SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 28 FEBRUARY 2012

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BAKER v THE QUEEN (M154/2011)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2010] VSCA 226

Date of judgment: 9 September 2010

Date special leave granted: 28 October 2011

The appellant was found guilty of murder, after a trial in the Supreme Court of Victoria and was sentenced to 17 years' imprisonment with a non-parole period of 12 years. His co-accused ('LM') was acquitted.

The events giving rise to the conviction occurred on 27 November 2005, at a party which was being held at a warehouse. Amongst those attending the party were the appellant, LM, and the victim ('S'). Also in attendance was Ali Faulkner, a friend of the appellant. At about 3.00 am, there was an outbreak of unprovoked violence in the main party area. The appellant and Faulkner attacked party-goers at random and inflicted injuries. Soon afterwards, the appellant, Faulkner and LM went out of the party through a door into the stairwell. Outside the door there was a landing, on one side of which were nearly full-length windows. The death of S occurred after he crashed through the window and fell 5.4 metres to the footpath below. The question for the jury was whether the Crown had established that it was the actions of the appellant and/or LM which caused S to go through the window and, if so, whether at the time of the relevant actions the appellant intended to cause S really serious injury.

The appellant sought leave to appeal to the Court of Appeal (Maxwell P, Buchanan, and Bongiorno JJA) on the ground that the jury could not have been satisfied beyond reasonable doubt that he had the requisite intent at the relevant time. The Court noted that there were five eyewitnesses who gave evidence, three of whom (Doig, Acaro and Stuart) implicated the appellant, the other two (Asfer and Masonga) implicating LM. In refusing leave to appeal, the Court found there was a perfectly sound basis for the jury to prefer the accounts of Doig and Arcaro, which were clear and consistent, over the conflicting accounts of Asfer and Masonga. The Court considered that, far from the evidence precluding a conclusion beyond reasonable doubt that the appellant acted with the requisite intent at the crucial time, that conclusion was well open to the jury on the version of events which they accepted. The eyewitness accounts of Doig and Arcaro described the appellant as having engaged in an unbroken, unrelenting, ferocious attack on S. The jury were entitled to be satisfied that the appellant set out to do all those acts in order to achieve his objective of causing S really serious injury.

The appeal to this Court raises an issue which was not argued in the Court of Appeal. In the case against LM the Crown relied on evidence of admissions made by LM on two occasions. The first was an admission to police in a record of interview that he pushed S, and the second was a statement he made to Faulkner shortly after the party: "Look what you made me do". The trial judge directed the jury that the evidence of those admissions could not be used in the appellant's case. It is conceded by the appellant that, as the common law of Australia is understood at present, there was no error in the approach of the trial judge, as there is no exception to the hearsay rule which renders hearsay evidence of an admission by a co-accused admissible. It is submitted by the appellant that had the point been taken in the Court of Appeal, that Court would have been bound to rule as the trial judge did. The appellant submits that the law should be reconsidered by this Court.

The grounds of appeal are:

- The Court of Appeal erred in failing to hold that the trial miscarried as a result of the trial judge's error:
  a) in directing the jury that the evidence of admissions by the co-accused was "only evidence in his case, it is not evidence in [the appellant's] case"
  b) in failing to direct the jury that the alleged admissions by the co-accused could be used in exculpation of the appellant.

- The Court of Appeal erred in failing to have regard to the evidence of the co-accused's admissions in determining whether the jury's verdict was unreasonable or could not be supported having regard to the evidence.

FORREST v. AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION AND ANOR (P44/2011)
FORTESCUE METALS GROUP LTD v. AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION AND ANOR (P45/2011)

Court appealed from: Full Court of the Federal Court of Australia [2011] FCAFC 19

Date of judgment: 18 February 2011

Date of grant of special leave: 29 September 2011

Andrew Forrest was the chairman and CEO of Fortescue Metals Group ("FMG"). In 2004, FMG entered into "framework agreements" with three Chinese companies for a mining project in the Pilbara Region. In August and November 2004, FMG provided information to the Australian Securities Exchange ("ASX") about the projects, relevantly stating that the parties had executed binding agreements to build, finance and transfer the infrastructure for the project. In 2006, ASIC commenced proceedings against FMG and Forrest, alleging that FMG breached s 1041H of the *Corporations Act* 2001 (Cth) ("the Act") or s 52 of the *Trade Practices Act* 1974 (Cth) by engaging in misleading or deceptive conduct by falsely representing that the framework agreements were binding. FMG was alleged to have breached its continuing disclosure obligations under s 674(2) of the Act. That provision required FMG to notify the ASX of information that was not generally available and that was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the entity's securities. Forrest was also alleged to have breached his duties as a director under s 180 of the Act.

