40/99; [2000] VSC 14

SUPREME COURT OF VICTORIA

SHOEBRIDGE v THE PASTA MASTER PTY LTD & ANOR

Warren J

14 December 1999; 7 February 2000

STATUTORY INTERPRETATION – CONVICTION IMPOSED ON EMPLOYER – APPLICATION FOR COMPENSATION FOR PAIN AND SUFFERING – OFFENCE COMMITTED PRIOR TO AMENDING ACT COMING INTO OPERATION – APPLICATION DISMISSED – MAGISTRATE FOUND ACT NOT RETROSPECTIVE – APPLICATION OF PRESUMPTION AGAINST RETROSPECTIVITY – EXCEPTIONS TO RULE – PAST ACTS A FOUNDATION FOR FUTURE ACTION – WHETHER GOVERNED BY PRESUMPTION – WHETHER MAGISTRATE IN ERROR – APPLICANT NOT INVOLVED IN PROSECUTION OF EMPLOYER – WHETHER APPLICANT ENTITLED TO MAKE APPLICATION FOR COMPENSATION: *SENTENCING ACT* 1991, S86.

Upon the conviction of PMP/L in 1999 of a breach of the *Occupational Health and Safety Act*, S. applied for compensation for pain and suffering as a result of the death of their son who died in a workplace accident in March 1997. The application was brought pursuant to the amended provisions of s86 of the *Sentencing Act* 1991 ("Act") which came into operation on 1 July 1997. On the hearing of the application, it was argued by PMP/L that as the circumstances of the death occurred prior to the commencement of the amendment to s86 there was no entitlement to bring an application notwithstanding that the employer PMP/L was convicted after the commencement of the amendment. In dismissing the application by S., the magistrate found that for S. to succeed would involve applying the amending legislation on a retrospective basis. As the legislature had not expressed a clear intent of retrospective application the amendment made to s86 did not apply to S. Upon appeal—

HELD: Appeal allowed. Application by S. remitted for hearing and determination in accordance with law.

1. In considering the retrospective or prospective application of amending legislation the usual starting point is that as a general rule a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose rights or liabilities which the law had defined by reference to past events. However, the courts have on occasions, held that legislation which relates to events that occurred prior to the commencement of the amending legislation nevertheless rendered the effect of the amending legislation prospective. The presumption against retrospective operation does not direct itself to legislation which merely uses past acts as a foundation for future action.

***Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261; [1957] ALR 231; (1957) 31 ALJR 143, cited.**

***Geschke v Del-Monte Home Furnishers Pty Ltd* [1981] VicRp 80; [1981] VR 856, applied.**

2. On the basis of the various authorities referred to, the amendment to s86 of the Act was prospective and was not properly characterised as retrospective because past acts are, by virtue of the amending legislation, the subject of the prospective legislation. In those circumstances, it was open to S. to make an application for compensation for pain and suffering against PMP/L who was convicted of an offence committed before the amending legislation came into operation. Accordingly, the magistrate was in error in finding otherwise.

3. Whilst S. were not directly involved in the prosecution of the employer PMP/L, they were entitled to bring an application under s86 of the Act. S86 of the Act contemplates that a person may bring an application providing he or she can establish the suffering of loss or destruction of or damage to property or pain and suffering as a result of the relevant offence. In each case it will be a question of fact for the court hearing the application to determine whether or not the person making the application has suffered such loss, destruction or pain and suffering.

