SHORT PARTICULARS OF CASES
APPEALS

AUGUST-SEPTEMBER 2009

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ICM AGRICULTURE PTY LTD & ORS v THE COMMONWEALTH OF AUSTRALIA & ORS (S24/2009)

Date of Special Case: 8 July 2009

This Special Case arises out of the proposed reduction by the State of New South Wales of the entitlements of licence holders to access ground water in specified areas. The plaintiffs allege that a funding agreement between the Commonwealth and New South Wales, and the enabling statutory regime, results in the acquisition by the State of New South Wales of property on otherwise than just terms thereby infringing section 51 (xxxi) and is consequently invalid. Alternatively, if the scheme is valid, the plaintiffs claim an implied right exists under the constitution to recover "just terms" compensation from the Commonwealth.

The Commonwealth alleges, inter alia, that the agreement is supported by section 51 (xxxix) and section 96 of the Constitution, and that there is no implied right to compensation.

Section 78B notices have been given and the State of Victoria, the State of South Australia, the State of Queensland and the State of Western Australia States have intervened in support of the defendants.

The Special Case states the following questions of law for the Full Court:

1. By reason of section 51 (xxxi) of the Constitution:

   (a) did the Commonwealth lack executive power to enter into the agreement?

   (b) is the *National Water Commission Act* invalid insofar as it authorised the CEO to enter into the funding agreement on behalf of the Commonwealth?

2. If the answer to either part of question 1 is "yes", are all or any of:

   (a) the Amendment Regulation;
   (b) the Proclamation;
   (c) the Amendment Order;

   invalid or inoperative as a consequence?

3. Do the plaintiffs remain the holders of all or any of the bore licences issued to them under the *Water Act*?

4. If the answers to 2 and 3 are "no", do the plaintiffs have an implied right under the Constitution to recover from the Commonwealth such compensation for the loss of their licences as would constitute "just terms" within the meaning of section 51 (xxxi) of the Constitution?

5. Who should pay the costs of the Special Case?

(Similar issues arise in the appeal, *Arnold & Ors v Minister Administering the Water Management Act & Anor*, listed in the same sittings.)

ARNOLD & ORS v MINISTER ADMINISTERING THE WATER MANAGEMENT ACT 2000 & ORS (S6/2009; S110/2009)

Court appealed from: New South Wales Court of Appeal
[2008] NSWCA 338

Date of judgment: 4 December 2008

Date of grant of special leave: 1 May 2009

The appellants held groundwater extraction entitlements under the *Water Act* 1912 (NSW) ("the Water Act"). Those entitlements were reduced by the *Water Management Act* 2000 (NSW) ("the Management Act") and the Water Sharing Plan for the Lower Murray Groundwater Source 2006 ("the 2006 Plan"). This was done in the context of a national water sustainability arrangement involving the *Natural Resources Management (Financial Assistance) Act* 1992 (Cth), the *National Water Commission Act* 2004 (Cth) and certain Commonwealth/State agreements, including a funding agreement.

The appellants challenged the validity of the 2006 Plan and the Commonwealth legislative scheme in the Land and Environment Court ("the L&E Court"). The Commonwealth then successfully sought the dismissal of the proceedings against it. On appeal, the issues included whether the L&E Court had the jurisdiction to determine the validity of Commonwealth legislation by reason of infringement of section 51(xxxi) or section 100 of the Constitution.

On 4 December 2008 the Court of Appeal (Spigelman CJ, Allsop P & Handley AJA) unanimously found that the L&E Court's jurisdiction in this case was determined by the Management Act. Their Honours held that that Act defined the extent to which the L&E Court was invested with federal jurisdiction pursuant to section 39(2) of the *Judiciary Act* 1903 (Cth). They also held that Section 16(1A) of the *Land and Environment Court Act* 1972 (NSW) conferred ancillary jurisdiction upon the L&E Court.

