

**Wilson Parking (N.S.W.) Pty. Limited** - - - - *Appellant*

v.

**The Federated Miscellaneous Workers' Union of  
Australia, New South Wales Branch, and Others** *Respondents*

FROM

**THE SUPREME COURT OF NEW SOUTH WALES  
COURT OF APPEAL**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER 1981

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*Present at the Hearing :*

LORD WILBERFORCE

LORD ELWYN-JONES

LORD FRASER OF TULLYBELTON

LORD RUSSELL OF KILLOWEN

LORD BRIDGE OF HARWICH

*[Delivered by LORD BRIDGE OF HARWICH]*

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This appeal raises questions concerning the jurisdiction of the Industrial Commission of New South Wales ("the commission") under section 88F of the New South Wales Industrial Arbitration Act, 1940 as amended ("the Act"). The section as in operation at the material date (it has since been amended in immaterial respects) 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 such 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 or agreement.

(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."

The specific questions for decision are:—

(1) Has the commission jurisdiction to entertain an application for an order or award under the section by a trade union which is not, and none of whose members is, a party to the contract or arrangement sought to be impeached?

(2) If so, has the commission jurisdiction to order payment of money to the union by one party to the impeached contract or arrangement to be held in trust for another such party, the latter being a respondent to the application, who does not himself seek any such order?

It will be convenient to summarise as shortly and simply as possible the somewhat complex history of the litigation leading up to this appeal to Her Majesty in Council.

On 9th September 1977 the Federated Miscellaneous Workers' Union of Australia, New South Wales Branch, the first respondent ("the Union"), applied to the commission for an order under section 88F(1) that a contract or arrangement between Wilson Parking (N.S.W.) Pty. Limited, the appellant ("the Company"), and Mr. T. J. L. Suneson, the second respondent ("Suneson"), be declared void and for consequential orders under subsections (2) and (3). Suneson was not a member of the Union and had not authorised the Union to make the application on his behalf. He was made a respondent to the Union's application. The Company challenged the jurisdiction of the commission to make such orders on the application of the Union. Dey J., sitting as a single member of the commission, referred the issues raised by this challenge to the commission in court session under section 30C of the Act. The commission in court session (Beattie J., President, Dey and Macken JJ.) determined in a unanimous judgment that the commission had jurisdiction to entertain the Union's application and to make such orders as the Union claimed. The Company sought to reverse this decision in proceedings in the nature of applications for orders of prohibition and *certiorari* in the Supreme Court of New South Wales Court of Appeal. The Court of Appeal (Street C.J. and Hope J.A., Hutley J.A. concurring for different reasons) affirmed the judgment of the commission in court session. This decision was given on 16th May 1979 and concluded what may be called the first phase of the litigation. An application for special leave to appeal to the High Court of Australia against the decision was made but not proceeded with.

The Union's application then proceeded to a hearing on the merits before Dey J. exercising the jurisdiction of the commission. He found that Suneson had performed the duties of a car park attendant for the Company, initially pursuant to an agreement between himself and the Company, latterly pursuant to an agreement between the Company and

a partnership of which Suneson was a member, both of which agreements gave Suneson the status of an independent contractor. He declared the current agreement void *ab initio* (save as to payments already made by the Company to Suneson) on the grounds indicated by section 88F(1) (c) (d) and (e) viz. that it was against the public interest; that it had provided a total remuneration less than Suneson performing the work would have received as an employee performing such work; and that it was designed to and did avoid the provisions of an award (the conditions governing the employment of car park attendants being governed by the Parking Attendants, Motor Car Washers, etc. (State) Award). He further ordered the Company to pay the Union \$6,161.87, to hold in trust for Suneson, and to pay the Union's costs. The sum of \$6,161.87 represented the difference between the sum actually earned by Suneson in his work for the Company and the sum he would have earned as an employee being paid the appropriate wages under the applicable Award.

The order of the commission made by Dey J. was dated 24th June 1980. On 25th November 1980 the Company issued a summons for hearing before the Court of Appeal seeking to impugn the order by applications for prohibition, *certiorari* and a declaration. It should be mentioned in parenthesis that Suneson's partners, who were also parties to the relevant agreement with the Company and were, no doubt, in like case with Suneson, were also made respondents to this application, as was the commission itself; nothing, however, turns on this. The matter came before the Court of Appeal (Moffitt P., Hope and Samuels J.J.A.) on 8th December 1980. In the course of a short discussion between counsel and the court it was conceded on behalf of the Company that the application had to be dismissed, essentially on the ground that the court was bound, as a matter of authority, by its own previous decision of 16th May 1979. All parties seem to have assumed that the matter was to be pursued further on appeal either to the High Court of Australia or to Her Majesty in Council. In the event final leave to bring the present appeal was granted on 20th July 1981.

