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

**COMMENCING TUESDAY, 1 FEBRUARY 2011**



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**KPMG v COMMONWEALTH OF AUSTRALIA & ANOR (M66/2010)**

Date Demurrer referred to Full Court: 11 August 2010

This matter concerns the constitutional validity of s 50 of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("the ASIC Act") which provides that:

> Where, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Part), it appears to ASIC to be in the public interest for a person to begin and carry on a proceeding for:
>
> (a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or
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> (b) recovery of property of the person;
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> ASIC:
>
> (c) if the person is a company--may cause; ...
>
> such a proceeding to be begun and carried on in the person's name.

In October 2008 the Australian Securities and Investments Commission ("ASIC") caused a proceeding to be commenced against KPMG in the Supreme Court of Victoria, in the names of eight companies in the Westpoint group of companies. In the proceeding, each of the companies seeks damages for negligence and seeks an order for compensation under s 87 of the *Trade Practices Act* 1974 (Cth) in respect of conduct in contravention of s 52 of that Act. The proceeding was transferred to the Federal Court of Australia on 9 April 2010.

KPMG has filed a writ of summons in this Court, seeking a declaration that s 50 of the ASIC Act (to the extent that it authorises ASIC to begin and carry on a proceeding in the name of a company) authorises an acquisition of property otherwise than on just terms contrary to s 51(xxxi) of the Constitution, and is therefore invalid.

The issues raised by the statement of claim and demurrer are:

- whether, by authorising ASIC to cause the proceeding to be begun and carried on in the name of the Westpoint companies, s 50 of the ASIC Act provides for an acquisition of property within the meaning of s 51(xxxvi) of the Constitution?

- whether s 50 of the ASIC Act is properly characterised as a law with respect to the acquisition of property within the meaning of s 51(xxxvi)?

- whether any such acquisition of property is on just terms within the meaning of s 51(xxxvi)?

**WESTPORT INSURANCE CORPORATION & ORS v GORDIAN RUNOFF LIMITED (S110/2010 & S219/2010)**

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| Court appealed from: | New South Wales Court of Appeal [2010] NSWCA 57 |
| Date of judgment: | 1 April 2010 |
| Date of grant of special leave / referral into the Full Court: | 3 September 2010 |

On 13 October 2008 a panel of arbitrators ("the Arbitrators") delivered an award in which Gordian Runoff Limited ("Gordian") was the claimant and Westport Insurance Corporation and Ors ("Westport") were the respondents. The dispute concerned the scope and operation of contracts of reinsurance issued by Westport, as re-insurer. It also involved the entitlement of Gordian, as the reinsured, to recover from Westport claims made on it by its original insured, FAI Insurances Limited ("FAI").

The Arbitrators held that once s 18B of the *Insurance Act* 1902 (NSW) ("the Insurance Act") was considered, the reinsurance contracts applied to those claims made within three years of the inception of the FAI policy. The re-insurers were therefore obliged to pay those claims under that policy which were notified to Gordian within that time.

Westport sought leave to appeal from the Arbitrators' award to the Supreme Court on the following bases:

a) Manifest error on the face of the award pursuant to s 38(5)(b)(ii) of the *Commercial Arbitration Act* 1984 (NSW) ("the Arbitration Act");

b) Strong evidence of error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

Justice Einstein heard both the application for leave to appeal and the appeal concurrently.

Westport's main complaint, with which Justice Einstein agreed, concerned the Arbitrators' interpretation and application of s 18B of the Insurance Act. Justice Einstein held that the Arbitrators had misunderstood s 18B to a degree that satisfied both ss 38(5)(b)(i) and (ii) of that Act.

Upon appeal Gordian submitted:

a) That Justice Einstein had erred in hearing the application for leave to appeal and the appeal concurrently;

b) That Justice Einstein had erred in finding that the Arbitrators' award demonstrated manifest error under s 38(5)(b)(i) and strong evidence of an error of law;

c) That Justice Einstein had erred in determining that the question of law may or may be likely to add substantially to the certainty of commercial law under s 38(5)(b)(ii).