The Court of Appeal held that none of the relevant agreements or legislation offended the prohibition in section 100 of the Constitution. This was because that section applied only to laws made under section 51(i) of the Constitution. Their Honours further found that neither of the relevant Commonwealth statutes could be characterised as a law with respect to the acquisition of property. They also held that the validity (or even existence) of any Commonwealth/State agreements was irrelevant to the validity of the 2006 Plan or the Management Act.

The Court of Appeal further held that the allocation of a Commonwealth grant under section 96 of the Constitution was valid despite those funds being used by the State to acquire a property on other than just terms. This was because the State was entitled to accept Commonwealth funds on whatever basis it wished.

The appellants have issued notices pursuant to section 78B of the *Judiciary Act*. The following states have intervened: the State of Victoria; the State of South Australia, the State of Queensland and the State of Western Australia. The third respondent, the Commonwealth of Australia, has also issued section 78B notices.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in holding that a grant made by the Commonwealth to a State on condition that the State acquire property on unjust terms is not invalid; and that it was not ultra vires the legislative power of the Commonwealth to authorise an agreement that requires a State to use its powers to acquire property on unjust terms.

The question of whether special leave to appeal should be granted in respect of the following ground:

- The New South Wales Court of Appeal erred in holding that the *National Water Commission Act* 2004 and the 2005 Funding Agreement were not laws or regulations of trade or commerce within the meaning of section 100 of the Constitution.

has been referred to the Full Court.

(Similar issues arise in the Special Case, *ICM Agriculture Pty Ltd and Ors v. The Commonwealth of Australia and Ors*, listed in the same sittings.)

C.A.L. No 14 PTY LTD t/as "TANDARA MOTOR INN" & ANOR v MOTOR ACCIDENTS INSURANCE BOARD (H7/2009); C.A.L. No 14 PTY LTD t/as "TANDARA MOTOR INN" & ANOR v SCOTT (H8/2009)

Court appealed from: Full Court of the Supreme Court of Tasmania [2009] TASSC 2

Date of judgment: 19 January 2009

Date special leave granted: 29 May 2009

At approximately 8.30 pm on 24 January 2002, Shane Scott was killed when his motorcycle ran off the road and collided with the guard rail of a bridge on the Tasman Highway at Orford. He had a blood alcohol reading of 0.253. The evidence did not suggest any cause of the accident other than his intoxication. For 3 hours prior to the accident he had been drinking at the Tandarra Motor Inn ("the hotel"), and in that time he drank 7 or 8 cans of Jack Daniels and cola. During that time, one of Scott's companions suggested that his motorcycle should be stored in the hotel's storeroom, as police with a breathalyser unit were believed to be in the area. Scott gave the motorcycle's keys to the publican, who stored them in the petty cash tin. At approximately 8.00 pm, the publican told him he had had enough to drink and offered to contact his wife so she could come and pick him up. Scott refused the offer in an aggressive manner, and began asking for his motorcycle. The publican claimed he asked Scott a number of times whether he was "right to ride" and he said he was fine. The publican believed he had no reason to deny him access to the motorcycle, and so returned the keys. Other patrons gave evidence that Scott did not appear intoxicated, but there was expert evidence that even a heavy drinker with that level of blood alcohol concentration would have exhibited obvious visible signs of intoxication.

Scott's widow (the respondent in H8/2009) brought an action under the *Fatal Accidents Act* (Tas) 1934 against the owner of the hotel (the first appellant) and the publican (the second appellant). The Motor Accidents Insurance Board (the respondent in H7/2009) filed separate proceedings against both respondents to recover payments it made pursuant to the *Motor Accident (Liabilities and Compensation) Act* (Tas) 1973. The trial judge (Blow J) relied on the decision in *South Tweed Heads Rugby Football Club Ltd v Cole* (2002) 55 NSWLR 113 as authority for the proposition that a publican's duty of care to a customer does not generally require the taking of care to prevent harm from the customer's own intoxication. (That decision was appealed to the High Court but the members of the Court expressed different views about the nature of any duty that might exist.) His Honour held that there was nothing exceptional in the facts of this case to justify a departure from that general rule, and therefore dismissed both proceedings.

