

**SHORT PARTICULARS OF CASES**  
**APPEALS**

**JUNE 2024**

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## **STEVEN MOORE (A PSEUDONYM) v THE KING (M23/2024)**

Court appealed from: Supreme Court of Victoria Court of Appeal  
[2023] VSCA 236

Date of judgment: 28 September 2023

Special leave granted: 7 March 2024

The appellant faces trial in the County Court of Victoria for seven charges of violence against the complainant alleged to have been committed on 30 and 31 August 2021. The appellant denies there was any physical argument and has pleaded not guilty to all charges. The complainant passed away in January 2023 in circumstances unrelated to the allegations and cannot give evidence at the appellant's trial. Another central witness, the complainant's neighbour, has also passed away. The prosecution served a notice of intention to rely on various statements made by the complainant to others as hearsay evidence under section 67 of the *Evidence Act 2008* (Vic), said to be admissible by reason of s 65, which permits hearsay evidence in certain circumstances where the person who made the representation is unavailable to testify (noting that s 62 of the *Evidence Act* restricts the operation of s 65 to first-hand hearsay).

The appellant filed an interlocutory application objecting to the admissibility of the hearsay evidence on dual grounds that it did not fall within the exception in s 65, and if it did, it was inadmissible by reason of s 137<sup>1</sup>. The trial judge (Judge Gucciardo) allowed the following representations made by the complainant after the alleged offending as hearsay evidence to be adduced at trial:

- representations to her mother in a telephone call from the deceased neighbour's house;
- representations made to a 000 operator in a telephone call;
- statements to a police officer at both the neighbour's home and the complainant's home, also recorded by a body worn camera; and
- in a written statement taken by a police officer.

The appellant sought leave to appeal to the Court of Appeal on four grounds including, relevantly, ground 4:

*"His Honour erred in finding that the probative value of the evidence outweighed the danger of unfair prejudice to the accused under s 137 of the Evidence Act".*

The Court of Appeal affirmed the trial judge's decision not to exclude the evidence pursuant to s 137, and dismissed the appeal on ground 4. The appellant submits that the Court of Appeal erred in applying the incorrect standard of review and in its assessment of the danger of unfair prejudice for the purpose of s 137 of the *Evidence Act*. On the latter, the appellant submits that there was a specific level of danger of unfair prejudice to the appellant by having an unavailable witness's evidence (and the sheer volume of the representations) admitted without

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<sup>1</sup> Section 137 of the *Evidence Act* provides that "in a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused".

cross-examination because there was “fodder for a cross-examiner”, and that the Court of Appeal was wrong to suggest that the danger of unfair prejudice was lessened or eliminated by the fact the appellant’s counsel could make submissions to the jury as to the matters they would have pursued in cross-examination. The appellant submits that while some of the complainant’s representations were of high probative value, the Court of Appeal should have concluded that the danger of unfair prejudice, properly assessed, was acute and outweighed the probative value of the hearsay evidence.

The respondent submits that the evaluative task of applying s 137, while requiring a number of different factors in assessing probative value and the danger of unfair prejudice, ultimately has a binary outcome – the danger of unfair prejudice either does, or does not outweigh the probative value of the evidence. The respondent submits that none of the appellant’s submissions demonstrate that any plausible lines of cross-examination materially added to the danger of unfair prejudice. In these circumstances, the respondent submits that the Court of Appeal was correct to hold that the high probative value was not outweighed by the danger of unfair prejudice, as ameliorated by appropriate judicial directions.

The sole ground of appeal to this Court is:

- The Court of Appeal erred in dismissing the appeal on ground 4, and thus confirming the trial judge’s ruling to admit into evidence 67 representations of an unavailable witness (the complainant), which error was the product of:
  - a. the Court of Appeal applying the wrong standard of review on an interlocutory appeal from a ruling on the admissibility of evidence under s 137 of the *Evidence Act 2008* (Vic); and/or
  - b. the Court of Appeal’s error in assessing the ‘danger of unfair prejudice to the accused’ of admitting the evidence whereby it:
    - i. failed to recognise that the existence of plausible lines of cross-examination that could not be pursued increased the danger of unfair prejudice;
    - ii. failed to recognise that the sheer volume, and repetitive nature, of the previous representations of an unavailable witness increased the danger of unfair prejudice; and/or
    - iii. wrongly assumed that the jury would follow any and all directions given by a trial judge to protect against unfair prejudice.