Before their Lordships' Board the point was taken by the Union that the issues raised in the appeal are *res judicata*, having been decided between the same parties by the judgment of the Court of Appeal on 16th May 1979 in the first phase of the litigation. Their Lordships heard argument on this as a preliminary point. It was not suggested that the addition of Suneson's partners as respondents to the second application to the Court of Appeal affected the matter. Leaving this aside, their Lordships see great force in the contention that the issue of the *locus standi* of the Union to institute proceedings under section 88F was fairly and squarely determined in favour of the Union by the reasoning of the majority in the first Court of Appeal decision. But it is by no means so clear that that decision covers the precise ground raised by the present challenge to the commission's order made by Dey J. for the payment of money to the Union to hold in trust for Suneson. Apart from that consideration, however, their Lordships would, in any event, be extremely reluctant to decide the appeal on what might be regarded, in the particular circumstances of the case, as a procedural technicality, when the parties appear to have contemplated at all earlier stages of the litigation, that the important questions of jurisdiction in dispute would in due course be submitted for decision to a final appellate tribunal. It is to those questions, therefore, that this judgment now turns.

The Act has been frequently and extensively amended. Section 88F was one of a group of sections introduced in 1959. In its original form it contained only the provisions now found in subsection (1) and in

those provisions the words "The commission" were followed by the words "or a committee". These words were deleted by an amendment in 1966 which also added subsections (2) and (3).

The essence of the reasoning which led the commission in court session and the majority in the Court of Appeal in the first phase of the litigation to hold that the commission had jurisdiction to entertain the Union's application relied on section 74 of the Act. They held that section 74 gave express authority to a union of employers or employees to commence proceedings before a committee; that this authority applied to proceedings under section 88F; that before the 1966 amendment a union could, therefore, institute proceedings under the section before either the commission or a committee; and that the amendment in 1966 withdrawing jurisdiction under section 88F from committees could not have been intended to narrow the scope of the commission's jurisdiction under the section or affect the *locus standi* of unions to invoke the section otherwise than on behalf of parties to contracts or arrangements sought to be avoided.

Mr. McAlary, for the Company, attacked this reasoning on two main grounds. He submitted first, that section 88F, as it now stands, is clear and unambiguous; that on its true construction it is only the parties to the contract or arrangement to be questioned who can institute proceedings thereunder; and that it is not legitimate to look at the history of the legislation or to consider section 74 as an aid to the construction of the section. If this submission is well founded, it leads to the conclusion, as Mr. McAlary conceded, that a contract or arrangement which was "against the public interest" under paragraph (c) or which was "designed to . . . avoid the provisions of an award" under paragraph (e) of subsection (1) of section 88F could not be attacked so long as the parties to it wished to continue it in force. He sought to justify this as not inconsistent with the intentions of the enactment by drawing an analogy between contracts liable to attack under the section and contracts at common law which are unenforceable on grounds of public policy. The general context of the Act, the power conferred by section 88F to declare contracts void *ab initio*, and the ground on which such action can be taken, particularly under paragraphs (c) and (e) of subsection (1), strongly incline their Lordships to the view that this is an "industrial policing" provision and that there is no-one more likely to be cast in the role of "policeman" than a union of employers or employees. Employers and employees operating within any given industry in accordance with the relevant statutory awards governing wages and other conditions of employment have a strong and obvious interest in protecting themselves against unfair competition by those who contrive to avoid the provision of such awards. Moreover, Mr. McAlary's submission involved, in their Lordships' opinion, the misapplication of a well known legal principle. It is a trite proposition that when the plain words of a statute, as in force at any given time, admit of only one meaning, that meaning cannot be contradicted or qualified by considerations derived from the history of the relevant legislation. But here we are concerned with a section which is totally silent as to who may initiate the proceedings it authorises. The question of construction, therefore, involves not the resolution of an ambiguity but the *a fortiori* case of filling a void. Their Lordships have no doubt, in the light of the statutory history, that section 74 provides the answer.

Mr. McAlary's second submission on the *locus standi* issue is that, if section 74 can properly be considered, it does not, on its true construction, authorise a union to commence proceedings before a committee. The section, so far as material, provides as follows:—

“(1) Proceedings before a committee shall be commenced by—

(a) . . .

(b) application to the committee by employers or employees in the industries or callings for which the committee has been established.

(2) An application under subsection (1)(b) shall be in the form, and shall contain the particulars prescribed, and shall be signed by—

(a) an employer or employers of not less than twenty employees in any such industry or calling; or

(b) an industrial union whose members are employers or whose members are employees in any such industry or calling.”

