SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 3 MARCH 2009

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KERAMIANAKIS & ANOR v REGIONAL PUBLISHERS PTY LTD (S311/2008)

Court appealed from: New South Wales Court of Appeal
[2007] NSWCA 375

Date of judgment: 21 December 2007

Date of grant of special leave: 13 June 2008

Dr Keramianakis and Dr Smagarinsky ("the Doctors") are medical practitioners who established the “Dubbo Skin Cancer Centre”. Regional Publishers Pty Ltd ("Regional Publishers") is the publisher of the *"Daily Liberal"*. On 22 March 2001 an article ("the article") was published in the *Daily Liberal* entitled “Claims skin clinic misleading public”.

The Doctors brought defamation proceedings against Regional Publishers, alleging that the article gave rise to the following three imputations:

(a) that the Doctors as medical practitioners were more concerned with making money than with the well-being of their patients;
(b) that the Doctors were medical practitioners who had misled the public;
(c) that the Doctors as medical practitioners had charged excessive fees for medical services.

In the District Court, the jury found that the article gave rise to imputations (b) and (c), in relation to Dr Smagarinsky but not to Dr Keramianakis. It also found that imputation (a) was not made out in relation to either Doctor.

On 21 December 2007 the Court of Appeal (Beazley & Basten JJA, Rothman J) unanimously dismissed the Doctors' appeal. Their Honours found that it was open to the jury to distinguish between imputation (a) and imputations (b) and (c). There was therefore no basis for holding that there was manifest unreasonableness in the jury’s answers. It was also open to the jury to find that imputation (a) was not conveyed by the article when read as a whole.

The Court of Appeal did however hold that the directions given to the jury were potentially confusing. Notwithstanding this, it was apparent that in upholding imputations (b) and (c) in relation to Dr Smagarinsky, but not (a), the jury was reading the article as a whole, in a legally appropriate manner.

A majority (Beazley & Basten JJA agreeing, Rothman J dissenting) further held that the right of appeal was never available in relation to a jury verdict in the District Court. It was only available from the ruling, order, direction or decision of a judge on a point of law or upon a question of evidence.

The grounds of appeal are:

- The Court of Appeal erred in holding that it lacked jurisdiction under section 127 of the *District Court Act* 1973 (NSW) to hear an appeal from a civil trial before a judge and jury in the District Court of New South Wales.

- The Court of Appeal erred in failing to find that a reasonable jury properly instructed could not have arrived at the jury's decisions with regard to the imputations pleaded in paragraphs 13(a) and 14(a) of the Third Further Amended Ordinary Statement of Claim.

On 15 July 2008 the Respondent filed a notice of cross-appeal, the ground of which is:

- The Court of Appeal erred in holding, at paragraphs 103 and 104 of the judgment of Basten JA, that in the circumstances of the present case, if the Court of Appeal had jurisdiction to entertain the appeal, it had power to direct a verdict and enter judgment for the First Cross-Respondent in relation to imputations (b) and (c).

On 15 July 2008 the Respondent filed a notice of contention, the grounds of which include:

- The Court of Appeal erred in finding that the Appellants were entitled to raise on appeal, in support of an order for a verdict and judgment, or alternatively a new trial, matters not raised at the trial in first instance.

This appeal was listed for hearing on 23 September 2009 when it was adjourned to allow the parties to consider whether a notice of a constitutional matter should be issued pursuant to s78B of the *Judiciary Act* 1903. The respondent has filed a notice of a constitutional matter indicating that the interpretation of s73 of the *Constitution* might arise in the course of the hearing of the appeal. The Attorney-General of the Commonwealth has intervened in the appeal pursuant to s78A of the *Judiciary Act* 1903.

