CHILDREN

Order for s 11F conference upon father reapplying for parenting orders six months after failing at trial held to be in error

In *Hart & Sellwood* [2016] FamCAFC 254 (2 December 2016) it was ordered in June 2015 after a trial that the parties' child live with the mother and spend three nights on alternate weekends with the father. Six months later the father re-applied for the orders he had previously sought (five nights per fortnight). The mother objected, relying on *Rice & Asplund* (1979) FLC 90-725 in arguing that it was not in the child's best interests to be the subject of further litigation. At a preliminary hearing Judge Myers granted the father's oral application under s 11F of the *Family Law Act 1975* that the parties and child attend with a family consultant so that a Children's and Parents Issues Assessment could issue ([5]). The mother appealed to the Full Court (Ainslie-Wallace, Ryan & Murphy JJ).

In allowing the appeal with costs, the Full Court said (from [33]):

"The … challenges raised by the mother can be distilled to a single proposition … whether the primary judge erred in the exercise of his discretion in making the s 11F order by failing to take into account relevant considerations ... and ... that his Honour was required to consider the best interests of the child in considering whether to involve the child in a further report and yet further conflict between his parents about him.

[34] As to the latter point, it is well settled that a Rice and Asplund threshold issue is to be determined by reference to the best interests of the child (*Marsden & Winch* [2009] FamCAFC 152 ...*Walter & Walter* [2016] FamCAFC 56). (…)

[39] ... his Honour failed to take account of a number of aspects of the evidence directly relevant to the exercise of … discretion. … [The] reasons for judgment contain numerous findings which would undoubtedly have given the primary judge serious reason to doubt whether a s 11F order would be in the best interests of the child. (…)"

Andrew Yuile's High Court Judgements

TAX

Income tax – A ssessable income

In *Blank v Commissioner of Taxation* [2016] HCA 42 (9 November 2016) the High Court considered whether amounts received by the appellant on the termination of his employment as part of an employee incentive profit participation plan were ordinary income and assessable for income tax. The appellant was involved in the plan through various agreements with companies in the corporate group of his employer. Ultimately, the appellant had an entitlement to "deferred compensation". Pursuant to that entitlement, after the termination of his employment the appellant relinquished his claims under a profit sharing agreement and assigned shares he held in one of the companies. He thereby became entitled to a lump sum paid in instalments. The High Court noted that reward for services in the form of remuneration or compensation is obviously income, and that is so even if the payment is in a lump sum or deferred until after retirement. In this case, the Court held that the instalments paid to the appellant were deferred compensation for the services performed and were therefore income according to ordinary concepts. French CJ, Kiefel, Gageler, Keane and Gordon JJ jointly. Appeal from the Full Federal Court dismissed.

WORKERS COMPENSATION

Whether injuries suffered "as a result of" reasonable administrative action

In *Comcare v Martin* [2016] HCA 43 (9 November 2016) the High Court considered the causal connection required to meet an exclusion from the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the Act). Ms Martin was diagnosed with an adjustment disorder after being treated following a work "break down". The break down occurred after Ms Martin was told that she would not be appointed permanently to a higher position in which she had been acting. That decision meant Ms Martin would return to being supervised by a man with whom she had a poor working relationship. Ms Martin made a claim under the Act for aggravation of a mental condition. Comcare argued that Ms Martin was precluded from compensation because the aggravation had occurred "as a result of reasonable administrative action". The Administrative Appeals Tribunal (AAT) found that the causal connection required by that phrase was met, but that the action was not reasonable in the circumstances. A majority of the Full Federal Court held that the phrase "as a result of" required a "common sense approach" to causation. The High Court rejected that approach. It held that an employee will suffer injury "as a result of" administrative action if that action is a cause in fact of the disease suffered. That is, the employee would not have suffered the disease as defined (which includes aggravation) if the action had not been taken. That connection was met in the case of an aggravation of a mental condition suffered in reaction to a failure to obtain promotion. The matter was to be remitted to the AAT to consider again the reasonableness of the action. French CJ, Bell, Gageler, Keane and Nettle JJ jointly. Appeal from the Full Federal Court allowed.

