SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 1 MAY 2012

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BARCLAY v. PENBERTHY AND ORS (P55/2011), PENBERTHY AND ANOR v. BARCLAY AND ORS (P57/2011)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2011] WASCA 102

Date of judgment: 10 June 2011

Date of grant of special leave: 9 December 2011

On 11 August 2003, an aircraft, owned by Fugro Spatial Solutions and piloted by its employee, Alec Penberthy, crashed. Two passengers died and three were injured. Each passenger was employed or engaged by Nautronix Holdings which had chartered the flight to conduct surveillance and aerial work in connection with the testing of certain marine technology it was developing. At trial, Murray J found that the accident was caused by the failure of an engine during takeoff and by the pilot's negligent handling of the aircraft in response. The engine failure was found to have been caused by a faulty sleeve bearing. The bearing was not the original but one which had been substituted. The substituted bearing was designed by Aaron Barclay, an aeronautical engineer.

These appeals concern the following question: whether Alec Penberthy and Aaron Barclay owed Nautronix Holdings a duty to exercise reasonable care to prevent it from suffering pure economic loss. The pure economic loss claim was advanced on the basis that the death/injury of Nautronix Holdings' employees led to the inhibition of its capacity to develop and commercially exploit the marine technology. Murray J held that Alec Penberthy, but not Aaron Barclay, owed Nautronix Holdings a duty to exercise reasonable care to prevent it suffering pure economic loss (with Fugro vicariously liable for Alec Penberthy's negligence).

Alec Penberthy and Fugro Spatial Solutions appealed. Part of their appeal involved them, in effect, seeking contribution from Aaron Barclay. In so doing, they submitted that Murray J erred in finding that Aaron Barclay did not owe Nautronix Holdings a duty of care in relation to its pure economic loss. The Court of Appeal agreed. McLure P, giving the judgment of the Court (Martin CJ, McLure P and Mazza J) on this ground, noted that a factor relevant in finding that the relevant duty was owed was that the common law had long recognised an action for loss of services which permitted a master/employer to recover damages from a negligent defendant for pure economic loss caused by an injury to a servant/employee. Her Honour found that whilst that action remained part of the common law of Australia, it was difficult to avoid the conclusion that a negligent defendant must owe to an employer a common law duty to take reasonable care to avoid causing pure economic loss by injuring its employees. The rule in *Baker v Bolton* [1808] 170 ER 1033 prevailed in relation to the deceased employees but not the injured ones.

However, her Honour noted that but for the existence of this common law action, she would have concluded that neither the applicant nor the pilot owed Nautronix Holdings a duty of care to avoid pure economic loss, the subject of the claim. Neither had a direct commercial relationship with Nautronix Holdings. Nautronix Holdings was not vulnerable in the relevant sense. Aaron Barclay had no knowledge relating to the particular flight. There was no finding or evidence to support it that the pilot knew or ought reasonably to have known of the risk that

Nautronix Holdings would suffer economic loss of the type claimed. Nor was there a finding or evidence that Nautronix Holdings was at any greater risk of harm from a crash than any other potential charterer of the aircraft. In the circumstances, to impose a duty of care to avoid pure economic loss was tantamount to bringing pure economic loss largely into line with physical injury to personal property.

The grounds of appeal for each appeal are materially identical and include:

(P55/2011):

- The Court of Appeal erred in holding that Aaron Barclay owed Nautronix Holdings a duty of care in respect of their claim for pure economic loss.

(P57/2011):

- The Court of Appeal erred in holding that the existence of the action for loss of services (*per quod servitium amisit*) was a relevant factor in deciding whether Alec Penberthy owed Nautronix Holdings a duty of care in respect of their claim for pure economic loss.

In each appeal Nautronix Holdings has filed a notice of cross-appeal and a notice of contention. Nautronix Holdings cross-appeals, subject to the grant of special leave, from that part of the judgment of the Court of Appeal as reflected by paragraph 2.2 of the orders made on 10 June 2011. The grounds of cross-appeal are materially identical for each appeal and include:

(P55/2011) & **(P57/2011):**

- The Court of Appeal erred in holding that the rule in *Baker v Bolton* (1808) 1 Camp 493 remains a part of the common law of Australia, or alternatively, that in so far as it remains a part of the common law of Australia, it applies to a cause of action in negligence or the action *per quod servitium amisit.*

The notice of contention filed by Nautronix Holdings in each appeal contends that the decision of the Court of Appeal should be affirmed on the following grounds in addition to those grounds relied on by the Court of Appeal:

(P55/2011):

- The Court of Appeal should have upheld Nautronix Holdings' claim for pure economic loss based upon the action *per quod servitium amisit* as against Aaron Barclay and Alec Penberthy.