WARREN J:

1. The appellants bring the proceeding by way of appeal under the *Magistrates' Court Act* 1989.

2. Leon Shoebridge, the son of the appellants, died in an accident at his workplace on 17 March 1997. As a result of the death the employer of the deceased was charged under s21(2)(a) of the *Occupational Health and Safety Act* 1985 with failing to provide a plant and system of work that was safe. The relevant parts of s21 of the *Occupational Health and Safety Act* under which

the respondent was charged provides:

> "**21. *Duties of employers***
> (1) An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.
>
> (2) Without in any way limiting the generality of sub-section (1), an employer contravenes that sub-section if the employer fails—
> (a) to provide and maintain plant and systems of work that are so far as is practicable safe and without risks to health;"

3. The employer, who is the respondent in this proceeding, pleaded guilty to the charge before the Magistrates' Court sitting at Bendigo and on 1 July 1999 was convicted and fined $30,000. Immediately after the conviction and sentence of the employer the magistrate heard an application by the appellants in this proceeding that the employer pay compensation to them for the pain and suffering suffered as a result of the death of their son. The application was brought pursuant to s86 of the *Sentencing Act* 1991 (as amended by the *Victims of Crime Assistance Act* 1996). Section 86 of the *Sentencing Act* in its present form came into operation on 1 July 1997. The section was amended by s74(1) of the *Victims of Crime Assistance Act* 1996. Prior to the amendment, the *Sentencing Act* limited the right of application for compensation to loss or destruction of or damage to property. There was no entitlement to compensation for pain and suffering as a result of a relevant offence.

4. The application for compensation was resisted in the Magistrates' Court below by the employer. The employer argued that the provisions of s86(1) of the *Sentencing Act* did not apply retrospectively, that is, did not relate to the circumstances of the death of Leon Shoebridge as his death occurred prior to the commencement of the legislation.

5. The magistrate reserved his decision until 13 July 1999 when the application was dismissed and reasons provided. The magistrate found that for the appellants' application to proceed it would involve applying the amending legislation on a retrospective basis. The magistrate held that as the legislature had not expressed a clear intent of retrospective application, on the basis of well-established legal principles, the amendment made by s74 of the *Victims of Crime Assistance Act* to s86 of the *Sentencing Act* did not apply to the appellants. The formal order made on 13 July 1999 was that the application was refused. As a result, the appellants seek to appeal on a question of law against such order.

6. The question of law on the appeal to be determined by this court was ordered by the Master to be whether on a proper construction of s86 of the *Sentencing Act* 1991 (Vic) ("the Act"), an application for compensation for pain and suffering may be made against an offender found guilty of or convicted of an offence committed before 1 July 1997, being the date of commencement of operation of s86 of the Act as amended by s74(1) of the *Victims of Crime Assistance Act* 1996 (Vic).

7. Prior to 1 July 1997, s86(1) of the *Sentencing Act* limited the power of a court in making a compensation order to circumstances where an applicant suffered loss or destruction of or damage to property as a result of an offence. Section 86(1) provided:

> "**86. *Compensation order*** (1) If a court finds a person guilty of, or convicts a person of, an offence it may, on the application of a person suffering loss or destruction of, or damage to, property as a result of the offence, order the offender to pay any compensation for the loss, destruction or damage (not exceeding the value of the property lost, destroyed or damaged) that the court thinks fit."

8. Arising from amendments made to the *Sentencing Act* by s74 of the *Victims of Crime Assistance Act*, s86(1) was extended to include claims for pain and suffering. In addition, the provisions of the *Victims of Crime Assistance Act* inserted new sub-sections (9A), (9B), and (9C) in s86 of the *Sentencing Act*.

9. Since 1 July 1997 s86 of the *Sentencing Act* provided:

> "**86. *Compensation order***
> (1) If a court finds a person guilty of, or convicts a person of, an offence it may, on the application of a person suffering loss or destruction of, or damage to, property or pain and suffering as a result