Justice Gilmour dismissed ASIC's proceedings. In relation to the alleged breach of s 674, his Honour noted that the information ASIC contended ought to have been disclosed comprised an assertion as to the meaning and legal effect of the framework agreements. That assertion was necessarily the product of a judgment or opinion and there was no evidence that FMG or Forrest ever held the opinions postulated by ASIC. There were reasonable grounds for FMG and Forrest to have held the view that the framework agreements were binding as claimed. Those views were based on legal advice and were honestly and reasonably held. In relation to the alleged breach of s 1041H of the Act, Gilmour J found that the relevant disclosures did not amount to misleading and deceptive conduct. ASIC's case against Forrest under s 180 of the Act was contingent upon FMG's breach of ss 674(2) and 1041H and, accordingly, failed.

ASIC's appeal was allowed by the Full Court (Keane CJ, Emmett and Finkelstein JJ). Keane CJ gave the principal judgment of the Court. His Honour noted that, in relation to s 1041H of the Act and s 52 of the *Trade Practices Act*, the issue was what ordinary and reasonable members of the investing public would have understood from the various announcements. It was the effect of the statements on the persons to whom they were published rather than the mental state of the publisher which determined whether the statement was misleading or deceptive.

In relation to Forrest, his known participation in the events leading to FMG's breach of s 1041H of the Act established that he was involved in its contraventions for the purposes of the Act. He was also a person involved in FMG's contravention of s 674 pursuant to s 674(2A). He failed to discharge the onus of showing that he took all reasonable steps to ensure that the agreements were, in law, binding agreements to

the effect represented by FMG and he was unable to rely on the defence under s 674(2B) of the Act. Further, he was unable to avail himself of the business judgment rule under s 180(2) of the Act. The decision not to make an accurate disclosure about the terms of a major contract could not be described as an exercise of business judgment.

The grounds of appeal include:

P44/2011 (Forrest)

- The Full Court erred in holding that the second respondent contravened ss 674(2) and 1041H of the Act and the appellant contravened ss 180(1) and 674(2A) of the Act in making announcements that the framework agreements were binding agreements under which the Chinese entities had agreed to build, finance and transfer the infrastructure for the Project and, in particular, that the financing risk for the Project had been agreed to be taken by the Chinese entities.

P45/2011 (FMG)

- The Full Court erred in holding that the appellant contravened ss 674(2) and 1041H of the Act in making announcements that the framework agreements were binding agreements under which the Chinese entities had agreed to build, finance and transfer the infrastructure for the Project and, in particular, that the financing risk for the Project had been agreed to be taken by the Chinese entities.

The first respondent cross-appeals, in each appeal, subject to the grant of special leave, from paragraph 2.1 of the judgment of the Full Court of the Federal Court of Australia given on 18 February 2011, as varied by orders made on 20 May 2011. The grounds of cross-appeal are materially identical for each appeal and include:

P44/2011 (Forrest)

- The Full Court should have held that the appellant contravened s 674(2A), by reason of his knowing involvement in [the] contraventions of s 674(2A) by the second respondent.

P45/2011 (FMG)

- Applying the test of "likely influence" for the purposes of s 677 of the Act as explained by the Full Court at para 188 of its reasons, and leaving aside the effect of any public announcement by the appellant concerning the framework agreements, the Full Court should have held that the appellant contravened s 674(2) of the Act, by reason that the appellant failed to notify the ASX, in accordance with the ASX Listing Rules, of the material terms or effect of each of the framework agreements immediately after the appellant and the board of the relevant Chinese counterparty approved each framework agreement.

The first respondent has also filed a notice of contention in identical terms in each appeal. The first respondent contends that the judgment of the Full Court should be affirmed on the following ground: "If and insofar as the Full Court failed to find that there was no reasonable basis for [Forrest and FMG] to believe that their public announcements accurately described the terms or legal effect of the framework agreements, the Full Court ought to have so found (although the first respondent contends that the Full Court did so find)."

THE QUEEN v KHAZAAL (S344/2011)

Court appealed from: New South Wales Court of Criminal Appeal [2011] NSWCCA 129

Date of judgment: 9 June 2011

Date of grant of special leave: 7 October 2011

On 10 September 2008 the Respondent was found guilty of an offence of making a document connected with preparation for, the engagement of a person in, or assistance in a terrorist act, knowing of that connection, contrary to section 101.5(1) of the *Criminal Code Act* 1995 (Cth) ("the Code"). The jury was unable to reach a verdict on the second count in the indictment, which charged an attempt to urge the commission by others of an offence, namely engaging in a terrorist act contrary to section 101.1(1) of the Code. On 25 September 2009 Justice Latham sentenced the Respondent to 12 years imprisonment, with a non-parole period of 9 years.

