SHORT PARTICULARS OF CASES
APPEALS

WEEK COMMENCING 1 DECEMBER 2014

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STATE OF QUEENSLAND v. CONGOO & ORS (B39/2014)

Court appealed from: Full Court of the Federal Court of Australia [2014] FCAFC 9

Date of judgment: 21 February 2014

Date special leave granted: 4 September 2014

In September 2001, the Bar Barrum People (the first respondents) made an application for a determination of native title over land on the Atherton Tableland in Far North Queensland. During the Second World War, extensive portions of that land were subject to five successive military orders ("the military orders"), made pursuant to the *National Security Act 1939* (Cth) and its Regulations. The issue is whether these orders impacted on the first respondents' native title.

In August 2013, Justice Logan referred the following questions, together with a special case, to the Full Federal Court:

1. Whether the military orders made under the National Security Regulations were an acquisition of the property of the Bar Barrum People otherwise than on just terms contrary to s 51(xxxi) of the Constitution;
2. If yes, whether the Regulations underpinning the military orders constitute "past acts" under the *Native Title Act 1993* (Cth) ("the NTA") and, if so, whether those past acts were validated under the NTA; and
3. Whether making the military orders extinguished native title rights and, if not, whether being in occupation pursuant to the military orders, extinguished native title rights and interests.

A majority of the Full Court (North and Jagot JJ, Logan J dissenting) held that the military orders did not extinguish any native title rights of the Bar Barrum People. The majority distinguished the effect of the military orders on native title from the effect of leases and fee simple grants, and held that it was apparent from the legislative scheme that all underlying rights and interests should continue.

Justice Logan (dissenting) found that when the military orders were made, they were of indefinite duration, proprietary in character and comprehensive in the rights they conferred on the Commonwealth, and that they were inconsistent with the continued existence of any of the native title rights claimed. His Honour further found that the Commonwealth took possession of the special case land merely by making the military orders. It was not necessary for the Commonwealth to occupy the land before taking possession of it.

The grounds of appeal are:

- The Full Federal Court erred in holding that the military orders made pursuant to regulation 54 of the *National Security (General) Regulations (Cth)* did not have the effect of extinguishing all the native title rights and interests with respect to the special case land.

- The Full Federal Court erred in holding that regulation 54 of the *National Security (General) Regulations (Cth)* did not allow the Commonwealth to take possession of the special case land simply by the making of orders purporting to take possession of that land.

COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE v ZHAO & ANOR (M92/2014)

Court appealed from: Court of Appeal, Supreme Court of Victoria [2014] VSCA 137

Date of judgment: 27 June 2014

Date special leave granted: 12 September 2014

The second respondent ('Jin') was charged with dealing with the proceeds of crime. The Crown alleges that Jin is a brothel owner who aided and abetted the commission of offences by dealing with cash taken from illegal sex workers. The charges are listed for trial next year. The first respondent ('Zhao') is Jin's wife but she has not been charged.

Zhao is the registered proprietor of a property in Donvale and Jin owns an apartment in Southbank. On 2 July 2013, a judge of the County Court made orders on the application of the appellant ('the Commissioner') pursuant to ss 25 and 26(4) of the *Proceeds of Crime Act* 2002 (Cth) ('the POC Act') to restrain the disposition of the properties and other personal items. The Commissioner then filed an application for forfeiture of the property pursuant to s 49 of the POC Act. On 22 November 2013, Jin and Zhao filed applications for a stay of the forfeiture proceedings until after the hearing and determination of the charges pending against Jin, on the grounds that if Jin was required to make a detailed affidavit or be cross examined regarding the purchase of the property and source of any relevant funds, there would be a real risk that any such evidence would prejudice the criminal case.

Judge Lacava rejected the stay applications. His Honour found that there was no evidence as to how the respondents giving evidence in the forfeiture proceedings might give rise to a real risk of prejudice in the criminal proceedings, and that a stay of those proceedings would frustrate the clear intention and purpose of the POC Act.

Jin and Zhao's appeal to the Court of Appeal (Nettle, Tate and Beach JJA) was successful. The Court considered it was bound by the decision of the Queensland Court of Appeal in *Director of Public Prosecutions (Cth) v Jo* (2007) 176 A Crim R 17 that, although s 319 of the POC Act provides that, the fact that criminal proceedings have been instituted is not a basis to stay forfeiture proceedings under the POC Act, an accused should be granted a stay of forfeiture proceedings if he or she can demonstrate that matters to be raised in those proceedings may prejudice his or her defence in the criminal proceedings. The Court rejected a submission by the Commissioner that the New South Wales Court of Appeal had cast doubt on the reasoning in *Jo* in *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581.

