SHORT PARTICULARS OF CASES
APPEALS

AUGUST/SEPTEMBER 2006

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GORDON v TOLCHER IN HIS CAPACITY AS LIQUIDATOR OF SENAFIELD PTY LTD (IN LIQUIDATION) AND ANOR (S62/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 3 May 2005

Grant of special leave: 14 February 2006

On 5 June 2000 Raymond George Tolcher ("the liquidator") was appointed liquidator of Senafield Pty Limited ("Senafield"). Charles Stuart Gordon, the appellant, was the father of Hugh Charles Gordon who was the sole director and shareholder of Senafield.

On 2 May 2003 the liquidator and Senafield (the respondents) filed a statement of liquidated claim in the District Court ("the action") against the appellant in which they sought various declarations and orders including an order that pursuant to s 588FF(1) of the *Corporations Act* 2001 (Cth) the appellant pay to the respondents the sum of $522,504.07.

The statement of liquidated claim was not served on the appellant. On 1 December 2003, pursuant to Part 18 rule 9 of the *District Court Rules* 1973 ("the Rules"), the action was taken to be dismissed. On 19 January 2004 the respondents filed a notice of motion in the District Court in which, inter alia, they claimed pursuant to Part 3 rule 2(2) of the Rules an extension of time. The practical effect of any such extension, if granted, was that the dismissal of the action would be rescinded.

His Honour Judge Armitage heard the notice of motion on 13 May 2004. At the conclusion of argument, his Honour delivered an ex tempore judgment whereby he ordered that the notice of motion be dismissed and that the respondents pay the appellant's costs of the motion. The respondents sought leave to appeal.

The Court of Appeal granted leave to appeal and allowed the appeal. The orders which the Court of Appeal made included the following:

"4. Pursuant to Part 3 Rule 2(2) of the [Rules], order that the time specified in Part 18 Rule 9 be extended to nunc pro tunc up to and including a date being sixty days after the date of these orders."

The effect of the orders was that notwithstanding that the proceedings had been finally disposed of some 18 months earlier, the period of time specified in Part 18 Rule 9 was enlarged to 2 July 2005.

Section 78B notices have been served and the Attorney General for Victoria and the Attorney General of the Commonwealth are intervening.

The ground of appeal is:

- The Court of Appeal erred in failing to hold that provisions of State legislation expressly authorising extension of time within which an action may be maintained, notwithstanding dismissal of proceedings, in this case Part 3 rule 2 of the Rules were not inconsistent with the requirements of Section 588FF(3) of the *Corporations Act* and accordingly were rendered inapplicable by reason of s 79 of the *Judiciary Act.*

LEICHHARDT MUNICIPAL COUNCIL v MONTGOMERY (S188/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 8 December 2005

Date of grant of special leave: 19 May 2006

This appeal involves the question of whether a road authority owes a duty of care to road users, including pedestrians, which is "non-delegable" so that the road authority must ensure that reasonable care is taken by any sub-contractor who works on the road.

The respondent commenced proceedings against the appellant ("the Council") and another in relation to injuries he sustained on 7 April 2001 when he fell into a pit in a footpath in Leichhardt. The Council had engaged Roan Constructions Pty Ltd ("Roan") to perform work on the footpath. When the respondent walked over the carpet covering the pit his left leg fell down and he injured his knee.

The Council contended that in the circumstances of the case it owed no duty of care to the respondent as it contracted with independent contractors to perform the work and therefore it did not relevantly occupy the footpath at the relevant time. The trial judge rejected this submission. At the time of the accident the footpath was open to all users of the footpaths in the area and there was no doubt that the Council was the relevant road authority and occupier of the footpath at the relevant time. Whilst the Council did not direct Roan as to the exact manner in which they were to physically perform the re-paving work, there were clear directions as to the hours of the work, the work to be carried out and that carpet or artificial grass was to be used to cover the work. The Council had not given control to Roan in the relevant sense and pedestrians had neither the right nor the opportunity to exercise control over the footpath. The Council in these circumstances had a particular responsibility for the care of pedestrians involving a high standard of care which it was unable to delegate to an independent contractor. There was no evidence that the respondent was not taking reasonable care for his own safety. The trial judge concluded that a non-delegable duty of care was owed, that it had been breached and that the respondent's injuries arose as a result of that breach.