The point would appear to be at least arguable on the face of the statutory language. But there are two reasons why their Lordships cannot accede to Mr. McAlary's submission. First, this point was never raised in any of the courts below, nor is it adumbrated in the appellant's printed case before the Board. Being essentially a point in the field of practice and procedure, a field with which the Australian courts must be much more familiar than their Lordships can hope to be, it would be quite wrong for their Lordships to pronounce upon the point without the assistance of any Australian court's views: *Perpetual Trustee Company (Limited) v. Pacific Coal Company Proprietary Limited* (1955) 93 C.L.R. 479. But in any event it would appear from the notes to section 74 in the standard textbook (*Industrial Laws, New South Wales, 4th Edition of "Nolan and Cohen" by C. P. Mills*) that the commencement of proceedings before committees in purported pursuance of section 74 by unions of employers and employees is a well established practice; moreover, the practice has the express sanction of the Industrial Arbitration Regulations made under the Act: see Regulation 61 and Form 25.

Their Lordships now turn to the second question as to whether the commission acted within its powers under section 88F (2) in ordering the Company to pay money to the Union to hold in trust for Suneson. It has already been mentioned that subsections (2) and (3) were added by the 1966 amendment of the Act. It would appear that what led to this legislative intervention was a decision of the commission, *Agius v. Arrow Freightways Pty. Limited* [1965] A.R. (N.S.W.) 77, which brought to light the absence of any machinery under the Act providing one party to a contract or arrangement which had been declared void *ab initio* under the section in its original form with any consequential remedy against the other party. The lacuna thus exposed, as was pointed out in *Agius'* case, was calculated to lead to multiplicity of proceedings. It is a fair inference that the new subsections were introduced to avoid such multiplicity and one may mention in passing that it was perhaps the substantial enlargement of the jurisdiction conferred by subsections (2) and (3) which prompted the legislature to confine its exercise to the commission by deleting the reference to a committee from subsection (1).

Starting from the premise that a union may take action against both parties to a contract or arrangement which is objectionable on one of the grounds listed in section 88F (1), particularly grounds (c), (d) or (e), but which, as here, the parties themselves are willing to continue in force, one may ask what kind of order the wide words of subsection (2) contemplate in such a case. The High Court of Australia has already held that an order for payment of money may be made against a person who is not a party to the contract or arrangement avoided, provided he has a sufficient connection with it: *Brown v. Reziis* (1970) 127 C.L.R. 157. Their Lordships derive assistance in relation to the question posed from a consideration of the enforcement provisions for breaches of

awards applicable to the ordinary employer/employee relationship. Section 92 provides a civil remedy for the recovery by an employee from his employer of the difference between what he has in fact been paid for work done and what he was entitled to be paid for that work pursuant to an award under the Act. Such proceedings may be brought, with the employee's consent, by the secretary of his union on an employee's behalf and in that case the amount recovered is held by the secretary of the union on trust for the employee. Section 93 embodies provisions for penal proceedings against an employer for breach of an award. These proceedings may be brought by the secretary of a union concerned in the industry covered by the award and require no consent of any employee. Section 93(2) is important and must be quoted in full. It provides:—

“Where in proceedings for the recovery of any such penalty in relation to a breach of an award or industrial agreement it appears that the breach complained of relates to the failure of the defendant to pay in full any wages (including wages for overtime) due to an employee at the price or rate fixed by the award or agreement or any other moneys due to or recoverable by an employee in terms of an award or industrial agreement, the industrial magistrate may also make such an order with respect to such wages or moneys as might have been made in proceedings taken under section 92. Such order may be made without motion, and shall be a bar to proceedings under the said section in respect of such wages or moneys.”

It appears to their Lordships that this provision contemplates that in penal proceedings a defaulting employer, in addition to the modest “penalty not exceeding two hundred dollars” for which the section provides, may be compelled to pay, at the suit of the appropriate union secretary, the amount due to an employee under a statutory award, even where the employee is unwilling to enforce his own rights and that in such case the sum recovered by the union will be held by the union secretary on trust for the employee. Even though, at the end of the day, the employee/beneficiary may return the money recovered on his behalf to his defaulting employer, this is perhaps not often likely to happen in practice, and the fact that an employee's willingness to work for less than the proper rate for the job under a statutory award cannot, as it should not, protect an employer from penal proceedings to enforce payment of the proper rate, must, as no doubt it is intended to, act as a significant disincentive to unfair competition, in an industry regulated by an award, by employers and employees acting in concert to undersell their law-abiding competitors.

Taking this view of the effect of the provisions for the enforcement of awards as between employer and employee, their Lordships have no difficulty in concluding that in a case of the kind at which section 88F is directed, e.g. of a contract or arrangement which seeks to circumvent the provisions of an award by conferring on the workman the status of an independent contractor, the language of subsection (2) is amply wide enough to give the commission power to make an order, *mutatis mutandis*, analogous to such as might be made by an industrial magistrate under section 93 (2). It follows that the order for the payment of money by the Company to the Union in trust for Suneson was properly made and accordingly their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.



**In the Privy Council**

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LORD BRIDGE OF HARWICH**