SHORT PARTICULARS OF CASES
APPEALS

OCTOBER 2019

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ASIC v KING & ANOR (B29/2019)

Court appealed from: Queensland Court of Appeal
[2018] QCA 352 & [2019] QCA 121

Dates of judgments: 18 December 2018 & 18 June 2019

Special leave granted: 17 May 2019

The MFS Group started out as the mortgage lending arm of a firm of Gold Coast solicitors. By 2007 it comprised a multitude of businesses, including managed investment schemes. One such scheme was the Premium Income Fund ("PIF") of which MFS Investment Management Pty Ltd ("MFSIM") was the responsible entity. PIF invested in equities, debt instruments, cash and registered mortgages.

In the relevant period, Mr Michael King was CEO of the MFS Group. As such, he had overall responsibility for MFSIM, with Mr Craig White taking instructions from him with respect to proprietary matters of MFSIM's business. Mr King continued to have influence over MFSIM's affairs even after he ceased to be a director of it in February 2007.

On 29 June 2007 MFSIM obtained a $200 million loan facility with the Royal Bank of Scotland Plc ("RBS"). This facility could only be used for the purposes of PIF and it was not available for the use of other companies in the MFS Group.

On 1 June 2007 the MFS Group obtained from Fortress Credit Corporation (Australia) II Pty Ltd ("Fortress"), a short-term loan facility of $250 million for purposes unrelated to PIF. The whole amount was due to be repaid by 31 August 2007, but this deadline was subsequently extended, on new terms, to 30 November 2007. By mid to late November 2007 however, MFS Ltd was in financial difficulty. In late November 2007 Mr King, as the CEO of MFS Ltd, negotiated terms with Fortress to defer repayment of the total amount of the loan. An agreement was reached for the payment by 30 November 2007 of $100 million, together with an extension fee of $3 million. The balance of $150 million was to be repaid by 1 March 2008. This meant that MFS Ltd had to find $103 million in order to repay Fortress by 30 November 2007.

MFSIM and senior individuals in the MFS Group arranged on 27 November 2007 to draw down $150 million under the RBS loan agreement. Rather than being used for the purposes of PIF, PIF's money was used to pay the debts of MFS companies for which PIF was neither actually nor contingently liable.

In broad terms, two disbursements totaling $147.5 million are in issue. At the trial, ASIC established that MFSIM had misused the $147.5 million that belonged to PIF to pay the debts of other companies in the MFS Group. It also established that, through the misuse of PIF's $147.5 million, MFSIM had breached its duties as PIF's responsible entity and thereby contravened s 601FC(1) of the *Corporations Act 2001* (Cth) ("the Act"). The primary judge found that Mr King and Mr White, as persons intimately involved in MFSIM's contraventions in respect of the November payments, had also contravened s 601FC. Both Mr King and Mr White were further found to have breached their duties, as "officers" of MFSIM, in contravention of s 601FD of the Act.

On 18 December 2018 the Court of Appeal (Morrison & McMurdo JJA, Appelgarth J) upheld Mr King's appeal. Their Honours held that any capacity Mr King may have had to substantially affect MFSIM's financial standing was derived from his position as CEO of the MFS Group and not because he acted in some office or position within MFSIM. The Court of Appeal went on to find that, *had it* concluded that Mr King was an officer of MFSIM, it *would have* concluded that he breached his duties under s 601FD.
In these appeals, the grounds of appeal include:

- The Court of Appeal erred by concluding (QCA at [249]) that it was necessary for ASIC to prove that Mr King acted in an "office" of MFSIM, that is, "a recognised position with rights and duties attached to it" (QCA at [246]) in order for Mr King to be an "officer" of MFSIM for the purposes of s 601FD and s 9(b)(ii) of the Act.

On 18 July 2019 Mr King filed a summons, seeking leave to cross-appeal from the judgment of the Court of Appeal dated 18 December 2018. The ground of that proposed cross-appeal is:

- The Court of Appeal erred in finding that Mr King approved and authorised the misuse of PIF's funds by Mr White (QCA at [163]) by impermissibly adopting inconsistent factual findings beyond the scope of ASIC's pleaded case.

COMMONWEALTH OF AUSTRALIA v HELICOPTER RESOURCES PTY LTD & ORS (S217/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 25

Date of judgment: 15 February 2019

Special leave granted: 21 June 2019

In January 2016 Captain David Wood, a helicopter pilot, died while working in the Australian Antarctic Territory, as a result of falling into a crevasse that was hidden by ice. The fall occurred while Captain Wood was attempting to reboard a helicopter that he had landed. At the time of his death, Captain Wood was employed by Helicopter Resources Pty Ltd ("Helicopter"), which was supplying helicopter services to the Commonwealth.