PRACTICE AND PROCEDURE

Anshun Estoppel – Abuse of process

Timbercorp Finance Pty Ltd (in liquidation) v Collins; Timbercorp Finance Pty Ltd (in liquidation) v Tomes [2016] HCA 44 (9 November 2016) concerned actions brought by the appellants to enforce loans made to the respondents. In their defences, the respondents alleged that the loans were invalid. The respondents had also been members of an earlier group proceeding in which it was alleged against the appellants that they had failed to disclose required information. The relief would have been the invalidity of loans, including those made to the respondents. The appellants argued that the claims raised by the respondents in their defences should have been put in the group proceeding and that the appellants were now estopped in the Anshun sense from raising them. In part, this argument relied on the lead plaintiff in the group proceeding being a privy in legal interest of the respondent. The High Court held, after reviewing the group proceeding provisions, that the lead plaintiff was not such a privy. The level of control of the group members could not go that far. The lead plaintiff represents the group in relation to the claim the subject of the proceedings, but not in relation to the individual claims of the group members. Anshun only operates where the defence raised in the later proceeding is so relevant to the subject of the first proceeding that it would have been unreasonable not to raise it. That could not be said in this case. The only connection was the relief in the two proceedings. Further, there would be no conflicting judgments if the defences were allowed. The Court also rejected an argument based on a broader concept of abuse of process. French CJ, Kiefel, Keane and Nettle JJ jointly; Gordon J concurring separately. Appeal from the Supreme Court (Vic.) dismissed.

TAXATION

Income tax – Residence of a company – Central management and control of company

In *Bywater Investments Limited v Commissioner of Taxation; Hua Wang Bank Berhad v Commissioner of Taxation* [2016] HCA 45 (16 November 2016), the High Court held that the central management and control of the appellants was exercised in Australia and therefore the appellants were resident in Australia for tax purposes. The appellants argued that the directors of the companies were resident abroad, and the board of directors of each appellant met abroad and took company decisions abroad, meaning that the companies were resident abroad for tax purposes. The High Court confirmed that the question of the place of exercise of a company's control and management is a factual one, determined through scrutiny of the company's actual business and trading, not just the company documents. Ordinarily, business will be conducted where directors and boards of directors conduct their business. But the same does not follow if a board of directors abrogates decision-making power in favour of an outsider and operates as a puppet, "rubber stamping" the decisions of the outsider. In this case, Perram J at first instance held that the appellants' real business was run from Sydney, and the role of the directors was "fake". Tax liability could not be escaped because the boards were overseas. French CJ, Kiefel, Bell, and Nettle JJ jointly; Gordon J concurring separately. Appeal from the Full Federal Court dismissed.

CRIMINAL LAW

Summing up – The "proviso" and substantial miscarriage of justice

In *Castle v The Queen; Bucca v the Queen* [2016] HCA 46 (16 November 2016), the appellants were convicted of murder. The deceased met Castle in a parking lot, got into Castle's car and was shot. The prosecution alleged Bucca was in the boot, crawled into the back seat and shot the deceased. Castle alleged another man, Gange, was the shooter. The prosecution relied on telephone records and evidence of Gange's partner, M, to show that Gange was not at the murder scene. The appellants alleged that the trial judge's summing up was unbalanced and favoured the prosecution; that evidence of handguns owned by Bucca should not have been admitted; and that evidence of a statement of Bucca, relied on as an admission, should not have been admitted. The High Court held that, in all the circumstances, the case was fairly left for the jury in the summing up, though some comments of the judge would better not have been made. The High Court also rejected the argument that the handgun evidence should have been excluded, finding that it was open to conclude that it was probative and outweighed any prejudice. However, the Court held that the "admission" was not properly an admission and should not have been allowed in. That raised the question of the application of the "proviso": whether the error meant there had been a substantial miscarriage of justice. The Court held that there had been because, notwithstanding the strength of the prosecution case, it could not be concluded that Bucca was guilty beyond reasonable doubt. The conviction had to be quashed and a new trial ordered. Kiefel, Bell, Keane and Nettle JJ jointly; Gageler J separately concurring. Appeal from the Court of Criminal Appeal (SA) allowed.

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