SHORT PARTICULARS OF CASES

AUGUST 2019

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VELLA & ORS v COMMISSIONER OF POLICE (NSW) & ANOR (S30/2019)

Dates writ of summons filed: 7 February 2019

Date special case referred to Full Court: 3 June 2019

The Plaintiffs, who are members of the Rebels Motorcycle Club, are defendants to proceedings in the Supreme Court of New South Wales that were commenced by the First Defendant ("the Commissioner") in October 2018. In those proceedings, the Commissioner seeks orders against the Plaintiffs under s 5 of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) ("the Act").

Section 5(1) of the Act permits the making of orders against adults who have been convicted of a serious criminal offence or who have been "involved in serious crime related activity" (without any charge or without a conviction, including due to acquittal). Section 5(1)(c) of the Act requires the court first to be satisfied that the orders would protect the public by preventing, restricting or disrupting involvement in serious crime related activities.

The orders sought under the Act by the Commissioner include restricting the Plaintiffs from associating with or contacting affiliates or hang-arounds of any outlaw motorcycle gang. They also include orders restricting the Plaintiffs from travelling in any vehicle between 9:00pm to 6:00am (except in a medical emergency) and prohibiting them from possessing more than one mobile telephone or having access to an encrypted communications device.

In their proceedings in this Court, the Plaintiffs seek a declaration that the Act, or alternatively s 5(1) of the Act, is invalid. This is on the basis that the power conferred by s 5(1) is incompatible with the institutional integrity of the relevant court (being either the Supreme Court or the District Court of New South Wales), in view of Chapter III of the Constitution. The Plaintiffs claim that, in substance, the Act erects an alternative criminal justice regime under which the liberty of a person, who has been acquitted or has not been charged with any crime, can be curtailed after findings made on the civil standard of proof (the balance of probabilities) rather than on the higher criminal standard of proof.

The parties filed a Special Case, which Justice Keane referred for consideration by the Full Court. The Special Case states the following questions for the Court's opinion:

1. Is subsection 5(1) of the Act invalid (in whole or in part) because it is inconsistent with and prohibited by Chapter III of the Constitution?
2. If the answer to Question 1 is "Yes":
    a) to what extent is that subsection invalid?;
    b) is that part of the subsection severable from the remainder of the Act?
3. Who should pay the costs of the Special Case?

The Plaintiffs have filed a Notice of Constitutional Matter. The Attorneys-General of the Commonwealth, Victoria, South Australia, Queensland and Western Australia are intervening in the proceeding.

LORDIANTO & ANOR v COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE (S110/2019)

Court appealed from: New South Wales Court of Appeal
[2018] NSWCA 199

Date of judgment: 11 September 2018

Special leave granted: 22 March 2019

The Appellants are Indonesian citizens and permanent residents of Australia. From time to time they transferred large sums of money from Indonesia to Australia using "money changers" in Indonesia. Those money changers directed the Appellants to pay the agreed sum into nominated Indonesian accounts. Between October 2013 and August 2015, a large number of cash deposits under $10,000 were then made into the Appellants' Commonwealth Bank accounts, amounting to the sum paid into the Indonesian accounts. This mode of deposits was part of a process of money laundering known as "cuckoo smurfing". It was not suggested that the Appellants were complicit in this activity.

On 28 June 2016 a restraining order was made pursuant to s 19 of the *Proceeds of Crime Act 2002* (Cth) ("the Act") covering the funds in five of the Appellants' Commonwealth Bank accounts. This was on the basis that there were reasonable grounds to suspect that those funds were either the proceeds of crime, or an instrument of money laundering and structuring offences.

The Appellants accepted that the funds were the proceeds of an offence. They made an application however for an order excluding their interests in the bank accounts from the restraining order. The Appellants claimed that, pursuant to s 330(4)(a) of the Act, their interests had ceased to be proceeds of an offence because they were acquired by them as "third parties" for sufficient consideration and without them knowing, and in circumstances that would not arouse a reasonable suspicion that their interests were proceeds of an offence. Justice Simpson dismissed that application.

On 11 September 2018, the Court of Appeal (Beazley P, Payne & McColl JJA) dismissed the Appellants' appeal. All Justices held that the Appellants relevantly had an "interest" in "property" each time a deposit was made into their bank accounts. Beazley P and Payne JA however held that a "third party" is a person who, at the time of the criminal conduct, is wholly removed from the property in question. Their Honours found that the Appellants were not therefore "third parties". McColl JA found that when a person is not complicit in the laundering activity, or otherwise stands at arms-length to the transaction, then that person is a "third party" for the purposes of s 330(4) of the Act.

