

SHORT PARTICULARS OF CASES
APPEALS

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THE KING v JACOBS GROUP (AUSTRALIA) PTY LTD
FORMERLY KNOWN AS SINCLAIR KNIGHT MERZ (S148/2022)

Court appealed from: Court of Criminal Appeal of the Supreme Court of
New South Wales
[2021] NSWCCA 337

Date of judgment: 21 December 2021

Special leave granted: 13 April 2022

Between 2000 and 2012, employees of Sinclair Knight Merz Pty Ltd (“SKM”) participated in the making of payments, via third parties and upon bogus invoices, to public officials in Vietnam and the Philippines, after infrastructure contracts had been awarded to SKM in those countries. The conduct was discovered by SKM’s lawyers in the lead-up to the acquisition of SKM by Jacobs Group (Australia) Pty Ltd (“Jacobs Group”). SKM reported the conduct to the Australian Federal Police (“AFP”) and to other authorities, and Jacobs Group subsequently assisted the AFP and the Commonwealth Director of Public Prosecutions in the preparation of prosecution cases against the company and against former employees of SKM.

In September 2020, Jacobs Group pleaded guilty to three offences of conspiring to cause a bribe to be offered to a foreign public official, contrary to ss 11.5(1) and 70.2(1)(a)(iv) of the *Criminal Code* (Cth) (“the Code”).

In relation to the third offence (“the Offence”), the gross income received by SKM pursuant to the contracts it had carried out was \$10,130,354 (“the Gross Amount”). Bribes paid in relation to those contracts amounted to \$204,661 (“the Bribes”). Fees of \$103,928 were also paid to an agent who engaged in lawful work but who also took steps related to bribery (“the Agent’s Fees”).

The penalty provision applicable to the Offence, s 70.2(5) of the Code, relevantly provided that the maximum fine was to be the greater of \$11 million or three times “*the value of the benefit that the body corporate ... obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence*”. Before the sentencing judge, Adamson J, the Crown contended that the maximum penalty was three times the Gross Amount. Adamson J however held that “benefit” in s 70.2(5) meant the benefit obtained after the deduction of related costs. Such costs in this case were the untainted business costs of SKM in carrying out its obligations under the contracts. The parties agreed that, after the deduction of those costs (which excluded the Bribes and the Agent’s Fees) from the Gross Amount, the net amount received by SKM was \$2,680,816. Adamson J ruled that that “net benefit” was the sum to be tripled when applying s 70.2(5) of the Code, with the result that the maximum penalty for the Offence was \$11 million. Her Honour considered that the Offence was in the mid-range of objective seriousness and, after applying substantial discounts for Jacobs Group’s early plea of guilty and its assistance of law enforcement agencies, her Honour imposed a fine of \$1.35 million.

An appeal by the Crown against the sentence was unanimously dismissed by the Court of Criminal Appeal (“CCA”) (Bell CJ, Walton and Davies JJ). Their Honours held that Adamson J had correctly applied s 70.2(5) of the Code, as the focus of the provision was the *value* of the benefit obtained. Although the contracts themselves constituted a benefit to SKM, the real value of the contracts to the

company was the monetary advantage derived from their performance, and “benefit” was defined very broadly in s 70.1 of the Code to include “any advantage”. The CCA held that Adamson J had erred when considering the factor of general deterrence, giving rise to the fine’s amounting to less than the net benefit to the company. Their Honours however considered that the circumstances of the case were idiosyncratic and that the CCA’s discretion to vary the sentence ought not be exercised.

The sole ground of appeal is:

- The CCA erred in concluding that, where the “benefit” under s 70.2(5)(b) of the Code is a contract secured by way of payment of a bribe, the value of that benefit is the contract price less the (untainted) costs of its performance rather than the contract price itself.

ZURICH INSURANCE PLC & ANOR v KOPER & ANOR **(S147/2022)**

Court appealed from: Court of Appeal of the Supreme Court of
New South Wales
[2022] NSWCA 128

Date of judgment: 20 July 2022

Special leave granted: 10 November 2022

In 2012, proceedings in the High Court of New Zealand were commenced by Mr Dariusz Koper and 198 other owners of apartments in the Victopia Apartments building in Auckland (“Victopia”), along with the owners corporation, seeking damages for building defects. The defendants to the action included Brookfield Multiplex Constructions (NZ) Limited (“BMX NZ”), which had designed and constructed Victopia. The plaintiffs obtained judgment against BMX NZ in the sum of NZ\$53 million in 2017, by which time BMX NZ had gone into liquidation.

