

SHORT PARTICULARS OF CASES
APPEALS

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CANTARELLA BROS PTY LTD v MODENA TRADING PTY LTD (S67/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 110

Date of judgment: 30 September 2013

Date of grant of special leave: 14 March 2014

The Appellant (“Cantarella”) produces coffee from beans which it imports. It promotes and sells its coffees using various trade marks (which include “Vittoria”). In 2000 it successfully obtained registration of a trade mark over “Oro” and in 2001 it did the same for “Cinque Stelle”. Those words mean, respectively, “Gold” and “Five Stars” in Italian. Cantarella widely promoted its Oro branded coffee, which was sold in supermarkets. Its Cinque Stelle coffee was served in many restaurants and by Qantas.

The Respondent (“Modena”) imports and markets coffee supplied by an Italian company, Caffè Molinari SpA (“Molinari”). Molinari’s coffees include blends named “Oro” and “Cinque Stelle”, which are sold in Italy and are exported to many countries. Those coffees have been imported into Australia since 1996 and 1998 respectively. Many other producers and importers of coffee also use the word “Oro” in their brands in Australia.

Cantarella sued Modena for infringement of its registered trade marks. Modena cross-claimed, seeking the cancellation of each trade mark’s registration. On 25 February 2013 Justice Emmett dismissed the cross-claim and declared that Modena had infringed Cantarella’s trade marks. His Honour held that the words “Oro” and “Cinque Stelle” had been duly registered, as they were sufficiently distinctive. This was because only a small minority of people in Australia would understand the meaning of the words and thus the allusions to quality made by them.

On 30 September 2013 the Full Court of the Federal Court (Mansfield, Jacobson & Gilmour JJ) unanimously allowed Modena’s appeal. Their Honours held that Justice Emmett had erred when applying s 41(3) of the *Trade Marks Act* 1995 (Cth) (“the Act”) by focusing on the knowledge of the general population. The focus ought to have been on the knowledge of traders in coffee. Their Honours found that Italian was so commonly used in relation to coffee in Australia that traders other than Cantarella would readily understand, and indeed had long used, the words “Oro” and “Cinque Stelle” to signify quality of goods. The Full Court then ordered that the registration of the trade marks of those words be cancelled.

The grounds of appeal include:

- The Full Court erred in finding that neither the sign “Oro” nor the sign “Cinque Stelle” was to any extent inherently adapted to distinguish the designated goods of Cantarella from the goods of other persons within the meaning of sub-section 41(3) of the Act.

MAXWELL v. HIGHWAY HAULIERS PTY LTD (P12/2014)

Court appealed from: Court of Appeal of the Supreme Court of
Western Australia [2013] WASCA 115

Date of judgment: 6 May 2013

Date of grant of special leave: 14 March 2014

The primary issue in this appeal is the proper construction of s 54 of the *Insurance Contracts Act 1984 (Cth)* (“the Act”).

The respondent, Highway Hauliers Pty Ltd (“the Insured”), carried on a trucking business and operated a fleet of trucks and trailers that transported freight between the Eastern and Western states of Australia. The appellant, Maxwell, is the authorised and nominated representative of various Lloyds underwriters. The Insured had a contract of insurance with Maxwell that covered accidental loss or damage to all vehicles owned, leased or acquired by the Insured. The contract of insurance also included a provision which stated that no indemnity was to be provided under the policy, unless all drivers met certain conditions, including obtaining a People and Quality Services driver profile score of at least 36 (“PAQS test”).

In June 2004 and April 2005, two trucks were damaged in separate incidents, and the Insured made two claims under the relevant insurance contract. Maxwell rejected the claims on the basis that at the time of the accidents each vehicle was being driven by a driver who had not met the requirements of the PAQS test. The Insured sued Maxwell for indemnity against repair costs for the trucks and trailers involved, and also claimed damages for breach of the contract of insurance for the loss of profits for not being able to use the damaged trucks.