of the offence, order the offender to pay any compensation for the loss, destruction or damage (not exceeding the value of the property lost, destroyed or damaged) or for the pain and suffering that the court thinks fit.
(2) If a court decides to make an order under sub-section (1) it may in determining the amount and method of payment of the compensation take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose.
(3) A court is not prevented from making an order under sub-section (1) only because it has been unable to find out the financial circumstances of the offender.
(4) In making an order under sub-section (1) the court may direct that the compensation be paid by instalments and that in default of payment of any one instalment the whole of the compensation remaining unpaid shall become due and payable.
(5) An order under sub-section (1)—
(a) may be made on an application made as soon as practicable (and, in the case of an application for compensation for pain and suffering, no later than 6 months) after the offender is found guilty, or convicted, of the offence; and
(b) may be made in favour of a person on an application made—
(i) by that person; or
(ii) on that person's behalf by the Director of Public Prosecutions or (if the sentencing court was the Magistrates' Court) the informant or police prosecutor.
(6) Nothing in sub-section (5)(b)(ii) requires the Director of Public Prosecutions or the informant or police prosecutor (as the case requires) to make an application on behalf of a person.
(7) On an application under this section—
(a) a finding of any fact made by a court in a proceeding for the offence is evidence and, in the absence of evidence to the contrary, proof of that fact; and
(b) the finding may be proved by production of a document under the seal of the court from which the finding appears.
(8) A court must not exercise the powers conferred by this section unless in the opinion of the court the relevant facts sufficiently appear from evidence given at the hearing of the charge or from the available documents, together with admissions made by or on behalf of any person in connection with the proposed exercise of the powers.
(9) In sub-section (8) 'the available documents' means—
(a) any written statements or admissions which were made for use, and would have been admissible, as evidence on the hearing of the charge; or
(b) the depositions taken at the committal proceeding; or
(c) any written statements or admissions used as evidence in the committal proceeding.
(9A) A court must not exercise the powers conferred by this section to order an offender to pay compensation for pain and suffering without giving the offender a reasonable opportunity to be heard on the application.
(9B) On deciding to grant or refuse an application for compensation for pain and suffering, the court must—
(a) state in writing the reasons for its decision; and
(b) cause those reasons to be entered in the records of the court.
(9C) The failure of a court to comply with sub-section (9B) does not invalidate the decision made by it on the application.
(10) Nothing in this section takes away from, or affects the right of, any person to recover damages for, or to be indemnified against, any loss, destruction or damage to property or to recover damages for pain and suffering so far as it is not satisfied by payment or recovery of compensation under this section.
(11) References in this section to property include references to a motor vehicle."

10. The *Victims of Crime Assistance Act* was silent as to whether the amending provisions contained in s74 of that Act were intended to operate retrospectively or prospectively.

11. Mr M Dreyfus QC who appeared with Mr R Heath for the appellants submitted that the application by the appellants under the *Sentencing Act* could only be brought upon the conviction, if any, of the employer. As the conviction was entered, it was argued, after the commencement of the amendment to s86(1) of the *Sentencing Act* the appellants were entitled to bring their application. It was submitted that the amendment to s86 was intended to have prospective application, that is, it was intended to apply in respect of convictions or findings of guilt occurring after the commencement of the amendment notwithstanding that the offence that led to the conviction was committed before the amending legislation came into operation.

12. For the respondent, three preliminary submissions were made. *[After dealing with the first two preliminary submissions (which are not relevant to this Report), Her Honour continued]* …

16. The third preliminary submission on behalf of the employer was that the appellants were not directly involved in the prosecution of the employer and, therefore, were not entitled to bring the application under the *Sentencing Act*. It was submitted as part of this argument that as a consequence the appellants were never "a party" for the purposes of s86 of the *Sentencing Act*. In my view such submission is misconceived. Section 86(1) of the *Sentencing Act* contemplates that a person may bring an application under the section providing she or he can establish the suffering of loss or destruction of or damage to property or pain and suffering as a result of the relevant offence. In each case it will be a question of fact for the relevant court hearing an application under s86(1) of the *Sentencing Act* to determine whether or not the person making the application has suffered such loss or destruction. Insofar as it may be necessary to determine whether the appellants were a "party" for the purposes of s109 of the *Magistrates' Court Act*, for the reasons already stated I am satisfied that the appellants' application below constituted a civil proceeding. Clearly, the appellants were a party to such proceeding.