SAMSUNG ELECTRONICS AUSTRALIA PTY LTD (FORMERLY ANSELL LTD & ORS) v DAVIES & ORS (A36/2008)

Court appealed from: Full Court of the Supreme Court of South Australia [2008] SASC 74

Date of judgment: 23 July 2008

Date special leave granted: 13 November 2008

On 3 January 2002 the creditors of Harris Scarfe Limited and Harris Scarfe Wholesale Pty Ltd ("Harris Scarfe") resolved that both companies be wound up. On 31 March 2004 the liquidators filed proceedings in the Supreme Court of South Australia ("the original proceedings") seeking an order to extend the time for filing an application pursuant to s 588FE of the *Corporations Act* 2001 (Cth) ("the Act"). Pursuant to s 588FF(3) of the Act, the time for filing an application pursuant to s 588FE expired on 2 April 2004. The original proceedings were brought against two sets of creditors: 13 companies listed in a schedule, who were referred to as the "ascertained creditors"; and "unascertained creditors" who could not be identified at the time the proceedings were filed. The appellant in this appeal is one of the unascertained creditors.

On 14 April 2004 Master Kelly made an order in relation to the unascertained creditors, extending the time for filing an application against them to 2 October 2005. On 30 September 2005, the liquidators instituted actions against a number of creditors of Harris Scarfe, including the appellants, seeking orders pursuant to s 588FE of the Act in respect of transactions which they alleged were voidable. The appellant was successful in an application to Debelle J to set aside the Master's order, on the grounds that it was not served with the original proceedings, and did not have the opportunity to be heard before the order was made. The liquidators have not challenged that decision.

On 6 December 2007 the liquidators filed an application for an order to join the appellant as defendant to the original proceedings. Debelle J decided that it was not necessary to join the appellant. The original proceedings were still on foot and the liquidators were entitled to have their application for an extension of time against the unascertained creditors reconsidered by the Court. It was as if those creditors had been named in the summons and the application against each of them was being heard for the first time. His Honour also found that, even if it was necessary to join the appellant to the original proceedings, the application to do so had been made within time, and an order for joinder could be made.

The appellant's appeal to the Full Supreme Court (Doyle CJ, Anderson and David JJ) was dismissed. The Court agreed with Debelle J's finding that the application for joinder of the appellant had been made within the time limit prescribed by s 588FF(3)(a) of the Act. That time limit does not apply to a particular creditor as a person, rather, it is a limit for the making of an order application for an order fixing a "longer period", and that time limit was satisfied in this case when the original proceedings were filed, even though the appellant was not then joined. With respect to Debelle J's decision that it was not necessary to join the appellant as defendant to the original proceedings, the

Court, while seeming to agree with His Honour's reasoning, found it was not necessary to decide the point, given its finding on the limitation issue.

The grounds of appeal include:

- The Full Court erred in finding that the application is a valid application to the extent that it was made in relation to unidentified creditors;

- In the alternative, the Full Court erred by:

  (a) finding that the appellant does not need to be joined as party to the application before an order pursuant to section 588FF(3)(b) of the *Corporations Act* 2001 (Cth) can be made against them;
  (b) failing to give any force and effect to the operation of Rule 28.05 of the *Supreme Court Rules* 1987; and
  (c) failing to find that joinder of the appellant to the application after the expiration of the three year time limit under s588FF(3)(a) of the *Corporations Act* 2001 (Cth) is futile.

FRIEND v BROOKER & ANOR (S475/2008)

Court appealed from: New South Wales Court of Appeal
[2008] NSWCA 118

Date of judgment: 29 May 2008

Date of grant of special leave: 30 September 2008

This matter concerns a claim by Mr Frederick Brooker for a contribution from his former business associate, Mr Nicholas Friend, to help repay a loan known as the "SMK loan". That loan was incurred by Mr Brooker when he borrowed $350,000 from SMK Investments Pty Ltd ("SMK") in 1986 on behalf of Friend & Brooker Pty Ltd ("Friend & Brooker"). Friend & Booker was the trading entity of both Mr Friend and Mr Brooker. It was however deregistered in 1996.

The SMK loan was secured by mortgages over two properties jointly owned by Mr Brooker and his wife and mother respectively. In July 1993 Friend & Brooker repaid $250,000 to SMK while Mr Brooker also repaid SMK (without reimbursement from Friend & Brooker) additional amounts from his own funds. With the accrual of interest, Mr Brooker's indebtedness to SMK stood at approximately $1.3 million in late 2004.

