

SHORT PARTICULARS OF CASES
APPEALS

SEPTEMBER 2023

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HARVEY & ORS v MINISTER FOR PRIMARY INDUSTRY AND RESOURCES & ORS (D9/2022)

Court appealed from: Full Court of the Federal Court of Australia
[2022] FCAFC 66

Date of judgment: 29 April 2022

Special leave granted: 16 December 2022

Mount Isa Mines Ltd (“MIM”) operates a port in the Northern Territory (“NT”) under a mineral lease, MLN 1126, the area of which includes a channel and a turning basin that require dredging. Dredged sediment, also known as “dredge spoil”, has long been deposited in an area of MLN 1126 and an adjoining area. At the port, concentrates of zinc, lead and silver ore are loaded on to a carrier and transhipped to larger oceangoing vessels. The concentrates are transported from mining sites the subject of mineral leases MLN 1121 to MLN 1125, some 120 km away. MIM was granted MLN 1121 to MLN 1126 by the *McArthur River Project Ratification Act 1992* (NT).

In March 2013, MIM applied for a mineral lease, ML 29881 (“the Application”), under the *Mineral Titles Act 2010* (NT) (“the MT Act”). The Application was made using a prescribed form, in which MIM stated, in a field requiring a description of the “associated purpose in conjunction with mining”, that the Application related to a loading facility for the export of concentrates. An accompanying summary of works stated that a new containment area for dredge spoil would be constructed, as the existing areas had reached their capacity.

In November 2019, after the NT Director of Mineral Titles had indicated an intention to grant the Application, proceedings were commenced in the Federal Court by native title holders including Mr David Harvey and Mr Thomas Simon, along with the Top End (Default PBC/CLA) Aboriginal Corporation RNTBC (“Top End”), which performs functions under the *Native Title Act 1993* (Cth) (“the NTA”). The Federal Court had previously determined the existence of native title in MIM’s McArthur River pastoral lease area, including the ML 29881 area and the land component of the MLN 1126 area. Top End and the native title holders sought to restrain the NT Minister for Primary Industry and Resources (“the Minister”) from granting the Application, contending that the proposed grant was not authorised by section 40(1)(b)(ii) of the MT Act, or that there had not been compliance with the requirements prescribed in s 24MD(6B) of the NTA.

Section 40(1)(b)(ii) of the MT Act provides that a mineral lease gives its title holder the exclusive right to conduct activities in the title area that are ancillary to mining conducted under another mineral lease. Division 3 of Part 2 of the NTA, which contains s 24MD(6B), provides for the validity of certain future acts that would affect native title. If made, the grant of ML 29881 would be such an act. Section 24MD(6B) prescribes requirements for notification to, and objection by, registered native title body corporates and claimants, and compliance with any ensuing determination in the absence of the withdrawal of an objection (after a period of consultation). Paragraph (b) of s 24MD(6B) provides that the requirements in sub-section (6B) apply to a future act that is “*the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining*”.

On 13 July 2021, Reeves J dismissed the application made by Top End and the native title holders. His Honour found that the activities proposed in the Application facilitated the transportation of concentrates from mining sites, being activities ancillary to mining conducted under other mineral leases and bringing ML 29881 within the meaning of s 40(1)(b)(ii) of the MTA. Reeves J found that the grant, if made, would constitute the creation of a right for the sole purpose of the construction of works associated with mining. The phrase “a right to mine” in s 24MD(6B)(b) was not to be construed narrowly such that “mine” meant only the direct activity of mining, otherwise the result would be paradoxical, destroying the exception underpinning the provision. Reeves J held however that the grant of ML 29881 was not a future act within the meaning of s 24MD(6B)(b), as the proposed dredge spoil emplacement area (“DSEA”) did not come within the definition of “infrastructure facility” in s 253 of the NTA. That definition was exhaustive, despite it providing that “infrastructure facility *includes any of the following: ...*”.

An appeal by Top End, Mr Harvey and Mr Simon was unanimously dismissed by the Full Court (Jagot, Charlesworth and O’Byrne JJ). Their Honours held that s 24MD(6B)(b) of the NTA did not apply, because ML 29881, if granted, would not create or vary a right to mine. The provision was not to be read as if the first element it prescribed, the creation or variation of a right to mine, were absent. The Full Court considered that, although there were difficulties in ascribing a clear meaning to the phrase “a right to mine”, relevant mining activity would include the processing of minerals and the removal of them from a mining area, the treatment of tailings and the storage of waste. Such a broad meaning was supported by the legislative history. Section s 24MD(6B)(b) applied to rights to mine which were within a category excluded by a related provision in the NTA, s 26(1)(c), and it was necessary to read the two provisions harmoniously. The category of future act excluded by the latter provision (with the result that provisions in the NTA prescribing a right to negotiate applied) was the creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining.

