SHORT PARTICULARS OF CASES
APPEALS TO BE HEARD IN PERTH

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MANDURAH ENTERPRISES PTY LTD & ORS v. WESTERN AUSTRALIAN PLANNING COMMISSION (P15/2009)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2008] WASCA 211

Date of judgment: 17 October 2008

Date special leave granted: 1 May 2009

The appellants owned four lots of land (referred to for convenience as Lots 7, 8, 30 and 49). In October 2002, the Peel Region Scheme was gazetted, showing that part of Lots 7, 8 and 30, and all of Lot 49, were reserved for the public purpose of "Primary Region Road". The balance of Lots 7 and 8 were zoned urban and the balance of Lot 30 was zoned industrial. In July 2003 the respondent wrote to the appellants to advise that it intended to resume the whole of the appellants' land, which was subsequently done by Taking Order registered on 8 August 2003, pursuant to s177 of the *Land Administration Act* 1997 (WA). The appellants' land was compulsorily acquired for the purposes of "Railways – South West Metropolitan Railways" and "Primary Regional Roads – North Mandurah Bypass". The purpose in taking the land was to build the South-West Metropolitan Railway over parts of Lots 7, 8 and 30 and the whole of Lot 49. Lots 7 and 8 were taken in their entirety because the effect of the construction of the railway would be to sever those parts of the Lots from access to any public road, such that pursuant to s102 of the *Public Works Act* 1902 (WA) the Public Transport Authority would be required to build crossings to give access. The whole of Lot 30 was taken in the mistaken belief that the construction of the railway would sever the balance of Lot 30 from public road access and therefore also require the construction of a crossing.

Subsection 177(2) of the *Land Administration Act* provides that the relevant Minister may make a taking order consistent with a "special Act" authorising the construction of a railway. The *Railway (Northern and Southern Urban Extensions) Act* 1999 (WA) is a "special Act". The *Public Works Act* prescribes that railways may only be made under the authority of a special Act which must define the line of the railway but which permits limited deviations from that line, and in s95 defines "railway" to include "all land taken, purchased, or acquired for railway purposes". The *Railway (Northern and Southern Urban Extensions) Act* prescribed the making and maintaining of "a railway, and all necessary, proper and usual works and facilities in connection with the railway" along the line defined in that Act.

The appellants challenged the validity of the taking order. At trial, Le Miere J held that the end to be achieved by the taking order was for regional transport including railways and roads, and that the taking of the balance of Lots 7, 8 and 30, so at to avoid landlocked land and not require the construction of crossings, was incidental to providing for the reservation and protection of the land for regional transport and therefore for the purpose of the Peel Regional Scheme, as required by s13(1) of the *Town Planning and Development Act* 1928 (WA).
Le Miere J also held that the taking order was a valid exercise of the power conferred by s177 of the *Land Administration Act* because it was for the purpose of a railway authorised by a special Act.

On appeal, the Court of Appeal by majority (McLure and Buss JJA; Murray AJS dissenting) dismissed the appellants' appeal except in relation to the portion of Lot 30 zoned "industrial" under the Peel Region Scheme. Murray AJA would have dismissed the appeal in relation to the zoned portions of Lots 7, 8 and 30. The majority held that an acquisition for the purposes of giving effect to the decision of the Public Transport Authority as to the appropriate location of crossings was a use of the balance of Lots 7 and 8 for the purposes of the railway, and was a use incidental to the undertaking, construction or provision of the railway. The Court held that the taking of the zoned portion of Lot 30 was ultra vires because on the objective facts the acquisition of that part of the land was incapable of being for the purposes of the railway. Murray J in dissent concluded that the zoned portions of Lots 7 and 8 could not be compulsorily acquired for the subjective purpose of avoiding the requirement under s13(1) of the *Town Planning and Development Act* to construct crossings.

The grounds of appeal include:

- Whether the majority of the Court of Appeal erred in failing to find that the taking of the whole of Lots 7, 8, 30 (except for that portion zoned industrial) and 49 was beyond the power of the respondent under either section 13 of the *Town Planning and Development Act* or section 161 of the *Land Administration Act*;

Having found that the taking of the zoned portion of Lot 30 was ultra vires, whether the Court of Appeal erred in severing the zoned portion rather than holding that the whole of the taking order was thereby invalid.

