SHORT PARTICULARS OF CASES
APPEALS

PERTH

JUNE 2018

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COMMISSIONER OF STATE REVENUE v PLACER DOME INC (NOW AN AMALGAMATED ENTITY NAMED BARRICK GOLD CORPORATION) (P6/2018)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia
[2017] WASCA 165

Date of judgment: 11 September 2017

Special leave granted: 16 February 2018

The appellant ("the Commissioner") argues that the critical issue in this appeal is whether the respondent ("Placer") had any goodwill of material value when it was acquired in a takeover as this affected its valuation and whether or not duty was payable on the sale.

Placer submits that the critical issue is rather whether the value of the land assets held by Placer at the time it was acquired exceeded the statutory threshold in Section 76ATI of the *Stamp Act* 1921 (WA) ("the Act").

The principal facts are not in dispute. Placer was a substantial Canadian gold mining enterprise with land mining tenements around the world, including in Western Australia ("WA"). On 4 February 2006 Barrick Gold Corporation Inc ("Barrick") was successful in its takeover of Placer for a price that ascribed a value to the total property of Placer of $15.3 billion. The acquisition was the largest transaction of its kind in the gold industry and created the world's largest goldmining business.

Part IIIBA of the Act imposes duty on the acquisition of a majority interest in a corporation that owns land in Western Australia, provided that certain thresholds as to the value of its underlying landholdings are met. Before any duty is payable, the land-holder must have land within WA valued at $1 million, and the value of all land must be 60% or more of the value of total property to which the land-holder is entitled less excluded property. If these criteria are satisfied, and duty is payable, the amount of duty is assessed by reference to the value of land and chattels situated in WA. There is no dispute that the value of Placer's property for the purposes of this provision was $12.8 billion and that to be a land-holder (and therefore to attract the imposition of duty) the value of its land had to equal or exceed $7.68 billion (60%).

In its consolidated financial statements Barrick nominated 'fair value' amounts to Placer's tangible assets and allocated the residual balance of the purchase price ($6.5 billion) to "goodwill".

Following the acquisition, an assessment of duty was made by the Commissioner pursuant to the provisions of the Act requiring Placer to pay duty of just under AUD $55 million, on the basis that the value of its land in WA was $1,015,900,000. Placer objected to the assessment but in April 2014 the Commissioner disallowed the objection. Placer then made an application to the State Administrative Tribunal ("the Tribunal") for review of the Commissioner's decision. The Tribunal accepted the Commissioner's argument that there was no material goodwill in determining the land value and assessed duty on the

acquisition by Barrick of Placer accordingly. The Tribunal found in favour of the Commissioner and the assessment was affirmed.

Placer appealed to the Court of Appeal. The appeal was allowed on the basis that the Tribunal had failed to distinguish the value of the land from the value of Placer's business as a going concern. It followed that Placer had material goodwill. The Commissioner disputed the goodwill allocation. It argued that Placer's only material revenue was that from the sale of (mostly) gold, sold as refined metal. The undisputed evidence of Placer's experts was that the prices of gold are set by transactions on international metal exchanges, to which the identity of the parties - whether as vendor or as purchaser- are irrelevant. There is no premium or discount on the traded price according to the reputation or capability of the miner, smelter or vendor; gold miners (such as Placer and Barrick) are "price takers, not price makers". Therefore there is no goodwill of material value unrelated to the use of its land for mining.

The Court of Appeal set aside the Tribunal's order dismissing Placer's review application. The matter was remitted to the Tribunal for reconsideration in accordance with the Court's reasons for decision and certain specified directions as to matters of valuation.

The Commissioner has appealed to the High Court. The Commissioner seeks to rely on a "top-down" approach to valuing the land, which starts with the value of the entire business, assumes there is no material goodwill or other intangible value within Placer's going concern business, and treats the residual as land. Placer disputes this methodology. Placer also argues that the Commissioner's case in this Court is different to the case mounted in the court below.

The grounds of appeal include that the Court of Appeal:

- Should have held that the Respondent had failed to make out its case that the value of "all land to which it was entitled" was less than 60% of the value of "all property to which it was entitled" at the relevant date;

- Erred in concluding (at [91]-[92]) that the Tribunal erred in adopting the approach of valuing the land by deducting the value of the non-land assets from the value of the Respondent's business;

- Erred in concluding (at [95]-[97]; [245]-[247]) that there was evidence to support a finding that the Respondent's business had material goodwill.

