Supreme Court Notes

Reporters for this month include David Lisson, Rex Wild, Chris Rowe, David Ward and Alistair Shields.

SOLICITOR'S CONTEMPT

Rogerson v Tchia & Ors

AP of 1992

Court of Appeal

Judgment of Martin CJ, Kearney & Thomas JJ delivered 17 March 1995.

Appeal from a judgment of Angel J given on 9 October 1992 pursuant to which the appellant was found guilty of contempt of court in that he breached an order of the Court which restrained him from contacting a former client. He was fined $5,000.00. The Appeal was dismissed (by majority; Thomas J dissenting) but the Court found that the appellant had not been given an opportunity to make submissions on penalty, and remitted this issue for further determination. The majority held that the appropriate standard of proof was the criminal one of beyond reasonable doubt.

Thomas J dissented on the basis that the correct procedure had not been followed. In particular, the charge of contempt should have been clearly specified so there was no room for misunderstanding.

McCormack instructed by Close & Carter appeared for the appellant.

Tiffin of the Office of the Solicitor for the Northern Territory appeared as *amicus curiae* (on the instructions of the Attorney-General).

RW

CANCELLATION OF PAYMENT

Aherne v Wormalds Australia

No. 194 of 1994

Judgment delivered by Martin CJ on 22 December 1994.

The worker appealed from a decision of the Work Health Court ("the Court") that cancellation of weekly payments to the worker by the employer pursuant to section 69 of the *Work Health Act* ("the Act") was valid. The employer cross-appealed from the Court's subsequent refusal to adjourn the hearing of the worker's substantive application for compensation.

Chief Justice Martin allowed both the appeal and cross appeal. The employer had cancelled weekly compensation payments to the worker under section 69 of the Act for the reason that the worker had failed to undertake reasonable medical treatment as he was obliged to do under section 75B of the Act. That section deems a worker who unreasonably fails to undertake medical treatment "which could enable him to undertake more profitable employment" to be "able to undertake such employment" such that weekly compensation payments to him may be "reduced or cancelled accordingly". Although the Chief Justice was satisfied that there was evidence before the Court upon which it could base a finding that the worker had unreasonably failed to undertake reasonable medical treatment, his Honour held that the Court erred in law in accepting the employer's submission that for a worker to be deemed able to undertake more profitable employment under section 75B it was sufficient for the employer to establish an unreasonable failure by the worker to undertake medical treatment. The Chief Justice held that this was insufficient, and that it must further be established that the medical treatment not undertaken by the worker could have enabled him to undertake more profitable employment before the worker will be deemed able to undertake such employment pursuant to section 75B(2).

In the hearing of the worker's substantive application for compensation, which followed upon the Court's decision in relation to cancellation of weekly compensation payments, the Court refused the employer's application for an adjournment, made consequent upon an amendment by the worker to his Statement of Claim to plead an injury different to that for which the employer had originally accepted liability. The employer cross-appealed from the Court's refusal to grant an adjournment. The Chief Justice held that in substance the amendment to the worker's Statement of Claim constituted a separate proceeding for the purposes of sections 105, 106 and 107 of the Act, such that the matter should have been referred to a conciliation/directions conference before proceeding to hearing. There being no provision under the Act whereby the compulsory conference procedures could be dispensed with, His Honour held that it was the duty of the Court to see that those procedures were followed. His Honour observed that a further objective of the conference procedures under section 106 and 107 "beyond that of having the matter prepared for hearing" was "by conciliation, to overcome distrust of hostility between the parties and reconcile their differences, both on procedural and substantive matters".

The Chief Justice granted a stay of proceedings in the Work Health Court pending the outcome of the appeal and cross-appeal, on the grounds that the employer would be substantially prejudiced if no stay were granted whereas the worker would suffer no substantial prejudice by the granting of the stay.

J Tippett instructed by Waters James McCormack for the Appellant.

S Gearin instructed by De Silva Hebron for the Respondent.

CR

PARTITION

In the Matter of Softwood Plantations Pty Ltd

No. 202 of 1994.

Judgment of Martin CJ delivered 24 March 1995.

Application by Softwood Plantations Pty Ltd pursuant to s.3 of the *Partition Act (SA) 1881* that land within which the company held a 12/63 interest be either sold to it or partitioned as between the co-owners.

All of the remaining five co-owners were deceased and in relation to four of them no probate had been issued in respect of their estates. One of the deceased co-owners, who had held a 9/63 interest in the land, had appointed the Public Trustee of South Australia as her executor.

Notice of the application was given to the Public Trustee of South Australia who had agreed to sell the applicant Company the 9/63 interest giving the Company a one third interest. The land had been independently valued by two valuers at $110,000 if sold at public auction. It was estimated by a professional engineer that the cost of subdividing the land, constructing a road and providing electricity would amount to over $315,000. The Court was satisfied that given the number of parties involved, the fact that after reasonable endeavours none of the descendants of the deceased could be located, the expense of sub-division and the fact that the Public Trustee of South Australia had agreed to sell the interest it held, a sale of the property and distribution of the proceeds would be more beneficial for the parties than a sub-division.

Consequently, the Court made orders enabling the applicant Company to purchase the outstanding interests for the sum of $73,333.33 (two thirds of $110,000.00).

