Dan Star QC Federal Court Judgments

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Numbers in square brackets refer to a paragraph number in the judgment.

SEPTEMBER

BANKRUPTCY – PROCEDURAL FAIRNESS

Right to fair hearing

Hayes v Pioneer Credit Acquisition Services Pty Ltd [2018] FCA 1113 (30 July 2018) concerned an appeal from the Federal Circuit Court in which a sequestration order was made against the estate of the appellant pursuant to s 52 of the *Bankruptcy Act 1966* (Cth). The appellant (a litigant in person) succeeded on the ground that he was denied procedural fairness at the hearing of the creditor's petition in circumstances where he was removed from the courtroom and therefore not able to give evidence or make submissions.

At the hearing of the creditor's petition, the appellant (who was also self-represented at this hearing) refused to identify himself as the respondent, despite being asked 13 times in total to do so, and an unproductive and frustrating exchange ensued between the primary judge and the appellant (at [7]). In the appeal in the Federal Court, Rangiah J compared the lenghty, circular discourse between the primary judge and the appellant to that of Monty Python's "Dead Parrot" (at [15]). Ultimately court security was called to remove the appellant and the Court adjourned. The hearing then proceeded in the appellant's absence, concluding with the primary judge making a sequestration order and an order for costs.

The appellant, while being difficult, did still repeatedly acknowledge that he was Brett John Hayes and that he was there to respond to the claim against him. This led Rangiah J to hold that the primary's judge's statement – "I don't know who that was" – was not correct and his conclusion that he was not satisfied that the appellant was the respondent to the proceeding was unreasonable (at [18]).

Rangiah J explained at [20]: "The primary judge was presumably faced with a busy bankruptcy list. The appellant was wasting the Court's time with nonsensical recitations and his refusal to directly acknowledge that he was the respondent to the proceeding. His Honour's frustration was palpable, and understandable. I am conscious of the reputation of appellate judges as 'the ones who lurk in the hills while the battle rages; then, when the battle is over, they descend from the hills and shoot all the wounded': see Ruth Bader Ginsburg, *Remarks on Writing Separately* (1990) 65 Washington L Rev 133 at 143. However, the 'battle' is not supposed to be between the

trial judge and a self-represented litigant. His Honour was not entitled to insist that the appellant describe himself by the title 'respondent' as a condition of being permitted to appear. The exchanges did not justify the exclusion of the appellant from the courtroom. The appellant was denied the opportunity to call evidence and to make submissions. That was a denial of procedural fairness."

As Rangiah J was not satisfied that a properly conducted hearing could not possibly have produced a different result (see *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-147), the appeal was allowed and the matter remitted to the Federal Circuit Court to re-hear and determine.

PRACTICE AND PROCEDURE – LEGAL REPRESENTATION

No right to legal assistance

In *ADF15 v Minister for Immigration and Border Protection* [2018] FCA 1099 (25 July 2018) Flick J dismissed the appeal from the decision of the primary judge in the Federal Circuit Court which dismissed an application for judicial review of a decision of the then Refugee Review Tribunal which affirmed the delegate's decision to refuse to grant a protection visa to the appellant.

The notice of appeal included, in the words of the appellant, "I have no lawyer to represent me in this court as I am unemployed and I have no money to pay for legal representation". Flick J held that appellant's lack of legal representation did not provide any reason to set aside the decision of the primary judge (at [27]).

The Court recognised that legal representation confers an unquestionable advantage (at [23]). Referring to the authorities, Flick J was cognisant of the Court's responsibility "... to ensure that a trial is fair" and that the unrepresented party "suffers no meaningful disadvantage ..." (at [24]). His Honour (at [25]) cited with apparent approval the following statement by Katzmann J in in *SZVLE v Minister for Immigtation and Border Protection* [2017] FCA 90 at [40]: "... there is no statutory right to legal representation. Nor is there any absolute right to legal representation at common law. In civil proceedings procedural fairness does not require that a party be provided with legal representation, no matter how serious the consequences of the proceedings might be."

PRACTICE AND PROCEDURE – ACCESS DOCUMENTS ON COURT FILE BY NON-PARTY

Whether plaintiff has a right to legal assistance

In *Castle v United States* [2018] FCA 1079 (19 July 2018) the Court (Mortimer J) made orders granting leave to a journalist from *The Age* newspaper to inspect and photocopy a number of documents on the Court file. The proceeding concerned an application by Mr Castle for review of a determination that he is eligible for surrender for extradition. The documents requested were (a) a reply; (b) an affidavit; (c) an outline of submissions; (d) an address for service; and (e) the originating application. The United States had no objection to access to material being granted to the non-party media organisation, save some diplomatic correspondence, known as "notes verbale", annexed to an affidavit filed on its behalf. Mr Castle on the other hand, submitted that the request for access to documents should be denied to "any/all media".

