AMENDED SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 27 JULY 2010

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DICKSON v THE QUEEN (M11/2009)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2008] VSCA 271

Date of judgment: 18 December 2008

Date referred: 23 April 2010

The applicant was charged with conspiring with Holmes and Purdy to steal cigarettes. At the conclusion of the Crown case at the first County Court trial in 2006, all three co-conspirators made submissions that there was no case to answer. The trial judge ruled that Holmes and Purdy had no case to answer and the jury had entered a directed verdict of acquittal. However the trial judge rejected the submission by the applicant. His Honour also rejected a submission by the applicant that there was then "no one" left with whom the applicant could conspire. The Crown subsequently filed over a further presentment alleging that the applicant had conspired with Holmes, Purdy, Wang and persons unknown to steal the cigarettes. After a second trial by jury in the County Court, the applicant was found guilty on 21 February 2008 of one count of conspiracy to steal and was sentenced to a term of imprisonment of five years and six months with a non-parole period of four years and six months.

The applicant was friends with one Farrell, an employee of the Australian Customs Service (Customs). Customs leased premises owned by a company known as Dominion Group (Dominion) which contained a large quantity of counterfeit cigarettes that had been seized in a Customs operation. The only means of accessing the storage area after hours was through Dominion staff. It was the Crown case that shortly before the theft of a number of pallets of cigarettes from the storage area, the applicant contacted Dominion employees posing as Farrell, creating the impression that a legitimate removal of the stock of cigarettes was being undertaken. Two men involved in the theft, Wang and Liang, gave evidence against the applicant. The Crown also relied on a significant amount of evidence about surveillance and telephone intercepts indicating that there were numerous calls made between the applicant and other alleged co-conspirators relating to the organisation of the theft and sale of the cigarettes. The defence case disputed that it was the applicant who had practised the deception and denied that there had been any conspiracy to steal the cigarettes.

The applicant appealed to the Court of Appeal (Vincent and Weinberg JJA and Robson AJA) against sentence and conviction. He submitted that the primary judge erred in ruling that the evidence relating to Holmes and Purdy was admissible in the trial of the applicant. Their Honours noted that this Court's decision in *R v Darby* (1982) 148 CLR 668 made it clear that it was open to convict one accused before the Court and acquit another who was jointly presented with him, even if they were the only two persons alleged to have participated. The fact that Holmes and Purdy had been acquitted did not of itself mean that no case could be presented against the applicant that he conspired with them. Evidence of Holmes and Purdy's acts and declarations could, subject to the principles set out by this Court in *Ahern v The Queen* (1988) 165 CLR 87, constitute part of the proof of guilt in the applicant's trial. The evidence relating to the activities of Holmes and Purdy was relevant to the issues of the existence of a conspiracy, its nature and objectives and the applicant's participation and role in it. The admissibility of the evidence was not affected by their acquittal, nor did its

reception involve any failure to give full recognition to those acquittals. The remaining grounds of appeal against conviction were also rejected.

On 23 April 2010 this Court, constituted by Gummow, Hayne & Crennan JJ, referred the application for special leave to an expanded bench to be argued as if on appeal.

The questions of law said to justify the grant of special leave include:

- Whether it is an abuse of process for the Crown to file a presentment against an accused alleging that that accused conspired with persons who have already been acquitted of the same conspiracy in the same proceedings.

- Whether the Court of Appeal erred in determining that the evidence relating to the acquitted co-conspirators was admissible on the second trial.

- Whether the Court of Appeal incorrectly relied on the Ahern principle [paragraph 57, *Ahern v The Queen* (1998) 165 CLR 87)].

- Whether the Court of Appeal wrongly apply the rule in *Darby*'s case.

COMMISSIONER OF TAXATION v ANSTIS (M64/2010)

Court appealed from: Full Court of the Federal Court of Australia [2009] FCAFC 154

Date of judgment: 4 November 2009

Date special leave granted: 23 April 2010

During the year ended 30 June 2006, the respondent was enrolled as a full-time university student. She received a youth allowance of $3,622. In her income tax return for that year she acknowledged receipt of $14,946 as wages. She claimed as allowable deductions outgoings totalling $920 for self-education expenses. The appellant disallowed the deduction. The respondent objected and the AAT affirmed the appellant's decision on the basis that self-education expenses were only deductible where they enabled a taxpayer to improve or maintain professional skill or knowledge or would lead, or be likely to lead to an increase in income from current income earning activities.