Pursuant to s. 58 of the *Public Trustee Act (NT)* the Court appointed the Public Trustee for the Northern Territory as managers of the interests of the four deceased co-owners and ordered that upon the sale of the land the Public Trustee was to hold the balance of the proceeds.

Kelly instructed by Philip & Mitaros for the Applicant.

Grant instructed by the Solicitor for the Northern Territory for the Respondent.

DW

Supreme Court Notes

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CROSS VESTING - TRANSFER OF PROCEEDINGS

Swanson -v- Harley

No 97 of 1994

Judgment of Martin CJ delivered 22 March 1995.

The defendant, a South Australian solicitor, appealed against a decision of the Master in which the Master refused the defendant's application that service upon him of a writ be set aside and the proceedings be stayed. The defendant also made an application for a stay of proceedings, and for the transfer of the proceedings to the Supreme Court of South Australia.

The facts were that the plaintiff and defendant in South Australia concerning the purchase of an office building in Darwin. The plaintiff commenced action against the defendant for damages arising out of the defendant's actions as solicitor for the plaintiff.

Held:

1. dismissing the appeal against the decision of the Master, the provisions of the *Service and Execution of Process Act* prevail over Rule 7.01 of the Supreme Court Rules;

2. dismissing the defendant's application to have the proceedings stayed, it is appropriate to approach this matter within the context of the cross vesting scheme.

3. on the facts of the case, the matter with which the action had most real and substantial connections arose in South Australia. The application for the transfer of proceedings to South Australia was granted.

In the course of his judgment the Chief Justice made a useful analysis of the inconsistencies of interpretation of the cross vesting scheme between the various supreme courts of Australia.

N Henwood of Cridlands for the plaintiff.

A Wyvill instructed by M Michaels of Philip and Mitaros for the defendant.

AS

TESTAMENTARY CAPACITY

In the matter of the Estate of the Late Donald Harold Bonson

No PR22 of 1994

Judgment of Martin CJ delivered 7 April 1995.

On 28 February 1992 the deceased, Donald Harold Bonson, executed a will. On 3 June 1993, shortly before his death, the deceased executed a second will.

The Public Trustee, as executor and trustee of the deceased's estate, sought probate of the June 1993 will. A caveat was lodged by one of the deceased's sons, a beneficiary under both wills. The caveator claimed that the June 1993 will was invalid because the deceased lacked the requisite testamentary capacity at the time it was made.

The question for the Court, therefore, was whether the deceased possessed sound mind, memory and understanding to the requisite extent when making the June 1993 will.

The court considered three major areas of evidence; evidence from those who took instructions from the deceased and witnessed him signing the will (Mr Flynn and Ms Meegan of the Public Trustee), evidence from the caveator and other members of the deceased's family and medical evidence.

Evidence was given by Mr Flynn and Ms Meegan that at the time instructions were given and at the time the will was signed the deceased understood what he was doing. For all intents and purposes the deceased appeared to understand the nature of the disposition and who the beneficiaries would be.

The evidence of Mr Flynn was that he saw nothing to raise any doubt in his mind as to the deceased's mental capacity. Shortly before 3 June 1993 the deceased gave instructions to Mr Flynn that he wanted to change his will and leave his house to all of his children equally. Mr Flynn had no difficulty understanding the instructions he was given. At the signing of the will on 3 June Mr Flynn had no doubts about the deceased's mental alertness, his capacity to understand the nature of the what he was doing and his capacity to make up his own mind about the contents of his will.

The evidence of Ms Meegan, a witness to the signing of the will, was that immediately prior to the will's execution Mr Flynn asked the deceased if he had read the will and if he understood it. The deceased answered "yes". Mr Flynn then asked the deceased whether the will his intentions and if he was happy to sign it. The deceased said that it did represent his intentions, that it seemed fair and that he was happy to sign it.

The evidence of the caveator and other members of the deceased's family was that in the twelve months to early 1993 the deceased's physical and mental condition deteriorated significantly. By early 1993 the deceased had stopped driving his car, often forgot to eat, no longer did his own shopping, no longer did any work around the house, had trouble holding a conversation, forgot names and was less talkative than before.

The medical evidence was that as a consequence of vascular occlusion the deceased suffered from dementia which, although no formal assessment was ever done, would have effected his memory and ability to make rational decisions.

After discussing law relevant law in *Banks -v- Goodfellow* [1870] All ER 47, *Bailey -v- Bailey* (1923) 34 CLR 558, *Timbury and Another -v- Coffee and Another* (1942-43) 66 CLR 277 and *Bull and Others -v- Fulton* (1942-43), His Honour said that there was nothing in the evidence from the family members which would cause him to think that the deceased was suffering a lack of testamentary capacity at the time he made his will in June 1993. His Honour said that physical deterioration, occasional confusion and loss of memory are not sufficient to raise doubt as to the existence of testamentary capacity at the relevant time. Even though there was evidence of the deceased's deterioration of mental capacities between 1992 and 1993 as well as evidence of dementia and loss of mental faculty His Honour believed that there was sufficient evidence that the testator retained his mental powers to the requisite extent.

His Honour concluded that the inference to be drawn from the evidence of Mr Flynn and Ms Meegan was that the Testator was of sound mind, memory and understanding when he made his will in June 1993.

His Honour accordingly granted probate of the June 1993 will.

Kelly instructed By Philip& Mitaros for the application.

Waters instructed by NAALAS for the respondent.

DW

BALANCE

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