In December 2000 Mr Brooker commenced proceedings seeking a declaration that, between May 1977 and January 1995, a partnership existed between Mr Friend and himself for the conduct of a building, construction and development business. In the alternative he sought a declaration that a joint venture existed. Friend & Brooker was said to be the corporate vehicle for either the partnership or the joint venture. In so far as the joint venture was concerned, Mr Brooker asserted that he and Mr Friend owed each other a fiduciary duty to act in good faith. He also claimed to be entitled to either damages (or an equitable compensation for loss) due to Mr Friend's refusal to make an equal contribution to the SMK loan. On 29 April 2005 Justice Nicholas gave judgment for Mr Friend (and Friend & Brooker) and dismissed those proceedings.
His Honour found that there was no evidence that Mr Friend had agreed to be jointly liable for, or to contribute to, the repayment of the SMK loan.

On 20 December 2006 the Court of Appeal (Mason P & McColl JA, Basten JA dissenting) allowed Mr Brooker's appeal. Their Honours set aside Justice Nicholas' order and ordered that Mr Friend contribute to the repayment of the SMK loan. Justice McColl held that a fiduciary relationship had existed between the parties since the commencement of their business relationship. The fact that they had borrowed unequal amounts (so as to keep the company going) supported the proposition that they understood that their respective contributions would be equalised at an appropriate time. This was a view broadly shared by President Mason.

Justice Basten however would have withheld relief. His Honour held that Mr Brooker was not entitled to relief unless he could show that he was subject to imminent enforcement of his legal obligation to repay the SMK loan.

The grounds of appeal include:

- The majority erred in ordering equitable contribution between Mr Friend and Mr Brooker in circumstances where there was no co-ordinate liability between the two.

- The majority erred in holding that there was a common benefit or common burden between Mr Friend and Mr Brooker so as to permit equitable contribution to be awarded, in circumstances where findings by the trial judge to the contrary were not disturbed on appeal.

On 23 December 2008 Mr Brooker filed a summons, seeking leave to rely upon a Notice of Contention filed out of time. The grounds of that proposed notice include:

- The judgment should be upheld on the basis of the findings of Mr Friend's breach of fiduciary duty made by Justices McColl and Basten.

- Orders 4 and 5 in the order made on 29 May 2008 were justified because Mr Brooker was entitled to equitable compensation from Mr Friend for breach of an equitable obligation to contribute to the SMK debt, in order to place Mr Brooker as nearly as possible in the position he would have been in if the breach of fiduciary duty had not occurred.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v CHANNEL SEVEN BRISBANE PTY LIMITED & ORS (S506/2008)

Court appealed from: Full Court of the Federal Court of Australia [2008] FCAFC 114

Date of judgment: 23 June 2008

Date of grant of special leave: 14 November 2008

On 31 October 2003 and 30 January 2004 the Respondents broadcast two episodes of "Today Tonight" featuring a program called the "Wildly Wealthy Women Millionaire Mentoring Program." That program was created by Ms Boholt and Ms Forster, both of whom were interviewed in each episode. In the first broadcast, the program was described as a one year program "for 150 women from all walks of life and all areas of the country" to teach them "the skills of making big money." Ms Boholt and Ms Forster were described as "self-proclaimed wildly wealthy women on a mission to make other women filthy rich" through the participation in a mentoring program.

The Applicant brought enforcement proceedings against the Respondents under Part VI of the *Trade Practices Act* 1974 (Cth) ("the TPA"). It contended that they contravened section 52 by making, or adopting as their own, misleading and deceptive representations regarding the mentoring programs and those conducting them. The Respondents sought to rely on section 65A(1) of the TPA as a defence.

On 5 October 2007 Justice Bennett found in favour of the Applicant. Her Honour held that the Respondents had contravened section 52 in respect of the representations that Ms Forster and Ms Boholt were "wildly wealthy women" who had made money from property investments. Those representations were misleading and deceptive and section 65A did not provide the Respondents with a defence. Justice Bennett found that the exemption in section 65A applied only where the publication was made on behalf of, or pursuant to, an agreement with the person who sold or supplied the subject matter.