17. I turn to consider the substantive submissions on behalf of the defendant employer. It was submitted that the amendment to s86(1) of the *Sentencing Act* did not operate retrospectively. On proper analysis the argument purported to be expressed on the basis that as the circumstances that related to the death of the deceased occurred prior to the commencement of the amendment to s86 there was no entitlement to bring an application under that section notwithstanding that the employer was convicted after the commencement of the amendment. It is the latter issue that is the nub of the dispute between the appellants and the respondent.

18. In considering the retrospective or prospective application of amending legislation the usual starting point is the statement of the principles by Dixon CJ in *Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261, 267; [1957] ALR 231; (1957) 31 ALJR 143:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events."

19. The courts have considered on many occasions whether amending legislation is properly characterised as prospective or retrospective and, on occasions, have held that legislation which relates to events that occurred prior to the commencement of the amending legislation nevertheless renders the effect of the amending legislation prospective.

20. In *Re a Solicitor's Clerk* [1957] 3 All ER 617; (1957) 1 WLR 1219 the court was concerned with an appeal against the disqualification of a solicitor's clerk on the ground of misconduct. The particular clerk had been convicted of larceny in 1953. Amending legislation was passed subsequently in 1956, that is, subsequent to the conviction enabling disqualification. The court held that the amending legislation was not retrospective as it enabled an order of disqualification to be made for the future. Lord Goddard CJ observed, at 1222, that " ... what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect".

21. In *Robertson v City of Nunawading* [1973] VicRp 81; [1973] VR 819; (1973) 29 LGRA 44 the Full Court of this court considered circumstances where a sub-divider of non-residential land filed a notice of intention to sub-divide. Shortly thereafter the *Local Government Act* 1958 was amended with the consequence that the local municipal council was entitled to request the payment of a security from the sub-divider of the land. The issue arose as to whether or not the sub-divider was obliged to pay the security as requested by the council as a result of the amending legislation. In the judgment of the Full Court, at 823, the court observed:

> "As is so often the case in similar circumstances resort has then to be to any presumption which operates to indicate what was intended to any interpretative statutory provisions. The common law principle which is applicable may for present purposes be taken from two statements, recently cited by Gibbs J, in *Mathieson v Burton* [1971] HCA 4; [1971] 124 CLR 1, at p22; (1971) ALR 533; 45 ALJR 147, one from the judgment of Wright J, in *Re Athlumney; Ex parte* Wilson [1898] 2 QB 547, at pp551-2; [1895-91] All ER Rep 329, the other from the judgment of Dixon J, in *Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261 at p267; [1957] ALR 231; (1957) 31 ALJR 143."

The Full Court in *Robertson* cited the extract of the judgment of Dixon CJ in *Maxwell v Murphy*

referred to already and then made the observation: (at CLR 824)

> "It is to be observed that this principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that: *Maxwell on Interpretation of Statutes,* 12th ed, pp216-7. The principle is concerned with the case where the enactment would apply to these antecedent facts and circumstances in such a way 'as to impair an existing right or obligation' or 'as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

22. Significantly for present purposes, the Full Court in *Robertson* proceeded then to observe:

> "As Fullagar J, said in *Ku-Ring-Gai Municipal Council v Attorney-General (NSW)* [1957] HCA 61; (1957) 99 CLR 251 at p269; [1957] ALR 953; 2 LGRA 268 — 'What the rule really means is that *prima facie* a statute must not be construed so as to change the legal character or the legal consequences, of past events and transactions."

23. Later, in an unreported judgment of *Re the Crimes Compensation Tribunal and Laufenberg & Ors* Crockett J of this court considered whether the then Crimes Compensation Tribunal was correct in refusing applications for compensation under the *Criminal Injuries Compensation Act* 1972 (unreported judgment delivered on 30 April 1986 in matter No.86/0327). The relevant circumstances were that the appellants suffered an injury as a result of a criminal act. Each of the appellants at the relevant time was living with the offender as a member of his household. At the time the criminal acts occurred the legislation excluded orders for compensation where a victim was married to the offender or was a member of the offender's household. Later, the legislation was amended to permit orders for compensation in such circumstances. The *Criminal Injuries Compensation Act* was amended by the *Criminal Injuries Compensation (Amendment) Act* 1980. Prior to the amendment s14(2) of the *Criminal Injuries Compensation Act* restricted the powers of awarding compensation of the Crimes Compensation Tribunal as follows:

> "s.14(2) The Tribunal shall not make an order for compensation under this Act - ... (c) if the victim was, at the time when the injury was sustained, living with the offender as his wife or her husband or as a member of the offenders' household".

