

SUPREME COURT OF QUEENSLAND

CITATION: *Di Carlo v Kashani-Malaki & Anor* [2012] QCA 320

PARTIES: **SALVATORE DI CARLO**
(appellant)
v
MORTEZA KASHANI-MALAKI
(first respondent)
THE PUBLIC TRUSTEE
(second respondent)

FILE NO/S: Appeal No 5558 of 2012
SC No 8474 of 2009

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 23 November 2012

DELIVERED AT: Brisbane

HEARING DATE: 5 November 2012

JUDGES: Muir and Fraser and Gotterson JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Appeal dismissed.**
2. The appellant pay the first respondent's costs of the appeal.

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND PROVISIONS – STATUTORY DEFINITION PROVISIONS GENERALLY – where appellant retained as counsel for respondent during trial – where respondent found guilty – where respondent successfully appealed conviction and a re-trial ordered – where respondent instituted proceedings against the appellant claiming, *inter alia*, damages for negligence and breach of contract – where no re-trial took place – where respondent pleaded guilty and sentenced to 11 years imprisonment – where appellant submitted respondent lacked capacity to bring the action as the written consent to do so was required from the Public Trustee as manager of respondent's estate – whether a prisoner convicted of an indictable offence and falling within the ambit of s 90(1)(a) of the *Public Trustee Act* may continue civil proceedings if such proceedings were instituted prior to imposition of term of imprisonment without the

consent of the Public Trustee – whether, if such consent is not required, the conduct of such proceedings is under the control of the Public Trustee as manager of the prisoner’s estate and whether its consent is required for any act or step in the prosecution of the litigation

Acts Interpretation Act 1954 (Qld), s 14A

Public Trustee Act 1978 (Qld), s 90(1)(a), s 91, s 92, s 94, s 95, s 97

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, considered
Barnes v St Helens Metropolitan Borough Council [2007] 1 WLR 879; [2007] 3 All ER 525; [2006] EWCA Civ 1372, cited

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26, considered

Newcastle City Council v GIO General Ltd (1997) 191 CLR 85; [1997] HCA 53, cited

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, considered

Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328; [1983] HCA 9, cited

R v Young (1999) 46 NSWLR 681; [1999] NSWCCA 166, considered

Saraswati v The Queen (1991) 172 CLR 1; [1991] HCA 21, cited

Tyler v Krause [2003] 1 Qd R 453; [\[2002\] QCA 295](#), considered

WACB v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 79 ALJR 94; [2004] HCA 50, considered

Wade v New South Wales Rutilite Mining Co Pty Ltd (1969) 121 CLR 177; [1969] HCA 28, cited

Watson v Watson [1919] VLR 384; [1919] VicLawRp 56, considered

COUNSEL: A J H Morris QC, with L M Copley, for the appellant
 N R Jarro for the first respondent
 W Sofronoff QC SG, with G Del Villar, for the second respondent

SOLICITORS: Milner Lawyers for the appellant
 Robert Bax & Associates for the first respondent
 Official Solicitor of the Public Trustee (Qld) for the respondent

[1] **MUIR JA: Introduction** The central issue for determination on this appeal is whether on the proper construction of Part 7 of the *Public Trustee Act 1978* (“the Act”) a prisoner convicted of an indictable offence and falling within the ambit of s 90(a) of the Act may continue civil proceedings instituted by him before his term of imprisonment was imposed. An alternative issue raised by the appellant is

whether, if the prisoner does not require the Public Trustee's consent to continue such proceedings, the conduct of the proceedings is nevertheless in the hands of the Public Trustee as manager of the prisoner's estate and the consent or concurrence of the Public Trustee is required for any act or step in the prosecution of the litigation.

- [2] Section 90(a) of the Act provides that Part 7 applies to:

“any prisoner who, after conviction of any indictable offence or offences, is undergoing a sentence of imprisonment for life or for a term of 3 years or upwards or for such term as, together with any other sentence or sentences imposed upon the prisoner, has rendered the prisoner liable to imprisonment for a period of 3 years or upwards...”

