SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 28 MAY 2013

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APOTEX PTY LTD v SANOFI-AVENTIS AUSTRALIA PTY LTD & ORS (S219/2012)
APOTEX PTY LTD v SANOFI-AVENTIS AUSTRALIA PTY LTD & ORS (S1/2013)

Court appealed from: Full Court of the Federal Court of Australia [2012] FCAFC 102

Date of judgment: 18 July 2012

Date special leave referred in/granted: 14 December 2012

The Respondents are related companies which supply the drugs "Arava" and "Arabloc". Both of those products contain the compound leflunomide. The Second Respondent holds Australian Patent Number 670491 ("the Patent") which claims a method of treating psoriasis by the administration of leflunomide. It also states that psoriasis was one of numerous medical uses which were the basis of an earlier patent ("the earlier patent") for leflunomide obtained by a predecessor of the Second Respondent. The earlier patent referred to the treatment of "rheumatic complaints". The main rheumatic complaint treated by rheumatologists is inflammatory arthritis, the most common forms of which are rheumatoid arthritis ("RA") and psoriatic arthritis ("PsA"). Psoriasis exists independently of PsA, but most people who have PsA also develop psoriasis.

Entries in the Australian Register of Therapeutic Goods ("the Register") were obtained for both Arava and Arabloc. Those entries state that those products are used to treat both RA and PsA. They also state however that the products' registration does not extend to the treatment of psoriasis that is not associated with arthritic disease. In July 2008 Apotex Pty Ltd ("Apotex") obtained a very similar entry in the Register for a generic product called "Apo-Leflunomide". In doing so Apotex provided descriptions which it had copied from the product information on Arava. The Respondents then sued Apotex for threatened infringement of the Patent. They also alleged breach of copyright and (threatened) misleading or deceptive conduct by Apotex.

On 18 November 2012 Justice Jagot restrained Apotex from marketing or supplying any products that contain leflunomide, as such acts would infringe the Patent pursuant to s 117(1) of the *Patents Act* 1990 (Cth) ("the Act"). Her Honour found that the Patent was valid, as the invention claimed in it was both novel and a "manner of manufacture". Justice Jagot also found that the method described in the Patent contemplated leflunomide as having an effect of treating psoriasis. That effect occurred whether or not the drug was prescribed only for the treatment of PsA. Her Honour held that previous instances of the copying of a competitor's information for the registration of a generic pharmaceutical product did not give rise to a licence implied by custom compelling the Respondents to accept Apotex's copying of Arava's product information. Apotex had therefore breached the Respondents' copyright.

On 18 July 2012 the Full Court of the Federal Court (Keane CJ, Bennett J & Yates J) unanimously dismissed Apotex's appeal. Their Honours found that the Patent was not invalid for lack of novelty, nor was it invalid for want of a "manner of manufacture". The Full Court held however that Apotex's planned supply of Apo-Leflunomide would infringe the Patent because the product information for Apo-Leflunomide would effectively cause leflunomide to be used for the treatment of psoriasis. This is despite that information (and rheumatologists' prescriptions) not referring to that skin condition. Their Honours held that Justice Jagot had correctly found that a licence to copy product information could not be implied on the basis of the industry practice alleged by Apotex.

In matter number S219/2012 the questions of law said to justify the grant of special leave to appeal include:

- When a patent claims the use of a compound for the treatment of a specific disease, can a person who supplies the compound and indicates its use for the treatment of a different disease infringe the patent under s 117(1) of the Act?

In matter number S1/2013 the ground of appeal is:

- The Full Court erred in finding that the claim of the Patent claimed a manner of manufacture within the meaning of s 18(1) of the Act.

