SHORT PARTICULARS OF CASES
APPEALS

BRISBANE
AUGUST 2017

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THORNE v. KENNEDY (B14/2017)

Court appealed from: Full Court of the Family Court of Australia

Date of judgment: 26 September 2016

Special leave granted: 10 March 2017

The parties to this appeal are the appellant wife ("the wife") and the deceased husband's personal representatives ("the husband's representatives").

The wife seeks to set aside orders of the Full Court of the Family Court of Australia which held that a Financial Agreement dated 20 November 2007 ("the November Agreement") between herself and her husband was binding and that it prevented her from seeking a property settlement and spousal maintenance under the *Family Law Act* 1975 (Cth) ("the Act").

The wife, then aged 36 and the husband, then aged 67 met over the internet in mid-2006. At the time that they met, the wife was not living in the country of her birth and her English language skills had been informally acquired. She had no children and no assets of any substance. The husband however was an Australian property developer with assets worth at least $18 million. He was divorced from his first wife, and had adult children.

Following their courtship, the wife travelled to Australia with the husband in February 2007 and moved into his penthouse. On 26 September 2007, with their wedding scheduled for 30 September 2007, the wife and the husband signed a Financial Agreement ("the September Agreement"). It provided that the wife was to receive a total payment of $50,000 plus CPI in the event of a separation after at least 3 years of marriage. There were some other provisions of a testamentary nature which provided for the wife to receive a penthouse worth up to $1.5M, a Mercedes and a continuing income in the event of the husband's death "prior to either party signing a Separation Declaration following separation".

The husband had made it clear to the wife from very early on that he wanted to protect his wealth for his children and that, if they were to get married, she would have to sign a legal agreement to that effect. The wife however did not learn the terms of the September Agreement until days before the wedding, when she attended at an appointment (arranged by the husband) at a solicitor's office to sign it. By that stage her parents and sister had travelled to Australia for the wedding and were also staying at the husband's home. The husband had also told the wife that if she failed to sign the September Agreement, the wedding would be off. When presented with the draft September Agreement, the wife's only concern was with the testamentary provisions - not about the separation provisions. The wife's solicitor advised her orally and then in writing not to sign the Agreement for several reasons including that it was all in the husband's favour and not in hers. After some minor changes to the September Agreement requested by the wife's solicitors were agreed to by the husband's, the wife nevertheless signed it and then in November signed the second Agreement, revoking the first but otherwise in the same terms.

On 16 June 2011 the husband signed a Separation Declaration after the couple had been cohabiting for about 4.5 years. The wife then commenced proceedings in the Federal Circuit Court seeking orders that both Agreements be declared not to be binding and/or to be set aside. In their place she sought orders for a property settlement and spousal maintenance. The husband died on 19 May 2014 (part way through the hearing) and the husband's representatives were then substituted for him in the proceedings. In March 2015 the Federal Circuit Court made orders that neither Agreements were binding and it set them both aside. The Federal Circuit Court held that the wife had "*signed the Agreements under duress born of inequality of bargaining power where there was no outcome to her that was fair and reasonable*".

On 26 September 2016 the Full Court of the Family Court (Strickland, Aldrige and Cronin JJ) allowed the appeal of the husband's representatives. Their Honours found that both Agreements were binding on the parties. They further held that there had *not* been duress, undue influence or unconscionable conduct on the husband's part which had induced the wife to enter into the agreements thus rendering them void or voidable.

A central issue in the appeal is whether the principles of law and equity for determining the validity of contracts are any different under the Act (in their application to Financial Agreements), given the statutory and public policy context in which they operate in accordance with the obligations of mutual support inherent in a marriage relationship.

The grounds of appeal are:

- That the Full Court erred in law in failing to find the Financial Agreements were not binding and should be set aside on the ground of duress;

- That the Full Court erred in law in failing to find the Financial Agreements were not binding and should be set aside on the ground of undue influence;

- That the Full Court erred in law in failing to find the Financial Agreements were not binding and should be set aside on the ground of unconscionable conduct in circumstances where the husband took unconscionable advantage in securing the Appellant's signature to them.

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ALDI FOODS PTY LIMITED AS GENERAL PARTNER OF ALDI STORES (A LIMITED PARTNERSHIP) v. SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION AND ANOR (M33/2017)

Court appealed from: Full Court of the Federal Court of Australia
[2016] FCAFC 161

Date of judgment: 29 November 2016

Special leave granted: 8 March 2017

This appeal concerns the jurisdiction of the Fair Work Commission in approving enterprise agreements under the *Fair Work Act* 2009 (Cth) ('the FWA").