In 2021, when NZ\$23 million of the judgment sum remained unpaid, Mr Koper applied to the Supreme Court of New South Wales for leave, under s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) (“the Claims Act”), to bring representative proceedings against BMX NZ’s insurers, Zurich Insurance PLC and Aspen Insurance UK Ltd (together, “the Insurers”) to recover the unpaid sum, under s 4 of the Claims Act. Mr Koper sought to establish that he could validly serve BMX NZ (in whose shoes the Insurers would stand, pursuant to s 4(3) of the Claims Act), and to that end he relied upon ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) (“the TTPA”). The Insurers contended that the Claims Act could not apply, as none of Victopia, the wrong committed, the judgment giving rise to the debt, Mr Koper and BMX NZ had a relevant connection with New South Wales (or Australia). The Insurers also argued that the TTPA could not validly confer non-federal jurisdiction on the courts of Australian States, as Chapter III of the *Constitution* permitted the Commonwealth to confer only federal jurisdiction on the courts of the States. The Attorney-General of the Commonwealth intervened and submitted that the TTPA merely conferred power to issue proceedings; it did not purport to confer judicial power.

The primary judge, Rein J, granted the leave sought by Mr Koper. His Honour found that the ability to properly serve sufficed for the necessary territorial hinge for the operation of the Claims Act, despite BMX NZ having no presence in New South Wales and both it and Mr Koper being domiciled in New Zealand. Rein J held that ss 9 and 10 of the TTPA were not constitutionally invalid, as the provisions addressed only territorial jurisdiction and service; they did not purport to confer jurisdiction to determine a justiciable controversy.

An appeal by the Insurers was unanimously dismissed by the Court of Appeal (Bell CJ, Ward P and Beech-Jones JA). Their Honours held that ss 9 and 10 of the TTPA provided an antecedent federal process concerning service such that the originating court would have personal jurisdiction over the defendant. The provisions did not deal with federal jurisdiction, with which Chapter III of the *Constitution* was concerned, nor with subject matter jurisdiction. The Court of Appeal also held that the broad power of the Commonwealth Parliament to make laws with respect to external affairs, given by s 51(xxix) of the *Constitution*, could not be read down by reference to s 51(xxiv), by which the Parliament had

power to make laws with respect to service throughout the Commonwealth of the process of State courts (with the result that the TTPA would be unauthorised). Sections 9 and 10 of the TTPA therefore were not invalid, nor were they to be read down so as to apply only to the service of process involving the exercise of federal jurisdiction, and the leave to proceed against the Insurers granted by Rein J was warranted.

The grounds of appeal are:

- The Court of Appeal erred in failing to hold that:
 - a) ss 9 and 10 of the TTPA cannot validly operate to authorise, or to deem as effective, the service of the process of a State court outside the territory of the Commonwealth except in matters that engage federal jurisdiction;
 - b) Mr Koper could not properly have brought any claim against BMX NZ, in connection with the design or construction of Victopia, in a court of New South Wales; and
 - c) in the premises, on the construction of the Claims Act favoured by the primary judge (which was not challenged in the Court of Appeal), Mr Koper had no right of action against the Appellants (the Insurers) in respect of any insured liability of BMX NZ in connection with Victopia.

The Attorney-General of the Commonwealth, as the Second Respondent in the appeal, raises the following ground by notice of contention:

- In the alternative to the reasons of the Court of Appeal at [35]-[55] of the reasons for judgment, if ss 9 and 10 of the TTPA confer jurisdiction on a State or Territory court, then they also create legal rights by reference to the content of State and Territory law and, by conferring jurisdiction to adjudicate those rights, confer federal jurisdiction as described in s 76(ii) of the *Constitution*: see [64] of the reasons for judgment.

The Appellants have filed a notice of a constitutional matter, as has the Second Respondent. No Attorney-General of a State or Territory is intervening in the appeal, however.

HCF v THE QUEEN (B50/2022)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2021] QCA 189

Date of judgment: 3 September 2021

Special leave granted: 14 October 2022

The appellant (“HCF”) was arraigned before a jury on an indictment containing 25 counts relating to allegations made by two complainants, K & E. The offending against K was said to have occurred between 1989 and 1999; the offending against E was said to have occurred between 1994 and 2000. At trial the issue was whether the alleged sexual offending occurred as alleged. At the close of the Crown case, the trial judge directed acquittal on 6 charges. The jury convicted HCF on 6 counts, all related to K, and acquitted HCF on all 13 charges relating to E.

The trial commenced on 13 October 2020. After the close of the Crown case on 16 October, the trial judge discharged the two reserve jurors and the jury retired later that day. There were a number of notes from the jury to the trial judge which led to further instruction from the trial judge in response. The jury delivered their verdicts on 20 October 2020. On 21 October, a juror (“Juror Y”) delivered a letter to the Registrar outlining observations in relation to the conduct of “Juror X”. This letter was provided to the parties. The letter disclosed that Juror X had indicated that he would not convict based on his own previous personal experience and that he had conducted his own research. The trial judge referred the matter to the Sheriff pursuant to s70(7) of the *Jury Act 1995* (Qld) for the purpose of an investigation. The Sheriff’s report in March 2021 showed that a questionnaire had been sent out to the fourteen jurors empanelled. Six, one of whom was a reserve juror, responded (including Juror Y). No response was received from the other eight jurors, including Juror X.