The Full Court also found that, although the DSEA the subject of the Application was an “infrastructure facility” within the ordinary meaning of that term, the definition of the term in s 253 of the NTA was exhaustive and the DSEA did not come within it. Their Honours considered that strong textual and contextual indicators made the definition exhaustive rather than inclusive. Those indicators included the highly specific nature of some of the things listed, and the definition’s final paragraph providing “*any other thing similar ... that the Commonwealth Minister determines ... to be an infrastructure facility ...*”.

The sole ground of appeal is:

- The Full Court erred in finding that the grant of the Application under s 40(1)(b)(ii) of the MT Act, if made, is not the creation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining within s 24MD(6B)(b) of the NTA.

ISMAIL v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS (M20/2023)

Date application for a constitutional or other writ filed: 28 March 2023

Date application referred to Full Court: 5 June 2023

Mr Mounib Ismail was born in Lebanon in 1989 and first arrived in Australia on a student visa in 2010. Thereafter he remained mostly in Australia, making occasional trips overseas. In August 2015 he was granted a partner visa. Between December 2010 and March 2021, Mr Ismail was convicted of numerous offences, including assault and contravention of an apprehended violence order.

On 13 April 2022, Mr Ismail departed Australia to visit and support family members in Lebanon due to a medical emergency. Section 82(6) of the *Migration Act 1958* (Cth) (“the Act”) immediately operated such that Mr Ismail’s partner visa ceased to be in effect.

On 15 April 2022, Mr Ismail applied for a resident return visa. On 30 August 2022, an officer of the Department of Home Affairs sent Mr Ismail a detailed letter, being a notice of an intention to consider refusal of the visa application. The officer explained in the notice that since Mr Ismail had a “substantial criminal record” within the meaning of s 501(7) of the Act, he did not pass the “character test” by virtue of s 501(6)(a), and that consequently it was open to the Minister or a delegate to refuse to grant Mr Ismail a visa. The officer invited Mr Ismail to make submissions on the “primary considerations” and “other considerations” set out in Ministerial Direction No 90 (“Direction 90”, given under s 499 of the Act), which a delegate was required to follow when considering the refusal of a visa under s 501 of the Act, and to comment more generally on the information indicating that he did not pass the character test and on why his application should not be refused even if he did not pass the character test.

The primary considerations set out in Direction 90 were: protection of the Australian community from criminal or other serious conduct (paragraph 8.1); whether the conduct engaged in constituted family violence (8.2); the best interests of minor children in Australia (8.3); and expectations of the Australian community (8.4).

After receiving a further statement and other documents from Mr Ismail and after having regard to Direction 90, on 28 September 2022 a delegate decided to refuse to grant the visa, under s 501(1) of the Act (“the Decision”). The delegate concluded that Mr Ismail posed an unacceptable risk of harm to the Australian community and that the community would expect that non-citizens who had engaged in acts of family violence should not hold a visa.

In relation to the primary considerations set out in Direction 90, the delegate’s findings included that Mr Ismail’s offending conduct, which included family violence, was very serious and displayed a disregard for Australian laws. There was a likelihood on balance that Mr Ismail would reoffend, any similar offending in future potentially causing harm to members of the community. The delegate considered that serious character concerns were raised by Mr Ismail’s past conduct and that the Australian community expected its government not to allow the entry of non-citizens who had engaged in such conduct. The interests of four children described in the documents provided by Mr Ismail weighed in favour of a decision not to refuse the visa. The delegate noted that a fifth child (“the Child”) had been

named in a certain form lodged by Mr Ismail but that no other information had been received and therefore the delegate was unable to determine if there would be any effects on that child were the visa refused.

Mr Ismail applied for a merits review of the Decision. The Administrative Appeals Tribunal however found that it lacked jurisdiction because Mr Ismail was not in “the migration zone” when he lodged his application for a review, as required by ss 347(3A)(b) and 500(3) of the Act.

Mr Ismail then commenced proceedings in this Court, seeking relief in the form of writs to quash the Decision and require the Minister to redetermine the visa application. This is on grounds that the delegate erred by: 1) failing to make enquiries about the Child and then to consider her best interests, either as an obvious enquiry or in compliance with paragraph 8.3 of Direction 90; and 2) repetitiously weighing family violence in considering paragraph 8.2 where weight was also given to family violence under 8.1 and/or 8.4 of Direction 90; or, alternatively, 3) the delegate misapplied 8.2 by giving weight to family violence in a punitive or irrelevant way, unconnected to the protection and/or expectations of the Australian community.

