct. The AAT concluded that on the totality of the evidence before it, there were serious reasons for considering that FTZK had committed the crime or crimes alleged.

In May 2013 the Full Federal Court (Gray & Dodds-Streeton JJ, Kerr J dissenting) dismissed FTZK's appeal. FTZK had submitted that the reasons of the AAT disclosed that it had taken into account "matters not probative and therefore ha[d] misconstrued its function" and so fallen into jurisdictional error. The majority was of the view that, although the AAT had failed to expressly state the basis of the relevance of the factors it took into consideration, this did not rob them of their objective relevance. Kerr J (dissenting) found that the AAT's reasons revealed that findings of flight and consciousness of guilt critical to its conclusion had not been made and that as a consequence, it had relied on irrelevant considerations.

The grounds of appeal include:

- The Full Court erred:

    a) In finding that it was unnecessary for the reasons of the Tribunal to state the basis on which it found irrelevant the factors it took into consideration; and/or

    b) In finding such factors to be relevant "on an objective basis" and/or incapable of any "other logical construction".

- The Full Court erred in reading into the Tribunal's decision, findings on critical issues of fact which had not been made by the Tribunal and in extrapolating from there to the decision reached by the Tribunal, thus effectively conducting a merits review of the decision reached rather than examining whether or not the Tribunal fell into legal error in undertaking its task.

HOWARD v COMMISSIONER OF TAXATION (M140/2013)

Court appealed from: Full Federal Court of Australia
[2012] FCAFC 149

Date of judgment: 26 October 2012

Date special leave granted: 8 November 2013

In early 1999, the appellant and five others were involved in a joint venture project to acquire and lease Kingston Links golf course, in such a way as to realise a "day-1" profit on the simultaneous completion of the acquisition and resale. The project required a lessee of the golf course at a sufficient rent and an equity participant who would purchase the course (using borrowed funds secured on the land, and its own equity funds) at a price based on the capitalised value of the rent. The appellant was a director of Disctronics Ltd ("Disctronics"), a delisted public company with investable funds. In early July 1999, the directors of that company proposed that, if the equity required was less than $1.5 million, Disctronics should be the purchaser. The proposal was put to, and adopted "as a possible investment opportunity" by, a meeting of directors of Disctronics on 13 or 14 July 1999. The directors agreed that, if Disctronics took up the investment, any joint venture profit share accruing to them would be accounted for, or rebated to, Disctronics.

By the beginning of August 1999, a purchase price and a rent had been agreed in principle with the vendor and a prospective lessee, although no agreement had been executed by either. Meanwhile, two of the joint venture partners ("Edmonds and Cahill") clandestinely negotiated a purchase and lease of the golf course by a syndicate comprising themselves and a third party. In June 2001, the directors of Disctronics commenced proceedings in the Supreme Court of Victoria for remedies consequent on the breach of fiduciary duties by Edmonds and Cahill. The proceedings were funded by Disctronics, to whom the director plaintiffs, including the appellant, assigned all benefits from the proceedings. Judgment was given in favour of the director plaintiffs at first instance, and upheld on appeal.
The issue in this application is whether the sum of $861,853.35, received by the appellant in 2005 as his share of the award of damages was assessable income in his hands. The primary judge (Jessup J) found that the appellant received his share of the damages as fiduciary for Disctronics, and the award was therefore not assessable income in his hands.

The respondent appealed to the Full Federal Court (Middleton, Perram, and Dodds-Streeton JJ). The appellant argued that, once Disctronics had adopted the project as a potential investment, it was incumbent on the directors to do what was in their power to preserve the company's opportunity to invest. It was inconsistent with their fiduciary duties to Disctronics to conduct themselves, in their personal capacity as participants on their own account in the joint venture, in a manner which conflicted with the interests of Disctronics. The appellant argued that there was no simple contingency according to which Disctronics would, or would not, make the investment. Disctronics had available to it $1.5 million in non-operational investment funds. The price at which the "investor" would acquire the golf course was not an independent, objective fact dependent on external events: it was a matter for negotiation among the joint venturers. This circumstance put the directors of the joint venture in a position of immediate and unresolvable conflict of duty and interest, because the interest of the joint venturers was to secure the

highest possible purchase price from an investor, while the interest of Disctronics was diametrically opposed: it sought to secure the lowest price.