HCF challenged his convictions on two grounds: that there was a miscarriage of justice (1) by reason of a juror conducting investigations and other jurors not reporting the conduct, and (2) by reason of Juror X not disclosing to the Court a stated bias. The parties were provided with a redacted version of the Sheriff’s report prior to the appeal. The Court of Appeal concluded that both the letter from Juror Y and the survey responses from five jurors supported the conclusion that the conduct of Juror X made no difference to the outcome, at least so far as the convictions were concerned. The Court found that, having regard to the chronology of deliberations, the verdicts delivered by the jury were genuinely unanimous and unaffected by the conduct of Juror X. The Court concluded that, although the conduct of Juror X was to be deplored and his conduct conflicted with his oath and the trial judge’s explicit directions, the responses of the jurors showed that there had not been a serious departure from the essential requirements of the law and the material showed that there was no miscarriage of justice.

The grounds of appeal are:

1. The Court of Appeal erred in concluding that no substantial miscarriage of justice had been occasioned by the proven disobedience by jurors of the trial judge’s directions that:
 - (a) prohibited the conduct of independent research; and

- (b) required that the discovery by other jurors of the occurrence of any such misconduct be reported to him.
2. The Court of Appeal erred in concluding that the verdicts of guilty were “true for the whole jury” in circumstances where only five of the twelve jurors who delivered the verdicts responded to an investigation by the Sheriff conducted pursuant to subsection 70(7) of the *Jury Act 1995* (Qld).
 3. The Court of Appeal erred in applying the proviso to section 668E of the *Criminal Code* (Qld) in circumstances where there had been a serious breach of one of the presuppositions of a trial, namely that a jury will obey judicial directions.

HORNSBY SHIRE COUNCIL v COMMONWEALTH OF AUSTRALIA & ANOR (S202/2021)

Date writ of summons filed: 13 December 2021

Date special case referred to Full Court: 5 September 2022

The Commonwealth provides grants of financial assistance to the States pursuant to legislation enacted under s 96 of the *Constitution*. Such grants include assistance under the *Federal Financial Relations Act 2009* (Cth) (“the FFR Act”), sourced from goods and services tax (“GST”) revenue, and assistance for local government purposes under the *Local Government (Financial Assistance) Act 1995* (Cth) (“the LGFA Act”).

The *Intergovernmental Agreement Implementation Act (GST) Act 2000* (NSW) (“the Implementation Act”) provides that a State entity may pay to the Commissioner of Taxation (“the Commissioner”) amounts that would have been payable for GST (“notional GST”) if the imposition of the GST were not prevented by s 114 of the *Constitution* and if s 5 of each of the various Acts, identified collectively as “the GST Imposition Acts”, had not been enacted. Section 114 of the *Constitution* provides, so far as is relevant, that the Commonwealth must not impose any tax on property belonging to a State. In each of the GST Imposition Acts, s 5(1) provides that the Act “does not impose a tax on property of any kind belonging to a State”.

Conditions on the grants made by the Commonwealth to the States for local government purposes are found in s 15 of the LGFA Act. Amendments made to that provision in 2000 included the addition of s 15(aa) which provides that, if a local government in a State does not pay to the Commissioner an amount of notional GST, the State will withhold that amount from the local government and will pay it to the Commonwealth.

The plaintiff is a New South Wales local government body that is considered a “State” for purposes of s 114 of the *Constitution* and is a “State entity” within the meaning of the Implementation Act. It lodges a monthly Business Activity Statement (“BAS”) with the Commissioner in which it reports GST returns. Under the *Taxation Administration Act 1953* (Cth), the Commissioner calculates an entity’s net tax liability or entitlement based on an entity’s GST returns, and any such liability is an enforceable debt owed to the Commonwealth.

In 2021, the plaintiff commenced proceedings in this Court against the Commonwealth and the State of New South Wales, challenging the validity of the legislative scheme effected by certain provisions of the LGFA Act, the FFR Act and the Implementation Act, on the ground that it imposed tax on the plaintiff’s property contrary to s 114 of the *Constitution*. The relief sought by the plaintiff includes a writ or declaration that it not be required to pay notional GST on supplies of its property and that where it does not do so the State of New South Wales not be required to withhold any corresponding amount pursuant to s 15(aa) of the LGFA Act.