All Justices however held that the Appellants were financially sophisticated international investors. The conduct identified therefore should have aroused in them a reasonable suspicion that their interests in the bank accounts were proceeds of an offence. Their Honours held that the Appellants themselves need not have known that that conduct itself constituted an offence.

The grounds of appeal include:

- The majority of the Court of Appeal misconstrued "third party" in para 330(4)(a) of the Act to exclude a person who acquires property at the time it becomes proceeds or an instrument of an offence.
- The Court of Appeal wrongly interpreted the phrase "for sufficient consideration" in para 330(4)(a) of the Act as requiring an immediate

connection between the third party acquirer of property and the person from whom the property passed.

KALIMUTHU & ANOR v THE COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE (P17/2019)

Court appealed from: Court of Appeal, Supreme Court of Western Australia [2018] WASCA 192

Date of judgment: 30 October 2018

Special leave granted: 22 March 2019

The appellants are residents of Malaysia. They wanted to transfer to Australia amounts of Malaysian Ringgit cash that they had received in Malaysia from the sale of recycled scrap metal. The first appellant gave the Malaysian Ringgit cash to a money changer in Malaysia (who was an acquaintance), who gave it to a Malaysian money remitter, who arranged for its Australian Dollar equivalent to be deposited into three Australian bank accounts that had previously been opened by the appellants. Between 11 August 2014 and 13 October 2014, a total of $2,466,936.47 was deposited into the bank accounts. Most of the deposits were of amounts less than $10,000, that being the threshold amount at which a transaction is required to be reported under s 43 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the Anti-Money Laundering Act).

On 20 October 2014, Allanson J, in the Supreme Court of Western Australia, made a restraining order, on the application of the respondent, pursuant to s 19 of the *Proceeds of Crime Act* 2002 (Cth) (the POC Act) on the basis that there were reasonable grounds to believe that the money in the accounts was the proceeds of crime or an instrument of a serious offence or both. The appellants then applied for an order that their interests in the property be excluded from the restraining order. They relied on s330(4)(a) of the POC Act, which provides:

> *Property only ceases to be proceeds of an offence or an instrument of an offence:*
>
> *(a) if it is acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence.*

On 19 April 2017, Allanson J ordered that all of the appellants' interests in the property restrained be excluded from restraint.

In his appeal to the Court of Appeal (Buss P, Murphy & Beech JJA) the respondent submitted, inter alia, that the primary judge erred in law in finding that the appellants were 'third parties' for the purposes of s 330(4)(a). The Court held that the effect of the text of s 330(4)(a), properly construed in the applicable context, is that a 'third party' is a person who was not involved with or connected to any transaction by which the property became proceeds of an offence or an instrument of an offence. In this case, the appellants acquired the property upon the credit balance in his or her bank account being increased by the deposit of the moneys the subject of each structured deposit. The property was acquired simultaneously with the moneys the subject of each structured deposit being deposited into his or her bank account. When the moneys were deposited into the bank accounts those moneys were 'proceeds of an offence'; in particular, proceeds of a structuring offence, contrary to s 142(1) of the Anti-Money Laundering Act. None of the acquisitions by the appellants occurred *after* the property became proceeds of an offence. Accordingly, neither of the appellants was a 'third party' within s 330(4)(a) in his or her acquisition of the property. Murphy & Beech JJA adopted the analysis of the Court of Appeal in *Lordianto v*

Commissioner of the Australian Federal Police [2018] NSWCA 199 (Lordianto) as it was not ‘plainly wrong’ (although they indicated that but for *Lordianto* they would have held that the appellants were ‘third parties’). Buss P conducted his own analysis which was materially the same as that of the Court of Appeal in *Lordianto.*

The Court also upheld the submissions of the respondent that Allanson J erred in law in finding that 'sufficient consideration' had been provided by the appellants for the purposes of s 330(4)(a) of the POC Act, and in finding that the circumstances in which the property was acquired would not have aroused a 'reasonable suspicion' that the property was the proceeds of an offence, or the instrument of an offence, within s 330(4)(a) of the POC Act.

Lordianto was also the subject of a successful special leave application. This appeal is listed for hearing together with the appeal in *Lordianto*.