MIGHTY RIVER INTERNATIONAL LIMITED v BRYAN HUGHES AND DANIEL BREDENKAMP AS DEED ADMINISTRATORS OF MESA MINERALS LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT) & ANOR (P7/2018)
MIGHTY RIVER INTERNATIONAL LIMITED v MINERAL RESOURCES LIMITED & ORS (P8/2018)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2017] WASCA 152
Date of judgment:	11 August 2017
Special leave granted:	16 February 2018

The main issue in these appeals is whether a deed of company arrangement ("the DOCA") entered into by Mesa Minerals Ltd ("Mesa") is a valid deed of company arrangement. It raises questions of the construction of Pt 5.3A of the *Corporations Act* 2001 (Cth) ('the Act").

Part 5.3A sets out the scheme for voluntary administration under the Act. Section 444A, which appears in Pt 5.3A, specifies the mandatory requirements for deeds of company arrangement. Relevantly it provides that a deed must specify "*the property of the company (whether or not already owned by the company when it executes the deed) that is to be available to pay creditors' claims*." (emphasis added). Here the DOCA provides that unless it is varied, there will be no property of Mesa available for distribution to creditors under the DOCA. The section further requires the deed to specify a mandatory distribution process and to specify that the priority of employees be respected in that process.

There is no relevant dispute about the facts. Mesa operated as a mining company. Its key assets comprised a 50% interest in 2 manganese projects (with the other joint venture partner being a subsidiary of Mineral Resources Limited ("MRL")), certain mining tenements and a mining lease called the Boodarie lease and an interest in a facility agreement with the Pilbara Port Authority. There were common directors and officeholders of Mesa and MRL.

On 13 July 2016, the directors of Mesa placed Mesa into voluntary administration, and the first respondents in P7/2018, ("the Administrators") were appointed its voluntary administrators.

From the time of appointment, the Administrators favoured Mesa entering into a 'holding deed' of company arrangement. The deed was a 'holding deed' because it did not specify any property that would be available to satisfy creditors' claims, nor did it otherwise provide for a return to creditors. Rather, it contemplated further investigations by the Administrators for up to 6 months, following which they might present a proposal to a creditors' meeting.

In early August 2016 the appellant ("Mighty River"), a creditor as to $69,000 and 13.5% shareholder of Mesa, queried why a 'holding deed' would be preferable to a liquidation. Later in August 2016 Mighty River complained, in effect, that the administrators had not investigated possible claims against Mesa's directors. That being the case, Mighty River said that there was 'no sensible rationale' for

continuing a proposed sale process until those potential claims had been investigated. On 20 October 2016 the Administrators recommended entering into the DOCA. The majority of Mesa's creditors voted in favour of entry into the DOCA and it was subsequently executed.

In the first appeal P7/2017, Mighty River seeks a declaration that the DOCA is of no force or effect. In essence it contends that the DOCA does not comply with the requirements of Pt 5.3 A of the Act, and is consequently invalid. It also claimed at first instance that the Administrators were not independent and impartial and that their conduct gave rise to a reasonable apprehension of bias. It seeks that Mesa be wound up and that the Administrators be appointed liquidators.

In the related second appeal P8/2018, MRL another creditor as to approximately $8 million and 60% shareholder of Mesa, claims that if there were any defects in the DOCA, the defects should be cured under s 445G (which appears in Part 5.3 A of the Act), or the deed should be varied to the extent to the extent necessary under that section.

The two appeals were heard together at first instance by the Master of the Supreme Court.

The Master dismissed the claims of Mighty River in the first appeal and made a declaration under s 445G in the second appeal that the DOCA was not void, in favour of MRL. Mighty River appealed to the Court of Appeal with respect to the Master's dismissal of its claims under Pt 5.3A of the Act (but not against the dismissal of its claims about impartiality/bias against the Administrators) and also against the making of the order declaring the DOCA was not void in the second appeal.

The Court of Appeal held that the DOCA complied with the requirements of Pt 5.3 A of the Act, properly construed. Each member of the Court of Appeal held that "the property" referred to in s 444A captured "no property". It dismissed Mighty River's appeals in both matters.

Mighty River has been granted special leave to appeal against both decisions of the Court of Appeal.

