

High Court Notes

COMPANY OPPRESSION

Gambotto v WCP Limited FC 95/007

Mason CJ, Brennan, Deane & Dawson JJ; (McHugh J dissenting), 8 March 1995.

Majority shareholder in respondent company (99.7%) purported to amend articles of association to permit "expropriation" of minority shares, at apparently fair value, to permit the company to become a wholly-owned subsidiary of another company and thereby enjoy substantial tax savings. Majority rejected the "bona fide for the benefit of the company as a whole" test in *Allen v Gold Reefs of Western Africa Limited* [1901] 1 Ch at 671 as not "... attach(ing) sufficient weight to the proprietary nature of a share ..." and said: "To allow expropriation where it would advance the interests of the company as a legal and commercial entity or those of the general body of corporators would ... be tantamount to permitting expropriation by the majority for the purpose of some personal gain and thus be made for an improper purpose." It was therefore oppressive and beyond the scope of s 176 of the Corporations Law. Onus lies upon those supporting expropriation to show that the power is validly exercised, that is, for a "proper purpose", and "fair in all the circumstances".

DL

BUILDER'S NEGLIGENCE

Bryan v Maloney FC/011

Mason CJ, Deane Toohey & Gaudron JJ. (Brennan J dissenting) 23 March, 1995.

The appellant builder built a house in 1979. The owner sold it and her successors re-sold it in 1986 to the respondent. The latter inspected it and found no fault. Six months later cracks developed. They were due to negligence by the builder in the footings provided. He was sued in negligence and judgment obtained in the Tasmanian Supreme Court by \$34,464. An appeal to the Full Court was dismissed as was the appeal to the High Court.

In all the circumstances, the relationship between builder and subsequent owner as regards the particular kind of economic loss should be accepted as possessing a comparable degree of proximity to that possessed by the relationship between builder and first owner and as giving rise to a duty to take reasonable care on the part of the builder to avoid such loss.

Decisions of the House of Lords in *D*

& *F Estates Ltd* [1989] AC 177 and *Murphy v Brentwood* [1991] 1 AC 398 not followed.

The important question for determination was whether the relevant relationship of proximity existed. Discussion of the concurrent duties in contract and tort in appropriate cases.

RW

NATIVE TITLE ACT

Western Australia v Commonwealth *Worrorra Peoples & Anor* *v Western Australia* *Biljabu & Ors v Western Australia* FC 95/010

Full Bench, 16 March 1995.

The High Court ruled unanimously that the *Commonwealth Native Title Act* (except for one section, which was severable) was valid and that the *Land (Titles and Traditional Usage) Act* of WA was invalid. It was invalid because it was inconsistent with the *Commonwealth Racial Discrimination Act* which effectively ensured native title holders had the same security of enjoyment of title as crown title holders. The *Native Title Act* was held to be a valid exercise of the Commonwealth power to legislate to make special laws for people of any race (s 51 (xxvi) of the constitution).

RW

SEPARATION OF POWERS

Brandy v Human Rights & Equal Opportunity Commission FC 95/006

Full Bench, 23 February 1995.

The matter was decided by a Full Bench (seven judges) of the High Court. The judges were unanimous in striking out various provisions of the *Racial Discrimination Act*. In the result sections 25ZAA, 25ZAB, 25ZAC and 25ZC were said to be invalid.

The matter came before the Court by way of a case stated by Gaudron J which reserved to the Court the determination of the validity of the relevant legislation and, in particular, whether it was invalid on the grounds of inconsistency with Chapter III of the Constitution.

The appellant was an officer of ATSIC. John Bell had made allegations of improper conduct against himself by Brandy and ATSIC. The respondent granted him compensation following a hearing. The determination made by the Commission was then registered in the Federal Court pursuant to the legislation. Proceedings were then instituted in the High Court to

test the validity of the amendments made to the legislation in 1993.

The challenge to the particular provisions of the amending act were based on the proposition that they provided for an exercise of judicial power otherwise than in conformity with Chapter III of The Commonwealth Constitution. The power was exercised by the Commission which was not a Court established pursuant to Section 71 of the Constitution or constituted in accordance with Section 72. It was also argued by the Plaintiff in the High Court that the correctness of that proposition was not affected by the provisions for review by the Federal Court.

The Commission, notwithstanding that on this occasion it comprised of a legally qualified person, is not constituted as a court in accordance with the requirements of Chapter III of the Constitution. It cannot therefore, exercise the judicial power, of the Commonwealth which, under section 71, may only be vested in the High Court of which other Courts as the Parliament creates or invests with Federal jurisdiction. Those Courts must be constituted as provided by section 72 (Deane, Dawson, Gaudron and McHugh JJ @ 22).

The majority did not find the review procedure supported the Commonwealth argument that the jurisdiction of the Federal Court was original and not by way of an appeal. This was because that review procedure, despite its name, did not indicate a proceeding in the original jurisdiction of the Federal Court.

This decision of the High Court also affects other Commonwealth legislation which seek to rely on similar registration procedures for enforcement of determinations of tribunals.

RW

Bills of sale on computer index

The Office of the Registrar-General has advised that Bills of Sale are now indexed via the computer system.

Indexing occurred around September, 1994. All of 1993, 1994 and 1995 bills of sale have been indexed but a few numbers are missing.

When a bill of sale is presented for registration, it will be given a number and inserted into the computer index within 24 hours from the date of lodgement.

Until all current bills of sale are indexed on the computer system (including those currently missing), practitioners need to conduct a search of the index cards and the computer records.

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