On 9 June 2011 a divided Court of Criminal Appeal allowed the Respondent's appeal and ordered a retrial. Of the four grounds of appeal against conviction argued, Justices Hall & McCallum upheld Ground 4. That ground alleged that Justice Latham had erred in holding that the Respondent had failed to discharge the evidentiary burden provided by section 101.5 of the Code. Justice Hall would have also allowed Grounds 1 & 3, while Justice McCallum (but for Ground 4) otherwise agreed with Justice McLellan who would have dismissed the appeal.

The grounds of appeal are:

- The majority in the Court below erred in finding that the Respondent had discharged the evidential burden on him under subsection 101.5(5) of the Code having regard to the definition of "evidential burden" in subsection 13.3(6) of the Code.

- The majority in the Court below erred in finding that, at the close of the evidence in the trial, there was evidence that suggested a reasonable possibility that the making of the subject document by the Respondent was not intended to facilitate assistance in a terrorist act so as to engage the defence in subsection 101.5(5) of the Code.

- The majority in the Court below erred in upholding the Respondent's appeal against his conviction of the offence in Count 1 in the indictment, quashing the conviction and ordering a re-trial.

On 26 October 2011 the Respondent filed a notice of contention, the grounds of which include:

- In concluding the learned trial judge's directions were sufficient and proper, the majority of the Court of Criminal Appeal (McClellan CJ at CL and McCallum J) erred in finding that the words "connected with" as employed in section 101.5 [of the] Code were words of ordinary meaning and did not require any further explanation.

HARBOUR RADIO PTY LIMITED v TRAD (S318/2011)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 61

Date of judgment: 22 March 2011

Date special leave granted: 2 September 2011

Mr Keysar Trad alleged that Radio Station 2GB ("the Radio Station") defamed him in a program broadcast on 19 December 2005. At a trial pursuant to section 7A of the *Defamation Act 1974* (NSW), the jury found that a number of defamatory imputations had been both conveyed and were defamatory. These included:

a) Mr Trad stirred up hatred against a 2GB reporter which caused him to have concerns about his own personal safety;
b) Mr Trad incites people to commit acts of violence;
c) Mr Trad incites people to have racist attitudes;
d) Mr Trad is a dangerous individual;
g) Mr Trad is a disgraceful individual;
h) Mr Trad is widely perceived as a pest;
j) Mr Trad deliberately gives out misinformation about the Islamic Community;
k) Mr Trad attacks those people who once gave him a privileged position.

The Radio Station claimed that each of the impugned imputations was published upon an occasion of qualified privilege at common law. It also submitted that they were a response to an attack upon it by Mr Trad the previous day. The Radio Station further pleaded that imputations (b), (c), (d) (h) & (j) were matters of substantial truth and were therefore related to a matter of public interest. It also claimed that any substantially true imputation was published contextually and they did not therefore further injure Mr Trad's reputation. The Radio Station additionally submitted that imputations (b) to (g) constituted comment on a matter of public interest.

The Chief Justice at Common Law, Justice McLellan, upheld the defences in respect of each imputation, except the defence of justification to the imputations (h) & (j). His Honour found that imputations (b), (c), (d) and (g) were substantially true and that the Radio Station's response related to a matter of public interest. He also upheld the defence of contextual truth with respect to imputations (a), (h), (j) & (k). Justice McLellan further held that the matter complained of was published on an occasion of qualified privilege and he rejected the submission that that defence was defeated by malice. He further found that imputations (b), (c), (d) & (g) were defensible as comment.

On 22 March 2011 the Court of Appeal (Tobias, McColl & Basten JJA) allowed the appeal in part. Their Honours found that a defence of truth was unavailable with respect to an imputation characterized as a statement of fact. With respect to imputations (b), (c), (d) & (g) they found that Justice McLellan erred in finding that Mr Trad believed that the appropriate punishment for homosexuality in modern Australia was death by stoning. His Honour had also failed to consider whether a right thinking member of the Australian community would consider that Mr Trad was the type of person (or that he actually held such views) giving rise to imputations (b), (c), (d) & (g).

The Court of Appeal further held that Justice McClellan had erred in finding that imputations (b), (c), (d) & (g) were defensible as comment and that (c), (h) & (k) were

published on an occasion of qualified privilege.