ELIAS v THE QUEEN & ANOR (M29/2013); ISSA v THE QUEEN & ANOR (M25/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2012] VSCA 160

Date of judgment: 30 July 2012

Date special leave granted: 15 March 2013

The appellants pleaded guilty to, and were sentenced in the Supreme Court of Victoria to eight years' imprisonment for, the common law offence of attempting to pervert the course of justice, for which the sentence is fixed by s 320 of the *Crimes Act* 1958 (Vic). The charges arose from each appellant's role in assisting Tony Mokbel to flee the jurisdiction while he was on trial for importing a trafficable quantity of cocaine. This was an offence against a law of the Commonwealth being tried in a State court pursuant to s 68 of the *Judiciary Act* 1903 (Cth). Each appellant appealed to the Court of Appeal against their sentence on the ground that the sentencing judge erred by failing to take into account a less punitive Commonwealth offence (attempting to pervert the course of justice pursuant to s 43 of the *Crimes Act* 1914 (Cth)) which was said to be as, or more, appropriate than the State offence upon which they were sentenced. They also contended, on the basis of *R v Liang & Li* (1995) 82 A Crim R 39, that the less punitive offence should have been taken into account in determining their sentences.

The Court of Appeal (Warren CJ, Redlich, Hansen & Osborn JJA, & Curtain AJA), in rejecting the appeals, held that the principle in *Liang & Li* is to be confined to less punitive offences that exist within the jurisdiction in which the judicial power is being exercised, and it does not require a judge exercising the judicial power of the State of Victoria to take account of like Commonwealth offences.

The Court noted that the fixing of a maximum penalty by the Victorian Parliament involves a pronouncement by the Legislature of its view as to the relative seriousness of the offence. Where the terms of the provision do not permit of an argument that the offence is not intended to cover the field of conduct to which the offence relates, the fixing of the maximum penalty by the Parliament does not leave any scope for a judge to diminish the effect of the prescribed maximum, by taking into account the maximum penalty fixed for identical or comparable offences in other jurisdictions. Where the Parliament has fixed different maximum penalties for a number of statutory offences which cover identical or very similar conduct, the common law principle in *Liang & Li* may apply. But maximum penalties fixed by the Commonwealth Parliament, even upon a subject in which it has an obvious interest, do not entitle a Victorian judge exercising State jurisdiction to depart in any respect from the lawful commands of the Parliament of Victoria, save where the laws of the Commonwealth so require. In this case there was no conflict between the Commonwealth and State offences. There was no constitutional constraint which required a State judge exercising State judicial power in relation to a State offence to have regard to a lesser maximum sentence of a comparable Commonwealth offence.

The appellants also contended that they should have been charged under s 43 of the Commonwealth *Crimes Act* which was the more appropriate charge, as it rendered it unlawful to interfere with the course of justice in relation to the judicial power of the Commonwealth and each of their offending included conduct in a number of States of Australia and internationally. They submitted that s 43, carrying with it a maximum penalty of five years' imprisonment could not be said to be inappropriate for the offence of attempting to pervert the course of justice when the highest sentence previously

imposed for this offence in Victoria was one of four years' imprisonment. The Court of Appeal found, however, that the gravity of the offending conduct by the appellants in undermining the curial process was unprecedented and called for the imposition of sentences more severe than any previously imposed. Having regard to the nature and extent of the appellants' offending conduct, s 43 was not a more appropriate, or even as appropriate an, offence with which to charge them.

The ground of appeal is:

- The Court of Appeal erred in failing to hold that the learned sentencing judge had erred, when sentencing on the count of attempting to pervert the course of justice contrary to common law (the maximum penalty for which is prescribed by s 320 of the *Crimes Act* 1958 (Vic) at 25 years' imprisonment):
  (a) by failing to have regard to the maximum penalty fixed for the offence of attempting to pervert the course of justice contrary to s 43 of the *Crimes Act* 1914 (Cth) (the maximum penalty for which, at the relevant time, was five years imprisonment) particularly in circumstances where the course of justice that the appellant attempted to pervert was in relation to the judicial power of the Commonwealth; or
  (b) by failing to have regard to the maximum penalty fixed for the related offence under State law of assisting an offender contrary to s 325 of the *Crimes Act* 1958 (Vic) (which also carried five years' imprisonment).

