SHORT PARTICULARS OF CASES
APPEALS

COMMENCING MONDAY, 29 MARCH 2010

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REPUBLIC OF CROATIA v SNEDDEN (S24/2010)

Court appealed from:	Full Court of the Federal Court of Australia [2009] FCAFC 111
Date of judgment:	2 September 2009
Date of grant of special leave:	12 February 2010

In February 2006 the Commonwealth of Australia received an extradition request from the Republic of Croatia concerning Mr Daniel Snedden. His extradition was sought in relation to two counts of war crimes against prisoners of war pursuant to Article 122 of the Basic Penal Code of the Republic of Croatia ("the Croatian Penal Code"). Mr Snedden was also being prosecuted for one count of a war crime against the civilian population pursuant to Article 120, paragraphs 1 and 2 of the Croatian Penal Code.

Pursuant to s19(2) of the *Extradition Act 1988* (Cth) ("the Act"), a person may only be surrendered if that person does not satisfy the Magistrate that there are "substantial grounds" for believing that there is an extradition objection in relation to that offence. Relevantly, an extradition objection may be established if that person can satisfy the Magistrate that they may be punished by reason of their race, religion, nationality or political opinions.

In April 2007 a Local Court Magistrate determined that Mr Snedden was eligible for surrender to the Republic of Croatia. An application for a review of that decision was also dismissed by Justice Cowdroy in February 2009.

On 2 September 2009 the Full Federal Court (Bennett, Flick & McKerracher JJ) unanimously allowed Mr Snedden's appeal, finding that he had established a valid extradition objection within the meaning of s7(c) of the Act. Their Honours noted that there was evidence in the Court below that service for the Croatian forces was treated by the Croatian Courts as a mitigating factor on sentence. (Mr Snedden fought for the Krajina Serbs, *against* the Croatian forces.) Their Honours accepted the submission that the application of the mitigating factor in favour of Croatian forces by the Croatian Courts meant that Mr Snedden would be imprisoned for a longer period than a Croatian counterpart, if convicted. Given the particular nature of the war in Croatia (and Mr Snedden's expressed pro-Serbian political beliefs), it followed that the mitigating factor would be applied by reason of his political beliefs.

On 25 February 2010 Justice Gummow made orders, inter alia, that Mr Snedden surrender his passport(s) and that he was not to leave Australia.

The grounds of appeal include:

- The Full Court erred in holding that Mr Snedden had established an extradition objection in relation to the extradition offences for the purposes of s19(2)(d) of the Act on the ground that he had established substantial grounds for believing that, on surrender to the Republic of Croatia in respect of the extradition offences, he may be "punished, detained or restricted in his….personal liberty, by reason of his….political opinions".

JOHN ALEXANDER'S CLUBS PTY LIMITED & ANOR v WHITE CITY TENNIS CLUB LIMITED (S309/2009)

WALKER CORPORATION PTY LIMITED v WHITE CITY TENNIS CLUB LIMITED & ORS (S308/2009)

Court appealed from: New South Wales Court of Appeal [2009] NSWCA 114, New South Wales Court of Appeal [2009] NSWCA 194

Dates of judgment: 3 June 2009 & 23 July 2009

Date of grant of special leave: 3 November 2009

Since 1948 the White City Tennis Club ("the Club") has operated out of the White City site in Paddington ("White City") pursuant to various licences granted by the site's owner, the NSW Lawn Tennis Association ("the LTA"). In April 2004 John Alexander's Clubs ("JACS") submitted a proposal to operate a facility out of the Club. On 26 August 2004 Tennis NSW (the LTA's successor) announced that some of White City would be offered for sale.

On 28 February 2005 the Club and JACS signed a memorandum of understanding ("MOU"). It recited that JACS had been negotiating with Tennis NSW to purchase (or for an option to purchase) the land by White City Holdings ("WCH"). It also stated that JACS was negotiating with a third party, the Trustees of the Sydney Grammar School ("SGS"), whereby JACS and SGS would tender for the purchase of the land by SGS. SGS would then grant JACS (on behalf of WCH) an option to purchase part of that land.

Of importance to the current proceedings was clause 3.7 of the MOU. It provided that JACS agreed that it would seek to obtain an option to purchase the land from Tennis NSW (or the third party) and that if it did so:

1. in the event that JACS exercised the option, that it would exercise the option on behalf of WCH upon which WCH would simultaneously grant JACS a 99 year lease;

2. JACS would seek to procure a further option to purchase for the Club if JACS did not exercise the option from Tennis NSW or the third party; or

3. in the event that the Club was not able to procure the further option and if JACS did not exercise the option, then upon the Club giving notice that it required JACS to exercise the option on its behalf, JACS would proceed to exercise the option.