The Court of Appeal noted that in *Lee v The NSW Crime Commission* (2013) 302 ALR 363 ('***Lee No 1***'), a majority of this Court spoke in terms which implied that the privilege against self-incrimination was not as broad as *Jo* held that it was. The Court further noted that more recently, however, this Court had spoken unanimously in *Lee v The Queen* (2014) 308 ALR 252 ('***Lee No 2***') in terms which implied that, where the subject matter of forfeiture proceedings is substantially the same as the subject matter of criminal proceedings, unless the forfeiture

proceedings are stayed until completion of the criminal proceedings, the Crown may be advantaged in a manner which fundamentally alters its position vis-à-vis the accused and therefore renders the trial of the criminal proceedings unfair.

The Court held that it followed from the logic of ***Lee No 2*** that it was bound to do what it could to protect the accused's right to require the Crown to prove its case without the accused's assistance. And, if the facts were such that the only way in which that could be achieved was by staying forfeiture proceedings until after the related criminal proceedings had been heard and determined, it was bound to adopt that course.

The Court noted that there had been a contested committal hearing and the date for trial of the criminal charges had been fixed. Consequently, Jin had a fair idea of what the Crown would allege and seek to prove, and a fair idea of the evidence which the Crown might adduce. Thus, there was not only a prima facie significant overlap between the subject matter of the charges and the matters to which he would need or wish to depose in the forfeiture proceedings, but importantly he could not defend the forfeiture proceedings without telegraphing his likely defence of the criminal proceedings. It followed that, if the forfeiture proceedings were to precede the criminal proceedings, the Crown would be informed in advance of trial of Jin's likely defence to the criminal charges. The Court interpreted ***Lee No 2*** to imply that, were that to occur, the criminal charges would be altered in a fundamental respect contrary to Jin's privilege against self-incrimination. Since that was not expressly, or by necessary implication, provided for by statute, the Court must do what it could to prevent it. The Court of Appeal therefore ordered a stay of the forfeiture proceedings until the hearing and determination of the criminal proceedings.

The grounds of appeal include:

- The Court below erred when it failed to apply properly the decisions of this Court in *Lee v The NSW Crime Commission* (2013) 302 ALR 363 and *Lee v The Queen* (2014) 308 ALR 252, and held erroneously that the latter decision required it to stay the Commissioner's and the respondents' applications under the Act to prevent any further abrogation of the privilege against self-incrimination.

- The Court below erred when, in determining the principles applicable to a stay of *in rem* forfeiture proceedings under the Act, it did not apply the test of whether there was a real risk to the administration of justice in allowing the trial to continue with parallel criminal proceedings, but instead substituted a test of whether there was an overlap in the subject matter between the two proceedings, and concluded that an affirmative answer required a mandatory stay.

CMB v ATTORNEY GENERAL FOR NEW SOUTH WALES (S257/2014)

Court appealed from: New South Wales Court of Criminal Appeal
[2014] NSWCCA 5

Date of judgment: 19 March 2014

Special leave granted: 12 September 2014

In October 2011 the Appellant was charged with offences of indecent and sexual assault against his daughter at a time when she was aged between 10 and 12 ("the first charges"). The Appellant was then referred for an assessment of his suitability to enter a program for the treatment of child sex offenders ("the Program"), which had been established under the *Pre-Trial Diversion of Offenders Regulation* 2005 (NSW) ("the Regulation"). The subsequent repeal of the Regulation caused the Program to be unavailable for any charges laid after 1 September 2012.

While undergoing assessment for the Program, the Appellant disclosed additional acts of which the police had been unaware. Such full disclosure was a condition of entry into the Program. After the Appellant had later informed the police of that further disclosure, in November 2012 he was charged with further sexual offences ("the second charges"). He later pleaded guilty to both the second charges and the first charges.

When before the District Court for sentencing, in respect of the first charges the Appellant gave an undertaking to participate in the Program for two years. In respect of the second charges, Judge Ellis imposed a three-year good behaviour bond ("the sentence"). This was with the agreement of the prosecutor, who had also inadvertently misled his Honour as to the operation of the Regulation on any further disclosures made by an offender.

After the Director of Public Prosecutions decided not to appeal against the sentence, the Respondent ("the Attorney") appealed.

The Court of Criminal Appeal ("CCA") (Ward JA, Harrison & R A Hulme JJ) unanimously allowed the Attorney's appeal, after finding that the sentence was manifestly inadequate. This was after considering the objective seriousness of the offences, which involved the most basic breach of trust between parent and child, and the substantial emotional harm caused to the victim. Their Honours found that the appropriateness of a custodial sentence was not negated by factors which militated in favour of the CCA exercising its discretion not to re-sentence the Appellant. Those factors included the Appellant's remorse, the circumstances of his disclosure that gave rise to the second charges and the conduct of the prosecutor before Judge Ellis. This was after their Honours had taken the view that the Appellant bore the onus of establishing that the CCA should exercise its discretion not to re-sentence him. The CCA then sentenced the Appellant to imprisonment for 5 years and 6 months with a non-parole period of 3 years.

