SHORT PARTICULARS OF CASES
APPEALS

SEPTEMBER - OCTOBER 2009

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ADEELS PALACE PTY LTD v MOUBARAK (S191/2009)
ADEELS PALACE PTY LTD v NAJEEM (S192/2009)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 29

Date of judgment: 26 February 2009

Date of grant of special leave: 31 July 2009

Early on New Year's Day 2003 the Respondents were shot and injured during a fight at the Appellant's restaurant/reception venue. (They had attended a function there which was open to the public upon the payment of an admission price.) The Respondents subsequently sued the Appellant in negligence. The trial judge, Judge Sorby, found that the Appellant both owed and had breached its duty of care to the Respondents. His Honour further found that the causation element had been made out. This is because the Appellant's failure to have an adequate security system in place had materially contributed to the Respondents' injuries.

On 26 February 2009 the Court of Appeal (Beazley, Giles and Campbell JJA) unanimously dismissed the Appellant's appeals. This was despite their Honours finding that Judge Sorby had incorrectly relied upon the notion of proximity to determine whether a duty of care existed. The Court of Appeal nevertheless found that the Appellant did owe its patrons a duty of care. This extended to taking reasonable steps to guard them against the intoxicated, unruly or violent behaviour of others. The Court noted that the premises were filled to capacity and that alcohol was readily available over a long period. The function should therefore have been seen as having the potential for drunken or violent behaviour. It was therefore foreseeable that one patron may pose a danger to others and the Appellant had at least some capacity to exercise control over that behaviour. Its duty of care also extended to taking reasonable care to guard its patrons against the unlawful conduct of others.

On the issue of breach, the Court of Appeal found that there was no error in the trial judge's finding that there was no security staff in place. The need for planned security arrangements, extending to controlling access to the premises and managing violence, called for some level of security presence. On the causation issue, it was also open to Judge Sorby to find that the assailant, (who had initially left the club after the altercation but later returned with a gun) would probably not have been permitted to re-enter the premises if access had been controlled.

The grounds of appeal (in both matters) are:

- The Court of Appeal erred in holding that the Appellant owed a duty to the Respondent to take reasonable care to prevent the Respondent being shot by another patron on premises owned by the Appellant.
- The Court of Appeal erred in failing to follow and apply the decision of this Court in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254.
- The Court of Appeal erred in holding that the Appellant breached the duty of care which the Appellant was held to owe to the Respondent.

- The Court of Appeal erred in holding that any reasonable response by the Appellant would have prevented the harm suffered by the Respondent.

On 3 September 2009, the Respondent in matter number S191/2009 (Moubarak) filed a notice of contention, the grounds of which include:

- In the circumstances of this case, the Appellant owed the Respondent the duty owed by an occupier to a contractual entrant, that is, to make the premises as safe for the purpose of their contract as reasonable skill and care on the part of anyone could make them.

On 2 September 2009, the Respondent in matter number S192/2009 (Najem) filed a notice of contention, the grounds of which include:

- The Respondent's injury was caused or materially contributed to by the failure of the Appellant to take reasonable steps to intervene early and suppress the growing disorder on the dance floor before it got out of hand.

TAIAPA v. THE QUEEN (B6/2009)

Court appealed from: Court of Appeal, Supreme Court of Queensland [2008] QCA 204

Date of referral to Full Court: 25 June 2009

On 12 October 2007 after a jury trial, the applicant, Dion Robert Taiapa, was convicted on one count of trafficking (in methylamphetamine) and one count of possessing in excess of two grams of methylamphetamine. The convictions arose out of a police search of the applicant's car, in which he was a passenger, which revealed almost $30,000 in cash and methylamphetamine with a resale valued of over $1 million. The applicant claimed that he had borrowed the money from his mother and that he had transported the drugs from Sydney because drug dealers had forced him to do so, as part of a means of repaying a debt he owed to those dealers for the supply of drugs to him over a period of time. The applicant claimed that the dealers had come to his house with a gun and threatened to shoot him and his pregnant girlfriend if he did not transport the drugs and repay the debt. The trial judge ruled that the defence of duress was not available to the applicant on the evidence because the dealers were not in a position to carry out their threats at the time that the applicant took possession of the drugs and engaged in the act of trafficking for which he was charged. The trial judge ruled that the immediacy of the operation of the compulsion upon the applicant, required by section 31(1)(d) of the *Criminal Code Act* 1899 (Qld), was absent and accordingly a defence of compulsion or duress could not be put to the jury.