In September 2017 a coronial inquest into Captain Wood's death commenced in the Australian Capital Territory ("the ACT"). In December 2017, while the inquest was still underway, both Helicopter and the Commonwealth were charged, as co-accused, with summary offences under the *Work Health and Safety Act 2011* (Cth) ("the criminal charges"). The criminal charges were laid on behalf of Comcare, in the ACT Magistrates Court. One of the criminal charges alleges contraventions arising out of the circumstances of Captain Wood's death.

After the criminal charges were laid (and prior to the entry of pleas), Helicopter applied for the coronial inquest to be adjourned pending completion of the criminal prosecution. At that stage of the inquest, the only witness remaining to be examined was Helicopter's Chief Pilot, Captain David Lomas. The Commonwealth submitted that the inquest should proceed to finality. On 12 April 2018 the Chief Coroner of the ACT refused Helicopter's application. The Chief Coroner considered that Helicopter's defence to the criminal charges would not be compromised by Captain Lomas giving evidence in the inquest, nor would the coronial findings be binding on the Magistrate determining the criminal proceedings.

Helicopter applied to the Federal Court for judicial review of the Chief Coroner's decision, contending essentially that an examination of Captain Lomas at the inquest prior to the determination of the criminal charges risked giving rise to an interference with the criminal proceedings in two ways: (1) the prosecution might become armed with evidence and admissions attributable to Helicopter; and (2) the Commonwealth would gain an advantage of assessing the evidence that Captain Lomas might give if he were called by the Commonwealth as a witness in its defence. On 29 June 2018 Justice Bromwich dismissed Helicopter's application, finding that although Helicopter had pointed to forensic disadvantage and a generalised sense of unfairness, it had not demonstrated that an improper interference with the criminal proceedings would result from the calling of Captain Lomas to give evidence at the inquest. Justice Bromwich found it premature to decide whether any restriction on Captain Lomas' appearance at the inquest was warranted, since there was no evidence as to the position Captain Lomas would take, nor could it be said in advance that the Coroner would not appropriately exercise protective powers such as restricting the disclosure of evidence.

An appeal by Helicopter was unanimously allowed by the Full Court of the Federal Court (Rares, McKerracher and Robertson JJ), which stayed the operation of any subpoena to be issued to Captain Lomas for him to give evidence at the inquest. Their Honours observed that anything said by Captain Lomas in giving evidence before the Coroner could be tendered against Helicopter as an admission by it in the criminal proceedings, by force of s 87(1)(b) of the *Evidence Act 2011* (ACT). The Full Court held that that fundamentally altered the position of Helicopter as an accused because Helicopter's hand could be forced prematurely. Such an alteration amounted to an improper interference with the criminal proceedings because it departed from the fundamental principle that the prosecution bears the onus of proving its case. Their Honours considered that such an interference could not be overcome by the entitlement of Captain Lomas to invoke the privilege against self-incrimination at the inquest, since Captain Lomas would be unable to object to answering a question on the basis that his answer might tend to incriminate Helicopter. The Full Court held that relief should not be withheld on the basis of prematurity, since the necessary considerations would be speculative and could not gainsay the risk to the due administration of justice.

The grounds of appeal are:

- The Full Court erred as to the meaning and effect of s 87 of the *Evidence Act 2011* (ACT).

- The Full Court erred as to the scope and effect of the accusatorial principle by treating it as preventing an employee of a corporation from being compelled to provide evidence that is relevant to pending criminal charges against that corporation.

- The Full Court erred in overturning the primary judge's findings as to prematurity.

FRANZ BOENSCH AS TRUSTEE OF THE BOENSCH TRUST v PASCOE (S216/2019)

Court appealed from: Full Court of the Federal Court of Australia [2018] FCAFC 234

Date of judgment: 20 December 2018

Special leave granted: 21 June 2019

On 23 August 2005 a sequestration order was made against Mr Franz Boensch, whereupon Mr Scott Pascoe became the trustee in bankruptcy of Mr Boensch's bankrupt estate. Mr Boensch's bankruptcy came after one of his creditors had sought it for nearly two years.