In 2015 the Appellant ("ALDI") was in the course of setting up a new region in South Australia, to be called "Regency Park". In so doing it canvassed its existing staff, employed in other regions, for expressions of interest in working in the new region. From those who expressed an interest ALDI selected a number to whom offers of employment in the region were made, and those offers were accepted. In all 17 contracts were issued to 17 proposed employees. ALDI proceeded to make an enterprise agreement with these employees under Pt 2-4 of the FWA ("the Agreement") and requested the employees to vote for the agreement under the FWA. Their votes were cast and then ALDI applied to the Fair Work Commission for the approval of the agreement. The Agreement was duly approved by the Deputy President of the FWC.

The First Respondent was not involved in this process but later sought, and was granted, leave to appeal against the approval decision of the Deputy President, but its appeal from that decision was dismissed by the Full Bench of the FWC. The First Respondent then applied for judicial review to the Federal Court, challenging several jurisdictional aspects of the decision of the Full Bench.

The majority of the Federal Court held that the 17 employees were not "covered by the Agreement" as required by the FWA. In so doing, the majority accepted the First Respondent's submission that this was a 'genuine new enterprise' i.e. a 'greenfield' agreement as it was setting up a new business and therefore the SDA, as the relevant employee organisation representing the employees that *would be covered* by the agreement, was entitled to represent the industrial interests of those employees. ALDI had taken the view that the Regency Park agreement was not a 'greenfields' agreement and had not followed the necessary procedures under the FWA for the making of such agreements. The Deputy President of the Fair Work Commission also dealt with the Agreement as if it was *not* a greenfields agreement and the Full Bench held that the employees who accepted on-going employment in the Regency Park region were employed by ALDI at the time the Agreement was made and were covered by the Agreement in the requisite sense.

The majority also held that the Full Bench erred in deciding that the Agreement satisfied 'the better off overall test" ("the BOOT"), i.e. that each award-covered employee, and each prospective award-covered employee would be better off overall if the Agreement applied rather than the applicable award.

ALDI appealed to the High Court.

The grounds of appeal are:

- That the majority of the Full Court erred in finding there was jurisdictional error by the Fair Work Commission in exercising its functions under s 186 of the FWA to approve the enterprise agreement in this case;

- That the majority erred in determining there was jurisdictional error made by the Fair Work Commission in determining that the Agreement satisfied the BOOT as set out in s 193 of the FWA.

In this appeal the First Respondent has filed a Notice of Contention contending that the decision of the Full Court should be affirmed on the grounds that the Full Bench:

- Committed an error of law on the face of the record in concluding that the employees by whom the Agreement was made were employees who will be covered by the Agreement within the meaning of s 172(g) of the FWA;

- Committed an error of law on the face of the record in concluding that the Agreement passed the BOOT under s 186(2) of the FWA.

ESSO AUSTRALIA PTY LIMITED v. THE AUSTRALIAN WORKERS' UNION (M185/2016);
THE AUSTRALIAN WORKERS' UNION v. ESSO AUSTRALIA PTY LIMITED (M187/2016)

Court appealed from: Full Court of the Federal Court of Australia
[2016] FCAFC 72

Date of judgment: 25 May 2016

Special leave granted: 16 December 2016

These appeals are being heard together as they arose from the same industrial action. They involve statutory interpretation of different sections of the *Fair Work Act* 2009 (Cth) *("*the FWA*").*

At all material times Esso and the AWU were bargaining for a new proposed enterprise agreement to apply at several of Esso's operational sites. In support of its claims the AWU organised various forms of industrial action against Esso, commencing in early February 2015. The AWU asserted that all of this industrial action was 'protected industrial action' under the FWA; Esso contended that some of it was not. One form of industrial action contested by Esso was a ban on 'equipment testing, air freeing and leak testing' which it asserted was not protected because it was not captured by the term 'de-isolation of equipment' specified in the AWU's requisite written notice under the FWA.

Section 418 of the FWA empowers the Fair Work Commission to make orders stopping 'unprotected' industrial action. On 6 March 2015 Esso obtained an order from the Commission under s 418(1) stopping the disputed industrial action between 6 and 20 March 2015. In contravention of the order the AWU continued to organise the disputed industrial action. Esso argued that flowing from these contraventions*, all other forms of industrial action* being organised by the AWU for the proposed enterprise agreements, from that point onwards, *including those forms which were otherwise notionally 'protected'*, could not be 'protected' because of the operation of s 413(5). Esso sought a declaration to this effect. The trial Judge upheld that argument. However Esso's claim for an injunction restraining the AWU from organising further industrial action was rejected by the trial Judge. Esso's claim was rejected by the Full Court for different reasons based on different constructions of s 413(5) by and it is those rejections which found the first appeal (Esso v. AWU).