In the Court of Appeal, Keane JA (who wrote the principal judgment, with which Fraser JA and Lyons J agreed) held that insofar as the trial judge held that compulsion must be exerted by a present threat of future harm at the time of commission of the offence, the trial judge had taken an unnecessarily restrictive view of s31(1)(d). However, Keane JA observed that the applicant bore an evidentiary burden to raise an arguable case that his belief that he could not escape the threat was reasonable, and the applicant had failed to meet that evidentiary burden.

On 25 June 2009, the application for special leave to appeal was referred to the Full Court for hearing as if on appeal.

The questions of law said to justify a grant of special leave to appeal include:

- Whether the Court of Appeal erred by holding that the trial judge was correct to rule that the applicant did not have an arguable defence of duress under s31(1)(d) of the *Criminal Code Act* 1899 (Qld);

- Whether the Court of Appeal erred by holding that the applicant did not have any evidentiary basis for a reasonable belief that he could not avail himself of the protection of a law enforcement agency to render nugatory the threat by the dealers.

JOHN HOLLAND PTY LTD v VICTORIAN WORKCOVER AUTHORITY (M16/2009)

Date Case Stated referred to Full Court: 26 June 2009

JOHN HOLLAND PTY LTD v INSPECTOR NATHAN HAMILTON & ANOR (S121/2009 & S122/2009)

Date Applications for Removal referred to Full Court: 11 June 2009

These proceedings concern the intersection of Commonwealth and State occupational health and safety legislation.

The plaintiff/applicant ("John Holland") was granted a licence to accept liability for and manage claims, pursuant to Part VIII of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Federal OHS Act") on 13 December 2006. On 14 March 2007, on the commencement of the relevant provisions of the *OHS and SRC Legislation Amendment Act* 2006 (Cth), John Holland became a "non-Commonwealth licensee" as defined in s5(1) of the Federal OHS Act. On 26 October 2007 an inspector employed by the Workcover Authority of New South Wales instituted two prosecutions against John Holland in the Industrial Court of New South Wales, alleging that it breached ss8(1) & 8(2) of the *Occupational Health and Safety Act* 2000 (NSW) from 27 October 2005 to 2 November 2005. On 12 September 2008 an inspector employed by the Victorian Workcover Authority issued a charge and summons against John Holland in the Latrobe Valley Magistrates Court for offences alleged to have been committed by it against s 21 of the *Occupational Health and Safety Act* 2004 (Vic) ("the Victorian Act") in October 2006.

John Holland commenced proceeding M16/2009 in this Court by way of a writ of summons, seeking a declaration that pursuant to s109 of the Commonwealth Constitution the Victorian Act is and was at all material times after 12.01 am on 15 March 2007 invalid insofar as it purported to apply to it, and in particular insofar as it purported to confer on the Victorian Workcover Authority the power to bring the Victorian prosecution. John Holland also applied to remove part of the proceedings in the Industrial Court of New South Wales to this Court insofar as they raised a similar issue to that raised in proceeding M16/2009, that is, that the provisions of the State legislation under which the prosecutions have been brought are invalid by reason of s109 of the Constitution, as they are inconsistent with s 4 of the Federal OHS Act.