The grounds of the appeal include:

- The Court of Appeal erred in law by misconstruing “third party” in s 330(4)(a) of the *Proceeds of Crime Act* 2002 (Cth) to exclude from that term a person who acquires property at the time it becomes proceeds or an instrument of an offence.
- The Court of Appeal erred in law in concluding that the appellants did not acquire property for “sufficient consideration” for the purposes of s 330(4)(a) and s 338 of the Act because they did not have any connection to the persons who deposited money into their bank accounts.

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v SHARPCAN PTY LTD (M52/2019)

Court appealed from: Full Court, Federal Court of Australia
[2018] FCAFC 163

Date of judgment: 27 September 2018

Special leave granted: 20 March 2019

The respondent ("Sharpcan") is the beneficiary of the Daylesford Royal Hotel Trust ("the Trust"). Spazor Pty Ltd, as Trustee for the Trust, ran the business undertaking of the Royal Hotel from 8 August 2005 to 9 November 2015. The business undertaking of the hotel involved deriving revenue from providing accommodation, sales of food and drink at its restaurant, café and public bar; gaming on 18 electronic gaming machines; and wagering (on racing and keno).

From 2005 until 15 August 2012, the Trustee engaged in gaming activities onsite, consistent with the *Gambling Regulation Act 2003* (Vic) (the "Act"), on the footing that Spazor had been granted a "venue operator's licence" as the operator of the venue on which gaming occurred on 18 machines, and Tattersalls Gaming Pty Ltd had been granted a "gaming operator's licence" enabling it to conduct gaming at the Royal Hotel through those 18 machines.

These arrangements changed, however, by reason of amendments made to the Act in 2009 by the *Gambling Regulation Amendment (Licensing) Act 2009* (Vic), the relevant provisions of which commenced on 16 August 2012. In order to conduct gaming in respect of the 18 machines, the Trustee had to acquire a gaming machine entitlement (a "GME") in respect of each machine. The State allocated GMEs to hotels and clubs by means of an auction held on 10 May 2010. In the auction, the Trustee was successful in its bid for 18 GMEs, the total cost of which was $600,300.

The Trustee claimed a deduction for the amounts paid in acquiring the GMEs in calculating the net income of the Trust estate for the year ending 30 June 2010. The respondent ("the Commissioner") contended, however, that the gaming machine expenditure was of capital or was capital in nature, and was not deductible. The Administrative Appeals Tribunal (DP Pagone) set aside the objection decision of the Commissioner on the ground that the outgoings for the gaming machine entitlements were allowable as a deduction in the 2010 year of income under s 8-1 of the *Income Tax Assessment Act* 1997 (Cth).

In the appeal to the Full Federal Court (Greenwood CJ, McKerracher and Thawley JJ), the Commissioner submitted that because the outgoing of 10 May 2010 secured the acquisition of the GMEs, as a new statutory entitlement, which enabled gaming to be conducted so as to derive income, the outgoing bore the character of capital.

The majority of the Court found, however that there were other factors which indicated that the outgoing was an outgoing on revenue account. The first factor was that the outgoing was incurred in relation to a business properly understood as an integrated hotel business characterised by the various trading activities, including gaming, conducted by the Trustee. It was not the business of conducting gaming at a gaming parlour, but involved conducting an integrated hotel undertaking and it was artificial to excise gaming from the integrated activities and then determine the character of the outgoing by reference, in effect, to only that activity.

The second consideration was that on 10 May 2010 when the Trustee went into the auction and incurred the obligation to pay $600,300 for the 18 GMEs, the

horizon the Trustee had to commercially look to was 16 August 2012, not the 10 year term of the GMEs. If the Trustee did not bid for, and win the bidding for, 18 GMEs on that day, it would not have any income from gaming from 16 August 2012 and the business of the integrated hotel undertaking would have been significantly at risk. The Trustee therefore incurred the outgoing to preserve the hotel business as a going concern.

The third consideration was the importance of keeping in mind that the circumstances which might characterise an outgoing as in the nature of capital in one set of circumstances may not necessarily lead to the same conclusion in the circumstances under consideration. The circumstance that the GMEs would form an asset in the sale of the hotel business as a going concern with the result that the outgoing by the incoming purchaser would be characterised as an outgoing on capital account, did not mean that the outgoing incurred by the Trustee in bidding for the GMEs in the auction, was necessarily an outgoing on capital account. The Trustee was confronted with the changed circumstances brought about by government intervention and had to respond to the possible loss of the right to derive revenue from gaming activities.