At first instance, Corboy J found that Maxwell was obliged to indemnify the Insured by reason of s 54(1) of the Act. Section 54 relevantly provides that where the effect of the policy would be that the insurer may refuse to pay a claim (in whole or in part) by reason of some act of the insured or of some other person, being an act that occurred after the policy was entered into, the insurer may not refuse to pay the claim by reason only of that act, but its liability is reduced by the amount that fairly represents the prejudice to the insurer's interests. However, if the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided, the insurer may refuse to pay the claim. It was accepted at trial that the failure of the drivers to complete a PAQS test had not caused or contributed to any losses incurred by the Insured, and so s 54(2) was not considered.

Maxwell's appeal was dismissed by the Court of Appeal (McLure P, Pullin and Murphy JJA). In considering the appropriate statutory construction of s 54(1) the Court arrived at a different result to the Queensland Court of Appeal when applying it to a similar scenario.

The grounds of appeal include:

- The Court below erred in holding that the appellant must indemnify the respondent as the failure of the respondent (or its employees) to comply with the relevant endorsement to the insurance contract was an omission for the purposes of sub-s 54(1) of the Act and that the appellant was not entitled to refuse to pay the claim of the respondent by reason of that omission.
- The Court below erred in its construction of sub-s 54(1) of the Act in giving the provision an operation that extended the scope of cover provided by the insurance contract.

KENTWELL v THE QUEEN (S113/2014)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCCA 266

Date of judgment: 14 November 2013

Date of grant of special leave: 16 May 2014

On 15 September 2008 the Appellant was convicted of the following offences:

- (i) recklessly causing grievous bodily harm to the Complainant, contrary to s 35(2) of the *Crimes Act* 1900 (NSW) ("the Act") (Count 1);
- (ii) maliciously destroying a glass candle holder, the property of the Complainant, contrary to s 195(1)(a) of the Act (Count 3);
- (iii) having sexual intercourse with the Complainant without her consent, contrary to s 61I of the Act (Count 4);
- (iv) assaulting the Complainant, contrary to s 61 of the Act (Count 5);
- (v) having sexual intercourse with the Complainant without her consent (on another date), contrary to s 61I of the Act (Count 7).

On 20 February 2009 Judge Johnstone sentenced the Appellant to a non-parole period of 8 years imprisonment, with an additional term of 4 years. Upon appeal, the Appellant submitted that Judge Johnstone made a so-called "*Muldrock error*" (see *Muldrock v The Queen* (2011) 244 CLR 120 with respect to his sentencing. As a preliminary however, he also required an extension of time in which to seek leave to appeal.

On 14 November 2013 the Court of Criminal Appeal (Hoeben CJ at CL, Johnson & Bellew JJ) unanimously agreed that Judge Johnstone had committed a *Muldrock error* with respect to the sentencing of counts 4 and 7. (They also agreed that there were additional, immaterial errors made with respect to those counts.) Their Honours further found that the trial judge had erred in his conclusion that the Appellant's mental illness had not contributed to his offending.

Despite these material errors however, the Court of Criminal Appeal still refused the Appellant's application for an extension of time in which to appeal his sentence. This was after it had considered all of the relevant factors. These included the reason for the delay, the interests of the Complainant and whether a substantial injustice would result if an extension of time were refused. The Court of Criminal Appeal concluded that, although material error had been established, none of the matters advanced on behalf of the Appellant supported a conclusion that there had been a substantial injustice arising out of the sentence imposed, or that some other sentence was warranted in law.

The grounds of appeal include:

- The Court of Criminal Appeal erred in:
 - a) refusing leave to extend the time within which to seek leave to appeal against the severity of sentence under s 5(1) and s 10 *Criminal Appeal Act* 1912 (NSW) by imposing a test on the Appellant of establishing "*whether, if an extension of time were refused, substantial injustice would result*" (at [67], [90]);

- b) failing to grant an extension of time and leave to appeal where several material errors in the exercise of the sentencing discretion were found to have been established.