The respondent has filed a Notice of Contention which in effect submits that the principle identified in *R v Liang & Li* is not a sentencing principle recognised at common law.

Note: A related appeal in *Pantazis v The Queen & Anor* (M28/2013) was discontinued on 28 May 2013 following the death of the appellant.

LEGAL SERVICES BOARD v GILLESPIE-JONES (M27/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2012] VSCA 68

Date of judgment: 19 April 2012

Date special leave granted: 15 March 2013

This application arises from the appellant's disallowance of the respondent's claim, under s 3.6.6 of the *Legal Profession Act* 2004 (Vic) ('the Act'), for compensation for pecuniary loss suffered by the respondent because of a default by a solicitor in misappropriating funds held in trust.

In or about 2005 a man ('the client') was charged with criminal offences. He retained a solicitor, to act on his behalf. In December 2006, the solicitor retained the respondent as barrister to represent the client. Between 19 December 2006 and 9 May 2007, the client paid the solicitor a total of $55,000 for legal costs in relation to his defence. The solicitor paid a total of $22,070 of the $55,000 to the barrister, but dishonestly misappropriated the remaining $32,930 to himself.

At the hearing in the County Court of Victoria, the respondent contended that he was a 'person' within the meaning of s 3.6.7 of the Act, and thus entitled to make a claim against the Fidelity Fund under that section. Judge Kennedy accepted that argument. Her Honour held that the money paid by the client to the solicitor was 'trust money' within the meaning of s 3.3.2(a) of the Act, and further or alternatively, money within the meaning of s 3.3.2(d) of the Act which was '*received by the practice [of the solicitor] ... the subject of a power, exercisable by... an associate of the practice, to deal with ... for or on behalf of another person*'. Her Honour gave judgment for the respondent for such amount as was determined by the Costs Court to be a '"fair and reasonable value" of the legal services that he provided to the client in the period December 2006 to 20 April 2007.

The appellant's appeal to the Court of Appeal was unsuccessful. The Court (Nettle, Redlich and Hansen JJA) found the fact that the client paid the money to the solicitor to be applied to a particular purpose implied that the relationship thereby established was a *Quistclose* trust, creating an interest by the respondent in the trust money. It was implicit in the client's arrangement with the solicitor that the respondent's and other persons' rights to receive payments out of the fund were conditional upon the respondent and those other persons having a present right to payment. If so, it would follow that, since the amount of the obligation owed to the respondent was not determined or agreed before the solicitor misappropriated the fund, the respondent did not acquire a vested equitable interest in the fund. This did not mean, however, that the fund was not held for, or on behalf of, the respondent within the meaning of s 3.3.1. In the reality of the circumstances which obtained, the logical and most probable inference was that the client impliedly put the funds beyond his power of immediate recall and thus subjected them to a trust for payment to counsel and other persons retained to assist in the defence.

Under the terms of the trust so constituted, the solicitor had an obligation to pay the respondent out of the fund when and if the respondent rendered a memorandum of fees in enforceable form. But the respondent's 'interest' did not depend upon the existence of a present unfulfilled obligation to pay and deliver the money. Even before his fees fell due, the respondent had a contingent interest in the fund, in that it was held on trust for payment to him when his fees became due. The respondent, therefore, had

an enforceable right to due administration of the fund and, ultimately, to have the solicitor account to the respondent out of the fund for the amount found to be due upon a memorandum of fees being rendered in enforceable form.

In the result, the judge was correct to hold that the failure of the solicitor to pay the respondent's fees due out of the fund was a default within the meaning of s 3.6.2 and the default arose from an act or omission of the solicitor that involved dishonesty. Equally, the judge was correct that the solicitor's failure to pay counsel out of the fund in accordance with the terms of the trust caused counsel loss equal to the amount of the fees which were due, and that it was 'actual pecuniary loss' within the meaning of s 3.6.7.

