IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P 26 of 2013

BETWEEN: **CONSTRUCTION FORESTRY MINING & ENERGY UNION**
Appellant

and

MAMMOET AUSTRALIA PTY LTD
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the internet.

PART II: ARGUMENT IN REPLY

2. The Appellant notes that the Respondent has joined issue on:

   (a) whether "payment" in s 470 includes accommodation provided "to enable employees to be in a position to perform their employment and earn their pay", as Gilmour J held (Respondent's submissions (**RS**) [6(3)]);

   (b) whether "payment" is limited to payment by money (RS [17]-[19]);

   (c) whether "payment" refers to the payment of remuneration, whether this connotes a *quid pro quo*, and whether this extends to the Accommodation[1] (RS [20]-[26]).

Payment in money

3. The Respondent places reliance upon s 416A of the FW Act at RS [14], [16] and [17(2)]. Section 416A does not limit the scope of s 416[2]. Rather s 416A is directed to continuity of employment, including in respect of certain prescribed matters (for example, "remuneration and promotion, as affected by seniority"[3]). This provision is not directed to the nature of payments able to be refused under s 416, let alone under s 470.

[1] Terms are employed here in the same way as in the Appellant's primary submissions (**AS**).
[2] RS [14].
[3] Regulation 3.09(b) of the *Fair Work Regulations 2009* (Cth).

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4. The Respondent refers at [17(2)] to various uses in the FW Act of the term "payment" or "pay". Not only are those uses not inconsistent with the position of the Appellant, they support it. As for s 471 (cf RS [17(3)]), it assumes "payments" are able to be "reduced"[4]. It may be noted that the Respondent has not answered the similar point made by the Appellant at AS [58] with respect to overtime bans, dealt with under s 470.

5. A construction of s 470 that requires "payment" to be read as a payment of money (or alternatively of remuneration) achieves consistency with provisions such as s 323[5]. The fact that s 323 was introduced after the predecessor to s 470 (RS [18]) does not obviate the need to achieve harmony between all of the provisions of the legislation. That provision serves to confirm the construction of s 470 advanced by the Appellant.

6. There is nothing in the language of s 470, nor in the ordinary meaning of "payment", that requires a broad reading such that it would include the "provision" of things that are incidents of the employment relationship. As for legislative purpose, the fact that the word "payment" is also used in ss 416 and 474 (RS [16]) does not constitute a reason for giving a broad and encompassing reach to the term, nor does it undermine the submission at AS [41] that s 470 should be understood as directed to strike pay and not meant to undermine the maintenance of the employment relationship. Whilst the Respondent discusses legislative purpose and history at RS [12]-[16], it is notable that the Respondent does not seek to defend the heavy reliance placed by Gilmour J (at AB203 [45]; AB204 [48]) on the putative legislative purpose said to underlie s 470.

Remuneration

7. The Respondent's position on whether "payment" involves notions of remuneration or *quid pro quo* is inconsistent. The dictionary definitions of "payment" invoked by the Respondent (RS [10]) itself involves these notions. Moreover, the Respondent's argument on its Notice of Contention involves an appeal to the "wages-work bargain" (RS [32], [35], [37], [43]-[45]). That is to say, the Respondent submits that there was no obligation to provide accommodation (which the Respondent characterises as a "payment" at RS [6(3)]) whilst the employees were not ready willing and able to perform work as part of the *quid pro quo* for the provision of accommodation.

8. The Appellant does not seek to substitute "remuneration" for "payment" in s 470, but to determine the meaning of the latter (*cf* RS [20(1)]). That the Parliament has employed the word "remuneration" in certain provisions does not detract from the point that "payment" in s 470 may bear that meaning (*cf* RS [20(2)]), reflecting ordinary usage.

