HIGH COURT JUDGMENTS

ANDREW YUILE

Trusts

Construction of trusts – trustees' powers

In *Fisher v Nemeske* [2016] HCA 11 (6 April 2016) the High Court was asked to construe a clause in a trust deed that conferred on the trustees power to "advance or raise any part or parts of the whole of the capital or income of the Trust Funds and to pay or to apply the same as the Trustee shall think fit . . ." (at [5]). The trust assets were comprised of shares in another company. In 1994, the trustee resolved to distribute an amount equal to the value of the shares to the two beneficiaries of the trust. The distribution was recorded in the trust accounts, along with a record of the same amount returned to the trust funds as beneficiary loans. A further deed was created in 1995 purporting to charge the shares in the favour of the beneficiaries, with an obligation on the trustee to repay the principal on the demand of the beneficiaries. The key question for the Court was whether the distribution was a valid exercise of the trustee's power under the deed. The majority held that the creation of a debt to be satisfied out of the property of the trust fell within the powers to "advance" and "apply" the capital or income of the trust fund. A creditor/debtor relationship had been created between the trustee and the beneficiaries. The actions of the trustee were valid and a debt was owed to the beneficiaries. French CJ and Bell J jointly, Gageler J concurring; Kiefel and Gordon JJ dissenting separately. Appeal from the Court of Appeal (NSW) dismissed.

Criminal law

Criminal liability – intent to cause specific result

In *Zaburoni v The Queen* [2016] HCA 12 (6 April 2016) the appellant was convicted of unlawfully transmitting a serious disease (HIV) to another with intent to do so. In the alternative he was charged with occasioning grievous bodily harm which did not require intent in the circumstances. He was convicted of the primary charge. The only issue was the appellant's intent. The High Court held that, under the Queensland Criminal Code, proof of intention to produce a result requires evidence that the accused meant to produce that result. Foresight or probability was not sufficient.

The Court further held that the evidence was insufficient to establish that the accused had the purpose of transmitting the disease, and he should instead be found guilty of the alternative offence. Kiefel, Bell and Keane JJ jointly; Gageler and Nettle JJ concurring separately. Appeal from the Court of Appeal (Qld) allowed.

Federal jurisdiction

Criminal law – application of state laws

In *Mok v Director of Public Prosecutions (NSW)* [2016] HCA 13 (6 April 2016) the High Court dealt with the application of s89(4) of the *Service and Execution of Process Act 1992* (Cth) to the appellant, who had been charged with attempting to escape lawful custody at an airport in Victoria, while being taken to NSW to face charges there. He was charged under s310D of the *Crimes Act 1900* (NSW), which applied by application of s89(4). The question for the Court was whether s89(4) applied s310D in precisely its terms (that is, unaltered), which would then impose a requirement for the appellant to be an "inmate" as defined (noting that the magistrate at first instance had found that the appellant was not an "inmate"). The Court held that s89(4) did not operate to pick up and apply state laws unaltered, but had to be read in the context of their application, which in turn meant that adjustments to the state laws were necessary. In the circumstances, the appellant could be convicted without being an 'inmate" as defined. French CJ and Bell J; Kiefel and Keane JJ jointly concurring; Gordon J separately concurring. Appeal from the Court of Appeal (NSW) dismissed.

Criminal law

Evidence – admissibility – relevance – tendency and complaint evidence

In *IMM v The Queen* [2016] HCA 14 (14 April 2016) a majority of the High Court held that a judge assessing the probative value of tendency or complaint evidence should do so assuming that the jury would accept the evidence. The appellant was convicted of sexual offences based in large part on tendency and complaint evidence. The trial judge ruled the evidence to be admissible, considering the probative value of the evidence on the basis that the jury would accept the evidence. The appellant argued that the judge erred, as an assessment of probative value is a different exercise to the assessment of relevance, and the reliability of the evidence is an essential part of assessing its probative value. By not having regard to the credibility of the witness, the assessment of probative value was flawed. Arguments were also put as to the admissibility of the particular evidence in the case. French CJ, Kiefel, Bell and Keane JJ held that the inquiry as to the probative value of evidence must be approached in the same way as for considering relevance, on the assumption that the jury will accept the evidence. Gageler J, and Nettle and Gordon JJ separately, dissented on this point, holding that an assessment of probative value necessarily involves considerations of reliability. However, the Court also held that, on any view, the tendency evidence did not have sufficient probative value and should have been excluded. A new trial was ordered. French CJ, Kiefel, Bell and Keane JJ; Gageler J, and Nettle and Gordon JJ jointly, concurring in the orders for different reasons. Appeal from the Court of Appeal (NT) allowed.

Statutory construction

Land valuation – statutory construction

In *Coverdale v West Coast Council* [2016] HCA 15 (14 April 2016) the High Court was asked to rule on the appropriate construction of the word "Crown land" in the *Valuation of Land Act 2001* (Tas) (VLA). The Council sought to levy rates on marine farming leases over parts of seabed and waters and sought a valuation of the area. The Valuer-General declined on the basis that the areas were not "lands" or "Crown lands" within the meaning of the VLA. The question for the Court was whether "land" in the VLA should be construed in accordance with its ordinary meaning, not to include seabed and waters above the land, or in accordance with the definition of "land" in the *Crown Lands Act 1976* (Tas) (CLA), which specifically included land covered by the sea or other waters. The Court held that, having regard to the legislative history of the VLA and antecedent circumstances, the scope and purpose of the VLA required that the definition of "land" in the VLA follow the definition in the CLA. The areas at issue therefore fell within the meaning of "land". French CJ, Kiefel, Keane, Nettle and Gordon JJ jointly. Appeal from the Full Court of the Supreme Court (Tas) dismissed. ■

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