## **MORGAN & ORS v McMILLAN INVESTMENT HOLDINGS PTY LTD & ANOR (S119/2023)**

Court appealed from: Full Court of the Federal Court of Australia  
[2023] FCAFC 9

Date of judgment: 16 February 2023

Special leave granted: 15 September 2023

The first appellant (“Morgan”) is the sole remaining liquidator of the second and third appellants, Sydney Allen Printers Pty Ltd (in liquidation) (“SAP”) and Sydney Allen Manufacturing Pty Ltd (in liquidation) (“SAM”). SAP and SAM operated a colour printing business. SAM owned the substantial printing equipment, and ordered and paid for supplies under credit facilities with suppliers of materials. SAP undertook the printing work. The internal accounts between SAP and SAM included entries under which, notionally, SAP paid the creditors on behalf of SAM. SAM did not receive any, or any sufficient, remuneration from SAP for providing the equipment and credit facilities which enabled SAP to conduct the business.

The first respondent (“MIH”) became involved with SAP and SAM in 2014 by providing finance to SAP and SAM to resolve a lease dispute with the landlord of the business premises. Morgan alleges that the MIH and its principals, Robert McMillan and his daughter Julie-Anne McMillan, became shadow directors of SAP and SAM. Subsequently, MIH, SAP and SAM entered into a finance facility under which SAP and SAM were described as the “borrower” (“the MIH facility”).

On 7 April 2016, Morgan was appointed as administrator with Mr Geoffrey Davis (“Davis”) of SAP. On that date Morgan and Davis were also appointed as liquidators of SAM. Shortly thereafter, a receiver and manager (“Warner”) was appointed to each of SAP and SAM under the MIH facility. In May 2016, Warner, together with SAP and SAM, entered into an agreement with Print Warehouse Australia Pty Ltd (“Print”) to sell the assets and colour printing business as a going concern for \$1.3 million (“the sale agreement”), which was GST exempt. On the same day, McMillan Group Services Pty Limited (“MGS”), an associated company of MIH, issued an invoice to Print for \$330,000 (inclusive of GST) for services provided in connection with printing plant and equipment (“the Invoiced Sum”). Print paid the Invoiced Sum to MGS. Morgan alleges that MGS did not provide any such services and that the amount paid was an asset of one or both of SAP and SAM, which had been diverted improperly from SAP and SAM. Morgan therefore claims that the true purchase price for the assets and business should have been \$1.6 million, factoring in the Invoiced Sum and deducting the GST amount of \$30,000.

On 13 May 2016, Morgan and Davis were appointed as liquidators of SAP. Prior to his retirement as liquidator of SAM, Davis asked the Australian Securities and Investments Commission (“ASIC”, the second respondent to this appeal) to deregister SAM on the basis that there were no funds left in the creditors’ voluntary liquidation to hold a final meeting, and also the affairs of the company had been fully wound up. ASIC deregistered SAM on 10 June 2018. As a consequence of the deregistration, SAM ceased to exist and all its property (other than that which was held by it on trust) vested in ASIC.

As part of the proceeding before the primary judge (Rares J), Morgan sought an order under section 601AH of the *Corporations Act 2001* (Cth) (“the Act”) that SAM’s registration be reinstated and that he be re-appointed as liquidator of SAM. Rares J granted that relief, and further made a pooling order under s 579E(1) of the Act. A pooling order can be made on the application of a liquidator in relation to a group of two or more companies if two conditions are satisfied: 1) that each company in the group is being wound up; and 2) relevantly, under s 579E(1)(b)(iv): that one or more companies in the group own particular property that is or was used, or for use, in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group. MIH appealed to the Full Court against the whole of the orders of Rares J, but the appeal was ultimately confined to whether the pooling order should be set aside.

Central to the question before the Full Court was the claim made by the appellants that the Invoiced Sum were moneys to which SAM and SAP were entitled but had been diverted, thus depriving SAM and SAP of part of the purchase price, giving rise to a cause of action to recover that amount. The parties were in dispute as to whether there exists a chose in action arising upon the sale of the printing business. While the primary judge was satisfied that a chose in action, in the form of the right to sue, can be “particular property” which is capable of being “used” within the meaning of s 579E(1)(b)(iv), the Full Court disagreed and found that the s 579E(1)(b)(iv) had not been satisfied. Consequently, the Full Court by majority found that the primary judge was not empowered to make a pooling order utilising such a purported foundation.

The appeal to this Court concerns the making of the pooling order. A separate but related issue concerns whether a deregistered company which was in a creditors’ voluntary liquidation prior to deregistration, is deemed or taken to have owned property and to have carried on jointly with another company (also in a creditors’ voluntary liquidation) a scheme or an undertaking within the meaning of s 579E(1)(b)(iv) during the period of its dissolution.