On 11 June 2009 Justice Hayne indicated that he would sign a Case Stated in M16/2009 in the form proposed by the parties and refer it to the Full Court. The Case Sated was in fact signed on 26 June 2009. On 11 June Hayne J also made orders referring the applications for removal (S121/2009 and S122/2009) to the Full Court for hearing with the Case Stated in M16/2009.

John Holland had filed Notices of Constitutional Matter in each of the proceedings. The Attorneys-General for the Commonwealth, Queensland and South Australia are intervening in all proceedings. The Attorney-General for the State of New South Wales is intervening in M16/2009. The Attorney-General for Victoria is intervening in S121/2009 and S122/2009.

The Attorney-General for South Australia has filed a Notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth), raising a further Constitutional issue: whether s 4 of the Federal OHS Act is invalid if the construction of s 4 for which John Holland contends, is accepted.

The issues raised by the case stated include:

- While the plaintiff remains a "non-Commonwealth licensee" for the purposes of the Federal OHS Act, is the plaintiff liable to conviction for offences against s21 of the State OHS Act committed before the plaintiff became a "non-Commonwealth licensee"?

- If the answer is "yes", while the plaintiff remains a "non-Commonwealth licensee" for the purposes of the Federal OHS Act, are any (and if so which) of ss 7, 8 and/or 130 of the State OHS Act invalid within s109 of the Commonwealth Constitution to the extent that any of those provisions purports to empower the defendant to authorise an inspector to bring proceedings against the plaintiff for offences against s21 of the State OHS Act allegedly committed before the plaintiff became a "non-Commonwealth licensee"?

KIRK & ANOR v INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES & ANOR (S106/2009)

KIRK GROUP HOLDINGS PTY LTD & ANOR v WORKCOVER AUTHORITY OF NEW SOUTH WALES (INSPECTOR CHILDS) (S347/2008)

KIRK GROUP HOLDINGS PTY LTD & ANOR v WORKCOVER AUTHORITY OF NEW SOUTH WALES (INSPECTOR CHILDS) (S348/2008)

Courts appealed from: New South Wales Court of Appeal (S106/2009)
[2008] NSWCA 156
Industrial Court of New South Wales (S347/2008)
[2006] NSWIRComm 355
Industrial Court of New South Wales (S348/2008)
[2007] NSWIRComm 86

Dates of judgment: 15 November 2006 (S347/2008), 8 May 2007 (S348/2008) & 3 July 2008 (S106/2009)

Date of grant of special leave: 1 May 2009 (S106/2009)

Date of referral of special leave applications into the Full Court:
1 May 2009 (S347/2008 & S348/2008)

The Industrial Court of New South Wales' judgment of 15 November 2006

The Kirk Group Holdings Pty Ltd and Mr Graeme Kirk ("the Kirk parties") sought leave of the Industrial Court of New South Wales ("IRC") to extend the time to appeal the matters of *WorkCover Authority of New South Wales (Inspector Childs) v Kirk Group Holdings Pty Ltd & Anor* and *Inspector Childs v Kirk Group Holdings Pty Ltd & Anor*.

In the first of those judgments, Justice Walton found proven the charges against Kirk Group Holdings Pty Ltd pursuant to section 15(1) and section 16(1) of the *Occupational Health & Safety Act* ("OH&S Act"). Mr Kirk was also successfully prosecuted under section 50(1) of that Act. Those prosecutions arose from a farm accident in 2001 in which Mr Graeme Palmer was killed. (Mr Palmer was the manager of a farm owned by Kirk Group Holdings Pty Ltd at Razorback Mountain near Picton.) That accident happened when Mr Palmer's all-terrain vehicle overturned on a steep slope. In his second judgment Justice Walton imposed, inter alia, various fines on the Kirk parties.

The application for an extension of time was filed almost two years after the judgment on liability and eighteen months after that on penalty. (A party normally has just twenty-one days in which to appeal to the Full Bench of the IRC). That delay was due to the Kirk parties' decision, ultimately unsuccessfully, to initiate proceedings in the Court of Appeal and the Court of Criminal Appeal.

