SHORT PARTICULARS OF CASES
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SPRIGGS v COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA (M92/2008); RIDDELL v COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA (M93/2008)

Court appealed from: Full Court of the Federal Court of Australia [2008] FCAFC 150

Date of judgment: 22 August 2008

Date special leave granted: 5 December 2008

Both appellants were professional footballers, Spriggs in the AFL and Riddell in the NRL. They engaged the services of accredited player agents who negotiated contracts/playing endorsements and sponsorships, and arranged legal, financial and other advice. The fees payable were calculated as a percentage of the playing contract monies and monies from other sources such as sponsorship. The appellants claimed a deduction for the fees under s 8-1 of the *Income Tax Assessment Act* 1997 (Cth) ('the Act'), which the respondent denied on the basis that the fees were not incurred in gaining or producing assessable income under s 8-1(a) and were not incurred in carrying on a business for the purpose of gaining or producing assessable income under s 8-1(b).

The appellants' appeals to the Federal Court (Gordon J) were allowed. Her Honour found that the management fees were relevant and incidental to the appellants' income as professional footballers and were deductible under s 8-1(a). The fact that the fees were for negotiating a contract of employment did not necessarily mean that they were not deductible. The relationship between the management fees and the appellants' income earning activities was direct, as the playing contract facilitated the generation of their income. Further, the appellants were carrying on a business for the purpose of gaining or producing assessable income under s 8-1(b) and were entitled to a deduction for the management fee. The management fee was not incurred prior to the generation of the income because the income was ongoing. The fee was expenditure outlaid in a framework in which the appellants, as professional footballers, produced their income.

The respondent's appeal to the Full Federal Court (Goldberg, Bennett and Edmonds JJ) was allowed in both matters. The Court found that the decision of this Court in *Federal Commissioner of Taxation v Maddalena* (1971) 2 ATR 541 applied (Gordon J had found that *Maddalena* was distinguishable). The subject fee in each case was paid for negotiating the employment contract. The outgoing was not incurred "in" gaining or producing assessable income, in the sense of being incurred "in the course of" deriving employment income. The outgoing was not occasioned by the taxpayer's employment as a sportsman but "by the need to be in a position where the taxpayer could set about the task by which assessable income would be derived" (citing *Federal Commissioner of Taxation v Payne* (2001) 202 CLR 93 at [14]). The outgoing was not an expense of "working" or a "working expense". It could not be said that the fee, which related entirely to the playing contract, was an outgoing incurred in the course of carrying on any business. Their Honours rejected Gordon J's finding

that the management fee was relevant and incidental to Spriggs' and Riddell's income as professional sportsmen.

The grounds of appeal include:

- the Full Federal Court erred in concluding that the decision of the High Court of Australia in *Federal Commissioner of Taxation v Maddalena* (1971) 2 ATR 541 applied to deny the claim by the appellants for a deduction for the management fee;

- in applying ss 8-1(b) the Full Federal Court erred in:
  - (a) concluding that the non-playing activities were separate and discrete from the taxpayer's activities as a professional [football] player;
  - (b) confining the business carried on by the taxpayer in the relevant year of income to his non-playing activities.

<u>LANE v. MORRISON & ANOR</u> (C3/2008)

<u>Date of referral to the Full Court</u>: 16 February 2009

The plaintiff, Brian George Lane, was an enlisted member of the Royal Australian Navy. While on a posting in Toowoomba, the applicant engaged in actions which subsequently became the subject of disciplinary charges brought by the Director of Military Prosecutions under the *Defence Force Discipline Act* 1982 (Cth) ("the Act"), being an act of indecency without consent or, in the alternative, assaulting a superior officer. Over a year before the charges were laid, the plaintiff had been discharged from the Royal Australian Navy and transferred to the Naval Reserve. The first defendant, Colonel Peter John Morrison, is a full-time military judge appointed by the Governor-General pursuant to the Act for a 10 year term and was nominated by the Chief Military Judge to try the charges against the plaintiff. When the matter was first listed, on 25 March 2008, the plaintiff objected to the jurisdiction of the Australian Military Court and did not enter an appearance. The charges will not be listed for trial until this application has been heard and determined.

The Commonwealth was joined by consent as the second defendant. The first defendant has entered a submitting appearance. The Attorney-General of the State of Western Australia has intervened in the proceedings.

The application seeks prohibition to restrain the first defendant from trying the charges laid against the plaintiff, and declarations of invalidity of those parts of the Act establishing the Australian Military Court and the office of Director of Military Prosecutions.