The grounds of appeal are:

- The majority erred in finding that the precondition in s 579E(1)(b)(iv) of the Act was not satisfied in circumstances where the second and third appellants jointly and severally owned “particular property”, being a chose in action, at the time of making of the pooling order, being immediately following the reinstatement of the third appellant (FC [71] and [148]).
- Beach J erred in finding that the precondition in s 579E(1)(b)(iv) of the Act was not satisfied because the “particular property” being the chose in action jointly and severally owned by the second and third appellants, did not come into existence until 1 July 2016 (FC [148]).
- In erring in finding that the precondition in s 579E(1)(b)(iv) of the Act was not satisfied, the majority impermissibly departed from the clear and unambiguous language of section 601AH(5) of the Act (FC [75] and [150]).

## **AUTOMOTIVE INVEST PTY LIMITED v COMMISSIONER OF TAXATION (S170/2023)**

Court appealed from: Full Court of the Federal Court of Australia  
[2023] FCACA 129

Date of judgment: 11 August 2023

Special leave granted: 7 December 2023

This appeal concerns the appellant's liability to the goods and services tax ("GST") and the luxury car tax for the tax periods from June 2016 to November 2017, in respect of forty cars acquired by the appellant and displayed at the Gosford Classic Car Museum ("the Museum"), which was owned and operated by the appellant. The appellant's liability turns on whether it used the cars for a purpose other than a "quotable purpose" as defined in the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) ("the LCT Act") and, in particular, whether it used each of the cars for the purpose of holding the car as trading stock, other than holding it for hire or lease, and for no other purpose. The Commissioner conceded that each of the cars was held by the appellant as trading stock. The issue is whether, by displaying the cars at the Museum, the cars were used "for no other purpose".

At first instance, the appellant's written submissions implicitly accepted that, if there was a purpose additional to one of holding the car as trading stock, then it must lose. The appellant's case was, however, that each car was used only for the purpose of holding it as trading stock and that the "museum concept" was "no more than a unique and inventive means of selling stock". At the hearing in the Federal Court, the appellant also sought to argue that the word "other" in the phrase "and for no other purpose" in section 9-5(1) of the LCT Act should be read as "alternative" rather than "additional". The appellant submitted that there was no "alternative" use of any of the cars: each car was held as trading stock and any additional use of the car was not "alternative" to the purpose of holding the car as trading stock. The primary judge (Thawley J) rejected this and held that each car was not used "for no other purpose" than holding the car as trading stock. He found that each car was also used for the purpose of displaying the car, together with other cars, as exhibits in a museum, being operated commercially as a museum.

On appeal to the Full Court of the Federal Court, the appellant submitted that the primary judge erred in his conclusion both as a matter of statutory construction and as a finding of fact based on the evidence. The Court (Wheelahan & Hespe JJ, Logan J dissenting) did not accept the appellant's construction of "and for no other purpose" as requiring the other purpose to be exclusive or alternative to the purpose of holding the cars as trading stock. The majority found that this construction was not consistent with the ordinary reading of the phrase, nor the use of the conjunctive "and"; and that it rendered the phrase "and for no other purpose" otiose. That phrase was to be read as "solely" or "only". The purpose for which the cars were used was ascertained by an objective consideration of the totality of the facts and circumstances. Although, on their own, the provision of facilities such as a café or an outlet offering memorabilia did not and could not determine the purpose for which each of the cars was used by the appellant, the existence of those facilities in conjunction with the charging of a real (i.e. not token) entrance fee, the engagement of employed and volunteer staff to provide guidance and information to visitors, and the marketing of the exhibited collection of cars as a

tourist or visitor destination was not consistent with a conclusion that the cars were used for the purpose of being held as trading stock and for no other purpose. The appellant's appeal was dismissed.

The grounds of appeal are:

- The majority erred in its construction of the *A New Tax System (Luxury Car Tax) Act 1999 (Cth)* ("LCT Act") and in particular in declining to follow earlier guidance of this Court in relation to sales tax legislation in *Brayson Motors Pty Ltd (in liq) v FCT* (1985) 156 CLR 651 and *DFCT v Ellis & Clark Ltd* (1934) 52 CLR 85 both of which held that sales tax legislation – of which the LCT Act is an example – is to be read and construed by reference to the underlying legislative policy (FC [95]): *Brayson Motors* at 658-9; *Ellis & Clark* at 92. The primary judge similarly erred (PJ [72]-[75]).
- The majority erred in treating the whole of s 9-5(1) (which is not an assessing or charging provision) as being determinative of whether the Applicant was subject to an increasing adjustment under the charging provisions in ss 15-30(3)(c) and 15-35(3)(c) (FC [56], [57], [92], [94], [110]) and as effectively controlling and contradicting those provisions.
- The majority erred in concluding that because the LCT Act does not define a "retail" sale there was no basis for importing into s 9-5(1)(a) "the idea of taxing only a 'retail sale'" (FC [95]).