SHORT PARTICULARS OF CASES
APPEALS

APRIL 2016

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BELL GROUP N.V. (IN LIQ) & ANOR v STATE OF WESTERN AUSTRALIA (S248/2015)

W.A. GLENDINNING & ASSOCIATES PTY LTD v THE STATE OF WESTERN AUSTRALIA (P63/2015)

MARANOA TRANSPORT PTY LTD (IN LIQ) & ORS v STATE OF WESTERN AUSTRALIA & ORS (P4/2016)

Dates writs of summons filed: 27 November 2015,
18 December 2015 and
4 February 2016

Date special cases referred to Full Court: 29 February 2016

The companies of a consolidated group known as "the Bell Group" are in the process of being liquidated, pursuant to orders made in the 1990s by the Supreme Court of Western Australia ("the Supreme Court") under the *Corporations Law* (Cth) (which has since been superseded by the *Corporations Act* 2001 (Cth)). The holding company of the group is The Bell Group Ltd (In Liq) ("TBGL"). Wholly owned subsidiaries of TBGL include Bell Group Finance Pty Ltd (In Liq) ("BGF"), which acted as the group's treasury entity, and Bell Group N.V. (In Liq) ("BGNV"), a foreign company registered in Australia. The liquidator of BGNV in Australia is Mr Garry Trevor, while the sole liquidator of the Australian companies of the Bell Group is Mr Antony Woodings.

In the liquidation of the Bell Group companies, the Commonwealth has lodged proofs of debt in respect of eleven companies for unpaid tax totalling $293 million. W.A. Glendinning & Associates Pty Ltd ("WAG") is an ordinary unsecured creditor of BGF, with an admitted proof of debt of $183 million. BGNV is an ordinary unsecured creditor of both TBGL and BGF, with admitted proofs of debt totalling $464 million.

In July 2014 a chain of litigation ("the Bell Litigation"), involving claims by the liquidators of TBGL and BGF (and others) against various banks, came to an end. This was upon the discontinuance of an appeal (and a cross-appeal) to this Court (*Westpac Banking Corporation & Ors v Bell Group Ltd (In Liq) and Ors* (P18/2013)) from a decision of the Court of Appeal of the Supreme Court. The claimants in the Bell Litigation had been funded, through several agreements for indemnification ("the Funding Agreements"), by a group of entities that included BGNV, the Commonwealth and the Insurance Commission of Western Australia ("ICWA").

The Bell Litigation resulted in various banks making payments that totalled more than $1.7 billion ("the Bell Litigation funds"). Approximately $718 million of those payments was paid to certain companies of the Bell Group pursuant to orders that were not contested in the appeal to this Court. The remainder of the Bell Litigation funds was then paid to Mr Woodings in his capacity as trustee of a trust ("the Settlement Trust") that was established in accordance with a Deed of Settlement executed by the parties to the Bell Litigation.

On 27 November 2015 the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act* 2015 (WA) ("the Bell Act") came into force. The Bell

Act establishes a body corporate known as "The WA Bell Companies Administrator Authority" ("the Authority"). Section 22 of the Bell Act provides that the property of many of the Bell Group companies, along with property held on trust in relation to the liquidation of those companies, is transferred to the Authority. The objects of the Bell Act stated in s 4 of it include the distribution of the Bell Litigation funds, without further litigation, in accordance with the substance of the Funding Agreements.

At the time of writing, various proceedings commenced in 2014 were underway in the Supreme Court in relation to the distribution of funds received by Mr Woodings from the Bell Litigation. An application to the Supreme Court by BGNV for the dismissal of one of those proceedings became the subject of an application for removal into this Court (*Bell Group N.V. (In Liq) v The Insurance Commission of Western Australia & Ors* (S247/2015)). On 18 March 2016 Justice Bell stood that application for removal over to a date to be fixed.

On 27 November 2015, Mr Trevor and BGNV filed a writ of summons and a statement of claim ("SOC") in this Court, commencing proceedings to challenge the validity of the Bell Act. Similar proceedings were then commenced by WAG, followed by proceedings brought by Maranoa Transport Pty Ltd (In Liq) ("Maranoa"), an Australian company of the Bell Group which is not a subject of the Bell Act. In the latter proceeding Mr Woodings is also a plaintiff, in his capacities as liquidator of Maranoa and as trustee of the Settlement Trust.

In all three proceedings the respective plaintiffs have filed a Notice of a Constitutional Matter. The Attorneys-General of Victoria, South Australia, Tasmania, Queensland and New South Wales are all intervening in each of the proceedings. The Federal Commissioner of Taxation has also applied for leave to intervene in all three proceedings.

