SHORT PARTICULARS OF CASES
APPEALS

HOBART
SEPTEMBER 2024

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FULLER & ANOR v LAWRENCE (B24/2024)

Court appealed from: Supreme Court of Queensland Court of Appeal [2023] QCA 257

Date of judgment: 15 December 2023

Special leave granted: 11 April 2024

In April 2020, Mr Mark Lawrence was released from custody under a supervision order ("the Supervision Order") made by the Supreme Court of Queensland under section 13(5)(b) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ("the DPSO Act"). The Supervision Order, in detailed terms addressed to Mr Lawrence, included "... you must obey any reasonable direction that a Corrective Services officer gives you about ... who you may not have contact with ...".

The DPSO Act prescribes mandatory requirements for the content of supervision orders, which include, in s 16(1)(db), that the released prisoner "comply with every reasonable direction of a corrective services officer that is not directly inconsistent with a requirement of the order". Sections 16A and 16B of the DPSO Act empower corrective services officers to give directions concerning certain matters which do not expressly include contact (or no contact) with other persons, while s 16C provides that a direction mentioned in s 16(1)(db) may be given if an officer believes it necessary to ensure the adequate protection of the community, or for the prisoner's rehabilitation or care or treatment.

In November 2022, a Queensland Corrective Services officer, Ms Bianca Fuller, issued a direction ("the Direction") that approved Mr Lawrence having contact with a certain person by telephone, including by video calls. The Direction however denied a request by Mr Lawrence to have in-person contact with the person. Ms Fuller then declined a request by Mr Lawrence for a statement of reasons, whereupon Mr Lawrence commenced proceedings under s 38 of the *Judicial Review Act 1991* (Qld) ("the JR Act") against Ms Fuller and the Chief Executive of Queensland Corrective Services (the Second Appellant), seeking an order for the giving of reasons for the Direction insofar as it denied in-person contact.

The Appellants resisted the giving of reasons, on the basis that the Direction was not a decision made "under an enactment", a requirement prescribed in s 4(a) of the JR Act; rather, they contended, it was made under the Supervision Order. Applegarth J found however that the Direction did meet the legal requirements of a decision made under an enactment, as it was both authorised by the DPSO Act and it was a decision which itself altered or affected legal rights or obligations. His Honour ordered that a statement of reasons under s 33 of the JR Act be given to Mr Lawrence.

An appeal by the Appellants was unanimously dismissed by the Court of Appeal (Bowskill CJ, Morrison and Bond JJA). Their Honours held that, although supervision orders make directions enforceable, the source of the power to give the Direction was the DPSO Act and not the Supervision Order. Power was conferred either expressly or impliedly by s 16C(1) of the DPSO Act. The Court of Appeal also held that the Direction was a decision which *itself* altered or affected legal rights or obligations, as Mr Lawrence was obliged to comply with it

at the time it was made, without more. Bond JA further explained that although Mr Lawrence's rights were affected by a judicial decision in the making of the Supervision Order, that decision operated so that Mr Lawrence's rights were capable of being affected by the second type of decision, namely the Direction. Mr Lawrence's rights were then affected by the Direction in a way in which they had not previously been affected.

The sole ground of appeal is:

- The Court of Appeal erred in concluding that a direction given by a Corrective Services officer to a prisoner who is the subject of a supervision order under the DPSO Act "itself" affects rights in the sense necessary to qualify as a "decision … made under an enactment" within the meaning of the JR Act.

KRAMER & ANOR v STONE (S53/2024)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales
[2023] NSWCA 270

Date of judgment: 10 November 2023

Special leave granted: 11 April 2024

The appellants are the executors of the estate of the late Dame Leonie Judith Kramer. Relevantly, the first appellant ("Hilary") is one of two daughters of Dame Leonie. Dame Leonie died on 20 April 2016. At the time of her death, Dame Leonie was the sole owner of a rural property of approximately 100 acres in Upper Colo, New South Wales ("the Colo Property"), her husband (Dr Harry Kramer) having died in 1988. By her will made on 11 November 2011, Dame Leonie left the Colo Property to Hilary. At the time of the grant of probate in December 2016, the Colo Property was valued at $1.5 million. This matter concerns the entitlement to the Colo Property.

