

SHORT PARTICULARS OF CASES

APRIL 2022

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HILL v ZUDA PTY LTD (ACN 008 968 232) AS TRUSTEE FOR THE HOLLY SUPERANNUATION FUND & ORS (P48/2021)

Court appealed from: Supreme Court of Western Australia Court of Appeal
[2021] WASCA 59

Date of judgment: 23 April 2021

Special leave granted: 12 November 2021

The Appellant is the only child of the late Mr Sodhy (“the deceased”) and was a dependent of him. The deceased established a self-managed superannuation fund (“SMSF”), the Holly Superannuation Fund. On 13 December 2011, the original trust deed was amended to insert a purported binding death benefit nomination (“BDBN”). The purported BDBN nominated the Third Respondent, the deceased’s de facto partner, as the person to whom the deceased’s account balance would be distributed upon his death. On 22 November 2016, the deceased died. The Second Respondent is the Third Respondent in her capacity as the Executor of the deceased’s estate. The Third Respondent is also the sole director of the First Respondent.

The Appellant made a claim under the *Family Provision Act 1972* (WA) against the estate in the Supreme Court of Western Australia. The Appellant argued that the purported BDBN was not valid because it did not satisfy reg 6.17A(6) and (7) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (“*SIS Regulations*”) and was therefore of no force and effect. She argued that reg 6.17A as well as s31 and s55A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (“*SIS Act*”) required the account balance to be paid to one or more of the Appellant, the Second Respondent and the Third Respondent. The Respondents argued that reg 6.17A(6) and (7) do not apply to SMSFs. They sought and were granted summary judgment on the basis that the authorities are all one way in favour of the Respondents’ construction of the *SIS Act* and *SIS Regulations*.

The Appellant appealed to the Court of Appeal. The Court of Appeal held that the Appellant’s construction was reasonably arguable. However, it found that it should accept the construction in *Cantor Management Services Pty Ltd v Booth* [2017] SASCFC 122, that is, the Respondents’ construction, until such time as that decision is overruled by the High Court. The appeal was dismissed.

The Appellant sought special leave to appeal which was granted on 12 November 2021.

The grounds of appeal are that:

1. The Court of Appeal of Western Australia erred in law in failing to find that sub-regulations 6.17A(4), (6) and (7) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (*SIS Regulations*) applied to a self-managed superannuation fund (SMSF) pursuant to:
 - a. Sections 31 and 55A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (*SIS Act*); and
 - b. Sub-regulation 6.17A(1) of the *SIS Regulations*.

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2. The Court of Appeal of Western Australia erred in law (CA Reasons [41]-[43], [48]-[50]) in finding that the principles of comity required the decision of the Full Court of South Australia in *Cantor Management Services Pty Ltd v Booth* [2017] SASCFC 122 to be applied as determinative of the appeal where that decision:
 - a. Did not contain seriously considered dicta as to the applicability of regulation 6.17A of the *SIS Regulations* to SMSFs;
 - b. Failed to consider sections 31 and 55A of the *SIS Act* and sub-regulation 6.17A(1) of the *SIS Regulations*; and
 - c. Was plainly wrong.
 3. By reason of ground 2, the Court of Appeal of Western Australia thereby erred in law in failing to determine whether sub-regulations 6.17A(4), (6) and (7) of the *SIS Regulations* applied to a SMSF pursuant to:
 - a. Sections 31 and 55A of the *SIS Act*; and
 - b. Sub-regulation 6.17A(1) of the *SIS Regulations*.

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS & ANOR v MONTGOMERY (S192/2021)

Cause removed from: Federal Court of Australia

Date cause removed: 29 November 2021

The Respondent, Mr Shayne Montgomery, is a citizen of New Zealand, where he was born to an Australian mother. After migrating to Australia in 1997 at the age of 15, he frequently lived with Aboriginal Australians and learnt about their culture. At the age of 18, Mr Montgomery underwent initiation as a member of the Mununjali clan of the Yugambah people of southern Queensland. He did not however become an Australian citizen.

