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LACEY v. ATTORNEY-GENERAL OF QUEENSLAND (B40/2010)

Court appealed from: Court of Appeal, Supreme Court of Queensland [2009] QCA 274

Date of judgment: 11 September 2009

Date special leave granted: 26 June 2010

This appeal concerns two brothers, the appellant Dionne and his co-accused Jade, who were tried together and convicted of manslaughter and wounding with intent to maim, respectively. The appellant, having been convicted of manslaughter, appealed unsuccessfully against conviction and the Attorney-General appealed successfully against sentence. Jade Lacey appealed unsuccessfully against both conviction and sentence. Both offences arose out of the same event. The brothers were at the flat of the deceased, and others, negotiating the purchase of cocaine. Both brothers were carrying concealed pistols. An argument broke out between the appellant and the deceased, Jade Lacey shot the deceased in the thigh, and the appellant shot the deceased in the chest, killing him. The appellant did not give evidence at his trial. Jade Lacey claimed that the deceased had rushed him while holding a pistol. There were several other witnesses but none who directly saw the shots being fired. The appellant was sentenced to 10 years' imprisonment and Jade Lacey to 5 years' imprisonment.

A five member Bench of the Court of Appeal heard the brothers' appeals against convictions and sentences, and the Attorney-General's appeal against sentence in the appellant's matter (de Jersey CJ, McMurdo P, Keane, Muir and Chesterman JJA; McMurdo P dissenting in part in relation to the sentence imposed on the appellant). The majority allowed the Attorney-General's appeal against the appellant's sentence and substituted a sentence of 11 years for that of 10 years imposed by the trial judge. McMurdo P would have reduced the sentence to 9 years and 8 months.

Special leave in relation to Jade Lacey's application was refused. Special leave in relation to the appellant's application challenging the decision of the Court of Appeal on his appeal against conviction was refused. Special leave was granted in relation to the orders of the Court of Appeal allowing the Attorney-General's appeal against sentence.

The grounds of appeal include:

- Whether the Court of Appeal erred in holding that the nature of the right to appeal conferred on the Attorney-General of Queensland by s 669A of the Criminal Code 1899 (Qld) did not require that error be shown on the part of the sentencing court before the jurisdiction of the appellate court was enlivened;

- Whether the Court of Appeal should not have overruled its previous decision in *R v. Melano; ex parte Attorney-General* [1995] 2 Qd R 186.

The Attorney-General of the Commonwealth of Australia and the Attorneys-General for the states of New South Wales, Western Australia and South Australia, have given notice of their intention to intervene in this matter pursuant to section 78A of the *Judiciary Act*.

EDWARDS AND ORS v. SANTOS LIMITED AND ORS (S153/2010)

Date referred to the Full Court: 18 August 2010

This is an application for an order to show cause in which the plaintiffs challenge the decisions made by Justice Logan of the Federal Court of Australia on 18 December 2009 and 17 March 2010 and the decision of the Full Court of the Federal Court given on 4 June 2010.

The plaintiffs are registered native title claimants under the *Native Title Act* 1993 (Cth) ("Native Title Act") in respect of land in south-west Queensland and north-west New South Wales ("the relevant land"). No native title determination has yet been made in respect of the plaintiffs' claim concerning the relevant land. The first defendant and the third defendant are the holders of an authority to prospect the relevant land (ATP 259P) issued under the *Petroleum Act* 1923 (Qld) ("Petroleum Act"). The dispute between the plaintiffs and the first and third defendants arose during negotiations for an indigenous land use agreement in respect of that land. A function of officers of the second defendant is the issuing of petroleum leases under the Petroleum Act.

In their amended application before Logan J the plaintiffs sought declarations in respect of any petroleum lease granted to the first and/or third defendants under s 40 of the Petroleum Act in respect of land subject to the native title claim and covered by ATP259. Specifically the declarations sought were that any such lease would (a) not be a pre-existing right-based act within the meaning of Part 2, Division 3, Subdivision I of the Native Title Act and (b) not be valid pursuant to s 24ID of the Native Title Act unless the requirements of Part 2, Division 3, Subdivision P had been satisfied. The plaintiffs also sought an order restraining the second defendant from granting any such petroleum lease to the first and/or third defendants.

