

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: *Stirling v DPP* [1944] AC 315, applied; (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: *R v Gay* [1976], applied; (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: *Ella v R* (unreported, Court of Appeal 11/1/91), referred to; (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: *Hammond v Lavender* (1976) 11 ALR 371 referred to; (5) "Shortly before" in the Act is different from "immediately before" in the *Traffic Ordinance*, repealed.

P Smith instructed by Noonans for the appellant, K Channells instructed by Director of Public Prosecutions for the respondent.

CORPORATIONS - locus standi of shareholder to bring action against company

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

The *Crown Lands Act* (NT), s38A, 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. O then purchased shared 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 the 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: *Pavlidis 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 neither deliberate nor reckless nor negligent; (7) It is not possible to acquire standing by buying some shares in the full knowledge of 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 rest of the public, to negotiate to purchase the disputed lands.

D Russell QC and DWE Trigg instructed by Philip and Mitaros for the appellants; 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.

* Note: An application for special leave to appeal to the High Court has been lodged.