On 23 June 2008 the Full Federal Court (Sundberg, Jacobson & Lander JJ) unanimously allowed the Respondents' appeal. The Court agreed that Justice Bennett was entitled to find that the representations in question were false and that the conduct in making them was both misleading and deceptive. Their Honours, however, noted that the goods or services promoted in the two broadcasts were not of a kind supplied by the Respondents. The Respondents were therefore entitled to the exemption offered in section 65A(1) of the TPA as prescribed information providers and nothing in section 52 of the TPA applied to the prescribed publication in the broadcasts. The Respondents could not therefore have contravened section 52 of the TPA.

The grounds of appeal include:

- The Full Court erred in holding that, by reason of the operation of section 65(1) of the TPA, section 52 of that Act did not apply to the conduct of the Respondents.

- The Full Court erred in holding that the reference to "goods or services of that kind" in section 65A(1)(a)(vi)(A) was a reference to goods or services of a kind supplied by the prescribed information provider as used in the expression "relevant goods or services" in section 65A(1)(a)(v) which, in turn, is defined in section 65A(3).

On 4 December 2008 the Respondents filed a notice of contention, the ground of which is:

- For the exception to the exemption contained in section 65A(1)(vi) of the TPA to apply, the "contract, arangement or understanding" "pursuant to" which the subject publication was made must be a "contract, arrangement or understanding" to publish the misleading or deceptive matter that resulted in the contravention of section 52; and as the Appellant concedes, there was no such "contract, arrangement or understanding".

CLARKE v COMMISSIONER OF TAXATION & ANOR (A35/2008)

Court appealed from: Full Court of the Federal Court
[2008] FCAFC 106

Date of judgment: 13 June 2008

Date special leave granted: 13 November 2008

The appellant was a member of the Parliament of South Australia from 1993 to 2002. During that period he was a member of three superannuation schemes: the parliamentary scheme, a superannuation scheme set up under the *Superannuation (Benefit Scheme) Act* 1992 (SA), and the Southern State Superannuation Scheme. In the appellant's tax assessment for each of the financial years ending 30 June 1997 to 2001, the first respondent ("the Commissioner") included a surcharge pursuant to the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act* 1997 (Cth) ("the CP Assessment Act"). The appellant's objections to the assessments were disallowed, and he applied to the Administrative Appeals Tribunal for review of the Commissioner's decision.

The AAT referred three questions of law to the Federal Court. The first two questions dealt with the construction of the relevant legislative provisions, and the third raised the issue of whether the CP Assessment Act and or/ the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act* 1997 (Cth) ("the CP Imposition Act") were invalid in their application to the appellant because (a) they so discriminated against the State of South Australia or so placed a particular disability or burden upon the operations or activities of the State, as to be beyond the legislative power of the Commonwealth; or (b) the CP Imposition Act imposed a tax on property belonging to the State contrary to s 114 of the Constitution.

The Full Federal Court (Branson, Sundberg and Dowsett JJ) rejected the appellant's argument that the CP Acts undermined the State's parliamentary pension arrangements and discouraged people from seeking election to Parliament. The appellant relied on an amendment to the *Parliamentary Superannuation Act* 1974 (SA) as evidence of impermissible interference in the operations or activities of the State. The amendment allowed members with an accumulated surcharge debt to comminute part of their pension to obtain a lump sum to expunge the debt. The Court found, however, that the *Parliamentary Superannuation Act* already contained a right of commutation, which made it difficult to see the amendment as something the State was compelled to do as a result of the CP Acts. Thus the Court did not consider that the amendment evidenced any significant interference with the exercise of the State's constitutional power to determine the method of remuneration of its parliamentarians.

The grounds of appeal include:

- The court below erred when applying the principle in the *Melbourne Corporation* case in not considering that the evidence before it established that there had been an impermissible interference in the constitutional capacity of the State to function as a government.

- Further, or alternatively, the court below erred in law in requiring that there be evidence of compulsion to introduce the legislative changes affecting the appellant's superannuation commutation rights as evidenced by ss21AA, 23AA and 35AA of the superannuation legislation in order to demonstrate the necessary interference with the exercise of State constitutional power or capacity.

The Attorney-General of the Commonwealth and the Attorneys-General for the States of Western Australia, New South Wales, Victoria and Queensland have intervened in the appeal.