

HIGH COURT OF AUSTRALIA

KIRBY J

ROADS AND TRAFFIC AUTHORITY

APPLICANT

AND

MINNA MAARIT CREMONA

RESPONDENT

Roads and Traffic Authority v Cremona
[2002] HCA 38
19 August 2002
S6/2002

ORDER

1. *The affidavits of Messrs Rossetto and Power and paragraphs 16 to 20 of the affidavit of Mr Rodney Buckley rejected.*
2. *The applicant to pay half of the respondent's costs of the application unless special leave to appeal is refused in which case the applicant must pay the respondent's costs.*
3. *Certify for the attendance of counsel.*

Representation:

A Porthouse for the applicant (instructed by Crown Solicitor for the State of New South Wales)

B M Toomey QC with M A Kumar for the respondent (instructed by Riley Gray-Spencer)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Roads and Traffic Authority v Cremona

High Court – Practice – Special leave to appeal – Evidence of suggested importance of the issue raised by the application for special leave – Requirement that evidence be in affidavit form – Limited use of evidence – Unavailability of new evidence in the appellate jurisdiction of the High Court.

Practice and procedure – High Court – Application for special leave to appeal – Evidence of suggested significance of decision the subject of the application – Admissibility of evidence – Requirement that evidence be in affidavit form.

1 KIRBY J. The application before the Court relates to three affidavits that have been filed by the Roads and Traffic Authority ("the applicant"). The affidavits have been filed in support of an application by the applicant for special leave to appeal to this Court from a judgment of the Court of Appeal of the Supreme Court of New South Wales. The application arises out of a decision of the Court of Appeal concerning the calculation of superannuation-related losses. The application for special leave will, in due course, come on for hearing before a panel of this Court. It will be determined on the record of the evidence and other materials adduced in the Court below.

Affidavits in special leave hearings

2 This Court has repeatedly stated that, for the purpose of the disposition of appeals, it will not receive fresh evidence beyond the record of the courts below¹. I have disagreed with this view²; but it is the clear authority of the Court and must be obeyed.

3 Notwithstanding the rule, this Court has permitted applicants for special leave, or those opposing the grant of special leave, to place before the Court evidence which tends to show that the issue for decision in this Court is, or is not, an important one. Indeed, if the demonstration of the significance of an issue in a special leave application requires the proof of facts, the Court has made it plain that such facts should be proved by affidavit and not stated in the course of oral argument from the Bar table³. This procedure gives a party that wishes to contest the facts the chance to test them or to rebut them with evidence of its own.

4 The parties were not in disagreement about the foregoing principles. They were in disagreement about the admissibility of the affidavits. My task is, therefore, to apply those principles to the affidavits. I have been assisted to do so by the submissions of counsel, both in writing and orally.

1 See *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 109-110; *Stuart v The Queen* (1959) 101 CLR 1 at 4-5; *Mickelberg v The Queen* (1989) 167 CLR 259 at 270-271; *Eastman v The Queen* (2000) 203 CLR 1 at 23-26 [67]-[78], 32-41 [103]-[133], 59-64 [181]-[193].

2 *Eastman v The Queen* (2000) 203 CLR 1 at 76-93 [232]-[276].

3 *Deputy Commissioner of Taxation (Cth) v Woodhams* High Court of Australia, transcript of special leave application, 14 May 1999.

Application of the principles

5 For reasons which I sufficiently indicated during argument, I would reject the affidavit of Mariano Rossetto and Robert Power. Each of those affidavits, in my opinion, simply endeavours to place before the Court new factual material which could, and should, have been placed before the trial judge if it was considered relevant to the calculation of the respondent's damages in respect of the loss of superannuation benefits. I do not believe that those affidavits are relevant, as such, to the issue of the importance of the matter that will be decided in the special leave application. It is necessary not only to keep in mind the limited purpose for which the Court will receive affidavits on a special leave application but also the fact that, even if special leave is granted, the affidavit material would not be available on the return of the appeal which will be decided on the record⁴.

6 The affidavit of Mr Rodney Buckley falls into a different class. Mr Buckley is the manager, compulsory third party claims, of AAMI Limited, a licensed insurer under the motor accidents legislation of New South Wales. That company is not the insurer of the applicant. In his affidavit, in its opening section, Mr Buckley draws attention to the Internet web site of a firm of forensic accountants indicating the large changes that are alleged to have come about since the decision of the Supreme Court in the present case ("*Cremona*"). He also draws attention to an article in which the application of the principles established in *Cremona* is said to be described. Each of these documents could, I think, be tendered on the special leave application as an indication of the importance of the matter to be debated.

7 Counsel for the respondent fairly pointed out that the issue of importance is not greatly advanced by Mr Buckley's affidavit. However, a certain measure of authenticity to the statements in Mr Buckley's affidavit is added by the fact that he holds a position as a claims manager in a large insurer that is not the insurer of the applicant. On this footing, I consider that paragraphs 1 to 15 of Mr Buckley's affidavit, dealing (for the most part) with practical consequences of the decision if it stands, fall into the exception to the rule established in *Mickelberg* and *Eastman*. That evidence should, therefore, be available to the applicant on the special leave application. The balance of Mr Buckley's affidavit, being paragraphs 16 to 20, relates to matters of the same class as the affidavits of Mr Rossetto and Mr Power. Those paragraphs are rejected.

8 The affidavit should be re-engrossed to delete the excluded paragraphs and to confine the affidavit of Mr Buckley to paragraphs 1 to 15. That affidavit

4 *Eastman v The Queen* (2000) 203 CLR 1 at 111 [340].

3.

may be filed and will be received by the panel of the Court hearing the special leave application.

Costs

9 A question arises as to the costs of this application. Counsel for the respondent pointed out that, some time before this hearing, his solicitors had asked the solicitors for the applicant to indicate the matters that they wished to place before the High Court in support of the application with a view to securing agreement about a way to do so. No reply was received to this request. However, I think that the position of the parties had by that stage reached a deadlock. The applicant wished to have the benefit of affidavits. The respondent was, at most, prepared to allow a statement of some kind to be made to the Court. The applicant has not succeeded in respect of most of the affidavit material. The respondent has succeeded in resisting most, but not all, of that material.

Orders

10 The proper order for costs is that the applicant should pay half of the respondent's costs of this application. The orders that I make are the application is refused except to the extent I have indicated. In the event that special leave is granted, the applicant must pay half of the respondent's costs of the application. However, in the event that special leave is refused by the Court, the applicant must pay the entirety of the respondent's costs. I certify for the attendance of counsel in chambers.