



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: S106/2023  
File Title: HBSY Pty Ltd ACN 151 894 049 v. Lewis & Anor  
Registry: Sydney  
Document filed: Form 27F - Plaintiff's Outline of oral argument  
Filing party: Plaintiff  
Date filed: 09 May 2024

#### Important Information

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

S106/2023

**BETWEEN:****HBSY PTY LTD ACN 151 894 049**

Plaintiff

and

**GEOFFREY LEWIS**

First Defendant

**THE FEDERAL COURT OF AUSTRALIA  
AND THE JUDGES THEREOF**

Second Defendants

**PLAINTIFF'S OUTLINE OF ORAL SUBMISSIONS**

**Part I:** The plaintiff certifies that these submissions are in a form suitable for publication on the internet.

**Part II: Outline of propositions the Plaintiff intends to advance in oral argument**

1. The text of s 7(5) of the *Cross-Vesting Act* identifies a single criterion for identifying where appeals involving matters arising under the Acts specified in the schedule are to be determined. That criterion incorporates statutory language which had a well-settled meaning in 1987.
2. The text thus focuses on the link between a matter in dispute and a particular Act. Its language is not apt to refer to an entirely different criterion – being the exercise, or not, of particular jurisdiction in the court below.
3. No ambiguity arises on a literal construction of s 7(5).

4. It is not the case that Parliament has, by inadvertence, failed to express the implication found by the Full Court; nor is it plain that Parliament intended the insertion of the additional words to give effect to the purpose of the Act.
5. Before 1987, the Commonwealth Acts specified in the schedule to the *Cross-Vesting Act* all conferred appellate jurisdiction, though not necessarily wholly exclusive jurisdiction, on the Full Court of the Federal Court or the Family Court. This was so even though State and Territory Supreme Courts had extensive original jurisdiction under those Acts. It is not surprising that, with the enactment of the *Cross-Vesting Act*, the Parliament should intend that federal courts continue to enjoy a special position as the courts to hear appeals under the specified Acts.
6. The implied limitation found by the Full Court impedes rather than promotes the object of ensuring that federal courts have exclusive appellate jurisdiction under the specified Acts. The policy would be frustrated because determining whether a federal appellate court had jurisdiction in the particular case would depend upon identifying the source of federal jurisdiction exercised by the primary judge.
7. Many appeals which would “arise under” the specified Acts would, on this construction, not be directed to a federal appellate court – not by dint of their subject matter but because a trial judge was not exercising cross-vested jurisdiction.
8. This construction gives rise to additional anomalies. Firstly, if cross-vested jurisdiction was not exercised at first instance, but federal jurisdiction was enlivened for the first time in the course of the conduct of an appeal in a State appellate court, that State appellate court would still have jurisdiction. Secondly, the primary judge may exercise, concurrently, both cross-vested and jurisdiction under *Judiciary Act*, s 39(2).
9. The drafters of the *Cross-Vesting Act* indicated, by precise language, certain consequences when cross-vested jurisdiction was enlivened: see ss 9(2), 9(3), 11(1) and 14(1). Where care was taken to do so, it is unlikely that the drafter omitted to do so in s 7(5). On the other hand, the evident purpose of the legislation would not be promoted by a construction which requires an appellate court to determine what jurisdiction the primary judge was exercising (particularly when, in practice, courts

at first instance often do not do so). The task which would now have to be undertaken on the first defendant's construction is inconsistent with the Minister's statement that no court would need to decide whether any particular matter was truly within State or federal jurisdiction.

10. None of the matters relied upon by the Full Court indicate that the Parliament plainly intended to incorporate the additional implied words. In particular, s 7(5) does not constitute an implied repeal of *Judiciary Act*, s 39(2), because s 7(5) does not deny jurisdiction but instead imposes an obligation upon a State court as to the way in which its jurisdiction is to be exercised.<sup>1</sup> The text of s 7 does not speak of the investiture or otherwise of jurisdiction. On the contrary, ss 7(7) and 7(8) assume that a State appellate court retains jurisdiction and that it may exercise it in defined circumstances.
11. So much deals with the first defendant's proposition that the extrinsic materials assert that the *Cross-Vesting Act* would not detract from the existing jurisdiction of State courts. As submitted, federal courts were invested with mostly exclusive appellate jurisdiction in respect of the Acts in the schedule as at 1987. The words of the Minister must not be substituted for the text of the law. A clear and unambiguous ordinary meaning cannot be precluded by an erroneous interpretation offered to Parliament.
12. In all events, it is plain that the generality of s 39(2) is subject to particular restrictions that may be imposed by Commonwealth legislation. Context here includes the fact that the *Cross-Vesting Act* was part of a parcel of complementary legislation passed by Commonwealth and State Parliaments.

Dated: 8 May 2024

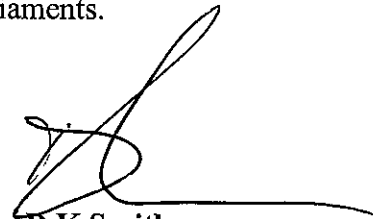


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<sup>1</sup> 2 *Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No. 73943* (2014) 88 NSWLR 488; [2014] NSWCA 409 at [91] (Leeming JA) (JBA/5 p.1565).