While taking a very dim view of the Kirk parties' forum-shopping, the Full Bench of the IRC (Wright J President, Boland & Backman JJ) was nonetheless prepared to grant them an extension of time to appeal. This was on the limited issue of whether the IRC had failed to deal properly with issue of corporate responsibility to ensure employee safety.

The Industrial Court of New South Wales' judgment of 8 May 2007

On 8 May 2007 the Full Bench of the IRC (Wright J President, Boland & Backman JJ) unanimously dismissed the Kirk parties' appeal. Their Honours found that Justice Walton had correctly identified Mr Kirk as the controlling mind of the company and that his findings concerning the liability of the Kirk parties were also correct.

Their Honours held that liability under sections 15 and 16 of the OH&S Act was absolute and that an employer's duty to ensure employee safety may not be delegated. While the IRC acknowledged that an employer may rely upon another to undertake certain (safety-related) work at its workplace, their Honours held that this was not a delegation of the employer's duty under sections 15(1) and 16(1) of the OH&S Act. In order to avoid criminal liability in such circumstances, the employer had to prove that it was not reasonably practicable for it to have otherwise complied with its safety obligations. Alternatively it had to prove that the commission of the offence was due to causes for which it was impractical to have made provision.

The Court of Appeal's judgment of 3 July 2008

The Kirk parties then sought to invoke the supervisory jurisdiction of the Court of Appeal. They alternatively sought an order pursuant to the *Crimes (Appeal and Review) Act* 2001 ("the Review Act") for an inquiry into their convictions.

On 3 July 2008 the Court of Appeal (Spigelman CJ, Hodgson JA & Handley AJA) unanimously held that an inquiry into the Kirk parties' convictions could not be commenced by way of summons in the Court of Appeal. Their Honours noted that while Section 79 of the Review Act empowered the Supreme Court to direct such an inquiry, that jurisdiction had to be exercised by the Chief Justice or by an authorised person. The Court itself had no jurisdiction to make such an order. On the issue of jurisdictional error however, their Honours found that they could review a jurisdictional error only after the Full Court of the IRC had dealt with the issue.

On the issue of capacity to comply, the Court of Appeal held that the IRC had not adopted an interpretation of the OH&S Act that rendered compliance with the statutory duties imposed by that Act impossible. They also found that no jurisdictional error of law had been made out in either the general jurisprudence of the IRC or its application to this case. They further found that the test of reasonable foreseeability should not be introduced into sections 15(1) and 16(1) of the OH&S Act.

In S106/2009 the grounds of appeal include:

- The Court of Appeal erred in holding that the construction afforded to section 15 of the OH&S Act by the IRC in these proceedings did not render the section incapable of compliance.

- The Court of Appeal erred in holding that the construction afforded to section 15 of the OH&S Act by the IRC in these proceedings was not affected by jurisdictional error.

In matter number S347/2008 the questions of law said to justify the grant of special leave to appeal include:

- Does an appeal lie by special leave to the High Court from a judgment of the IRC sitting on appeal in its criminal jurisdiction?

- Is it a proper exercise of discretion for an appellate Court dealing with a criminal matter to decline to exercise a discretion to hear an appeal out of time on the basis that the Appellant has sought to exercise an alternative right of appeal thought to be available?

In matter number S348/2008 the questions of law said to justify the grant of special leave to appeal include:

- Does an appeal lie by special leave to the High Court from a judgment of the IRC sitting on appeal in its criminal jurisdiction?

- In determining whether a corporation is criminally liable for conduct in breach of the OH&S Act, is it sufficient to determine whether the 'controlling mind' of the company took the steps identified as necessary to obviate the relevant risk or must the Court be satisfied beyond reasonable doubt that no-one on behalf of the Company took the identified steps?

In all three matters, section 78B notices have been filed. The Court has been advised that the Attorneys-General for the Commonwealth, New South Wales, Victoria and South Australia will be intervening.