Another instalment in the showdown between the Court of Appeal and the Industrial Relations Commission

*By Louise Clegg**

Previous editions of Bar News have alerted readers to jurisdictional conflict emerging from the unfair contracts jurisdiction of the Industrial Relations Commission.[1] One source of conflict arises due to the presence of s179 in the *Industrial Relations Act 1996* which protects decisions of the commission from review ('the privative clause').[2]

In a suite of recent decisions,3 the Court of Appeal has dramatically upped the ante in its territorial stoush with the commission. It has provided a party who wishes to contest the jurisdiction of the commission with a direct route to the Court of Appeal, despite the presence of the privative clause.

Background

In *Mitchforce v Industrial Relations Commission*[4] a landlord who was a party to a commercial lease agreement to operate a tavern sought prerogative relief in the Court of Appeal in an attempt to quash the commission's earlier decision that the s106 proceedings commenced against it by the lessee were within the commission's jurisdiction.[5] The central question was whether or not the lease agreement was a 'contract or arrangement *whereby* a person performs work in any industry'[6] such that it invoked the jurisdiction of the commission.

The Court of Appeal (Spigelman CJ and Mason P, Handley JA dissenting) found that the lease in question was not a contract or arrangement *whereby* work was performed in an industry because the lease agreement was not one which led 'directly' to the performance of work.[7] However, the Court of Appeal held[8] that the privative clause operated to protect decisions of the commission from review so long as the threefold 'Hickman principle' enunciated in *R v Hickman; ex parte Fox and Clinton*[9] is satisfied. The court by majority decided that although the commission had committed a jurisdictional error, as a matter of construction, the privative clause operated to protect the error.[10] The court determined it was not necessary to address the constitutional question concerning the validity of the privative clause. Instead, the Court of Appeal took the unprecedented step of inviting the full bench of the commission to reconsider its earlier decision.[11]

In doing so the Court of Appeal made plain its views concerning 'the march of the commission's jurisdiction into the heartland of commercial contracts'.[12] Spigelman CJ observed that the commission's jurisprudence had travelled a long way from an 'industrial context' to encompass arrangements not ordinarily fitting a description of an 'industrial colour or flavour'.[13] Mason P observed that this represented a 'significant inroad into the effective and efficient exercise of the Supreme Court's jurisdiction in commercial causes' and observed that 'something has gone seriously wrong somewhere in the process'.[14]

In December 2003 the full bench of the commission delivered its 'reconsideration' of the jurisdictional question.[15] The

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majority (Wright P and Walton J), with significant reluctance and hesitation,[16] concluded it should defer to the view of the majority of the Court of Appeal[17] in the interests of judicial 'comity'[18] despite the fact that it did not agree with the conclusions of the majority in the Court of Appeal. The dissenting decision of Boland J delivered a rebuke to the Court of Appeal. After taking issue with the conclusion of Mason P that the process had gone 'seriously wrong' His Honour concluded:[19]

> I do not agree that the appeal should be upheld... notwithstanding that such a course fails to achieve comity with the majority views of the Court of Appeal....as presently advised, s179 is valid enactment with the consequence that the commission is the final arbiter of its jurisdiction. To uphold the appeal...would amount to a constructive circumvention of s179. I consider that such a course is inappropriate, particularly in circumstances where I regard the observations made by the majority as inconsistent with High Court authority and wrong.

Solution 6 and QSR

Over a few days in April 2004, the Court of Appeal heard three separate applications seeking various forms of prerogative relief from the commission.[20] In each case the claimants had not yet exhausted all avenues of appeal in the commission. In *Solution 6* and *QSR*, no trial had even been held. A central question in each of the cases was whether the Court of Appeal should invoke its supervisory jurisdiction in relation to proceedings which are before the commission in circumstances where the commission had not yet made a 'decision' concerning the jurisdictional issue. If there had been no 'decision' made by the commission, then arguably the privative clause did not operate to prevent prerogative relief being obtained.