On 15 April 2005 SGS successfully tendered for the purchase of the land on behalf of both itself and Sydney Maccabi Tennis Limited ("Maccabi"). Part of the land was immediately onsold to Maccabi. On 29 June 2005 SGS, Maccabi, JACS and the Club entered into an agreement ("the White City Agreement") which provided that SGS/Maccabi granted JACS an option to acquire some of the land. It further stated that if it did not do so, the Club would be granted that option. The White City Agreement also provided that JACS and the Club agreed that the

MOU continued and that each would continue to carry out its obligations. In the event of any inconsistency however, the White City Agreement would prevail.

On 12 April 2006 JACS served a notice of termination of the MOU on the Club, stating that the Club had evinced an intention not to be bound by it. The Club rejected this. On 27 June 2007 Poplar Holdings Pty Ltd ("Poplar"), as JACS' nominee, purchased the option and became the land's registered proprietor. Walker Corporation Pty Limited ("Walker") financed Poplar's purchase and an unregistered mortgage was granted in its favour. A charge was also granted to secure Poplar's borrowings.

The Club commenced proceedings against both JACS and Poplar. It alleged that the MOU gave rise to a fiduciary duty on JACS only to exercise the option on the Club's behalf. It further alleged that it was in breach of that duty and that the Club was deprived of its opportunity to exercise the option in default of JACS. The Club also contended that JACS held the option on a constructive trust and that it ought to be conveyed to the Club upon payment of the amount for the option land. It further alleged fraud, unconscionability and breach of the *Trade Practices Act* 1974 (Cth) ("the TPA").

On 21 November 2008 Chief Justice Young in Eq dismissed the Club's application, holding that there was no such fiduciary duty. His Honour also held that the MOU had been repudiated before 12 April 2006 and that Poplar was protected by the indefeasibility provisions of the *Real Property Act 1900* (NSW) ("the RPA"). His Honour further held that there was no unconscionability, nor was there a breach of the TPA.

On 3 June 2009 the Court of Appeal (Giles, Basten and Macfarlan JJA) allowed the Club's appeal. Their Honours found that it would be unconscionable for Poplar to deny the Club's interest in the option land and that Poplar held that land on a constructive trust for the Club. They further found that the constructive trust arose notwithstanding JACS's termination of the MOU. It was also not necessary to base the finding that a constructive trust existed upon a conclusion that there was a fiduciary relationship between the parties. The Court additionally held that Poplar was not entitled to rely upon the indefeasibility provisions of the RPA.

On 5 June 2009 the Club filed a notice of motion, seeking a variation of the orders made on 3 June 2009. On 11 June 2009 Walker sought an order that it be joined as a party, asserting that its interest in the land ranked over the Club's.

On 23 July 2009 the Court of Appeal (Giles, Basten and Macfarlan JJA) delivered judgment on both applications. Justice Macfarlan noted that Walker knew of the litigation at all relevant times and it was now too late for it to be joined as a party. He further found that Walker's claim of having an equitable interest ranking in priority over the Club's could be pursued in separate proceedings. Their Honours did however make certain variations to the earlier order and they also granted a stay.

These appeals were set down for hearing on 10 and 11 February 2010. On 11 February both appeals were stood over for further hearing to the sittings in Canberra commencing 29 March 2010.

In matter number S309/2009 the grounds of appeal include:

- The Court of Appeal erred in its conclusion that Poplar held its interest in the land in Folio Identifier 2/1114604 upon constructive trust for the Club.

In matter number S309/2009 a notice of contention has also been filed, the grounds of which include:

- The Court below erroneously failed to decide whether the MOU was terminated on 12 April 2006, or subsequently repudiated, or whether the MOU remained on foot at all relevant times.

In matter number S308/2009 the grounds of appeal include:

- The Court of Appeal erred in holding that Walker's joinder to the proceedings was not necessary to determine the disputes between the Club, Poplar and JACS.

In matter number S308/2009 a notice of contention has also been filed, the grounds of which include:

- In light of the orders made by the Court of Appeal, and the availability to Walker of equity proceedings to seek to protect its claimed interest, Walker was not prejudiced by the dismissing [of] its amended notice of motion.