SHORT PARTICULARS OF CASES
APPEALS

JUNE 2008

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MASTER EDUCATION SERVICES PTY LIMITED v KETCHELL (S139/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 19 July 2007

Date of grant of special leave: 8 February 2008

The Franchising Code of Conduct ("the Code") prescribed by Clause 3 of the *Trade Practices (Industry Codes - Franchising) Regulations* 1998 (Cth) ("the Regulations") imposes a number of duties on a franchisor and franchisee. Clause 10 requires the franchisor to provide a copy of the disclosure document (created within the requirements of the Code) and a copy of the Code to the franchisee prior to entry into a Franchise Agreement. Clause 11 provides that the franchisor must not enter into a Franchise Agreement without receiving from the franchisee a written statement stating that they have read, and have had a reasonable opportunity to understand, both the disclosure document and the Code.

A Franchise Agreement was executed on 11 February 2000 between the Appellant franchisor and the Respondent franchisee. The Appellant franchisor subsequently sued the Respondent franchisee in the Local Court for money due to it under that agreement.

The Supreme Court found that the Appellant franchisor did not comply with Clause 11(1) of the Code. Associate Justice Malpass held that, although this breach was tantamount to a finding of a contravention of section 51AD of the *Trade Practices Act* 1974 (Cth) ("TPA"), it did not render the receipt of the non-refundable payment illegal.

On appeal it was not disputed that the Appellant franchisor had failed to comply with Clause 11 of the Code. The issue was whether a contravention of Clause 11(1)(a) and a resulting contravention of Clause 11(1)(c) rendered the contract unenforceable for statutory illegality.

On 19 July 2007 the Court of Appeal (Mason P, Basten JA & Handley AJA) allowed the Respondent franchisee's appeal. Their Honours held that if the legislature prohibits the making of a contract, then the making of a contract does not give rise to an enforceable right or obligation. They further found that section 51AD of the TPA, when read with Clause 11, directly prohibited the contract in question and the recovery of the monies claimed.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in holding that a contract entered into in breach of clause 11(1)(a) of the Code as prescribed by the Regulations and, consequently, a breach of section 51AD of the TPA is rendered illegal and unenforcable by the application of the common law doctrine of illegality.
- The New South Wales Court of Appeal ought to have held that a failure to comply with clause 11(1)(a) of the Code, being a breach of section 51AD of the TPA, gives rise to an entitlement to make application for relief pursuant to Part IV of the TPA, but does not result in the illegality and unenforcablility of a contract entered into in breach of such provisions of the Code and the TPA.

BURRELL v THE QUEEN (S141/2008 & S142/2008 and **S327/2007 & S328/2007)**

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 16 March 2007 and 23 March 2007

Date of grant of special leave/ referral to the Full Court: 7 March 2008

The appellant was charged with detaining Mrs Kerry Whelan for advantage and of murdering her on or about 6 May 1997.

The Crown presented a circumstantial case against the appellant. The main pieces of evidence related to:

> (i) A Pajero of the kind owned by the appellant being caught on security footage departing an area outside the Park Royal Hotel shortly after Mrs Whelan's image was captured leaving the hotel car park;
>
> (ii) The discovery by police of two "dot point " notes during a search of the appellant's home (suggestive of a kidnapping plan); and
>
> (iii) The appellant making a telephone call from outside the Empire Hotel in Goulburn on 23 May 1997 to Mr Whelan's workplace, displaying a knowledge of the contents of a ransom note previously sent to Mr Whelan demanding the payment of $US 1 million and giving instructions about an advertisement that was to be placed in the Daily Telegraph when the money was ready for collection.

Additional circumstantial evidence was presented, including: evidence relating to the appellant's financial situation; his recent and apparently inexplicable re-entry into the lives of the Whelans; an unexpected telephone call to Mr Whelan on 7 April 1997; and his visit to the Whelan property where the appellant spoke privately to Mrs Whelan on 16 April 1997.

On 6 June 2006 the jury returned verdicts of guilty on both counts. The appellant was sentenced to life imprisonment for the offence of murder. (For the offence of detaining for advantage the appellant was sentenced to a term of imprisonment of 16 years.)

The appellant appealed against his conviction. His appeal was dismissed by the Court of Criminal Appeal (McClellan CJ at CL, Sully and James JJ) on 16 March 2007. McClellan CJ at CL gave the judgment of the Court. Inter alia, the appellant argued that the jury should have been directed that there were three "indispensable intermediate facts" (i - iii above) which had to be proved beyond reasonable doubt in order to convict.

The Court dismissed this ground of appeal holding that although the Crown had submitted that there were three bodies of evidence of significant probative force, the Crown case was not confined to that evidence and the jury were directed that they were not restricted to any piece of evidence and could take into account every piece of evidence capable of bearing upon their decision.