The respondent appealed to the Federal Court. Ryan J held that the expenses were deductible in accordance with s 8-1 of the *Income Tax Assessment Act* 1997 (Cth) ("the Act"). What was productive of assessable income was the respondent having qualified for the receipt of youth allowance and having preserved that qualification through the relevant period. The expenses were not outlaid to put the respondent in a position to receive the youth allowance but were incurred as a necessary incident of pursuing a particular course of study. That the respondent's ultimate purpose in undertaking the course of study was to acquire a qualification leading to future employment as a teacher was irrelevant to the characterisation of the expenditure and it was sufficient that the expenditure was incurred as a necessary incident of deriving the youth allowance.

The Full Federal Court (Finn, Sundberg and Evans JJ) dismissed the appellant's appeal. The Court found that the appellant's characterisation of the respondent's activities as a student as "qualifying activities" by reference to the youth allowance was to be rejected as an exercise in semantics. The respondent was paid to undertake the course in which she was enrolled on the condition that she do so in a particular manner. As for the appellant's argument that the respondent incurred the expenditure in undertaking her studies rather than to obtain the youth allowance, this would be to introduce a purpose test as a criterion for deductibility under the first limb of s 8-1. The first limb of s 8-1 was concerned with whether the outgoing was incurred in the course of deriving assessable income, not whether the outgoing was incurred for the purpose of deriving assessable income. All of the expenditure in issue was incurred by the respondent in the course of undertaking her course of study. The income producing activity commenced with her enrolment and continued throughout the period in which the allowance was paid. There was nothing suggesting that any part of the expenditure claim was incurred prior to or as a condition of enrolment so as to lack the requirement of contemporaneity referred to in *Federal Commissioner of Taxation v Maddalena* (1971) 2 ATR 541. Accordingly, the expenditure was incurred in the course of gaining or producing the respondent's assessable income within the first limb of s 8-1.

The grounds of appeal include:

- The Court should have decided that the outgoings were not deductible because:
  (a) they were not incurred in gaining or producing the respondent's assessable income for the purpose of s 8-1(1)(a); alternatively
  (b) they were of a private or domestic nature for the purposes of s 8-1(2)(b);

- In particular, the Court erred:
  (a) in deciding that the respondent was paid "Youth Allowance" pursuant to the *Social Security Act 1991* (Cth) to undertake the course of study in which she was enrolled; and
  (b) that, accordingly, the relevant outgoings were incurred in the course of gaining or producing the respondent's assessable income because the occasion for the incurrence of the outgoings was productive of the Youth Allowance.

COMMISSIONER OF STATE OF TAXATION v CYRIL HENSCHKE & ORS (A4/2010)

Court appealed from: Full Court Supreme Court of South Australia [2009] SASC 148

Date of judgment: 29 May 2009

Date special leave granted: 12 February 2010

The partnership of CA Henschke & Co (the partnership) as constituted from time to time has been in the winemaking business for 50 years. By a deed dated 17 January 1986 Mrs Doris Henschke and the three respondents agreed to conduct the partnership business and hold interests in that business as follows:

Doris – 1/6th
Cyril Henschke Pty Ltd (the first respondent) 1/3rd
Henschke Cellars Pty Ltd (the second respondent) – 1/3rd
Stephen Henschke (the third respondent) – 1/6th

On 22 December 2004 the property of the partnership, comprising almost entirely the goodwill in the partnership business, was valued at around $36M. On 23 December 2004 the partners executed a deed by which Doris retired (the Retirement Deed). Doris was paid approximately $6M representing her 1/6th interest and the former partners (the Continuing Partners) continued the partnership business. The Retirement Deed stated that the Continuing Partners now held interest as follows:

Cyril Henschke Pty Ltd - 2/5th
Henschke Cellars Pty Ltd – 2/5th
Stephen Henschke – 1/5th

In March 2006 the appellant assessed stamp duty on the Retirement Deed at $316,669 on the basis that the Retirement Deed effected a transfer of Doris' 1/6th interest in the goodwill to the Continuing partners. In December 2007 the objection by the Continuing Partners was disallowed.

They appealed against the assessment to the Supreme Court. Gray J began by noting that a partner has a beneficial interest in all of the property of the partnership. His Honour approached the issue before him as being: on retirement from a partnership, not whether the beneficial interest has been conveyed, but whether there was a conveyance of the interest by the document on which stamp duty is to be levied. He held that either expressly or by necessary implication the conveyance of Doris' interest in the partnership property was effected by the Retirement Deed. The assessment was upheld.