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[4] Note the Explanatory Memorandum accompanying the *Fair Work Bill 2009* at r.309: "*An employer will be required to issue a written notice accepting partial performance and specifying the proportion of the employee's wages to be deducted that are reasonably attributable to the work which is the subject of the ban. The amount to be deducted will not be damages suffered by the business, but will relate to the proportion of the employee's work not performed and his or her normal wages. At least one working day must elapse after the notice before a deduction is made*". (emphasis added)

[5] *Project Blue Sky v ABA* (1998) 194 CLR 355 at [67]-[71]; *Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16 at [47].

9. At RS [24]-[26] the Respondent contends that the expression "make a payment to an employee" in s 470 should include a payment made on behalf of an employee to a third party, and further that the facts of this case are that the Respondent made a payment "on behalf of" the employees to Woodside. As for the issue of law, the Respondent's arguments fail to address the simple language of "payment *to*". Further, the predecessor provisions to s 471 included the expression "payment to" employees at a time when the provision was not concerned with prohibiting such payments (RS [11(1)]; *cf* RS [25(2)]). There is no basis for suggestion that expression was cast widely in order to prevent circumvention.

10. As to the issue of fact, there is no evidence that this was the purpose of the payment. That would assume there was a cost attached to the Accommodation that the Employees were liable for. The better view is that the Accommodation was provided at no cost as a condition precedent in order to attract a workforce to a remote area, and was not the subject of a payment in return for work performed. Such arrangements have received judicial recognition.[6]

11. As for the Respondent's submissions on health and safety (RS [27]-[29]), they do not address the fact that there is no requirement in s 414 of the FW Act imposed on an employer to give notice of what it intends to do by way of "non-payment". In this case, notice of an intention to withdraw access to Accommodation was given less than 24 hours before the decision was put into effect: **AB38 at [13]**. Further, assuming that State occupational, health and safety laws apply to workers while they are residing offsite (*cf* RS [35(2)]), the fact remains that in this case there was no attempt by the Respondent to assist the Employees in finding either accommodation or transport back to their permanent places of residence because it asserted that it was unable to do so by reason of s 470 of the FW Act. In any event, the Respondent's argument that there may be some core duty on employers to avoid causing harm to employees is but a weak response to the Appellant's arguments as to seeking to give s 470 a sensible construction.

Notice of Contention

12. By its notice of contention the Respondent seeks to raise issues which have not been the subject of determination by either Court below – significantly as a consequence of the Respondent having chosen to make a "no case" submission in the FMC – and which involves close consideration of the Agreement and s 340, where this raises no general issue of principle or importance. The Appellant submits that if it succeeds on the issue raised with respect to the construction of s 470 of the FW Act, the matter should be remitted for determination of the outstanding issues.

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[6] See eg *Tennant v Smith* [1892] AC 150 at 154, 157 and 165; *Reed v Cattermole* [1937] 1 KB 613 628-9; *H A Warner Pty Ltd v Williams* (1946) 73 CLR 421 at 429 per Dixon J; *Heaton (Inspector of Taxes) v Bell* [1968] 2 All ER 1156 at 1166 per Danckwerts LJ; at p.1167 per Salmon LJ; *HWE Contracting Pty Ltd v Young* (2007) 153 NTR 77 at [19] per Angel J (dissenting); *Batley v Cocos Islands Co-operative Society Ltd* [2010] FWA 2289 at [35].

13. In case that submission is not accepted, the following brief submissions are made. An answer may be made both with respect to the Agreement and to s 340 of the Act. As for the Agreement, the starting point is the duty of the Respondent, in cl 6 of Appendix 7, to provide Distant Workers with either suitable board and lodging or LAHA. The Respondent submits that the predicate of the duty is that the Distant Worker has travelled to the workplace and is ready, willing and available for work (RS [36]). This is a bootstraps argument. The Relevant Employees had been in place and working until they commenced protected industrial action, having given the requisite notice of such. The issue then is what the Agreement provides, if anything, with respect to ending their Accommodation.