- [3] The respondent was found guilty of drug trafficking. The appellant had been retained as the respondent's barrister in the trial in respect of drug offences and in respect of related confiscation proceedings brought against the respondent pursuant to the *Proceeds of Crime Act 2002* (Cth). The respondent commenced proceedings against the appellant on 6 August 2009 in the Supreme Court claiming the repayment of monies paid for a consideration which failed in whole or in part and damages for negligence and breach of contract. The respondent also appealed against his conviction. A retrial was ordered, but never held. On 12 October 2011, the respondent pleaded guilty and was sentenced to a term of imprisonment of 11 years. On 13 October, the appellant filed a notice of intention to defend and a defence which alleged that the respondent lacked capacity to bring the action on grounds that: he had been sentenced to a term of imprisonment in excess of three years; the Public Trustee was the manager of his estate; and he was incapable of bringing the action without the written consent of the Public Trustee.

Relevant statutory provisions

- [4] The provisions of the Act which most bear upon the arguments advanced by the parties, including the Public Trustee who was granted leave to appear as *amicus curiae*, are as follows:

“91 Public trustee to manage property of certain prisoners

Except as otherwise provided in this part the public trustee shall, without further or other order or authority, be the manager of the estate of every prisoner to whom this part applies.

92 Public trustee may discontinue management after notice

- (1) Where the public trustee is of the opinion that it is not desirable that the public trustee should continue to manage the estate of a prisoner, the public trustee shall give to the chief executive (corrective services) notice in duplicate, in the form approved by the public trustee, of the public trustee's intention to discontinue such management from a date to be stated in the notice, being not less than 8 weeks after the date of signing of the notice.

...

94 Powers of public trustee

- (1) When the public trustee is manager of the estate of a prisoner under this part the public trustee shall have full power to deal with any property of the prisoner and to acquire any property for or on behalf of the prisoner and generally may do all such things in relation to property, on behalf of and in the name of the prisoner, as the prisoner could do if the prisoner were not a prisoner; and in particular—

...

- (f) the public trustee may, in the public trustee's corporate name or in the name of the prisoner, institute any proceedings of a property nature or for the recovery of any debt or damage which the prisoner might have instituted but for the provisions of this part, and in like manner defend any proceedings instituted against the prisoner and, in either case, may enter into such compromise or arrangement as the public trustee thinks fit.

...

95 Restrictions on property dealings or proceedings

- (1) During the time when the public trustee is manager of the prisoner's estate under this part, a prisoner shall be incapable, except with the consent in writing of the public trustee—
- (a) of alienating or charging any property or of making any contract; and
 - (b) of bringing or defending any action of a property nature or for the recovery of any debt or damage.
- (2) If the court becomes aware that an action has been brought or defended in contravention of subsection (1)(b), the prisoner can take no further steps in the action without the written consent of the public trustee, in the approved form, filed in the court.
- (3) The consent of the public trustee is then taken to have been given when the action was brought or defended.

97 Cessation of public trustee's authority

...

- (2) If, immediately prior to the ceasing of the authority of the public trustee as provided by subsection (1), there is anything within the powers of the public trustee in relation to the estate which, having been commenced by the public trustee, is not completed, then, subject to any order of the court to the contrary, that thing, if the public trustee thinks fit, may be completed by the public trustee as if the public trustee's authority still continued, and for this purpose the provisions of this part with all necessary adaptations shall apply and extend accordingly."

The appellant's argument

- [5] The appellant contended that, on its proper construction, the effect of Part 7 of the Act is that once a prisoner is subject to it the prisoner requires the consent of the Public Trustee to continue proceedings instituted even before the term of imprisonment was imposed. That, according to the argument, is the meaning of the term "bringing or defending" in s 95(1)(b). The word "bringing" includes continuation.
- [6] The argument was developed as follows. There is no policy reason for treating proceedings commenced prior to imprisonment differently to those commenced subsequently. Section 95(2) assumes that proceedings already commenced by the prisoner prior to imprisonment are under the management and have the consent of the Public Trustee and acknowledges that proceedings could be commenced by the prisoner without the knowledge (and therefore consent) of the Public Trustee, hence the use of the word "brought".
- [7] The appellant's alternative argument was that nothing in s 95 removes existing litigation from the management regime established by s 91. The words "except as otherwise provided in this Part" in s 91 do not support the conclusion that a prisoner whose estate is under the management of the Public Trustee is free to conduct litigation. Nothing in Part 7 positively permits a prisoner to conduct litigation and so the conduct of litigation is not "provided" for within the meaning of "except as otherwise provided in this Part". The exception is a reference to the provisions of Part 7 which provide for the discontinuance or cessation of management of the prisoner's estate.
- [8] Nothing in Part 7 treats the conduct of litigation differently to other parts of the prisoner's estate – the litigation forms part of the prisoner's estate. There is no reason in policy or otherwise, in the absence of an express provision in Part 7 which states that a prisoner may conduct his own litigation, to treat litigation as different to any other part of the prisoner's estate. As the manager of the litigation, the Public Trustee must consent or concur in the conduct of the litigation.
- [9] Counsel for the appellant also sought to draw assistance from the speech of the Attorney-General in introducing the *Public Trustee Bill* 1978 into the Parliament on 16 November 1978. It referred, in general terms, to the Public Trustee becoming the manager of the estate of a prescribed prisoner, to a proposal that the Public Trustee should not automatically manage the estate of every prisoner and the Public Trustee being allowed to relinquish management of the estate of a prisoner.