On appeal, the Full Court described the interest of a partner in partnership property as an interest in every asset expressed as a right to share of any surplus (after realisation of assets and discharge of liabilities). The Court considered that the right was an equitable right and was categorised as a chose in action. The Court held that the effect of the Retirement Deed was not to convey Doris' interest to the Continuing Partners, but rather that the Deed effected a transaction by which the equitable chose in action was converted into an entitlement to payment of a specific amount and once that payment was satisfied that chose in action ceased to exist. Having concluded that Doris' interest was not transferred, the Full Court found that both in form and substance the transaction was not a sale and so not subject to stamp duty.

The grounds of appeal are:

- The Court erred in finding that the Deed of Retirement dated 23 December 2004 did not effect a "conveyance" within the meaning of s 60 of the *Stamp Duties Act 1923* (SA);

- The Full Court erred in characterising the beneficial interest of a partner in partnership property as a mere chose in action that may be converted to an entitlement to payment of a specific sum, and as not including a proprietary interest in the underlying assets of the partnership.

ROWE & ANOR v. ELECTORAL COMMISSIONER & ANOR (M101/2010)

Date referred to Full Court: 29 July 2010

This is an application for an order to show cause in which the plaintiffs challenge the validity of ss 102(4), 102(4AA) and 155 of the *Commonwealth Electoral Act* 1918 (Cth) ('the Act"). These provisions prescribe the days available for new enrolments (s 102(4)), transfers of enrolment (s 102(4AA)) and the close of the Rolls (s 155) following the issue of writs for an election.

In 2006 the Act was amended and the number of days available for each of these steps was reduced from 7 days to 1 day in the case of new enrolments and from 7 days to 3 days in the cases of transfers of enrolment and the close of the Rolls. The plaintiffs contend that the current provisions infringe the express requirements of ss 7 and 24 of the *Constitution* that senators and members of the House of Representatives be "chosen by the people".

Writs for a federal election were issued on Monday, 19 July 2010, for an election to be held on Saturday, 21 August 2010. Under s 93(2) of the Act, only a person who is on the electoral roll is entitled to vote in an election, even if that person is otherwise qualified to vote.

The first plaintiff was not on the electoral roll on the date that the writs were issued, but was entitled to enrol pursuant to ss 93 and 99(1) of the Act. After 8pm on Monday, 19 July, but before 8pm on Monday, 26 July, 2010, the first plaintiff applied to have her name added to the electoral roll pursuant to s 101(1) of the Act. Section 102(4) of the Act has the effect that the divisional returning officer (who is subject to the direction of the first defendant the Electoral Commissioner) cannot consider the first plaintiff's claim to enrol to vote until after the 21 August election. Section 102(4) will thus prevent the first plaintiff from voting in the election.

The second plaintiff was on the electoral roll for the Division of Wentworth on the date that the writs were issued, thus entitling him to vote in relation to that division. However, on the date that the writs were issued, the second plaintiff resided at a different address, entitling him to be on the roll for the Division of Sydney. After 8pm on Thursday, 22 July, but before 8pm on Monday, 26 July 2010 the second plaintiff applied to transfer his enrolment pursuant to s 101(1) of the Act. Sections 102(4AA) and 155 of the Act have the effect that the divisional officer (who is subject to the direction of the first defendant) cannot consider the second plaintiff's claim to transfer his enrolment until after the 21 August election. Sections 102(4AA) and 155 will thus prevent the second plaintiff from voting in the election in the sub-division in which he resides.

The plaintiffs claim a right to be enrolled and vote in the election. The plaintiffs seek a declaration that ss 102 (4), 102(4AA) and 155 of the Act, and any other provisions of the Act to the extent that they give effect to those provisions, are invalid and of no effect. The plaintiffs also seek writs of mandamus requiring the first defendant to direct the divisional returning officers for the Division of Sturt and the Division of Sydney to include on the electoral roll the name of the first plaintiff and the name of the second plaintiff and to permit the first plaintiff and the second plaintiff to cast a vote or a provisional vote at the 21 August election.

The grounds on which the relief is claimed are:

1. Sections 102(4), 102 (4AA) and 155 of the Act, and any other provisions of the Act that give effect to those provisions, are

...

(c) contrary to ss 7 and 24 of the *Constitution*; and/or

(d) beyond the legislative powers of the Commonwealth conferred by ss 51(xxxvi) and 30 of the *Constitution* or any other head of legislative power; and/or

(e) beyond what is reasonably appropriate and adapted, or proportionate, to the maintenance of the constitutionally prescribed system of representative government;

and are therefore invalid and of no effect.

On 29 July 2010 Justice Hayne referred the proceeding for further hearing by a Full Court.

The Attorney-General for the State of Western Australia has intervened in the proceedings in support of the defendants.