In each proceeding the parties filed an amended special case, stating questions that were then referred by Justice Bell for consideration by a Full Court.

In proceeding S248/2015, the referred questions are as follows:

1. Do the plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraph 56 of the SOC?

1A. Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the SOC insofar as the grounds rely on former s 215 of the *Income Tax Assessment Act* 1936 (Cth) ("the ITAA 1936") (and alternatively, s 260-45 of Schedule 1 to the *Taxation Administration Act* 1953 (Cth) ("the TAA"))?

2. Is the Bell Act invalid in its entirety?

3. If the answer to question 2 is "no", are any of the provisions of Parts 3 and 4 and any of ss 48, 54, 55, 56, 58 and 69 to 74 of the Bell Act invalid (and, if so, to what extent)?

4. If the answer to question 3 is "yes", is the invalid provision severable from the rest of the Act (and if so, to what extent)?

5. Who should pay the costs of the special case?

In proceeding P63/2015, the questions are:

1. Do the plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56 to 58 of the SOC?

2. Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the SOC insofar as the grounds rely upon s 215 of the ITAA 1936 (alternatively, s 260-45 of Schedule 1 to the TAA)?

3. Are any of the provisions of Parts 3 and 4 and any of ss 51, 52 and 73 of the Bell Act invalid (and, if so, which and to what extent):
   (a) by the operation of s 109 of the Commonwealth Constitution by reason of:
      (i) inconsistency between that provision (as a law of the State of Western Australia) and:
         (1) the ITAA 1936, the *Income Tax Assessment Act* 1997 (Cth) ("the ITAA 1997") or the TAA, on the grounds alleged in paragraphs 56 to 58 of the SOC; further or alternatively
         (2) the Corporations Act, on the grounds alleged in paragraphs 72 to 88 of the SOC; further or alternatively
         (3) s 39(2) of the *Judiciary Act* 1903 (Cth), on the grounds alleged in paragraphs 59 to 68 of the SOC?;
         further or alternatively
   (b) because it infringes Chapter III of the Constitution, on the grounds alleged in paragraphs 59 to 68 of the SOC?

4. If any provisions of the Bell Act are invalid, are they severable from the rest of the Act (and, if so, to what extent); or is the Bell Act invalid in its entirety?

5. Is the Bell Act invalid in its entirety because it infringes Chapter III of the Constitution on the grounds alleged in paragraphs 69 and 71 of the SOC?

6. Who should pay the costs of the special case?

In proceeding P4/2016, the questions are:

1. Do the plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in:
   (a) paragraph 56.1 of the SOC, insofar as the grounds rely upon s 215 of the ITAA 1936 (alternatively, s 260-45 of Schedule 1 to the TAA) and s 254(1)(h) of the ITAA 1936; and
   (b) paragraphs 56.2, 56.3 and 56.4 of the SOC?

2. Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the SOC insofar as the grounds rely upon s 215 of the ITAA 1936 (alternatively, s 260-45 of Schedule 1 to the TAA) and s 254(1)(h) of the ITAA 1936?

3. Are any of ss 9, 10, 22, 25, 27, 28, 29, 30, 33, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 54, 55, 56, 68, 69, 71, 72 or 73 of the Bell Act invalid, and, if so, which and to what extent, by the operation of s 109 of the Commonwealth Constitution by reason of inconsistency between that provision (as a law of the State of Western Australia) and:

   (a) the ITAA 1936, the ITAA 1997 or the TAA, on the grounds alleged in paragraphs 40 to 56 and 91A of the SOC; further or alternatively:

   (b) the Corporations Act, on the grounds alleged in paragraphs 59 to 91 and 91B of the SOC?

4. If any provisions of the Bell Act are invalid, are they severable from the rest of the Act (and, if so, to what extent); or is the Bell Act invalid in its entirety?

5. Who should pay the costs of the special case?

BETTS v THE QUEEN (S281/2015)

Court appealed from: New South Wales Court of Criminal Appeal
[2015] NSWCCA 39

Date of judgment: 24 March 2015

Special leave granted: 11 December 2015

In May 2012 Mr Joel Betts was sentenced by Judge Toner for wounding his ex girlfriend, Ms Samantha Holland, with intent to murder her, contrary to s 27 of the *Crimes Act* 1900 (NSW) ("the Crimes Act"). He was also sentenced for detaining Ms Holland without her consent with the intent of obtaining an advantage, namely a psychological advantage, and immediately before the detaining actual bodily harm was occasioned to her. This was contrary to s 86(2B) of the Crimes Act. The offences themselves occurred when Mr Betts and Ms Holland were alone at the apartment that they formerly shared in April 2010. It is common ground that Ms Holland received multiple stab wounds during the attack, while Mr Betts himself was also badly injured. After allowing a 10% discount for Mr Betts' guilty pleas, Judge Toner sentenced him to an effective term of 16 years imprisonment, with a non-parole period of 11 years.