- [10] Counsel for the appellant relied on the following observation of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*:¹

“The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole’. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’. Thus, the process of construction must always begin by examining the context of the provision that is being construed.”
(citations omitted)

- [11] Reliance was placed also on s 14A of the *Acts Interpretation Act* 1954 (Qld) which provides that when interpreting an Act, the interpretation that will “best achieve the purpose of the Act is to be preferred to any other interpretation”.

Consideration

- [12] The principal obstacle in the way of the appellant’s argument lies in the language of s 95. Section 95(1) expressly prohibits a prisoner “except with the consent in writing of the public trustee” from “bringing or defending any action of a property nature or for the recovery of any debt or damage”.² It is implicit in paragraph (b) of sub-section (1) that a prisoner is not prohibited from bringing or defending actions which are not “of a property nature or for the recovery of any debt or damage”. This tends to erode the force of the appellant’s argument that, subject to express exceptions, the Public Trustee’s management powers were intended to be all encompassing.
- [13] The expression “bringing... any action” is not, in everyday language, apt to encompass “prosecuting” or “maintaining” an action. As counsel for the Public Trustee submitted the words “bring” and “brought” are commonly used to signify the commencement of proceedings.³ For example, s 10 of the *Limitation of Actions Act* 1974 (Qld) provides that certain actions “shall not be brought after the expiration” of certain limitation periods.
- [14] Counsel for the appellant submitted that s 95(1) should be seen as doing no more than providing examples of the types of transactions that a prisoner is prevented from undertaking. According to the argument, the restrictions were all ones which were implicit in s 91. However, paragraph (b) must be construed in light, not only of s 91, but of its immediate neighbours, sub-sections (2) and (3) of s 95.
- [15] Sub-section (2) refers to an action which “has been brought or defended in contravention of subsection (1)(b)”. It prevents the prisoner taking “further steps in the action without the written consent of the public trustee”. It is plain enough that this provision is referring to the commencement of a proceeding, or the instituting

¹ (1998) 194 CLR 355 at 381.

² Section 95(1)(b).

³ See e.g. *Barnes v St Helens Metropolitan Borough Council* [2007] 3 All ER 525 at [16].

of a defence of a proceeding, rather than the prosecution of a claim or a defence. Were it otherwise, the sub-section would refer to the prosecution of the action rather than its commencement, “is being” would be used, not “has been”. The words “becomes aware that an action has been brought” cannot sensibly be construed as “becomes aware that an action is being prosecuted”. This construction is fortified by sub-section (3) which deems the Public Trustee’s consent to have been given “when the action was brought or defended”. Plainly, the date at which the Public Trustee’s consent is deemed to have been given is the date on which the action was commenced.

[16] Given the language of sub-sections 1(b), (2) and (3) and their degree of interconnection, it is improbable that “brought” does not have the same meaning in each of these provisions.

[17] Counsel for the Public Trustee and the respondent referred to authorities which supported the conclusion that “bringing” meant commencing or instituting and that “brought” meant commenced or instituted.⁴ In *Tyler v Krause*,⁵ McPherson JA, with whose reasons the other members of the Court agreed, observed:

“[9] The impression that s. 95(b) imposes a disqualification or disability from suing, rather than a prohibition that is breached if action is brought without the written consent of the Public Trustee, is supported by the particular language of s. 95(b) itself. It provides that ‘a prisoner shall be incapable, except with the consent in writing of the Public Trustee ... (b) of bringing ... any action ...’. Moreover, what seems to me to be conclusive against any other interpretation of the section is the provision in s. 94(1)(f) of the Act. In specifying the powers of the Public Trustee as manager of the estate of a prisoner, s. 94(1)(f) provides that the Public Trustee may, in its corporate name or in the name of the prisoner, ‘institute any proceedings of a property nature or for the recovery of any debt or damage’ which the prisoner might have instituted.