Logan J dismissed the substantive application. In summary, his Honour found that the plaintiffs had no reasonable prospect of success within the meaning of s 31A of the *Federal Court of Australia Act* 1976 (Cth) ("Federal Court Act"), and further that the Court had no jurisdiction to entertain the State law aspect of the plaintiffs' claim. His Honour considered separately the question of jurisdiction and standing and held that the pleaded facts did not establish any matter forming part of a justiciable controversy between the parties. No petroleum lease had been granted nor did the defendants have a legal right to require a lease to be granted.

The plaintiffs sought leave to appeal from the principal orders of Logan J made on 18 December 2009 and also from the costs orders made on 17 March 2010. The Full Court (Stone, Greenwood and Jagot JJ) in a unanimous judgment dismissed the applications for leave to appeal noting that an application for leave to appeal would not be granted if the case sought to be put on appeal had no prospect of success.

The grounds on which the relief is claimed include:

- That Logan J in the judgment given on 18 December 2009 in proceeding QUD 86 of 2009, erred in finding that the Federal Court of Australia did not have jurisdiction to hear and determine the plaintiffs' application.

- That Logan J in the said judgment erred in failing to find that the plaintiffs' application sought a determination by the Federal Court to resolve a dispute between parties to negotiations pursuant to Part 2, Division 3, Subdivision C of the NTA for an Indigenous Land Use Agreement (ILUA) and not to enforce procedural rights under Part 2, Division 3 of the NTA.

The first and third defendants have filed a notice of a constitutional matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth) as have the plaintiffs. The Attorney-General of the Commonwealth of Australia and the Attorney-General of the State of Queensland have intervened in this matter.

WAINOHU v. THE STATE OF NEW SOUTH WALES (S164/2006)

Writ of Summons: Issued 22 July 2010

Date of Referral of Special Case to the Full Court: 15 October 2010

This special case involves the validity of the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) ("the Act") which came into force in New South Wales on 3 April 2009.

The plaintiff is a member of an unincorporated association known as the Hells Angels Motorcycle Club ("the Club"). He has been a member since November 1989. He regularly associates with other members and supporters of the Club in NSW.

On 4 July 2007 a number of members and supporters of the Hells Angels Sydney Chapter assaulted Mohammed Taiba on a footpath on Guildford Rd, Guildford. The plaintiff who stood in close proximity to the victim during the assault was wearing Hells Angels Colours and was in possession of a hammer, for which he was convicted for affray and for having custody of an offensive implement in a public place and sentenced.

On 6 July 2010 the Acting Commissioner of Police for New South Wales filed a document in the Supreme Court of NSW entitled "*Application to an eligible Judge for a declaration*". The application was filed pursuant to the Act. In the event that the application is successful and a declaration is made under the Act that the Club is a "declared organisation" for the purposes of the Act the plaintiff is exposed to being the subject of an application for an interim control order and a control order pursuant to the Act.

The Special Case reserves the following questions for consideration by the Full Court:

- Is the Act or any provision or part of it invalid on the grounds that:
    - It undermines the institutional integrity of the Supreme Court of New South Wales; or
    - It is outside the legislative powers of the Parliament of the defendant?
- Who should pay the costs of the special case and/or of the proceedings?

Notice of a constitutional matter has been given by the plaintiff as required by section 78B of the *Judiciary Act* 1903 (Cth). A further notice was filed on 18 November 2010. The Attorney-General of the Commonwealth of Australia and the Attorneys-General for the states of New South Wales, Western Australia, South Australia, Victoria and Queensland as well as the Attorney-General for the Northern Territory have given notice of their intention to intervene in this matter pursuant to section 78A of the *Judiciary Act*.

