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LUMBERS & ANOR v W COOK BUILDERS PTY LTD (IN LIQ) (A39/2007)

Court appealed from: Full Court, Supreme Court of South Australia

Date of judgment: 1 March 2007

Date special leave granted: 8 August 2007

In November 1993 the second appellant (Lumbers) entered into an oral contract with W Cook & Sons Pty Ltd (Sons P/L) for the construction of a house. The house was not a standard building and of an unusual design. Lumbers had known David McAdam, then a director of Sons P/L, for many years and trusted him. Lumbers approached McAdam about Sons P/L undertaking the work. Sons P/L was to act as the builder and Lumbers would do, or arrange, some of the work himself, including the structural steel work. McAdam would oversee the work. At the time of the agreement Sons P/L was a licensed builder which had been long established and had a significant reputation.

In February/March 1994 the Cook Group of companies underwent a corporate reorganisation. As a consequence Sons P/L arranged for another company, the respondent, W Cook Builders Pty Ltd (Builders) to carry out the building work on its behalf. The restructuring of the group was done on an informal basis with little documentation. This new arrangement was never communicated to Lumbers. As the two companies had common employees the same people continued to work on the construction. Builders was not a licensed builder under the *Builders Licensing Act* 1986 (SA). Lumbers continued to deal with McAdam throughout. Lumbers made payments as and when requested orally by McAdam and there was virtually no documentation. The work was completed in late 1995.

After completion of the project Builders went into liquidation. In November 1999 the liquidator of Builders sent Lumbers a demand for some $275,000 for building work done. Builders then commenced proceedings against the appellants and Sons P/L claiming that it did the work and was therefore entitled to recover the balance of any monies owing. The proceedings against Sons P/L have been stayed. Builders submitted that there had been an assignment of the Lumbers contract from Sons P/L to Builders. The trial judge found that the assignment had not been made out as the requisite intention to assign had not been established on the evidence before him. McAdam did not give evidence at trial. The trial judge also rejected Builders' claim for restitution.

The Full Court agreed with the trial judge's finding that there had been no assignment made out. However a majority of the Court (Sulan & Layton JJ, Vanstone J dissenting) held that Builders was entitled to succeed in a claim for restitution. The fact that there was a contract between Lumbers and Sons P/L to carry out the very work that Builders in fact carried out was not a basis for denying Builders' claim in restitution. The majority found that Builders had established that Lumbers had been unjustly enriched by Builders' provision of building services; that Lumbers had been provided with an incontrovertible benefit (the construction of the house) which was accepted and retained; and that in those circumstances it was unconscionable for Lumbers to retain that benefit without making restitution to Builders. Vanstone J was of the view that as there was no contract between Builders and Lumbers and as Lumbers had no knowledge of Builders' role in the construction, Lumbers was never in a position to exercise a choice as to whether to accept and retain the benefit. On that basis the claim in restitution by Builders ought not succeed.

The grounds of appeal include:

- The Full Court erred in holding that a claim in restitution was available to the respondent where it was in a position of a third party or subcontractor to the appellants.
- The Full Court erred in holding that the respondent had been enriched at the expense of the appellants.
- The Full Court erred in holding that the doctrine of free acceptance exists as a ground justifying an award of restitution.

MZXOT v MINISTER FOR IMMIGRATION AND CITIZENSHIP (M36/2007)

Date Case Stated: 8 November 2007

The plaintiff, a national of Nigeria, arrived in Australia in February 2006 on a Business (Short Stay) visa. In March he applied for a protection visa on the basis of a well-founded fear of persecution on the ground of his religion. The Department of Immigration requested from the Department of Foreign Affairs and Trade a copy of its file and papers relating to the business visa granted to the plaintiff. That information was received on 18 April 2006 and on that date a delegate of the defendant decided to refuse the application for protection visa. A copy of the decision was sent to the plaintiff's last notified address that day. The plaintiff was informed of the decision when he attended the offices of the Department in January 2007, after being contacted by phone and informed that he was an unlawful non-citizen. In February 2007, whilst unrepresented, the plaintiff applied for judicial review in the Federal Magistrates Court, the competency of which the defendant challenged. The plaintiff received a copy of the delegate's decision for the first time when documents were provided by the defendant in this proceeding. This was discontinued by consent in May 2007 because of the objection to competency. In March 2007, assisted by Victoria Legal Aid, the plaintiff had applied to the Refugee Review Tribunal (the RRT) to review the delegate's decision. On 25 May 2007 the RRT found that it had no jurisdiction to review the decision because the application was lodged out of time.

On 11 April 2007 the plaintiff filed an application for an order to show cause in this Court. The application sought relief on the ground that the decision was made on the basis of information from the Department of Foreign Affairs and Trade which was adverse to him and that he was not given an opportunity to comment on it or make submissions.

