

**SHORT PARTICULARS OF CASES**  
**APPEALS**

**SEPTEMBER 2022**

---

No.	Name of Matter	Page No
-----	----------------	---------

---

Tuesday, 6 September 2022, Wednesday, 7 September 2022 and  
Thursday, 8 September 2022

1.	Electricity Networks Corporation Trading as Western Power v Herridge Parties & Ors	1
----	---	---

Tuesday, 13 September 2022

2.	Awad v The Queen; Tambakakis v The Queen	4
----	--	---

Wednesday, 14 September 2022

3.	Page v Sydney Seaplanes Pty Ltd trading as Sydney Seaplanes	6
----	---	---

\*\*\*\*\*

---

**ELECTRICITY NETWORKS CORPORATION TRADING AS  
WESTERN POWER v HERRIDGE PARTIES & ORS (P5/2022)**

Court appealed from: Supreme Court of Western Australia Court of Appeal  
[2021] WASCA 111

Date of judgment: 2 July 2021

Special leave granted: 17 March 2022

On 12 January 2014, a jarrah point of attachment pole (“PA pole”), which belonged to the 4<sup>th</sup> respondent (“Mrs C”), failed below the ground line due to fungal decay and termite damage. As it fell, Mrs C’s submains cable was pulled through the cable hole at the base of her switchboard enclosure affixed to the PA pole. This exposed the submains cable’s insulation to the sharp metallic edges of the hole, damaging it. This caused a short circuit fault and arcing, which ignited the dry vegetation around the base of the PA pole, starting the Parkerville fire. The fire spread over a wide area and destroyed or damaged property of those individuals comprising the 1<sup>st</sup> to 3<sup>rd</sup> respondents (“the plaintiffs”). An aerial service cable owned by the appellant (“WP”) ran from WP’s termination pole, on the road adjacent to Mrs C’s property, passed through WP’s wedge clamp hooked onto Mrs C’s attachment hook at the top of the PA pole, and then into Mrs C’s mains connection box secured adjacent to the top of the PA pole. Inside that box at the top of the PA pole, electricity passed from the wires of WP’s service cable to the wires of Mrs C’s consumer mains cable. The consumer mains ran in Mrs C’s PVC conduit down the side of the PA pole and into her switchboard enclosure. Inside that enclosure was a meter panel owned by Mrs C, to which was attached three fuses and a meter owned by WP, and other electrical apparatus owned by her. After passing through the meter, electricity was conveyed by Mrs C’s submains in her PVC conduit attached to the PA pole, and then underground to a distribution board near Mrs C’s house. The purpose of the system was to convey electrical current from WP’s network, the South West Interconnected System (“SWIS”), to the domestic premises of its customer, Mrs C. The service life of an untreated PA pole is 15 to 25 years in ground and 15 to 40 years above ground.

The PA pole was embedded in land owned by Mrs C. The PA pole, the mains connection box, the consumer mains, and other electrical apparatus were provided and installed by Mrs C and her late husband before 1983. Mrs C never procured any inspection of the PA pole. The mains connection box was the point at the property at which WP’s predecessor connected its distribution network. When the PA pole was installed, WP’s predecessor was required only to take its service cable to the consumer’s point of attachment; the consumer provided the PA pole. There was no finding that WP or its predecessor at any time thereafter had any physical control of the PA pole or Mrs C’s property. WP had systems in place for the regular inspection and maintenance of its own network assets, including wooden poles belonging to it. WP did not regularly inspect or maintain consumer-owned PA poles. In June 2013, WP engaged the 5<sup>th</sup> respondent (“Thiess”) to replace a number of WP’s network poles in the vicinity of Parkerville, including WP’s termination pole. The works were undertaken on 19 July 2013. Thiess, as WP’s independent subcontractor, was required under the terms of its contract to conduct a pre-work inspection of the PA pole when replacing the termination pole (from which WP’s cable ran to the PA pole). The inspection undertaken by the Thiess line crew was inadequate. It did not comply with industry standards or Thiess’ contractual obligations.