On 5 June 2023, Justice Jagot referred the matter to the Full Court for hearing.

The Minister contends that there was no obligation on the delegate to make enquiries about the Child. The delegate was entitled to make a decision based on the material Mr Ismail had chosen to put forward, which included very little information about the Child. The Minister submits that Direction 90 did not prohibit giving weight to a particular matter in relation to more than one of the prescribed considerations. It was unsurprising that there would be overlap when taking into account matters relevant to paragraphs 8.1, 8.2 and 8.4, and the delegate’s consideration of family violence was not illogical or unreasonable. The Minister further submits that a comparison of the delegate’s decision-making with criminal sentencing cannot assist Mr Ismail, as the two are fundamentally different tasks, and nothing in the delegate’s reasons for the Decision suggests that the delegate approached the exercise of power under s 501(1) of the Act for the purpose of punishment for past conduct.

HUXLEY v THE QUEEN (B19/2023)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2021] QCA 78

Date of judgment: 23 April 2021

Special leave granted: 17 March 2023

In 2019, Mr Brent Huxley stood trial on a charge that he had murdered Mr Michael McCabe, who was last seen alive on 15 August 2015, and whose body was found a month later at a remote location near Crystal Creek, north of Townsville. Mr Huxley was tried jointly with Mr Mathew Rewha, who was charged with assault occasioning actual bodily harm in company, and with Ms Leonie Doyle, charged with being an accessory after the fact to murder or alternatively to manslaughter.

The prosecution case against Mr Huxley was that he had killed Mr McCabe at or near the location where Mr McCabe's body had been found. Evidence at the trial given by Ms Candis Greer included that on 15 August 2015, Mr McCabe was assaulted at a home unit in Townsville in which Mr Huxley lived. Ms Greer, who had consumed alcohol and had been injected with methylamphetamine on the day in question, testified that after hearing a commotion she entered a room and saw Mr Jason Taylor kick the torso of Mr McCabe, who lay prone on the floor, coughing and spluttering and with blood pooling near his face. Ms Greer stated that Mr Rewha had entered the room just before the commotion, and that he subsequently helped Mr Taylor take Mr McCabe out of the unit. (Prior to the joint trial of Mr Huxley, Mr Rewha and Ms Doyle, a separate trial had resulted in Mr Taylor being convicted of having murdered Mr McCabe.)

Mr McCabe's blood was later found in the unit and at the unit's garage, and in the boot of a car that was linked to Mr Huxley, Mr Taylor and Ms Doyle. The car had been driven north of Townsville from the unit in the early hours of 16 August 2015. There was evidence that Mr Huxley told someone in August 2015 that he had done "a hit" for \$10,000, killing a man by dropping a rock on his head. Experts were unable to determine the cause of Mr McCabe's death, but gave evidence of facial fractures that would have resulted from severe force, death ensuing possibly within minutes or within two hours.

Early in his summing up to the jury, North J stated, in relation to the evidence of Ms Greer, "... *you should only act upon her evidence if you are satisfied beyond reasonable doubt that her evidence is truthful, reliable and accurate. If you are not satisfied beyond reasonable doubt that the evidence of Ms Greer is truthful, reliable and accurate, then you should disregard it*" ("the impugned direction"). In addition to being central to the prosecution case against Mr Rewha, Ms Greer's evidence was relevant to Mr Huxley's defence because it included that Mr Huxley was not present when Mr McCabe was assaulted. It also supported a contention by Mr Huxley that the jury could not exclude the possibility that Mr McCabe had died from injuries sustained during the assault at the unit.

Mr Huxley was subsequently found guilty of having murdered Mr McCabe and was sentenced to life imprisonment. (Ms Doyle was found guilty of being an accessory after the fact to manslaughter, following an earlier directed verdict of acquittal on the charge of accessory after the fact to murder, while Mr Rewha was found not guilty of assault in company.)

In an appeal against his conviction, Mr Huxley argued that a miscarriage of justice had arisen on account of the impugned direction, because the jury should not have been instructed that they could disregard Ms Greer's evidence in its entirety.

The Court of Appeal (Fraser, Morrison and Mullins JJA) unanimously dismissed Mr Huxley's appeal, holding that there was no error in North J's directions to the jury in relation to the evidence given by Ms Greer. Their Honours considered that the significance of that evidence, insofar as it might have assisted Mr Huxley, was reduced because the prosecution came to confine its case against Mr Huxley to the allegation that he had dropped a rock on Mr McCabe's head at Crystal Creek, and North J had reminded the jury of evidence other than that given by Ms Greer which supported the contention that Mr McCabe may have suffered an assault so severe that it had caused his death. The Court of Appeal also found that the impugned direction and similar warnings given by North J were appropriately ameliorated by his Honour having instructed the jury that even if they disbelieved Ms Greer, it would not mean that Mr Huxley had been present, it would just mean that there was no evidence about that matter.