Mortimer J held that access should be granted to all of the documents sought (at [13]). The documents fell into two categories. Documents (d) and (e) are commonly referred to "unrestricted documents" within r 2.32(2) of the *Federal Court Rules 2011* (Cth) (the Rules). In the absence of orders providing for their confidentiality, such documents can be inspected by a non-party, such as *The Age* journalist, without leave of the Court. The remaining documents (documents (a) to (c)) are commonly known as "restricted documents" and are outside r 2.32(2) of the Rules. Leave of the Court is required before they can be inspected or copied by non-parties.

Mortimer J referred to the principle of "open justice" expressed in s 17(1) of the *Federal Court of Australia Act 1976* (Cth) and further reflected in the terms of Part VAA of that Act, in particular in ss 37AE and 37AG (at [16]-[17]).

At [18], her Honour explained in relation to affidavits and written submissions: "Thus, where an affidavit has been 'read' in open court, there is a strong presumption that any member of the public should be given leave to inspect it: see *Baptist Union of Queensland - Carnity v Roberts* [2015] FCA 1068; 241 FCR 135 at [28]-[29], [33]-[40] (Rangiah J) and the authorities there cited. The same can be said for written outlines of submissions filed by parties and relied on in court. Where court proceedings are entirely oral, as occurred in superior courts more frequently in the past, then the evidence would have been spoken in open court, and the submissions would have been made orally in open court. All present could hear them, repeat them and report

on them, so long as the reporting was fair and accurate. The move to giving evidence, and making submissions, in writing should not obscure the fact that evidence and submissions are still presumptively treated as being given in open court".

There was no basis for refusing access to the documents sought. Indeed, there was a public interest in allowing information concerning extradition processes, and the competing claims made during proceedings under the *Extradition Act 1988* (Cth), to be publically available (at [26]).

STATUTORY INTERPRETATION

Judicial comity – whether single judge should follow the interpretation of another judge

In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] FCA 83 (13 February 2018) the Court considered the proper interpretation of industrial activity under s 347 of the *Fair Work Act 1999* (Cth). Bromberg J's preferred construction was at least impliedly rejected by Jessup J in both *Esso Australia Pty Ltd v The Australian Workers' Union [2015] FCA 758 and Australian Building and Construction Commissioner v Australian Manufacturing Workers' Union (The Australian Paper Case)* [2017] FCA 167. Bromberg J therefore considered the principles and authorities about when it is appropriate for a single judge to depart from earlier authority (at [83]-[85]). While his Honour thought that the interpretration of Jessup J was wrong, he was not persuaded it was plainly wrong and therefore did not depart from it (at [85]).

In giving his preferred construction of the relevant provision the *Fair Work Act 1999*, Bromberg J summarised the principles regarding the circumstances in which reference may be made to extrinsic materials including an explanatory memorandum (at [50]-[52]).

OCTOBER

PRACTICE AND PROCEDURE

Mandatory interlocutory injunction granted

In *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221 (13 August 2018) Beach J granted a mandatory interlocutory injunction sought by the Australian Competition and Consumer Commission (ACCC) that required certain companies (the Aurizon parties) to carry on Queensland's intermodal business (QIB). (Note: "Intermodal" refers to the carriage of general freight usually in a container using two or more modes of transportation, such as truck and rail.)

The injunction application was in the context of proceedings instituted by the ACCC for alleged contraventions of ss 45 and 50 of the *Competition and Consumer Act 2010* (Cth) (CCA) (at [18]-[20]). The impugned conduct arose from the sale and purchase the Aurizon parties' QIB.

The ACCC sought interlocutory injunctive relief against the Aurizon parties requiring them to carry on Aurizon's QIB until the hearing and determination of the proceedings. Beach J summarised why he granted a mandatory injunction at [2]: "The mandatory injunction sought against the Aurizon parties is exceptional. Nevertheless, given that I have determined to bring on the main trial of these proceedings on 19 November 2018, and to deliver a final judgment before Christmas of this year, I propose to grant the injunction sought. The injunction will operate for a relatively short period, even though I accept that there will be significant prejudice to the Aurizon parties in the interim. The injunction is necessary to preserve the status quo. In this regard the Aurizon parties have not yet commenced to shut down the QIB. Moreover, the injunction is necessary to preserve the competitive framework in Queensland concerning the relevant markets dealing with intermodal and steel rail linehaul services. If no injunction is granted, Pacific National may achieve a monopoly position in Queensland which to say the least is likely to produce a substantial lessening of competition. Now I accept that I ought only grant a mandatory injunction of the type sought in exceptional circumstances. Moreover, the present context also involves no undertaking as to damages being given by the ACCC, which is a point in favour of the Aurizon parties on the balance of

convenience. But the period of the restraint is short. The status quo is preserved by the restraint. And the adverse consequences for competition are too severe if I do not impose the restraint ..."

The Court discussed the test for an interloctory injunction as it applies in relation a mandatory injunction (at [5]-[15]). There is no separate test for a mandatory interlocutory injunction compared to that for a prohibitive injunction (at [8]).

