SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 5 FEBRUARY 2013

****

BECKETT v THE STATE OF NEW SOUTH WALES (S144/2012)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 114

Date of judgment: 2 May 2012

Referred into Full Court: 5 October 2012

In September 1991 a jury found the Applicant guilty of having committed various offences, on eight of the nine counts indicted. She was then sentenced to a lengthy period of imprisonment. After an unsuccessful appeal, the Applicant petitioned the Governor for a review of her convictions in 2001. The Attorney General then referred the matter to the Court of Criminal Appeal pursuant to s 474C(1)(b) of the *Crimes Act* 1900 (NSW). In August 2005 the Court of Criminal Appeal acquitted the Applicant on one count, but quashed her convictions and ordered a new trial on five of the other counts. On 22 September 2005 however the Director of Public Prosecutions ("the Director") directed that no further proceedings be taken against the Applicant on the outstanding charges. In August 2008 the Applicant instituted proceedings for malicious prosecution.

In those proceedings, the Respondent sought the separate determination of two questions. The first was in regard to the counts which were quashed, while the second was in regard to the count for which the Applicant was acquitted. Each question queried whether the Applicant was required to prove her innocence on each count to succeed on the malicious prosecution claim.

On 5 August 2011 Justice Davies found for the Respondent on the first question and for the Applicant on the second. The Applicant then appealed on the first question and the Respondent cross-appealed on the second.

On 2 May 2012 the Court of Appeal (Beazley & McColl JJA, Tobias AJA) unanimously dismissed both the appeal and the cross-appeal. Their Honours held that, upon the quashing of the Applicant's convictions (and the ordering of a new trial) on five counts, the indictment containing those counts remained on foot. It was therefore open to the Director to direct that no new trial take place. Their Honours held that they were bound by the High Court's decision in *Davis v Gell* (1924) 35 CLR 275 (*"Davis v Gell"*). It was therefore necessary, despite the Director's decision, for the Applicant to prove her innocence in order to succeed in her action for malicious prosecution. The Court of Appeal also held that, as a consequence of the High Court's decision in *Commonwealth Life Assurance Society Ltd v Smith* (1938) 59 CLR 527, the effect of the decision in *Davis v Gell* did not extend to the Applicant's acquittal on one count. She did not therefore have to prove her innocence in relation to that count.

On 5 October 2012 Justices Gummow, Hayne and Heydon referred this matter into an enlarged bench so that the application for special leave to appeal could be argued as if it were on appeal.

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

- Whether the decision in this Court in *Davis v Gell* is correct in holding that the plaintiff in a malicious prosecution case must prove her innocence when the relevant prosecution was terminated by the filing of a nolle prosequi?

- What are the elements of the tort of malicious prosecution and, in particular, when (if at all) must a plaintiff affirmatively prove innocence?

CASTLE CONSTRUCTIONS PTY LTD v SAHAB HOLDINGS PTY LTD & ANOR (S263/2012)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 395

Date of judgment: 15 December 2011

Date of special leave: 7 September 2012

In 1921 the property known as 134 Sailors Bay Road, Northbridge ("Sailors Bay") was burdened by an easement in favour of 69 Strathallen Avenue, Northbridge ("69 Strathallen)". In September 2001 the owner of Sailors Bay, Castle Constructions Pty Ltd ("Castle"), successfully requested that the Registrar-General either cancel or delete that easement from the folios in the Register relating to the two properties. In October 2008 the Registrar-General declined a request from the owner of 69 Strathallen, Sahab Holdings Pty Ltd ("Sahab"), that that easement be restored. Sahab then commenced proceedings, seeking a declaration that the easement had been wrongly extinguished. It also sought its restitution to the folios in the Register of the two properties.

On 8 March 2010 Justice Slattery dismissed Sahab's summons, rejecting the proposition that the Registrar-General was bound to correct the Register. His Honour subsequently also made certain orders as to costs.

On 15 December 2011 the Court of Appeal (McColl & Campbell JJA; Tobias AJA) unanimously upheld Sahab's appeal, finding that the Registrar-General had no power to remove the easement in 2001. Their Honours also held that the Registrar-General had the power under s 12(1)(d) of the *Real Property Act* 1900 (NSW) ("the Act") to restore the easement because there had been "an omission" in the Register in 2008. They further found that Castle had not obtained indefeasible title because of the exception in s 42(1)(a1) of the Act relating to "the omission … of an easement". It was therefore unable to rely on s 118(1) which, with limited exceptions, otherwise prohibits proceedings against the registered proprietor for recovery of an interest in land.