HAMERSLEY IRON PTY LTD v. SPENO RAIL MAINTENANCE AUSTRALIA PTY LTD & ORS (P29/2009)
METALS AND MINERALS INSURANCE PTE LTD v. SPENO RAIL MAINTENANCE AUSTRALIA PTY LTD & ORS (P30/2009)
ZURICH AUSTRALIAN INSURANCE LTD v. METALS AND MINERALS INSURANCE PTE LTD & ORS (P33/2009)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2009] WASCA 31

Date of grant of special leave: 31 July 2009

Hamersley Iron Pty Ltd ("Hamersley") entered into a contract with Speno Rail Maintenance Australia Pty Ltd ("Speno") as part of its iron ore mining and transport operations, which provided that Speno would arrange public liability insurance that included Hamersley's interests as a principal, and that Speno would be solely liable for and would indemnify Hamersley against any common law liability for personal injuries to Speno's employees engaged in the contract works. Speno entered into a general liability insurance policy with Zurich Australia Insurance Ltd ("Zurich") which provided the public liability insurance, but did not insure Speno for its liability to indemnify Hamersley ("the Speno policy"). Hamersley entered into an insurance policy with Metals & Minerals Pte Ltd ("MMI") which provided public liability insurance cover for Hamersley ("the Hamersley policy"). Two employees of Speno performing work under the contract with Hamersley were injured and commenced proceedings in the District Court. Hamersley admitted negligence and sought indemnity from Speno. Speno and Zurich were joined as parties in one of the employee's actions, and both were ordered to indemnify Hamersley in respect of the judgment sum. But the Court held that, although Zurich was liable to indemnify Hamersley under the Speno policy, it was not liable to indemnify Speno because Speno's policy excluded liability for personal injury suffered in the course of employment with the insured. On appeal, a Full Court of the Supreme Court held that Zurich was not entitled to a contribution from Speno because the liabilities of Speno and Zurich were not co-ordinate: Speno's liability under the Hamersley/Speno works contract was primary, whereas Zurich's liability as an insurer was secondary.

Zurich then commenced an action against MMI claiming contribution ("the Zurich contribution action"), on the basis that as MMI was liable to indemnify Hamersley for its liability to the employees under the Hamersley policy, which was the same liability that Zurich had already indemnified Hamersley for, Hamersley was therefore doubly insured for its liability and Zurich was entitled to contribution. MMI relied on a clause in the Hamersley policy which provided that in the event that Hamersley was indemnified under insurance effected on Hamersley's behalf by a third party, the insurance afforded by the Hamersley policy was for excess insurance over the applicable limit of indemnity of the underlying insurance policy. MMI argued that there was no double insurance and Zurich was not entitled to a contribution. Zurich contended that the clause relied on by MMI was void under s45(1) of the *Insurance Contracts Act* 1984 (Cth) ("the Act") which provides that a provision would be void if it had the effect of limiting or excluding the liability of the insured under a general insurance policy and had that effect by reason that the insured entered into some other contract of insurance, not being a contract required to be effected by or under a law other than the insurance contract.

MMI then commenced an action against Speno claiming that if it was obliged to pay contribution to Zurich, it was entitled to Hamersley's rights against Speno to the extent of its obligations to contribute ("the MMI subrogation action"). MMI issued out of the District Court a writ of fieri facias against Speno, and Speno applied to strike out the writ ("the Speno strike out action").

All three actions were heard before Johnson J of the Supreme Court. Her Honour found for Zurich in the Zurich contribution action, for MMI in the MMI subrogation action, and for MMI in the Speno strike out action. Her Honour found that the underlying insurance clause in the Hamersley policy was void under s45(1) of the Act and could not be relied upon by MMI to allege that its liability was not co-ordinate with that of Zurich. Speno appealed all three decisions. MMI cross-appealed in the Zurich contribution action.

The Court of Appeal (Martin CJ, McLure JA and Beech AJA) heard all three matters together. The appeal and cross-appeal in the Zurich contribution action were upheld. The Court held that the underlying insurance clause could be severed without affecting the meaning of the remainder after severance such that there was no double insurance. The appeal in the MMI subrogation action was upheld. The Court held that MMI was entitled to exercise its rights of subrogation in Hamersley's name against Speno to recover the whole of MMI's liability to Zurich, in reliance on the indemnity clause in the Hamersley/Speno works contract. The appeal in the Speno strike out application was upheld. The Court held that Hamersley's rights of indemnity against Speno merged in the judgment in favour of the injured employee, and there was nothing in that judgment which gave a different character to the respective liabilities of Speno and Zurich to indemnify Hamersley. Each party was simply liable to indemnify Hamersley.

The grounds of appeal include:

- Where an insured has double insurance so that two insurers are under co-ordinate liabilities to make good the same loss, and the first insurer indemnifies the insured, is the second insurer entitled to be subrogated to the insured's rights against a third party after the second insurer has paid contribution to the first insurer and the first insurer has contractually renounced its right to equitable subrogation (in matters P29/2009 and P30/2009)?

- Whether the Court of Appeal erred in its construction of s45(1) of the Act (in matter P33/2009).