SHORT PARTICULARS OF CASES
APPEALS

OCTOBER 2020

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OAKEY COAL ACTION ALLIANCE INC v NEW ACLAND COAL PTY LTD (ACN 081 022 380) & ORS (B34/2020)

Court appealed from: Queensland Court of Appeal
[2019] QCA 238

Date of judgment: 1 November 2019

Special leave granted: 5 June 2020

New Acland Coal Pty Ltd ("Acland") is a mining company that applied for new mining tenements (and amendments to certain other statutory instruments) to augment its existing rights. Oakey Coal Action Alliance Inc ("Oakey") was one of several objectors to the grant of those new tenements. The Land Court Member who heard this dispute recommended against the granting of Acland's applications. Acland then successfully sought the judicial review of that decision, with Justice Bowskill remitting the matter, subject to the following qualifications:

a) issues concerning groundwater, as well as issues about intergenerational equity affected by groundwater, were not to be the subject of the new hearing;
b) issues about noise (subject to a minor qualification) were excluded from consideration); and
c) other findings made by the original Member would bind the parties.

The effect of these qualifications was to limit the issues upon rehearing.

The Land Court then reconsidered the matter and in doing so Kingham P refused Oakey's application for an adjournment, pending the outcome of an appeal against Bowskill J's orders. (Oakey did not appeal that refusal.) On 7 November 2018 the Land Court made final orders in favour of Acland.

Meanwhile Oakey had appealed (and Acland cross-appealed) from Justice Bowskill's orders. In September 2019 the Court of Appeal upheld Acland's cross-appeal, while it also found that Justice Bowskill was correct about the scope of the Land Court's jurisdiction. The effect of this result was to confirm the correctness of Bowskill J's order to set aside the Member's orders. That left for consideration however her Honour's other orders, including the order for a rehearing.

The Court of Appeal noted that although Oakey had applied in the Land Court for the rehearing to be adjourned, that application was refused. (Oakey also did not apply to the Court of Appeal for a stay of the orders made by Bowskill J.) As a result, orders 4, 5, 6, 7 and 8 of her Honour's orders had been performed. Those orders having been spent, the Court of Appeal found that there would be no utility in setting them aside. The Court of Appeal further found that the setting aside of the order for rehearing would accomplish nothing. It was also not open to interfere with the final orders made by Kingham P, or with the decision of the delegate.

The grounds of appeal are:

- The Court of Appeal erred in concluding that, although the findings of the Third Respondent were affected by apprehended bias:

    a) there was no utility in setting aside orders 4 - 8 made by Bowskill J in the Supreme Court on 28 May 2018;

    b) it was not open to it to interfere with the orders made by the Land Court by Kingham P on 7 November 2018, which were binding upon the parties;

    c) it should not remit the matter to the Land Court for a further hearing that was unaffected by the findings of the Third Respondent.

WESTPAC SECURITIES ADMINISTRATION LTD (ACN 000 049 472) & ANOR v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (S69/2020)

Court appealed from: Full Court of the Federal Court of Australia [2019] FCAFC 187

Date of judgment: 28 October 2019

Special leave granted: 24 April 2020

The Appellants ("Westpac") offered superannuation products under the "BT" brand. During 2014 it invited existing BT customers to consolidate their external superannuation accounts into their BT accounts. Each of the 15 customers who form the subject of the Australian Securities and Investments Commission's ("ASIC") claim received communications from Westpac highlighting the potential benefits of rolling over their superannuation accounts. These included:

a) the potential to save fees; and
b) the convenience of having all of one's superannuation in one place.

Westpac also offered to conduct a search for other superannuation accounts that the customers may have held elsewhere. These benefits were basically the same general benefits as identified by ASIC in its "Moneysmart" website.

Westpac then called each of the 15 customers in question. Both the primary judge and the Full Court held that Westpac, in its calls to a customer known as "Customer 1", had impliedly recommended that that customer roll over her external accounts into her BT account. In doing so Westpac had travelled beyond the giving of general advice and had assumed the more onerous obligations imposed by s 766B(3)(b) of the *Corporations Act 2001* (Cth) ("the Corporations Act") for providers of personal advice.

All three members of the Full Court (Allsop CJ, Jagot & O'Bryan JJ) found that a reasonable person standing in Customer 1's shoes (and with that customer's knowledge) might have expected that Westpac had considered that customer's subjective circumstances in making the implied recommendation that she roll-over her superannuation accounts. In doing so, the Full Court overturned the primary judge's finding that distinguished between what a reasonable person might expect Westpac to have *actually* considered, compared to what it *should* have considered.

Having found that Westpac had given personal advice, the Full Court held, inter alia, that Westpac had contravened s 961B of the Corporations Act (and therefore s 961K, the civil penalty provision) by failing to act in the customers' best interests. Westpac had also contravened s 946A of the Corporations Act by failing to give each customer a written statement of advice.

The grounds of appeal include:

- The Full Court erred in its construction of the reasonable person test in s 766B(3)(b) of the Corporations Act, by asking whether a reasonable person might expect that the advice provider *should have* considered one or more of the recipient's objectives, financial situation and needs, rather than asking whether a reasonable person might expect that the advice provider *had in fact* considered such matters.