The issues raised in the application include:

- Whether the establishment of the Australian Military Court and the office of Director of Military Prosecutions invalid as being inconsistent with section 68 of the Constitution because of their independence from command;

- Whether the Australian Military Court is a federal court impermissibly created outside Chapter III, and contrary to section 71, of the Constitution;

- Whether the Act purports to confer on the Australian Military Court a general criminal jurisdiction which is not subordinate and supplementary to the general criminal law, and whether the Act thereby violates the separation of powers under Chapter III of the Constitution and is beyond the power conferred by section 51(vi) of the Constitution.

MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZIZO & ORS (S568/2008)

Court appealed from: Full Court of the Federal Court of Australia [2008] FCAFC 122

Date of judgment: 3 July 2008

Date of grant of special leave: 5 December 2008

The Respondents (a husband, wife and their four children) are Lebanese citizens who applied for protection visas, claiming to fear persecution in Lebanon from members of an extremist Islamic group. The Applicant's delegate refused that application, as did the Refugee Review Tribunal ("RRT") on 16 May 2006. The Respondents then unsuccessfully applied to the Federal Magistrates Court for the judicial review of that decision.

Upon appeal to the Full Federal Court, an issue arose as to whether the Respondents had been properly notified of the RRT's hearing. (That issue had not been raised before the Magistrate where they had been unrepresented.) The Respondents sought to rely upon an alleged breach of section 441G of the *Migration Act* 1958 (Cth) ("the Act"), which relevantly provides:

(1) If: …

(b) the applicant gives the RRT written notice of the name and address of another person (the authorised recipient) authorised by the applicant to do things on behalf of the applicant that consist of, or include, receiving documents in connection with the review;

the RRT must give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant.

On 3 July 2008 the Full Federal Court (Moore, Marshall and Lander JJ) unanimously allowed the Respondents' appeal. The Court noted that all of the Respondents lived together and that the eldest daughter had been nominated as the authorised recipient. They further noted that the invitation to attend the RRT hearing ("the hearing letter") was addressed to the wrong addressee. Despite that irregularity however, all of the Respondents had appeared before the RRT.

The Full Federal Court held that the RRT had failed to comply with section 441G by sending the hearing letter to the correct address but to the wrong addressee. Their Honours held that the contents of Divisions 4 and 7A of Pt 5 of the Act, together with sections 416, 437 and 438 were a complete code for the discharge of the RRT's obligations in relation to the natural justice hearing rule. This suggested that Parliament intended that there be strict adherence to each of the procedural steps leading up to the hearing. Any failure by the RRT to comply with section 441G would, if uncorrected before the hearing took place or the decision made, mean that it had committed jurisdictional error.

The Court also held that it is only in exceptional circumstances that a Court should decline to exercise its discretion to refuse relief. This was not such a case.

The grounds of appeal are:

- The Full Court erred in its construction of section 441A and 441G of the Act.
- The Full Court erred in finding that the RRT committed jurisdictional error (at paragraph [91]) of the Full Court's reasons for judgment).
- The Full Court erred in the exercise of its discretion by granting relief.

<u>AON RISK SERVICES AUSTRALIA LIMITED v. AUSTRALIAN NATIONAL UNIVERSITY</u> (C9/2008)

<u>Court appealed from</u>: Court of Appeal of the Supreme Court of the Australian Capital Territory [2008] ACTCA 13

<u>Date of judgment</u>: 25 August 2008

<u>Date of grant of special leave</u>: 13 February 2009

The respondent ("the University") suffered damage to buildings located at Mount Stromlo as a result of a bushfire on 18 January 2003. The University commenced proceedings on 10 December 2004 against its three insurers in relation to that damage, and on 6 June 2005 joined the appellant ("AON") as a defendant and filed an amended statement of claim. The case against the three insurers alleged that the buildings and contents damaged were insured. The case pleaded against AON was that, although the University alleged that the buildings and contents damaged were insured, if they were not then AON was in breach of its retainer in failing to effect such insurance in accordance with the University's instructions. The matter was set down for trial to commence on 13 November 2006 and shortly before trial the parties participated in a mediation. The University settled its claims against the three insurers two days before the trial was to start and consent orders were made in the form of an undivided amount of damages for the loss alleged. On the same day, the University indicated that it required an adjournment in order to prepare a proposed amended pleading to enlarge its case against AON. On 27 November 2006 the University applied for leave to amend the statement of claim and for an adjournment of the trial. Leave to amend and the adjournment were opposed by AON. The trial judge (Gray J) on 12 October 2007 granted leave to amend. The amended statement of claim introduced new claims against AON, including that AON had effected insurance without obtaining the University's instructions, and that AON owed and breached a duty to the University in relation to the valuation of the buildings and contents. AON sought leave to appeal from this order.