After receipt of the judgment the Crown sought a re-opening of the proceedings on the appeal on the basis that the judgment referred to matters not in evidence at the appellant's trial. The appellant submitted that because the orders were perfected the Court had no jurisdiction to re-open the proceedings. McClellan CJ at CL who gave the judgment of the Court held that as the appeal had not been determined in relation to the relevant evidence, it had not been determined on its merits, therefore the Court could re-open the proceedings. The appellant further argued that the Court as then constituted should excuse itself from hearing the matter and refer it to a differently constituted bench. The basis for this submission was that there would be a reasonable apprehension of bias on the ground that the Court's further consideration of the matter might be tainted by its prior consideration of the material not in evidence. There was no allegation by the appellant of actual bias. The Court found that there was no impediment to it considering whether the Court had jurisdiction to re-open the appeal and then re-considering the appeal upon the facts correctly identified. The order of the Court dismissing the appeal was confirmed. The Court comprised the same members who constituted the Court in its initial hearing of the matter.

The grounds of appeal are:

S141/2008

- The Court of Criminal Appeal erred in not deciding the appeal exclusively upon the evidence on the record of the trial and in taking into account prejudicial matters not the subject of any evidence.

S142/2008

- The Court of Criminal Appeal erred in finding that it had jurisdiction to re-open the appeal it having delivered judgment on 16 March 2007 and the orders the subject of the judgment having been perfected on 16 March 2007
- In the alternative the Court of Criminal Appeal erred in failing to disqualify itself for apprehended bias and refer the application to re-open the appeal to another bench of the Court differently constituted.

The grounds referred to the Full Court include:

S327/2007 & S328/2007

- The Court of Criminal Appeal erred in not finding the trial judge was in error in failing to direct the jury there were three indispensable intermediate facts (*Shepherd v the Queen* (!990) 170 CLR 573) which the jury would have to find beyond reasonable doubt before being able to convict the appellant, being:

    - Kerry Whelan left the front of the Parkroyal Hotel by way of the Pajero 4WD seen in camera 7 at 9.38 45/46 on 6 May 1997;

    - The terms of the two dot point notes had the meanings ascribed to them by the Crown theory; and

    - The accused was in the phone booth outside the Empire Hotel in Goulburn at the time the subject call was made to Crown Equipment at 9.21am on 23 May 1997.

MACEDONIAN ORTHODOX COMMUNITY CHURCH ST PETKA INCORPORATED v HIS EMINENCE PETAR, THE DIOCESAN BISHOP OF THE MACEDONIAN ORTHODOX DIOCESE OF AUSTRALIA AND NEW ZEALAND & ANOR (S107/2008)

Court appealed from: New South Wales Court of Appeal

Dates of judgment: 27 March 2007 & 23 October 2007

Date of grant of special leave: 7 March 2008

In 1996 the First Respondent appointed the Second Respondent as the parish priest in Rockdale. In July 1997 the Appellant, which has held all of the property associated with that parish since 1992, dismissed the Second Respondent. The Respondents claimed that the Appellant also excluded them from church affairs and they commenced proceedings to rectify this. The main proceedings (which are not before this Court) concern whether the Appellant used church property for church purposes. They also concern whether the Appellant should be removed as the trustee. This gave rise to the consequential issues of whether the church's property was held on trust, and the terms of any such trust.

Following a number of separate hearings regarding ancillary issues, the Appellant sought judicial advice from Justice Palmer concerning the management of trust property and the interpretation of the trust instrument. This advice was sought pursuant to section 63(1) of the *Trustee Act* 1925 (NSW) ("the Act"). Justice Palmer gave such advice and directed that the Appellant was justified in defending the main proceedings. His Honour also held that the Appellant could use such funds as might be realised by the disposal or encumbering of property known as the "Schedule A real estate" for the purposes of paying its legal costs. Those directions could however be revoked by the trial judge in the main proceedings. The Respondents duly appealed.

The Court of Appeal (Giles, Hodgson and Ipp JJA) allowed the Respondents' appeal. Their Honours held that despite Justice Palmer's power to give the advice in question, he erred in exercising his discretion to do so. The Court also ordered that the Appellant pay the Respondents' costs of the appeal.

The grounds of appeal include:

- The Court below failed to apply the text of section 63(1) of the Act but applied, instead, a glossary of "propositions" held to have been derived from cases in which jurisdiction under the section had been exercised.

On 4 April 2008 the Respondents filed a notice of contention, the grounds of which include:

- In addition to those errors identified by the Court of Appeal, the primary judge erred in making an order that the orders made by him in favour of the Appellant might be revoked by the judge hearing the main proceedings ("the revocation order), and then relying upon the making of the revocation order as a factor in favour of acceding to the Appellant's application, in that, in the circumstances of the case, the right of the Respondents to seek revocation purportedly conferred by the revocation order would be illusory or practically so.

On 15 April 2008 the Respondents filed a notice of cross-appeal, the grounds of which include:

- The Court below erred in its judgment of 22 June 2007 in holding (at [125] - [126]) that it would be unjust to grant leave to appeal against the orders of Palmer J of 7 May 2004 and 10 June 2005 or, if those orders had properly been revocable, to revoke them.

On 20 May 2008 the New South Wales Attorney-General filed a summons, seeking leave to intervene as amicus curiae at the hearing of the appeal.