Mr Boensch was the trustee of a trust ("the Trust"), the property of which was commercial premises ("the Property") at which Mr Boensch operated a mechanical workshop. The Trust had been created in August 1999, by a memorandum of trust executed by Mr Boensch and his former wife. Its beneficiaries were the former couple's two children. A detailed deed of trust was not executed until March 2004.

Six days prior to the making of the sequestration order, Mr Boensch lodged a caveat over the Property forbidding the registration of any instruments which were not in accordance with the Trust. On 25 August 2005 however Mr Pascoe, in accordance with his usual practice in respect of bankrupt estates, lodged a caveat of his own over the Property ("the Caveat"). He did so in the belief that whatever interest Mr Boensch had in the Property had vested in him (Mr Pascoe) as the trustee of Mr Boensch's bankrupt estate. Mr Pascoe also believed that the Trust had been created with the intention of putting the Property beyond the reach of Mr Boensch's creditors and that the Trust consequently would be void under s 121 of the *Bankruptcy Act 1966* (Cth).

Between November 2005 and August 2008, Mr Boensch made three formal requests to Mr Pascoe to remove the Caveat. After declining to accede to those requests, Mr Pascoe eventually let the Caveat lapse in September 2009. That was after a series of legal proceedings pursued by Mr Pascoe (in the midst of which was an unsuccessful application to this Court for special leave to appeal, *Pascoe v Boensch & Anor* [2009] HCASL 61) had come to an end. In those proceedings Mr Pascoe had sought, but failed, to establish that Mr Boensch was insolvent in 1999 and that the Trust was created for the purpose of putting the Property beyond the reach of Mr Boensch's creditors. In allowing the Caveat to lapse, Mr Pascoe also had recently decided that any right of indemnity out of the Trust assets to which he was entitled would be worth little. (From at least November 2005, Mr Pascoe had thought that Mr Boensch had such a right of indemnity for loan repayments and rates paid on the Property.)

In 2012 Mr Boensch commenced Supreme Court proceedings against Mr Pascoe, seeking compensation under s 74P(1) of the *Real Property Act 1900* (NSW) on the basis that Mr Pascoe did not have reasonable cause to lodge or maintain the Caveat. On 10 December 2015 Justice Darke dismissed the proceedings. His Honour held that Mr Boensch's ownership interest in the Property had vested, subject to the terms of the Trust, in Mr Pascoe as trustee in bankruptcy by virtue of s 58(1)(a) of the *Bankruptcy Act*. As equitable owner of

the Property, Mr Pascoe had a caveatable interest in it. Therefore it could not be said that Mr Pascoe had lodged the Caveat, or had failed to withdraw it upon request, without reasonable cause.

The Full Court of the Federal Court (Besanko, McKerracher and Gleeson JJ) unanimously dismissed an appeal by Mr Boensch. (Section 7(5)(a) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) required that such an appeal, involving matters arising under the *Bankruptcy Act*, be made to the Full Court of the Federal Court.) Their Honours held that Justice Darke was correct to hold that Mr Pascoe had a caveatable interest which was adequately described in the Caveat and that that conclusion sufficed for the dismissal of Mr Boensch's claim. The Full Court considered it unnecessary to decide whether Mr Boensch had a right of indemnity out of the Trust's assets, which had vested in Mr Pascoe and which in turn was an interest that could support the Caveat.

The grounds of appeal include:

- The Full Court erred when it concluded that any caveatable interest in the Property held by Mr Boensch, as the trustee of the Trust, vested in Mr Pascoe, as the trustee in bankruptcy of Mr Boensch, upon the making of a sequestration order against the estate of Mr Boensch by operation of s 58(1) of the *Bankruptcy Act*.

- The Full Court erred when it concluded Mr Pascoe, accordingly, held a caveatable interest in the Property of the type which he had identified in his caveat.

Mr Pascoe has filed a notice of contention, the grounds of which include:

- The Full Court should have found that Mr Boensch did not discharge his onus of proving that Mr Pascoe at material times had no caveatable interest in the Property, in circumstances where Mr Boensch:

    a) had incurred liabilities in the performance or administration of the Trust; and

    b) did not disprove that immediately before Mr Pascoe's appointment as trustee of his bankrupt estate, he had a proprietary interest in the Property by reason of an entitlement to be indemnified for the abovementioned liabilities (both by way of reimbursement and exoneration) out of the assets of the Trust.

