SHORT PARTICULARS OF CASES
APPEALS

ADELAIDE CIRCUIT - AUGUST 2006

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SONS OF GWALIA LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) v MARGARETIC AND ANOR (S208/2006)

ING INVESTMENT MANAGEMENT LLC v MARGARETIC AND ANOR (S209/2006)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 27 February 2006

Date of grant of special leave: 16 June 2006

Sons of Gwalia ("SOG") was one of the largest and most successful gold miners in Australia. On 18 August 2004 Mr Margaretic purchased shares in SOG on the Australian Stock Exchange for approximately $26,000. Eleven days later Ferrier Hodgson were appointed administrators of SOG which went into voluntary administration shortly thereafter. By this time the shares were worthless. Mr Margaretic claimed that at the time the shares were purchased SOG was in breach of its obligations under s 674 of the *Corporations Act* 2001 (Cth) ("the Act"), which required disclosure of information to the market that a reasonable person would expect to have a material effect on the price and value of SOG's shares. Mr Margaretic also contended that SOG contravened s 52 of the *Trade Practices Act* 1974 (Cth) and the *Australian Securities and Investments Commission Act* 2001 (Cth) by failing to disclose matters concerning its level of gold reserves.

It was common ground that s 553 of the Act covered Mr Margaretic's claim. That section provides that in every winding up, all debts payable by, and all claims against, a company in liquidation (present or future, certain or contingent, ascertained or sounding only in damages) being debts or claims, the circumstances giving rise to which occurred before the date on which the winding up is taken to have begun, are admissible to proof against the company.

In the proceedings before Emmett J in the Federal Court, SOG, through the administrators, sought two declarations. The first was that Mr Margaretic's claim for damages would not be provable under the proposed Deed of Company Arrangement. The second was that payment of Mr Margaretic's claim under the proposed Deed would be postponed until all debts owed to all claims made by persons not in the capacity as members had been paid under s 563A of the Act. Mr Margaretic then cross-claimed seeking a declaration that he was a creditor of SOG and entitled to all the rights of the creditors under Part 5.3A of the Act. ING Investment Management LLC ("ING") which is a creditor of SOG was joined to the proceedings. ING was the true contradictor of the arguments put by Mr Margaretic.

Emmett J concluded that Mr Margaretic was a creditor as that term was defined in the proposed Deed of Company Arrangement and accordingly was entitled to attend creditor's meetings and to vote at such meetings.

SOG and ING appealed. The Full Federal Court (Finkelstein, Gyles & Jacobson JJ) agreed that the appeals must be dismissed.

Finkelstein J noted that there was some controversy regarding the ratio of this Court's decision in *Webb Distributors v State of Victoria* (1993) (*"Webb")*. Finkelstein J noted that in *Webb* the Court accepted that a subscriber for shares could not sue the company for damages for misrepresentation which induced such a subscription whilst he or she remained a shareholder. Second, to the extent that a member has a claim against a company in his or her capacity as a member, that claim must be deferred to the claims of the creditor. The ambiguity said to arise in this Court's decision in *Webb* was that the High Court accepted that a shareholder who has not rescinded his subscription contract has no claim against the company. However, the potential for ambiguity arose from the statement of the majority that a claim of a defrauded shareholder fell within the area which the statutory predecessor to s 563A sought to regulate. Finkelstein J observed that the question in *Webb* centred on claims made by subscribing shareholders and that the instant case dealt only with the position of on-market purchasers of shares. Finkelstein J indicated his view that the principle in *Webb* was confined to subscribing shareholders and there was nothing in that or any other decision which lent support to the contrary view.