The plaintiffs in several actions (all heard together) sued WP, Thiess and Mrs C, alleging the Parkerville fire had been caused by their negligence and was a nuisance created by each of them. The trial judge found that WP did not owe the plaintiffs the pleaded duty of care to regularly inspect and maintain the PA pole in a safe and fit condition for use in the supply of electricity because (i) that duty was incompatible with the applicable statutory scheme, which required WP to maintain only service apparatus belonging to it; and (ii) WP did not have requisite control over the source of the risk of harm, namely, the risk that Mrs C's PA pole might fail in service. WP owed the plaintiffs a duty to take reasonable care (pre-work inspection duty) to inspect the PA pole to ascertain whether it was in a safe and fit condition for use in the supply of electricity before and when undertaking works involving contact with the pole; and if WP identified that the pole was not safe and fit for such use, WP had a duty not to use it. WP discharged this duty, which was not non-delegable, by engaging Thiess to carry out work, including a pre-work inspection of the PA pole. Thiess owed the plaintiffs a duty to take reasonable care to inspect the PA pole. Thiess breached this duty by not adequately inspecting the PA pole on 19 July 2013 when Thiess replaced WP's termination pole and had to connect and disconnect WP's service cable from the PA pole. Mrs C owed the plaintiffs a duty to take reasonable care, which she breached, to inspect and maintain the PA pole in a safe and serviceable condition. The breaches of duty by both Thiess and Mrs C caused the plaintiffs' loss from the fire and each of them was also liable in nuisance. The trial judge apportioned responsibility for the plaintiffs' losses 70% as to Thiess and 30% as to Mrs C and dismissed all of the claims against WP.

Mrs C appealed against the trial judge's findings that WP did not owe a duty to regularly inspect, and the plaintiffs also adopted that challenge. All other grounds of appeal against WP failed.

The Court of Appeal found that WP did not control the PA pole or Mrs C's land in which it was embedded, but did have control over the SWIS, including where the service cable was (on the Court's characterisation "chosen") to be placed, what structure would be used to support the service cable, and whether the service cable was electrified. The plaintiffs' pleaded duty of care to regularly inspect and maintain the PA pole in a safe and fit condition for use in the supply of electricity was too narrow to be a useful tool for analysing WP's liability. The Court reformulated the plaintiffs' duty case. The Court held that WP owed a duty to persons in the vicinity of the SWIS to take reasonable care to avoid or minimise the risk of injury to those persons, and loss or damage to their property, from the ignition and spread of fire in connection with the delivery of electricity through its electricity distribution system. The Court said this duty was not inconsistent with the statutory scheme. The risk of harm by fire to persons or property in the vicinity of WP's distribution network, if a pole supporting an aerial cable failed, was reasonably foreseeable and not insignificant. The Court said that a reasonable network operator in WP's position would have responded to that risk of harm by establishing a system for the periodic inspection of such poles, irrespective of ownership, and when that system identified a defective consumer pole, a reasonable network operator would repair or replace the pole itself, or require the consumer to do so in order to continue to receive electricity. The Court said that WP breached the duty, as formulated by the Court, by failing to have such a system, and that breach caused the plaintiffs' loss. The Court re-apportioned responsibility 50% as to WP, 35% as to Thiess and 15% as to Mrs C.

WP applied for special leave to appeal. When granting special leave this Court directed that all 12 applications filed by WP be consolidated into one appeal.

The grounds of appeal are:

- In holding that WP owed a duty of care requiring it to have a system for inspecting wooden point of attachment poles owned by consumers, the Court of Appeal erred in that:
  - a) WP's functions do not give rise to a relationship, especially as concerns control, which supports the asserted duty and the consequent intervention of the common law of negligence; and
  - (b) the asserted duty is inconsistent with the statutory scheme, which exhaustively regulates WP's duties to inspect things and guard against the risk of fire (expressly up to the point of interface between its distribution system and consumer property to which it connects).

The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents have each filed a notice of cross-appeal, with varying grounds. The 3<sup>rd</sup> respondent has filed a submitting appearance.