O'GRADY v THE QUEEN (S114/2014)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCA 281

Date of judgment: 18 November 2013

Date of grant of special leave: 16 May 2014

In July 2010 the Appellant was convicted of an offence of specially aggravated break and enter, contrary to s 112(3) of the *Crimes Act* 1900 (NSW). That offence was committed in the company Mr Bradley Carter and Mr Robert Puha. The Appellant was subsequently sentenced by Judge Murrell to a non-parole period of 5 years and 6 months imprisonment, with an additional term of 3 years and 6 months.

In June 2013 the Appellant sought an extension of time in which to seek leave to appeal against sentence. (A separate appeal against conviction was dismissed on 30 September 2012.) The Appellant submitted before the Court of Criminal Appeal ("CCA") that Judge Murrell had made a "*Muldrock*" sentencing error (see *Muldrock v The Queen* (2011) 244 CLR 120. This was through her Honour's adoption of a two stage approach to sentencing in which, having determined the standard non-parole period, she considered if there were reasons to depart from it. Before the CCA, the Respondent conceded that Judge Murrell had in fact erred in the manner for which the Appellant contended.

On 18 November 2013 the CCA (Hoeben CJ at CL, Johnson & Bellew JJ) unanimously refused the Appellant's application for an extension of time in which to appeal against his sentence. This was despite their Honours accepting the Respondent's concession that a "*Muldrock*" error had been made out.

The CCA noted that Judge Murrell had considered the Appellant's youth and his (relatively) minor criminal history when she approached the issue of sentencing. Her Honour had also considered the leading, vicious role the Appellant had played in the offence (as compared to his accomplices), along with the strong subjective nature of his case. This latter point arose from the Appellant's witnessing of his partner's murder approximately 10 months prior to this offence being committed.

The CCA considered that these factors, when assessed in conjunction with the substantial delay in bringing the application for leave to appeal the sentence, did not warrant a lesser sentence being imposed. Their Honours found that in refusing time, no substantial injustice would result.

The grounds of appeal include:

- The Court of Criminal Appeal erred in:
 - a) refusing leave to extend the time within which to seek leave to appeal against the severity of sentence under s 5(1) and s 10 *Criminal Appeal Act* 1912 (NSW) by imposing a test on the Appellant of establishing "*whether, if an extension of time were refused, substantial injustice would result*" (at [67], [90]);
 - b) failing to grant an extension of time and leave to appeal where material error in the exercise of the sentencing discretion was found to have been established.

ALPHAPHARM PTY LTD v H LUNDBECK A/S & ORS (S97/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 129

Date of judgment: 18 November 2013

Date of grant of special leave: 11 April 2014

Australian Patent No. 623144 (“the Patent”) claims the (+)-enantiomer component of citalopram, known as “escitalopram”, certain salts of it and methods for preparing it. The Patent was held by H Lundbeck A/S (“Lundbeck”), which had applied for it on 13 June 1989. Citalopram hydrobromide is marketed by Lundbeck as the anti-depressant drug Cipramil. Cipramil was first included in the Australian Register of Therapeutic Goods (“the ARTG”) on 9 December 1997. Lundbeck also markets escitalopram oxalate, as an anti-depressant drug known as Lexapro, which was first included in the ARTG on 16 September 2003 (“the Lexapro date”).

In December 2003 Lundbeck applied, under s 70 of the *Patents Act* 1990 (Cth) (“the Act”), to extend the term of the Patent. In purported compliance with s 71(2) of the Act, that application was made within six months of the Lexapro date. The Commissioner of Patents (“the Commissioner”), after finding that the relevant date for the application’s timeliness was the Cipramil date, not the Lexapro date, nevertheless extended the term of the Patent to 9 December 2012. The Appellant (“Alphapharm”) challenged that extension, on the basis that Lundbeck’s application had not been made within the time limit imposed by s 71(2) of the Act. That challenge succeeded in June 2008, when the Federal Court ordered that the Patent’s extension of term be removed from the Commissioner’s register. An appeal by Lundbeck to the Full Court of the Federal Court was dismissed, as was a subsequent application for special leave to appeal to this Court. The resulting position was that, by virtue of s 71(2)(c) of the Act, the latest within-time date on which Lundbeck could have applied to the Commissioner to extend the term of the Patent was 26 July 1999.