(P57/2011):

- The Court of Appeal should have upheld Nautronix Holdings' claim for pure economic loss based upon the action *per quod servitium amisit* as against Aaron Barclay and Alec Penberthy.

- The Court of Appeal should have upheld Nautronix Holdings' claim that Aaron Barclay owed a duty of care at common law to avoid pure economic loss to Nautronix Holdings, irrespective of the existence or otherwise of the action *per quod servitium amisit*.

BURNS v THE QUEEN (S46/2012)

Court appealed from: New South Wales Court of Criminal Appeal [2011] NSWCCA 56

Date of judgment: 1 April 2011

Special leave granted: 10 February 2012

Mrs Natalie Burns and her husband received methadone as part of a programme to treat their drug addictions. In breach of methadone clinic procedures (and of legislation), they pooled their drugs and sold them from their flat. Purchasers either carried the methadone away in a bottle or administered it intravenously whilst at the Burns' flat, using a syringe supplied by Mr & Mrs Burns. On 9 February 2007 Mr David Hay ingested methadone (probably by injection) in the Burns' flat. He was an inexperienced methadone user. Mr Hay had been taking olanzapine (a prescription drug) to treat a psychiatric illness. On the day he visited the Burns' flat he had taken greater than his prescribed dose of olanzapine, which caused him slight drowsiness. After ingesting the methadone he became very drowsy. Mrs Burns said that she wanted him out of the flat. Mr Burns however suggested calling an ambulance. Mr Hay declined and left the flat, accompanied by Mr Burns. The next day, Mr Burns found Mr Hay dead in a toilet in the back yard of their block of flats. The post mortem examination found that Mr Hay's death was caused by the toxic combination of methadone and olanzapine.

Mr & Mrs Burns were tried separately and a jury found each of them guilty of manslaughter. Mrs Burns was found guilty of manslaughter by gross criminal negligence (which required a finding that she had owed Mr Hay a duty of care) and/or by an unlawful and dangerous act. On 23 October 2009 Judge Woods sentenced her to 5 years 8 months imprisonment with a non-parole period of 4 years 6 months. This was for both the manslaughter charge and several offences involving the supply of methadone. Mrs Burns appealed against her conviction for manslaughter.

On 1 April 2011 the Court of Criminal Appeal (McClellan CJ at CL, Schmidt J & Howie AJ) unanimously dismissed Mrs Burns' appeal. Their Honours held that Judge Woods had not erred in refusing to remove from the jury the charge of manslaughter by gross criminal negligence, nor in directing the jury that a supplier of drugs owed the recipient a duty of care. The Court of Criminal Appeal also held that the existence of a duty of care was a matter of law for the judge to determine, and that Judge Woods had correctly instructed the jury on their fact-finding duty. Their Honours found that the jury's verdict, if based on gross criminal negligence, was not unreasonable on the evidence. In the circumstances of Mr Hay's condition deteriorating after he had received methadone, it was extremely negligent for Mrs Burns to require him to be taken out of the flat and abandoned.

Their Honours also held that Judge Woods had not erred in refusing to remove from the jury the charge of manslaughter by an unlawful and dangerous act. They found that Judge Woods had appropriately instructed the jury that it could not find Mrs Burns guilty of manslaughter unless her act or omission had substantially contributed to Mr Hay's death. The Court of Criminal Appeal also

found that it was open on the evidence for the jury to conclude that Mrs Burns (or Mr Burns) had injected methadone into Mr Hay's left arm. Such an act was unlawful and dangerous in the circumstances, and it had led to Mr Hay's death.

The grounds of appeal are:

- The Court of Criminal Appeal erred in holding that the circumstances that arose in this case were capable of giving rise to a duty of care.

- The Court of Criminal Appeal should have held that the directions of the trial judge as to duty of care and breach were erroneous.

- The Court of Criminal Appeal should have held that the directions of the trial judge as to causation were erroneous.

- The Court of Criminal Appeal should have held that causation could not be established on either limb of involuntary manslaughter.

P.T. GARUDA INDONESIA LTD v. AUSTRALIAN COMPETITION & CONSUMER COMMISSION (S343/2011)

Court appealed from: Full Court of the Federal Court of Australia [2011] FCAFC 52

Date of judgment: 19 April 2011

Date special leave granted: 7 October 2011

The Australian Competition and Consumer Commission ("ACCC") commenced separate proceedings against PT Garuda Indonesia Ltd ("Garuda"), Malaysian Airline System Berhad ("MAS") and its wholly owned subsidiary, Malaysian Airlines Cargo Sdn Bhd ("MAS Cargo"). The ACCC alleged that each airline was party to price fixing, market sharing and entering into anti-competitive cartels with other airlines. The ACCC alleged that that cartel conduct contravened s 45 of the *Trade Practices Act* 1974 (Cth) ("the Act"). It therefore sought injunctions, declarations and civil pecuniary penalties against the airlines.