The sole ground of appeal is:

- The Court of Appeal erred by finding the direction that a witness' evidence in a joint trial could only be used by the jury if they were satisfied that the evidence of that witness was truthful, reliable and accurate beyond a reasonable doubt, did not constitute a miscarriage of justice.

REDLAND CITY COUNCIL v KOZIK & ORS (B17/2023)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2022] QCA 158

Date of judgment: 26 August 2022

Special leave granted: 17 March 2023

Between June 2011 and July 2016, the appellant passed resolutions (“the Resolutions”) to impose special charges aimed at financing both capital and operational expenses for services connected to certain areas of land (“the Services”). Consequently, the appellant included sums for the special charges in rates notices issued to numerous landowners, which included the respondents.

In March 2017, the appellant discovered that the Resolutions did not comply with certain requirements prescribed in section 28(4) of the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) (“LGR 2010”) and s 94(3) of the *Local Government Regulation 2012* (Qld) (“LGR 2012”). Although the Resolutions referred to a requisite “overall plan” as required by those provisions, that plan was non-compliant because it did not include a statement of its estimated cost and the estimated time for carrying it out. The appellant then reimbursed ratepayers a portion of the special charges they had paid, along with interest. Withheld however was a portion which the appellant had already spent on funding the Services.

In 2018, the respondents commenced Supreme Court proceedings as representative parties under Part 13A of the *Civil Proceedings Act 2011* (Qld), seeking to recover the unrefunded portion of the special charges that had been paid by them and by other ratepayers (group members in the proceedings). The appellant argued that an entire reimbursement would inequitably benefit the ratepayers, whose land values had received a small boost and who would continue to enjoy benefits from the Services.

Bradley J found in favour of the respondents and ordered the appellant to pay to the group members the unrefunded balance of the special charges, in the sum of \$3,791,536.80 plus interest. His Honour held that, although rate notices issued before 14 December 2012 were valid and group members were obliged to pay them, the Resolutions’ invalidity meant that the Resolutions could not produce legal effects. The special charges attracted the operation of s 32 of LGR 2010, which provided that special charges levied on land to which they did not apply must be returned to the person who paid them. Bradley J held that s 98 of LGR 2012 similarly applied to the special charges contained in rate notices issued after 14 December 2012, such that the appellant must return the whole of the special charges that had been paid by group members. His Honour rejected the appellant’s defence based on unjust enrichment (of the group members), as the power to levy and retain special charges was statutory, and the appellants must comply with its statutory obligation to return those funds to which it had no legal entitlement.

The appellant appealed and the respondents cross-appealed.

The Court of Appeal (PD McMurdo JA, Boddice J and Callaghan J) allowed the appeal in part and allowed the cross-appeal, but did not disturb the order for payment made by Bradley J. McMurdo JA and Boddice J held that the appellant was not under a statutory obligation to refund the moneys, as s 32 of LGR 2010 and s 98 of LGR 2012 (together, “the return regulations”) were not engaged. This was because those provisions were premised on the levying of special charges founded on valid resolutions. They were aimed at administrative errors made in the process of levying valid charges, and from December 2014 the operation of s 98 of LGR 2012 was extended so as to include rates notices containing special charges levied on the wrong land. McMurdo JA and Boddice J held however that the group members were entitled to the refund of the spent funds because the special charges had been paid under a mistake of law. The appellant could not succeed on its defence of unjust enrichment, because the group members had paid in the belief, albeit a mistaken one, that they were legally obliged to pay the special charges, rather than having believed that they should pay because their land would benefit from the Services.

Callaghan J would have affirmed Bradley J’s decision on the basis that, when the appellant first insisted on payment of the special charges without having met its statutory obligations, the return regulations were engaged.

The grounds of appeal are:

- The Court of Appeal erred in:
 - (a) conflating a mistake of law when paying a public impost with whether there was a total failure of consideration; and
 - (b) denying the appellant a defence of value received.

By a notice of cross-appeal, the respondents raise grounds that the majority of the Court of Appeal erred in construing the return regulations and holding that those provisions did not apply in the circumstances of this case.

By a notice of contention, the respondents raise grounds including that the Court of Appeal erred by failing to hold that the respondents were entitled to recover the unrefunded amount of the special changes pursuant to the principles in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

A notice of a constitutional matter was filed by the respondents. The Attorneys-General of the Commonwealth and Queensland are intervening in the appeal.