SHORT PARTICULARS OF CASES
APPEALS

BRISBANE SITTINGS 2009

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FELLOWES v. MILITARY REHABILITATION AND COMPENSATION COMMISSION (B8/2009)

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

Date of grant of special leave: 13 February 2009

In 1986 the appellant, Robyn Christine Fellowes, suffered a work-related injury to her left knee. In 1987, she suffered another, separate, work-related injury to her right knee. In February 2007, the appellant received a lump sum compensation on the basis that she had suffered a 10% whole person impairment as described in Table 9.5 of the "Guide to Assessment of the Degree of Permanent Impairment" ("the Guide", which is prepared by Comcare and approved by the Minister pursuant to s28 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth)). The appellant also lodged a claim with the respondent for compensation in relation to her right knee injury, pursuant to the same criteria in Table 9.5 of the Guide. The medical evidence was that the right knee injury was a stand-alone condition and had been assessed as amounting to a 10% whole person impairment. The respondent accepted liability but, in its determination on 22 March 2007, determined that the appellant had already been compensated for a 10% impairment under Table 9.5 of the Guide and rejected the claim for compensation for the right knee condition. The Administrative Appeals Tribunal (Deputy President Hack SC) affirmed that decision.

The Full Court of the Federal Court of Australia (French, Moore and Lindgren JJ) dismissed the appellant's appeal. French and Lindgren JJ in a joint judgment concluded that subsection 24(5) of the Act required a determination of the degree of permanent impairment "resulting from" the second injury, which necessarily required that allowance be made for her existing permanent impairment. That existing permanent impairment did not result from the second injury. The second injury did not take the appellant's level of permanent impairment beyond the level of 10% whole person as described in the Guide. French and Lindgren JJ concluded that the decision of the Full Federal Court in *Comcare v Van Grinsven* (2002) 117 FLR 169 was not plainly wrong and should be followed, and that that decision had not been impliedly overruled by the decision of this Court in *Canute v Comcare* (2006) 226 CLR 535 which was distinguishable on the fact as it involved two injuries arising from a single event. Moore J concluded that the approach of the Federal Court in *Van Grinsven* was in error in construing the Guide as requiring that any permanent impairment flowing from a second injury is to be treated as merging with the permanent impairment flowing from a first injury. However, his Honour agreed with French and Lindgren JJ that *Van Grinsven* had not been impliedly overruled by *Canute* and accordingly he was bound to apply *Van Grinsven*.

The grounds of appeal include:

- Whether the Federal Court ought to have found that the decision of the Federal Court in *Van Grinsven* could not be reconciled with the decision of the High Court in *Canute*.

COMMISSIONER OF TERRITORY REVENUE v. ALCAN (NT) ALUMINA PTY LTD (D6/2009);
ALCAN (NT) ALUMINA PTY LTD v. COMMISSIONER OF TERRITORY REVENUE (D7/2009)

Court appealed from: Court of Appeal of the Supreme Court of the Northern Territory [2008] NTCA 14

Date of grant of special leave: 1 May 2009

In 2001, Alcan (NT) Alumina Pty Ltd ("Alcan") acquired 70% of the shares in Gove Aluminium Limited, and at the same time Gove Aluminium acquired the remaining 30% of its share capital by a share buy-back, resulting in Alcan becoming the sole shareholder in Gove Aluminium. The total acquisition price amounted to $A740.1 million. The Commissioner of Territory Revenue ("the Commissioner") assessed stamp duty on the transactions, including penalty, as $47,517, 997.00, on the basis that the transactions attracted the operation of Division 8A of Part III of the *Taxation (Administration) Act* 1994 (NT) and the *Stamp Duty Act* 1978 (NT). The assessment concerned the value of the "land" held by Gove Aluminium, which was in the form of mineral leases and options to renew those leases. The issue was whether an option to renew a lease is "land" for the purposes of s4 of the *Taxation (Administration) Act*, and therefore whether that land amounts to 60% or more of the value of all the property transferred as a result of the acquisition of the shares in Gove Aluminium, as prescribed in s56N(2)(b) of that Act. Alcan's objection to the Commissioner's assessment was disallowed. Alcan then appealed successfully to the Supreme Court (per Mildren J) and the assessments were set aside, Mildren J concluding that the options to renew were not "land".

The Commissioner appealed successfully to the Court of Appeal (Martin (BR) CJ and Angel and Southwood JJ) which set aside the orders of Mildren J and remitted the matter back for reconsideration. After examining the history of legislative amendments to the *Taxation (Administration) Act* and the purpose of that Act and the *Stamp Duty Act*, Martin CJ (with whom Angel and Southwood JJ agreed) held that despite the definition in s4 of the *Taxation (Administration) Act* that "land" included a lease, and "lease" excluded "an option to renew a lease", a contrary intention appears such that the literal interpretation of that definition would defeat the primary purpose of the legislation.

Having found that the options to renew constituted "land", the Court of Appeal (by majority; Martin (BR) CJ in dissent) allowed a cross contention by Alcan that the trial judge erred in concluding that Gove Aluminium held no goodwill in the business such that its land holdings did amount to at least 60% of the value of all the property transferred in the share acquisition.

The grounds of appeal include:

- Whether the Court of Appeal erred in finding that the definition “lease” in the *Taxation (Administration) Act* did not apply to exclude an option to renew from “land” for the purposes of Division 8A of that Act;

- Whether majority of the Court of Appeal, on the cross contention, erred in its finding that there was “goodwill” in the business and therefore whether the Court failed to apply the decision of this Court in *Federal Commissioner of Taxation v. Murray* (1998) 193 CLR 605.