Mr Betts subsequently appealed against his sentence, submitting inter alia that the sentencing judge erred:

i) in finding that the offences were aggravated, because the victim was "vulnerable" within the meaning of s 21A(2)(l) *Crimes (Sentencing Procedure) Act* 1999 (NSW); and

ii) in finding that the effect of his own injuries (sustained during the fight with Ms Holland) were relevant only to the question of special circumstances, and thus only to the term to be served by way of the non-parole period, rather than relevant also to the head sentence.

On 24 March 2015 the Court of Criminal Appeal (Meagher JA, Hidden J & RS Hulme AJ) unanimously upheld these two grounds of appeal, while also dismissing two other grounds of appeal. With respect to the first of those grounds, their Honours noted that s 21A(2)(l) "is concerned with the weakness of a particular class of victim and not with the threat posed by a particular class of offender". They held that, in finding that Ms Holland was vulnerable because she was alone in the apartment with Mr Betts and at his mercy, indicates that his Honour did not direct attention to the correct operation and limits of sub-paragraph (l). While acknowledging that Ms Holland *was* vulnerable, the Court of Criminal Appeal found that that vulnerability arose because of the particular events of the day, not because of the characteristics of any group of which she was a member. With respect to the second of those listed grounds, their Honours held his Honour erred in limiting the significance of Mr Betts' own injuries as he did.

Despite these errors, the Court of Criminal Appeal still upheld the sentence imposed by Judge Toner. Their Honours were "not persuaded" that a sentence other than the one imposed by the sentencing judge was warranted.

The ground of appeal is:

- The Court of Criminal Appeal, when determining whether a less severe sentence than that originally imposed was warranted, erred in failing to take into account new evidence bearing on the causes of the Appellant's offending.

ROBINSON HELICOPTER COMPANY INCORPORATED v McDERMOTT & ORS (B61/2015)

Court appealed from: Queensland Court of Appeal
[2014] QCA 357

Date of judgment: 19 December 2014

Special leave granted: 30 October 2015

In May 2004 a "Robinson 22" helicopter crashed close to the Northern Territory-Queensland border killing the pilot, Mr Kevin Norton. Mr Graham McDermott (the sole passenger in the helicopter at the time), his wife Ms Juanita McDermott, and Mr McDermott's employer, NTB Pastoral Holdings Pty Ltd (together "the Respondents") brought an action for damages against a number of parties, including the Robinson Helicopter Company Inc. ("Robinson").

It was common ground the accident was caused by the failure of bolt 4 in the helicopter's forward flexplate. Bolt 4 was a critical fastener that, if removed or lost, could compromise the safe operation of the helicopter. For this reason, the helicopter maintenance manual ("the manual") specified that a secondary locking mechanism be employed. This involved a "palnut" to be placed on bolt 4 and that after its installation, a torque (paint) stripe to be applied across both bolt 4 and the palnut. If bolt 4 had been incorrectly assembled therefore, the torque stripe would have been visibly damaged, thus alerting the Licensed Aircraft Maintenance Engineers ("LAMEs") during the regular inspections.

On 28 March 2014 Justice Lyons dismissed the claim against Robinson. His Honour concluded that Robinson had taken reasonable care to address the risk of the flexplate's failure from an inadequately torqued bolted joint. He further held that neither the helicopter itself nor the manual had a defect for the purposes of s 75AD and s 75AE of the *Trade Practices Act* 1974 (Cth).

On 19 December 2014 the Court of Appeal (McMurdo P & Wilson J; Holmes JA dissenting) allowed the Respondents' appeal. The majority noted that Justice Lyons' reasoning was reliant on the premise that an intact torque stripe was a sufficient indicator of the security of each relevant bolt. This however was not the case, as the application of a torque wrench would have revealed to the LAMEs that the relevant bolt was loose. The majority further found that the manual itself was inadequate because it did not instruct the LAMEs to investigate a deteriorated or incomplete torque stripe. Justice Holmes however held that the most recent LAMEs who had inspected the helicopter were alive to the significance of an intact torque stripe. His Honour noted that each of them had given evidence that he would have taken further action had he noticed a deteriorated torque stripe.

The grounds of appeal include:

- The Court of Appeal erred in finding (at [85]) that no disadvantage of the kind there identified from the use of [the] torque wrench, attached to the use of a simple, inexpensive spanner to check each bolt in the flexplate for looseness, when the evidence was to the contrary.