The Council appealed. The Court of Appeal was constituted by Mason P, Hodgson & McColl JJA. Hodgson JA gave the main judgment of the Court. In relation to the non-delegable duty argument, the Council submitted that according to this Court in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, a road authority's duty was to take reasonable care, not to ensure that reasonable care was taken. Hodgson JA referred to English authority to the effect that where a road authority engages a contractor to do work on a road used by the public such as to involve risk to the public unless reasonable care is exercised, such an authority has a duty to ensure that reasonable care is exercised and will be liable if the contractor does not take reasonable care. Further, his Honour noted that a road authority undertaking work on a road involving a risk to road users was so placed in relation to such users as to assume a particular responsibility for their safety. Such an approach was not inconsistent with *Brodie*. His Honour observed that the general duty of road authorities was to take reasonable care but that in a particular circumstance where the authority undertakes work involving a risk to road users (a circumstance not considered in *Brodie*), the general duty was overlaid by a more extensive duty arising

because of the risk created by the undertaking of those works. As such, a non-delegable duty of care was owed.

The respondent seeks leave to file and rely on a Notice of Contention. The proposed Notice contends that the Court of Appeal should have found that the appellant was negligent other than through its non-delegable duty of care in that the appellant (inter alia) failed to deny pedestrians access to the footpath whilst construction work was in progress.

The grounds of appeal are:

- The Court of Appeal erred in holding that the duty of care owed to the respondent by the appellant was a non-delegable one, namely a duty which obliged the appellant to ensure that reasonable care was taken for the safety of the respondent as a road user.

- The Court of Appeal ought to have held that the duty of care owed by the appellant to the respondent was one which obliged it to take reasonable care that the exercise of its statutory powers did not create a foreseeable risk of harm to the respondent as a road user.

- The Court of Appeal erred in holding that there was any breach of duty on the part of the appellant.

STATE OF NEW SOUTH WALES v IBBETT (S227/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 13 December 2005

Date of grant of special leave: 16 June 2006

At around 2.00am on 23 January 2001 Mr Warren Ibbett was being pursued by two police officers who suspected him of having committed a traffic offence. He then drove into his mother's garage and closed the door. One of those officers dived under the closing door and drew his revolver. Mrs Ibbett heard the commotion and entered the garage through a side door. She then told that police officer to leave. He then pointed his gun at Mrs Ibbett briefly and demanded that his colleague be granted access. That offficer then turned his gun back on Mr Ibbett. Mr Ibbett was then arrested and strip-searched in Mrs Ibbett's vicinity.

Mrs Ibbett sucessfully sued the State of New South Wales ("the State") in both trespass and assault. On 19 November 2004 Judge Phegan awarded her $15,000 in general damages and $10,000 in exemplary damages in relation to the assault. He also awarded her $20,000 in aggravated damages and $20,000 in exemplary damages for the trespass.

The main issue for the Court of Appeal was whether an award of exemplary damages was precluded by the *Civil Liability Act* 2002 (NSW) ("the Act"). The secondary issue was whether such an award was justified in any event.

On 13 December 2005 the Court of Appeal dismissed the State's appeal. It also allowed Mrs Ibbett's cross-appeal. Chief Justice Spigelman and Justice Basten held that section 21 of the Act did not preclude the award of exemplary damages in this case. This is because the proceedings were with respect to “an intentional act...done with intent to cause injury” within the meaning of section 3B(1)(a) of the Act. Justice Ipp, who otherwise agreed with Chief Justice Spigelman, held that the definition of "injury" in section 11 should be applied to the term "injury" in section 3B(1)(a).

In relation to the award of exemplary damages for the assault, Chief Justice Spigelman held that the police officer's conduct was outrageous and it deserved the Court's censure. His Honour then held that the exemplary damages should be increased to $25,000. Justice Basten also held that there was a sufficient factual basis for an award of exemplary damages. Justice Ipp however dissented as to quantum.

With respect to the award of exemplary damages for the trespass to land, Chief Justice Spigelman held that the police officers' conduct showed a complete disregard of Mrs Ibbett's right to have her guests undisturbed. His Honour then found that an award of $20,000 was appropriate in the circumstances. Justice Basten agreed that that police officer had a palpable disregard for Mrs Ibbett's rights as a proprietor. Justice Ipp however held that a property owner has no right to claim damages because his or her guests have been disturbed. His Honour therefore would have set aside the award of exemplary damages for trespass to land.

With respect to the award of aggravated damages for the assault, Justices Ipp and Basten held that an additional amount of $10,000 should be awarded. With respect to the award of aggravated damages for trespass to land, Chief Justice Spigelman held that the $20,000 awarded by Judge Phegan was appropriate. Justice Ipp

however would have set aside that award.

The grounds of appeal include:

- The Court of Appeal erred in awarding aggravated and/or exemplary damages for trespass to land on the ground that, inter alia, the interest of the owner, or the occupier, of land in his or her guests being undisturbed was sufficient to support an award of such damages.

