

40/81

O N A P P E A L
FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL
IN PROCEEDINGS NO. 350 of 1980

B E T W E E N :

WILSON PARKING (N.S.W.) PTY. LIMITED Appellant

- and -

THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH First Respondent

- and -

TORE JOHN LENNART SUNESON
HAROLD SIMPSON
JOHN McCORMACK
WILLIAM SMITH
LIONEL DOUGLAS WHITTINGHAM
NORMAN RICHARDSON
ALLEN O'NEIL
GEORGE WILLIAM WILKS
INDUSTRIAL COMMISSION OF NEW SOUTH WALES Other Respondents

CASE FOR THE APPELLANT

1. This is an appeal pursuant to leave granted by the Court of Appeal of the Supreme Court of New South Wales on 20th July 1981 to appeal from the Judgment and Order of that Court whereby proceedings brought by the Appellant in the Court of Appeal to prohibit restrain and/or quash an application made

Record

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to the Industrial Commission of New South Wales by the First Respondent was dismissed.

2. On 9 September 1977 the Federal Miscellaneous Workers' Union of Australia, New South Wales branch (the 'Union') commenced proceedings in the Industrial Commission of New South Wales against Wilson Parking (N.S.W.) Pty. Limited (the Appellant') and Tore John Lennart Suneson and another seeking orders under Section 88F of the Industrial Arbitration Act 1940 (the 'Act') declaring void ab initio a contract or arrangement made between the Appellant on the one hand and the said Tore John Lennart Suneson and others on the other hand. p.49

3. The Union was not a party to the aforesaid contract or arrangement in respect of which it sought a declaration that the contract or arrangement be avoided or otherwise varied.

4. The Union's application came on for hearing before His Honour Mr Justice Dey who, pursuant to Section 36C of the Act, referred a preliminary point, as to, the locus standi of the Union to bring proceedings under Section 88F of the Industrial Arbitration Act 1940 in respect of a contract or arrangement to which it was not a party to the Industrial Commission in Court Session. The matter referred by His Honour was:-

'Has the Industrial Commission jurisdiction, power and/or authority under the Industrial Arbitration Act of 1940 to make, upon the application of the Federated Miscellaneous Workers' Union of Australia, N.S.W. Branch, as an industrial union of employees, an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time a contract or arrangement between the respondent, Wilson Parking (N.S.W.) Pty. Limited and the respondent, L Suneson, to which the union is not a party?'

Subsequently, and by consent, Mr Justice Dey added to his reference

'and providing in terms of Paragraphs (2) and (3) of the schedule to the Notice of Motion'.

The addition was made to ensure that the question of the Commission's jurisdiction to make orders for payment of money and costs pursuant to Section 88F (2) and (3) was before the Commission in Court Session.

5. On 25 August 1978 the Industrial Commission in Court Session heard and determined the preliminary point and held that the Union was entitled to institute proceedings under Section 88F of the Act. pp.66-87
6. An application to the Supreme Court of New South Wales Court of Appeal, to restrain the Industrial Commission from proceeding further on the said application made by the Union was dismissed on the ground that the Union had locus to commence the proceedings. Members of the Court suggested that that application to the Court of Appeal may have been premature as no final determination had been made by the Industrial Commission. pp.88-121
7. Subsequently the Industrial Commission constituted by Mr Justice Dey resumed the hearing of the application by the Union for an order declaring void ab initio, or otherwise varying, the contract or arrangement made between the appellant on the one hand and the said Tore John Lennart Suneson on the other hand.
8. Both the appellant and the said Tore John Lennart Suneson resisted the Union's application and sought to maintain the said contract or arrangement in full force and effect. p.18
9. On 24 June 1980 Mr Justice Dey made the following orders that:- pp.33-34

(1) The contract or arrangement constituted by the submission of the tender document dated 11th March 1977, signed by Norman Cooper Richardson as Managing Partner on behalf of the partnership consisting of the respondent, Tore John Lennart Suneson and others, and the acceptance thereof by the respondent, Wilson Parking (N.S.W.) Pty. Limited and all conditions be declared void in whole ab initio, except insofar as such contract or arrangements or such conditions or collateral arrangements provided for the payment of money to the said Tore John Lennart Suneson or any other memembr of the

said partnership in accordance with the terms of such contract or arrangement or of such conditions and collateral arrangements for work actually performed for the said Wilson Parking (N.S.W.) Pty Limited.

(2) The said Wilson Parking (N.S.W.) Pty Limited shall pay to the applicant, the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch, the sum of \$6,161.87 to hold in trust for the said Tore John Lennart Suneson.

(3) The said Wilson Parking (N.S.W.) Pty Limited shall pay to the said applicant, the applicant's costs of these proceedings, being 'a sum to be agreed between the parties or to be determined by the Industrial Commission of New South Wales on application by either party in the event of non-agreement as to the said sum.'