The grounds of appeal include:

- In determining whether the broadcast was published on what the Court of Appeal had found was an occasion of qualified privilege arising from Mr Trad's prior public attack upon the Radio Station, the Court of Appeal applied wrong tests, namely, whether individual imputations "constituted a legitimate response", were "a relevant response" or were "a bona fide answer or retort by way of vindication fairly warranted by the occasion".

On 28 October 2011 Mr Trad filed a summons, seeking to file both a notice of cross-appeal and a notice of contention out of time. The grounds of the proposed notice of cross-appeal include:

- The Court of Appeal erred in upholding [the] defence of reply to attack to five imputations (a), (b), (d), (g) and (j) out of eight pleaded.

The ground of the proposed notice of contention is:

- That the decisions of the Court of Appeal relating to qualified privilege (reply to attack) and truth should be affirmed, but on grounds in addition to those relied upon by the Court below, that is to say on the ground that the whole of the qualified privilege defence should have been rejected because of malice and on the ground that the general community standard test was irrelevant to the termination of the truth defences.

PILBARA INFRASTRUCTURE PTY LTD & ANOR v AUSTRALIAN COMPETITION TRIBUNAL & ORS (M155/2011; M156/2011; M157/2011);
THE NATIONAL COMPETITION COUNCIL v HAMERSLEY IRON PTY LTD & ORS (M45/2011);
THE NATIONAL COMPETITION COUNCIL v ROBE RIVER MINING CO PTY LTD & ORS (M46/2011)

Court appealed from: Full Court of the Federal Court of Australia [2011] FCAFC 58

Date of judgment: 4 May 2011

Date special leave granted: 28 October 2011

Pilbara Infrastructure Pty Limited, a subsidiary of Fortescue Metals Group (together "Fortescue") sought access to four railway lines and associated infrastructure in the Pilbara region pursuant to Pt IIIA of the *Trade Practices Act* 1974 (Cth) and its successor the *Competition and Consumer Act* 2010 (Cth) ("the Act"). Two of the lines were owned by BHP entities ("BHP") (the Goldsworthy and Mt Newman lines) and two were owned by Rio Tinto Ltd and associated entities ("Rio Tinto") (the Hamersley and Robe lines). Under Pt IIIA, a service could be declared by the relevant Minister, in which case, an enforceable right to negotiate the terms of access to the service vested in any interested person. The Commonwealth Treasurer, on the recommendation of the National Competition Council ("the Council"), made a declaration over the lines for a period of 20 years. Of particular importance for these matters is s 44H(4) of the Act which provided:

> *The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters: ...*
> *(b) that it would be uneconomical for anyone to develop another facility to provide the service; . . .*
> *(f) that access (or increased access) to the service would not be contrary to the public interest.*

BHP and Rio Tinto sought review of the Minister's decisions in the Australian Competition Tribunal. The Tribunal set aside the Minister's decision with respect to the Hamersley line and varied the decision with respect to the Robe line so that it would expire in 10 years. The Tribunal found that criterion (b) involved a "natural monopoly" test, to the effect that the criterion would not be satisfied because the existing facility could not meet market demand at a total cost less than that required to construct a new line. It further found that criterion (f) was not met in relation to the Hamersley line because access would be contrary to the public interest.

Both Fortescue and Rio Tinto sought judicial review by the Full Federal Court. The Council sought, and was granted, leave to intervene. The Court (Keane CJ, Mansfield and Middleton JJ) dismissed Fortescue's application and allowed Rio Tinto's. It found that criterion (b) established a test of private economic feasibility, that is, not whether it would be economically efficient from the perspective of society as a whole, but whether it was not economically feasible for a participant in the marketplace to develop an alternative facility. To the extent that the "natural monopoly" test relied on by the Tribunal required an evaluation of efficiency in terms of costs and benefits, that approach was inconsistent with the legislative intent that access should not be made available because it would be convenient to some parties or society more generally. The word "anyone", in the phrase "*uneconomical for anyone*" in s 44H(4)(b), did not

include the incumbent owner of the facility. On the proper interpretation of criterion (b), Fortescue's application failed.

In relation to criterion (f), the likely consequences of access, assumed to be on reasonable terms, including matters of economic efficiency and competition policy, were to be considered in evaluating public interest. The costs of the second stage might also be relevant. Although the same evidence in relation to the same issues might be considered at each stage, the perspective of each decision-maker would be different.

Both Fortescue and the Council applied to this Court for special leave to appeal. On 28 October 2011 the Court granted special leave to Fortescue and referred the applications by the Council to an enlarged Bench. The Council has also sought leave to intervene in the Fortescue appeals.