- The Court of Appeal erred in departing from findings made by the trial judge which were open on the evidence and further which were neither glaringly improbable nor contrary to compelling inferences.

ACQUISTA INVESTMENTS PTY LTD & ANOR v THE URBAN RENEWAL AUTHORITY & ORS (A29/2015)

Court appealed from: Full Court of the Supreme Court of South Australia [2015] SASCFC 91

Date of judgment: 20 July 2015

Date special leave granted: 13 November 2015

On 13 December 2013 the Urban Renewal Authority (the Authority), the Premier (and Minister for State Development) and the 3rd respondent, Adelaide Capital Partners Pty Ltd (ACP) entered into a contract (the Deed) granting options to ACP to purchase 407 hectares of land to the north of Adelaide. The appellants (Acquista) are entities who would have liked to have tendered for purchase of the land had it been placed on the open market. Acquista commenced an action for judicial review in the Supreme Court seeking, amongst other relief, to set aside the Deed. They challenged the validity of the Deed on several grounds, including that the decision was unlawful and void on account of non-compliance with s 11(1) of the *Public Corporations Act* 1993 (SA) (the PCA Act), which requires a public corporation to perform its commercial operations in accordance with prudent commercial principles. Although the trial judge (Blue J) found there had not been compliance with that requirement and that the contract was therefore unlawful, he declined to declare it void. Acquista also argued that the contract should be set aside on the basis that the decision to enter it was unreasonable in the *Wednesbury* sense, in that no reasonable person would have made the decision. The judge upheld that claim but found that this was not such as to render the agreement void.

In their appeal to the Full Court, Acquista argued that, having made the findings he made, the judge should have declared the contract void or unenforceable. The respondents argued by notices of contention that the findings that the decision to enter the contract was unlawful and legally unreasonable were in error and should be set aside. More fundamentally, the respondents also contended that the decision to enter the contract made by the Cabinet, and the contract itself, were not amenable to judicial review and that Acquista lacked standing to bring the action.

The majority (Vanstone and Lovell JJ, Debelle AJ dissenting) found that the Cabinet made the decision to sell the land, either as the delegate of the Authority or as an exercise of executive power. The issue was whether that decision was amenable to judicial review. Acquista asserted that non-compliance with the mandatory requirements in s 11(1) of the PCA Act brought the decision within the ambit of a reviewable decision. However the majority considered that s 11 was essentially aimed at the internal operations of statutory corporations and was not such as to restrict the powers of the Authority. Thus they did not consider that, even if there were non-compliance with s 11 (as to which they expressed no opinion) it could lead to a finding that the contract was unlawful and liable to be set aside.

As to the argument that the decision was legally unreasonable, the majority found no basis to make that finding. They noted that the Cabinet submissions which formed the basis of the discussion of the proposal were comprehensive in terms of outlining both positive and negative aspects of accepting ACP's proposal. Even assuming that the only information before the Cabinet was that contained in those

submissions, the decision to accept ACP's offer and not go to the open market would not be legally unreasonable. The majority considered that it was not the role of the Court, nor was the Court equipped, to adjudicate on the validity of the reasons which motivated the Cabinet to approve the proposal. The inability of the Court to assess the decision in all its aspects tended towards a conclusion that the decision to enter into the contract was not one susceptible of judicial review, at least on account of legal unreasonableness. Further, that decision was not one which affected any rights, interests or legitimate expectation, other than those of the parties to the contract. For this reason, too, neither the decision to enter the contract, nor the contract itself, was amenable to judicial review.

Debelle AJ (dissenting) held that the appeal should be allowed on the basis that the judge's findings that there was non-compliance with s 11 and as to legal unreasonableness were correct and that it followed that the contract should have been declared invalid and of no effect.

The grounds of appeal include:

- The majority erred in finding that the decision made by Cabinet, as the delegate, or purported delegate, of the first respondent (the Authority), to cause the Authority to enter into a deed dated 13 December 2013 between the Authority, the Minister for State Development and the third respondent was not amenable to judicial review.

- The majority erred in finding that the decision made by Cabinet, as the delegate or purported delegate of the Authority, to cause the Authority to enter into the deed was a valid exercise of the executive power of the State.

The 1st and 2nd respondents have filed a notice of contention, the grounds of which include:

- The appellants lacked the necessary standing to bring the action for judicial review to challenge the validity of the Deed, in circumstances where the appellants were not parties to the Deed.

The 3rd respondent has also filed a notice of contention the grounds of which include:

- Entry into the Deed was authorised because the Board of the Authority delegated authority to Cabinet to decide to enter the Deed.