Supreme Court Notes

Reporters for this month include Anita Kneebone, Alastair Sheilds and Paula Meegan.

CROSS VESTING: TRANSER OF PROCEEDINGS

Toren Fishing and Trading Pty Ltd v McKenzie Family Nominees Pty Ltd and Ors

No 229 of 1994

Judgment of Kearney J delivered on 3 May 1995.

The Second Defendant (SBF) filed an Interlocutory Summons seeking, inter alia, to have the action transferred to the Supreme Court of Western Australia for trial. The first defendant did not oppose the application, the third defendant supported it and the plaintiff opposed it.

The Plaintiff, a company incorporated and carrying on business in the Territory, commenced an action against the defendants, all Western Australian companies who have their management in that State, for damages arising out of the negligent completion of surveys and repairs on a fishing vessel. The purchase of the vessel came into existence and was performed in Western Australia. The vessel was in Western Australia when purchased. Subcontracts for hull and gear surveys and repairs were entered into and performed in Western Australia.

Held: 1. That on the facts of the case, the Supreme Court of Western Australia is the more appropriate (or 'natural') forum, and that with which the action has the more real and substantial connection and in which it is better that it be tried in the interests overall of the parties and of justice;

2. The law in the Territory with respect to cross-vesting applications is as per Swanson v Harley (unreported, 22 March 1995) *viz* that a 'broad' approach to the 'interests of justice' is to be adopted.

3. As a matter of reality, an applicant (and a respondent) bear a forensic onus, as opposed to a legal onus, of establishing that there should be a transfer.

G M Roussos of Cridlands for the plaintiff.

A Woodcock of Mildrens for the first defendant.

A Wyvill instructed by James Noonan for second defendant.

C Hodges of Ward Keller for third defendant.

AK

JUSTICE'S APPEAL – MISTAKE OF FACT – WHETHER UNDUE WEIGHT GIVEN TO PRIOR CONVICTIONS

Kevin John Young v David John Llewellyn

No 56 of 94

Judgment of Kearney J delivered on 20 April 1995.

The appellant had been convicted following pleas of guilty to charges that he carried a firearm exposed to public view in a public area within the boundaries of a town contrary to section 60(2) of the *Firearms Act*, and that he carried a loaded firearm in a public place within the boundaries of a town contrary to section (60)3 of the Act. He was sentenced to two months imprisonment for the first offence and three months for the second offence, to be served concurrently.

On appeal, the appellant relied upon the following two grounds of appeal:

1. That the learned Stipendiary Magistrate erred in failing to consider sentencing alternatives to immediate imprisonment, because of a mistake of fact; and

2. That undue weight was given to the prior convictions of the appellant when he was sentenced.

The appellant contended that a close examination of the sentencing remarks of the learned Stipendiary Magistrate indicated that she was under a misapprehension about the facts surrounding the appellant's previous convictions.

Held: 1. In an appeal against sentence pursuant to section 163(1) of the *Justices Act*, the appellant must show that the exercise of the sentencing discretion was miscarried.

2. Appellate courts should be cautious when drawing conclusions from a close examination of sentencing remarks. See R v Davey (1980) 50 FLR 57 at 65-6.

3. On the facts of the case, Her Worship's sentencing remarks do not indicate a misapprehension of fact, and it is cler that Her Worship considered sentencing dispositions other than actual imprisonment.

4. Appeal dismissed.

D Bamber of CAALAS for the appellant.

C Roberts of DPP for the respondent.

AS

CAVEATABLE INTEREST – UNENFORCEABLE AGREEMENT

Cathy Yuk Chu Lin v Katamon Pty Ltd & Anor

No 29 and 30 of 1995

Judgment of Kearney J delivered on 11 April 1995.

The plaintiff sought an extension of time under section 191(VII) of the *Real Property Act*, of the twenty-one (21) day period after which the Registrar-General must remove a cavet in accordance with section 191(VI). The plaintiff sought to rely upon a written agreement executed in Hong Kong on 29 November 1993, which provided for the sale of Lot 2666 Town of Darwin to the plaintiff for the sum of $20,000.

Held: 1. The test to determine whether time should be extended is that "appropriate to the grant of an interlocutory injunction". See Whallin v Bailbart Investments Pty Ltd (1987) 47 SASR 198.

2. The contract for sale of the land to the plaintiff was part of the larger transaction between the plaintiff and the second defendant, and in its nature it was clearly the implementation of a commission or fee for the work done by the plaintiff in

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arranging the investment by a third party.

3. The contract was unenforceable by virtue of the provisions of section 121 of the *Agents Licensing Act*, because it was a contract for the payment of a fee, commission or other gain or reward for acting as an agent to a person who was not a licenced agent.

4. The plaintiff had failed to show that there was a serious question to be tried, and the application for extension of time was therefore refused.

Mr Howe QC instructed by Barr Moore & Co for the plaintiff.

Mr Abbott QC and Mr McDonald instructed by Mildrens for the defendants.

AS

ADMINISTRATIVE LAW

Tennant Creek Trading Pty Ltd & Ors v Liquor Commission of the NT & Julalikari Council Aboriginal Corporation

Judgment of Thomas J delivered on 7 April 1995.

The four plaintiffs were all holders of liquor licences in Tennant Creek. They sought a remedy in the nature of certiorari pursuant to order 56 of the Supreme Court Rules to quash a decision which had been made by the Liquor Commission ("the Commission") to vary the conditions of the plaintiffs' liquor licences by reducing their hours of trading and prohibiting the sale of certain types of liquor.