The question was then whether Mr Margaretic's claim was brought in his capacity as a member of SOG. Finkelstein J approved the House of Lords approach to this issue in *Soden v British & Commonwealth Holdings* [1998] to the effect that in the absence of any contrary indication, sums due to a member "in his capacity of a member" are only those sums, the right to which is based by way of cause of action on the statutory contract between the members of the company and the members inter se. On this basis, it was clear that Mr Margaretic had a claim against SOG which was not brought in his capacity as a member and was not caught by s 563A. Gyles J agreed with Finkelstein J's approach to *Webb*. Gyles J noted that in addition, an action in tort against a company for misleading conduct in connection with the acquisition of fully paid shares from a third party had nothing to do with the return of capital which had been subscribed by that third party or its predecessors and, further, such an action had no relevant connection with the rescission of any contract with the company, as the operative contract was with a third party. Jacobson J also agreed with the approach outlined above. His Honour agreed that *Webb* was confined to the position of subscribing shareholders. Jacobson J agreed with Gyles J that an action in tort for misleading conduct in connection with the purchase of fully paid shares from a third party has nothing to do with the return of capital and was a cause of action independent of the statutory contract and was not based upon the rights of a member contained in the Act.

The grounds of appeal include:

Sons of Gwalia

- The Full Court erred in construing s 563A of the Act as being applicable only to claims by shareholders against SOG arising from the acquisition of those shares by subscription. The Full Court should have found that, upon its proper construction, the section applies equally to claims by shareholders against SOG, including the claims of Mr Margaretic arising from the acquisition of those shares by transfer. Both types of claims are brought by the shareholders in their "capacity as a member" and are postponed under s 563A of the *Corporations Act*.

ING

- The Full Court erred in law in holding that Mr Margaretic is a creditor of SOG in respect of the Claim which is described at paragraphs [7] and [8] of the Reasons for Judgment of Finkelstein J and at paragraphs [70] to [72] (inclusive) of the Reasons for Judgment of Jacobson J. The Full Court should have held that:
  - Margaretic is not a creditor of SOG in respect of the Claim within the meaning of Part 5.3A of the Act and the Deed of Company Arrangement in respect of SOG.
  - The Claim is not admissible to proof in competition with ordinary unsecured creditors of SOG pursuant to the Deed of Company Arrangement.

CLAYTON v THE QUEEN (M156/2005)
HARTWICK v THE QUEEN (M157/2005)
HARTWICK v THE QUEEN (M158/2005)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 24 October 2005

These applications concern the question of whether, on a trial of joint accused for murder, proper directions were given in respect of the requirements of "extended common purpose". Each of the three applicants was charged and convicted of the murder of Stephen Borg and of intentionally causing serious injury to Paula Rodwell. The affray arose after Borg had deliberately rammed and damaged vehicles parked at the applicants' home. The applicants subsequently armed themselves and drove to Borg's house, bashed Ms Rodwell and then assaulted Borg, who died from the effects of multiple stab wounds. The Crown contended that although it could not identify who inflicted the fatal wound, each was guilty on the basis of complicity on any of 3 bases: (1) in the course of the implementation of a plan to cause really serious injury to Borg; (2) each had agreed to assault Borg and reasonably foresaw the possibility that death or really serious injury might be intentionally inflicted by one of them in carrying out the agreed lesser crime; or (3) two of them aided and abetted the principal offender by helping the principal in their commission of murder.

The appeals to the Court of Appeal (Charles, Chernov & Nettle JJA) alleged inter alia that the trial judge (Smith J) misdirected the jury as to the operation of the principle of extended common purpose. It was said that His Honour failed to make clear that the jury needed to be satisfied that the accessory foresaw not only the *actus reus*, but also the necessary intention. The Court dismissed the appeals, holding that the judge's charge made this perfectly clear and that a check list given by the judge to the jury had been adequately explained and would not have misled them.

On 16 June 2006 Justices Hayne and Heydon made orders that so much of the applications for special leave as concerned the issue of extended common purpose be adjourned for argument before a Full Court as on appeal.

The relevant proposed ground of appeal is:

- There has been a substantial miscarriage of justice as there is a real possibility that the [applicant] was convicted of murder on the basis of "extended common purpose" which is a head of complicity that should not be accepted as part of the common law of Australia because it does not reflect a proper relationship between moral culpability and legal responsibility.

VBAO v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR (M81/2006)

Court appealed from: Federal Court of Australia

Date of judgment: 19 November 2004

Date special leave granted: 2 June 2006

The appellant, a Sri Lankan of Sinhalese ethnicity, entered Australia on 5 November 2001 as a musician, with an entertainment visa. Upon cancellation of the visa on the basis he was not a genuine entertainer, the appellant then lodged an application for a protection visa on 9 November 2001. The first respondent's delegate refused the application. This decision was affirmed by the second respondent (the Tribunal) on 29 January 2002.

