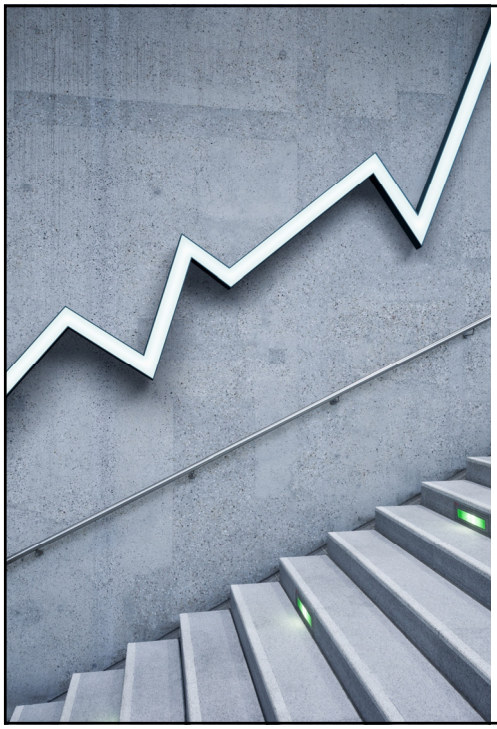

Snell – Managing Repeat Business in the AAT

CHAIR: BERNARD MCCABE (DEP PRES, AAT).

PRESENTERS: DAVID W MARKS QC

TRAVIS O'BRIEN,

INNS OF COURT BRISBANE

1

The reasons of the Court reflect an important debate that was had about how the Administrative Appeals Tribunal should approach its task. That is a matter of significant public importance.

- FULL COURT, COMMONWEALTH V SNELL (NO 2), [5]

2

Disclosures

- We appeared for Mr Snell in *C'th v Snell* (2019) 269 FCR 18
- Mr O'Brien appeared for Mr Snell:
  - at trial, *Re Snell and C'th* (2018) 74 AAR 526
  - on the costs decision *C'th v Snell* (No.2) [2019] FCAFC 97; and
- The litigation terminated without need of a further trial.

3

Controlling repeat business

- Courts control repeated litigation by issue, & cause of action, estoppels
- The AAT is not a court
- How may it control its process?
- *Snell* involved attempted application of the so-called *Matusko* methodology, using section 33 AAT Act (directions)

4

Not a new issue for the Tribunal

- Most involve attempted re-litigation by subjects (†), but not all
- Examples:
  - *Quinn & Australian Postal Corp'n* (1992) 15 AAR 519
  - *Matusko & Australian Postal Corp'n* (1995) 21 AAR 9 (†)
  - *Weigand & Comcare* (2014) 63 AAR 526 (†)
  - *Benjamin & FCT* (2017) 71 AAR 226 (†)
  - *Moore & Military Rehab'n & Compensation Com'n* (2017) 72 AAR 71 (†)
  - *Giger & Repatriation Commission* (2017) 72 AAR 367 (†)
- Balance of authority in Federal Court against issue estoppel (as such)

5

Guba's Case

Administration of PNG v Guba (1973) 130 CLR 353

- History of decision-making in that case:
  - Land Board summoned in 1954 to decide matters, and issued decision
  - 1964, Mr Daera Guba sought registration of the land instead to a different lineage
  - Land Titles Commission allowed application, saying no estoppel from 1954 decision
- HCA (on appeal from SC of PNG) prevented relitigation of 1954 "Land Board" decision
- Apparent basis for *res judicata* (or something like it) in tribunals: see esp Gibbs J, p453
- Applied in NZ: *P v Iyengar* [2012] NZAR 829 (Kós J)
- How distinguished by FCAFC in *Snell*, [50]-[51]

6

Snell is not really about issue estoppel

- We didn't run it as issue estoppel
- Thus FCAFC didn't determine it on issue estoppel
- In the AAT and FCAFC, Mr Snell said that the AAT should not receive or rely on evidence tending only to relitigate a prior consent order
- AAT's error was in "starting from a position that it ought not generally allow relitigation …", requiring reason to do so: [74]

7

The power to make directions (s33)

Procedure of Tribunal

(1) In a proceeding before the Tribunal:

(a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;

(b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and

(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

8

The power to make directions (s33)

(2A) Without limiting the operation of this section, a direction as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal may:

(a) require any person who is a party to the proceeding to provide further information in relation to the proceeding; or

(b) require the person who made the decision to provide a statement of the grounds on which the application will be resisted at the hearing; or

(c) require any person who is a party to the proceeding to provide a statement of matters or contentions upon which reliance is intended to be placed at the hearing; or

(d) limit the number of witnesses who may be called to give evidence (either generally or on a specified matter); or

(e) require witnesses to give evidence at the same time; or

(f) limit the time for giving evidence or making oral submissions; or

(g) limit the length of written submissions.