The grounds of appeal include:

- The Court of Criminal Appeal erred in the application of s 5D *Criminal Appeal Act* 1912 (NSW) by imposing the onus on the Appellant contrary to *Malvaso v The Queen* (1989) 168 CLR 227; *Everett v The Queen* (1994) 181 CLR 295; *Green v The Queen* (2011) 244 CLR 462; *Hernando v The Queen* (2002) 136 A Crim R 451 and by failing to have regard to the limiting purpose of Crown appeals.

PLAINTIFF S297/2013 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S297/2013)

Date writ of summons filed: 16 December 2013

Date special case referred to Full Court: 23 September 2014

The Plaintiff is a national of Pakistan who arrived in Australia by sea in May 2012 without a visa, whereupon he was placed in detention. Initially prevented from lodging a valid application for a protection visa by s 46A(1) of the *Migration Act* 1958 (Cth) ("the Act"), he was later permitted to lodge such an application after a determination by the First Defendant ("the Minister") under s 46A(2) of the Act that he could do so. The Plaintiff's application however was refused by a delegate of the Minister in February 2013.

Upon a review of that refusal, the Refugee Review Tribunal remitted the Plaintiff's visa application to the Minister for reconsideration. This was after finding that the Plaintiff satisfied the visa criterion prescribed by s 36(2)(a) of the Act.

Amendments to the *Migration Regulations* 1994 (Cth) ("the Regulations") then introduced criteria for a protection visa which the Plaintiff was unable to satisfy. In December 2013 the Plaintiff commenced proceedings in this Court, challenging the validity of the relevant amending instrument, the *Migration Amendment (Unauthorised Maritime Arrival) Regulation* 2013 (Cth) ("UMA Regulation"). He also sought an order that the Minister determine his application for a protection visa forthwith.

On 4 March 2014 the Minister made a determination under section 85 of the Act ("the Determination") that the maximum number of protection visas that could be granted in the 2013-2014 financial year was 2,773. When that figure came to be reached (on 24 March 2014), the Plaintiff's visa application still had not been determined and the Plaintiff remained in immigration detention.

The Plaintiff later amended his claim, after the Senate disallowed the UMA Regulation. A special case stated questions of law for determination by the Full Court. Those questions were answered on 20 June 2014, in *Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor* [2014] HCA 24. In answering one of the questions, the Court held the Determination to be invalid.

In accordance with another of the answers given by the Court, a writ of mandamus was issued to the Minister, commanding him to determine the Plaintiff's application for a protection visa according to law. On 17 July 2014 the Minister refused the Plaintiff's application, on the ground that a certain criterion in Sch 2 to the Regulations had not been met. That criterion was clause 866.226, which provides "*[t]he Minister is satisfied that the grant of the visa is in the national interest.*" Although the Minister refused to grant a protection visa, he immediately granted the Plaintiff a seven-day safe haven visa and a three-year humanitarian visa (both under s 195A(2) of the Act) and released him from detention. The Minister then filed a notice certifying his compliance with the writ of mandamus.

The Plaintiff now challenges the sufficiency of the Minister's compliance with the writ of mandamus. The Plaintiff contends that clause 866.226 is invalid, on the basis that it is inconsistent with ss 501(3) and 501C of the Act. An alternative

basis of the alleged invalidity of clause 866.226 is that it departs from the scheme of protection visas provided for by various provisions of the Act, including ss 36 and 501.

A second special case filed by the parties, and referred to the Full Court by Chief Justice French, states the following questions of law:

1. Is clause 866.226 of Sch 2 to the Regulations invalid?

2. Was the decision made by the Minister on 17 July 2014 to refuse to grant a protection visa to the Plaintiff made according to law?

3. What, if any, relief should be granted to the Plaintiff?

4. Who should pay the costs of this special case?

LAVIN & ANOR v TOPPI & ORS (S258/2014)

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 160

Date of judgment: 23 May 2014

Special leave granted: 12 September 2014

Ms Dolores Lavin and Ms Paola Toppi were directors and equal shareholders of Luxe Studios Pty Ltd ("Luxe"), which had a loan from the National Australia Bank Ltd ("the Bank"). By written guarantee Ms Lavin, Ms Toppi and others associated with them (including the other parties to the current application to this Court) were guarantors of Luxe's obligation to repay that loan. When Luxe defaulted, the Bank sued the guarantors.