With respect to the Court's power to compel the Registrar-General to reinstate the easement, their Honours held that Sahab's proceedings were proceedings "for the recovery of any land, estate or interest from the person registered as proprietor "within the meaning of s 138(1) of the Act". They further found that the term "recovery" encompasses a claim for an interest in land to which a party was entitled (even unknowingly) and where it had been taken by a process that turns out to be defective and ineffective. Since Sahab's proceedings fell within s 138(1) and the indefeasibility provisions were not engaged, the Court therefore had the power make orders under s 138(3) of the Act.

The grounds of appeal include:

- The Court of Appeal erred in holding, contrary to the principles of indefeasibility embodied in the Act that the subject easement should be reinstated to the Register, despite it having been deliberately removed by the Registrar-General in 2001.

- The Court of Appeal erred in holding that the Registrar-General had power to reinstate the easement pursuant to s 12(1)(d) of the Act.

On 27 September 2012 Sahab filed a notice of cross-appeal, the grounds of which include:

- The Court of Appeal erred in finding (CA1 [70]-[72], [73(e)], [75]-[79]) that the easement by right of way created by transfer A752953 continued to be subject to the four restrictions contained in the Schedule of Covenants relating to the right of way.

- The Court of Appeal ought to have found, as the cross-appellant submitted and the Court of Appeal recorded (CA1 [74]), that the four restrictions set out in the Schedule of Covenants relating to the right of way ceased upon the registration in 1960 of transfer H403542 (described in CA1 [31]-[32]).

On 2 October 2012 Sahab filed a notice of contention, the grounds of which include:

- The Court of Appeal ought to have found, but did not, that s 138(3) of the Act provided a separate and independent source of authority and power for the correction of the Register sought by Sahab, whether or not that correction was or would be authorised under s 12(1)(d), s 42, s 136(1), 138(1) or 138(2) or any other provision of the Act, s 65 of the *Supreme Court Act* 1970 (NSW) or the general law, including where there is a determination and declaration of the rights of a party to land under the Act in proceedings that do not otherwise conform to those referred to in s 138(1) or s 138(2), and that these proceedings came within such scope of s 138(3) (CA1 [122], [129],130]).

MINISTER FOR IMMIGRATION AND CITIZENSHIP v LI & ANOR (B68/2012)

Court appealed from: Full Court of the Federal Court of Australia [2012] FCAFC 74

Date of judgment: 24 May 2012

Date of grant of special leave: 16 November 2012

On 10 February 2007 the first respondent (Ms Li), a citizen of the People's Republic of China, applied to the Department of Immigration and Citizenship for a Skilled-Independent Overseas Student (Residence) (Class DD) Visa under s 65 of the *Migration Act* 1958 (Cth) ("the Act"). The delegate refused to grant the visa.

On 30 January 2009 Ms Li applied to the Migration Review Tribunal ("the Tribunal") for review of the delegate's decision. On 19 October 2009 Ms Li's migration agent asked the Tribunal to hold the matter in abeyance as further work experience had been accumulated and a second skills assessment application was being finalised. A hearing took place on 18 December 2009 at which time Ms Li had not received a second skills assessment. The Tribunal wrote to Ms Li on 21 December 2009 calling for her to comment on a couple of issues. On 18 January 2010 the migration agent asked the Tribunal to forbear from making a final decision until the outcome of Ms Li's skills assessment was finalised. The Tribunal did not accede to that request and on 25 January 2010 proceeded to determine the application. Ms Li then applied for review of that decision by the Federal Magistrates Court. Burnett FM upheld the application to review the Tribunal's decision and remitted the matter to the Tribunal for rehearing. The Minister appealed.

The key question for determination by the Full Court of the Federal Court was whether a decision of the Tribunal to refuse to adjourn a hearing could, in particular circumstances, constitute an error going to the jurisdiction of the Tribunal, so as to warrant an order quashing the Tribunal's decision.

The Full Court (Greenwood, Collier and Logan JJ) held, (per Greenwood and Logan JJ) that "… [w]hen a tribunal fails in this way to offer an opportunity to be heard, it fails to discharge its core *statutory function* of *reviewing* the decision of the Minister or his delegate." The majority also considered that there was a denial of procedural fairness. Collier J held that in the circumstances of the case the Tribunal failed to properly consider the application for an adjournment. That failure constituted a breach by the Tribunal of its obligations, imposed by s 360 of the Act, to give an applicant a reasonable opportunity to present evidence and argument.

