Supreme Court Notes

by Cameron Ford, Barrister at Law

CORPORATIONS - locus standi of shareholder to bring action against company.

Australian Agricultural Company & Ors v Oatmont Pty Ltd & Ors (Asche CJ, Martin & Mildren JJ) 19/3/92

The Crown Lands Act (NT), s38 makes it an offence for a person to own or have an interest in pastoral land which exceeds 12,590 sq km, subject to the Minister consenting to a holding of up to 20,000 sq km. The appellant acquired an interest in land which the respondents said exceeded the maximum allowed. Oatmont then purchased shares in the appellant and, together with D, brought an application by originating motion for a declaration that the appellant was in breach of the Act. The appellant brought an application to strike out the proceedings for, inter alia, lack of standing on the part of the respondents. O said its standing to bring the action was (a) as a shareholder, and (b) by virtue of a special interest as a competitor for the lands acquired. D said its standing was by virtue of a special interest as a competitor with the appellant for access to and use of the lands. The trial judge held that O, but not D, had established a sufficiently arguable case to found standing on the basis of the shareholding, but that neither had established a special interest as competitors of the appellant. From this the appellant appealed and respondents cross-appealed.

Held, per curiam: (1) One of the requirements for a plaintiff seeking declaratory relief is that it must have a real interest to raise the question to be decided.

Foster v Jododex Pty Ltd (1972) 127 CLR 421, applied. This is another way of asking whether the plaintiff has locus standi; (2) A shareholder may have standing to seek a declaration that the proposed activity is unlawful where the directors are acting in abuse of their powers by knowingly or recklessly acting contrary to the general law, as a result of which the company sustains loss. This would be a derivative action in the name of the company; (3) where a derivative action would lie, an individual shareholder may have a sufficient interest to bring an action for a declaration; (4) No derivative action lies where there is mere negligence by the directors. *Pavlides v Jenson* [1956] Ch 565, referred to; (5) No personal action lies for diminution in O's share value. *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] Ch 204, followed; (6) It would be oppressive to allow an individual shareholder to, where personal rights were not affected except a possible diminution in share value, and who cannot bring derivative action, to seek a declaration where the lawfulness of the conduct complained of is netierh deliberate nor reckless nor negligent; (7) It is not possible to acquire standing by buying some shares in the full knowledge of the alleged unlawful conduct; (8) Neither O nor D have a special interest by reason of their competition with the appellant because the best they could hope for here was an opportunity, together with the resolf of the public, to negotiate to purchase the disputed lands.

Application for leave to appeal and appeal (from Angel J at (1990) 75 NTR 1).

D Russell QC and DWE Trigg instructed by Philip and Mitaros for the appeallants; R Conti QC and NJ Henwood instructed by Cridlands for the respondents/cross-appellants; T Riley QC and J Waters instructed by the Solicitor for the NT for the cross-respondent Minister for Lands and Housing.

MINES - terms of exploration agreement under Land Rights (Northern Territory) Act 1976 (Cth) contrary to that Act - whether void

Northern Territory of Australia v Northern Land Council & Ors (Kearney J) 11/3/92

The plaintiff sought a declaration that certain articles of a Deed of Exploration between a mining company, a land council and an Aboriginal association were void as being contrary to the Land Rights (Northern Territory) Act (Cth). The provisions sought to impose further conditions on the grant of mining rights to the mining company, other than those contained in the Act.

Held: (1) the regime for the granting of exploration licences and mining rights in Part IV of the Act is fully comprehensive; (2) It is necessary to adopt a purposive approach in interpreting Part IV. That purpose was to protect the right of traditional owners to prevent exploration and mining on their lands. But it was also to protect the interest of all Territorians in the minerals below the surface which are invested in the Territory; (3) A "once-only" scheme of consent is established by Part IV and it is not competent for the traditional owners to impose further conditions on mining once they have consented to the granting of an exploration licence. Accordingly, the articles of the Deed purporting to do so were void as against the Act.

Application for declaration.

TI Pauling QC and G C McCarthy instructed by the Solicitor for the NT, PG Minogue instructed by Australian Government Solicitor for the first defendant, FX Costigan QC and RG Blowes instructed by Brett I Medina for the second and third defendants, D Morris instructed by Ward Keller for the fourth defendant.