- The Court of Appeal erred in failing to observe that an award of "general damages" for trespass to land involves an element of punishment, deterrence or rebuke and therefore punished the Appellant twice for the same wrong or alternatively failed to have proper regard to the overlap between such general damages, aggravated damages and exemplary damages.

A v STATE OF NEW SOUTH WALES & ORS (S59/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 2 September 2005

Date of grant of special leave: 10 February 2006

The Appellant brought proceedings for malicious prosecution, false imprisonment, false arrest and abuse of process against the Second Respondent, the Second Respondent's employer ("the First Respondent") and another police officer. This followed the dismissal of two charges of homosexual intercourse against him under section 78H of the *Crimes Act* 1900 (NSW). The trial judge found that the claim of malicious prosecution was established against the First and Second Respondents in respect of one charge only. (The First Respondent's liability was based upon its vicarious liability as the Second Respondent's employer.) His Honour however dismissed the rest of the Appellant's claims.

The Appellant appealed against the dismissal of the other claim for malicious prosecution. He also appealed against the dismissal of the claims for false imprisonment, false arrest and abuse of process. The Appellant further appealed against various components of the award of damages. The First and Second Respondents cross-appealed, seeking a verdict on both claims of malicious prosecution.

In determining whether the Respondents had acted without reasonable and probable cause in laying the charges, the trial judge applied the test stated by Jordan CJ in *Mitchell v. John Heine & Son Ltd ("Mitchell")*. At the outset of the appeal however, the Court raised the issue of whether Jordan CJ's statement was contrary to those made by this Court in *Sharp v. Biggs* (*"Sharp"*) and *Commonwealth Life Assurance Society Ltd v. Brain*. One of the main issues upon the appeal therefore was the identification of the proper test to apply in such cases.

On 2 September 2005 the Court of Appeal (Beazley JA, with whom Mason P and Pearlman AJA agreed) held that an accused must show that a prosecutor acted maliciously and with want of reasonable and probable cause to succeed in an action for malicious prosecution. They also found that a prosecutor will act without reasonable and probable cause if they lacked an honest and reasonable belief that charging a person was justified. In reaching these conclusions their Honours followed *Sharp* as opposed to *Mitchell.* The Court of Appeal further held that a prosecutor will "honestly and reasonably believe" that charging a person is justified if the evidence would lead a person of ordinary caution and prudence to conclude that it was warranted. Their Honours held however that a prosecutor need not actually believe that an accused is guilty. It is sufficient that they honestly and reasonably believed that there was a proper case to put before a Court.

The Court of Appeal further held that malice will be proved if an accused can show that a prosecutor was motivated by spite, ill-will or by improper motives towards the accused. This could include succumbing to pressure from bureaucratic superiors to lay a charge. In this case however there were no improper motives. The pressure to charge the Appellant existed because there was a "prima facie case" against him.

The grounds of appeal include:

- The Court of Appeal erred in determining the appeal and cross-appeal by formulating and applying an incorrect test for determining absence of reasonable cause in a case of malicious prosecution.

- The Court of Appeal erred in finding that the Appellant had not established absence of reasonable and probable cause to lay the charge in respect of D.

- The Court of Appeal erred in finding that a reasonable prosecutor, exercising 'prudence and judgment' would have been justified in laying the charge in respect of C.

- The Court of Appeal erred in finding that malice had not been established in respect of charging C and D.

LOCKWOOD SECURITY PRODUCTS PTY LTD v DORIC PRODUCTS PTY LTD (S226/2006)

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

Date of judgment: 8 December 2005

Date of grant of special leave: 16 June 2006

Lockwood Security Products Pty Ltd ("Lockwood") manufactures and sells door locks. It is the registered proprietor of Australian Patent No. 702534 ("the Patent"). This is in respect of an invention described as a 'key controlled latch'. Doric Products Pty Ltd ("Doric") also carries on business manufacturing and selling door locks. The Patent's invention arose out of a problem with doors that had one lock on the outside and one on the inside. Such doors could not be opened without a key and this was potentially dangerous. The Patent overcame this problem by proposing that the external operation of the key (or other actuator such as a handle) would simultaneously unlock the internal handle.

In October 2000 lawyers for Lockwood sent letters to Doric (and others) in which they asserted that one or more of Doric's products had infringed the Patent. Doric responded by commencing proceedings under section 128 of the *Patents Act* 1990 (Cth) ("the Act") seeking a declaration that such threats were unjustifiable. It also sought injunctive relief and damages. Doric further denied that its products had infringed any valid claim of the Patent.

On 21 December 2001 Justice Hely rejected Doric's submission that the claims of the Patent were invalid due to obviousness. He also rejected their arguments concerning sufficiency, utility and uncertainty. His Honour did however find that each of Lockwood's claims 1 to 32 were invalid on one of two fair basis grounds. This left claim 33 as the only valid claim, but it was not contended that Doric had infringed it. Justice Hely ordered that claims 1 to 32 of the Patent be revoked. He also dismissed Lockwood's cross-claim alleging infringement. His Honour did however grant a stay of that judgment.