The grounds of appeal include:

- The majority erred in:
  a) having regard to their assessment of the merits of the first respondent's basis for requesting an adjournment;
  b) holding that the learned Federal Magistrate was correct in finding that the Tribunal's refusal of an adjournment was a decision that no reasonable tribunal could have made; and
  c) holding that the discretionary power to adjourn, in s 363(1)(b) of the Act, was exercised unreasonably.

PLAINTIFF M79/2012 v MINISTER FOR IMMIGRATION AND CITIZENSHIP (M79/2012)

Date Special Case referred to Full Court: 30 October 2012

The Plaintiff arrived in Australia at Christmas Island on 7 February 2010 without a visa and was detained. In April 2010 he made a request for a Refugee Status Assessment; these processes were completed on 17 May 2011 and an Independent Merits Reviewer concluded that the plaintiff was not a refugee. The plaintiff commenced judicial review proceedings in the Federal Magistrates Court in July 2011. In April 2012, the Minister, acting pursuant to a policy to release certain groups from immigration detention while their asylum claims were being assessed or judicial review proceedings were on foot, exercised his power under s 195A of the *Migration Act* 1958 (Cth) (the Act) to grant to the plaintiff both a Temporary Safe Haven Visa (the TSH visa) (valid for 7 days only) and a Bridging E Visa (the First Bridging visa).

On 18 September 2012 the plaintiff made application for a protection visa, but on 8 October he was advised by the Department that his application was not a valid one. On 12 October 2012 the First Bridging visa expired and on 15 October the plaintiff was again taken into detention. However on this date the Minister granted a Second Bridging visa to the Plaintiff and he was released from immigration detention.

The Plaintiff filed an application for an order to show cause and Hayne J had, on 30 October 2012, referred the Special Case agreed by the parties to the Full Court. It is noted in the Special Case that similar decisions (to grant a TSH visa and a Bridging visa) were made at various times with respect to over 2,300 other offshore entry persons.

The issues arising are: whether the Minister had the power to grant the plaintiff the TSH visa under s 195A of the Act; and whether the decision of the Minister to grant the TSH visa was made for an improper purpose. The plaintiff submits there is a subsidiary question of whether the Minister made a single decision to grant 2 visas simultaneously or whether he made two separate decisions in respect of each visa.

The Plaintiff submits that the Act gives the Minister power to grant one visa only at any one time. If the TSH visa was validly granted, then s 91K of the Act prevented the plaintiff from applying for a protection visa and that his application was invalid. If the TSH visa was not validly granted then the application for a protection visa should not have been rejected by the Department and the Minister ought to be compelled to consider it. The Plaintiff contends that the legislative history and context show that the Act was amended in 1999 to create TSH visas to give effect to a commitment of the Australian Government to provide temporary safe haven to Kosovars who had been displaced in the Balkan conflict of the late 1990s. There is also speculation that one particular class of that type of visa was created in anticipation of a humanitarian crisis in East Timor in that period also. Since the Plaintiff was in Australia at the time of the TSH visa, and at that time did not need safe haven in response to any humanitarian emergency, the Minister had no power under s 195A to grant him a TSH visa. Thus the purpose of granting the TSH visa was to impose the statutory bar in s 91K , which the plaintiff submits is an improper purpose.

The Defendant submits that the Minister made a single decision under s 195A and maintains that the TSH visa was validly granted in the exercise of power under s 195A. The Minister contends that there is no criterion applicable that a TSH visa can only be granted in response to a humanitarian emergency. It was open to the Minister to conclude that the grant of such a visa was "in the public interest". In the alternative the Defendant contends that if the TSH visa was invalid, the First Bridging visa was also invalid because its grant was not severable from the grant of the TSH visa. If both visas were invalid then s 46A(1) applied to prevent the Plaintiff from making a valid protection visa application when he did.

The questions reserved by the Special Case signed by the parties include:

- Was the plaintiff validly granted the TSH visa?

- Is the plaintiff's application for a protection visa a valid application?

LEO AKIBA ON BEHALF OF THE TORRES STRAIT REGIONAL SEAS CLAIM GROUP v COMMONWEALTH OF AUSTRALIA & ORS (B58/2012)

Court appealed from: Full Court of the Federal Court of Australia [2012] FCAFC 25

Date of judgment: 14 March 2012

Date of grant of special leave: 5 October 2012

A native title determination application was filed on 23 November 2001 on behalf of the Torres Strait Regional Seas Claim Group ("the Seas Claim Group") who are descendants of an extensive list of named ancestors who were themselves Torres Strait Islanders. The principal respondents were the State of Queensland, the Commonwealth of Australia, a large group of people and companies collectively described as "The Commercial Fishing Parties" and a small number of parties from Papua New Guinea. The application sought a determination of native title rights and interests in a large part of the sea area of the Torres Strait. The occupation of the region by the Seas Claim Group and their ancestors was of an essentially maritime character. The sea is an integral presence in the lives and livelihood of the Islander communities which comprise the Seas Claim Group.

