High court pendulum swings - Cross vesting falls

Implications for plaintiff lawyers

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Believe it or not, the ruling involved a personal injuries claim and alleged solicitor's negligence. Interested ? Well, you should be.

We appreciate you are busy. We also realise that not everyone shares an interest in constitutional law. Therefore :-

(a) if all you have is 10 seconds you should at least read the "*bare minimum*" paragraph;
(b) if you have 10 minutes, you should read this article;
(c) if you have 10 hours you can read and analyse the 83 page case yourself; but
(d) if you are smart, you can ring us and for a small fee we can send you our notes (just kidding, we would not do that to anybody).

Bare Minimum

On 17 June, 1999 the High Court handed down a ruling in three cases that were heard together. By a majority of 6:1 (Kirby J dissenting) the court ruled that the co-operative arrangement between the Commonwealth and the States for the cross vesting of State matters to the Federal court was constitutionally invalid.

That's it. If you want to know more, you may just have to read the rest of this article.

Full Monty

There is no point launching into a detailed analysis of the case without giving a brief refresher in constitutional law.

Chapter 3 of the Commonwealth Constitution deals with the judiciary. It sets up the High Court and gives it jurisdiction. It also gives power to the Federal Parliament to create other federal courts (which it has done, namely the Federal court and the Family court). Most importantly for our purposes, it gives the Parliament the power to vest federal judicial power in the State courts [section 77(iii)]. It certainly does not however, give an express power to the States to vest power in the federal courts. The Constitution does not mention the vesting of State powers in federal courts at all.

The Constitution is rightly silent on the topic. We say rightly because such a power rests with the States and the Commonwealth Constitution is not an appropriate place (or at least was not the appropriate place at Federation) to mention such a power.

"we are talking about the most fundamental legal document in Australia, so you will need a referendum to make it valid"

While it is tempting to think that what goes one way also goes the other, the High court has not agreed. The constitutional silence has been interpreted in two ways. One view is, if there is no express prohibition on something, it can be done. At least, that is what the proponents of the cross vesting argued; unsuccessfully as it turns out.

The alternative view, held by the majority, was that Chapter 3 is an exhaustive definition of the Commonwealth judicial powers. This is no surprise. The court has said so in cases as far back as eighty years ago.

The majority did not say that the States cannot pass acts which purport to vest jurisdiction in federal courts, so the state acts are valid as such. Instead, the majority held that the Commonwealth does not have the power to accept such jurisdiction.

The court also said that the Commonwealth could not validly create federal courts that could accept State litigation.

An argument that the scheme is valid by the use of the incidental power [s. 51 (xxxix)] failed for a number of reasons. As you will recall from your law school days, the incidental power requires a principal power to which it can attach. The majority stated that there was no such principal power in this case.

In the alternative, if Chapter 3 was the relevant principal power, the question became whether the scheme made the exercise of Commonwealth judicial power more effective, and the answer was it doesn't. It certainly makes the exercise of State powers more effective, but that is not relevant. According to Gleeson CJ, the use of the incidental power in this case could not be justified because if that was done, the incidental power would have been used for a purpose which is impliedly prohibited by the Constitution.

As a matter of completeness, we should also point out that there were six separate judgments in the ruling. The only joint judgment was as it turns out the leading judgment of Gummow and Hayne JJ.

This is, with respect, a classic case of the court saying in effect "We like what you are doing in this particular case (as all the players seem to agree), but we are talking about the most fundamental legal document in Australia, so you will need a referendum to make it valid. If we allow this, we are concerned that there may be other pieces of legislation which may come up in the future which may not be so harmonious."

The Facts

As often happens in important cases,

the facts are almost forgotten. If you are going to read the judgment and want to know the facts you will have to go to page 32 of the decision to find them. Anyway, here they are. The court heard four applications involving three cases, namely:-

1. *Re Wakim; Ex parte McNally & Anor* and *Re Wakim; Ex parte Darvall;*
2. *Re Brown & Ors; Ex parte Darvall;* and
3. *Spinks & Ors v Prentice*

We consider each in turn.