The respondent had been farming on the Colo Property under an oral share farming agreement for some decades. The respondent claimed that he was entitled to the Colo Property on the basis of a representation allegedly made to him by Dame Leonie that he would receive the Colo Property on her death, following earlier similar representations made to him by Dr Kramer. He claims that in leaving the Colo Property to Hilary rather than to himself, Dame Leonie acted unconscionably in conflict with the representations that had been made to him by Dame Leonie and Dr Kramer. The respondent maintains that he relied on the representations, conducted the share farming, and undertook additional tasks on the Colo Property in circumstances where he did not, as he otherwise would have, terminate the share farming agreement to seek more remunerative work elsewhere. It is noted that Dame Leonie made a bequest of $200,000 to the respondent in her will.

The issues raised in this matter are whether, in a proprietary estoppel case, the element of encouragement coupled with reasonable and detrimental reliance by the respondent is sufficient to establish unconscionable conduct; and the type of knowledge of the detriment (if any) that is required.

The primary judge (Justice Robb) found that the respondent had established an entitlement to equitable relief and that the Colo Property was held on constructive trust for the respondent on the basis of an equitable estoppel arising out of the representation made by Dame Leonie to the respondent. The appellants appealed to the Court of Appeal, which dismissed the appeal.

The appellants submit that the equity recognised by proprietary estoppel arises from the conduct of the donor after making the voluntary promise, and that the Court of Appeal's conclusion departed from this position and was contrary to binding authority on the issue, particularly the decision in *Olsson v Dyson* (1969) 120 CLR 365. The appellants further submit that the Court of Appeal ought to have held that constructive knowledge of detrimental reliance is insufficient to establish unconscionability in this case, where knowledge was the only relevant matter arising after the making of the promise which could support a conclusion of unconscionability.

The respondent objects to the statement of material facts as set out by the appellants, claiming it is inaccurate and tendentious, and that the appellants' submissions mischaracterise what happened and what was determined by the primary judge and the Court of Appeal. The respondent submits that the grant of special leave to appeal should be revoked.

The grounds of appeal are:

- The Court of Appeal erred by concluding that, in cases of proprietary estoppel by encouragement, the elements of *encouragement* coupled with *reasonable* and *detrimental reliance* are sufficient, without more, to establish unconscionable conduct. Consistently with authority of this Court binding upon it, the Court of Appeal ought to have held:

  a) the equity "*arises… from the conduct of the donor <u>after</u> making the voluntary promise*"; and

  b) constructive knowledge of detrimental reliance is insufficient to establish unconscionability, at least where (as in this case) knowledge is the only matter which would support an unconscionability finding.

SKYCITY ADELAIDE PTY LTD v TREASURER OF SOUTH AUSTRALIA & ANOR (A10/2024)

Court appealed from: Supreme Court of South Australia Court of Appeal [2024] SASCA 14

Date of judgment: 22 February 2024

Special leave granted: 6 June 2024

The appellant ("SkyCity") operates the SkyCity Casino in Adelaide pursuant to a licence granted under section 5(2) of the *Casino Act 1997* (SA) ("the Casino Act"). The conditions of the licence are contemplated by s 16 of the Casino Act, which provides for an Approved Licensing Agreement ("ALA"). On 27 October 1999, SkyCity and the Treasurer of South Australia for and on behalf of the State of South Australia (together, "the respondents") entered into an ALA. The most recent variation to that agreement took place on 20 October 2020. Section 51 of the Casino Act provides that a licensee must pay casino duty (and interest and penalties for late payment). The calculation of casino duty is governed by a separate Casino Duty Agreement ("CDA"), as contemplated by s 17 of the Casino Act. The CDA has been varied by agreement several times since its inception in 1999. Pursuant to the CDA, SkyCity is obliged to pay casino duty on "net gambling revenue", which comprises "gross gambling revenue" less the amount of monetary prizes (and some other specified amounts).