10. Proceedings were subsequently instituted by the Appellant in the Supreme Court of New South Wales Court of Appeal seeking an order prohibiting and restraining the Industrial Commission of New South Wales and the Union from proceeding further on the Orders of the Industrial Commission and requesting that such Orders be quashed. These proceedings were dismissed by the Court of Appeal (without argument) to enable the Appellant to bring the present appeal.

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11. The relevant findings of fact made by Dey J. are as follows:-

(a) The relationship between the 2nd to 9th Respondents was that of partners under a deed of Partnership.

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(b) The appellant and the 2nd to 9th Respondents had entered into a legal contractual relationship in terms of the tender document dated 11th March 1977 which provided that in consideration of a lump sum payment of \$2727.00 so the partnership would perform the following

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pp.67-69

- (i) well and faithfully execute the management of the nominated car parks;
- (ii) supply and provide all, if any, plant, equipment materials and other things requisite for or incidental to carrying out the contract;
- (iii) provide such men as shall reasonably be necessary to manage the nominated car parks for the period.

(c) That the 2nd Respondent Tore John Lennart Suneson, appeared and opposed the Union's application

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12. There was no evidence that any of the Respondents was a member of the Union and the Union did not cause to be acting on behalf of any such Respondents.

ISSUES IN THE APPEAL

13. The issues in the appeal are:-

(a) Whether on the application of an industrial union an order can be made by the Industrial Commission under Section 88F of the Act declaring void or otherwise varying a contract or arrangement where such Union is not a party of the said contract or arrangement and in opposition to the desire of all parties to such contract or arrangement to maintain it in full force and effect.

(b) Whether an order can be made by the Industrial Commission under Section 88F of the Act directing a party to a contract or arrangement avoided or varied under such section to pay monies to an industrial union where such union is not a party to such contract or arrangement and has no connection therewith.

THE LEGISLATION

14. Section 88F provides as follows:-

'(1) The Commission may make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in any industry on the grounds that the contract or arrangement or any condition or collateral arrangement relating thereto-

- (a) is unfair, or
- (b) is harsh or unconscionable, or
- (c) is against the public interest.

Without limiting the generality of the words 'public interest' regard shall be had in considering the question of public interest to the effect such a contract or a series of contracts has had or may have on any system of apprenticeship and other methods of providing a sufficient and trained labour force, or

(d) provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work, or

(e) was designed to or does avoid the provisions of an award, industrial agreement, agreement registered under Part VIIIA or contract determination.

(2) The Commission, in making an order or award pursuant to subsection (1), may make such order as to the payment of money in connection with any contract, arrangement, condition or collateral arrangement declared void, in whole or in part, or varied in whole or in part, as may appear to the commission to be just in the circumstances of the case.

(3) The Commission may make such order as to the payment of costs in any proceedings under this section, as may appear to it to be just and may assess the amount of such costs.

(4) An application under this section in respect of a contract or carriage to which Part VIIIA applies may be made by a party to the contract or by an association or contract carriers of which a party to the contract is a member.'

15. In the Courts below it was common ground that any party to a contract or arrangement which came within the ambit of Section 88F could bring proceedings under that section for an order avoiding or otherwise varying the same. See Brown -v- Rezitis (1970) 127 C.L.R. 157 and Stevenson -v- Barham (1977) 136 C.L.R. 190 where the High Court of Australia considered and inferentially approved of proceedings brought by a party to such contract or arrangement.

SUBMISSIONS ON FIRST ISSUE

16. Under Section 88F the Industrial Commission is empowered to avoid or otherwise vary contracts or arrangements whether of the employer/employee type, or the independent contractor and client type.

17. It is submitted that Section 88F does not authorise a Union to initiate proceedings under the section in relation to either contracts or employment or independent contractor and client contracts. This conclusion is based on the following considerations.

(a) The terms of the section do not confer any express right upon the Union to bring proceedings.

(b) There is no ambiguity in the section which would justify any implied right.

(c) As any of the parties to the contract or arrangement can institute proceedings to avoid or vary it, there is no need to imply the grant of such a power to the Union.

(d) Section 88F is directed to the judicial modification of private rights and the long established rules of common law and equity require that such proceeding be brought by the parties to such rights. Stockport District Waterworks -v- Manchester Corporation (1863) 7 L.T. 545, Gouriet -v- Union of Post Office Workers (1978) A.C. 435.

(e) Section 88F is designed to permit the Industrial Commission to avoid or vary specific individual contracts or arrangements and is not concerned with the general regulation or employment conditions on an industry-wide basis. The Union may have a legitimate concern in the latter (recognised by Section 20 and Section 30 of the Act); but not in the former. It has no legitimate interest in avoiding or modifying the incidents of specific employment contracts which conform with the general industry awards and which the parties wish to maintain in opposition to it.

(f) It is not permissible to utilise the history of the legislation to create an ambiguity. It is only if an ambiguity arises on the face of the legislation that reference to the history is permissible to assist in resolving it.