PRACTISE - amendment - whether alteration in name or description of party - whether step a "nullity"

Smart & Ors v Stuart (Martin, Angel and Mildren JJ) 2/4/92

On 19 January 1988 the plaintiff commenced an action under the Compensation (Fatal Injuries) Act in respect of a death occurring on 1 February 1985. The limitation period expired on 1 Feburary 1988. She intended to sue in a representative capacity but styled the action "as personal representative of the estate of [the deceased]." At that time she was not the personal representative of the estate. After the expiration of the limitation period, she sought and obtained leave to amend the title of the proceeding to delete the words quoted above (on 1 November 1987, the rule in *Weldon v Neal* was abrogated in the Territory). From this the appellants sought leave to appeal.

Held, per curiam, granting leave but dismissing the appeal: (1) r36.01 as to amendment should be given the widest interpretation its language will permit, to cover not only misnomers, clerical errors and misdescriptions, but also mistakes as to the name, but not the identify, of a party.

Per Angel J: (2) the deletion of the words did not change the name or identity of the party, simply her description, and odes not expose the defendants to any new or different liability; (3) the term "nullity" for proceedings or documents is to be avoided because of the connotation of the absolute void this induces.

Per Mildren J: (4) substitutions or additions of persons takes effect from the date of the order, not from the date of initiation of the proceedings as was once thought.

Application for leave to appeal, and appeal, from interlocutory application.

T Riley QC instructed by Ward Keller for the appellants; J Reeves instructed by Cridlands for the respondent.

EXECUTORS and admnistrators - who has the right to bury the body

Calma v Sesar & Anor (Martin J), 27/3/92

A young man died in Darwin and the estranged father and mother each sought tomake their own arrangements for the burial, the father in Port Hedland WA and the mother in Darwin. The mother sought and was granted an interim injunction restraining the father from removing the remains from Darwin, and then sought a permanent injunction to like effect. When she discovered the competing plans of the father, the mother applied for letters of administration, but the father lodged a caveat, and that application had not been determined at the time of these proceedings.

Held: (1) There is no property in a human corpse held for burial; (2) the rightful executor has the power and duty to bury the deceased in a manner befitting his estate; (3) a person entitled to possession of a dead body may enforce that right in the courts, and an injunction will be granted since damages would not be an adeqwuate remedy; (4) the mother and father were here on an equal footing as regards the right to disposal, and the court had to resolve the argument in a practical way paying due regard to the need to have the body disposed of without unreasonable delay, but with all proper respect and decency; (5) since the body was in Darwin and proper arrangements had been made for its burial here, there was no good reason in law to remove it to Western Australia.

Application for permanent injunction.

B Cassells instructed by J MacPherson for the plaintiff/mother; D Crowe instructed by Crowe Hardy for the defendant/father and the undertakers.

APPEAL - Justices' Appeal - raising matter for first time on appeal - failing to provide sufficient sample for breath analysis - evidence required.

Nguyen v Thompson (Mildren J) 19/2/92

The appellant was convicted of failing to provide a sample for breath analysis sufficient for the completion of an analysis contrary to s20(1)(b) of the Traffic Act. His solicitor failed to object to the reception into evidence of a Form 8 under the Traffic Regulations nor were questions asked or submissions made as to a number of prerequisites which were said, on appeal, to be essential to the proof of the charge.

Held, dismissing the appeal: (1) a failure to take objections at trial is not necessarily fatal to an appeal; (2) there is a distinction between a mere failure to object, and a conscious decision whether or not to object. The latter will prevent an appeal against the admission of inadmissible evidence; (3) this rule applies to any legal practitioner, whether experienced or not, although the inexperience of an advocate may lead to such a miscarriage of justice that an appeal court will interfere; (4) evidence of a refusal to submit to a breath analysis may also amount to evidence of refusing or failing to provide a sufficient sample, if there is also evidence that the accused had been given directions by the analyst as to how to provide the sample; (5) "shortly before" in Act is different from "immediately before" in the Traffic Ordinance, repealed.

Justices Appeal.

P Smith instructed by J Noonan for the appellant; K Channells instructed by Director of Public Prosecutions for the respondent.