PRACTICE AND PROCEDURE

Res judicata – whether final judgment must be decided "on the merits"

Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2) [2018] FCAFC 132 (16 August 2018) concerned a claim from Zetta Jet Pte Ltd and Mr King (a trustee appointed to Zetta Jet under the insolvency law of the United States) that Zetta Jet was the owner in equity of a vessel, Dragon Pearl, which was in the custody of the Admiralty Marshal pending the outcome of the proceedings. When the matter was to be heard, Zetta Jet failed in a late application to adjourn the proceedings. Counsel for Zetta Jet was then invited to open and lead evidence and, after he indicated that he was not in a position to do so, the proceedings were dismissed. An appeal against the decision to dismiss the proceedings was unsuccessful.

Half an hour after the appeal was dismissed, the vessel was sold by the registered owner. After second proceedings were dismissed, Zetta Jet and Mr King then commenced third proceedings including an application for an interlocutory injunction to restrain the new owner from removing the vessel from Australian waters. Claims to proprietary relief of the same kind as those that had been advanced against the previous owner of the vessel in the first proceedings were advanced in support of the application for an injunction. There was also a new proprietary claim based upon an alleged alienation to defraud creditors of Zetta Jet and, in addition, a proposed claim for relief for an uncommercial transaction under s 588FF of the *Corporations Act 2001* (Cth).

The primary judge refused the interlocutory injunction on the basis that a res judicata arose in respect of claims in rem by Zetta Jet or Mr King against the vessel by reason of the dimissal of the original proceedings. Zetta Jet and Mr King sought leave to appeal from that refusal and the orders for the summary dismissal of a second in rem claim against the vessel.

The Full Court held that the primary judge was correct in refusing the claim to injunctive relief based upon principles of res judicata insofar as those claims depended upon a Barnes v Addy claim to ownership in equity by Zetta Jet of the vessel or the other proprietary claim based on an alleged alienation to defraud creditors. However, leave to appeal was granted and orders made to allow Mr King to pursue his application for urgent provisional relief based upon the claim to orders under s 588FF of the *Corporations Act* which were not considered by the primary judge (at [11]-[13]). Whether *Anshun* estoppel or abuse of processs apply in respect of this claim was remitted to the primary judge (at [59]).

The Full Court analysed the state of the law on res judicata (at [14]-[51]). The key question in this case was whether there needed to be a final judgment "on the merits" of a claim in order for res judicata to apply. Based on an examination of Australian authority, the Full Court held there is no such requirement. English cases which suggest otherwise are founded on a different use of terminology (that is, an English practice of using the term res judicata to apply to both a cause of action estoppel and an issue estoppel) (at [36] & [45]).

Allsop CJ and Moshinsky and Colvin JJ explained at [33]: "It is an important principle. A party who is commanded to attend a trial or final hearing to answer a claim based upon a cause of action would face the same injustice if the claim could be re agitated after final judgment was given dismissing the claim irrespective of the circumstances in which the judgment was given. Whether a claim is allowed or dismissed by consent, default or after a contested hearing, the need for finality is the same in each instance. A party who wishes to preserve the right to bring further

proceedings should seek leave to discontinue. The need for finality is one reason why an application for such leave may be refused if brought late in the day and without explanation beyond inability to proceed with the case."

As the judgment in the original proceedings brought by Zetta Jet and Mr King was final in respect of all causes of action then raised, the principles of res judicata applied (at [52]-[54]).

PRACTICE AND PROCEDURE

Strike out of pleading of the tort of misfeasance in public office

Farah Custodians Pty Limited v Commissioner of Taxation [2018] FCA 1185 (9 August 2018) was a strike out application brought by the Commissioner of Taxation (Commissioner) to those parts of the applicant's statement of claim alleging that the Commissioner had (A) engaged in "conscious maladministration" or misfeasance in public office (misfeasance) and (B) liability based on the rule in *Barnes v Addy*.

The central issue was whether the pleading disclosed a reasonable cause of action against the Commissioner for the tort of misfeasance. The Court undertook a summary of the elements of the cause of action for misfeasance (at [97]-[111]). In relation to the state of mind requirements, these relevantly include that liability cannot be established by aggregating the acts and knowledge of various officers (at [108]) and the tort cannot be established by simply attributing the knowledge held by one person in an organisation to another person in a different position, or at a different level, in the organisation (at [111]).

The applicant's pleading (which was highly criticised by the Court) concerned, inter alia, knowledge on the part of various tax officers of frauds perpetuated by the applicant's former tax agent, and the shortcomings of the subsequent investigation, as well as the payment of tax refunds somewhere other than to the applicant's nominated account. There were various fundamental problems with the misfeasance allegations (at [112]). Among other things, it was impermissible to plead a case of misfeasance against the Commissioner personally based on a composite or aggregate of the conduct and states of mind of a number of individual officers (at [144]-[147]). There were also flaws with the allegations of vicarious liability for misfeasance (at [132]-[135]).

Wigney J made orders stricking out the paragraphs relating to misfeasance and the *Barnes v Addy* claims. The Court held it would be inappropriate to simply grant leave to re-plead, and should the applicant wish to reformulate these causes of action it should be made to file an application for leave to amend (at [179]).