(g) So far as the use of the word 'award' is concerned, this reflects the right of the Commission to act on its own motion under Section 31(1)(b), and/or the right of an individual employer or employee to approach the Commission where original indication is directly conferred upon the Commission and the Commission is therefore not subject to the limitations of Section 30.

18. Alternatively to the above submission, the appellant contends

(a) that Section 88F is directed to the judicial modification of private rights.

(b) that the long established rule of both common law and equity is that a private right can only be enforced or modified on the application of the persons entitled to the right or subject to the correlative obligation.

(c) that a person who is not a party to an impeached contract or arrangement cannot be an applicant for an order seeking to have the rights avoided or modified unless acting as an agent.

19. It is therefore submitted that as the Union did not represent or act as the actual agent of any Respondents, (indeed it was actively opposed by the Respondents that appeared) it had no locus standi to seek the orders made by the Industrial Commission unless it can find some statutory agency to support its intervention. Can any basis be found?

20. The Union is registered as a trade union under the Trade Union Act 1881 and as an industrial union of employees under the Industrial Arbitration Act 1940.

2. Registration under the above Acts entitles that Union to represent only the following

(a) Members of the Union who are employees, or deemed to be employees in those industries in respect of which the Union is registered;

(b) employees or deemed employees in those industries in respect of which the Union is registered.

22. Registration under the above Act does not entitle the Union to represent persons who are not employees or deemed employees.

23. Under the Industrial Arbitration Act 1940 the main rôle of a Union is to seek awards or variations of awards in respect of the groups of employees or deemed employees whom it is entitled to represent. See Section 20. An award made on the application of a Union binds employers and employees in the industry covered by the award (see Section 87 of the Act) but does not bind non employers and non employees.

24. Mr Justice Dey's finding was that the Appellant and the 2nd to 9th Respondents were independent contractors. As the Union was registered under this Act to deal only with issues arising out of the employer/employee relationship and no others, and as the

relationship between the Appellant and the 2nd to 9th Respondents was not of that type, it was outside the scope of the Unions registered capacity and authority.

25. We submit that it is inconceivable that the legislature intended to confer power on a Union to strike down a contract or arrangement made between independent contractors in situations where no employer/employee relationship is involved. This submission is supported by the following

(a) Where the legislature desired to bring contractual relationships within the scope of the Industrial Arbitration Act 1940 it did so by express enactment . See Section 88E.

(b) In addition the Legislature provided that any expansion of the class of contractors who were to be deemed to be employees should be made by Regulation under the Act. See Section 88E(2).

26. We submit that in the light of the foregoing there can be no basis for inferring that the Legislature intended when enacting Section 88F, to confer power upon a Union to intermeddle in transactions between parties who it is not authorised to represent.

SUBMISSION IN SECOND ISSUE

27. The second issue for consideration is whether an order can be made by the Industrial Commission under Section 88F of the Act directing a party to a contract or arrangement avoided or varied under the section to pay monies to an industrial union where such union is not a party to such contract or arrangement and has no connection therewith.

28. We submit that the Industrial Commission of New South Wales had no power under Section 88F to order payment of the sum of \$6,161.87 to the Union.

29. The power to make orders under Section 88F(2) is not without limitation. The requisite limitation is to be found, as Barwick C.J. observes in Brown -v- Rezitis (1970) C.L.R. 157 at 165 "by construction of the section" and is contained in

"the need for a close connection between the order made and the contract or arrangement varied or avoided"

We submit that the Section does not provide any mandate for making an order in favour of a person who has no connection with the contract or arrangement declared to be void or otherwise varied.

30. Brown -v- Rezitis is clear authority for the proposition that an order cannot be made under Section 88F against a person who has no appropriate connection with the impeached contract or arrangement; we submit, by parity of reasoning that Brown -v- Rezitis is also authority for the proposition that an order cannot be made in favour of a person who has no connection with the contract or arrangement avoided or otherwise varied.

31. The statement in Mr Justice Dey's order that the said sum of \$6,161.87 be held by the Union 'in trust for the said Tore John Lennart Suneson' has no statutory basis. His Honour's sole jurisdiction was statutory and the statute provided no jurisdiction for the imposition of the condition which is ineffective in law to impose a trust obligation upon the Union.

32. The express statutory obligation imposed upon the Union by Section 92(4A where it has brought proceedings in the name of, and as agent for, an employee for recovery of wages owing to such employee, to hold same "on trust for the person on whose behalf the proceedings were taken" should be noted.

33. In view of the express, but limited, grant of power in Section 92, to the Union to bring proceedings with the written consent, in the name of, and as agent for an employee, it is impossible to argue for a similar implied grant of power in Section 88F. *Experssio unius est exclusio alterius*.

34. In any event we submit that Section 88F(2) does not provide a basis for making an order for the payment of money in favour of a person who had no connection with the contract or arrangement under attack.

JL.2K.E1

B. McAlary

IN THE PRIVY COUNCIL

NO. 29 of 1981

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CASE FOR THE APPELLANT

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