At trial the Seas Claim Group contended that at sovereignty the members of the Seas Claim Group and their ancestors were members of one "society" for the purposes of the *Native Title Act* 1993 (Cth) ("the Act"). This contention was disputed by the Commonwealth and the State of Queensland. Finn J concluded that there was indeed a single Torres Strait Islander society and that it was the only relevant society.

The Seas Claim Group contended that their native title rights included the taking of fish and other marine resources for sale or trade and that this right had not been extinguished by legislation of the State of Queensland or the Commonwealth of Australia. Finn J accepted this contention, holding that the Seas Claim Group members enjoyed a non-exclusive right "... to access, to remain in and to use their own marine territories or territories shared with another, or other communities ...[and] to access resources and to take for any purpose resources in those territories." His Honour determined that the Seas Claim Group held native title over the claim area.

The Commonwealth of Australia, the State of Queensland and the Commercial Fishing Parties, appealed against Finn J's decision, contending that any native title right to fish for trade or exchange (commercial purposes) had long ago been extinguished by controls placed upon commercial fishing in the Torres Strait by State and Commonwealth legislation.

The Full Federal Court (Keane CJ, Mansfield and Dowsett JJ), by majority (Keane CJ and Dowsett J) allowed the appeal. All agreed that a cross-appeal by the Seas Claim Group should be dismissed.

By summons filed on 12 December 2012 the Attorney-General for Western Australia seeks leave to intervene in this matter. Biddy Bunwarrie on behalf of the Warrarn People also seeks leave to intervene, by summons filed on 23 January 2013.

The grounds of appeal include:

- The majority of the Full Court erred in holding that the native title right to take fish and other aquatic life for trade or sale is extinguished in all or any part of the native title area by applicable Queensland and Commonwealth fisheries legislation.

- The Full Court erred in holding that rights held under traditional laws and customs on the basis of a 'reciprocal relationship' with a holder of 'occupation based rights' are not native title rights or interests within the meaning of s 223(1) of the Act.

YATES v THE QUEEN (P21/2012)

Court appealed from: Court of Criminal Appeal of the Supreme Court of Western Australia (no media neutral citation)

Date of judgment: 29 July 1987

Referred into Full Court: 16 November 2012

On 7 August 1986 the applicant was charged with one count of deprivation of liberty and one count of aggravated sexual assault upon a child under the age of 13 years. At the time the applicant was 25 years old.

On 13 March 1987 the applicant was found guilty of the offences. He changed his plea from not guilty to guilty during the course of the trial. He was sentenced to seven years imprisonment on each count to be served concurrently, followed by an indeterminate sentence imposed pursuant to s 662 of the *Criminal Code*.

The applicant appealed against the sentence imposed upon him on two bases: (1) that he had been given no credit for six months spent in custody awaiting trial; and (2) challenging the order for indeterminate sentence.

The Full Court (Burt CJ, Brinsden and Smith JJ) decided that the finite term of imprisonment be reduced to allow for time spent in custody on remand. In relation to the challenge to the order for indeterminate sentence, the appeal was dismissed by majority, Burt CJ dissenting. His Honour noted that the trial judge had told the applicant: "It may be that you can receive and accept counselling and treatment for your unfortunate deviant conduct whilst you are incarcerated and in that event earn your release upon a reasonable period of parole to be served within the community. That will be up to you." Burt CJ in relation to these remarks commented: "On the facts it would seem that the applicant's 'deviant behaviour' is caused by factors including brain damage which are permanent. They are beyond the reach of treatment. Hence when the applicant has served his finite sentence less remissions his condition is likely then to be as it is now and if that condition now justifies detention to protect the public it will continue to justify detention for evermore. And with respect, that cannot be right."

On 16 November 2012 Justices Hayne, Crennan and Bell referred this application for special leave to appeal to an enlarged bench, for argument as if on an appeal.

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

- Is it appropriate to order that an indeterminate sentence be served following a finite term of imprisonment in circumstances where an accused person suffers from an intellectual disability and has little relevant prior criminal history?

- Is it appropriate that s 662 of the *Criminal Code* be used for the purpose of manipulating the period of time which an offender must serve on parole following the expiration of a future term?

- Had this offender "shown himself to be a danger to the public" which would justify an indeterminate sentence pursuant to s 662 of the *Criminal Code*?