The appellant claimed a fear of persecution, from rival political party members, on the basis of his involvement with the Sri Lankan Freedom Party. This included assault (being dragged into a van, beaten and having his hair cut), receipt of threatening phone calls and letters, culminating in his going into hiding.

The Tribunal found that the appellant's political involvement was limited and he did not go into hiding as claimed, but was prepared to accept he might have received intimidating and threatening telephone calls and letters and was assaulted. It found that it was not satisfied that there was a real chance that the appellant would face persecution for the reasons of his political opinion, or for any other of the reasons in the Refugee Convention, and his fears, if he were to return to Sri Lanka, were unfounded.

The appellant appealed to the Federal Magistrates' Court. Walters FM found that the Tribunal failed to properly or fairly address the claims made, failed to properly apply s 91R of the *Migration Act*, (the Act), failed to apply or misunderstood the nature of, the opinion it was to form and fell into jurisdictional error.

The Federal Court (Marshall J) allowed the first respondent's appeal, finding it was open to the Tribunal to have considered that alleged death threats did not constitute serious harm and that it had correctly applied s 91R. Marshall J examined the parties' contentions regarding the meaning of the word "threat" in s 91R(2)(a), finding in favour of the first respondent's contention that it must involve a risk, in the sense of danger or hazard, so that s 91R(2)(a) contemplates persecution involving an instance of serious harm which manifests itself as danger to life or liberty as distinct from a possibility of danger.

The ground of appeal is:

- Marshall J erred in the construction of s 91R(2) of the Act.

The first respondent has filed a Notice of Contention.

STCB v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS & ANOR (A5/2006)

Court Appealed from: Full Court, Federal Court of Australia

Date of Judgment: 6 October 2004

Date special leave granted: 10 February 2006

The appellant, an Albanian national, sought a protection visa alleging fear of persecution arising out of a long standing blood feud between his family and another family. He alleges if he returned to Albania he would be killed in accordance with the traditional code of custom observed by the Albanian people (the code of Leke Dukagjini or the Kanun) ("the Kanun").

The Refugee Review Tribunal ("the Tribunal") found section 91S of the *Migration Act* 1958 (Cth) ("the Act") prevented the appellant's membership of his family as a social group being used as a vehicle to bring him within the scope of the obligations under the Convention Relating to the Status of Refugees 1951 (the Convention), because his fear of persecution was motivated by a non-Convention reason. The appellant's alternative contention that it was his membership of a wider, particular social group, namely citizens of Albania subject to the Kanun, which occasioned fear of harm, was also rejected. The Tribunal held that such citizens could not be united, cognisable or distinguished from the greater Albanian society.

The appellant's appeal to Finn J of the Federal Court was dismissed following the reasoning in another Albanian blood feud case; *SCAL v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) FCAFC 301.

The Full Court of the Federal Court (Spender, Stone, and Bennett JJ) dismissed the appeal, finding no error in the Tribunal's conclusion that Albanian citizens subject to the Kanun were not distinguishable as a particular social group. The Court found there was no common element that united individuals and made them a cognisable group within Albanian society, and a target for persecution.

The grounds of appeal are:

- The Full Court erred in relation to the proper construction and application of section 91S of the Act:
    - by holding that the Tribunal did not err in disregarding the appellant's fear of persecution by the [other] family;
    - by not holding that the Tribunal erred in finding that the reason for the persecution, or fear of persecution, feared by members of the appellant's family was not a reason mentioned in Article 1A(2) of the Refugees Convention.
- The Full Court erred in not holding that the Tribunal had erred in not holding that revenge could not be a reason mentioned in Article 1A(2) of the Refugees Convention.

- The Full Court erred in not holding that the Tribunal had erred in failing to consider the subjective perceptions of Albanian society in relation to whether the particular social group of "Albanian citizens who are subject to the customary law, the Code of Lek Dukagjini or the Kanun" exists for the purposes of the Refugees Convention.

- The Full Court erred in not holding that the Tribunal had failed to consider the individual circumstances concerning the appellant's claim that the Albanian State was unwilling or unable to provide adequate protection to him from the [other] family.