BYRNES & ANOR v KENDLE (A23/2010)

Court appealed from:	Full Court of the Supreme Court of South Australia [2010] SASC 64
Date of judgment:	18 December 2009
Date special leave granted:	3 September 2010

The second appellant (the wife) and the respondent (the husband) married in 1980 and separated in early 2007. In 1984 property in Brighton was purchased in the husband's name, to which purchase the wife contributed. In 1994 the Brighton property was sold and a property in Rachel Street, Murray Bridge was purchased using the proceeds of sale. Again the property was registered in the husband's name. In 1997 the wife and the husband had executed an "Acknowledgement of Trust" ("the Acknowledgement"), by which the husband acknowledged that he held an undivided half interest in the property as tenant in common upon trust for the wife, and each of them acknowledged that their survivor was entitled to the use of the property for life. They lived in the house at Rachel Street from early 1995 until 2001. In 2001 the first appellant (the wife's son and the husband's stepson) purchased another property in Murray Bridge in which his mother and her husband thereafter lived. A son of the husband occupied the house at Rachel Street from 2002 to 2007. He failed to pay the agreed rent to the husband.

After the wife and husband separated a dispute arose concerning the value of the Rachel Street property, which was eventually sold in July 2008. The wife and her son commenced proceedings in the District Court, claiming half of the net proceeds of sale of the Rachel Street property. She also claimed that the husband was a trustee of her interest in the property, and had breached his duty as trustee by failing to collect the rent payable by his son. The wife claimed that the husband should account to her for half of the rent that ought to have been paid by the son. Judge Boylan made a declaration that the husband held one half of the net proceeds of sale of the Rachel Street property on trust for the wife. However he dismissed the claim regarding the unpaid rent. He found that the Acknowledgement did not create "an express trust." If he was wrong in that, the judge found that the husband was under no duty, enforceable by the wife, to collect rent. In any event, even if the husband was in breach of his duty as trustee, the judge found that the wife had "co-operated" in the breach and so could not complain about it.

The Supreme Court (Doyle CJ, Nyland and Vanstone JJ) dismissed the wife's appeal. The Court disagreed with the trial judge's finding regarding the existence of a trust, finding that the Acknowledgement constituted the husband a trustee for the wife of an interest as tenant in common, with a life interest in his interest in the event that he predeceased her. The Court upheld the trial judge's decision however, that the husband was not in breach of any duty in failing to collect the rent from his son. The Court found that in letting out the property he was not subject to the duties that would normally be imposed on a trustee who lets out trust property. The husband acted as one of two co-owners. He and the wife agreed that the property should be let to his son. She was aware that the son had stopped paying the rent. It was open to her, if she saw fit, to insist upon action being taken to enforce payment, either by suing for the rent or by evicting the son, but she chose not to do so. None of that gave rise to a liability on behalf of the husband for the rent that was not paid. Such a liability would arise only if the terms and circumstances of the trust were ignored. In short, the husband was under no duty to Mrs Byrnes to let the property; to let it to his son

was not a breach of duty; and to fail to take action to insist upon payment of the rent was not a breach of a duty owed to the wife. Even if the husband had been under a duty to take steps to enforce payment, the wife "acquiesced in that breach" and in circumstances that lead to a conclusion that it would not be just and equitable that she should require the husband to account to her for her share of the unpaid rent.

The grounds of appeal are:

- The court below erred in law in finding that the respondent, as trustee, did not have a duty with respect to the recovery of rent in respect of the property of which he was trustee.

- The court below erred in law in considering that the respondent, as trustee, was not subject to the duties that would normally be imposed on a trustee who rents out trust property.

- The court below erred in law and in fact in finding that the second appellant was capable of consenting to or acquiescing in her husband's actions as trustee and the second appellant had effectively consented to or acquiesced in her husband's actions as trustee.

The respondent has filed a Notice of Contention.