The Commission's decision to vary the licence conditions was made on 8 June 1994, during a special meeting of the Commission ("the 8 June meeting"). The Court was not concerned with the merits of the decision or whether the Commission was right or wrong, but rather whether in reaching their decision on 8 June 1994 the Commission followed due pocess.

At the 8 June meeting the Commission was addressed by representatives from the Menzies School of Health, the Living with Alcohol program and the Julalikari Council. No licensees were invited to the meeting.

Prior to the 8 June meeting, during the period from January 1994 to April 1994, the Commission had initiated and conducted substantial public consultation to address the issue of alcohol consumption in Tennant Creek. Amongst other things, this ultimatley led to the Commission directing all liquor outlets in the town to close for one day (the "grog free day"); and the establishment of a Steering Committee consisting of representatives of the Julalikari Council, the Northern Territory Police, BRAADAG, the Department of Health and Community Services, Tennant Creek Town Council, licensees and the Commission.

The Commission hoped that the Steering Committee would be able to speak as a single voice to convey the needs and wishes of the Tennant Creek community. Prior to 8 June 1994 the Commission reached the conclusion that the Tennant Creek community was not going to speak with a unified voice.

On 10 June the Commission issued a Notice of Intent, pursuant to section 33 of the Act, proposing variations of licnec conditions of a number of licensees in Tennant Creek. On or about 10 June the Commission served a Notice on each of the plaintiff licensees, as well as one other licensee, advising of proposed changes to the licence conditions of their respective premises.

By 1 July 1994 each of the licensees who had been served with a Notice had requested a hearing pursuant to section 33(2) of the Act. Therefore the proposed variations did not come into effect. Section 33 of the Act is designed to allow licensees to require a hearing before the commission in respect of any decision by the Commission to vary licence conditions. The Commission has the power to vary, affirm or set aside its initial decision after hearing from the licensees.

The formal hearing was scheduled for 22 August 1994. The hearing did not proceed as scheduled because the plaintiffs issued an Originating Motion seeking certiorari in the Supreme Court. The Julalikari Council sought and was granted leave to be joined as a defendant to the Supreme Court proceedings.

The plaintiffs argued that the Commission's decision at the 8 June meeting should be set aside because:

(i) It amounted to a denial of natural justice and procedural fairness because:

(a) The rights of licensees in respect of the businesses they conduct was substantially prejudiced by the decision to vary the licences; and

(b) They had legitimate expectations arising out of the consultative process to be told about the 8 June meting, to be advised that their rights may be effected by the deliberation at the meeting and to be given an opportunity to make submissions. The plaintiffs argued that the section 33 hearing pocess is not a comprehsive right of appeal.

(ii) It was unreasonable because:

(a) No reasonable body in the position of the Commission could make the decision it did in light of the knowledge that the "grog free day" had caused racial disharmony in Tennant Creek and also because, as the Commission was aware (from reading a letter from the Third Plaintiff to the Chief Minister), that imposing a grog free day had already had serious adverse effects on trading and to impose permanent restrictions would compound those adverse effects; and

(b) It was unreasonable because the restriction of sale of alcohol to members of the Julalikari Community is discriminatory on the basis of race, and the Commission did not

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consult the Human Rights Commission or the Office of the Anti-Discrimination Commissioner at the 8 June meeting.

(iii) The section 33 procedure gave rise to an apprehension of bias because the persons who would sit at a section 33 hearing were the same persons who constituted the Commission when it made its decision on 8 June.

Conclusions: The plaintiffs' application was refused. Thomas J came to the following conclusions:

(i) She did not accept the plaintiffs' submission that they had been denied natural justice or procedural fairness. by virtue of section 33 and section 51 (procedure at hearings) the Act itself provides for a code of procedural fairness in relation to the variation of licence conditions. In this instance the plaintiffs had exercised their rights and sought a hearing before the Commission and dates for the hearing had already been allocated. There was no suggestion that a hearing would not be granted.

(ii) She did not consider the restrictions manifestly unreasonable or so unreasonable that no person would make them. The test applied by Her Honour was that to find an error of law it must appear from the face of the record that the conditions were manifestly unreasonable. Her Honour considered that the Commission was not required to accept as factually correct the conclusion put forward by Tennant Creek Council that the grog free day had given rise to racial disharmony, or the statement in Mr Hallett's letter to the Chief Minister that closing for the grog free day meant his financial circumstance rendered it difficult for him to obtain funds from the bank. The Commission may have considered the latter as just one of the many circumstances it had to balance.

(iii) She was not persuaded that the grounds of apprehended bias were made out. Her Honour applied the principle stated in Laws v Australian Broadcasting Tribunal (1990) 179 CLR 70 @ 100:

"... what must be firmly established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her..."

Her Honour applied the test enunciated by Deane J in Webb v R (1994) 68 ALJR 582 @ 595:

"That test, as so formulated, is whether in all the circumstances a fair minded lay observer with a knowledge of the material objective facts might entertain a reasonable apprehension that (the judges) might not bring an impartial and unprejudiced mind to the resolution of the question in issue."

Her Honour found no basis for holding that a fair minded lay observer, with knowledge of the general circumstances in which the Commission operates, including the provisions of section 33 of the Act, but without knowledge of the integrity or personal qualities of the tribunal members, would apprehend bias.

Mr Reeves instructed by Philip and Mitaros for the plaintiffs.

Mr Tiffin of the Solicitor for the Northern Territory for the first defendant.

Mr Basten QC instructed by Dittons for the Second defendant.

PM