In *Solution 6* and in *QSR* the Court of Appeal granted relief to both claimants. In both cases, the Court of Appeal found that the commission had no jurisdiction to entertain the impugned contracts or arrangements on the basis that they were not contracts or arrangements which led directly to work being performed. [21]

In *Solution 6*, there had been no steps taken in the commission other than the filing of pleadings by both parties. The impugned arrangement in *Solution 6* was a share sale agreement which was conditional on the employee agreeing to be employed by Solution 6. The employee complained that the

formula for the computation of share price was unfair, or operated unfairly. The Court of Appeal found that the share sale agreement was a contract for the purchase and sale of a business, and not one *whereby* work was performed in an industry. The relationship between share sale agreement and the performance of work in an industry was merely indirect or consequential, rather than direct. The formulation for the computation of the purchase price bore no relationship to the performance of work.[22]

In *QSR*, the commission had already entertained a motion which had been initiated by the respondent seeking an order that the proceedings be dismissed for want of jurisdiction. Peterson J had dismissed the motion, leaving open the question of jurisdiction to be decided at the final hearing.[23] The Court of Appeal took the same approach as it did in *Solution 6*. As no final decision had been made concerning the question of jurisdiction,[24] the Court of Appeal granted the relief sought by the claimants - again because one (or part) of the pleaded arrangements was not an arrangement *whereby* work was performed in an industry.

Practical implications

The difference between *Mitchforce* on the one hand, and *Solution 6* and *QSR* on the other, is that in *Mitchforce*, by the time the proceedings seeking prerogative relief had been commenced in the Court of Appeal, the commission had already made a 'decision'. This meant that the privative clause came into play to protect the decision of the commission from review. However in *Solution 6* and *QSR*, no decision had yet been made by the commission concerning the jurisdictional question.

The practical import is clear. Respondents in unfair contracts cases now have a direct and effective route to approach the Court of Appeal for orders in the nature of prohibition, so as to restrain the commission from further hearing unfair contract matters - provided the prerogative relief is sought prior to the commission making a decision which would otherwise be protected by the privative clause. It is noted that the opponents in *Solution 6* argued that the prerogative relief proceedings were premature - because the evidence to be adduced in the commission might provide a basis for attracting jurisdiction, and because the commission is not a court of 'strict pleading' and the summons might not necessarily represent the final factual position. However the Court of Appeal took the view that the summary of facts and law contained in the summons was sufficient to establish the factual foundation for relief and noted that the parties were free to place evidence before the Court of Appeal in such matters.[25]

Conclusion

In the meantime, the validity of s179 - described by Handley JA as 'the widest privative clause I have seen'[26] - still remains to be considered.[27] It seems more likely that it will be tested in the commission's criminal (occupational health and safety) jurisdiction, where a finding by the Court of Appeal that the commission has committed error of law which is protected by the *Hickman* principle, might render it 'necessary' for the Court of Appeal to finally consider the constitutional question.[28]

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The Court of Appeal's approach in *Solution 6* and *QSR* heralds a sure departure from the usually restrained approaches of the Court of Appeal and the High Court in days gone by. Spigelman CJ acknowledged this much in *Solution 6*.[29] Minds differ about whether the departure is warranted, and whether the commission's jurisdiction has exceeded its proper bounds. As special leave applications to the High Court have been filed in both cases, it remains to be seen if the High Court pays homage to the famous remarks of Barwick CJ: 'the legislature has apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality, or whose labour was not being oppressively exploited'.[30] In *Mitchforce*, the Court of Appeal thought the commission had gone too far. Will the High Court now say the Court of Appeal has gone too far? Watch this space.

* Louise Clegg appeared as junior counsel to the solicitor general, intervening in QSR v Industrial Relations Commission.

1 See '*Mitchforce v Industrial Relations Commission*' by Ingmar Taylor, *Bar News*, Summer 2003/04, p.4 and '*A source of jurisdictional conflict*' by Malcolm Holmes QC and Andrew Bell in *Bar News*, Winter 2002, p.23.