**AWAD v THE QUEEN (M44/2022);**  
**TAMBAKAKIS v THE QUEEN (M45/2022)**

Court appealed from: Supreme Court of Victoria Court of Appeal  
[2021] VSCA 285

Date of judgment: 15 October 2021

Special leave granted: 17 June 2022

After a 26-day jury trial, in September 2019 the appellants (Awad and Tambakakis) were found guilty of attempting to possess a commercial quantity of an unlawfully imported border-controlled drug, namely cocaine (the jury was discharged without verdict in the case of a third accused). On 12 November 2019, the trial judge sentenced each of Awad and Tambakakis to 15 years' imprisonment and fixed a non-parole period of 10 years.

At trial, the Crown sought to prove that each of the three then accused men took possession of the consignment at (and from) different points in time. The Crown case against Tambakakis was that he was in possession of the consignment from when he collected it at Overall Auto Care in Coburg North, had it loaded onto his skip truck and driven to his yard at Randor Street Campbellfield, until he unloaded the consignment from the Kia van in the warehouse at Halsey Road Airport West on the evening of 10 May 2017. The Crown case against Awad was that, together with Tambakakis, he entered the Kia van outside premises in King Street Airport West at 6:25 pm, was driven in the Kia van to the warehouse at Halsey Road and helped unload the consignment in the warehouse, prior to exiting the warehouse with Tambakakis in the Kia van at 6:55 pm. The Crown sought to prove that during this period, Awad was in joint possession with Tambakakis (but not that he was in possession of the consignment at any time before he got into the Kia van at 6:25 pm). In order to convict Awad, it was necessary for the jury to find beyond reasonable doubt that at 6:25 pm on 10 May 2017, Awad entered the Kia van, was driven to the warehouse at Halsey Road, and there unloaded the consignment from the Kia van, until exiting the warehouse (in the Kia van) at 6:55 pm.

Awad did not give evidence at trial and his defence relied, in substantial part, upon the evidence which had been given by Tambakakis, namely that Awad did not enter the Kia at all. In these circumstances, it was necessary for the jury to exclude beyond reasonable doubt the hypothesis that Awad had not entered the Kia van, but had instead merely remained in King Street until meeting again with Tambakakis (upon the return of Tambakakis in the Kia van) at approximately 7:00pm. In giving his evidence, Tambakakis explained his essential defence that he believed he was in possession of and dealing with copier boxes containing steroids and not cocaine. Tambakakis admitted in his evidence that he had previously been involved in the importation and distribution of steroids. He also gave explanations as to his movements, his conversations, and his association with his co-accused Awad. In cross-examination, he was accused of lying about a number of aspects of his evidence.

In his charge to the jury, the trial judge directed the jury concerning the evidence given by Tambakakis. He stated: "*Now, there are two factors that are significant that you should have regard to when you are assessing Mr Tambakakis' evidence. Firstly, in a criminal trial, there is nothing more than [sic] an innocent [person] can do than give evidence in his own defence and subject himself to cross-examination,*

and that is what occurred here. On the other hand, secondly, a guilty person might decide to tough out cross examination in the hope or belief that he will be more likely to be believed and his defence accepted if he takes the risk of giving evidence. You should consider both of these observations when evaluating Mr Tambakakis' evidence" ("the impugned direction").

The impugned direction given by the trial judge was a direction that was previously given to juries in Victoria on a regular basis. However, in 2017 the *Jury Directions and Other Acts Amendment Act 2017* (Vic) ("the amending Act") amended the *Jury Directions Act 2015* (Vic) to include sections 44H to 44K. Section 44J expressly prohibited the giving of such a direction. Senior Counsel for Tambakakis objected to the impugned direction at the first opportunity, but in order not to have the error highlighted, he preferred that the issue not be revisited.

In the Court of Appeal, Awad contended that the trial judge, in giving the impugned direction had erred, such a direction being prohibited by s44J of the *Jury Directions Act*, so that there had been a substantial miscarriage of justice requiring his conviction to be quashed. Tambakakis similarly contended that a substantial miscarriage of justice resulted from (among other things) the trial judge directing the jury in a manner expressly prohibited by s44J. A majority of the Court of Appeal (McLeish & Niall JJA, Priest JA dissenting) held that, although there was a contravention of s44J of the *Jury Directions Act*, they were not satisfied that there had been a substantial miscarriage of justice. Priest JA considered that the impugned direction, whilst not amounting to a "fundamental departure", had the potential to taint the jury's consideration and evaluation of Tambakakis' evidence and thereby undermine his defence. He was satisfied that the impugned direction would have deflected the jury from applying the requisite standard of proof and that it had the very real potential to undermine the presumption of innocence.