24. As a result of amendments contained in s2 of the *Criminal Injuries Compensation (Amendment) Act* 1980 s14 of the Act was amended as follows:

> "s.14(2) The Tribunal shall not make an order for compensation under this Act— ... (c) if the victim was, at the time when the injury was sustained, living with the offender as his wife or her husband or as a member of the offenders' household - unless the offender has been convicted of inflicting the injury the subject of the application for an award of compensation under this Act or has, in any proceedings in which he is charged with an offence on inflicting the injury, pleaded 'Guilty' to the information or complaint or otherwise admitted that he inflicted the injury as charged or been found to be insane at the time of the commission of the alleged offence; (4) Unless otherwise expressly provided an order for compensation may be made under this Act whether or not any person is prosecuted for or convicted of an offence arising out of the criminal Act or omission." (The underlining indicates the amendments.)

25. On a case stated, Crockett J was concerned with whether the amendment to the *Criminal Injuries Compensation Act* applied to the applicants. In the matter the offender pleaded guilty and was convicted of a number of counts of incest and indecent assault with respect to the applicants.

26. In his judgment Crockett J, at 8a-10a, analysed the authorities. After commencing with the previously cited principles expressed by Dixon CJ in *Maxwell v Murphy*, Crockett J turned to consider the application of legislative princples:

> "But what is meant by giving an Act retrospective operation? As Dr. Pearce pointed out in his *Statutory Interpretation in Australia* 2nd ed at p149: 'Two possible approaches are open. It can be said that an Act operates retrospectively if it impairs an existing right or obligation or creates a new right or obligation. Henceforward that right or obligation is not as it was before. Alternatively, it is possible to say that an Act is only retrospective in effect if it provides that at a past date the law is to be taken to be that which it was not. Few Acts do not interfere with some existing right. The usual intention of a legislature is to make some change in an existing course of conduct. It is, therefore, appropriate

> to talk in terms of retrospectivity only where an Act affects rights by changing them with effect prior to the commencement of the amending Act'. The distinction between the two approaches is made clear in *Re A Solicitor's Clerk* [1957] 3 All ER 617; (1957) 1 WLR 1219. In that case the clerk, despite having been convicted of an offence of larceny, could not under the relevant Act be prohibited from employment in a solicitor's office. The Act was then amended so as to allow a prohibition order to be made in the case of such a conviction. An order was made in the case of the clerk. He contended that the making of such an order was to give the amendment retrospective operation. The court held that there was no such retrospectivity. The Act had future operation only - even if the conduct on which it depended had taken place in the past. On the other hand, the Act would have had retrospective operation if anything done before its commencement had been declared void or voidable. In a case not dissimilar in some respects from the present, *Dubbo Base Hospital v Jones* (1979) 1 NSWLR 225, it was made clear that, where a provision gives a fresh right to an existing class of persons, then to hold that those forming the class at the date of the enactment of the provision on as well as those who joined it after that date should have the benefit of that right was not to hold that the enactment was operating retrospectively. I take a similar view of the legislation in the present case. In my opinion, the amendment operates so as to allow the appellants to claim the relief sought by them provided that, at the time of the making of the application, the offender with whom the appellant had been living as a member of his household had been convicted of inflicting the injury the subject of the application for an award of compensation. In so concluding, I do not consider that the amending legislation has been given a retrospective effect. It has this effect only if it - to use Counsel's words – "changes yesterday's laws in relation to yesterday's actions". This view of the legislation means that no question arises as to whether, in the present case, the presumption against retrospectivity should be treated as having been rebutted; though had the question to be considered, I would have been disposed to take the same view of the legislation as did Adam J take of the Act he had to construe in *Doro v Victorian Railways Commissioners* [1960] VicRp 12; (1960) VR 84 at p86."