Appeals M155 to M157 of 2011

The grounds of appeal in the Fortescue matters include:

- The Court erred in concluding that the criterion in s 44H(4)(b) of the Act "*that it would be uneconomical for anyone to develop another facility to provide the service*" should be construed as a test of private financial profitability, measured by accounting standards rather than a test of economic efficiency.
- The Court erred in concluding that the criterion for declaration of a service specified in s 44H(4)(f) of the Act "*that access (or increased access) to the service would not be contrary to the public interest*" requires or permits a complex inquiry into the likely net balance of social benefits and costs if a declaration is made as opposed to a declaration not being made.
- The Court erred in concluding that s 44H of the Act conferred a broad, general discretion upon the Minister, if otherwise appropriately satisfied that all specific matters in s44H pointed in favour of declaration, to conduct a free ranging inquiry into matters referred to in s 44H(4)(f) so as to reach a decision of non-declaration.

Applications M45 and M46 of 2011

The questions of law said to justify a grant of special leave in the Council matters are:

- what is the proper construction of the phrase "*uneconomical for anyone to develop another facility to provide the service*", in s 44H(4)(b) of the Act?
- whether criterion (b) should be construed by reference to:
  - (i) a social cost test, adopting either:
    - A. the "net social benefit test" approach adopted by the Australian Competition Tribunal in, inter alia, *Re Review of Freight Handling Services at Sydney International Airport* (2000) 156 FLR 10; or
    - B. the "natural monopoly test" approach articulated by the Tribunal in the matter of *Fortescue Metals Group Ltd* [2010] ACompT 2; or
  - (ii) the "private feasibility test" adopted by the Full Federal Court in the current matter?

THE QUEEN v GETACHEW (M139/2011)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2011] VSCA 164

Date of judgment: 2 June 2011

Date special leave granted: 29 September 2011

After a trial in the County Court of Victoria, the respondent was found guilty on one count of rape. The defence did not call any evidence. The complainant gave evidence that on 29 June 2007, she drank bourbon and champagne in several bars with a friend called Mary, a friend of Mary's (Bothin) and the respondent. The complainant said she was 'getting very drunk' and she decided not to drive home in her car. Instead, she, Mary and the respondent were driven by Bothin to a bungalow at the rear of a house in which Bothin's parents lived. The bedroom of the bungalow contained one bed. Bothin placed a mattress on the floor of the bedroom for the complainant and the respondent, while Bothin and Mary shared the bed. The complainant was wearing a short skirt, a top and a coat. As she was going to sleep, the respondent touched her leg. She told him to go away. The respondent touched her again. The complainant said that she told him that if he did not stop touching her, she would sleep in the car. The respondent offered to sleep somewhere else but the complainant said she told him, 'Don't worry about it. Just don't touch me and let me sleep'. The complainant gave evidence that after she went to sleep, she woke up and the respondent was lying behind her, her clothing was dishevelled and the respondent "was thrusting into me". The complainant said she pushed him away, got up and went out to her car. She said she was 'in complete shock'.

In his appeal to the Court of Appeal (Buchanan and Bongiorno JJA, Lasry AJA dissenting), the respondent submitted that the trial judge erred in his directions to the jury on the mental element required for proof of the offence of rape: in particular, by directing that such element would be established if the accused was aware that the complainant might be asleep. The Court noted that the defence case was based on the issue of whether or not penetration occurred, and there was no evidence of the respondent's state of mind. He had made a record of interview in which he failed to answer any questions and stood mute at his trial. However, the majority held that it was not incumbent upon defence counsel to expressly raise the question of the respondent's awareness that the complainant might not be consenting. The jury were required to be satisfied that the element of *mens rea* had been proved and, accordingly, counsel for the respondent was entitled to assume that the trial judge would instruct the jury as to that requirement. The majority found the trial judge erred in his instructions as to the element of *mens rea*, as the jury could be satisfied that the respondent was aware of the possibility that the complainant was asleep, but at the same time think that it was a reasonable possibility that he believed she was awake. The majority of the Court set aside the respondent's conviction and ordered a retrial.

Lasry AJA (dissenting) while agreeing that the trial judge's direction was in error, did not agree that the error had led to any miscarriage of justice.

The grounds of appeal are:

- The Court of Appeal erred in holding that His Honour's direction that, if the jury was satisfied beyond reasonable doubt that the respondent was aware that the complainant was either asleep or might be asleep, that would be sufficient to establish that the complainant was not or might not be consenting, was wrong at law.
- The Court of Appeal erred in law in holding that on the facts and issues relied upon by the respondent at his trial, the element of his awareness that the complainant was consenting or might be consenting was enlivened.