The plaintiff has filed a notice of a constitutional matter. The Attorneys-General of Victoria, Queensland, Western Australia and South Australia are intervening in the proceeding.

Justice Gageler granted the parties leave to state the following questions of law, in the form of a special case, for the opinion of the Full Court:

1. Are any of items 16, 17 or 18 of Sch 1 to the *Local Government (Financial Assistance) Amendment Act 2000* (Cth) invalid in whole or in part on the ground that they purported to introduce a law imposing taxation into an Act that deals with matters other than taxation, contrary to s 55 of the *Constitution*?
2. Do any, or any combination, of the provisions comprising ss 6(8), 11(3), 14(3), 15(aa) and 15(c) of the *Local Government (Financial Assistance) Act 1995* (Cth), ss 6(3)(a)(ii) and 6(3)(c) of the *Federal Financial Relations Act 2009* (Cth) and ss 4 and 5 of the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) impose a tax on property belonging to the plaintiff, contrary to s 114 of the *Constitution* and, if so, which provisions (if any) are invalid or inoperable?
3. What relief, if any, should be granted to the plaintiff in respect of the payment under protest of notional GST with respect to the sale of the plaintiff's vehicle on 24 May 2022?
4. Who should pay the costs of the special case?

The transaction to which question 3 refers is one put forward by the parties for the purpose of the special case. Although GST was recorded as a component of the price when the vehicle was sold by the plaintiff, the plaintiff excluded the (notional) GST of \$3,146 from its May 2022 BAS. The plaintiff subsequently amended its May 2022 BAS and paid \$3,146 to the Commissioner under protest. (The plaintiff intends to continue to pay notional GST under protest, pending the determination of the proceeding.)

BDO v THE QUEEN (B52/2022)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2021] QCA 220

Date of judgment: 15 October 2021

Special leave granted: 21 October 2022

The appellant (“BDO”) was tried on 15 counts of rape and one count of indecent treatment of a child under 16. He was acquitted on the latter count and on 4 counts of rape, but convicted on the rest. The complainant was BDO’s younger sister. The alleged offending was said to have taken place over a period of nine years between late 2001 and late 2010. During that period BDO could have been anywhere between 10 and 19 years old and the complainant between 4 and 14.

The only evidence of the offending came from the complainant, who said that BDO had sexually abused her “for years”. She said the sexual abuse stopped when she was around 12 or 13 and in high school. The first time she disclosed the offending was to a friend in high school. She then told her mother in late 2016. She first complained to the police in November 2017. At that time, she made a “pretext call” to BDO from the police station. She told BDO she needed to know why he had done what he did to her when she was younger. BDO replied that he didn’t understand why “we did what we did. I was young as well. I don’t know what I was doing”. He said he was “very young too”, that it stopped “once we were both old enough to know what we were doing”, and that he “never did anything unless it was consensual”. BDO did not give evidence at trial.

Section 29 of the *Criminal Code Act 1899* (Qld) (“the Code”) provides that:

“(1) A person under the age of 10 years is not criminally responsible for any act or omission.

“(2) A person under 14 years of age is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.”

The trial judge in directing the jury on s 29 observed that the broad time period covered by the indictment meant that some of the acts relied upon were alleged to have been committed by BDO at a time when he was not yet 14 years old. The trial judge directed the jury that it was for them to decide in relation to each charge whether BDO was 14 when an act occurred and, if not, if he had the capacity at the time.

In his appeal to the Court of Appeal, BDO submitted that although the jury were expressly directed about the applicable law in respect of capacity under s 29 of the Code, the trial judge did not explain how “capacity to know that he ought not to do the act” might apply to particular facts. BDO further submitted that while s 349 of the Code provided that a child under 12 cannot consent to penetration, the amendment only took effect from 5 January 2004. Thus, the trial judge erred in directing the jury without qualification that a child under 12 cannot consent.

The respondent submitted that there was no miscarriage of justice in the direction given about s 29 of the Code. The respondent accepted that s 349(3) of the Code was not inserted until after the alleged offending commenced and that the law as to consent was more complicated than the direction given by the trial judge. However, the respondent maintained that there was no miscarriage of justice in that regard.

The Court of Appeal held that there was no miscarriage of justice and dismissed BDO's appeal. In this Court BDO submits, inter alia, that, had the Court of Appeal assessed the trial judge's directions against the principles in this Court's decision in *RP v The Queen* (2016) 259 CLR 642, the Court of Appeal would have found them to be inadequate.

The Aboriginal Legal Service of Western Australia Ltd has sought leave to be heard as *amicus curiae* (limited to written submissions).

The grounds of appeal are:

- The Court of Appeal erred by misapplying the principles in *RP v The Queen*.
- The Court of Appeal erred by applying the proviso in circumstances where the trial judge had removed an element of the offence from the jury.