Thawley J (dissenting) found that the payments for the GMEs were capital in nature, as the GMEs were a capital asset forming part of the business structure and the payments were made for that capital asset.

The grounds of the appeal include:

- The Full Court ought to have held that the GME Expenditure was an outgoing of capital or of a capital nature, and therefore not deductible by reason of s 8-1(2) of the *Income Tax Assessment Act* 1997 (Cth);
- The Full Court ought to have held that the GME Expenditure was not expenditure which the Trustee incurred to preserve (but not enhance) the value of good will within the meaning of s 40-880(6) and accordingly no deduction was allowable under s 40-880 by reason of s 40-880(5)(f).

BMW AUSTRALIA LTD v BREWSTER & ANOR (S152/2019)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales
[2019] NSWCA 35

Date of judgment: 1 March 2019

Special leave granted: 15 May 2019

Mr Owen Brewster is the plaintiff in representative proceedings against BMW Australia Ltd in the Supreme Court of New South Wales ("the Proceedings"). (Similar proceedings in that Court are pending against other motor vehicle companies, all in relation to the supply of vehicles that contained airbags which had been the subject of product recalls.) Certain of the group members on whose behalf the Proceedings were brought have contracted with Regency Funding Pty Ltd ("the Funder") for it to fund the litigation.

In August 2018 Mr Brewster sought an order ("the Common Fund Order") that he, his solicitors and the Funder be bound by a set of proposed Funding Terms. The Funding Terms comprise detailed provisions governing the payment of legal costs (of Mr Brewster, the group members and the Funder) and administration expenses, and the payment of remuneration to the Funder, out of any sum obtained by Mr Brewster from the Proceedings as a result of judgment or settlement. Both the Funding Terms and the Common Fund Order itself provide that the Funder be paid remuneration of 25% of any sum obtained (after the payment of legal costs and administration expenses), prior to distribution to Mr Brewster and the group members.

The Common Fund Order was sought under s 183 of the *Civil Procedure Act 2005* (NSW) ("the CPA"), which provides that in representative proceedings the Supreme Court may make any order it thinks appropriate or necessary to ensure that justice is done. BMW Australia contended that power to make the Common Fund Order was not given by s 183 or, if power was so given, it contravened Chapter III of the Constitution. BMW Australia also argued that the Common Fund Order, if made, would amount to an acquisition of property other than on just terms, contrary to s 51(xxxi) of the Constitution.

On 22 October 2018 Justice Sackar referred to the Court of Appeal, for separate decision, the question of whether the Supreme Court had the power to make the Common Fund Order. (The Court of Appeal then heard argument on that question concurrently with the hearing by the Full Court of the Federal Court of Australia of an appeal from "common fund" orders made by a Justice of the Federal Court. The judgment in that appeal is the subject of an appeal to this Court, *Westpac Banking Corporation & Anor v Lenthall & Ors* (S154/2019).)

The Court of Appeal (Meagher, Ward and Leeming JJA) unanimously answered the referred question in the affirmative. Their Honours held that s 183 of the CPA provided power for the Common Fund Order to be made. The Court of Appeal held that the making of common fund orders under s 183 was an exercise of judicial power that did not contravene Chapter III of the Constitution. This was because new rights would not be created on a hypothetical basis in advance of judgment. Rather, any orders such as the Common Fund Order would be made after considering evidence and submissions (including as to reasonable rates of return for litigation funders) and would initially be made only on an interlocutory basis. Such orders would be subject to reassessment and variation at the conclusion of proceedings. Their Honours also held that s 51(xxxi) of the Constitution, even assuming that it was applicable (via s 79 of the *Judiciary Act 1903* (Cth), in an exercise of federal jurisdiction by the Supreme Court), was not

contravened. This was because s 183 of the CPA was not a law with respect to the acquisition of property, it merely conferred a general power to make orders.

The grounds of appeal are:

- The Court of Appeal erred in concluding that s 183 of the CPA on its proper construction empowered the Supreme Court of New South Wales to make the Common Fund Order.
- The Court of Appeal erred in failing to conclude that, insofar as s 183 of the CPA empowered the making of the Common Fund Order, it was not picked up by s 79 of the *Judiciary Act 1903* (Cth) because that would infringe Chapter III and/or s 51(xxxi) of the Constitution.