27. The issue of retrospectivity was visited in *La Macchia v Minister for Primary Industry* (1986) 72 ALR 23; 6 AAR 160 where the Full Court of the Federal Court was concerned with an appeal against cancellation of a fishing licence. The applicant was convicted of an offence under the *Fisheries Act* 1952 (Cth) on 13 June 1985. On 31 August 1985 the legislation was amended empowering the relevant Minister to cancel a licence where the holder of a licence was convicted of an offence against the Act. Subsequent to the conviction and the amending legislation the Minister determined to cancel the licence on 14 October 1986. On appeal it was argued that the amending legislation did not empower the Minister to cancel the licence as it would involve giving the legislation retrospective effect and which effect it did not have. The Full Court of the Federal Court held that the order of the Minister did not have retrospective effect merely because it relied upon conduct which occurred before the power existed. Toohey J, with whom Bowen CJ agreed, held that the Minister was not constrained to rely upon a conviction that occurred after the legislative amendment, rather, that the commission of an offence whether before or after the amending legislation warranted the Minister giving notice of cancellation of the licence. Toohey J held (at 26) that the Ministerial order did not have retrospective effect merely because it relied upon conduct that occurred before the power existed. The learned judge cited *Re a Solicitor's Clerk*. A similar view was taken by French J (at 33) to the effect that the fact that the power to cancel a licence under the amending legislation was conditioned upon a class of past events "... does not mean that the inclusion in that class of events which pre-dated the law, renders its operation retrospective". Again, French J cited with approval *Re a Solicitor's Clerk*.

28. In *Commissioner for Corporate Affairs v X and Y* [1987] VicRp 41; [1987] VR 460; (1986) 11 ACLR 355; (1987) 5 ACLC 1 the Full Court of this court considered circumstances where the Commissioner for Corporate Affairs sought orders for the examination of former receivers and managers of a company in respect of events that occurred prior to the commencement of legislation that empowered the Commissioner to conduct such examination. At first instance the trial judge held that the Commissioner was not entitled to conduct the examination as the relevant legislation (s541 of the *Companies (Victoria) Code)* did not have retrospective operation. Marks J with whom Murphy and McGarvie JJ agreed held (at 464):

> "Mr Goldberg QC for the respondents submitted that the liability of the respondents to be examined under s541 was new and comprised a new liability. But in my view that description is merely of the alteration in the law as to the 'mode' by which it may be demonstrated that any fraud or negligence etc. previously occurred or may have occurred. In a sense, but not a relevant one, any alteration in procedure effected by a new law might be said to impose a new 'liability', but this is not the 'liability' on which the presumptive rule of construction operates. Thus, I consider Mr Batt correct in submitting that legislation is not properly called retrospective merely because past events are by virtue of it the subject of prospective action such as examination under Court order: *R v Inhabitants*

> *of St.Mary, Whitechapel* [1848] EngR 746; (1848) 12 QB 120 at p127; 116 ER 811 at p814; 17 LJMC 172; *West v Gwynne* [1911] 2 Ch 1 at p11; *In re a Solicitor's Clerk* [1957] 3 All ER 617; [1957] 1 WLR 1219, at p1222; *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at p194; *Robertson v City of Nunawading* [1973] VR 819 at p824; *Geschke v Del-Monte Home Furnishers Pty Ltd* [1981] VR 856, at pp859-60; *Halsbury's Laws of England* 4th ed, vol 4 para 921. In *Fisher v Hebburn Ltd* [1960] HCA 80; (1960) 105 CLR 188; 34 ALJR 316 Fullagar J said, at (105 CLR) p194: 'There can be no doubt that the general rule is that an amending enactment — or, for that matter, any enactment ... is *prima facie* to be construed as having a prospective operation only ... But there is no rule of law that such statutes must be so construed, and it would not be true to say that a retrospective effect can only be avoided by confining the operation of such a statute to subsequently occurring 'accidents' or 'injuries'. It may truly be said to operate prospectively only, although its prospect begins, so to speak, with some other event than accident or injury.'"