9

Mr Snell's circumstances till 2013

- Born 1930s
- Worked as seafarer 1950s - 1990s
- 2000s - 2010s – solar-related medical conditions, etc, including removal of malignant melanomas
- 2011 – claimed compensation for permanent impairment under *Seafarers Rehabilitation & Compensation Act* (***Seafarers' Act***)
- 2013 – s42C order (in part):

  "the applicant's solar induced skin disease has been contributed to in a material degree by his employment …"

10

Mr Snell's circumstances after 2013

- 2017:
  - January - Claim for permanent impairment compensation for solar-induced skin disease
  - March/May 2017 – refusal; then internal review affirming review="reviewable decision"
- 2017 – Mr Snell contends for *Matusko* methodology to prevent the Commonwealth relitigating connection of disease to employment
- 2018 – AAT so holds
- 2018 – Commonwealth's appeal – set down in Full Court
- 2019 – AAT overturned, remanded, and later resolved by parties

11

Comcare & Seafarers compensation

- The Seafarers' Act is generally the same pattern as the Safety, Rehabilitation & Compensation Act ***(SRC Act)***
- Compensation is not common law once and for all
- The level of impairment is able to be reviewed (as are other aspects), and new compensation decisions can be made, on application or own motion
- "progressive and evolving decision-making": *Telstra v Hannaford*

12

Matusko methodology

- Before *Snell* it was nevertheless very doubtful issue estoppel applied in AAT
- To control repeated applications, the AAT laid down some rules, starting with *Quinn* (per O'Connor J & Barbour M) : AAR p526
- Settled formulation in *Matusko*: AAR pp20-21
  - AAT should not generally allow relitigation of issues
  - Not issue estoppel, but use of its flexible procedure "to allow further consideration of issues where there is a reason to do so", eg change in circumstance, fresh evidence, clear legislative intent, etc
  - Not a power to be exercised beforehand at a directions hearing, but on tender of the evidence

13

Decision in *Snell*

- Statutory scheme: "progressive and evolving decision-making"
- Decision confined to that context (but we suggest it cannot be ignored outside that context)
- *Matusko* cannot stand unaltered – with its plain disposition against re-litigation. It may be "further refined": [50]
- FCAFC indicates a "less rigid approach": [50]
- But AAT can look at its previous decision: [76]

14

What to do with the previous decision:

- AAT can look at its previous decision: [76]
- Can give it appropriate weight
- If no new evidence undermining previous decision:
  - FCAFC leaves open summary determination
  - Otherwise – earlier decision may have "significant if not overwhelming weight"

15

Where this leaves us

- *Matusko* requires "refinement", at least in compensation cases
  - FCAFC warns against frivolous/vexatious relitigation: s42B
  - FCAFC expects employers will not "inappropriately" engage in reconsideration
- Parties are still sensing the way forward, after *Snell*
- Beyond that "progressive and evolving decision-making" context, the answer may be that it is a wholly new decision being reviewed: see *Benjamin*, AAR [66] *et seq* (Forgie DP)

16

Snell - Managing Repeat Business in the AAT

Australian Institute of Administrative Law 2020

QUESTIONS?

AIAL 2020 Webinar Series:

12 May: Marks QC & O'Brien (Ch, McCabe, Dep Pres)
"Snell – Managing Repeat Business in the AAT"

26 May: Matthew Paterson (Ch, Logan J)
"The Administrative Continuum"

9 June: Wheatley QC & McGlade (Ch, Greenwood J)
"Unreasonableness"

--oOo--

Paper for this evening:

David W Marks QC , "Snell: controlling the process of the Administrative Appeals Tribunal" (2020) 98 AIAL Forum 85-99

17