Westport filed a notice of contention, submitting that three grounds not dealt with by Justice Einstein were sufficient to justify his Honour's orders. These were:

a) That the Arbitrators had erred in concluding that the loss was not caused or contributed to by the events or circumstances;

b) That the Arbitrators had failed to provide reasons for the finding that the proviso to s 18B(1) was satisfied;

c) That the Arbitrators had failed to provide reasons for the conclusion relating to the Arbitration Act and that general justice and fairness would produce the same result.

The re-insurers also cross-appealed concerning the refusal of Justice Einstein to permit an issue to be raised (about the applicability of s 18B to reinsurance when that point had not been taken before the Arbitrators).

The Court of Appeal (Spigelman CJ, Allsop P & Macfarlan JA) unanimously allowed the appeal and dismissed the cross-appeal. Their Honours held, inter alia, that:

1. The context and legislative history of the Arbitration Act, s 38 make it plain that ordinarily a leave application should precede an appeal. An application for leave to appeal and an appeal should only be heard concurrently in special cases;

2. A "manifest error" for the purposes of s 38(5)(b)(i) must be more than arguable. It must be evident or obvious;

3. The assertion that the Arbitrators had not provided reasons as required by s 29(1)(c) was rejected.

At the hearing on 3 September 2010, this Court granted special leave to appeal on some grounds, referred other grounds for further consideration and dismissed the remaining grounds.

On 13 January 2011 a summons seeking leave to appear as *amici curiae* was filed on behalf of the Australian Centre for International Commercial Arbitration Limited, the Australian International Disputes Centre Limited, the Institute of Arbitrators and Mediators Australia Limited and the Chartered Institute of Arbitrators (Australia) Limited.

On 14 January 2011 a summons seeking leave to appear as *amicus curiae* was filed on behalf of the Attorney-General of the Commonwealth.

In matter number S110/2010 the questions of law said to justify the grant of special leave include:

- Did the New South Wales Court of Appeal misconstrue and misapply the criteria under sub-ss 38(5)(b)(i) and 38(5)(b)(ii) of the Arbitration Act for leave to appeal from the award of the Arbitrators?

In matter number S219/2010 the ground of appeal is:

- The New South Wales Court of Appeal erred in failing to conclude that the Arbitrators had not given any, or any adequate, reasons as required by s 29(1) of the Arbitration Act for the conclusion that:

  a) It was reasonable for Westport to be required to indemnify Gordian within the meaning, and on the proper construction, of the proviso to s 18B(1) of the Insurance Act;

  b) Considerations of general justice and fairness did not compel the conclusion that Westport should not be required to indemnify Gordian within the meaning, and on the proper construction, of s 22(2) of the Arbitration Act.

**SHOALHAVEN CITY COUNCIL v FIREDAM CIVIL ENGINEERING PTY LIMITED (S216/2010)**

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 59

Date of judgment: 19 April 2010

Date of grant of special leave: 3 September 2010

Firedam Civil Engineering Pty Ltd ("Firedam") sought a declaration that an expert determination made by Mr Neil Turner on 6 February 2009 was not binding upon it. It also sought a declaration that it was therefore free to commence litigation against Shoalhaven City Council ("Shoalhaven").

Mr Turner was appointed pursuant to a contract ("the Contract") between Firedam (as Contractor) and Shoalhaven (as Principal) for the design and construction of a waste water transportation system. He was appointed to determine the monetary claims made by the parties against each other. This required him to consider, inter alia, whether certain claimed extensions of time should be granted. Firedam contended that Mr Turner's determination was not binding due to mistakes which put it at variance with the Contract. In the alternative it submitted that Mr Turner had failed to give proper reasons for his conclusions.

On 12 August 2009 Justice Tamberlin rejected Firedam's submissions, finding that Mr Turner's determination was binding. His Honour held that there was no inconsistency in Mr Turner's findings concerning the parties' applications for extensions of time. This was because each application concerned distinct claims based upon different criteria, calling for different findings. He further found that the extension of time under cl 54.6 was exercised solely in relation to Shoalhaven's claim for damages. Justice Tamberlin found that Mr Turner displayed no inadequacy of reasoning when determining that Firedam's claim for an extension of time should not be granted.