COMMISSIONER OF TAXATION v BHP BILLITON LIMITED (M117-120/2010)
COMMISSIONER OF TAXATION v BHP BILLITON PETROLEUM (NORTH WEST SHELF) PTY LTD (M121& M123/2010)
COMMISSIONER OF TAXATION v BROKEN HILL PROPRIETARY COMPANY PTY LTD (M122/2010)
COMMISSIONER OF TAXATION v BHP BILLITON MINERALS PTY LTD (M124 & M125/2010)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCAFC 25

Date of judgment: 17 March 2010

Date special leave granted: 3 September 2010

In June 1995 the board of BHP Billiton Limited ("BHPB") approved expenditure of $1,550 million for a hot briquetted iron ("HBI") processing plant at Boodarie in Western Australia. BHPB established a wholly-owned subsidiary called BHPB Direct Reduced Iron Pty Ltd ("DRI") to own the HBI plant, and financed it from shareholders funds contributed by one BHPB subsidiary, BHPB Minerals Holdings Ltd, ("Holdings") and by borrowing money from another BHPB subsidiary, BHPB Finance Limited ("Finance"). In November 1996 and August 1997 the BHPB board approved further increases in capital expenditure on the plant, half of which were provided by Finance. On 30 March 2000, the board of Finance asked Ernst & Young to review the carrying value of the DRI loan recorded in Finance's accounts. Pending that report Finance made provision for doubtful debt in respect of the loan of over $2 billion, which left it with negative net assets in excess of $940 million. In May 2000, Ernst & Young delivered its report valuing the DRI loan at $346 million. The board of Finance then resolved to treat the balance of the loan (in excess of $1,845 million) as irrecoverable and bad, and directed that it be written off.

The expenditure that DRI incurred on the HBI project gave rise to "capital allowance" tax deductions, which DRI claimed for the income years 1996 to 2002. In the 2003 to 2006 income years, BHPB claimed these deductions in its capacity as "head" company of the BHP tax consolidated group. The appellant applied Division 243 of the *Income Tax Assessment Act* 1997 (Cth) ("the Act") to reduce the capital allowance deductions claimed by BHPB by a total of $603,096,634. Because DRI was in losses in the income years 2000 & 2002 and transferred its tax losses to other companies in the BHPB group, the adjustments resulted in reductions in losses transferred to these other companies. The adjustments were therefore reflected in assessments issued to a number of subsidiaries of BHPB.

Following disallowance of their objections, the respondents appealed to the Federal Court. The issue to be determined in these proceedings was whether the loan from Finance to DRI was "limited recourse debt" as defined in ss 243-20(1) and (2) of the Act. Gordon J decided that the loan was unlimited, as Finance had a right to call for repayment of the principal and any interest that had accrued, to sue on the promise of repayment in the standard terms and then to prove with other unsecured creditors in the event of a winding up of DRI.

The Full Court (Sundberg, Stone and Edmonds JJ) dismissed the appellant's appeal. The Court identified the legislative policy underlying Division 243 as being to reverse capital allowance deductions that had been obtained for expenditure that is funded by

debt when the debtor (in this case DRI) is not fully at risk in relation to the expenditure and the debt is not fully repaid. The Court held that the legislative policy so identified conditioned the proper construction of ss 243-20(1) and (2). They were to be construed so that their application was confined to situations where, at the time of borrowing, the debtor was not fully at risk in relation to the expenditure because of contractual limitations on the lender's rights of recourse on a relevant event of default or, where, at the time of borrowing, the debtor or someone else had the capacity to subsequently bring about that state of affairs. Applying that construction, there was no error in Gordon J's conclusion that the DRI debt was not "limited recourse debt" for the purposes of Division 243.

The grounds of appeal are:

- The Full Court erred in holding that the loan from BHPB Finance Limited (the creditor) to BHP Billiton Direct Reduced Iron Pty Limited (the debtor) was not "limited recourse debt" within s 243-20(2) of the *Income Tax Assessment Act* 1997 (Cth) because of the absence of a legally enforceable right to limit the creditor's rights to recover the loan in the way described in s 243-20(1).

- The Full Court erred in paragraph [107] in holding that it was part of the legislative purpose of s 243-20(2) that it should not apply to companies established to undertake a specific resources or infrastructure project, whose assets were therefore confined to that project.