The single ground of appeal in each matter is:

- The Court below, having determined that the learned trial judge had erred in directing the jury concerning their assessment or evaluation of the evidence given by John Tambakakis by directing the jury in a manner prohibited by s44J of the *Jury Directions Act 2015* (Vic), erred in failing to determine that there has been a substantial miscarriage of justice.

**PAGE v SYDNEY SEAPLANES PTY LTD TRADING AS SYDNEY SEAPLANES (S60/2022)**

Court appealed from: Court of Appeal of the Supreme Court of New South Wales  
[2021] NSWCA 204

Date of judgment: 7 September 2021

Special leave granted: 13 April 2022

On 31 December 2017, Ms Heather Bowden-Page and five others perished when a floatplane operated by the respondent (“Sydney Seaplanes”) crashed soon after take-off on a local flight in Sydney.

In December 2019, Heather’s father, Mr Alexander Page, sued Sydney Seaplanes for damages in the Federal Court, in a proceeding purportedly brought under Part IV of the *Civil Aviation (Carriers’ Liability) Act 1959* (Cth) (“the Commonwealth Act”), as incorporated by s 5 of the *Civil Aviation (Carriers’ Liability) Act 1967* (NSW) (“the NSW Act”). Section 34 of the Commonwealth Act provided that a person’s right to damages under Part IV was extinguished if his or her action was not brought within two years of the relevant flight. In April 2020, Griffiths J ordered that Mr Page’s claim be dismissed for want of jurisdiction (“the Federal Court order”), holding that the Federal Court lacked jurisdiction in any claim for damages under the Commonwealth Act relating to an intra-state flight, as liability in respect of such flights arose under ss 4 and 5 of the NSW Act.

Since his damages claim by that time faced extinguishment by s 34 of the Commonwealth Act, Mr Page applied to the Supreme Court of New South Wales (“the Supreme Court”) under s 11(2) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) (“the State Jurisdiction Act”) for an order that the Federal Court proceeding be treated as a Supreme Court proceeding. The making of such an order would see the proceeding deemed, under s 11(3)(b) of the State Jurisdiction Act, to have been commenced on the date of commencement of the Federal Court proceeding “*for the purposes of any limitation law*”. In October 2020, Adamson J made the order sought, and declared that the Federal Court proceeding was deemed to have been brought in the Supreme Court on 23 December 2019. In doing so, her Honour considered that the Federal Court order was a requisite “relevant order”, defined in s 11(1) of the State Jurisdiction Act as including “*an order of a federal court ... dismissing ... a proceeding relating to a State matter for want of jurisdiction*”.

An appeal by Sydney Seaplanes was unanimously allowed by the Court of Appeal (Bell P, Leeming JA and Emmett AJA). Their Honours considered the history and purpose of the State Jurisdiction Act, and concluded that the want of jurisdiction which was the subject of that Act was limited to that which arose from a purported conferral of jurisdiction on a federal court by State legislation, where such conferral was unconstitutional. It did not extend to any want of jurisdiction so as to assist persons who invoked the jurisdiction of a federal court by mistake. The Court of Appeal therefore held that the Federal Court order was not a “relevant order” within the meaning of s 11 of the State Jurisdiction Act.

The ground of appeal is:

- The Court of Appeal erred in holding that the order made by Griffiths J on 24 April 2020 dismissing proceedings NSD 2138/2019 for want of jurisdiction was not a “relevant order” within the meaning of s 11 of the State Jurisdiction Act.

By a notice of contention, Sydney Seaplanes contends that the Court of Appeal erred in failing to decide the following grounds of appeal:

- a) s 34 of the Commonwealth Act, operating as State law (by s 5 of the NSW Act), and ss 11(2) and/or 11(3)(b) of the State Jurisdiction Act are inconsistent; and
- b) the effect of s 6A of the NSW Act is that s 34 of the Commonwealth Act should prevail over ss 11(2) and/or 11(3)(b) of the State Jurisdiction Act.

Sydney Seaplanes filed a notice of a constitutional matter. No Attorney-General has intervened in the appeal.