KADIR v THE QUEEN (S160/2019)
GRECH v THE QUEEN (S163/2019)

Court appealed from: New South Wales Court of Criminal Appeal
[2017] NSWCCA 288

Date of judgment: 30 November 2017

Special leave granted: 17 May 2019

Mr Zeki Kadir and Ms Donna Grech ("the Appellants") carried on a greyhound training business. The Crown alleged that in the course of that business, Mr Kadir used live animals (rabbits and in one instance, a possum) to train the greyhounds. He did this by attaching them to a mechanical device called a lure-arm, which then propelled the animals around a circular area called a bull-ring. The animals, as bait, were then chased by the greyhounds until they were caught. In that process they were either seriously injured or killed. On occasions, the animals in question were subjected to this procedure repeatedly. As a result the Appellants were changed with numerous counts of serious animal cruelty, contrary to s 530 of the *Crimes Act 1900* (NSW).

On the first day of their trial, the Appellants successfully applied to exclude certain evidence under s 138 of the *Evidence Act 1995* (NSW) ("Evidence Act"). It is common ground that the effect of those exclusions was to demolish the Crown case on counts 1-12 (against both Appellants), while substantially weakening it in relation to the remaining count against Mr Kadir.

Broadly speaking, the excluded evidence fell into the following three main categories: the surveillance evidence, the alleged admissions and the search warrant evidence. The relevant illegality engaged by s 138 of the Evidence Act consisted of various breaches of the *Surveillance Devices Act 2007* (NSW) ("the Surveillance Act"). It also included trespasses to Mr Kadir's property which occurred when a person engaged by an animal welfare organisation entered his property (without permission) and left a video recording device there. Relevantly, s 8 of the Surveillance Act prohibits the unauthorised installation, use or maintenance of such devices.

On 30 November 2017 the Court of Criminal Appeal ("CCA") upheld an application by the Director of Public Prosecutions ("the Director") for leave to appeal from the exclusion rulings. Justices Ward, Price & Beech-Jones unanimously, but only partially, upheld the Director's appeal. Their Honours found that the trial judge had erred in excluding the first of the video recordings, the alleged admissions and the search warrant evidence. The CCA however rejected the Director's challenge to the rejection of the balance of the video recordings.

In each of these appeals the grounds of appeal include:

- The CCA erred in finding appealable error in the trial judge's decision on the basis that the trial judge did not assess the admissibility of the first item of evidence individually.

- The CCA erred in in finding error in the trial judge's finding that the s 138 Evidence Act factors governing the exclusion of the recordings were "directly applicable" to the other evidence obtained as a consequence of the illegally obtained recordings, namely recorded admissions and evidence obtained under search warrant.

In each appeal the Respondent has filed a notice of contention, the identical ground of which is:

- The CCA erred in holding that, in order to succeed in the appeal, the Crown was required to demonstrate that the trial judge erred in the sense referred to in *House v King* (1936) 55 CLR 499 at 504-505.

CNY17 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (M72/2019)

Court appealed from: Full Court, Federal Court of Australia
[2018] FCAFC 159

Date of judgment: 21 September 2018

Special leave granted: 17 May 2019

The appellant, who is a Faili Kurd from Iraq, arrived in Australia by boat in August 2013 and was detained on Christmas Island. While in detention, the appellant broke a window and was charged with damaging Commonwealth property. He pleaded guilty and was convicted but released on condition that he be of good behaviour for six months and pay reparation. The appellant was involved in a second incident, as a result of which he was charged with spitting at a detention officer and breaking a window. He subsequently applied for a protection visa. His application was refused by a delegate of the first respondent.

The first respondent referred the decision to refuse the visa to the Immigration Assessment Authority ('the IAA'). Amongst the documents given to the IAA by the Secretary of the Department of Immigration and Border Protection ('the documents') were: internal Department emails and other material referring to the appellant having been charged for damaging Commonwealth property; references to the appellant having spent time in a prison; assertions that the appellant was involved in a 'riot', that he had 'a history of aggressive and/or challenging behaviour when engaging with the department', and that he had been involved in 'many incidents while in detention'; and an imputation that he was a national security risk. The IAA affirmed the delegate's refusal to grant a protection visa.

The appellant applied to the Federal Circuit Court for judicial review of the IAA's decision. He contended that, amongst other things, the decision was affected by apprehended bias by reason of the IAA receiving and considering prejudicial material contained in the documents. The Federal Circuit Court rejected this contention and dismissed the application for review.