The Court of Appeal (Higgins CJ and Penfold J; Lander J dissenting) dismissed the appeal. The majority held that leave to amend was properly granted by the trial judge, on the basis that leave should only be refused where the opposing party would suffer specific prejudice, irremediable by a costs order, as a result of the proposed amendment, relying on the decision of this Court in *State of Queensland v. J L Holdings Pty Ltd* (1997) 189 CLR 146 (per Dawson, Gaudron, McHugh and Kirby J). Penfold J (and, in dissent, Lander J) observed that the University had made an earlier, deliberate, forensic decision not to bring the new claims against AON until it had settled with the insurers. The majority also held that it was not an abuse of process for the University to maintain a case against AON that the buildings and contents were not insured notwithstanding that judgment had been entered (by consent) in favour of the University against one of its insurers on the statement of claim as amended.

The grounds of appeal include:

- Whether the decision of the High Court in *State of Queensland v. J L Holdings* requires reconsideration or is in error to the extent that it provides that a party is entitled to a grant of leave to amend a pleading, including to vacate a trial date, unless the opposing party demonstrates specific prejudice which cannot be cured by an order for costs;

- Whether the Court of Appeal erred in failing to find that it was an abuse of process for the University, having obtained judgment for an undivided amount against other defendants for loss of certain property, to permit the University to assert against AON as its insurance broker that it was not insured for some of that property.

GARSEC PTY LTD v HIS MAJESTY SULTAN HAJI HASSANAL BOLKIAH MU'IZZADDIN WADDAULAH THE SULTAN AND YANG DI-PERTUAN OF BRUNEI DARUSSALAM & ANOR (S457/2008)

Court appealed from: New South Wales Court of Appeal [2008] NSWCA 211

Date of judgment: 5 September 2008

Date of referral into the Full Court: 13 February 2009

On 19 June 2006 Garsec Pty Ltd ("Garsec") commenced proceedings ("the proceedings") in the Supreme Court of New South Wales regarding a disputed agreement with the First Respondent ("the Sultan"). This concerned the purchase by the Sultan from Garsec for $8 million of a rare, tiny handwritten Qur'an of exceptional quality. Garsec alleges that the agreement was entered into in April 2005 through the Second Respondent ("Pehin Nawai"), the Sultan's private secretary.

Both the Sultan and Pehin Nawai voluntarily submitted to the jurisdiction of the Supreme Court, but they subsequently sought a stay of the proceedings on forum non conveniens grounds. In doing so they relied, inter alia, on the immunities from suit conferred on them by the Constitution of Brunei.

On 15 August 2007 Justice McDougall ordered the proceedings to be permanently stayed. His Honour held that the immunities from suit conferred on the Respondents were, for the purposes of Australian choice of law rules, substantive rather than procedural. In the alternative, his Honour held that the continuation of the proceedings in the Supreme Court would be vexatious or oppressive in the *Voth v Mildura Flour Mills Pty Limited* sense.

On 5 September 2008 the Court of Appeal (Spigelman CJ, Hodgson and Campbell JJA) dismissed Garsec's appeal. Their Honours agreed with Justice McDougall's characterisation of the Respondents' constitutional immunities from suit as being substantive. Working on the contrary assumption that those immunities were procedural, they also considered whether Justice McDougall had erred in concluding that the continuation of the proceedings would be vexatious and oppressive. Justice Campbell concurred with Justice McDougall, while Chief Justice Spigelman and Justice Hodgson held that he had erred by giving inadequate weight to the absence of an alternative forum in which the proceedings could be entertained.

On 13 February 2009 Justices Gummow, Heydon and Kiefel referred this application to an enlarged bench of this Court.

The questions of law said to justify the grant of special leave to appeal are:

- Whether an immunity from suit conferred on particular individuals by a foreign constitution is, for the purposes of Australian choice of law rules, procedural or substantive in character?
- Whether the general principles discussed in *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 need to be qualified in their application to

the present case, having regard to the special character of sovereign immunity from suit under the Constitution of Brunei?