Re: *Wakim cases*

Mr Wakim was a parking attendant who suffered a workplace injury. He was employed by a partnership comprising of Mr and Mrs Nader. Mr Wakim obtained a judgment against Mr Nader only. Mr Nader subsequently went into voluntary bankruptcy. The Official Trustee, in the course of administering the estate, sued Mrs Nader to recover assets for the creditors. The case settled, with Mrs Nader paying $10,000.00 plus purchasing some property worth about $400,000.00.

Mr Wakim thought that the official trustee had not done enough and sued him for loss which Mr Wakim allegedly suffered. Mr Wakim pleaded breach of the trustee's duty (imposed by the federal *Bankruptcy Act*) and in the alternative, negligence.

Mr Wakim then instituted a further separate action for negligence (for the same loss) this time against the Official Trustee's solicitors (McNally) and barrister, Mr Darvall.

Both of the actions were brought in the Federal court.

In the course of defending themselves the solicitors raised the validity of the cross vesting scheme. They argued that since the matter did not involve federal issues, the claim could only have been brought if the cross vesting was valid; and according to the solicitors, the scheme was not valid. The Full Federal Court upheld the scheme and the matter went on appeal to the High court.

As it turns out, the solicitors lost their appeal but not before the High Court ruled the cross vesting scheme invalid. The solicitors lost because, by majority, the court considered that under the Federal Court's "accrued jurisdiction" it could hear the claim against the solicitors and the barrister even though it involved no federal questions as such. It was sufficient that the trustee's action did.

Re *Brown*

Some of you may remember the 1998 High court case of *Gould v Brown* where the court split 3:3 on the validity of the cross vesting legislation. In that case, Brennan CJ, Toohey and Kirby JJ held the legislation valid, while Gaudron, McHugh and Gummow JJ held it invalid. In the present case, with Brennan CJ and Toohey J gone, Kirby J was left in the minority of one.

As you are probably aware, Corporations law is a group of State acts which allow the Federal Court to deal with a variety of matters including the winding up of companies. In the present appeal, the court was asked to consider the validity of such orders.

The appellant in this appeal was the very same Mrs Brown from *Gould v Brown*. She sought to quash a Federal Court's winding up order of a company in which she was involved. She also sought that an order for her examination be quashed. Mr Amman, who was involved with the wound up company as well, was also ordered to be examined.

The members of the High Court came to various conclusions about what orders should be made. Importantly however, the court did not invalidate the Federal Court's winding up order citing the passage of time since it has been made and the fact that third parties' interests may be affected as reasons for their decision.

Spinks & Ors v Prentice

The third factual scenario involved an examination of a director after a company was wound up under the Australian Capital Territories legislation. The court left the question open regarding commonwealth/territory scheme validity because the issue was not squarely raised by the actual parties to the litigation. The court did however suggest that the scheme is likely to be valid because of the special provision regarding territories in the Constitution.

The Implications

Because the majority decided that the claim against the solicitors could be heard by the Federal Court under its accrued jurisdiction, it is not clear whether the winding up order would have been valid had the court found the claim to be outside that jurisdiction. McHugh J certainly thought the order would not be valid. The other judges did not express an opinion.

We therefore cannot tell what the answer is. We would be doing no more than guessing in that regard. The conservative view is that orders made by federal courts (including the Family Court) post introduction of the scheme and which are outside the accrued jurisdiction are invalid.

The alternative argument is that given the passage of time the orders need to be valid to at least protect rights of third parties in particular. We suspect it will not be long before a further matter regarding these questions reaches the High Court. Parties caught up in current disputes will no doubt argue various orders are valid or invalid depending on what favours them.

There will be confusion in claims involving, for example, negligence and breach of the *Trade Practices Act*. Where should one run such a claim? Given that the cross-vesting of federal jurisdiction into State courts is still valid, it would appear safer to begin any new claims through the State courts.

By the way, who says personal injuries litigation is not ground-breaking? ■

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