2 See s179 of the IR Act which excludes all decisions (including 'purported decisions') from review.

3 *Solution 6 Holdings Limited & Ors v Industrial Relations Commission of NSW &Ors* [2004] NSWCA 200 ('*Solution 6*') ; *QSR Limited v Industrial Relations Commission & ors* [2004] NSWCA 199 ('*QSR*'); *Uniting Church in Australia Property Trust (NSW) v Industrial Relations Commission of NSW* [2004] NSWCA 183 ('Uniting Church'); *Old UGC Inc & ors v Industrial Relations Commission of NSW & Anor* [2004] NSWCA 197, where the claimants had exhausted all avenues of appeal, the Court of Appeal found that the impugned contract or arrangement was one whereby work was performed in an industry. Note also in *Uniting Church* the Court of Appeal was considering the commission's powers under s180 of the IR Act concerning the statutory offence of contempt, and not the unfair contracts jurisdiction. A recent decision, *Mayne Nickless Limited v IRC* [2004] NSWCA 359, 1 October 2004, supported the commission's jurisdiction in a case in which doctors claimed to be performing work pursuant to a services agreement through a corporate entity.

4 *Mitchforce Pty Limited v Industrial Relations Commission of New South Wales and ors* (2003) 57 NSWLR 212.

5 *Starkey v Mitchforce* (2000) 101 IR 177 (Hungerford J at first instance) and *Mitchforce v Starkey* (2002) 117 IR 122 (Full Bench).

6 Section 106(1) of the IR Act.

7 Above n4 at 217 - 220 and 224 - 227 (Spigelman CJ). There has been a debate about whether Spigelman CJ added a new purposive 'industrial colour or flavour' test, but in *Solution 6* Spigelman CJ has clarified this.

8 Subject to the question of the constitutional validity of the privative clause. See n27 below.

9 (1945)70 CLR 598 at 617-618

10 Above n4 at 233 (Spigelman CJ) and at 240(Mason P). Note that there were some final relief given by the IRC which was not protected by the Hickman principle, and prerogative relief was granted to prevent an excess of jurisdiction in respect of those orders.

11 On the basis that the full bench had earlier declined leave to appeal the jurisdictional question. Above n4 239 (Spigelman CJ) and at 242 (Mason P).

12 Above n4 at 240 (Mason P).

13 Above n4 at 224 (Spigelman CJ).

14 Above n4 at 241 (MasonP).

15 *Mitchforce v Starkey* (No 2) (2003) 130 IR 378 (Wright P and Walton J, Boland J dissenting).

16 ibid., p.383.

17 ibid., p.390.

18 ibid., pp.385-6.

19 ibid., p.443-444.

20 *Solution 6*, *QSR* and *Uniting Church* above n3.

21 Spigelman CJ delivered the leading judgment in *Solution 6* (Mason P, Handley JA agreeing). In QSR Handley JA (Mason P agreeing) thought the part of the arrangement whereby the applicant was working as a 'promoter' for a start up venture did not constitute an arrangement whereby work was performed in an industry. Spigelman CJ thought the claimant's case was sufficiently unclear that it should go back to the IRC for determination of the jurisdictional question.

22 *Solution 6* above n3 at [53] - [95] (Spigelman CJ). The Court also construed ss105-6 of the IR Act to mean that 'collateral arrangements' or 'related conditions' must also satisfy the '*whereby* a person performs work in an industry' test.

23 Peterson J had declined to make a finding concerning the jurisdictional question at an interlocutory stage because the threshold test in *General Steel Industries Inc v Commissioner for Railways* had not be met. See *Maylord Equity Management Pty Limited & Anor v QSR Limited* (2003) NSW IRComm 366 (Peterson J at [39]).

24 *QSR* above n3 at [85] - [89].

25 ibid., [47] - [51].

26 Above n4 at 252 (Handley JA).

27 See article by Michael Sexton and Julia Quilter, 'Privative clauses and state constitutions' (2003) 5 CLPR at 69.

28 But note possible impact of s 196 IR Act which may bear the result that prerogative relief can only be obtained from the High Court because the full bench of the commission may be taken to be the Court of Criminal Appeal when exercising its criminal jurisdiction. This will probably depend on whether s196 is taken to be either a procedural or substantive provision which vests CCA jurisdiction in the full bench.

29 *Solution 6* above n3 at [136] - [158] (Spigelman CJ) and at [182] (Handley JA).

30 *Stevenson v Barham* (1977) 136 CLR 190.