29. After citing *Robertson v City of Nunawading* and *Ku-ring-gai Municipal Council v Attorney-General (NSW)* Marks J (at 465) went on to observe:

> "It cannot be said that s541 in any way changes the legal character or legal consequences of any past conduct of the respondents. I think that Gobbo J in *Geschke v Del-Monte Home Furnishers Pty Ltd* [1981] VicRp 80; [1981] VR 856 was correct when he observed, at ([1981] VR) p860: 'In my view, the presumption against retrospective operation does not direct itself to legislation which merely uses past acts as a foundation for future action.'"

30. On the basis of the analysis of the authorities by Marks J the Full Court held that the Commissioner for Corporate Affairs was entitled and empowered to conduct an examination as proposed in relation to transactions that occurred prior to the operation of the amending legislation.

31. In this matter, Mr Lindeman who appeared for the respondent employer submitted that the amendment to s86 of the *Sentencing Act* was retrospective and therefore the appellants were not able to make an application under s86 of the *Sentencing Act* as amended. He sought to distinguish the circumstances in the present matter from those in the authorities I have cited to support a view of prospective application on the basis that the amendment to s86 of the *Sentencing Act* created an entirely new right to make an application for compensation for pain and suffering and as such did not just expand the class of persons entitled to make a claim for compensation. Mr Lindeman relied upon *Carter v Ried* [1992] VicRp 22; [1992] 1 VR 351; (1991) 13 MVR 229. In that case Hedigan J was concerned with an appeal against a conviction for driving a vehicle where the blood alcohol level of the driver exceeded the lawful limit. In a summary hearing in the Magistrates' Court a breathalyser operator's certificate was admitted as conclusive proof and the driver was ultimately convicted. Subsequent to the conviction the Full Court held in another matter (*Bracken v O'Sullivan* [1991] VicRp 94; [1991] 2 VR 573; (1990) 13 MVR 91) that such breathalyser operator's certificates were not admissible in proof of a drink driving offence. The legislation was amended to overcome the effect of the judgment of the Full Court. On appeal after the operation of the amending legislation Hedigan J held that the appeal before the learned judge was to be determined by applying the law that operated at the time of the original hearing and that the appellant driver had the right to have his conviction quashed, that is, that the breathalyser operator's certificate on the basis of the Full Court judgment was not admissible in evidence. Hedigan J formed the view (at 358) that the amending legislation did not operate retrospectively and was intended to operate prospectively only. At 359 the learned judge said:

> "If events have occurred prior to the passing of an amending Act which have brought into existence particular rights or liabilities in respect of that act or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transactions as regards to creation of further particular rights or liabilities: see *Coleman v Shell Company of Australia Ltd* (1943) 45 SR (NSW) 27, at p31; 62 WN (NSW) 21. The appellant's arguments appeared to suggest that, as Mr Carter had been wrongly convicted, he had a 'substantive right' to have that conviction set aside on appeal which could not be taken away from him by the legislature. Whatever may be said about the question of whether or not a statute has been apt to effect such an objective, it may be doubted that there is any principle which prevents a Parliament from making laws retrospective in operation, including perhaps a law of the kind alluded to, and subject to one further issue later referred to. The usual dispute, and it is the dispute here, is whether or not the amending Act ought to be construed on the ordinary principles, as intending and achieving that objective. If it is correct to say that there is a presumption against retrospectivity, such presumption clearly may be rebutted by the terms of the legislation itself, and, even if it is not specifically stated to be retrospective, the court will regard the presumption as being rebutted if it perceives the intendment of the Act is to

> operate retrospectively. Statutes which are passed specifically for the purpose of making legal what was illegal prior to the commencement of the Act, or to make illegal that which was legal, must of their very nature operate retrospectively."