In July 2018 a delegate of the First Appellant cancelled Mr Montgomery's visa, under s 501(3A) of the *Migration Act 1958* (Cth) ("the Act"). This was on the basis that Mr Montgomery did not pass "the character test", as he had been sentenced to imprisonment for more than 12 months (for an offence of aggravated burglary).

Mr Montgomery immediately lodged a request that the cancellation of his visa be revoked. Among his claims in support of revocation, Mr Montgomery stated that he identified as an Aboriginal Australian and that he was recognised as such by community elders. He also provided documents in support of his Aboriginality. On 7 May 2020 the Second Appellant, the Minister for Home Affairs ("the Minister"), decided not to revoke the cancellation of Mr Montgomery's visa ("the non-revocation decision").

Meanwhile, in February 2019 Mr Montgomery was placed in immigration detention following his release from prison.

In Federal Court proceedings for judicial review of the non-revocation decision, Mr Montgomery sought a declaration that, as an Aboriginal Australian, he was not an "alien" within the meaning of s 51(xix) of the *Constitution*. He also sought to be released from immigration detention, on the basis that he was a non-citizen non-alien whom the Minister had no power under the Act to detain or deport.

On 15 November 2021 SC Derrington J quashed the non-revocation decision, ordered the release of Mr Montgomery from detention, and remitted the matter to the Minister for redetermination. Her Honour found that the suspicion held by the officer responsible for Mr Montgomery's detention, that Mr Montgomery was an alien by virtue of his not being an Aboriginal Australian, was not reasonable, in view of the information that had been provided by Mr Montgomery. Mr Montgomery's detention therefore could not be justified by s 189(1) of the Act. SC Derrington J also found that the Minister, in making the non-revocation decision, had failed to give any degree of consideration to Mr Montgomery's representations as to his Aboriginality. (This followed the removal into the High Court of part of the cause then pending in the Federal Court, by order of Justice Keane on 11 October 2021. That removed cause came to be discontinued by Mr Montgomery on 2 December 2021.)

The Appellants appealed. Justice Keane ordered the appeal's removal from the Federal Court into the High Court, under s 40(1) of the *Judiciary Act 1903* (Cth), upon an application by the Attorney-General of the Commonwealth.

A notice of a constitutional matter was filed by the Appellants. The Attorneys-General of the Commonwealth and Victoria are intervening in the appeal. The National Native Title Council, the Northern Land Council and the Australian Human Rights Commission have been granted leave to intervene and/or to appear as *amicus curiae*.

The grounds of appeal include:

- Having found that the detaining officer held a reasonable suspicion that the Respondent was an unlawful non-citizen, the primary judge erred in holding that the detention of the Respondent was not authorised and required by s 189 of the Act unless the detaining officer also held a reasonable suspicion that the Respondent was not an Aboriginal Australian within the meaning of the tripartite test in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70 (“the tripartite test”) because:
 - a. *Love v Commonwealth* (2020) 270 CLR 152 was wrongly decided, with the result that no reading down or partial disapplication of s 189 of the Act is required in order to prevent it from exceeding the limits of Commonwealth legislative power under s 51(xix) of the *Constitution*;
 - b. Alternatively, even if *Love v Commonwealth* (2020) 270 CLR 152 was correctly decided:
 - i. s 189 of the Act should have been applied in accordance with its terms to the Respondent in the absence of evidence that he is biologically descended from the Munanjali people (or, alternatively, from any indigenous person);
 - ii. neither s 3A of the Act nor s 15A of the *Acts Interpretation Act 1901* (Cth) justified reading down of ss 13 and 14 of the Act so that persons who satisfy the tripartite test are not “non-citizens” for the purposes of the Act, even if they are not Australian citizens.

A notice of contention filed by Mr Montgomery raises the following ground:

- In determining the ultimate question (Reasons at [55]) whether the Appellants had discharged their burden of proof to show positive authority or lawful authority at the time of trial for the Respondent’s detention, the primary judge erred (Reasons at [66]) in excluding from consideration the fact that the officer responsible for the Respondent’s detention (Mrs McBroom) had for a period of over 120 days failed to read or consider sworn expert report from Dr Fiona Powell dated 21 May 2021 (Reasons at [23]) which contained detailed opinion on matters relevant to the question before the officer.