On 19 April 2010 the Court of Appeal (Beazley, Campbell & Macfarlan JJA) unanimously allowed Firedam's appeal. For broadly similar reasons, their Honours concluded that Mr Turner gave inadequate reasons for rejecting two of Firedam’s claims. This was because he had made inconsistent findings about factual matters which were critical to those claims. They found therefore that it was impossible to discern why those claims had been rejected. The Court of Appeal held that since the relevant clauses of the expert determination were not severable, the determination itself fell outside the Contract and was not binding on the parties.

Subsequent to the grant of special leave in this matter, administrators were appointed to Firedam. This led to Firedam being wound-up by its creditors on 26 November 2010. On 10 December 2010 Justice McDougall granted Shoalhaven leave to proceed against Firedam (in liquidation) in the current proceedings in this Court. This was done pursuant to ss 500(2) and 471B of the *Corporations Act* 2001 (Cth).

The grounds of appeal include:

- The Court of Appeal erred in holding that there was an inconsistency between the expert's reasoning in his expert determination in extending time pursuant to cl 54.6 of the Contract dated 18 October 2005 between Shoalhaven and Firedam when considering Shoalhaven's claim for damages for delay on one hand, and on the other hand his reasoning in rejecting Firedam's claim to an extension of time.

- The Court of Appeal erred in taking the view that an exercise of the power conferred under cl 54.6 operated for all purposes, and in particular, for the benefit of Firedam.

**MOMCILOVIC v THE QUEEN & ORS (M134/2010)**

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| Court appealed from: | Court of Appeal of the Supreme Court of Victoria [2010] VSCA 50 |
| Date of judgment: | 17 March 2010 |
| Date special leave granted: | 3 September 2010 |

After a trial in the County Court of Victoria, the appellant was convicted of one count of trafficking in methylamphetamine. She was sentenced to two years and three months' imprisonment. The drugs in question were found in the appellant's apartment. Under s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('the DPCS Act'), the appellant was deemed to be in possession of the drugs unless she 'satisfie[d] the court to the contrary'. Her partner (Markovski) owned another apartment in the same building but mostly lived with the appellant in her apartment. In evidence given at the appellant's trial, Markovski admitted that he was involved in drug trafficking and said that the drugs were in his possession for that purpose. He denied, as did the appellant in her own evidence, that she had any knowledge of the drugs or the trafficking operation.

The appellant appealed to the Court of Appeal (Maxwell P, Ashley and Neave JJA). She submitted that on ordinary principles of construction, s 5 should be construed as imposing only an evidentiary, rather than a legal, burden on the accused. The Court rejected that argument, finding that the question of construction was straightforward: the phrase '*unless the person satisfies the Court to the contrary*' conveyed unambiguously the legislative intention that the accused should carry the legal burden of establishing, to the Court's satisfaction, that he/she was not in possession of the relevant substance.

The appellant further argued that s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides: '*So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights*', required that s 5 be interpreted as placing only an evidentiary burden on the accused. The Court held s 32(1) does not create a 'special' rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question. Accordingly, when it is contended that a statutory provision infringes a Charter right, the Court held that the correct methodology is as follows:

> Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).
>
> Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.
>
> Step 3: If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified.

The Court found that, on any view of s 32(1) of the Charter, it was not possible to interpret s 5 of the DPCS Act, consistently with its purpose, otherwise than as it had been traditionally interpreted – that is, as imposing a reverse legal onus of proof. The appeal was rejected.

The grounds of appeal include:

- (a) In interpreting s 5 of the DPCS Act as casting on an accused a legal - as opposed to only an evidential burden - of disproof of possession of drugs;
  (b) in concluding that it was not possible, within the meaning of s 32(1) of the Charter to interpret s 5 of the DPCS Act as casting on an accused only an evidentiary - as opposed to a legal - burden of disproof of possession of drugs in circumstances where the Court also concluded (correctly) that, insofar as s 5 of the DPCS Act placed a legal burden of disproof on an accused, it was not compatible with the right to the presumption of innocence in s 25(1) of the Charter and did not, within the meaning of s 7(2) of the Charter, place a reasonable limit on that right.

The Attorneys-General of the Commonwealth, New South Wales, the Australian Capital Territory, Western Australia and South Australia have given notice of their intention to intervene. The Human Rights Law Resource Centre is seeking leave to appear as amicus curiae. The second respondent has filed a summons seeking leave to file a Notice of Contention.