On 8 November 2007 Hayne J stated a case for consideration by the Full Court. The issues raised for consideration arise from a number of provisions of the *Migration Act* 1958 (Cth) (the Act) which in combination have the effect that in "primary decisions" as identified in the Act, the High Court is the only court which has jurisdiction. Because the jurisdiction of the Federal Court or the Federal Magistrates Court is excluded by certain provisions of the Act, this Court cannot remit them for hearing to either of those courts. The plaintiff seeks to challenge the validity of the identified provisions of the Act contending that there is an implied power in the High Court to remit matters commenced in its original jurisdiction to another court and that a law purporting to prohibit the Court from exercising that power is invalid.

A Notice of Constitutional Matter has been given and the Attorney-General of the Commonwealth will be intervening.

The questions referred by the Case Stated include:

Q1. Is the effect of ss 476, 476A, 476B & 484 of the *Migration Act*, read with the definition of "migration decision" in ss 5, 5E & 474, that the only Court that can hear and determine an application for any or all of:

a) the constitutional writs of prohibition and mandamus;
b) the constitutional remedy of injunction against an officer of the Commonwealth;
c) the public law remedy of certiorari;

d) the public law remedy of declaration in a suit against the Commonwealth or a person being sued on behalf of the Commonwealth,

in respect of a "primary decision" (as defined in s 476(4)), is the High Court of Australia?

Q2. If the answer to Question 1 is "yes", are any or all of ss 476, 476A, 476B & 484 of the Act invalid:

A. because they curtail, limit or impair, either directly or as a matter of practical effect, the constitutional role of this Court?

B. because they curtail, limit or impair, either directly or as a matter of practical effect, the right or ability of applicants to seek the relief identified in paragraphs (a)-(d) of Question 1?

Q3. If the answer to Question 1 is "yes", are any or all of ss 476, 476A, 476B & 484 of the Act, and/or ss 38(e) & 39(1) of the *Judiciary Act* 1903 (Cth) invalid in so far as they apply to "migration decisions" (as defined):

A. because they are contrary to an implied power of this Court to remit to another court an application commenced in this Court for the relief identified in paragraphs (a)-(d) of Question 1?

B. because they impair or frustrate the exercise of an implied power of this Court to decline to hear an application commenced in this Court for the relief identified in paragraphs (a)-(d) of Question 1, on the basis that another court is a more appropriate court?

Q4. If the answer to Question 1 is "No", or the answer to Question 2 or to Question 3 is "Yes", should this matter be remitted to another court and, if so, to which court?

C.T.M. v THE QUEEN (S591/2007)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 24 May 2007

Date of grant of special leave: 16 November 2007

The Crown case was that the complainant was sexually assaulted by the appellant and two of his friends.

The complainant was 15, the appellant 17, at the time of the offence. They met at school and had been friends for some months. The complainant went with a friend to the appellant's flat on a Saturday night at about 10.30pm. She was quite intoxicated. The appellant was at the flat with a number of other boys. They had also been drinking. The complainant eventually fell asleep in an upstairs bedroom. She woke to find the appellant having sex with her. Two of his friends also had sex with her. When they had finished the complainant went downstairs and stormed out of the house. She ran into a friend soon afterwards and reported that she had been sexually assaulted. The police were notified.

The appellant and his co-accused were tried before a jury on a charge of aggravated sexual assault. That offence was pursuant to s 61J of the *Crimes Act* 1900 (NSW) ("the Act"). There was an alternative charge of having sexual intercourse with a child between the age of 14 and 16 in circumstances of aggravation contrary to s 66C(4) of the Act. The appellant was found not guilty of these two offences but was found guilty of a statutory alternative, being an offence under s 66C(3) (sexual intercourse with a child between the age of 14 and 16).

The defence case was a complete denial that intercourse had occurred - the appellant did not give evidence at trial, but in his interview with police he denied that he had intercourse with the complainant. Notwithstanding this, defence counsel submitted that if the jury did not accept the appellant's denial he had a common law defence of honest and reasonable mistake of fact available, because he had held an honest and reasonable belief that the complainant was 16 years old at the relevant time. Garling DCJ ruled that the common law defence was still available and that the appellant was permitted to argue it. The trial judge directed the jury that the onus of proof of this defence rested on the appellant on the balance of probabilities.

The Court of Criminal Appeal (Hodgson JA, Howie and Price JJ) dismissed the appeal. Howie J gave the judgment of the Court. His Honour noted that insofar as the trial judge directed that the appellant bore the onus of proof with respect to the defence, he fell into error. However, the principal question was whether in fact the defence of honest and reasonable mistake was available at all. His Honour concluded that it was not.

The respondent has filed a notice of contention. The respondent contends that the Court of Criminal Appeal wrongly held that the decision of this Court in *Pemble v The Queen* (1971) 124 CLR 107 has the effect that the common law defence of honest and reasonable mistake applies even though the defence relied on was not that the appellant, at the time of having intercourse mistakenly believed that the complainant was over 16, but a denial that intercourse occurred at all. The respondent also contends that the Court of Criminal Appeal wrongly held that the onus of disproving the defence of honest and reasonable mistake lay on the prosecution and that there was no onus on the accused to establish the defence.

The grounds of appeal are:

- The Court of Criminal Appeal erred by finding that the common law defence of honest and reasonable mistake of fact does not apply to an offence pursuant to the *Crimes Act* 1900 (NSW) s 66C(3).