14. The Agreement simply does not address the issue in terms. And it cannot be said that there is any necessary or obvious implication that the Accommodation was to be withdrawn immediately. That is so for much the same reasons as given by the Appellant with respect to the construction of "payment" at AS [78]-[90]. The provision with respect to deductions from LAHA for days that a worker receiving such is not ready, willing and available for work does not address specifically a case of protected industrial action; further, it is one thing for an employer to withdraw a rental allowance where the worker has, eg, rented premises locally, and it is another to withdraw accommodation actually provided to the worker with immediate effect (cf RS [36(3)]). That there is a material difference between provision of accommodation and payment of LAHA in this regard is illustrated by cl 31(1)(b)(ii), cited at RS [36(2)], which provides that LAHA is payable as part of annual leave, but there is no equivalent payment if the worker was provided with accommodation (the implicit premise being that a worker on LAHA may still face relevant accommodation costs whilst on leave, but no such provision need be made for workers for whom the Respondent organized accommodation).

15. The notion of "no work, no pay" does not relevantly inform the proper construction of the Agreement in this regard. The Stand Down provision in cl 38(6), referred to at RS [36(1)], entitles the Company to "deduct payment for any day or part of a day an Employee cannot be usefully employed" because of (eg) strike or machinery breakdown. On the Respondent's construction this provision must give it the right to withdraw Accommodation with immediate effect (and presumably not pay for return flights home) where machinery breaks down – a result which could not have been contemplated by the parties; see also Appendix 9 involving cyclone procedures.

16. In any case, as noted above, the Respondent's submissions on this point assume the Accommodation was a *quid pro quo* for the work done. As put above, it was not.

17. Turning then to s 340, whether or not there was a legal obligation to provide the Accommodation in the circumstances is not an element of a claim under s 340 of the FW

Act, being the claim brought in this proceeding[7]. Thus even if (contrary to the above) the Respondent was entitled to withdraw the Accommodation with immediate effect under the Agreement, that would not answer the s 340 claim. Even if the Agreement *permitted* the Respondent to withdraw the Accommodation, it did not *require* it.

18. For the purposes of Item 1(c) of s 342(1) of the FW Act, an employee's position may be altered to his or her prejudice regardless of whether the employee suffers any loss or infringement of a legal right. Provided the alteration in the employee's position is real and substantial rather than merely possible or hypothetical, it will occur if the advantages enjoyed by the employee before the conduct in question have been adversely affected or have deteriorated in any way[8].

19. Item 1(d) of s 342(1) refers to action which discriminates between the employee and other employees of the employer. To withdraw the Accommodation with immediate effect from the Relevant Employees was to discriminate against them in comparison to other employees. The Relevant Employees were deprived, from 6.30am on 28 April 2010, of the Accommodation. Other employees - even if also on strike – were not. Distant Workers on LAHA may have suffered a loss of monetary allowances, but a deprivation of actual accommodation is materially different. Further, Local Workers received a lower allowance again for accommodation. Any detriment to them for striking was thus even less significant.

20. Finally, s 361 of the FW Act creates a presumption that adverse action is taken for a prohibited reason unless the employer proves otherwise[9]. The Respondent is yet to discharge the correlative onus created by the section as the proceeding was determined at first instance prior to the Respondent opening its evidentiary case[10].

Dated: 14 June 2013

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[7] AB 18-19; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at pages 17-18; *Qantas Airways Limited v Australian Licensed Aircraft Engineers Association* [2012] FCAFC 63 (4 May 2012) at [30]-[32]

[8] *Patrick Stevedores Operations No 2 Proprietary Limited v Maritime Union of Australia* (1998) 195 CLR 1 at [4]; *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93 at [18]; *Commonwealth Bank of Australia v Finance Sector Union of Australia* (2007) 157 FCR 329 at [127]; *Qantas Airways Limited v Australian Licensed Aircraft Engineers Association* [2012] FCAFC 63 at [32].

[9] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 86 ALJR 1044 at [44] per French CJ and Crennan J

[10] AB 151 at [26]