On 12 June 2009 Lundbeck lodged an application (“the Time Application”) with the Commissioner for an extension of time (from 26 July 1999) in which to apply afresh to extend the term of the Patent. On 13 June 2009 the Patent expired, upon which Alphapharm and the Third, Fourth and Fifth Respondents (together, “the Competitors”) immediately launched their own generic products containing escitalopram. On 1 June 2011 the Time Application was granted by a delegate of the Commissioner. The Competitors each applied to the Administrative Appeals Tribunal (“AAT”) for a review of that decision.

On 4 December 2012 the AAT (Deputy President Tamberlin & Senior Member Nicoletti) affirmed the delegate’s decision. The AAT found that Lundbeck had not acted unreasonably by relying on the Lexapro date in its first extension-of-term application, nor by its delay in making the Time Application (in the belief that the Federal Court’s orders of June 2008 would be set aside on appeal). The AAT also found that the Commissioner’s power under s 223(2) of the Act to extend time for a “relevant act” had been properly exercised to grant the Time Application.

The Competitors together appealed to the Federal Court.

On 18 November 2013 a Full Court of the Federal Court (Jessup, Jagot & Yates JJ) unanimously dismissed the Competitors' appeal. Their Honours held that the AAT, having duly considered s 223(11) of the Act and reg 22.11(4)(b) of the *Patents Regulations* 1991 (Cth) ("the Regulations") had correctly found that the Commissioner had power under s 223(2) to extend the time limit set by s 71(2) of the Act. The Full Court found that the various conclusions reached by the AAT were open to it on the evidence before it. Their Honours also found that the AAT's exercise of its discretion in granting Lundbeck a ten-year extension of time had not miscarried.

On 13 June 2014 the Institute of Patent and Trade Mark Attorneys filed a summons, seeking leave to intervene in this matter as *amicus curiae*.

The ground of appeal is:

- The Full Court erred in finding that s 223(2)(a) of the Act conferred power on the Commissioner to extend the time within which Lundbeck could apply under s 70(1) of the Act for an extension of the term of the Patent having regard to the provisions of s 223(11) of the Act and reg 22.11(4)(b) of the Regulations.

**PLAINTIFF S4/2014 v MINISTER FOR IMMIGRATION AND BORDER
PROTECTION & ANOR (S4/2014)**

Date application for an order to show cause filed: 6 January 2014

Date special case referred to Full Court: 30 April 2014

The Plaintiff is a stateless person originally from Myanmar. He arrived in Australia on 13 December 2011 without a visa. A Protection Obligations Evaluation (“POE”) carried out by the department of the First Defendant (“the Minister”) determined that the Plaintiff had refugee status. The Plaintiff however was prevented from making a valid application for a protection visa by s 46A(1) of the *Migration Act* 1958 (Cth) (“the Act”).

On 6 January 2014 the Plaintiff commenced proceedings in this Court, seeking orders to compel the Minister to exercise his power under s 46A(2) of the Act to enable the Plaintiff to make a valid application for a protection visa.

On 4 February 2014 the Minister granted the Plaintiff both a temporary safe haven (“TSH”) visa and a temporary humanitarian concern (“THC”) visa. The THC visa lasts for three years, whereas the TSH visa was in force for only seven days. The Minister gave no prior notice to the Plaintiff of his intention to grant those visas.

As the Plaintiff has held a TSH visa, ss 91J and 91K of the Act operate to prevent him from making a valid application for any other type of visa, including a protection visa. The Plaintiff now challenges the validity of the Minister’s decision to grant him a TSH visa. The Plaintiff contends that since the POE process involved an assessment against the criteria for a protection visa set out in s 36(2) of the Act, it was not open to the Minister to take a step that has resulted in his failure to consider whether to permit the Plaintiff to apply for a protection visa. The Plaintiff contends that the Minister, instead of granting him a TSH visa, should have given him an opportunity to make submissions that he be granted a different type of visa (resulting in his being able to apply for a protection visa).