The major issue before the Full Federal Court was whether the correct fair basis test pursuant to section 40(3) of the Act had been applied. If Justice Hely's finding was overturned, Doric's products would have infringed Lockwood's claims 13, 14, 15, 20 and 30. On 7 March 2003 the Full Federal Court (Wilcox, Branson & Merkel JJ) upheld Justice Hely's decision that claims 1 to 32 were not fairly based. Their Honours did not disturb Justice Hely's other findings and they offered no view as to obviousness. Following a grant of special leave to appeal to this Court, the Full Court (Gleeson CJ, McHugh, Gummow, Hayne & Heydon JJ) upheld Lockwood's appeal on 18 November 2004. Their Honours ordered, inter alia, that Orders 1 and 2 of the Full Federal Court's orders dated 7 March 2003 be set aside. They further declared that claims 1-32 of the Patent were fairly based and that the remainder of the matter be remitted to the Full Federal Court.

On 8 December 2005 a differently constituted Full Federal Court (Heerey, Sundberg & Bennett JJ) dismissed the remainder of Lockwood's appeal.

Their Honours ordered that, pursuant to Order 1 made by Justice Hely on 19 March 2002, only claims 1-6, 12 & 31-32 of the Patent were revoked due to a lack of novelty. They also ordered that claims 1-6, 12-15, 20-21 & 30-32 of the Patent be

revoked for a lack of an inventive step. The Full Federal Court also stayed the operation of these orders, a stay that has been extended by this Court until further order.

The grounds of appeal include:

- The Full Court erred in finding that claims 1-6, 12-15, 20, 21, 30, 31 and 32 of the Patent lacked an inventive step.

- The Full Court erred in finding that claim 1 (and dependent claims) lacked an inventive step on the basis of an implied corollary admission said to have been made in the specification of the Patent and without evidence in support of such a finding.

- In finding that claims 1-6, 12-15, 20, 21, 30, 31, and 32 of the Patent lacked an inventive step, the Full Court erred by failing to distinguish between the distinct grounds of invalidity of lack of inventive step (which had been pleaded) and lack of manner of manufacture (which had not been pleaded).

Z v N (S229/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 19 November 2004

Date of grant of special leave: 16 June 2006

This matter involves the interpretation of sections 18(2) and 18B(4) of the *New South Wales Crime Commission Act* 1985 ("the Act"). It specifically concerns whether legal professional privilege, public interest immunity or a fear of reprisals can be relied upon for refusing to answer questions.

The Appellant is a solicitor who was retained by X in respect of passing information to the police about M (without X's identity being disclosed). As a result, the police acted against M on several occasions. In November 2002 M was shot, but survived. A detective told the Appellant that he suspected that police were involved in that shooting and he requested X's name and address. The Appellant declined on the basis of both legal professional privilege and his fear of reprisals to himself and his family.

In September 2003 the Appellant attended the New South Wales Crime Commission ("the Commission") and declined to answer questions about X's identity and address. He relied, inter alia, upon section 18B(4) of the Act which provides in part "....the legal practitioner or other person is entitled to refuse to comply unless the privilege is waived....However, the legal pratitioner must, if so required....furnish to the Commissioner the name and address of the person to whom or by whom the communication was made."

The Appellant sought a review of the presiding member's direction in the Supreme Court. Justice Grove dismissed that application, holding that the communication by X to the Appellant of his identity was not a privileged communication. His Honour also held that even if it was, the proviso in section 18B(4) of the Act overrode it.

The Court of Appeal (Mason P, Giles JA and Wood CJ at CL) also refused the Appellant leave to appeal. Their Honours held, by majority, that section 18B(4) of the Act gave the presiding member a discretion to require an answer even where a person's name and address themselves were privileged. They further found that that discretion had not miscarried.

The grounds of appeal are:

- The Court of Appeal should have held that protection from disclosure of privileged communications given by sub-section 18B(4) of the Act extends to protection from disclosure of the name and address of a client.

- The Court of Appeal erred in as much as the majority (Mason P and Wood CJ at CL, but not Giles JA) found that the protection given to privileged communications by sub-section 18B(4) of the Act excludes from its operation the name and address of a client.

- The Court of Appeal should have held that the communication of the name and address of the Appellant's former client, X, is subject to legal professional privilege.

- The Court of Appeal should have held that the Appellant has a "reasonable excuse" under subsection 18B(4) of the Act for refusing to answer questions seeking the name and address of his former client.