The Court did not accept this was a correct analysis, nor one that accorded with the conclusion reached by the primary judge as to the appellant's role, or fulfilment of his obligation to Disctronics. The evidence, as accepted by the primary judge, was that the appellant was responsible for having Disctronics accepted as equity participant by the other joint venturers. In that case, and only in that case, did the appellant agree to rebate his share of the "day-1" profit to Disctronics. The appellant's obligation to Disctronics only involved him using his reasonable endeavours to have it become purchaser, which obligation he discharged. Therefore, the only expectation of Disctronics was to be a potential purchaser, if and when there was a secured sale price and a tenant's agreement for a long-term lease. Disctronics' only interest arose when and if the equity required was less than $1.5 million. In the end, Edmonds and Cahill, despite all of the endeavours of the appellant, were not prepared to accept Disctronics as equity participant and purchaser. In these circumstances, there could be no conflict of interest in the way contended for by the appellant, and no breach of his fiduciary duty to Disctronics. Accordingly, the award of damages in question had the character of assessable income in the appellant's hands, and was not received by him as trustee.

The grounds of appeal include:

- The Full Court erred in holding that the gain made by the appellant from his participation in the joint venture, being the sum awarded to him by the Victorian Supreme Court, was derived by the appellant beneficially and should have held that it was derived by the appellant as trustee for Disctronics;

- The Full Court erred in identifying as the principal issue between the parties the question whether there was a breach by the appellant of his fiduciary duty to Disctronics and should have held that the appellant accounted to Disctronics for the gain arising from his participation in the joint venture in discharge of his fiduciary duties to Disctronics and as trustee for Disctronics.

The respondent has filed a Notice of Contention on the following ground:

- That the Full Court should have decided that, if the litigation agreement between Disctronics and the appellant was effective to assign to Disctronics the right to receive any damages awarded to the appellant such that Disctronics derived those damages as income, then s102B of the *Income Tax Assessment Act* 1936 applies to treat that assignment as not having been made.

<u>GILLARD v. THE QUEEN</u> (C20/2013)

<u>Court appealed from</u>: Court of Appeal of the Supreme Court of the Australian Capital Territory [2013] ACTA 17

<u>Date of judgment</u>: 18 April 2013

<u>Date of grant of special leave</u>: 8 November 2013

The appellant was convicted of multiple sexual offences against the victim ("DD") when she was aged between 10 and 16.

The appellant appealed against conviction and sentence. The ground of appeal relevant to this appeal was ground (c) which was expressed as follows: "In respect of counts 13, 14, 16 and 18 his Honour misdirected the jury in respect of the issue of consent". (Ultimately, this was relevant only to count 13 because in relation to the other counts the appellant simply denied that sexual activity had taken place at all.) Ground (c) raised the interpretation of s 67 of the *Crimes Act* 1900 (ACT) ("the Act") which describes situations in which apparent or ostensible consent to a sexual act cannot be relied on by an accused because of the origins of the "consent".

At trial, counsel for the appellant had argued that the relevant provision had not been shown to be applicable in this case. His argument had the following elements: "(a) The appellant was not shown to be in a position of authority or trust in relation to DD, and the trial judge did not explain to the jury how they could conclude that he was; (b) Even if the appellant was in a position of authority or trust, s 67 did not 'negate' DD's consent unless that 'consent' had been obtained by a separately identifiable abuse of that position of authority or trust; (c) Furthermore, even if it could be shown that DD's will had been overborne by the abuse of the appellant's position of trust or authority, it also had to be shown that the appellant knew that DD's 'consent' has been obtained because of the overbearing of her will by that abuse (recklessness as to consent would not be sufficient)."

The Crown case was that consent was negated by abuse of trust (s 67(1)(h) of the Act).

The Court of Appeal (Refshauge, Penfold and North JJ) concluded that ss 67(1) and (2) were applicable to determining whether there was consent, not only where knowledge of absence of consent is alleged but also where the allegation is recklessness as to consent. The Court was satisfied that both the following matters were properly before the jury in the appellant's trial: the possibility that any apparent consent given by DD to any of the acts charged in counts 13 to 18 was caused by the abuse by the appellant of his position of authority over, or trust in relation to, DD (that is, the possibility that any "consent" was "negated" under s 67(1)(h)); and, the possibility that the accused was reckless as to whether the complainant was consenting at all. The Court did not consider that the trial judge misdirected the jury as to consent and the appeal was dismissed.

The grounds of appeal include:

- The Court of Appeal erred in holding that Higgins CJ did not err in directing the jury that it could find the appellant guilty in respect of counts 13, 14, 16

and 18 if it was satisfied that the complainant's consent was caused by the abuse of the appellant of his position of authority over the complainant and the appellant was reckless as to that circumstance.

- The Court of Appeal erred in failing to find that where s 67(1)(h) is relied upon by the prosecution to negate the consent, the requisite mental element is knowledge, by virtue of s 67(3).