The parties to the proceeding in this Court filed a special case, which Chief Justice French referred to the Full Court for hearing.

The questions of law stated in the special case are:

1. Was the grant of the TSH visa to the Plaintiff invalid?
2. If the answer to question 1 is “yes”, was the grant of the THC visa to the Plaintiff invalid?
3. If the answer to question 2 is “yes”, is the Minister bound to determine that s 46A(1) of the Act does not apply to an application by the Plaintiff for a protection visa?
4. If the answer to question 3 is “no”, is the Minister bound to determine whether s 46A(1) of the Act does not apply to an application by the Plaintiff for a protection visa?
5. What, if any, relief sought in the Plaintiff’s further proposed statement of claim filed 8 April 2014 should be granted to the Plaintiff?
6. Who should pay the costs of the proceeding?

VERSI v THE QUEEN (S296/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCCA 206

Date of judgment: 14 November 2013

Date referred to Full Court: 11 April 2014

In June 2011 Mr Peter Versi was charged with offences involving sexual misconduct against his step-daughter, "SD2", in the 1980s. On 31 August 2011 a jury found Mr Versi guilty on two of the four charges. Both offences occurred when SD2 was about 12 years old. The first was an act of indecency by Mr Versi having SD2 rub medicinal cream on his genitals (count 2), the second was sexual intercourse with a child under his authority (count 3).

Evidence ruled admissible in the trial included that of SD1, who had been a step-daughter of Mr Versi's during his previous marriage. SD1 gave evidence of an incident which she alleged occurred when she was about 13 years old (approximately seven years prior to the events giving rise to counts 2 and 3). On that occasion, she followed instructions given by Mr Versi which he said would help ease a hernia in his groin. That involved SD1 holding Mr Versi's erect penis while he moved his hips. Judge Taylor admitted SD1's evidence as coincidence evidence in respect of count 2. His Honour then instructed the jury that they must not use SD1's evidence in considering any of the other three counts. The prosecution suggested to the jury that it consider count 2 first and, after any finding of guilt on that count, that it then consider the other counts on the basis that Mr Versi had an active sexual interest in SD2. Judge Taylor later directed the jury that, if it found Mr Versi guilty on any of the counts, it could proceed to find that Mr Versi had a sexual interest in SD2 on which he had acted, a finding which in turn it could use as tendency evidence in relation to any of the other counts.

After receiving the jury's verdicts, on 29 March 2012 Judge Taylor sentenced Mr Versi to imprisonment for two and a half years, with a non-parole period of a year and a half. Mr Versi appealed against his conviction, on grounds that included a challenge to the admission of SD1's evidence. That was on the basis that its probative value in relation to count 2 was outweighed by its prejudicial effect on the jury's consideration of the evidence relating to the other counts.

On 14 November 2013 the Court of Criminal Appeal ("CCA") (Basten JA, Adams & Latham JJ) unanimously dismissed Mr Versi's appeal. Their Honours held that although Judge Taylor had incorrectly directed the jury to assess SD1's evidence in isolation before making use of it in deciding upon count 2, that error had not given rise to a miscarriage of justice. This was because the evidence of SD2 (in respect of count 2) and that of SD1 was mutually corroborative. The CCA found that there was nothing to suggest that the jury, in finding Mr Versi guilty on count 3, had made use of SD1's evidence contrary to Judge Taylor's direction not to use it directly in relation to counts 1, 3 or 4.

On 11 April 2014 Justices Kiefel and Keane referred this matter into an enlarged bench to be argued as if it were an appeal.

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

- Was SD1's evidence inadmissible by virtue of ss 98(1), 137 or 101(2) of the *Evidence Act 1995* (NSW)?
- Was SD1's evidence treated improperly once admitted, by being given undue weight and by then being used to support a finding of guilt on a count for which it was not admitted?
- If the answer to either of the above questions is "yes", was there a miscarriage of justice?