The respondents' appeal to the Full Supreme Court (Evans and Tennant JJ, Crawford CJ dissenting) was successful. The majority of the Court distinguished *Cole* on the basis that the circumstances of this case were very different: the hotel was in a small community, the number of patrons on the night in question was relatively small, Scott was a known customer, he had requested the publican to lock his bike away to avoid being breathalysed, the publican had continued to serve him, and there was no evidence that the publican was under any threat if he refused to hand over the keys to the

motorcycle. In those circumstances, the majority held that the respondents owed a duty to take reasonable care to avoid Scott riding the motorcycle from the hotel while intoxicated. That duty was breached by the publican in failing to ring Mrs Scott to collect her husband, and by returning the motorcycle keys to him.

Crawford CJ considered that the weight of authority was against the existence of an actionable duty in negligence in this case. For the reasons given by the New South Wales Court of Appeal in *Cole*, an extension of the duty of care was undesirable. Scott should be treated as solely responsible for his own actions.

The grounds of appeal include:

- the majority of the Full Court erred in imposing a duty of care upon the appellants to take reasonable care to protect a patron from self-harm arising from his own intoxication;

- the majority of the Full Court erred in failing to hold that a duty of care which required the appellants to refuse and/or resist handing over the deceased's motorcycle to him was inconsistent with the respective legal rights and obligations of the deceased and the appellants concerning ownership and retention of the motorcycle.

BOFINGER & ANOR v KINGSWAY GROUP LIMITED & ORS (S160/2009)

Court appealed from: New South Wales Court of Appeal
[2008] NSWCA 332

Date of judgment: 3 December 2008

Date of grant of special leave: 19 June 2009

The appellants were guarantors of loans to a developer. Those loans were secured by first, second and third mortgages over the development property. They were also secured by similar mortgages over both the appellants' own home and an investment property. The appellants then sold both their own home and the investment property and the net proceeds were paid to the first mortgagee. The three mortgages over the appellants' properties were discharged upon settlement, but the second and third mortgagees received nothing.

The first mortgagee then realised its security over the development property. After it had been paid out, it retained the surplus proceeds (and the certificates of title to two unsold properties) which were then paid and delivered to the second mortgagee. The appellants claimed to be subrogated in equity and under section 3 of the *Law Reform (Miscellaneous Provisions) Act* 1965 to the rights of the first mortgagee over the surplus proceeds and unsold properties in priority to the second mortgagee. The Chief Judge in Equity held that the appellants' right of subrogation protected them from unconscionable conduct by the first mortgagee, but the latter had not acted unconscionably in transferring the surplus proceeds and the certificates of title to the second mortgagee. The appellants' proceedings were therefore dismissed.

On 3 December 2008 the Court of Appeal (Giles JA, Handley & Sackville AJJA) held that a guarantor of a first mortgage who pays it off can normally keep it alive for his own benefit against the mortgagor and a second mortgagee. Justices Giles & Handley however held that the rule in *Otter v Vaux* applied in principle and should be extended to prevent a guarantor who pays off a mortgage that he has guaranteed from keeping it alive as against any later mortgage that he has also guaranteed.

All Justices held that the appellants were not entitled to be subrogated to the surplus assets in priority to the second mortgagee. This was because it was not unconscionable for the first mortgagee to hold those assets for the benefit of the second mortgagee or for the second mortgagee to claim them in priority to the guarantor(s). The appellants' appeal was therefore dismissed.

Notices of contention have been filed by all of the respondents (save the fourth respondent). The respondents contend that the decision of the Court below should be affirmed on grounds that were not dealt with by the Court below.

The grounds of appeal include:

- That the Court of Appeal erred in holding that s 3 of the *Law Reform (Miscellaneous Provisions) Act* 1965 did not apply to the appellants.

- The Court of Appeal erred in holding that the equitable right to subrogation that the appellants would otherwise obtain by partly paying out the first mortgagee was inconsistent with the obligations undertaken by the appellants to the second mortgagee.