The grounds of appeal in P7/2018 are:

- That the Court of Appeal erred in holding that the deed of arrangement entered into by the first respondents and the second respondent is a valid deed of company arrangement under of Pt 5.3 A of the *Corporations Act* 2001 (Cth);

- That the Court of Appeal ought to have held that the deed of company arrangement was void pursuant to s 445G(2) of the *Corporations Act* 2001 (Cth).

The grounds of appeal in P8/2018 are:

- That the Court of Appeal ought to have held that the deed of arrangement entered into by the first respondents and the second respondent was void or invalid pursuant to s 445G(2) of the *Corporations Act* 2001 (Cth).

JOHNSON v THE QUEEN (A9/2018)

Court appealed from: Court of Criminal Appeal of the Supreme Court of South Australia
[2015] SASCFC 170

Date of judgment: 24 November 2015

Special leave granted: 16 February 2018

In 2015 the appellant (then 61 years old) was tried before a jury on five charges of historical sexual offences against his sister, VW (who was aged 58 at the time of the trial). The charges were essentially as follows:

- Count 1 – indecent assault, when VW was aged 7-8;
- Count 2 – carnal knowledge, when VW was aged 14;
- Count 3 – persistent sexual exploitation, when VW was aged 15-16;
- Count 4 – rape, when VW was aged 25-26; and
- Count 5 – rape, when VW was aged 27.

VW's testimony included allegations of various uncharged acts of assault by the appellant against her, which included incidents when VW was aged about 3 to 6 years. Those alleged acts were relied upon by the prosecution in relation to count 1 in aid of rebutting the presumption of *doli incapax*, which arose because the appellant's age at the time was no more than 10. In relation to count 3, which required at least two specific acts for the offence to be made out, VW testified that the appellant abused her almost weekly for approximately two years and that there was nothing to differentiate one assault from another. The trial judge, Judge Beazley, warned the jury against impermissible propensity reasoning and instructed the jury as to the limited potential relevance of the uncharged acts (in the event that the jury were satisfied that any of those alleged acts had occurred).

The jury found the appellant guilty on all counts. Judge Beazley then sentenced him to imprisonment for 8 years and 3 months, with a non-parole period of 3 years.

The appellant appealed against his conviction, on grounds which included that all verdicts were unreasonable and that the trial had miscarried due to the lack of a separate trial on count 1. He contended that evidence led in relation to the question of *doli incapax* was prejudicial and that it was also irrelevant to the other counts.

The Court of Criminal Appeal ("the CCA") (Sulan, Peek & Stanley JJ) unanimously allowed the appeal in part. Their Honours found that the evidence relating to count 1 was not capable of rebutting the presumption of *doli incapax*. The jury should have had a reasonable doubt as to the appellant's understanding, at 10 years old, that what he was doing with VW was seriously wrong in the sense that it attracted criminal responsibility. The CCA then set aside the verdict of guilty on count 1 and entered an acquittal. Their Honours also acquitted the appellant on count 3, finding that it was not possible on the evidence for the jury to identify and agree upon any particular alleged acts as the two or more required to found the commission of the charged offence.

The CCA also held however that the verdicts on counts 2, 4 and 5 were not unreasonable. Their Honours considered that the evidence relevant to count 1 remained admissible on the other counts, principally as "relationship evidence", and that the jury could not have had reasonable doubt as to the appellant's guilt on counts 2, 4 and 5. The CCA also held that there was no miscarriage of justice on account of the appellant's acquittal on count 3, since that acquittal was on a matter of law, not because the evidence of relevant facts was suspect.

The grounds of appeal include:

- The CCA erred by failing to find that it followed from the fact that a verdict of acquittal should have been entered in relation to count 1 that the joinder of count 1 together with counts 2, 4 and 5 caused a miscarriage of justice, in that:

  (a) the evidence led in relation to count 1, including with a view to rebutting the presumption of *doli incapax*, was not properly admissible with respect to counts 2, 4 and 5;

  (b) alternatively, if that evidence might have been admissible as evidence of uncharged acts and admissible with respect to counts 2, 4 and 5, there was nevertheless prejudice to the appellant, resulting in a miscarriage of justice, arising from the fact that:

    (i) that was not the basis on which the evidence was led nor upon which the jury were instructed;

    (ii) having returned a verdict of guilty in relation to count 1, the jury necessarily treated the evidence in relation to it as having a status or effect which, according to the CCA's findings, it could not properly bear; and

    (iii) the jury's verdict on count 1 necessarily involved a rejection beyond reasonable doubt of the appellant's sworn account.