[10] The words quoted from s. 94(1)(f) are indistinguishable in substance and effect from those used in s. 95(b) in imposing the disability from bringing any action that is comprehended in that subsection. The proceedings which, under s. 94(1)(f), the Public Trustee may institute are identified as those which the prisoner might have instituted ‘but for the provisions of this part’. From this it is clear that the proceedings which the Public Trustee is by s. 94(1)(f) authorised to institute in the prisoner’s own name are precisely those that the prisoner is by s. 95(b) disabled from bringing himself. It seems clear that the Act does not contemplate that two sets of proceedings might at the same time be instituted in the prisoner’s name, one of them by the Public Trustee and the other by the prisoner himself. Section 94(1)(f) thus confirms that, without the written consent of the Public Trustee, the prisoner is disabled from instituting proceedings because it is only the Public Trustee who may institute them. All action so taken is binding on the prisoner: see s. 94(2).”

⁴ *Watson v Watson* [1919] VLR 384 at 385; and *Tyler v Krause* [2003] 1 Qd R 453.

⁵ [2003] 1 Qd R 453 at 456–457.

- [18] A desire to make the language of s 95 accommodate the legislative purpose identified by the appellant as vesting the management of the whole of a prisoner's estate in the Public Trustee should not be given effect at the expense of ignoring the plain words of s 95 or by giving them a meaning they are not reasonably capable of bearing. In *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*,⁶ Gleeson CJ, McHugh, Gummow and Heydon JJ observed that in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*:⁷

“Gibbs CJ said that the canons of construction should not be treated so rigidly as to prevent the implementation of a realistic solution in the case of a drafting mistake. However, his Honour went on to say that, where the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, it must be given its ordinary and grammatical meaning”.

- [19] Neither s 14A nor a purposive approach to construction authorises a departure from the grammatical or literal meaning of a statute, where that meaning gives effect to the purpose or object of the statute.⁸ The court's role is one of construction not legislation.⁹
- [20] In *R v Young*,¹⁰ Spigelman CJ cautioned that although a “court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate... the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based.”
- [21] The primacy of the language of a statute in the determination of its meaning was affirmed in the judgment of Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*.¹¹ Their Honours said:

“This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.” (citations omitted)

- [22] Their Honours also warned against concentrating on the legislative purpose at the expense of due consideration of the text:¹²

“Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did not receive the attention it deserves. This danger was adverted to by Gleeson CJ in *Carr v Western Australia* when he said:

⁶ (2004) 79 ALJR 94 at 101–102.

⁷ (1981) 147 CLR 297 at 304.

⁸ *Saraswati v The Queen* (1991) 172 CLR 1 at 21.

⁹ *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 109.

¹⁰ (1999) 46 NSWLR 681 at 687.

¹¹ (2009) 239 CLR 27 at 46–47.

¹² (2009) 239 CLR 27 at 47–48.

‘[I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.’”

- [23] This is not a case in which a literal construction of a provision will subvert an obvious legislative intention and produce an obviously unreasonable result.¹³ The words in s 91 “except as otherwise provided in this part...” are apt to accommodate a situation in which civil proceedings are on foot when s 91 takes effect by operation of s 90. Section 95 “otherwise provides” by necessary implication and it is significant that it is a provision which deals specifically with a prisoner’s ability to commence and prosecute proceedings.
- [24] There is nothing startling or even impractical in the construction favoured by the primary judge and supported by the Public Trustee. It may be expensive in both time and money for the Public Trustee to come to grips with legal proceedings in which a prisoner is engaged when s 91 takes effect. There are other considerations. There may be a need for compliance with court orders, the progress of a trial may be disrupted or a forensic advantage lost if the management of an existing proceeding automatically vests in the Public Trustee.
- [25] In *Watson v Watson*,¹⁴ Hood J, in considering legislation similar to that under consideration, said:

“The words, ‘no action shall be brought,’ do not refer to the carrying on of an action. The action has been brought when the writ is issued. That action may be continued or discontinued or stayed, but it is already in existence... There may be some good reason for preventing a convict while he is subject to the Act from bringing an action by issuing a writ, but the inconvenience of applying that restriction to the continuing of an action which may be near its termination is extreme, and would be an excessive restriction on the rights of the person convicted. If the defendant’s contention were correct, an action might be stayed in the middle of the evidence, or even while the jury were deliberating, or while the Judge had reserved judgment.”