On 2 June 2010 Justice Jacobson held that none of the airlines was a separate entity of a foreign State within the meaning of s 3(1) of the *Foreign States Immunities Act* 1985 (Cth) ("the Immunities Act"). His Honour also held that if any of the airlines had been a separate entity, they would have been entitled to claim immunity from the jurisdiction of the Court under section 9 of that Act. This was because their cartel conduct was outside the exception from immunity (concerning commercial transactions or activities) created by s 11(3) of the Immunities Act.

Garuda (and the other airlines) each applied for leave to appeal from Justice Jacobson's judgment that none of them was entitled to immunity under the Immunities Act. For its part, the ACCC filed a notice of contention, challenging his Honour's conclusion that the alleged cartel conduct was not within the meaning of a “commercial transaction” in s 11(3) of the Immunities Act.

On 19 April 2011 the Full Federal Court unanimously dismissed the airlines' appeals. Justice Rares (with whom Justices Lander and Greenwood broadly agreed) held that Justice Jacobson had erred in holding that the definition of “separate entity” required a foreign State to both own and exercise a tangible level of day-to-day control over the corporation in question. His Honour held that Garuda is a State owned airline, established on a corporate model, under [Indonesian] Law No 19 for State owned companies. It is the means by which Indonesia carries on an airline business. It followed therefore that Garuda was a separate entity of Indonesia.

Justice Rares further held that the definition of “commercial transaction” in s 11(3) of the Immunities Act should be given its natural and ordinary meaning. So too should the expression “in so far as the proceeding concerns a commercial transaction” in s 11(1).

In this matter, the ACCC had alleged that each airline had offered its cargo freight services at prices determined by reference to an antecedent arrangement with members of a price fixing cartel. Such alleged conduct was part and parcel of the airline’s ordinary commercial transactions with its consumers. It was also an

activity of a commercial or trading kind, designed to maximise the cartel participants' profits at the expense of other market participants. Such conduct, if proved, was clearly a commercial transaction within s 11. It followed therefore that the airlines' claim to immunity from the jurisdiction of the Court failed.

The grounds of appeal are:

- The Court erred in concluding that the proceeding brought against Garuda by the Respondent is a proceeding concerning a commercial transaction within the meaning of section 11 of the Act with the result that Garuda was not immune from the exercise of jurisdiction by the Federal Court at [52] – [67] (Lander and Greenwood JJ) and [195] – [228] (Rares J).

- The Court should have held that the commercial transaction exception to Garuda’s immunity under the Act does not apply.

MANSFIELD v. THE QUEEN AND ANOR (P60/2011), KIZON v. THE QUEEN AND ANOR (P61/2011)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2011] WASCA 132

Date of judgment: 16 June 2011

Date of grant of special leave: 9 December 2011

The appellants, Nigel Mansfield and John Kizon, were jointly tried upon an indictment containing 52 counts. Nine of the counts alleged a conspiracy between the appellants pursuant to s 11.5 of the *Criminal Code* (Cth) to commit an offence contrary to s. 1311(1) of the *Corporations Act* 2001 (Cth) ("the Act") by contravening the insider trading provisions of s. 1002G(2)(b) of the Act (before 11 March 2002) and s 1043A(1)(d) of the Act on and after 11 March 2002. Five of the counts alleged a substantive insider trading offence against Mr Kizon alone and the remaining counts alleged a substantive insider trading offence against Mr Mansfield alone. A number of substantive counts were alternatives to the conspiracy counts.

The Crown filed and served particulars of the information which it alleged constituted the "inside information" for each count. The "inside information" allegedly concerned the affairs of two publicly listed companies, Adultshop.com.Ltd ("ASC") and My Casino Ltd ("MYC"). The alleged inside information did not include the fact that it was allegedly sourced from Malcolm Day, the CEO of ASC or Michael O'Donnell, the managing director of MYC. The source was only relevant to the issue of materiality.

The Crown opened its case before Wisbey DCJ on 18 January 2010 and closed it on 12 March 2010. The Crown did not call Malcolm Day or Michael O'Donnell as witnesses. The Crown conceded with respect to all but four counts that the evidence could not satisfy a jury beyond reasonable doubt that all of the particulars of the alleged inside information were fact. On 15 March 2010 counsel for the appellants submitted that there was no case to answer on all counts on the grounds that "information" for the purpose of the insider trading offences of the Act did not include falsehoods or lies.