The appellant's appeal to the Full Court of the Federal Court (Moshinsky and Thawley JJ, Mortimer J dissenting), was unsuccessful. The appellant submitted that, objectively, none of the documents could have had any relevance to whether the appellant's claims, as made in his application for a visa, engaged Australia's protection obligations. Accordingly, all of the documents came within what Deane J in *Webb v The Queen* (1994) 181 CLR 41 defined as the "fourth category" of disqualification by apprehended bias: "*disqualification by extraneous information ... [which] consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias*".

The majority of the Court found that much of the information that the appellant contended was prejudicial was before the IAA in any event, in the appellant's application for a visa and in the reasons of the delegate. While the documents contained additional information about the appellant, they did not consider the additional information to provide a sufficient basis to conclude that a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made. The information broadly concerned the appellant's conduct while in immigration detention. This was irrelevant to the issues that the IAA had

to determine. Although the IAA was required to consider the documents, the fair-minded lay observer would consider it likely that it would put the information aside as irrelevant to its task.

Mortimer J (dissenting) found that the impugned material was legally irrelevant, prejudicial and adverse to the appellant. A hypothetical lay observer might apprehend that the reading and consideration of that material by the IAA might cause the IAA to deviate from a neutral evaluation of the appellant's evidence and of his claims, because of the way that material fixed the appellant with certain characteristics, where those characteristics were capable of affecting both the ultimate question (if he should be granted a visa to be released into the Australian community) and questions along the way (whether he should be believed in what he said in support of his protection visa application).

The grounds of the appeal include:

- In considering apprehended bias, the Full Court erred in finding that materials, correctly found by the Full Court to be not relevant to the review which the IAA would be required to conduct, were not prejudicial, in circumstances where:

    (a) the information conveyed by those materials went beyond the facts disclosed to the first respondent by the appellant (as he was required to do, when he applied for the protection visa), including by going to the appellant's character as assessed by the officers of the Minister;

    (b) those materials were provided to the IAA by the Secretary; and

    (c) the *Migration Act 1958* (Cth) permits the fact of those materials being before the IAA to never be disclosed by any of the Minister, the Secretary or the IAA.

COMPTROLLER-GENERAL OF CUSTOMS v PHARM-A-CARE LABORATORIES PTY LTD (S161/2019)

Court appealed from: Full Federal Court of Australia
[2018] FCAFC 237

Date of judgment: 21 December 2018

Special leave granted: 17 May 2019

Pharm-A-Care Laboratories Pty Ltd ("Pharm-A-Care") imported pastilles from Germany which contained manufactured vitamins. These were marketed in Australia under the "Nature's Way" brand and are known as the "Vitamin Preparations". Pharm-A-Care also imported two categories of weight loss gummies, which did not contain vitamins but did contain garcinia cambogia. These are known as "the Garcinia Preparations".

On 19 October 2017 the Administrative Appeals Tribunal ("the Tribunal") made a decision concerning the classification of both the Vitamin Preparations and the Garcinia Preparations. This was for the purposes of the Customs Tariff in Sch 3 ("the Tariff") to the *Customs Tariff Act 1995* (Cth) ("the Customs Tariff Act"). The Tribunal found that the Vitamin Preparations were not "food supplements" for the purposes of Note 1(a) of Ch 30 of the Tariff, but were medicaments for the purposes of subheading 3004.50.00. A critical element of its reasoning was its acceptance that a "food supplement" must be either a "food" or a "beverage".

With respect to the Garcinia Preparations, the Tribunal likewise rejected the characterisation of these preparations as food. It found that these products were designed to enable weight loss. A weight-loss preparation would not therefore ordinarily be described as a food or a food supplement.

On 21 December 2018 the Full Federal Court (Burley, Steward & Thawley JJ) rejected the Comptroller-General of Customs' appeal. In doing so, their Honours endorsed the Tribunal's reasoning that the Vitamin Preparations were not a "food" in the sense that that term is ordinarily used.

With respect to the Garcinia Preparations, the Full Federal Court endorsed the Tribunal's reasoning as to why these preparations were not food. Their Honours further noted that there was also no challenge to the Tribunal's finding that the main purpose of the Garcinia Preparations was cosmetic.

The grounds of appeal are:

- The Full Court erred in holding that the Tribunal had not erred in construing Note 1(a) to Chapter 30 of Schedule 3 of the Customs Tariff Act.

- The Full Court erred in holding that the Tribunal had not erred in construing heading 2106 of the Customs Tariff Act.