¹³ As to which see *MacAlister v The Queen* (1990) 169 CLR 324 at 330.

¹⁴ [1919] VLR 384 at 385–386.

- [26] Another relevant consideration is the “general principle that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges, whether by express words or by necessary implication”.¹⁵ This principle was described by Barwick CJ in *Wade v New South Wales Rutile Mining Co Pty Ltd*¹⁶ as “the fundamental principle that if Parliament intends to derogate from the common law right of the citizen it should make its law in that respect plain...”.
- [27] For generally the same reasons, I would reject the appellant’s alternative argument. Section 95 deals expressly with the bringing of proceedings **after** management of the prisoner’s estate is vested in the Public Trustee. Where such proceedings are commenced, the prisoner can take no further steps in them without the written consent of the Public Trustee. It is significant that this restriction is directed to proceedings commenced after the vesting of management and not to proceedings commenced both before and after.
- [28] It is also significant, as mentioned earlier, that the Public Trustee’s consent is required only for the bringing of proceedings of a specified nature. By necessary implication, there is no prohibition on the prisoner taking steps in proceedings not within the description in s 95(1)(b) whenever they are commenced. As counsel for the Public Trustee submitted, if the appellant’s interpretation is correct, the Public Trustee would have the management of even those proceedings unless their management is discontinued under s 92.
- [29] The Public Trustee has a role in relation to proceedings commenced before management of the prisoner’s estate is vested in him. The prisoner may prosecute the action only to the extent that he can do so without “alienating or charging any property or making any contract”. The prisoner would not be able to enter into a new retainer, but would be free to give instructions within the existing one. It may be that arrangements already in place, or which could be entered into, would permit the prisoner’s legal representatives to retain expert witnesses and the like without the necessity for the prisoner to make a contract. Of course, the prisoner may be self represented and have no need to engage expert witnesses or another person may be prepared to fund the litigation. It is unnecessary, I think, to investigate these issues any further to illustrate the fact that there may be sound reasons for permitting existing proceedings to continue subject to the constraints of s 95(1)(a).
- [30] Counsel for the appellant submitted that virtually everything done in the course of litigation involves, in some way, an alienation of property or the making of a contract. The submission attributes too broad a meaning to “alienating”. In Australia, the word is normally used in relation to the disposition of interests in real property.¹⁷ I do not suggest that “alienation” in the context under consideration is so restricted, but for property to be “alienated”, it must be disposed of.¹⁸ An act which may lead ultimately to disposition will not suffice. But, of course, an agreement to dispose of property may effect the disposition of an equitable interest in it.

¹⁵ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341.

¹⁶ (1969) 121 CLR 177 at 181.

¹⁷ See e.g. *Lang v Castle* [1924] SASR 255 at 263–264; and *Re Symon, Public Trustee v Symon* [1944] SASR 102 at 108.

¹⁸ *Re Gaskell & Walters’ Contract* [1906] 2 Ch 1 at 10.

- [31] There is one other matter I wish to mention. The orders sought by the appellant, apart from costs, are that the proceedings be stayed until the Public Trustee consents in writing to the respondent's continuing to prosecute the proceedings or, alternatively, that the respondent be restrained from taking any step or continuing to prosecute the proceedings until such consent in writing is given or until the Public Trustee gives notice under s 92(1) of the Act.
- [32] The Act, properly construed, provides no basis for such orders. It may also be the case that, even if the powers of the Public Trustee under s 91 extended to these proceedings, there would be no impediment to the respondent's prosecuting the proceedings, if to do so would not infringe s 95(1)(a).
- [33] For the above reasons, I would order that the appeal be dismissed and that the appellant pay the respondent's costs of the appeal. I would make no order in respect of the Public Trustee's costs. His intervention has been most helpful to the Court in arriving at a decision on a matter of general importance. In my view, it is preferable that those costs be borne by the public rather than the parties.
- [34] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the orders proposed by his Honour.
- [35] **GOTTERSON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.