32. The principle applied by Hedigan J in *Carter v Ried* has no application in the present matter. Carter was not a case where past acts were used as a foundation for future action. Rather, it was a case where the appellant had a substantive right that existed prior to the enactment and commencement of amending legislation.

33. Mr Lindeman relied also upon judgments of the Supreme Court of Queensland in *Re Wilkinson* (1999) QSC 177 and the Supreme Court of Western Australia in *Law v Austin*, an unreported judgment of Scott J delivered 23 April 1999. The Queensland and Western Australian authorities were concerned with applications for compensation arising from criminal injuries in circumstances where amending legislation had been enacted and arguably had affected the entitlement of the particular applicant. I have considered the two authorities carefully. However, they do not appear to have considered the various authorities to which I have already referred including those authorities that bind me. In any event both authorities were concerned with different legislation to that presently before me.

34. On the basis of the various authorities referred to I consider that the amendment to s86 of the *Sentencing Act* was prospective and is not properly characterised as retrospective because past acts are, by virtue of the amending legislation, the subject of the prospective legislation. To adopt the words of Gobbo J in *Geschke*, cited with approval by the Full Court in *Commissioner for Corporate Affairs v X and Y*: " ... the presumption against retrospective operation does not direct itself to legislation which merely uses past Acts as a foundation for future action".

35. It was further submitted on behalf of the respondent employer that even if the legislation was properly characterised as prospective, as a result of s134A(1) of the *Accident Compensation Act* 1985 the appellants had no entitlement to compensation. The section provides:

> "Section 134A(1) A worker who is, or the dependants of a worker who are or may be, entitled to compensation in respect of an injury arising out of or in the course of, or due to the nature of, employment on or after 12 November 1997 shall not, in proceedings commenced in respect of the injury or otherwise, recover any damages of any kind".

36. Strictly speaking the application of s134A of the *Accident Compensation Act* was not properly before me as the issue did not fall within the question of law formulated by the Master. However, I observe that on its face the submission is misconceived in any event as s134A is specifically confined to employment injuries arising on or after 12 November 1997, that is, well after the subject injury in the proceeding before me. I note also that s86(10) of the *Sentencing Act* provides that s86 does not prejudice compensatory rights under other legislation. Finally, I observe that Mr Lindeman for the respondent relied upon the approach adopted by Ashley J in *Bentley v Furlan* (1999) VSC 481; [1999] 3 VR 63; (1999) 30 MVR 241, judgment delivered 30 November 1999) wherein the learned judge considered whether there was an entitlement to compensation for pain and suffering under s86(1) of the *Sentencing Act* where there was an entitlement to compensation under the provisions of the *Transport Accident Act* 1986. Having had the opportunity to consider the judgment of Ashley J in *Bentley* I am satisfied that the submission on behalf of the respondent is misconceived. The ultimate conclusion of Ashley J in *Bentley* was that there was no reason other than to conclude that legislation such as compensatory provisions under the *Sentencing Act* and the entitlement of a person under the *Transport Accident Act* were intended to co-exist.

37. It follows from my reasons that I conclude that there was an error of law in the orders made by the magistrate below and, accordingly, the question of law ordered by the Master will be answered in the affirmative and the appeal ought be allowed. Whilst not absolutely necessary, in my view, it would be desirable for the same magistrate as determined the conviction and penalty of the respondent employer below to proceed to hear the application by the appellants. I will direct that the matter be remitted to a magistrate to be heard and determined in accordance with law. *[Her Honour then dealt with a matter not relevant to this Report.]*

APPEARANCES: For the appellants Shoebridge: Mr MA Dreyfus QC and Mr R Heath, counsel. Slater & Gordon, solicitors. For the respondent The Pasta Master Pty Ltd: Mr A Lindeman, counsel. Phillips Fox, solicitors.