On 19 March 2010 Wisbey DCJ ruled that "information" for the purpose of the relevant insider trading offences of the Act "must, in general circumstances, be a factual reality". His Honour directed verdicts of acquittal on all counts, except counts 2, 3, 19 and 20. The jury subsequently acquitted Mr Mansfield on those counts.

The Crown appealed pursuant to s 24(2)(e)(i) of the *Criminal Appeals Act* 2004 (WA) against the judgments of acquittal. The Court of Appeal (McLure P, Buss JA and Murray J) by majority (McLure P dissenting) allowed the Crown appeal and set aside the judgments of acquittal. Buss JA and Murray J held that the fact that information is untrue did not cause it to cease to be information. Pursuant to orders sought by the Crown, a new trial of Mr Kizon and Mr Mansfield was ordered in respect of the ASC counts only.

The grounds of appeal are materially identical in each appeal and include:

P60/2011

- The Court of Appeal erred in law finding that ‘information’ for the purpose of the offence created (by the former) s 1002G of the Act and “inside information” for the purpose of the offence created by s 1043A of the Act could include falsehoods, lies or matters devoid of factual reality.

P61/2011

- The court below erred in failing to hold and find that it is an element of the offence of insider trading created by s 1002G of the Act and s 1043A of the Act that the inside information in the possession of the accused correspond in whole or in part with the actual information in the possession of the entity entitled to have or use it.

PAPACONSTUNTINOS v HOLMES A COURT (S319/2011)

Court appealed from:	New South Wales Court of Appeal [2011] NSWCA 59
Date of judgment:	21 March 2011
Date of grant of special leave:	2 September 2011

In 2005 the Respondent (and others) made a bid for the controlling interest in the South Sydney Rugby League Club ("Souths"). That bid was bitterly opposed by elements at Souths, including by the Appellant At that time, the Appellant was one of the directors of South Sydney Leagues Club, a licenced club associated with Souths. He was also an employee of the Construction, Forestry, Mining and Energy Union ("CFMEU"). The bid itself was put to a vote of Souths' members at an Extraordinary General Meeting ("EGM") on 19 March 2006. It ultimately succeeded.

Two days prior to the EGM, the Respondent wrote to Mr Andrew Fergusson, (the state secretary of the CFMEU) and made certain allegations about the Appellant. The primary judge found that that letter contained three defamatory imputations. One accused the Appellant of repeating misleading information about the bid ("the misleading information allegation") and the others accused him of the misuse of Souths' funds ("the corruption allegations"). The corruption allegations related to the employment (by Souths) of the Appellant's son several years earlier. The Respondent defended the proceedings on the basis that the matter complained of was published on an occasion of qualified privilege.

On 4 September 2009 Justice McCallum rejected the Respondent's defence. While her Honour found that the CFMEU (as the Appellant's employer) had a limited interest in receiving the information complained of, she also held there was no pressing need for the Respondent to protect his interests (or that of others associated with the bid) by voluntarily publishing it.

On 21 March 2011 the Court of Appeal (Allsop P, Beazley, Giles, Tobias & McColl JJA) unanimously allowed the Respondent's appeal. Their Honours held that Justice McCallum had erred in rejecting the defence of common law qualified privilege. This was due to her Honour's reference to the voluntary nature of the matter complained of and the absence of any pressing need for its publication. They found that neither was decisive on the issue of whether the defence of qualified privilege was made out.

The Court of Appeal further held that Justice McCallum had erred in concluding that the Respondent had not established the reciprocity of interest necessary to establish the defence of qualified privilege. Their Honours found that the Respondent had in fact proved that necessary interest. He had a tangible interest in ensuring that the Appellant stopped spreading misleading information about the EGM. The CFMEU also had an interest in knowing about the Appellant's character. Their Honours further held that the misleading information allegation and the corruption allegations were germane to the occasion of qualified privilege. This is because, in the Respondent's mind, the latter explained the former.

The grounds of appeal include:

- The Court of Appeal erred in finding that, in the case of a volunteered statement, where reciprocal interests were relied upon (as distinct from reciprocal duty and interest), the defence of qualified privilege at common law did not require the defendant to show a pressing need to communicate the defamatory matter on the occasion in question.
- The Court of Appeal erred in finding that a pressing need to make the communication was not a requirement for the defence once the defendant had shown that, otherwise, he had an interest in the communication of the defamatory matter.