MINISTER FOR HOME AFFAIRS v DUA16 & ANOR (M57/2020); MINISTER FOR HOME AFFAIRS v CHK16 & ANOR (M58/2020)

Court appealed from: Federal Court of Australia, Full Court
[2019] FCAFC 221

Date of judgment: 10 December 2019

Special leave granted: 29 May 2020

Respondent DUA16 is a male of Tamil ethnicity from the Northern Province of Sri Lanka who arrived by boat in Australia on 28 September 2012. On 21 January 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 24 August 2016. The second respondent, the Immigration Assessment Authority (IAA), affirmed this decision on the basis that they were not satisfied that there were substantial grounds for believing that there was a real risk that DUA16 would suffer significant harm if returned to Sri Lanka.

Respondent CHK16 is also a male of Tamil ethnicity from the Northern Province of Sri Lanka. CHK16 applied for a protection visa on 10 September 2015. The delegate refused to grant the visa on 14 June 2016. The IAA affirmed this decision on the basis that there were not substantial grounds for believing that there was a real risk that CHK16 would suffer significant harm if returned to Sri Lanka.

Both DUA16 and CHK16 sought judicial review of the IAA's decision in the Federal Circuit Court of Australia. On 30 April 2019 Judge Riethmuller found that the misconduct by DUA16 and CHK16's migration agent deprived them of an opportunity to make submissions to the IAA that new evidence should be considered. The agent had provided four-page "submissions" to the IAA on behalf of each respondent, in a similar form which the agent (with some variations) ultimately used in around 40 cases. Each submission stated that it was made on instructions. The respondents each paid the agent a fee for her work. The "submissions" said "little" or "virtually nothing" about the respondent's respective personal circumstances. But each "submission" included information that: did not relate to the respondent or their claims; had not been given by the respondent to the agent; and which instead related to another client of the agent. Consequently, Judge Riethmuller ordered that in both matters a writ of certiorari issue quashing the decision of the IAA and a writ of mandamus issue requiring the IAA to re-hear the applications for review according to law.

The Minister for Home Affairs appealed to the Federal Court of Australia on the basis that Judge Riethmuller erred in finding that the conduct of the migration agent stultified the performance of the function of the IAA such that their decision was affected by jurisdictional error.

By majority (Mortimer J and Wheelahan JJ, Griffiths J dissenting), the Full Federal Court found that the agent's conduct did stultify the performance of the Authority's review function.

The grounds of appeal are that:

- the Federal Court (Mortimer J, Wheelahan J agreeing, Griffiths J dissenting) erred in dismissing ground 2 of the Minister's appeal, in upholding ground 2 of the respondent's notice of contention, and thereby in concluding that the primary judge did not err in finding that fraud of the first respondent's migration agent (the Agent) stultified the decision of the second respondent (the Authority) under section 473CC(2)(a) of the *Migration Act 1958* (the Act) to affirm a decision of a delegate of the Minister under section 65(1)(b) to refuse to grant the first respondent a protection visa such that the Authority's decision was affected by jurisdictional error.

Each first respondent has filed a notice contending that the decision of the Court below should be affirmed on the ground that:

- The Federal Court ought to have upheld the decision of the Federal Circuit Court to quash the decision of the second respondent on the basis that the second respondent acted unreasonably in the conduct of the review by making a decision on the review in circumstances where it was aware that the submissions before it did not relate to the case of the review applicant but related to the claims of some other person, without contacting the first respondent or his representative to seek clarification, or to get information under s 473DC.

PENIAMINA v THE QUEEN (B32/2020)

Court appealed from:	Queensland Court of Appeal [2019] QCA 273
Date of judgment:	29 November 2019
Special leave granted:	5 June 2020

The Appellant brutally killed his wife and was convicted of her murder. The issue at trial was whether he had proven the partial defence of provocation. The conduct of the deceased, which the Appellant claimed had caused his loss of self-control, was her cutting of his hand with the knife she was using to defend herself.

The Appellant suspected that his wife was planning to leave him. On the night that she was killed, he had tried to speak with her. Things then escalated violently, with the Appellant hitting his wife in the face. She then obtained a knife from the kitchen, presumably to defend herself. The Appellant then grabbed its blade and received a deep cut on his hand in the process. He became enraged and then inflicted the horrific and fatal injuries on his wife.

Upon appeal, the main issue was whether the trial judge had correctly dealt with the issue of the partial defence of provocation. On 29 June 2019 the Court of Appeal (Morrison JA & Applegarth J; McMurdo JA dissenting) dismissed the Appellant's appeal, with the majority holding that the trial judge had not erred in this regard.

The partial defence of provocation contained in section 304(1) of the *Criminal Code Qld* ("the Code") is only available in the limited circumstances outlined in s 304(3). Relevantly, there must be a domestic relationship in which one party kills the other and whereby the act of provocation must be done by the deceased to change (or end) the relationship. Justice Applegarth, with whom Morrison JA broadly agreed, held that the Appellant had failed to establish that the trial judge had erred in directing the jury that the defence had to prove, on the balance of probabilities, that the provocation was not based on s 304(3)(c). This is in circumstances where the defence case did not rely on a sudden provocation consisting of a thing referred to in s 304(3)(c).

Justice McMurdo however would have allowed the appeal. His Honour held, inter alia, that the trial judge erred in leaving to the jury the question of whether the knife wound inflicted by the wife was done to change the relationship. His Honour found that such an inference was not open. During the altercation which culminated in her death, the wife had done many things which made it clear that the relationship had either ended or changed. The only realistic view of the evidence therefore was that the wife's use of the knife was for self-defence. His Honour held that this misdirection may have therefore deprived the Appellant of the chance of an acquittal.

The grounds of appeal include:

- The majority of the Court of Appeal erred in concluding that s 304(3) of the Code was not confined in its operation to the provocative conduct identified by the accused as causative of a loss of control.