The grounds of appeal include:

- The Court erred in its determination that the respondent had a proprietary interest in trust money at the time of the "*default*" by the solicitor, such that he was entitled to compensation from the Fidelity Fund pursuant to Part 3.6 of the *Legal Profession Act* 2004.

- The Court erred in holding that the respondent had a contingent proprietary interest in the trust money at the time of the "*default*" and that this interest was sufficient to found his claim for compensation from the Fidelity Fund.

- The Court erred in determining that the client had created a *Quistclose* trust over the trust money, in favour of the respondent.

NGUYEN v THE QUEEN (M30/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2010] VSCA 23

Date of judgment: 23 February 2010

Date special leave granted: 15 March 2013

After a trial by jury in the Supreme Court of Victoria, the appellant was convicted of the murder of Hieu Trung Luu and the attempted murder of Chau Minh Nguyen ('Chau Minh'). The events that gave rise to the conviction occurred on 7 November 2004. The appellant, with two co-accused, Bill Ho ('Ho') and Dang Quang Nguyen ('Quang'), went to a flat in Carlton, allegedly to collect a drug debt. While they were there Ho pulled out a hand gun, shot Chau and then killed Hieu.

Both the appellant and Quang appealed to the Court of Appeal (Neave and Bongiorno JA and Lasry AJA), both arguing that the trial judge had erred in her directions to the jury concerning the alternative verdict of manslaughter. Quang's appeal was upheld and his convictions were quashed. The Court found that a jury, acting reasonably, must have had a reasonable doubt as to Quang's guilt. There was no evidence that he knew of the existence of the drug debt or knew that Ho was carrying a gun before they went to the flat. There was also insufficient evidence to establish that, after the men arrived at the flat, Quang reached an agreement or understanding with Ho to kill or inflict serious injury if necessary to recover the debt, or to use violence to recover the debt, and that Quang foresaw the possibility that death or serious injury could occur. However, the Court did not consider that the verdicts against the appellant were unsafe and unsatisfactory. On the basis of the evidence of one of the witnesses it would have been open to a reasonable jury to conclude that the drug debt was owed to the appellant rather than Ho, and/or that the appellant went to the flat to assist Ho to use violence, if necessary to collect the drug debt. In addition the jury would have been entitled to rely on the evidence of Chau Minh that the appellant told Ho to 'fuck him off' or 'get him off' and that he nodded at Ho before Ho shot Chau Minh in the head.

The respondent had sought special leave to appeal in this Court against the orders made by the Court of Appeal in relation to Quang, and on 30 July 2010 Hayne, Crennan and Bell JJ directed that the application be referred to an expanded bench to be argued as on appeal. Quang had filed a Notice of Contention on the ground that the trial judge had erred in failing to properly direct the jury as to criminal complicity, and in particular as to the alternative verdict of manslaughter. On 3 November 2010 this Court ordered that the respondent's appeal and Quang's cross-appeal be allowed, the orders of the Court of Appeal be set aside, Quang's convictions be quashed, and a new trial be had. On 9 November 2010, Quang pleaded guilty to manslaughter and recklessly causing serious injury. Subsequently in September 2012 the appellant applied for special leave out of time and was successful in obtaining a grant of special leave.

The ground of appeal is:

- The Court below erred in failing to determine that the trial judge had erred in failing properly to direct the jury as to criminal complicity and, in particular, as to the alternative verdict of manslaughter?

The respondent will be seeking to rely on a Notice of Contention which contains the following grounds:

- The Court of Appeal erred in considering that if the possibility of an alternative of manslaughter arose on the facts it could not take into account the manner in which the case was run in determining if there was a substantial miscarriage of justice.

- The Court of Appeal erred in considering that it was bound by *Gilbert v The Queen* (2000) 201 CLR 414 and could not use the conviction on the count of murder as showing that the alternative of manslaughter was not a viable alternative.