Ms Lavin reached an agreement with the Bank, which was set out in a "Deed of Release and Settlement" ("the Deed"). Under the Deed, Ms Lavin paid the Bank an amount that was less than half of the balance owed to it by Luxe under the loan. The Bank in return covenanted not to continue its claim against Ms Lavin or to make a new claim against her. Its claim against Ms Lavin was then dismissed by consent.

Ms Toppi subsequently paid out the rest of Luxe's debt to the Bank. She then sued Ms Lavin for an equitable contribution to the difference between the amounts they had each paid to the Bank. Ms Lavin contended that the Deed had limited her liability as a co-surety such that her liability to the Bank was no longer co-ordinate with Ms Toppi's.

On 18 September 2013 Justice Rein ordered Ms Lavin to pay Ms Toppi equitable compensation of $726,000, being half of the difference between the amount of Ms Lavin's payment to the Bank and the amount paid by Ms Toppi.

On 23 May 2014 the Court of Appeal (Macfarlan, Emmett & Leeming JJA) unanimously dismissed Ms Lavin's appeal. Their Honours found that none of the terms of the Deed amounted to a release of Ms Lavin from her liability to the Bank. There was merely a promise not to sue, which in no way constrained the rights of other guarantors as against Ms Lavin. The Court of Appeal therefore held that Ms Toppi was entitled to equitable contribution from Ms Lavin as a co-surety.

The grounds of appeal include:

- The Court of Appeal erred in holding that co-sureties were subject to co-ordinate liabilities of the same nature and to the same extent, notwithstanding the receipt by one co-surety from the creditor of a covenant not to sue and the dismissal as against that co-surety of the proceedings brought by the creditor against the co-sureties.

- The Court of Appeal erred in concluding that the payment by the Respondents to the Bank entitled them to contribution, when the Appellants derived no practical benefit from that payment because, by reason of the covenant not to sue, they could not be required to satisfy any remaining liability to the Bank.

FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LTD & ANOR v FLETCHER & ORS (S276/2014)

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 148

Date of judgment: 14 May 2014

Special leave granted: 17 October 2014

Octaviar Ltd (Receivers and Managers Appointed) (In Liquidation) ("OL") is the holding company of a group that includes Octaviar Administration Pty Ltd (In Liquidation) ("OA"). Mr William Fletcher and Ms Katherine Barnet ("the Liquidators") are the joint and several liquidators of both OL and OA.

In the winding up of OA, the relation-back day is 3 October 2008. The Liquidators faced a three-year time limit from that date, under s 588FF(3)(a) of the *Corporations Act* 2001 (Cth) ("the Act"), in which to apply for orders under s 588FF(1) of the Act in respect of any voidable transactions made by OA.

The Liquidators applied for an order under s 588FF(3)(b) of the Act to extend the time in which they could make any application under s 588FF(1) from 3 October 2011 to 3 April 2012. In doing so, the Liquidators identified certain entities which may have been parties to voidable transactions with OA. Those entities did not include the Appellants. On 19 September 2011 Justice Ward made the order sought ("the extension order").

On 3 April 2012 the Liquidators commenced proceedings against the Appellants that included an application under s 588FF(1) ("the Claim"). The Liquidators also applied to vary the extension order such that it would expressly permit the Claim. The Appellants meanwhile applied to set aside or vary the extension order such that the Claim would not be permitted.

On 18 December 2012 Justice Black dismissed both applications in relation to the extension order. His Honour held that the extension order permitted the Claim, despite the Liquidators' failure to identify the transactions (and the parties to those transactions) the subject of the Claim at the time the extension order was made. Justice Black also found that, were the extension order to be discharged, the court could re-exercise its discretion under s 588FF(3)(b) of the Act after the time prescribed by s 588FF(3)(a) had expired. The Appellants appealed.

The Court of Appeal (Bathurst CJ, Beazley P, Macfarlan, Barrett & Gleeson JJA) unanimously dismissed the appeal. Their Honours found that although s 588FF(1) refers to "a transaction" and s 588FF(3) refers to "[a]n application under subsection (1)", s 588FF(3)(b) confers a discretionary power that is to be construed broadly. The Court of Appeal held that that power, to extend time for an application later to be made under s 588FF(1), was not limited to applications targeting transactions (and third parties) that could be identified by liquidators at the time they applied for an extension order.

The grounds of appeal include:

- The Court of Appeal should have held that the Court does not have power under s 588FF(3)(b) of the Act to make an order extending the time for a liquidator to make an application under s 588FF(1) of the Act, by reference to, or capable of comprehending, transactions that are, at the time of the application under s 588FF(3), neither known nor identified as the possible subject of an application under s 588FF(1), because, upon their proper construction, ss 588FF(1) and 588FF(3)(b) of the Act require that an application under ss 588FF(3)(b) be made by reference to a particular transaction or categories of transactions.