BMW Australia has filed a Notice of Constitutional Matter. The Attorneys-General of the Commonwealth, Victoria, Queensland and Western Australia are intervening in the appeal.

WESTPAC BANKING CORPORATION & ANOR v LENTHALL & ORS (S154/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 34

Date of judgment: 1 March 2019

Special leave granted: 15 May 2019

The First to Fourth Respondents ("the Plaintiffs") are the applicants, on behalf of themselves and numerous group members, in Federal Court representative proceedings against the Appellants ("the Proceedings"). In the Proceedings, the Plaintiffs allege breaches of statutory and fiduciary duties in the provision of advice on insurance policies.

The Plaintiffs have each entered into an agreement with the Fifth Respondent, JustKapital Litigation Pty Ltd ("JKL"), to fund the prosecution of the Proceedings.

On 28 September 2018 Justice Lee made orders in the Proceedings, upon an application by the Plaintiffs and after hearing from JKL as an intervener. One of the orders, made under ss 23 and 33ZF of the *Federal Court of Australia Act 1976* (Cth) ("the FCA Act"), was that the Plaintiffs and the group members in the Proceedings make payments in accordance with clause 6 of the Funding Terms annexed to the orders ("the Common Fund Order"). (Section 23 of the FCA Act gives the Federal Court a general power to make interlocutory and other orders, and s 33ZF provides that in representative proceedings the Federal Court may make any order it thinks appropriate or necessary to ensure that justice is done.) Clause 6 of the Funding Terms essentially provides that JKL is to receive, from any sum obtained by the Plaintiffs as a result of judgment or settlement of the Proceedings, certain payments in advance of any distributions to the Plaintiffs' lawyers, the Plaintiffs and the group members. Those payments to JKL equate to approximately 25% of the total sum obtained, although clause 6 concludes with the words "but not exceeding any such amounts as the Court determines to be fair and reasonable in all the circumstances."

The Appellants appealed from Justice Lee's orders. The Appellants contended that the Common Fund Order impermissibly effected a reduction in value of, or an acquisition by a non-party (JKL) of the rights to, property to which the group members were entitled, without the group members' consent. (Argument on that appeal was heard concurrently with argument presented to the Court of Appeal of the Supreme Court of New South Wales on a question that had been referred by a Justice of the Supreme Court. The Court of Appeal's answer to that question is the subject of an appeal to this Court, *BMW Australia Ltd v Brewster & Anor* (S152/2019).)

The Full Court of the Federal Court (Allsop CJ, Middleton and Robertson JJ) unanimously dismissed the Appellants' appeal. Their Honours held that the power given by s 33ZF was broad enough to support the Common Fund Order. The making of such an order involves a consideration of relevant factors beyond a mere assessment of a funding commission. It is an action incidental to the resolution of legal rights that amounts to an exercise of judicial power. The Full Court held that s 33ZF did not require reading down in view of s 51(xxxi) of the Constitution, because the Common Fund Order did not effect an acquisition of property other than on just terms. Although the Common Fund Order made an adjustment of rights (in respect of the group members' choses in action), that was on an interlocutory basis and the benefit obtained by JKL was not proprietary in nature. Their Honours also held that Justice Lee had not erred in the exercise of

his discretion, finding that his Honour had considered the group members' interests and what might happen if the Common Fund Order were not made.

The grounds of appeal are:

- The Full Court erred in holding that, properly construed, s 33ZA of the FCA Act empowers the court to make a common fund order.
- In reaching that conclusion, the Full Court erred in holding that:

  a) s 33ZF permitted the creation of a right in a litigation funder to a share of any settlement or judgment in favour of a group member;

  b) the principle of legality did not apply because a common fund order "supports and fructifies", rather than diminishes, rights of group members;

  c) as a matter of construction, and notwithstanding the *Anthony Hordern principle*, s 33ZF supported the making of a common fund order;

  d) s 33ZF conferred judicial power, or power incidental to the exercise of judicial power, on the court;

  e) neither s 33ZF nor the Common Fund Order resulted in an acquisition of property for the purposes of s 51(xxxi) of the Constitution; and

  f) if s 33ZF is a law with respect to the acquisition of property, it is not invalid because the Appellants had failed to demonstrate that group members would not receive the pecuniary equivalent of the property acquired.

The Appellants have filed a Notice of Constitutional Matter. The Attorneys-General of the Commonwealth, Victoria, Queensland and Western Australia are intervening in the appeal.