In relation to the second appeal (AWU v. Esso), the issue is whether the intent to coerce referred to in ss 343 and 348 refers to a subjective intent to take unlawful, illegitimate or unconscionable action in order to overbear the will or negate the choice, of another. Esso contended that by organising the bans in the written notice, the AWU contravened s 343 by organising 'action' against Esso 'with the intent to coerce Esso …to make an enterprise agreement...on terms acceptable to the AWU'. The primary Judge held that "the intent of Mr D, and therefore the AWU in organising the action …was to apply sufficient pressure on Esso to cause it to act otherwise than in the exercise of its own free choice". Because of the way the Judge construed the relevant section *the actual belief* of Mr D that the action would be protected was "irrelevant to the question of whether he intended to coerce Esso". The Full Court upheld the primary Judge's approach in this regard.

As to the first appeal (in which Esso is the appellant) the ground of appeal is:

- That the Full Court erred in its construction of s 413(5) by concluding that it only operated with respect to the engagement in or organisation of industrial action which was of itself in contravention of an order of the kind referred to in that section, and when those orders still currently operated and applied to the contravention at the time of that action.

In this appeal the respondent has filed a Notice of Contention whereby the respondent wishes to contend that the decision of the Full Court should be affirmed but on the ground:

- That the Full Court erred by failing to construe s 413(5) as being limited in its operation to contraventions where the contravening conduct is continuing or occurring at the time when the relevant bargaining representative is seeking to organise or arrange protected industrial action.

As to the second appeal (in which the AWU is the appellant) the grounds of appeal include:

- That the majority of the Full Court erred in holding that it is unnecessary in the establishment of ss 343 and 348 contraventions to prove that the person said to have acted with an intent to coerce intended to take action that was unlawful, illegitimate or unconscionable and hence coercive;

- That the majority of the FC erred by excluding from its consideration, the appellant's actual intent, which was to take protected industrial action and not to take coercive action prohibited by ss 343 and 348.

COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE v HART & ORS (B21/2017);
COMMONWEALTH OF AUSTRALIA v YAK 3 INVESTMENTS PTY LTD AS TRUSTEE FOR YAK 3 DISCRETIONARY TRUST & ORS (B22/2017);
COMMONWEALTH OF AUSTRALIA & ANOR v FLYING FIGHTERS PTY LTD & ORS (B23/2017)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2016] QCA 215

Date of judgment: 29 August 2016

Special leave granted: 6 April 2017

Mr Steven Hart, an accountant, ran tax avoidance schemes that resulted in the acquisition of various assets by Mr Hart and four of his companies. In 2003 the Commonwealth obtained a restraining order over property owned or leased by Mr Hart or his companies, under s 17 of the *Proceeds of Crime Act* 2002 (Cth) ("the Act"). The property included land, aircraft and subleases of hangars.

In 2005 Mr Hart was sentenced to seven years' imprisonment, upon being convicted of nine offences of defrauding the Commonwealth in contravention of s 29D of the *Crimes Act* 1914 (Cth). Due to Mr Hart's convictions, in 2006 the restrained property was forfeited to the Commonwealth under s 92 of the Act. In 2010 the District Court of Queensland ordered Mr Hart to pay a pecuniary penalty of $14,757,287.35 to the Commonwealth under s 116 of the Act.

The Commonwealth then applied to the District Court for an order under s 141 of the Act that the forfeited property be applied towards satisfaction of the pecuniary penalty, on the basis that Mr Hart had had effective control of such property. The companies applied for their interests in the forfeited property to be transferred to them under s 102 of the Act. Section 102(3)(a) provided that an order could be made if "the property was not … derived or realised, directly or indirectly, by any person from any unlawful activity". In response, the Commonwealth sought orders that any such transferred interests nevertheless be applied to reduce the pecuniary penalty.

On 6 May 2013 Judge Andrews, after largely refusing the companies' application, ordered that certain assets be transferred to the companies if they paid the Commonwealth $1.6 million (less certain sale proceeds). This was after construing the words in s 102(3)(a) of the Act, in relation to the derivation of the subject property, to mean "not substantially" derived from any unlawful activity. His Honour held that the relevant date for the assessment of effective control, for the purposes of s 141(1)(c) of the Act, was the date on which a restraining order was made. After finding that all elements of s 141 of the Act had been satisfied, his Honour nevertheless dismissed the Commonwealth's application on discretionary grounds. That outcome turned on the fact that the assets under Mr Hart's effective control were encumbered by charges in favour of another company (Merrell Associates Ltd).

Appeals were filed by Mr Hart's companies, on one hand, and by both the Commonwealth and the Commissioner of the Australian Federal Police (together, "the Commonwealth appeals") on the other.