SkyCity operates a rewards program within the casino. Customers who participate in the rewards program are able to accumulate 'Points' when using the cashless gaming system that is operative in Electronic Gaming Machines and Automated Table Games. Points can be converted into 'Credits'. To enable a conversion, a customer must first wager Credits on the same trading day in an amount equal in value to the nominal value of the Points they wish to convert. Once the Points have passed through that 'gate', Credits can then be converted into cash or used for gambling ("Converted Credits").

A dispute arose between the parties as to what duties are payable by SkyCity with respect to Converted Credits under the operative terms of the CDA. In particular, they disagreed as to whether the value of the Converted Credits, which had been converted from Points and then wagered by a customer, were to be regarded as constituting "gross gambling revenue" and consequently "net gambling revenue" subject to duty at specified rates.

In September 2022, SkyCity lodged a statement of claim in the Supreme Court of South Australia, seeking declarations as to the correct interpretation and effect of the CDA. The respondents filed a cross claim seeking payment of any duty payable by SkyCity should the respondents' interpretation of the CDA be upheld. In June 2023, a Judge of the Supreme Court ordered that three questions of law be reserved for determination by the Court of Appeal.

The Court of Appeal in answering those questions found that Points are fundamentally different from Credits. They can be converted directly to cash and can be staked in gambling at any time. They do not expire. A positive Credit balance represents a chose in action against SkyCity, of monetary value to the amount represented by the Credit balance. At the point of gambling, there is no distinction between Credits dependent on their genesis. The duty regime under the

Casino Act and the CDA is constructed on the basis of taxing the difference between the monetary value gained by the casino and the monetary value paid out at the point of gambling. It does not purport to be a tax on a different form of 'revenue' received at some earlier point, such as when Credits are purchased. The Court held that Points do not constitute a 'monetary prize' within the meaning of "net gambling revenue" in clause 1.1 of the CDA. On the question related to interest and penalties, the Court found that the legislative regime provides for agreement on both interest and penalties. This language, having regard to its ordinary usage in the law of contract, distinguishes objectively between interest as a compensatory device and penalties as a penal device. Section 51 of the Casino Act contains no strong contextual indicator that the legislative regime has abolished the common law against, or the equitable jurisdiction to relieve against, interest provisions that go beyond the compensatory so as to operate as penalties.

The appeal to this Court relates to the first question reserved.

The sole ground of appeal is:

- The Court of Appeal erred in answering "Yes" to Question 1 of the case stated, on the basis that the concepts of "gross gambling revenue" and "net gambling revenue" in the CDA included the value of Credits wagered on electronic gambling which had their source in loyalty points given to customers by the appellant.

The respondents have filed a notice of cross-appeal with the following grounds:

- The Court of Appeal erred in answering "Yes" to Question 3 of the case stated. The Court of Appeal should have found that ss 17 and 51 of the *Casino Act 1997* (SA) have the effect that the common law or equitable principles concerning penalty clauses do not apply to cl 11 of the current CDA because:

    1. by expressly providing that the agreement would deal with "penalties", ss 17 and 51 of the Casino Act authorised the parties to the CDA to agree a term that was a penalty at law: that is, a clause that had as its predominant purpose penalising any failure by SkyCity to meet its obligations as agreed under the CDA in a timely manner and thereby to compel SkyCity's compliance with the scheme, including by means of the imposition of interest on unpaid duty; or

    2. in the alternative, by expressly providing that the licensee "must pay casino duty (and interest and penalties…) in accordance with the CDA" which if not paid would be recoverable as a debt, s 51 of the Casino Act created a liability imposed by statutory fiat, including a mechanism for enforcement and recovery, which did not depend upon cl 11 of the current CDA for its efficacy.