The Court of Appeal by majority (Douglas J and Peter Lyons J; Morrison JA dissenting) allowed the companies' appeal and dismissed the Commonwealth appeals. The Court of Appeal then made various declarations and orders in relation to the transfer of forfeited property by the Commonwealth to the companies, after setting aside the condition (ordered by Judge Andrews) that the companies pay the Commonwealth.

In respect of the Commonwealth appeals, the majority held that declarations could not be made under s 141 of the Act in respect of property that was already the subject of a restraining order under s 17 (which would ordinarily mature into forfeiture to, and subsequent sale by, the Commonwealth). Their Honours held that the question of effective control was to be determined at the date of the determination of an application under s 141, not at the date of a restraining order. The Commonwealth could therefore not establish effective control by Mr Hart at the relevant time. In respect of the companies' appeal, the majority held that the words "derived or realised" in s 102(3)(a) of the Act meant "wholly derived or wholly realised". Derivation partly from unlawful activity was no barrier to the making of orders that the Commonwealth transfer property that had been forfeited to it under s 92.

Morrison JA however would have allowed the appeal of the Commonwealth and dismissed those of the companies and the Commissioner of the Australian Federal Police. His Honour held that the relevant time to assess "effective control" under s 141(1)(c) of the Act was when the restraining order was made. Morrison JA also held that s 102(3)(a) was not to be read as if "substantially" (or any other word) was included.

In appeal B21/2017, the grounds of appeal include:

- The majority of the Court of Appeal erred in construing s 141 of the Act as being inapplicable to property that had been subject to restraining orders under s 17 of the Act;
- The majority of the Court of Appeal erred in construing the date of effective control in s 141(1)(c) as the date on which an application under s 141 is determined, notwithstanding that the property was the subject of restraining orders under s 17 of the Act.

In appeals B22/2017 and B23/2017, the grounds of appeal include:

- The majority erred in construing the words "the property was not … derived or realised … by any person from any unlawful activity" in s 102(3)(a) of the Act as meaning "the property was … not wholly derived or wholly realised … by any person from any unlawful activity."

Notices of contention have been filed by the respondents in appeals B22/2017 and B23/2017.

KOANI v THE QUEEN (B20/2017)

Court appealed from: Queensland Court of Appeal
[2016] QCA 289

Date of judgment: 11 November 2016

Special leave granted: 6 April 2017

Mr Christopher Koani was charged with murdering his de facto partner, Ms Natalie Leaney, with a single gunshot wound to the head on 10 March 2013. At the commencement of his trial he pleaded not guilty to murder, but guilty to manslaughter. The prosecution however refused to accept that plea. The prosecution's case was that Mr Koani shot Ms Leaney in the course of an argument, during which he was handling a modified shotgun. After a six day trial, Mr Koani was convicted of murder and sentenced to life imprisonment.

Mr Koani later appealed against that conviction on two grounds, only one of which is relevant for present purposes. That being, whether it is open to the jury to consider whether a person is guilty of murder through a negligent act or omission.

Relevantly, s 289 of the *Criminal Code* (Qld) ("the Code") imposes a duty on a person in charge of a dangerous thing (such as a gun) to also take reasonable care so as to avoid any danger arising from its use. The person in charge of that thing is therefore held to have caused any consequences (such as a death) by reason of any omission to perform that duty.

On 11 November 2016 the Court of Appeal (Gotterson JA & Atkinson J, McMurdo P dissenting) dismissed Mr Koani's appeal. The majority held that there was no difficulty in the trial judge directing the jury to consider s 289 if they were not satisfied that the prosecution had established that Mr Koani had killed Ms Leaney by a willed act. It also followed that the trial judge could direct the jury that, if they were satisfied that the duty in s 289 had been breached, then they should consider whether the unlawful killing was either murder or manslaughter by reference to the element of intent.

President McMurdo however held that a breach of the duty as required by s 289 of the Code can only support a conviction for manslaughter. To convict for murder, the prosecution was required to prove beyond reasonable doubt that Mr Koani's willed act discharged the gun thereby killing Ms Leaney and that he contemporaneously either intended to kill or do her grievous bodily harm. Her Honour held that the trial judge was wrong to direct the jury that, if the prosecution failed to prove beyond reasonable doubt that the discharge of the gun was a willed act, but it did prove beyond reasonable doubt his criminal negligence under s 289 of the Code (and a contemporaneous intent to kill or do bodily harm), then they could convict of murder.

The ground of appeal is:

- The majority of the Court of Appeal erred in holding that a breach of s 289 of the Code could found a conviction of murder, rather than only manslaughter.